COMMENTARY TO ALASKA RULES OF EVIDENCE

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Introduction

The Commentary to the Alaska Rules of Evidence was prepared by Professor Stephen A. Saltzburg, who served as Reporter for the Rules of Evidence. Some changes to the Commentary have been made by the staffs of the Administrative Office and the Supreme Court Clerk's Office to reflect the form of the rules as ultimately adopted by the Alaska Supreme Court. This Commentary has not been adopted or approved by the Supreme Court, but is being published for informational purposes and to assist the users of the Rules of Evidence.

The Alaska Supreme Court extends its thanks to Professor Saltzburg and to the members of the Advisory Committee on the Rules of Evidence for the considerable time and effort they have devoted to the preparation of the rules and of this Commentary. Serving on the Advisory Committee were Alexander O. Bryner, Chairman; Superior Court Judges James R. Blair, Victor D. Carlson, William H. Sanders, and Thomas B. Stewart; and attorneys Walter L. Carpeneti, Richard O. Gantz, Patrick Gullufsen, and Dick L. Madsen.

The Commentary to the Alaska Rules of Evidence which follows does not necessarily reflect amendments which have been made to the Alaska Rules of Evidence after the Evidence Rules were originally adopted. Any amendment after the Rules were added by SCO 364, effective August 1, 1979, would be reflected in the legislative history note following each Evidence Rule.

ARTICLE I. GENERAL PROVISIONS

Rule 101. Scope and Applicability.

(a) **General Applicability.** There are three courts in the Alaska judicial system—the Supreme Court, the Superior Court, and the District. Trials, both civil and criminal, are conducted at the Superior Court and District Court level. The judges who sit on these courts should find the new Rules of Evidence no more difficult to apply—and hopefully somewhat easier—than common law rules. But magistrates, whose authority is delimited under AS 22.15, are working on a part time basis and may find the New Rules difficult. Nevertheless, experience has shown that they exhibit a workable grasp of the existing rules of evidence. Thus, this subdivision states that the Rules of Evidence shall apply in cases tried before magistrates as well as judges.

These rules are not applicable in areas directly covered by other rules promulgated by the Alaska Supreme Court. For example, Criminal Rule 5.1(d) as amended (preliminary examinations in criminal cases) and Criminal Rule 6(r) (grand jury) govern the admission of evidence in their respective areas. *See, State v. Gieffels,* 554 P.2d 460 (Alaska 1976). Children's Rules specifying special rules of evidence for children's proceedings will remain in effect *(e.g.,* 13(a) (2)), unless they are superseded by these Rules (*e.g.,* 17(a)).

(b) **Rules of Privilege.** This subdivision implements the privilege article of the rules. "It recognizes that confidentiality once destroyed cannot be restored, and that a privilege is effective only if it bars all disclosure at all times." 5 Weinstein's *Evidence* Paragraph 1101 [1].

(c) **Rules Inapplicable.** It should be noted that this rule does not decide the reach of constitutional principles as applied to admission of illegally seized evidence. *See State v. Sears,* Reporter's Comment to that rule.

(1) *Preliminary Questions of Fact.* Paragraph (1) states for convenience, the provisions of Rule 104(a), *supra. See* Reporter's Comment to that rule.

(2) *Miscellaneous Proceedings.* Extradition and rendition proceedings are essentially administrative, and traditionally the rules of evidence have not applied. 1 Wigmore § 4(6).

The rules of evidence have not been regarded as applicable to sentencing or probation proceedings, where great reliance is placed upon the presentence investigation and report. This is in accord with previous law. *Cf. State v. Sears, supra.*

Warrants for arrest, criminal summonses, and search warrants are issued upon complaint or affidavit showing probable cause. The nature of the proceedings make application of the formal rules of evidence inappropriate and impractical.

Because summary contempt proceedings are not full adversary contests but immediate responses to special problems of misbehavior, the rules of evidence do not apply.

Habeas corpus hearings are treated like all other cases under subdivision (b), *supra,* and the rules apply in these hearings.

Rule 102. Purpose and Construction.

Alaska Rule 102 copies the text of Federal Rule 102.

While this Rule provides that all of the evidence rules shall be interpreted so as "to secure…promotion of growth and development of the law of evidence to the end that truth may be ascertained," this should not be read to encourage the search for truth at any cost. Another end is also sought: that "proceedings [may be] justly determined." Occasionally, situations will arise where justice requires that accuracy in fact-finding gives way to a more significant social goal.

Deciding when proceedings are "justly determined" requires an examination of federal and state constitutional protections (*see, e.g.,* U.S. Const., amends, IV and V; Alaska Const., art. I, § 22; *Ravin v. State,* 537 P.2d 494, 504 (Alaska 1975)) and legislative attempts to protect individuals from official intrusion, including judicial intrusion. *See, e.g.,* AS 47.10.080 (g). Evidence that is apparently probative may be excluded to create disincentives to governmental abuses (*see, e.g., Lauderdale v. State,* 548 P2d 376 (Alaska 1976 (Alaska 1976) to recognize and perhaps to foster socially desirable private conduct (*see, e.g.,* Rules 407 & 410, *infra*) to protect personal privacy (*see, e.g.,* Rule 505 *infra*) and to enable persons to maximize the effectiveness of professional counseling (*see, e.g.,* Rules 503 & 504).

In short, the search for truth is important in its practical impact and philosophical overtones. Sometimes the search for fact-finding precision itself may have constitutional roots. *See Davis v. Alaska,* 415 U.S. 308, 39 L.Ed. 2d 347 (1974). But it is not the end all of a system of justice; other values must be weighed.

"Insuring that 'proceedings [are] justly determined' as this Rule states is by no means a simple task." K. Redden & S. Saltzburg, Federal Rules of Evidence Manual 15 (2d ed. 1977).

Rule 103. Rulings on Evidence.

(a) **Effect of Erroneous Ruling.** Subdivision (a) is a codification of the basic rules of offering evidence and objecting to the admission of evidence. It corresponds closely with the substance of Rules 4 and 5 of the Uniform Rules of Evidence and Rules 6 and 7 of the Model Code of Evidence (1942). The Rule is designed to reject the Court of Exchequer's misguided view in *Crease v. Barrett,* 1 C.M.&R. 919 (1835), that any error might require reversal. In the case of a ruling admitting evidence, to constitute grounds for a reversal an error must affect a substantial right of the party and a timely objection stating the specific grounds of the objection must be made. If the ruling is to exclude evidence, the substance of the offered evidence must be made known to the court in order to ascertain on appeal whether a substantial right has been affected. While noting the existence of basic requirements in the form, timing, and specificity of objections, this rule does not attempt to set forth details or nuances which are better dealt with on a case by case basis. The common law tradition requiring prompt challenges to questions, to offers of evidence, and to qualifications of witnesses, and reasonable prompt motions to strike is continued in these general rules. No formal exceptions need be noted. See Morgan, Basic Problems of Evidence 53-54 (1962).

In rejecting the notion of automatic reversal on the basis of any error whatsoever, this rule does not prescribe any particular test for distinguishing reversible from harmless

errors. The one certain rule is that a constitutional error requires reversal unless an appellate court can be certain beyond a reasonable doubt that the error did not influence the verdict. *Chapman v. California*, 386 U.S. 18, 17 L.Ed.2d 705 (1967). There is disagreement on the proper test for determining when non-constitutional errors are harmless. See generally, R. Traynor, The Riddle of Harmless Error (1970). Saltzburg, The Harm of Harmless Error, 59 Va. L. Rev. 988 (1973). Although harmless error rules can be found in Rule 47(a), Alaska R. Crim. P., and Rule 61, Alaska R. Civ. P., no formula is offered in either place for determining when an error affects substantial rights. There is some authority in existing case law for distinguishing the tests of harmlessness used in criminal and civil cases. *Compare Love v. State*, 457 P.2d 622 (Alaska 1969), *Daniels v. State*, 388 P2d 813 (Alaska 1964), and *Biele v. State*, 371 P.2d 811, 814 (Alaska 1962) *with Zerbinos v. Lewis*, 394 P.2d 886 (Alaska 1964). But there is also authority suggesting that the civil test closely resembles the criminal test. See *Howarth v. Pfeifer*, 423 P.2d 680 (Alaska 1967). This Rule does not attempt to set forth any test; that is left for adjudication, the approach preferred in *Love v. State*, and more recently in *McCracken v. Davis*, 560 P.2d 771 (Alaska 1977). For recent cases invoking the doctrine of harmless error, *see*, *Hayes v. State*, 581 P.2d 221 (Alaska 1978) and *Priest v. Lindig*, 583 P.2d 173 (Alaska 1978).

(b) **Record of Offer and Ruling.** Like its federal counterpart, this section borrows from the wording of a preexisting rule of civil procedure, rule 43(c). The obvious purpose of the rule is to provide an appellate tribunal with an accurate record of the trial proceedings—*i.e.*, to ensure that the specific objections and proper offers of proof are accurately reflected in the record. "It is designed to resolve doubts as to what testimony the witness would have in fact given, and, in nonjury cases, to provide the appellate court with material for possible final disposition of the case in the event of reversal of a ruling which excluded evidence…. Application is made discretionary in view of the practical impossibility of formulating a satisfactory rule in mandatory terms." Fed. R. Evid. 103(b), Advisory Committee Note (citation omitted).

(c) **Hearing of Jury.** A ruling excluding evidence may be pointless if the jury hears the evidence as part of an offer of proof. Hence, this subdivision provides that proceedings surrounding rulings on evidence should be conducted as much as possible outside the presence of the jury. As reflected in the note accompanying subdivision (a), the Rule does not specify the form that an offer of proof will take. Subdivision (b) recognizes, however, that the trial judge may require a question and answer format. When this is the format, the questions and answers should be asked outside the jury's hearing. While this subdivision should have its principal impact on offers of proof, arguments on extended objections should also be outside the presence of the jury, if practicable, since rulings on preliminary questions, and law and argument relating thereto, are the province of the judges alone.

(d) **Plain Error.** This subdivision incorporates the doctrine of plain error found in Alaska case law, *Stork v. State*, 559 P2d 99 (Alaska 1977), *Merrill v. Faltin*, 430 P2d 913 (Alaska 1967); and Rule 47(b), Alaska R. Crim. P., [modeled after Fed. R. Crim. P. 52(b)]. Most codifications have included some provision resembling this one. The 1974 revision of the Uniform Rules of Evidence, for example, includes a similar provision but omits the word "plain." Maine Rules of Evidence, based on the Federal rules of Evidence, uses the word "obvious" instead of "plain." Maine Rule of Evidence 103(d). There is apparently some worry about the ambiguity of the plain error concept. The Report of the Committee on the Revision of the Law of Evidence to the Supreme Court of New Jersey (1955) stated the general view of plain error:

> Our courts have been loathe to apply this escape in the case of the failure to interpose timely objection to the introduction of evidence…The policy behind the necessity for timely objection is obvious; the escape apparently will only be applied where a shocking miscarriage of justice would result. It seems desirable that the "plain error" rule be retained to take care of extreme cases.

No precise formula for determining when the plain error doctrine should be invoked is offered in the Rule. This, like the harmless error test, is left for a case by case determination.

It is arguable that plain error is a principle that should be excluded from rules governing trial procedure, since it relates to the willingness of appellate courts to review claims not raised below. Subdivision (d) is included in these Rules for these reasons: 1) to promote uniformity with the Federal Rules; 2) to negate any implication that there is no such doctrine; 3) to alert the trial judge that intervention may be necessary when plain error would result in reversal on appeal; 4) to also remind the state appellate courts that invocation of the doctrine may remove the need for federal scrutiny of state judgments.

> If a federal court is going to review a criminal conviction and perhaps set it aside in a federal habeas corpus proceeding, the state may feel it would rather consider the error in the first instance itself, and may utilize the doctrine of plain error to do so.

Saltzburg, *Another Ground for Decision-Harmless Trial Court Errors*, 47 Temp. L. Q. 193, 200-01 n.25 (1974).

Applying the plain error concept has not been easy for most appellate courts, and it has not been easy for the Alaska Supreme Court. *See, e.g., Stork v. State*, 559 P2d 99 (Alaska 1977); *Bakken v. State*, 489 P2d 120 (Alaska 1971). The obvious tension is between the natural instinct of an appellate court to affirm a result that may only have been reached, or may have been reached in part, because of an error committed below and the understandable reluctance of appellate judges to create incentives for litigants to allow errors to go uncorrected at trial in order to preserve possible arguments for appeal. The dilemma is most apparent in cases where a clearly erroneous instruction on an important point is given to a jury. On the one hand, it would seem that the mistake cannot be permitted to support a verdict lest the "wrong" party win and subvert the goals of the legal rules at stake in the litigation. On the other hand, it may be argued that it is not likely that a lawyer would have failed to see an error of great magnitude and that it is more likely that the verdict loser remained silent in the belief that the jury would not listen closely to the very instruction which would, in the event of a loss, provide ammunition for appeal. In actual practice the dilemma is complicated by the realization that, absent a plain error rule, the party benefiting from the error may have an incentive to knowingly abet an error of the trial court.

In deciding when to invoke the plain error concept, appellate courts have looked, and will probably continue to look, to see how important the error was; what impact the error probably had on the outcome of the case; whether the record demonstrates any intentional failure to bring an error to the attention of the trial court; how burdensome re-litigation would be, especially for the verdict winner; whether the verdict loser promptly sought to correct any error by moving for a new trial below; and whether the principal fault was that of the trial judge or the attorney for the verdict loser. Weighing these factors is not likely to produce a totally satisfactory solution, but a less flexible approach threatens to remove the dilemma by advocating a result which will be totally unsatisfactory in many cases.

(Amended by SCO 671, effective June 15, 1986).

Rule 104. Preliminary Questions.

(a) **Questions of Admissibility Generally.** The applicability of a particular rule of evidence often depends upon the existence of a condition. Is the alleged expert a qualified physician? Is a witness whose former testimony is offered unavailable? Was a stranger present during a conversation between attorney and client? Was an out-of-court statement against interest when made? In each instance the admissibility of evidence will turn upon the answer to the question of the existence of the condition. Accepted practice, incorporated in the rule, places on the judge the responsibility for these determinations. McCormick (2d ed.) § 53; Morgan, Basic Problems of Evidence 45-50 (1962). The general rule is that when relevant evidence may be excluded under some rule of evidence and factfinding is necessary in the application of the rule, the judge acts as a trier of fact. *See generally*, Maguire & Epstein, Preliminary Questions of Fact in Determining the Admissibility of Evidence, 40 Harv. L. Rev. 392 (1927).

Entrusting the judge—rather than the jury—with the responsibility of determining certain factual questions serves a threefold purpose. First, it prevents the submission of highly technical evidentiary questions to a group of lay persons ill equipped "to do legal reasoning." Maguire & Epstein, *supra* at 393, quoting C. Chamberlayne, Evidence § 81 (1911). See Morgan, *supra* at 169 ("A mind trained to sift evidence may substantially accomplish even so difficult a task; but to expect the unskilled minds of jurors to do so is little short of ridiculous"). Second, it insulates the jurors from the kinds of evidence that they may be unable to evaluate fairly; trepidations as to the ability of jurors to evaluate fairly certain kinds of evidence give rise to various exclusionary rules. *See* Morgan, *supra* at 166 n.4 (hearsay rules). *See generally*, Levin & Cohen, *The Exclusionary Rules in Nonjury Criminal Cases*, 119 U. Pa. L. Rev. 905 (1971). Finally, resolution of the preliminary factual question by the judge may be necessary to preserve and protect the very interest sought to be furthered by the suppression of certain evidence. As was stated by Morgan, *supra* at 169: "[N]othing could be more absurd than to violate the interest and then to instruct the jury to repair the damage by disregarding the wrongfully extracted evidence. If a lawyer is compelled to repeat in open court the confidential communications of his alleged client, and the jury is told to disregard them in case they find the relationship exists, the harm of disclosure is beyond remedy." *See generally*, Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 Stan. L. Rev. 271, 271-73 (1975).

If the question is factual in nature, the judge will of necessity receive evidence pro and con on the issue. The rule provides that the rules of evidence in general do not apply to this process. One commentator points out that the authorities are "scattered and inconclusive," and observes:

> Should the exclusionary law of evidence, "the child of the jury system" in Thayer's phrase, be applied to this hearing before the judge? Sound sense backs the view that it should not, and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay.

McCormick (2d ed.) § 53 at 122 n.91. This view is reinforced by practical necessity in certain situations. An item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted in evidence. Thus the content of an asserted declaration against interest must be considered in ruling whether it is against interest. Again, common practice calls for considering the testimony of a witness, particularly a child, in determining competency. *See* McCormick on Evidence § 10 at 21 (2d ed. 1972).

Legitimate concern may exist that the use of affidavits by the judge in preliminary hearings on admissibility will reduce factfinding precision. But many important judicial determinations are made on the basis of affidavits.

Rule 43(e), Alaska R. Civ. P., dealing with motions generally, provides: "When a motion is based on facts not appearing of record, the court may hear the matter on affidavits or other documentary evidence presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions." Civil Rule 4(e) (6) provides for proof of service by affidavit. Civil Rule 56 provides in detail for the entry of summary judgment based on affidavits. Affidavits may supply the foundation for temporary restraining orders under Civil Rule 65 (b).

The study made for the California Law Revision Commission recommended an amendment to Uniform Rule 2 as follows: "In the determination of the issue aforesaid [preliminary determination], exclusionary rules shall not apply, subject, however, to…any valid claim of privilege." California Law Revision Commission, Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence 470 (1962) (Article VII, Hearsay). The proposal was not adopted in the California Evidence Code. The Uniform Rules are likewise silent on the subject. However, New Jersey Evidence Rule 8(1), dealing with preliminary inquiry by the judge, provides:

> "In his determination the rules of evidence shall not apply except for Rule 4 [exclusion on grounds of prejudice, etc.] or a valid claim of privilege."

N.J. Rev. Stat. Ann. § 2A:84A-8 (West 1976).

There is now increased support for the proposition that the exclusionary rules are confined to trials. *See United States v. Matlock*, 415 U.S. 164, 39 L.Ed. 2d 242 (1974); cf. *United States v. Calandra*, 414 U.S. 338, 38 L.Ed. 2d 561 (1974).

It is important to keep in mind that, while the court may not be bound by the rules of evidence in ruling on preliminary questions, it may be reversible error for the court to refuse to

hear testimony actually offered. This subdivision offers a shortcut to proof. It does not provide that refusal to hear probative evidence will be permitted. A permissible shortcut should not become a rule of preference.

(b) **Relevancy Conditioned on Fact.** It frequently happens that two or more controverted facts are so related that evidence of one is inadmissible without evidence of one or more of the others. Thus when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it. Or if a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it. Relevance in this sense has been labelled "conditional relevancy." Morgan, Basic Problems of Evidence 45-46 (1962). Problems arising in connection with it are to be distinguished from problems of logical relevancy (*e.g.*, evidence in a murder case that the accused on the day before purchased a weapon of the kind used in the killing) treated in Rule 401.

In the case of conditional relevance, as generally, the judge has some control over the order in which each piece of evidence is to be offered. He may refuse to receive evidence of one fact until evidence sufficient to warrant a finding of another has been offered. Or, he may receive evidence of one upon assurance by counsel that the requisite evidence of the other or others will be offered. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude either that fulfillment of the condition is or is not established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration. Morgan, *supra;* Cal. Evid. Code § 403 (West); N.J. Rev. Stat. Ann. § 2A:84A8(2) (West 1976). *See also* Uniform Rules of Evidence 19 & 67. If the evidence so received is very prejudicial, a mistrial may be ordered.

If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. Relevance questions are appropriate questions for juries. Accepted treatments, as provided in the rule, is consistent with that, given fact questions generally.

(c) **Hearing of Jury.** Preliminary hearings on the admissibility of confessions must be conducted outside the hearing of the jury. *See Jackson v. Denno,* 378 U.S. 368, 12 L.Ed.2d 908 (1964). Otherwise, detailed treatment of when preliminary matters should be heard outside the hearing of the jury is not feasible. The procedure is time consuming. Not infrequently the same evidence which is relevant to the issue of establishment of fulfillment of a condition precedent to admissibility is also relevant to weight or credibility; and time is saved by taking foundation proof in the presence of the jury. Much evidence on preliminary questions, though not relevant to jury issues, may be heard by the jury with no adverse effect. A great deal must be left to the discretion of the judge who will act as the interests of justice require.

However, where an accused is a witness as to a preliminary matter, he has the right, upon his request, to be heard outside the jury's presence. Although in some cases duplication of evidence will occur and the procedure may be abused, a proper regard for the right of the accused not to testify generally in the case dictates that he be given an option to testify outside the hearing of the jury on preliminary matters. To leave completely to the judge's discretion the determination of whether the preliminary hearing is held outside the hearing of the jury would risk allowing the jury to hear extremely prejudicial evidence. For a similar provision, see Cal. Evid. Code § 402(b) (West 1966).

The second sentence of subdivision (c) should apply to civil actions and proceedings as well as criminal cases.

(d) **Testimony by Accused.** This subdivision is more protective of a criminal defendant than the Federal Rule.

The first sentence, which is the same in both rules, bars cross-examination on issues unrelated to the factfinding necessary to resolve the preliminary matter; it enables the prosecution to fully litigate all preliminary questions but prevents questioning on preliminary matters to be used as a mechanism for circumventing the privilege against self-incrimination. It is difficult to see how the prosecutor is unfairly disadvantaged by such a procedure, and it is plain that the defendant is encouraged to take the witness stand. Since factfinding on the preliminary matter is likely to be improved, the policies underlying the evidence rule giving rise to the factfinding should be well served. *See generally,* Carlson, *Cross-Examination of the Accused* 52 Cornell L. Q. 705 (1967).

The equivalent of the second sentence of this subdivision, which was found in an earlier draft of the Federal Rule and was subsequently deleted, affords additional protection. It provides a further incentive for a defendant to testify on preliminary matters by insuring that the defendant's words cannot be used at trial by the government unless the defendant testifies and contradicts the previous testimony given at the preliminary hearing. The defendant has a shield against general use of the evidence, but cannot seek to turn that shield into a perjurious sword. *Compare Agnello v. United States,* 269 U.S. 20, 70 L.Ed. 155 (1925) *with Walder v. United States,* 347 U.S. 62, 98 L.Ed. 503 (1954). *But see* Rule 412 *infra* (evidence illegally obtained). This is consistent with the United States Supreme Court's position in *Simons v. United States,* 390 U.S. 377, 19 L.Ed.2d. 1247 (1968).

In *Simmons* the Court held that a defendant had a right to testify at a preliminary hearing on a motion to suppress evidence illegally seized under the Fourth Amendment for the purpose of establishing standing and then to prevent the government's use of the testimony as part of its case-in-chief. The Court emphasized the tension between Fourth and Fifth Amendment rights and opted for this way of easing the tension.

It has been argued that the later decision in *McGautha v. California,* 402 U.S. 183, 28 L.Ed.2d 711 (1971), leaves *Simmons* of dubious precedential value. But this is not necessarily so. In one of the two cases decided together as *McGautha,* the Court rejected an argument that Ohio violated a defendant's right to a fair trial by establishing a unitary procedure for determination of guilt and penalty by the jury. The argument that the single verdict improperly pitted the

defendant's right to remain silent on the issue of guilt against his right to address the authority imposing punishment was rejected. Although the Court had never recognized a constitutional right of allocution, it assumed one existed. But the Court noted that the Ohio Constitution guaranteed defendants the right to have their counsel argue in summation for mercy as well as for acquittal. It also noted that defendants were allowed much leeway in offering evidence on the issue of punishment. The Court concluded, in addition, that "[e]ven in a bifurcated trial, the defendant could be restricted to the giving of evidence, with argument to be made by counsel only." *Id.* at 220, 28 L.Ed.2d at 733. As for the defendant's claim that evidence might exist within the unique knowledge of a defendant, the Court concluded that the Constitution did not forbid "a requirement that such evidence be available to the jury on all issues to which it is relevant or not at all." *Id.* at 220, 28 L.Ed.2d at 734.

In sum, the Court declared that the tension between a defendant's desires to remain silent on the issue of guilt and to speak on the question of penalty was not serious enough to require bifurcation as a matter of federal constitutional law. Whatever the ultimate judgment on the wisdom of *McGautha*, it is apparent that the Court faced a different kind of problem from that faced in *Simmons*. If it had required bifurcation, would all criminal defendants have been entitled to limited waiver of their privilege against self-incrimination on the ground that there would be a right to present evidence on one issue pitted against a privilege to remain silent on another? For example, would a criminal defendant have a constitutional right to bifurcate the mens rea and actus reus parts of a case? Would a defendant have a right to bifurcation every time his testimony could be used on more than one issue and he desired to address himself to only one? If the answer to these questions was to be "no," how would the *McGautha* issue be distinguished?

Simmons was different, of course, because in *Simmons* there had to be two proceedings. Hence, the defendant was asking that the practical requirement of two proceedings—a trial and a hearing—be considered in assessing the conflict between constitutional rights. It was in this context that the Court responded favorably.

Thus, one reading of *McGautha* and *Simmons* is that where a hearing, aside from trial, must be held on a constitutional claim raised by a defendant, the defendant must be permitted to testify at the hearing with the assurance that the testimony will not be used as part of the prosecution's case-in-chief. At the trial itself, the defendant cannot speak to one issue only without risking the use of testimony on other issues.

This is not the only reading of these cases. It is possible that *Simmons* is to be confined to its facts and that *McGautha* began the confinement. Moreover, hearings on preliminary matters not involving constitutional claims may be treated somewhat differently than hearings on Fourth Amendment claims. Subdivision (d) is not confined to any one type of preliminary matter; it is a broad section and must, therefore, rest on more than *Simmons* regardless of how that case is read.

It rests on the same fairness considerations that support the first sentence of the subdivision. Accurate decision-making on preliminary issues is promoted, thereby upholding the underlying policies of the rule at stake. Defendant and prosecutor are on equal terms during the hearing. And the privilege against self-incrimination is promoted, not impaired.

If the defendant chooses to testify at trial and contradicts his preliminary hearing testimony, impeachment is permitted. Subsequent perjury prosecutions are also permitted. Deference to the privilege against self-incrimination should not be viewed as a license to lie. See AS 11.70.020. *See generally, Beavers v. State*, 492 P.2d 88 (Alaska 1971).

(e) **Weight and Credibility.** An example of the application of this subdivision is that nothing in Rule 104 precludes the defendant from attacking the credibility of a confession that is admitted by presenting to the jury evidence which may include some of the same matters presented to the judge during the preliminary hearing.

For similar provisions see Uniform Rule of Evidence 8; Cal. Evid. Code § 406 (West 1966); Kan. Stat. § 60-408 (1976); N.J. Rev. Stat. Ann. § 2A:84A-8(1) (West 1976).

The basic rule is that courts are just as willing to accept relevant evidence, as defined in Rule 401, previously used on a preliminary matter as they are to accept relevant evidence offered for the first time at trial. It is obvious, however, that the actual decision on the preliminary matter may render some otherwise relevant evidence inadmissible. If, for example, a confession is suppressed because of a failure to advise the accused of his rights, the suppression ruling eliminates relevant evidence from the government's case. In short, since rules of evidence may result in the loss of relevant evidence anytime an objection or motion to suppress is sustained, some relevant evidence is lost. If an objection or motion is overruled and evidence is deemed admissible, no relevant and proper evidence is necessarily excluded at trial.

Rule 105. Limited Admissibility.

This rule reflects existing common law doctrine by requiring the trial judge, upon request, to instruct the jury as to the proper scope of the evidence where it is admitted for a limited purpose or against only one party. The burden generally is placed on the party who wants the instruction to ask for it. There may be cases where a trial judge should give a limiting instruction sua sponte as failure to do so would lead to reversal on appeal for plain error. See Rule 103(d). One example where the failure to give such an instruction might be likely to produce sufficient injustice to constitute plain error is where the confession of a non-testifying co-defendant is introduced against another co-defendant. *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476 (1968).

The rule does not set forth the criteria for a proper request, but is somewhat analogous to Rule 103 which requires a specific objection or a reasonably definite offer of proof. Counsel should not be permitted to make an unsupported request but should be required to inform the court of the specific concerns and to suggest possible methods of appropriately instructing the jury. *Cf.*, Rule 51, Alaska R. Civ. P.

This rule, while incorporating the text of Federal Rule 105, additionally requires that all reasonable efforts be made to delete references to parties as to whom the evidence is inadmissible. The purpose of this provision is to avoid, wherever possible, prejudice to one party resulting from

admission of evidence as to another party. A similar provision is found in the second sentence of the Maine Rules of Evidence 105:

> In a criminal case tried to a jury evidence admissible as to one defendant shall not be admitted as to other defendants unless all references to the defendant as to whom it is inadmissible have been effectively deleted.

There is little reason to limit concern for the prejudicial impact of evidence in multi-party cases to criminal trials. Thus, Rule 105, unlike Maine's rule, will apply in all cases tried to a jury.

A reasonable attempt to delete references is all that is required here. If it is not possible to delete all references to parties as to whom the evidence is inadmissible, the court has two options. It may order a severance or a separate trial of one or more of the parties in accordance with Rule 42(b), Alaska R. Civ. P., and Rule 14, Alaska R. Crim. P., if the evidence would be unduly prejudicial despite a limiting instruction and a reasonable attempt to delete references. Or, the court may rely upon Rule 403, which provides the alternative of excluding the evidence altogether if its probative value is substantially outweighed by the danger of unfair prejudice.

Nothing in this Rule is intended to limit the availability of these alternatives where the interest of justice cannot be served by a limiting instruction to the jury.

Rule 106. Remainder of, or Related Writings or Recorded Statements.

The standard rule at common law does provide that when a writing or recorded statement or part thereof is introduced by any party, an adverse party can require admission of the entire statement, assuming that the entire statement is relevant. But at common law this evidence often is introduced as part of the adverse party's own case-in-chief, which may be presented after much time has elapsed following the introduction of the original segment. In theory, the trial judge has discretion to change the normal order of proof and to permit the full statement, or all relevant portions, to be introduced together with the first portion offered. But many judges are hesitant to depart from the usual order and to "interfere" with counsel's approach to a case. Common law courts are even less apt to allow additional statements to be introduced immediately than they are to allow an adverse party to offer a complete statement as soon as some portions are presented.

Where time elapses between the offer of part of a statement and the offer of the remainder, the jury may become confused or find it difficult to reassess evidence that it has heard earlier in light of subsequent material. Rule 106 creates a right to require immediate admission of a complete written or recorded statement or of all relevant portions. It is designed to enable one party to correct immediately any misleading impression created by another party who offers part of a statement out of context. *See* McCormick § 56 (2d ed.); Cal. Evid. Code § 356 (West 1966). The rule also provides that it extends to immediate admission of all matters so closely related to a statement that in fairness they should be admitted immediately.

Although the Rule does not create any right of discovery of documents, the Rule should be read to permit a court to require a party who has introduced part of a writing or recorded statement to show that writing or recorded statement to the other side before the other side asks that it be introduced into evidence. It would be impractical to allow the adverse party to require that all statements on the same subject be produced for inspection. Arguably, any statement that is relevant to the issues being tried would have to be turned over in order to avoid a later claim that the Rule was not complied with. If all statements were produced, the burden on the court might be tremendous. Fairness does not require such full discovery, in view of the countervailing concerns giving rise to the general protections for witness statements. Thus, it is only where a specific statement is relied upon by one party that the other should be permitted to see the entire statement.

This understanding regarding disclosure of writings and recorded statements builds upon the Jencks Act, 18 U.S.C. § 3500 and on AS 12.45.060. But this Rule applies in both civil and criminal actions, and it applies to defendants as well as to plaintiffs.

Nothing in this Rule changes the pre-trial discovery rules currently in use. *See, e.g.*, Rule 16, Alaska R. Crim. P., Rule 26(b), Alaska R. Civ. P. These procedural rules define what may be discovered before trial. Whatever a party has discovered before trial may be offered under the last sentence of Rule 106 so that the trial judge can decide whether in fairness it should be considered along with a statement or part thereof put forth by another party.

Rule 106 does expand discovery at trial, as opposed to pretrial discovery. Generally, in civil cases witness statements will not be discoverable before trial. They usually will qualify as trial preparation materials. Under Rule 16, Alaska R. Crim. P., as recently amended, criminal defendants usually will see witness' statements before trial. But there are exceptional cases, *see, e.g.*, Rule 16(d) (4), Alaska R. Crim. P., which is governed by AS 12.45.060. Rule 106 advances the point at which such statements are discoverable to the point at which discovery will do the most good — *i.e.*, the point at which part of a statement is introduced in evidence. In civil cases, no Jencks Act applies, and there is no general obligation to turn over a witness' previous statement to an opposing party after a witness testifies. Rule 106 takes the position that once a civil litigant offers into evidence a portion of a witness' statement, fairness requires that the litigant turn over the entire relevant portion of the statement to an opposing party. This Rule is consistent with the United States Supreme Court decision in *United States v. Nobles*, 422 U.S. 225, 45 L.Ed.2d 141 (1975).

Rule 106 does not create any affirmative duty to proffer the whole of any statement when one desires to introduce only a part, but the Rule allows an adverse party to inspect the whole immediately upon request in order to ascertain that no misleading impression will result from incomplete admission. Adequate protection against disclosure of irrelevant information is afforded the offering party and third persons by the fact that the judge might delete irrelevant material, if requested to do so. Article IV should be consulted on relevance issues.

At first blush any privilege that might be claimed with respect to a statement would seem to be waived by offering a portion of it into evidence. But a statement may address several unrelated issues, and any waiver may be partial. The

court cannot demand the complete statement without permitting the offering party to claim a privilege as to unrelated matters. Some minimal inquiry into the nature of the privileged matter may be required. But in view of the common law experience with waiver, the judicial task should not be unfamiliar. *See United States v. Weisman*, 111 F.2d 260, 261-62 (2d Cir. 1940) (L. Hand, J.). Article V will govern privilege questions. Once privileged matter is deleted, the judge will make the relevant determination regarding non-privileged matters. *Cf.*, AS 12.45.070.

Upon request, the court should provide protection against undue annoyance, embarrassment, or oppression, a philosophy reflected in Fed. R. Civ. P. 26(c) and Rule 26(c), Alaska R. Civ. P. Among other things, the court may wish to restrict the extrajudicial flow of information and to hear argument in chambers on the offer of certain information which may be highly prejudicial and which ultimately may be excluded under Rule 403.

For practical reasons, Rule 106 is limited to the introduction of a writing or recorded statement; testimony by a witness is not affected by the rule. Any attempt to include testimony within the coverage of this rule would open the door to immediate cross-examination of a witness who refers during testimony to any out-of-court statement by anyone. Rule 106 takes the position that there is no more reason to allow immediate cross-examination of this testimony than any other testimony by the witness which presumably could be made more complete by cross-examination. Testimony is not likely to have the impact of a written or recorded statement which, when offered, may appear to be extremely trustworthy.

Note: The Alaska Supreme Court's Committee on Rules of Evidence voted to adopt, in lieu of the Reporter's Comment to this rule, the commentary contained in the Advisory Committee's note to Federal Rule 106, with the following addition: "The rule of completeness as set forth in Rule 106 does not deal with issues of relevancy and privilege, nor is it intended to alter or affect the normal rules pertaining to relevancy and privilege contained elsewhere in the Alaska Rules of Evidence. Accordingly, the problem of deletion of privileged or irrelevant material from a writing whose admission is sought under the provisions of Rule 106 should appropriately be dealt with by pertinent provisions of the Rules of Evidence dealing with relevancy and privilege."

ARTICLE II. JUDICIAL NOTICE

Rule 201. Judicial Notice of Fact.

(a) **Scope of Rule.** Rule 201 restricts only the power of the court to declare on the record, without resort to formal proof, that a particular fact exists, i.e., that something is actually true, where the fact involved is one that would otherwise be decided by the trier of fact upon submission of proof by the parties. No other practice falls within the scope of this Rule.

The term "judicial notice" has been indiscriminately applied to several different aspects of the decisional process. Many of these aspects will not be affected by this Rule.

One aspect not covered by Rule 201 involves assumptions made by the court in its determination of policy; *e.g.*, that a particular change in the law would probably do more harm than good. This is not the sort of fact question that, in a jury trial, would normally be put to the jury, and so is not subsumed by Rule 201's definition of "judicial notice of fact." Rather than findings of fact, these are policy determinations made by the court acting in its lawmaking capacity. The court as lawmaker is held to the same standard as the legislature is for the veracity of its inferences: it must be rational. The court taking judicial notice of a fact as that term is used in Rule 201 is held to a different and more demanding standard—the same standard required for it to direct a verdict; it must be right, meaning that rational minds would not dispute the fact that the court notices.

Stated more specifically, Rule 201 does not bar:

(1) Common law rule-making on the basis of factual assumptions based on the court's familiarity with non-evidence sources. *See e.g.*, *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975).

(2) Rule-making pursuant to a constitutional grant of authority on the basis of disputable factual assumptions. See, *e.g.*, Rules of Evidence 407 and 408.

(3) Constitutional interpretation based upon disputable factual assumptions—for example the balancing of interests in the vague area of due process.

(4) Judicial creation of remedies assumed to be necessary to carry out the legislative intent of a statute.

Rule 201 follows the existing Alaska practice regarding scope of judicial notice rather than adopting the federal practice of separating facts into "adjudicative" and "legislative" categories. This dichotomy is rejected as an unnecessary and artificial description of the difference between taking judicial notice of a fact and making assumptions in the determination of policy. The terms used in the Federal Rule are ambiguous and overlap. See *Goodman v. Stalfort, Inc.*, 411 F. Supp. 889 (D. N.J. 1976), for an example of a court's struggle to come to grips with the categories.

Alaska Rule 201 requires a determination of whether a question is one normally decided by the trier of fact or is the sort properly left to the maker of law. While this determination is not always easy to make, it is one that courts have coped with for many years. Simply stated, the guiding principle should be: if the fact involved tends to show that general conduct X is or is not, or should or should not, be against the law (or unconstitutional), it is for the court to consider freely; if the fact involved tends to prove an instance of X, it is a question for the trier of fact and covered by Rule 201.

(b) **General Rule.** Courts have traditionally been cautious in taking judicial notice of facts normally decided by the trier of fact after being proved. As Professor Davis says;

> The reason we use trial-type procedure, I think, is that we make the practical judgment, on the basis of experience, that taking evidence, subject to cross-examination and rebuttal, is the best way to resolve controversies involving disputes of adjudicative facts, that is, facts pertaining to the parties. The reason we require a determination on the record is that we think fair procedure in resolving disputes of adjudicative facts calls for giving each party a chance to meet in the appropriate fashion the facts that come to the tribunal's attention, and the appropriate fashion for meeting disputed adjudicative facts includes rebuttal evidence,

cross-examination, usually confrontation, and argument (either oral or written or both). The key to a fair trial is opportunity to use the appropriate weapons (rebuttal evidence, cross-examination, and argument) to meet adverse materials that come to the tribunal's attention.

A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69, at 93 (1964). Rule 201 is based on the belief that wherever a lawmaking authority conditions the applicability of a law on the proof of facts, these considerations call for dispensing with traditional methods of proof only in clear cases regardless of what label is attached to the facts. Compare Professor Davis' conclusion that judicial notice should be a matter of convenience, subject to the requirements of procedural fairness. *Id.* at 94.

For the most part this Rule is consistent with both Federal Rule 201 and the now superseded Alaska Rule of Civil Procedure 43(a), which was based on Uniform Rule 9. Rule 201 limits judicial notice to facts not subject to reasonable dispute in that they are either generally known in the territorial jurisdiction of the trial court or are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be doubted.

These general categories (matters of common knowledge, readily verifiable facts) have traditionally been treated as the clearest cases for judicial notice. *See* McCormick §§ 328-330. Like the Federal Rule, this Rule omits any mention of propositions of generalized knowledge, which were included in Uniform Rule 9(1) and (2). It is doubtful that many such propositions will fall within the scope of Rule 201 as limited by subdivision (a). Any that do must satisfy the condition of subdivision (b) in order to be judicially noticed. For instance, it is not proper for a court to base its decision on the unsupported belief that "no one could be so naive as to believe that a small advisory service with only 5,000 subscribers could by its own recommending influence cause such stocks as Union Pacific (22,000,000 shares outstanding),…invariably and automatically to rise so that defendants could always sell their small holdings at a small profit." *Securities and Exchange Commission v. Capital Gains Research Bureau,* 300 F.2d 745, at 748 (2d Cir. 1961), *reversed and remanded* on other grounds 375 U. S. 180, 11 L.Ed.2d 237 (1963).

Lack of information should not be confused with indisputability. If the information before the court, whether or not furnished by the parties, is insufficient to satisfy subdivision (b) or fails to clearly convince the court that a matter should be judicially noticed, the court should decline to take judicial notice and require proof in the usual manner, although the court considers the fact more probable than not. An adequate development of the facts at trial in a jury case protects a party's right to have questions of fact resolved by the jury, and, in a non-jury case, assures the parties the power to cross-examine and submit contrary evidence.

(c) and (d) **When Discretionary—When Mandatory.** Under subdivision (c) the judge has a discretionary authority to take judicial notice, as long as subdivision (b), *supra,* is satisfied, regardless of whether he is so requested by a party. The taking of judicial notice is mandatory under subdivision (d) only when a party requests it, the necessary information is supplied, and each adverse party has been given adequate notice, to be determined by the court. If these conditions are not met the court need not take judicial notice, although it is still free to do so as a matter of discretion. The question of whether or not to take judicial notice of fact that satisfies the conditions of subdivision (b) is thus left primarily to the court's discretion. This is a simple, workable system, and it reflects the existing Alaska practice (see Alaska Civil Rule 43(a) (1), (2), and (3)).

Federal Rule 201 (c) and (d) are very similar to this Rule. Compare Uniform Rule 9, making judicial notice of facts universally known mandatory without request, and making judicial notice of facts generally known in the jurisdiction or capable of determination by resort to accurate sources discretionary in the absence of request, but mandatory if request is made and the information furnished. But see Uniform Rule 10(3), which directs the judge to decline to take judicial notice if available information fails to convince him that the matter falls clearly within Uniform Rule 9 or is insufficient to enable him to notice it judicially. Substantially the same approach is found in California Evidence Code §§ 451-453 and in New Jersey Evidence Rule 9. In contrast, the present Rule treats alike all facts which are subject to judicial notice.

Rule 202. Judicial Notice of Law.

(a) **Scope of Rule.** The Federal Rules of Evidence contain no provision analogous to this Rule. Expressing the view that the manner in which law is "fed into the judicial process" is not the proper concern of rules of evidence, the Advisory Committee recognizes Rule 44.1 of the Federal Rules of Civil Procedure and Rule 26.1 of the Federal Rules of Criminal Procedure as governing the method of invoking the law of foreign countries. However, in adopting Rules of Evidence based on the Federal Rules, Nevada provides for judicial notice of matters of law. *See* Nevada Rule of Evidence 47.140. Because Alaska R. Civ. P. 43 (a), superseded by this Rule, combined judicial notice of law and fact, and because the failure of a court to take judicial notice of law may result in proof being offered by the parties, Rule 202 follows Nevada's lead in including a provision for judicial notice of law among evidence rules. This Rule governs judicial notice of domestic laws and regulations, and both foreign and international law.

(b) **Without Request—Mandatory.** Under this subdivision, judicial notice of the laws of sister states is not mandatory upon the court. For some time judicial notice has only been taken of a state's own laws and the laws of the federal government. It has been necessary to both plead and prove the law of other jurisdictions. In 1936 the National Conference of Commissioners on Uniform State Laws drafted the Uniform Judicial Notice of Foreign Law Act which was adopted in substance by over half the jurisdictions (withdrawn in 1966). In effect, this Act provided that every court within the adopting jurisdiction must take judicial notice of the common law and statutes of every other state. This was also the approach of Uniform Rule 9 (1953). Alaska R. Civ. P. 43(a), superseded by this Rule accepted the reform. This subdivision does not make notice mandatory because the Committee on Rules believed that the realities of law practice in Alaska, especially the availability of books, was such that parties should be encouraged to provide the court and opposing counsel with copies of sister states' laws. It is important to

recognize that a court will take notice of sister state law if a proper request and presentation are made, or if the court decides to exercise its option to take notice under subdivision (c), *infra*.

(c) **Without Request—Optional.** This subdivision defines the discretionary power of the court to take judicial notice on its own initiative.

Section (1) recognizes that federal rules, and state and territorial laws may often be difficult to find in Alaska libraries. However, where the court is in possession of relevant material, notice may be taken.

Section (2) is very similar to Uniform Rule 9(2) (a), which was based on the Model Code of Evidence, Rule 802(a) (1942). Where private acts and resolutions are easily ascertained the court can conveniently take judicial notice of them and often will. Where agency regulations operate with the power of law there is every reason to take judicial notice of them. See AS 44.62.110, providing for judicial notice of regulations printed in the Alaska Administrative Code or Alaska Administrative Register. *See also* 44 U.S.C.A. § 1507, providing for judicial notice of the contents of the Federal Register; and *Alaska Airlines, Inc. v. Northwest Airlines, Inc.*, 228 F. Supp. 322 (D. Alaska 1964), *cert. denied*, 383 U.S. 936, 15 L.Ed. 2d 853 (1965). Due to the difficulty of ascertaining all such acts, resolutions, regulations and ordinances as may be applicable to a case, the court need only take judicial notice on its own initiative where it is convenient to do so. *See Australaska Corp. v. Sisters of Charity*, 397 P.2d 966 (Alaska 1965).

Section (3) expands the scope of judicial notice. It recognizes that today there is no reason to conclusively presume that the law of sister states is beyond the reach of Alaska. Sometimes acts, regulations, and local ordinances of other states will be unavailable. If so the court will not have to take notice of them, because this section is permissive and Subdivision (d) places a burden of producing sufficient information on a party before notice must be taken. If Subdivision (d) is satisfied, there is no good reason not to take notice. A similar view is taken with respect to emergency and unpublished regulations of Alaska agencies.

Section (4) provides for discretionary notice of foreign law and international law. Long after the law of foreign states became a matter of judicial notice in many jurisdictions, the law of foreign countries remained a matter of fact to be pleaded and proved. The Uniform Judicial Notice of Foreign Law Act, although only applicable to the law of sister states, did state that determining the law of foreign countries ought to be an issue for the court, not the jury. *See* 9A Uniform Laws Ann. 550, 569 (1965). Foreign law still had to be pleaded and proved even after some states took the determination of foreign law from the jury. Where it was not pleaded or properly proved, dismissal was usually avoided by presuming the foreign law to be the same as the law of the forum. *See* Stern, Foreign Law in the Courts: Judicial Notice and Proof, 45 Cal. L. Rev. 23 (1957).

Federal R. Civ. P. 44.1 and its identical counterpart, Crim. R. P. 26.1 require that to raise an issue of foreign law, either notice must be given in the pleadings or other reasonable notice must be given. In determining foreign law, the court "may consider any relevant material or source, including testimony." The notice requirement functions to alert the parties that foreign law is an issue in the case.

Evidence Rule 202 treats foreign law as the proper subject of judicial notice. This is the view taken by Uniform Rule 9(2) (b) and by Alaska R. Civ. P. 43(a) (2) [b], superseded by this Rule. The court may look to any pertinent source of information including the testimony of expert witnesses to ascertain foreign law.

Section (2) also provides for judicial notice of international law. It was early stated that

> [i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdictions as often as questions of right depending upon it are duly presented for their determination.

The Paquete Habana, 175 U.S. 677, 700, 44 L.Ed. 320, 328 (1899).

In ascertaining international law the court may consult and use any source of pertinent information. Just as in English canon law experts played a large part in determining foreign law, it is anticipated that expert testimony may play a role in showing what foreign and international law is in a given situation. *See Texas v. Louisiana*, 410 U.S. 702, 35 L.Ed. 2d 646 (1973); Panel, "Proving International Law in a National Forum," 70 Am. Soc'y Int'l L. (1976). Maritime law is treated similarly.

Section (5) provides that if a matter of law could be noticed under this Rule, but the law has been repealed or replaced, it still may be proved by judicial notice, if it remains relevant to the case.

(d) **With Request—Mandatory.** At the request of a party the court shall take notice of any matter included in subdivision (c). If the party's request is accompanied by sufficient information and adequate notice to adverse parties, it is mandatory that the court take judicial notice. The difficulty of finding all applicable law and obtaining proper information under subdivision (c) disappears when the requirements of this subdivision are satisfied. The notice requirement to adverse parties provides the opportunity for a chance to be heard on the propriety of taking judicial notice of the matter.

Rule 203. Procedure for Taking Judicial Notice.

This Rule applies to all aspects of judicial notice and must, therefore, be read in conjunction with both Rule 201 and Rule 202.

(a) **Determining Propriety of Judicial Notice.** Basic considerations of procedural fairness demand an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed. The rule requires the granting of that opportunity upon request. No formal scheme of giving notice is provided. An adversely affected party may learn in advance that judicial notice is in contemplation, either by virtue of being served with a copy of a request by another party under subdivision (d) of Rule 201 that judicial notice be taken, or through an advance indication by the judge. Or he may have no advance notice at all. Although the rule does not require formal notice by the court to the parties, before judicial notice is taken

(except in unusual circumstances) the court should announce its intentions to the parties and indicate for the record the particular facts to be taken as true. *See Concerned Citizens v. Kenai Peninsula Borough*, 527 P.2d 417 (Alaska 1974). In the absence of advance notice, a request made after the fact could not in fairness be considered untimely. See the provision for hearing on timely request in the federal Administrative Procedure Act, 5 U.S.C. § 556(e). *See also* Revised Model State Administrative Procedure Act (1961), 9C U.L.A. § 10(4) (Supp. 1967).

In considering taking judicial notice, the court is not restricted to sources of information proffered by the parties, but may consult any source, including treatises, experts, scientific journals, etc. No exclusionary rule except a valid claim of privilege shall apply. However, the court as a matter of discretion, should disclose, on request, the main sources on which a decision to take judicial notice is or was based, in order to make the parties' opportunity to be heard meaningful.

(b) **Time of Taking Notice.** In accord with the usual view, judicial notice may be taken at any stage of the proceedings, whether in the trial court or on appeal. Federal Rule 201(f); Uniform Rule 12; McCormick § 333.

(c) **Instructing the Jury.** In civil cases, the rule contemplates there is to be no evidence before the jury in disproof of a judicially noticed fact. The court instructs the jury to take judicially noticed facts as established. This position is justified by the undesirable effects of the opposite rule in limiting the rebutting party, though not his opponent, to admissible evidence, in defeating the reasons for judicial notice, and in affecting the substantive law to an extent and in ways largely unforeseeable. Ample protection and flexibility are afforded by the broad provision for opportunity to be heard on request, set forth in subdivision (a).

Authority upon the propriety of taking judicial notice against an accused in a criminal case with respect to matters other than venue is relatively meager. While it may be argued that the right of jury trial does not extend to matters which are beyond reasonable dispute, the rule opts for the greater protection of the accused's right to a jury trial afforded by the limited instruction that the jury may, but is not required to, accept as conclusive any fact judicially noticed. The Federal Rule is in accord. Much of the concern about a possible need to take notice of some facts in criminal cases can be eliminated by careful attention to the elements of an offense. Venue and jurisdiction are not usually elements of a crime. Of course, they must be proper (assuming an appeal will be taken). But the same judge who decides in a civil case whether a court has jurisdiction and what proper venue is can do so in a criminal case. Of course, venue and jurisdiction questions may involve factfinding, but many questions left for the court involve factfinding. *See, e.g.,* Rule 104 (a), *supra.* Consider also change of venue motions and attacks on jury verdicts. Factfinding unrelated to the elements of the crime can be done by the judge. With this in mind, Rule 203 is drafted to avoid the knotty constitutional questions that would arise were an attempt made to permit judicial notice of some facts relevant to the merits of an action but not others. To draw such a line might be to resurrect the "ultimate issue" test abandoned in Rule 704, *infra.*

Rule 203(c) is drafted so that it conclusively states that determining questions of law shall be a matter for the court. When the determination of the law of foreign states and foreign countries was treated as a question of fact, it became a matter for the jury in appropriate cases. Statutes and acts such as the Uniform Judicial Notice of Foreign Law Act and Federal Rule of Civil Procedure 44.1 have attempted to remove this anomaly in traditional court and jury functions. This subdivision expresses the view that determining the law is a function of the court. See Uniform Rule 10(4) for an identical provision. If judicial notice of law is not taken, evidence will be required, but the decision on what the law is remains that of the court.

Nothing in the rule is intended to suggest that it authorizes a lawyer to argue jury nullification to the jury in a criminal case. The jury simply is to be told that a noticed fact is treated as if evidence of it were authorized, and the trier of fact is to treat it as if evidence were submitted. A defense lawyer can argue that any fact should be disbelieved by the jury and this is as true of a judicially noticed fact as of any other fact.

ARTICLE III. PRESUMPTIONS

Rule 301. Presumptions in General in Civil Actions and Proceedings.

(a) **Effect.** This Rule governs rebuttable presumptions generally in civil cases. See Rule 302 for presumptions controlled by federal law and Rule 303 for those operating in a criminal case.

The word "presumption" has many different meanings in the law. See Laughlin, In Support of the Thayer Theory of Presumptions, 52 Mich. L. Rev. 195, 196-209 (1953). As used herein, a "presumption" is a recognition in law of the relationship between two facts or groups of facts. If one fact or group of facts is shown to exist, the law presumes the existence of the other but permits rebuttal.

The burden placed upon the party seeking the advantage of a presumption is to prove the initial fact, often called the "basic" or "proved" fact. If this fact is not disputed, then the presumption will operate. If the fact is disputed, the presumption will only operate if the trier of fact finds that the basic fact exists.

Assuming the existence of the basic fact, Rule 301 provides that the presumed fact shall also be found to exist unless the party against whom the presumption operates meets the presumption with evidence sufficient to permit a reasonable trier of fact to find that the presumed fact does not exist. A failure to meet the presumption with sufficient evidence results in a peremptory instruction or a directed verdict. If the burden of producing evidence is satisfied, the presumption disappears and no mention of it may be made to the jury, which is likely to be confused by the term. The court must, however, instruct the jury that it may infer the existence of the presumed fact from the basic fact.

There has been substantial disagreement in the past among common law courts and legal commentators regarding the proper weight to be given a presumption. Some authorities hold that a presumption places the burden of proof on the party opposing the fact presumed to establish its non-existence once

the party invoking the presumption establishes the basic facts giving rise to it. This position is associated with McCormick and Morgan, although the latter's view is arrived at with some reluctance. *See* Morgan, Further Observations on Presumptions, 16 So. Cal. L. Rev. 245, 254 (1943). Other authorities, following Thayer's "bursting bubble" theory, approved by Wigmore, hold that the presumption vanishes upon the introduction of evidence that would support a finding of the non-existence of the presumed facts. There are numerous intermediate positions that have attracted attention. *See* Morgan, *supra*, at 247-49. It is possible to treat different presumptions differently. See Calif. Evid. Code § 600 *et seq.* But Morgan, *supra*, at 254, persuasively argued the case for a single standard.

> Unfortunately, however, there are myriads of presumptions created by courts and legislatures. They can not be authoritatively classified by courts except as each one is involved in a litigated action. Wherever there is room for difference of opinion, no presumption can finally be assigned its proper place except by the appropriate court of last resort. To evolve a classification by judicial decision would require decades, if not centuries. To make a legislative classification of existing presumptions would involve immense labor and would still leave room for debate as to all subsequently created presumptions. Unless a trial judge were presented with a catalogue of classified presumptions, it would be fatuous to expect him to determine the reasons and objectives of a presumption suddenly thrust at him in the hurry of a trial, with a demand to classify it and accord it the appropriate effect.

The approach of this Rule approximates more closely the views of Thayer and Wigmore than those of McCormick and Morgan.

The shifting-the-burden of persuasion approach, approved by the Advisory Committee on the Federal Rules and the United States Supreme Court before being rejected by the Congress, is rejected for several reasons.

First, Alaska has a myriad of statutes creating presumptions within the meaning of this Rule. Some use the word presumption or a related term. *See, e.g.,* AS 13.06.035(3) (Evidence as to death or status); AS 45.05.376 (Evidence of dishonor and notice of dishonor). More use the term "prima facie evidence," AS 02.35.070 (Receipts for certified certificates); AS 08.24.300 (Court action by agency); AS 10.05.726 (Failure to pay tax as evidence of insolvency); AS 10.05.795 (Certificates and certified copies to be received in evidence); AS 13.06.035 (1) & (2) (Evidence as to death or status); AS 18.50.320(2) (Copies of data from vital records); AS 21.84.100 (Certificate of compliance); AS 21.84.030 (Annual license); AS 27.10.170 (Effect of recording and of failure to record affidavit of labor or improvements); AS 27.10.190 (b) (Recording the notice to contribute and affidavits); AS 28.10.261 (Evidence); AS 32.05.180 (b) (Continuation of partnership beyond fixed term); AS 45.05.022 (Prima facie evidence by third party documents); AS 45.50.290 (Certificate of registration as evidence). While it is difficult to ascertain the legislative intent in creating these presumptions, and while the intent may vary from presumption to presumption, it is highly unlikely that the legislature intended many of these presumptions to have the potential impact associated with a shift in the burden of persuasion.

Second, shifting the burden of persuasion on some issues may tend to confuse the jury, especially in cases involving affirmative defenses where the normal instructions on burdens of proof already may be confusing.

Third, in situations in which the presumption operates against a party already bearing the burden of persuasion on an issue, the presumption may have no effect once it is rebutted. No good reason appears why a presumption that is powerful enough to shift the burden of persuasion should disappear entirely when shifting is impossible.

Fourth, the Federal Rule does not shift the burden of persuasion. When federal and state issues are tried together, rarely will it be necessary under this Rule or Rule 302 to face the problem of conflicting presumptions.

(b) **Prima Facie Evidence.** This subdivision makes it clear that when the legislature uses the term "prima facie" in reference to proving a fact, generally it intends to create a presumption. See Degnan, Syllabus on California Evidence Code 18-25 (11th Ann. Summer Program, U. Cal.-Berkeley) in D. Louisell, J. Kaplan, & J. Waltz, Cases and Materials on Evidence 980-83 (3d ed. 1976). "The term 'prima facie case' is often used in two senses and is therefore an ambiguous and often misleading term. It may mean evidence that is simply sufficient to get to the jury, or it may mean evidence that is sufficient to shift the burden of producing evidence." McCormick (2d ed.) § 342, at 803 n.26. A presumption may be utilized in both senses in the same case. The statutes set forth, *supra*, do more than permit a party to get to a jury on the basis of prima facie evidence; they evince a legislative determination that the presumption should be accepted until rebutted. This rule so provides.

(c) **Inconsistent Presumptions.** When conflicting presumptions are present in a single case, the court attempts to determine which is founded in the weightier considerations of policy and logic. McCormick (2d ed.) § 345, at 823-24, discusses the "special situation of the questionable validity of a second marriage [which] has been the principal area in which the problem of conflicting presumptions has been discussed by the courts." Most courts have taken the approach of this subdivision in such a situation. "This doctrine that the weightier presumption prevails should probably be available in any situation which may reasonably be theorized as one of conflicting presumptions, and where one of the presumptions is grounded in a predominant social policy." McCormick (2d ed.) § 345, at 824. The final sentence of the Rule provides that if there is no such preponderance, both presumptions shall be disregarded. This follows Uniform Rule 15 (1953). It would be confusing if the judge were to instruct the jury that it might find fact A, but that it is not bound to, and that it might find not-A but that is not bound to. No instruction is preferable. Instead, the jury will learn of two basic facts suggesting opposite inferences, and it must determine the one that is most probable in light of all the evidence.

Nothing in this rule affects the application of conclusive presumptions, *see, e.g.,* AS 10.10.030 (6) (d) (Articles of incorporation), which the United States Supreme Court recently referred to as rules of law. *Usery v. Turner Elkhorn*

Min. Co., 428 U.S. 1, 49 L.Ed.2d 752 (1976). Nor does this Rule address the validity of conclusive presumptions. Compare *Weinberger v. Salfi*, 422 U.S. 749, 45 L.Ed.2d 522 (1975), with *Vlandis v. Kline*, 412 U.S. 441, 37 L.Ed.2d 63 (1973), *United States Dep't of Agriculture v. Murray*, 413 U.S. 508, 37 L.Ed.2d 767 (1974), and *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 39 L.Ed. 2d 52 (1974). Nothing in this Rule inhibits the creation or utilization of presumptions to protect constitutional rights. *See, e.g., Keyes v. School Dist. No. 1*, 413 U.S. 189, 37 L.Ed.2d 548 (1973), discussed in K. Redden & S. Saltzburg, *Federal Rules of Evidence Manual* 82-83 (2d ed. 1977).

The first sentence of the rule makes clear that the legislature and the courts retain power to create presumptions having an effect different from that provided for in this Rule.

Rule 302. Applicability of Federal Law in Civil Actions and Proceedings.

Whenever a state court looks to federal law to find the rule of decision with respect to a claim or defense, federal law will govern with respect to the effect of a presumption. *Cf., Dice v. Akron, C. & Y. R.Co.*, 342 U.S. 359, 96 L.Ed. 398 (1952). *See also* the Reporter's Comment accompany Rule 501. As Alaska Rule 301 prescribing the effect of presumptions is identical to the federal evidence rule, courts will seldom have to determine which law should be followed. The only potential conflict is in the case of a claim or defense for which the United States Congress has provided by statute for the shifting of the burden of persuasion or where the federal judiciary has interpreted the Constitution or a federal statute to require shifting the burden of persuasion and the Alaska rule is *contra*, or vice versa. Rule 302 will apply to such situations. Federal criminal cases will be litigated in federal courts, so no state rule is needed to deal with presumptions in such cases. *But see Testa v. Katt*, 330 U.S. 386, 91 L.Ed. 967 (1947).

Rule 303. Presumptions in General in Criminal Cases.

(a) **Effect.** This rule governs rebuttable presumptions generally in criminal cases. Rule 301 governs in civil cases and Rule 302 governs presumptions controlled by federal law, although it is unlikely to have any impact in criminal cases.

The word "presumption" is used in this Rule in the same manner as in Rule 301. The Reporter's Comment accompanying Rule 301 explains this use in detail. As was the case with presumptions operating in civil cases, the legislature sometimes creates "presumptions" without using the word "presumption." For example, the legislature may employ the term "prima facie evidence," which is covered by subdivision (b). *See, e.g.*, AS 11.20.220 (Evidence of knowledge of insufficient funds); AS 11.20.250 (Evidence of intent to defraud), quoted in *Selman v. State*, 411 P.2d 217 (Alaska 1966).

The Advisory Committee on the Federal Rules expressed its opinion that "[i]t is axiomatic that a verdict cannot be directed against the accused in a criminal case . . . . with the corollary that the judge is without authority to direct the jury to find against the accused as to any element of the crime… Although arguably the judge could direct the jury to find against the accused as to a lesser fact, the tradition is against it…" Without making any constitutional decisions, Rule 203(c) accepted this opinion as expressing sound policy and denied judges the power to bind juries to facts believed by the judges to be beyond reasonable dispute. The instant rule is in accord. A presumption cannot be used against a defendant as a device to preempt the jury's function of finding facts and assessing guilt and innocence.

When a presumption is directed against the government, different policies govern, and a presumption may result in a directed verdict or peremptory instruction in favor of a defendant. Presumptions working against the government are treated like civil presumptions under Rule 301 and will not be discussed in this Comment.

If a presumption cannot be binding on a defendant, what is its utility? Judge Weinstein identifies a two-fold function:

> Presumptions are utilized to overcome two separate problems in federal law. Primarily this function is to lessen the prosecution's burden of establishing guilt by authorizing short-cuts in proof and exerting pressure on the person with the most knowledge to come forward with an explanation. . . .
>
> In addition, a presumption may serve the secondary function of making undesirable activities amenable to federal jurisdiction.

1 Weinstein's Evidence, Paragraph 303 [01] (1975). The second function is of no concern to the states in their lawmaking activities. But a third function may be important. "In a borderline case a judge may be influenced by the legislative judgment of Congress [or a state legislature] to submit a basic fact to a jury which he would not have submitted as merely circumstantial evidence of the presumed fact." *Id.* Thus, the first and third functions are the important ones for the states. There also may be a fourth function — to make clear the intent of the legislature in special circumstances.

Subdivision (a) allows presumptions to perform their intended functions, but prevents them from exerting too great an impact on the outcome of a case. If a presumption is created by the legislature or the courts, it serves as an incentive for the accused to submit rebuttal evidence. If no rebuttal evidence or insufficient evidence is offered, the court, without using the word "presumption," will instruct the jury that it may, but is not bound to, infer the existence of the presumed fact from proof of the basic fact. Such an instruction is couched purely in terms of a permissible inference; no attempt is made to guide the jury in assessing the sufficiency of the inference to prove guilt. This mandatory instruction is in the nature of a mild comment on the evidence. No good reason appears why the legislature or the courts cannot require a specific non-binding instruction when they deem it desirable.

If the accused offers evidence to rebut or meet the presumption, the giving of an instruction is discretionary. In instances where the nature of a presumption directed against the accused is such that the relationship between the proved fact and the presumed fact is self-evident or apparent, no instruction should normally be given by the court if the accused offers evidence to rebut or meet the presumption, since in such instances, a jury instruction would tend to emphasize unduly and unnecessarily the existence of the presumption. On the other hand, in circumstances where there

is no obvious connection between the proved fact and the presumed fact, an instruction to the jury regarding the existence of the presumption would ordinarily be appropriate.

A good example of this latter situation would be the standard case involving the presumption created by a Breathalyzer examination. The proved fact in such a case would be a Breathalyzer reading of .10 percent blood alcohol or greater; the fact to be presumed from the proved fact is that the accused was under the influence of intoxicating liquor at the time of the test. Under normal circumstances, with no expert testimony concerning the significance of .10 percent blood alcohol level in terms of its effect on an individual's sobriety, the mere awareness of the proved fact—i.e., the .10 percent blood alcohol level—would be meaningless to the average juror. Assuming the accused in such a situation was willing to concede the blood alcohol level, but opted to rebut the presumption by arguing that, despite the blood alcohol level, he was not in fact impaired, the mere establishment of blood alcohol level by the prosecution would be rendered wholly ineffective in the absence of a specific instruction to the jury concerning the presumption which arises from proof of a blood alcohol level of .10 percent or greater. It should be noted that the burden of coming forward is less onerous here than in Rule 301. This reflects a judgment that the defendant should have the benefit of reasonable doubts.

One advantage of the approach taken in this Rule is that it probably avoids the problem of applying to most presumptions the confusing test of constitutionality compelled by the following decisions of the United States Supreme Court: *Tot v. United States*, 319 U.S. 463, 87 L.Ed. 1519 (1943), *United States v. Gainey*, 380 U.S. 63, 13 L.Ed.2d 658 (1965), *United States v. Romano*, 382 U.S. 136, 15 L.Ed.2d 210 (1965), *Leary v. United States*, 395 U.S. 6, 23 L.Ed.2d 57 (1969), *Turner v. United States*, 396 U.S. 398, 24 L.Ed.2d 610 (1970), and *Barnes v. United States*, 412 U.S. 837, 37 L.Ed.2d 380 (1973).

As long as a court confines itself to a description of a permissible inference, avoiding a statement like the trial judge's in *Barnes*—"[i]f you should find beyond a reasonable doubt…that the mail…was stolen,…you would *ordinarily be justified* in drawing the inference…unless such possession is explained…" (emphasis added)— and avoiding the legislative language in *Leary* employed by the court in its instruction—"[w]henever…the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed *sufficient evidence to authorize conviction* unless the defendant explains…" (emphasis added)—the relatively mild comment in the form of an instruction commanded by this Rule is likely to be sustained in light of the traditional power of federal courts to comment on the weight of the evidence in criminal cases and the nature of the instruction.

Another advantage of the rule is that it avoids the complications of the proposed Federal Rules. They caused the eminent jurist, Henry Friendly, to complain to the Congress that he did not understand them. *See* Hearings on Proposed Rules of Evidence Before the Subcomm. on Crim. Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 249 (1973). This is not surprising, since many lawyers would have the same difficulty.

A final advantage is that by creating presumptions that are covered by this rule, the legislature makes the same "statement" to courts about desired treatment of borderline cases as it makes with more powerful presumptions.

The legislature and the courts remain free under Rule 303 to create presumptions with a different effect than that provided here. For example. AS 41.15.110(c) (Allowing fire to escape or failure to make effort to extinguish; misdemeanor) provides that "[i]n a criminal action brought under this section, the escape of the fire is presumptive evidence of negligence by the person responsible for starting the fire and unless rebutted is sufficient to sustain a conviction." While this statute avoids any implicit reference to silence on the part of the defendant and thus is less worrisome than some instructions approved by other courts, *see, e.g., United States v. Gainey, supra,* application of the statute may be challenged more readily under the line of United States Supreme Court cases previously cited than under this rule.

(b) **Prima Facie Evidence.** See the Reporter's Comment accompanying Rule 301 (b).

(c) **Inconsistent Presumptions.** The reason for this subdivision is set forth in the Reporter's Comment accompanying Rule 301 (c). There is one important difference, however, between the instant rule and Rule 301 (c): Under the instant rule the effect of the preponderant presumption will vary, depending on whether it favors the government or the accused; no such variance occurs under Rule 301 (c).

This rule does not establish that the government must always bear the burden of persuasion on every issue litigated in a criminal case. Whether an accused sometimes may be compelled to bear the burden of persuasion is beyond the scope of these Rules of Evidence. *See generally Mullaney v. Wilbur,* 421 U.S. 684, 44 L.Ed.2d 508 (1975); *Patterson v. New York*, 432 U.S. 197, 53 L.Ed.2d 281 (1977). The language of the Rule assumes, however, that in most instances when the government seeks the benefits of a presumption it bears the burden of persuasion.

Nothing in this rule eliminates the instruction that a defendant is presumed to be innocent. This presumption is not an evidence presumption, but a special casting of the burden placed on the government to prove guilt beyond a reasonable doubt.

ARTICLE IV. ADMISSIBILITY OF RELEVANT EVIDENCE

Rule 401. Definition of Relevant Evidence.

This rule adopts Rule 401 of the Federal Rule of Evidence verbatim. The Advisory Committee's Note to Federal Rule 401 explains this rule completely and concisely. It comprises the remainder of this comment, albeit in slightly altered form.

The variety of relevancy problems is coextensive with counsel's skill in mustering substantive theories to support a case and ingenuity in using circumstantial evidence as a means of proof. An enormous number of cases fall in no set pattern, and this Rule is designed as a guide for handling them. On the other hand, some situations recur with sufficient frequency to create patterns susceptible of treatment by specific rules. Rule 404 and those following it are of that variety; they also serve as

illustrations of the application of the present Rule as limited by the exclusionary principles of Rule 403.

Passing mention should be made of so-called "conditional" relevancy. Morgan, *Basic Problems of Evidence* 45-46 (1962). In this situation, probative value depends not only upon satisfying the basic requirement of relevancy but also upon the existence of some matter of fact. For example, if evidence of a spoken statement is relied upon to prove notice, probative value is lacking unless the person sought to be charged heard the statement. The problem is one of fact, and the only rules needed are for the purpose of determining the respective functions of judge and jury. See Rule 104(b). The discussion which follows in the present note is concerned with the relevancy generally, not with any particular problem of conditional relevancy.

Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand. James, Relevancy, Probability and the Law, 29 Calif. L. Rev. 689, 696 n. 15 (1941), in Selected Writings on Evidence and Trial 610, 615 n. 15 (Fryer ed. 1957). The Rule summarizes this relationship as a "tendency to make the existence" of the fact to be proved "more probable or less probable." Compare Uniform Rule 1(2) which states the crux of relevancy as "a tendency in reason," thus perhaps emphasizing unduly the logical process and ignoring the need to draw upon experience or science to validate the general principle upon which relevancy in a particular situation depends. Ultimately, legal reasoning depends upon logic, but the logical calculus includes not only a priori knowledge but facts, insights, and principles developed by scientific methods or tested by experience.

The standard of probability under the Rule is "more…probable than it would be without the evidence." Any more stringent requirement is unworkable and unrealistic. As McCormick (2d ed.) § 185, at 436, says, "A brick is not a wall," or, as Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L. Rev. 574, 576 (1956), quotes Professor McBaine,"…[I]t is not to be supposed that every witness can make a home run." Dealing with probability in the language of the Rule has the added virtue of avoiding confusion between questions of admissibility and questions of the sufficiency of the evidence.

The words "any tendency" in the rule suggest that the court should err, in doubtful cases, on the side of admissibility. For example, courts need not exclude all cumulative evidence. The fact that Witness 1 testifies to the existence of fact X does not compel the conclusion that testimony by Witnesses 2 and 3 to the same effect is not relevant. The probability that fact X exists may increase when it becomes apparent that several different people support it; corroboration may increase the likelihood that the fact is true. At some point further corroboration will be of little help to the trier of fact, and the court will either rule that the additional evidence is not relevant or will exclude it under Rule 403.

The Rule uses the phrase "fact that is of consequence to the determination of the action" to describe the kind of fact to which proof may properly be directed. The language is that of California Evidence Code § 210; it has the advantage of avoiding the loosely used and ambiguous word "material." Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. I. General Provisions), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 10-11 (1964). The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action. *Cf.* Uniform Rule 1(2) which requires that the evidence relate to a "material" fact.

The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (See Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute. Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. Charts, photographs, views of real estate, murder weapons, and many other items of evidence fall in this category. A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission. *Cf.* California Evidence Code § 210, defining relevant evidence in terms of tendency to prove a disputed fact.

Rule 402. Relevant Evidence Admissible—Exceptions—Irrelevant Evidence Inadmissible.

This rule is nothing more than a codification of the common law. The provisions that all relevant evidence is admissible, with certain exceptions, and that evidence which is not relevant is not admissible are "a presupposition involved in the very conception of a rational system of evidence." Thayer, Preliminary Treatise on Evidence 264 (1898). They constitute the foundation upon which the structure of admission and exclusion rests. All states which have codified their evidence law have provided that all relevant evidence, with certain exceptions, is admissible. The model for the rule was Federal Rule of Evidence 402, modified to conform to the Alaska judicial system. Nebraska adopted a similarly modified version of Federal Rule 402, in Nebraska Rule of Evidence 27-402. For similar provisions see also Maine Rule of Evidence 402 and New Mexico Rule of Evidence 20-4-402. Provisions that all relevant evidence is admissible are found in Uniform Rule 7(f), Kansas Code of Civil Procedure § 60-407(b), and New Jersey Evidence Rule 7(f), but the exclusion of evidence which is not relevant is left to implication.

Not all relevant evidence is admissible. The exclusion of relevant evidence may be called for by these rules; by other rules, e.g. the Alaska Rules of Civil and Criminal Procedure; by enactment of the legislature; or by constitutional considerations.

Succeeding rules in the present article, in response to the demands of particular policies, require the exclusion of evidence despite its relevancy. In addition, Article V recognizes a number of privileges; Article VI imposes

limitations upon witnesses and the manner of dealing with them; Article VII specifies requirement with respect to opinions and expert testimony; Article VIII excludes hearsay not falling within an exception; Article X spells out the handling of authentication and identification; and Article X restricts the manner of proving the contents of writings and recordings.

The Alaska Rules of Civil and Criminal Procedure in some instances require the exclusion of relevant evidence. For example, Rule 30(b) of the Rules of Civil Procedure, by imposing the requirements of notice and opportunity to consult counsel, limits the use of relevant depositions. Similarly, Rule 15 of the Alaska Rules of Criminal Procedure restricts the use of depositions in criminal cases, even though relevant.

Alaska statutes restricting admissibility of relevant evidence, for example by formulating a privilege or prohibition against disclosure, are not affected by this rule. The rule recognizes the power of the legislature to restrict admissibility. See, e.g., AS 09.25.030 (governing evidence of representations as to credit, skill, or character of third person); AS 12.45.030 (necessary evidence for false pretenses); AS 12.45.085 (notice requirement for evidence of mental defect or disease); AS 28.35.120 (barring use of accident reports).

The rule recognizes but makes no attempt to spell out the constitutional considerations which impose basic limitations upon the admissibility of relevant evidence. Some such limitations have roots in the United States Constitution; see, e.g., evidence obtained in illegal search and seizure, *Mapp v. Ohio,* 367 U.S. 643, 6 L. Ed. 2d 1081 (1961); incriminating statements obtained without proper warnings, *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed.2d 694 (1966); line-up identifications made after indictment when the accused is without counsel, *Gilbert v. California,* 388 U.S. 263, 18 L.Ed. 2d 1178 (1967). The Alaska Constitution may be the source of further limitations. *Cf. Lanier v. State,* Alaska, 486 P.2d 981, at 986 (Alaska 1971):

In defining the scope of constitutional protections which shall be afforded in Alaska courts, we are not limited to the minimum constitutional guarantees as enunciated by the United States Supreme Court. In appropriate circumstances we may more broadly define the rights of the litigants.

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

This rule is almost identical to Federal Rule of Evidence 403. The rule merely codifies the common law powers of the court in this regard. The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. Slough, Relevancy Unraveled, 5 Kan. L. Rev. 1, 12-15 (1956); Trautman, Logical or Legal Relevancy—A Conflict in Theory, 5 Vand. L. Rev. 385, 392 (1952) McCormick (2d ed.) § 185, at 440-41.

The Federal Rule provides that the probative value must be "substantially" outweighed by these other factors before evidence is excluded. The problem with the word "substantially" is that it seems to require admission of evidence in cases where the court is certain that the evidence is more harmful than helpful, but cannot say that the balance is substantially one way or the other, only that it is as clear as it is close. Alaska Rule 403 omits "substantially" on the theory that the language "if its probative value is outweighed by…" is a clear enough indication of the balance the court is supposed to strike in view of the further guidance to be found in the case law.

If the balance between probative value and prejudicial effect (signifying all of the factors discussed in this rule) is close, the Judge should probably decide to admit the evidence. In other words, there is a slight presumption in favor of admitting relevant evidence. In order to overcome this minimal presumption, the prejudicial effect must be demonstrably greater than the probative value of the evidence.

Application of this principle should produce the same results as the federal rule in most cases, but the fact that the balance is kept clearly a matter of discretion rather than reduced to measurement by the "substantial" yardstick, should free the court to make the ruling more clearly promoting a just result. The confusion attending the use of burden of persuasion terminology is also avoided by the omission of "substantially"; *see, e.g., Gordon v. United States*, 383 F.2d 936 (D.C. Cir. 1967), *cert. denied,* 390 U.S. 1029, 20 L.Ed.2d 287 (1968).

Exclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities. "Unfair prejudice" within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.

The rule does not enumerate surprise as a ground for exclusion, in this respect following Wigmore's view of the common law. 6 Wigmore § 1849. *Cf.* McCormick § 152, at 320, n.29, listing unfair surprise as a ground for exclusion but stating that it is usually "coupled with the danger of prejudice and confusion of issues." While Uniform Rule 45 incorporates surprise as a ground and is followed in Kansas Code of Civil Procedure § 60-445, surprise is not included in California Evidence Code § 352 or New Jersey Rule 4, though both the latter otherwise substantially embody Uniform Rule 45. While it can scarcely be doubted that claims of unfair surprise may still be justified despite procedural requirements of notice and instrumentalities of discovery (especially in criminal cases), the granting of a continuance is a more appropriate remedy than exclusion of the evidence. Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. n. Extrinsic Policies Affecting Admissibility), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 612 (1964). Moreover, the impact of a rule excluding evidence on the ground of surprise would be difficult to estimate. It is assumed that if a continuance is not feasible and if the evidence giving rise to a claim of surprise is somehow suspect, it may be excluded as prejudicial, confusing, or misleading, in the sound exercise of judicial discretion.

In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable

effectiveness or lack of effectiveness of a limiting instruction. See Rule 105 and Reporter's Comment thereunder. The availability of other means of proof may also be an appropriate factor.

The rules which follow in this Article are concrete applications evolved for particular situations. However, they reflect the policies underlying the present rule, which is designed as a guide for the handling of situations for which no specific rules have been formulated.

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

(a) **Character Evidence Generally.** This subdivision deals with the basic question whether character evidence should be admitted. Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 405, which follows, in order to determine the appropriate method of proof. If the character is that of a witness, See Rules 608 and 610 for methods of proof.

Character questions arise in two fundamentally different ways. (1) Character may itself be an element of a crime, claim, or defense. A situation of this kind is commonly referred to as "character in issue." Illustrations are: the honesty of a victim in an action for libel based on a statement that he is a thief where truth is a defense, or the competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent driver. No problem of the general relevancy of character evidence is involved, and the present rule therefore has no provision on the subject. The only question relates to allowable methods of proof, as to which see Rule 405, immediately following. (2) Character evidence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character. This use of character is often described as "circumstantial." Illustrations are: evidence of a violent disposition to prove that the person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft. This circumstantial use of character evidence raises questions of relevancy as well as questions of allowable methods of proof.

In most jurisdictions today, the circumstantial use of character is rejected but with important exceptions: (1) an accused may introduce relevant evidence of good character (often misleadingly described as "putting his character in issue"), in which event the prosecution may rebut with evidence of bad character; (2) an accused may introduce relevant evidence of the character of the victim, as in support of a claim of self-defense to a charge of homicide or consent in a case of rape, and the prosecution may introduce similar evidence in rebuttal of the character evidence, or, in a homicide case, to rebut a claim that deceased was the first aggressor, and (3) the character of a witness may be gone into as bearing on his credibility. McCormick (2d ed.) §§ 186-195.

The Federal Rule uses the word "pertinent" to describe the character traits referred to above. This rule substitutes the word "relevant" to emphasize the necessity for the evidence to advance fact-finding and not merely to relate to the case. While Rule 402 would bar irrelevant evidence in any event, this rule emphasizes that general relevance concepts must be employed in ruling on character evidence. *See* Morgan, Basic Problems of Evidence 200 (1962).

There is a current trend, especially in rape cases, to exclude all or much character evidence that relates to the victim. Maine's Rule of Evidence 404, for example, has excluded character evidence relating to the victim in all cases. Total exclusion may protect the victim against the introduction of deeply personal facts in cases where introduction of such facts is intended to embarrass the victim rather than help the defendant, but it does so at the expense of allowing such evidence to come in for the benefit of the accused when it would substantially improve his case. This raises constitutional problems. See Westen, Compulsory Process II, 74 Mich. L. Rev. 191, 208-13 (1975); *Davis v. Alaska*, 415 U.S. 308, 39 L.Ed. 2d 347 (1974). By requiring the court to make determinations on admissibility out of the presence of the jury, an appropriate balance can be struck between the need of the accused to present probative exculpatory evidence and the socially desirable goal of protecting victims of crime from embarrassment or harassment and encouraging them to come forward with complaints and to participate in convicting the guilty. If the probative value of character evidence is outweighed by unfair prejudice, confusion of issues, or unwarranted invasion of the victim's privacy, the evidence will be kept from the jury. There is no reason to suppose that only rape victims need the added procedural precaution afforded by this rule. The rule requires both the government and the accused to utilize this procedure. Subdivision (a) (2) (iv) incorporates the language of AS 12.45.045(b) adopting a rebuttable presumption against admissibility of evidence of a rape victim's sexual conduct occurring more than one year before the date of the offense charged.

The word "prejudice" usually refers to prejudice to parties. This rule is also concerned with the interest of non-party complaining witnesses. In balancing the probative value of character evidence against its tendency to invade the privacy of the victim, the court must concern itself with the confrontation clause of the Sixth Amendment. If there is a reasonable probability that character evidence might legitimately help the defense, invasion of the privacy of the victim is warranted. If the evidence is of minimal probative value and is not reasonably likely to assist the defense, invasion of the privacy of the victim is unwarranted. The balance to be struck closely resembles the balance governing claims of a government privilege to protect the identity of an informant. *See* Rule 509 and proposed Federal Rule 510, recently discussed in *State v. Robinson*, 549 P.2d 277 (N. Mex. 1976). *See also United States v. Turchick*, 451 F.2d 333 (8th Cir. 1971).

The hearing out of the presence of the jury or *in camera* envisioned by this rule should be on the record. Examination and cross-examination of witnesses should be permitted, when necessary, and the trial judge should exercise discretion to assure that the record is complete. *Cf.* rule 103(b), *supra*. In the event that the court determines that evidence should not be admitted, in the interests of justice the court may order the record of these proceedings sealed pending appellate review.

The argument is made that circumstantial use of character ought to be allowed in civil cases to the same extent as in criminal cases, i.e. evidence of good (nonprejudicial) character would be admissible in the first instance, subject to rebuttal by

evidence of bad character. Falkner, Extrinsic Policies Affecting Admissibility, 10 Rutgers. L. Rev. 574, 581-583 (1956); Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 657-658 (1964). Uniform Rule 47 goes farther, in that it assumes that character evidence in general satisfies the conditions of relevancy, except as provided in Uniform Rule 48. The difficulty with expanding the use of character evidence in civil cases is set forth by the California Law Revision Commission in its ultimate rejection of Uniform Rule 47, *id.*, at 615:

> Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.

Much of the force of the position of those favoring greater use of character evidence in civil cases is dissipated by their support of Uniform Rule 48 which excludes the evidence in negligence cases, where it could be expected to achieve its maximum usefulness. Moreover, expanding concepts of "character," which seem of necessity to extend into such areas as psychiatric evaluation and psychological testing, coupled with expanded admissibility, would open up such vistas of mental examinations as caused the Court concern in *Schlagenhauf v. Holder*, 379 U.S. 104, 13 L.Ed.2d 152 (1964). It is believed that those espousing change have not met the burden of persuasion.

The Federal Rule permits the prosecutor upon an accused's introduction of evidence of self-defense to respond with evidence of the victim's character. This is contrary to the common law doctrine which requires the accused to actually introduce evidence relating to the victim's character before opening the door to rebuttal by the prosecutor. *See* 1 Wigmore § 63; Annot., 34 A.L.R.2d 451 (1954). The 1969 and 1971 drafts followed the common law doctrine, but were revised in the 1975 adopted rules to accommodate a recommendation by Senator John L. McClellan. Letter to Hon. Albert Maris, August 12, 1971, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Crim. Justice of House Comm. on the Judiciary, 93rd Cong., 1st Sess. 47, 48-49 (1973). Little attention was paid to the change during the legislative hearings and debates.

There remain arguments for permitting the accused to introduce evidence of self-defense without automatically allowing character evidence relating to the victim to come in. Character evidence is suspect for the reasons quoted above. When evidence of the victim's character is offered, pressure may be placed upon a defendant to explain his own character, which would open the door to much damaging evidence. If the defendant offers no evidence regarding his own character, the Federal Rule imposes a penalty on the plea of self-defense by allowing the introduction of evidence that may be used to prove too much in a situation where the evidence of self-defense is scanty. But this rule opts to admit evidence of character when the victim of a homicide is attacked by the defense as the first aggressor. In such cases the crime is grave, the victim cannot tell a story, and there is some reason to believe that a peaceable person is not likely to be the first aggressor.

This rule only applies to character evidence relating to people and does not operate to exclude evidence relating to the character of a building. See AS 11.40.270 and 11.60.130.

(b) **Other Crimes, Wrongs, or Acts.** Subdivision (b) deals with a specialized but important application of the general rule excluding circumstantial use of character evidence. Consistently with that rule, evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition. In this situation the rule does not require that the evidence be excluded. No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence, in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403. *See, e.g., Freeman v. State*, 486 P.2d 967 (Alaska 1971). *See also* Slough and Knightly, Other Vices, Other Crimes, 41 Iowa L. Rev. 325 (1956). *See also Demmert v. State*, 565 P.2d 155 (Alaska 1977) (other crimes evidence offered to prove intent). Of course, "other crimes" evidence admissible under Rule 404(b) may be excluded under Rule 403. *Cf., In re F.S.*, 586 P.2d 607 (Alaska 1978).

Rule 405. Methods of Proving Character.

(a) **Reputation or Opinion.** The common law traditionally has provided that proof of character or a trait of character of a person, when permitted, may be made by testimony as to reputation only. Reputation evidence is usually presented by calling a witness to the stand who is familiar with the reputation of the defendant, or perhaps the victim, if the victim's character is being challenged, and asking the witness to state what the reputation is in the community where the defendant or victim lives. The foundation for such testimony comes in the form of establishing that the witness has sufficient familiarity with the people in the community so that he can make a valid attempt at assessing reputation.

The rationale for the limitation was best stated by Dean Ladd:

> The object of the law in making reputation the test of character is to get the aggregate judgment of a community rather than the personal opinion of the witness which might be considered to be warped by his own feeling or prejudice. Even reputation must, to be admitted, be general in a community rather than based upon a limited class. While it is not necessary that a character witness know what the majority of a neighborhood think of a person, he must know of the general regard with which the party is commonly held.
>
> It is the general concurrence of a great number of people reflecting the sentiment toward the party whose character is subject to inquiry that is necessary to establish a reputation and to warrant its use as evidence. In this, the theory of the law is that trustworthiness is gained from the

> expressions of many people in their estimation of a person which would not be obtained by the individual opinion of a single witness however well acquainted he might be with the party's character.
>
> The requirement that the reputation be broadly general rather than that of a particular group…again emphasizes the effort to get away from the secularized and consequently biased estimate of character… The reputed character of a person is created from the slow spreading influence of community opinion growing out of his behavior in the society in which he moves and is known and upon this basis is accepted as proof of what his character actually is.

Ladd, Techniques and Theory of Character Testimony, 24 Iowa L. Rev. 458, 513 (1939).

There is a growing trend in common law jurisdictions to permit testimony as to the person's reputation where he works, as well as where he lives. The Federal Rule, on which this Rule is modeled, does not indicate the scope of reputation evidence. This rule fills a gap left in the Federal Rule by clearly stating that reputation evidence is not confined to the community in which the defendant lives; reputation where the defendant works, goes to school or in a group with whom the defendant habitually associates will suffice. *See* Uniform Rule 63(28) (1953); McCormick, Evidence § 191, at 456; 112 A.L.R. 1020 (1938).

While not explicitly required by the rule, reputation evidence to be relevant must relate to the period in which the acts giving rise to the litigation took place. The evidence must relate to a relevant trait of character under Rule 404.

Besides expanding the scope of permissible reputation evidence, this rule departs from the majority common law view in permitting opinion evidence to be admitted. It is consistent, however, with recent Alaska cases. *See, e.g., Freeman v. State* 486 P.2d 967 (Alaska 1971). This was considered such a controversial issue that the House Committee on the Judiciary deleted the provision allowing for opinion evidence in its proposed draft of rules. During the House debate, the provision was reinstated. The case for opinion testimony is made by Wigmore:

> Put any one of us on trial for a false charge, and ask him whether he would not rather invoke in his vindication, as Lord Kenyon said, "The warm affectionate testimony" of those few whose long intimacy and trust has made them ready to demonstrate their faith to the jury, than any amount of colorful assertions about reputation. Take the place of a juryman, and speculate whether he is helped more by the witnesses whose personal intimacy gives to their belief a first and highest value, or by those who merely repeat a form of words in which the term "reputation" occurs.

7 Wigmore, Evidence § 1936, at 166.

In opening the door to this evidence, Rule 405 places both familiar and new responsibilities on the trial judge.

> He will have to exercise firm control over the proceedings to ensure that the witness does not relate the particular incidents on which he bases his opinion of defendant—for proof of character by specific acts is still prohibited. And as with all testimony, he will have to weigh its probative value against the countervailing factors to admissibility specified in Rule 403.

2 Weinstein's Evidence, ¶ 405[03] (1975). In exercising the sound discretion required by Rule 403, the trial judge should be able to handle the new types of opinion testimony that may be offered when Rule 405 is considered in conjunction with other Rules that expand categories of admissible evidence. *See, People v. Jones*, 266 P.2d 38 (Cal. 1954); *cf., United States v. Hiss*, 88 F. Supp. 559 (S.D.N.Y. 1950). *See generally* Curran, Expert Psychiatric Evidence of Personality Traits, 103 U. Pa. L. Rev. 999 (1955); Falknor & Steffen, Evidence of Character: From the "Crucible of the Community" to the "Couch of the Psychiatrist," 102 U. Pa. L. Rev. 980 (1954). Alaska has had experience with novel types of opinion. *See Freeman v. State, supra.*

As discussed in the next paragraph, specific acts cannot be used to prove character unless a character trait is in issue. But specific acts can be used to prove the knowledge of a character witness on cross-examination. According to the great majority of cases, on cross-examination inquiry is allowable as to whether the reputation witness has heard of particular instances of conduct relevant to the trait in question if the crossexaminer has a good faith belief that the conduct actually took place. *Michelson v. United States*, 335 U.S. 469, 93 L.Ed. 168 (1948); Annot., 47 A.L.R.2d 1258 (1956). The theory is that, since the reputation witness relates what he has heard, the inquiry tends to shed light on the accuracy of his hearing and reporting. Accordingly, the opinion witness would be asked whether he knew, as well as whether he had heard. The fact is, of course, that these distinctions are of slight if any practical significance, and the second sentence of subdivision (a) eliminates them as a factor in formulating questions. This recognition of the propriety of inquiring into specific instances of conduct does not circumscribe inquiry otherwise into the bases of opinion and reputation testimony.

(b) **Specific Instances of Conduct.** 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 poses 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. McCormick (2d ed.) § 187.

Probably the most familiar example of character being in issue is the libel case where someone publishes a charge that the plaintiff is a thief, plaintiff sues the publisher, and a defense of truth is raised. The publisher is entitled to show the specific acts that prove the charge. Another familiar example is a case in which an employer is charged with negligently hiring or retaining an incompetent employee. On the question of the competence of the employee, both sides are entitled (and may have to in order to satisfy burden of proof requirements) to offer evidence of specific acts of the employee demonstrating competence or incompetence.

Rule 406. Habit—Routine Practice.

This rule is identical to Federal Rule 406 which confirms the trend toward admissibility of habit and routine practice as persuasive proof of conduct on a particular occasion. The difficulty arises in distinguishing habit evidence from character evidence which is viewed as a less reliable and potentially more dangerous means of establishing the likelihood of specific conduct on a particular occasion. In part the difficulty stems from the inability to precisely define "habit." It is clear that the more regular the performance of an act, the more likely it is to be regarded a habit. An oft-quoted paragraph, McCormick (2d ed.) § 195, at 462, describes habit in terms effectively contrasting it with character.

> Character and habit are close akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. "Habit," in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semiautomatic.

In determining whether evidence shall be admissible, the court may look to Rule 104 and make a preliminary determination that it is a habit or a routine business practice that is being described. When an activity fails to achieve the status of a habit, evidence as to its practice must be excluded. Certain practices are not readily defined as "habits." For example, in *Levin v. United States*, 338 F.2d 265 (D.C. Cir. 1964), testimony as to the religious "habits" of the accused, offered as tending to prove that he was at home observing the Sabbath rather than out obtaining money through larceny by trick, was held properly excluded:

> It seems apparent to us that an individual's religious practices would not be the type of activities which would lend themselves to the characterization of "invariable regularity." [1 Wigmore 520.] Certainly the very volitional basis of the activity raises serious questions as to its invariable nature, and hence its probative value.

Id. at 272.

Evidence of a routine practice of an organization may be as relevant as a person's habit in proving that an act was performed in a certain way or that an event took place. The circumstantial nature of the proof requires that the routine specifically describe a particular organization's manner of daily operation or the probative value is greatly diminished. Since an organization must often rely upon consistent performance in order to make a profit or otherwise succeed, evidence of routine practices may be more probative in many cases than habit evidence. And the nature of this evidence is such that it is not likely to be very prejudicial. This rule does not refer to the practice of a given trade or industry, except insofar as it parallels a specific company's routines.

This rule specifically states that corroboration of a habit is unnecessary as a condition precedent to its admissibility. New Jersey adopted a similar policy in its Rule 49, rejecting its previous requirement that a necessary condition for the introduction of habit evidence was the introduction of other evidence that the habit was followed in the particular occasion in question. The New Jersey Commission stated that habit or custom alone is evidential as to conduct on a particular occasion and that corroboration goes only to weight.

> To require corroborative evidence that on that date the behavior did conform to the proven habit would be to defeat the purpose of the rule and put an unnecessary hurdle in the path of the attorney with circumstantial proofs only.

Report of the Committee on the Revision of the Law of Evidence to the Supreme Court of New Jersey 101 (1955).

This rule specifically rejects the common law "eyewitness rule." Followed in a great number of jurisdictions, the eyewitness rule only permits evidence of a habit to be admissible where no eyewitnesses are available to testify about the events in question. There are reasons to be wary of habit evidence: individuals may consciously take advantage of a known habit as an alibi, well-established habits do not always govern behavior, and habits sometimes may be easy to fabricate but difficult to refute. These problems are not insoluble. By requiring repetitive acts, this rule should make fabrication more difficult and should enable the cross-examiner to fully explore the specifics of the habit claim. Moreover, habit evidence is not unique in its imperfections. The eyewitness rule does not take into account the fact that evidence of an established habit may be more reliable than the testimony of an eyewitness. The Law Revision Commission's Comment to California's Rule § 1105, 29b West Ann. Cal. Evid. Code 19 (1966), which also rejects the eyewitness rule states:

> The "no eyewitness" limitation is undesirable. Eyewitnesses frequently are mistaken, some are dishonest. The trier of fact should be entitled to weigh the habit evidence against the eyewitness testimony as well as all of the evidence in the case.

This provision, like its federal counterpart, is silent as to the means of proof that a habit or routine practice existed. The 1969 and 1971 drafts of the proposed federal rules contained a provision which specified that habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine. Congress deleted the section in favor of allowing courts to develop and consider various methods of proof. This rule anticipates that any relevant manner of proof may be employed, subject to Rule 403's requirements that the proof be more probative than prejudicial, confusing, or misleading and that the probative value justify the time needed to hear the evidence.

Rule 407. Subsequent Remedial Measures.

This rule is modeled on Federal Rule 407, which incorporates conventional doctrine excluding evidence of

subsequent remedial measures as proof of an admission of fault.

The rule rests on three grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects the notion that "because the world gets wiser as it gets older, therefore it was foolish before." *Hart v. Lancashire & Yorkshire Ry. Co.*, 21 L.T.R. N.S. 261, 263 (1869). Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one. (2) The second ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. This assumes, however, that many repairs would not be made but for the exclusionary rule, a proposition subject to serious empirical challenge. (3) The third and perhaps most important reason for the Rule is that people who err on the side of caution and take measures to protect fellow citizens from even the possibility of injury should not bear the risk that the jury, unlike Baron Bramwell, will read more into a repair than is warranted.

The courts have applied this principle to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees, and the language of the present rule is broad enough to encompass all of them. See Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L. Rev. 574, 590 (1956).

The second sentence of the rule directs attention to the limitations of the rule.

Rule 407 explicitly bars the use of subsequent remedial measures to prove negligence. It also inhibits the use of the evidence to prove "culpable conduct," which may include fault other than negligence, e.g., recklessness (wantonness, willfulness). There is often no clear distinction between recklessness and gross negligence (see Prosser, Torts § 34 (4th ed. 1971)); consequently the policy arguments mentioned above apply equally to both.

In effect Rule 407 rejects the suggested inference that fault is admitted. Other inferences are, however, allowable, including defective condition in a products liability action, ownership or control, existence of duty, and feasibility of precautionary measures, if controverted, and impeachment. 2 Wigmore § 283; Annot., 64 A.L.R.2d 1296. A recent Alaska case is illustrative. In *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975), actions were brought against the State to recover for deaths of the driver of and passenger in a front-end loader which slipped off an icy highway and overturned. In reviewing the finding of negligence on the part of the State, the Supreme Court of Alaska noted that shortly after the accident, the road in question was sanded. Citing Federal Rule 407, the Court emphasized that the evidence was not used to show negligence directly, but to show feasibility of repair. Admission for this purpose was deemed proper.

There are few cases and few scholarly discussions of the applicability of this exclusionary principle in products liability cases. Unlike most rules that have been promulgated, this Rule explicitly excepts from the reach of the exclusionary rule the use of subsequent remedial measures to show a defect in a product. The reasons mentioned above for the general rule do not apply in a products liability case because,

> [T]he focus of attention in strict liability cases is not on the conduct of the defendant, but rather on the existence of the defective product which causes injuries. Liability is attached, as a matter of policy, on the basis of the existence of a defect rather than on the basis of the defendant's negligent conduct . . . .

Bachner v. Pearson, 479 P.2d 319, 329 (Alaska 1970).

Evidence of subsequent repairs or improvements may be highly probative as to the existence of a defect in a product at the time of an accident. In common law jurisdiction such evidence has been regarded as relevant to the issue of defectiveness in negligence-based cases and admissible, e.g., *Steele v. Wiedemann Mach. Co.*, 280 F.2d 380 (3d Cir. 1960).

Moreover, the rationale of not discouraging repairs or improvement does not justify excluding this evidence in the products liability case. The California Supreme Court appropriately observed in *Ault v. International Harvester Co.*, 528 P.2d 1148, 1152 (Cal. 1975), a decision rejecting this exclusionary rule in products liability cases, that

> [t]he contemporary corporate mass producer of goods, the normal products liability defendant, manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will forego making improvement in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement. In the products liability area, the exclusionary rule of section 1151 [California equivalent of Rule 407] does not affect the primary conduct of this mass producer of goods, but serves merely as a shield against potential liability.

Since the manufacturer of a product makes more of a business judgment than a humanitarian gesture in making repairs, the third rationale for the rule is not applicable either.

Of course, when evidence is admitted for any of these "other purposes," the court should instruct the jury to consider it only for the limited purpose for which it is offered, not on the issue of negligence or culpable conduct. It is important to note that the requirement that the other purpose be controverted calls for automatic exclusion unless a genuine issue is present and allows the opposing party to lay the groundwork for exclusion by making an admission. If, for example, control is not controverted, there is no reason to admit subsequent remedial measures to prove control, and there is a good reason to exclude it: evidence of subsequent remedial measures might be used by the jury as an admission of fault regardless of the limiting instruction given by the court.

It is also important to keep in mind that even if the issue is a valid one, the factors of undue prejudice, confusion of issues, misleading the jury, and waste of time remain for consideration under Rule 403.

For comparable rules, see Uniform Rule 51; California Evidence Code § 1151; Kansas Code of Civil Procedure

§ 60-451; Nebraska Rule 27-407; Nevada Rule 48.095; New Jersey Evidence Rule 51; and New Mexico Rule 20-4-407.

Rule 408. Compromise and Offers to Compromise.

This rule, like the common law doctrine, operates to exclude evidence of an offer to compromise a claim when offered to prove the validity, invalidity or amount of the claim. Under the prevailing common law view, statements of fact made independently of the compromise offer—i.e., statement not inextricably bound up in the offer to compromise—can be admitted for any relevant purpose. But this exception can be artfully dodged by the attorney who specifies that all factual statements are hypothetical, or who states in advance that the discussion is "without prejudice." *See* Annot., 15 A.L.R. 3d 13 (1967). *See also* Alaska R. Civ. P. 43(i) (2) (superseded by this rule).

This rule expands the scope of protection afforded compromise negotiations by eliminating the common law exception and making statements of fact and conduct which are made or which occur during settlement negotiations inadmissible whenever an offer to compromise would be excluded. See California Evidence Code §§ 1152, 1154 for similar provisions. In addition to eliminating the need to talk continually in hypothetical terms, this change promotes the major policy behind the rule—to encourage settlement of disputes. It also avoids preliminary factfinding as to what was said during negotiating sessions, i.e., whether statements were made in hypothetical or "without prejudice" form.

The Advisory Committee's comment to the Federal Rule after which this rule is modeled cites two rationales for a rule of exclusion. (1) The evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position. The validity of this position will vary as the amount of the offer varies in relation to the size of the claim and may also be influenced by other circumstances. (2) A more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes. McCormick § 274, at 663. While the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to a completed compromise when offered against a party thereto. This latter situation will not, of course, ordinarily occur except when a party to the present litigation was compromised with a third person.

Unless the amount of the claim or the claim itself is in dispute, the policy of encouraging freedom of communication with respect to compromise is not advanced. Hence the rule does not apply when the effort is to induce a creditor to settle an admittedly due amount for a lesser sum. McCormick (2d ed.) § 274, at 663. See also Uniform Rules 52 and 53 for similar provisions. An offer to pay the full amount in dispute is admissible as an unconditional acknowledgment of liability because it is not conditioned on a compromise. *See Saxton v. Harris*, 395 P.2d 71 (Alaska 1964).

This Rule governs whether or not any compromise that is reached is carried out. Some common law jurisdictions admit completed settlements as evidence if they are not successful in terminating litigation. Nothing in this rule prevents the use as evidence of settlement agreements in subsequent contract actions, however.

This rule differs from the federal rule by explicitly providing that statements made during negotiations must not be used for impeachment as prior inconsistent statements of a party. This further protection is required in order to encourage free and open negotiations and to foster settlements. It may be necessary to "concede" issues to an opponent to advance negotiations which are not issues that one would readily concede for purposes of proving liability. If impeachment is allowed, the common law requirement of communicating in hypothetical terms would, for all practical purposes, be reinstated. Unless the parties to the negotiation are insured that they will not prejudice the merits of their respective cases, communications will be guarded. As recognized in Rule 410, admissibility of guilty pleas later withdrawn or offers to plead guilty for purposes of impeachment would effectively stifle the open communication needed to promote compromise. The same is true in civil cases.

Where statements made in compromise negotiations are not used to advance litigation relating to the validity, invalidity or amount of the underlying claim admission is proper. Collateral uses such as those mentioned in the final sentence of the rule are supported by existing authorities. *E.g.*, proving bias or prejudice of a witness, see Annot., 161 A.L.R. 395 (1946); negativing a contention of lack of due diligence in presenting a claim, 4 Wigmore § 1061. *See also* Alaska R. Civ. P. 68 in which evidence of an unaccepted offer of judgment is admissible on the collateral issue of determining costs. An effort to "buy off" the prosecution or a prosecuting witness in a criminal case is not within the policy of the rule of exclusion.

This rule further provides that evidence which would otherwise be discoverable is not rendered inadmissible merely because it was presented during negotiations. A party should not be able to immunize documents by once revealing them; no policy is advanced by such protection. Where statements made during negotiations lead to the discovery of relevant evidence it shall not be rendered inadmissible merely because the information obtained could not have been introduced into evidence in the form of statements made during negotiations.

Rule 409. Payment of Medical and Other Expenses.

The considerations underlying this rule parallel those underlying Rules 407 and 408, which deal respectively with subsequent remedial measures and offers of compromise. As stated in Annot., 20 A.L.R.2d 291, 293 (1951):

> [G]enerally, evidence of payment of medical, hospital, or similar expenses of an injured party by the opposing party, is not admissible, the reason often given being that such payment or offer is usually made from humane impulses and not from an admission of liability, and that to hold otherwise would tend to discourage assistance to the injured person.

Contrary to Rule 408, dealing with offers of compromise, the present rule does not extend to conduct or statements not a part of the act of furnishing or offering or promising to pay. This difference in treatment arises from fundamental differences in nature. Communication is essential if compromises are to be effected, and consequently broad protection of statements is

needed. This is not so in cases of payments or offers or promises to pay medical expenses, where factual statements may be expected to be incidental in nature and where protecting such statements would not encourage the approved behavior. A party can offer to pay medical expenses without making statements as to liability.

This rule, unlike Rule 408, does not require that liability or amount be in dispute. Prompt payment of medical and other expenses is encouraged and the humanitarian nature of the payment or offer is highlighted.

If liability or amount is in dispute, an offer to pay medical expenses may be part of a compromise negotiation. Once the offer becomes part of the negotiating process, any statements or conduct made in compromise negotiations will be protected under Rule 408.

Evidence of an offer to pay or of a completed payment of medical expenses may be admissible for purposes other than proving liability or amount. In this respect the rule is like Rule 408. When the issue upon which the evidence is offered is collateral to the merits of the case, admission may be proper. For example, if A is involved in an accident with B and C, and A pays B's medical expenses, C may want to introduce this evidence to show the possible bias of B as a witness.

Rule 410. Inadmissibility of Plea Discussions in Other Proceedings.

Rule 410 is modeled on former rule 11(e) (6) of the Alaska Rules of Criminal Procedure, which is superseded by this rule. It differs in substantial respects from its federal counterpart. The basic goals of the rule are two: (1) to foster free and open negotiations between prosecutors and those accused of crimes, and (2) to ensure fair treatment for defendants whose guilty pleas are set aside by a trial or an appellate court.

To foster negotiations the rule provides that nothing that is said during plea bargaining may be used against the accused in any proceeding, whether criminal, civil or administrative. Thus, the accused is free to discuss the case without resort to hypothetical statements of fact and without fear that a slip of the tongue may be devastating at a later trial or other proceeding.

To ensure fair treatment for defendants whose pleas are entered and later withdrawn or overturned, this rule provides that the slate should be wiped clean and that no part of the plea process can be used for impeachment or any purpose against the defendant in subsequent proceedings (unless made in court, and they are voluntary and reliable) or in a perjury prosecution. This is in sharp contrast to Federal Rule 410. As amended in December, 1975 by the Congress, the Federal Rule provides that a statement made in connection with a plea "is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel." Alaska Rule 410 offers defendants greater protection: when a plea is withdrawn or otherwise set aside, no use shall be made on the merits of a subsequent case of any statement made in connection with a plea, even though that statement may have been made in court, under oath and with the advice of counsel. However, limited impeachment use is recognized.

Note, however, that this rule does not prohibit admission of statements made by the defendant during the plea process at a hearing on defendant's motion to withdraw a plea. In this situation the statements are subject only to the requirement of relevance.

It is important to observe that leave to withdraw a guilty or nolo contendere plea, once accepted, is not a matter of right; the burden is on the defendant to convince the court that withdrawal of a plea should be permitted in the court's discretion upon grounds set forth in Alaska R. Crim. P. 32(d). The most common ground for withdrawal is that the plea was involuntarily made. Clearly, when the plea was involuntarily made, statements made in connection with it are likely to be unreliable as well; due process would probably require the suppression of both plea and statements.

This rule admits statements found to be both voluntary and reliable that are made in court. Such statements should be very useful for impeachment purposes and are worthy of consideration by a trier of fact considering the credibility of a witness.

In deciding whether or not a statement made in connection with a plea in court is voluntary, the court will consider many of the same questions that arise with respect to confessions. In determining whether the plea statements are reliable, the court must keep in mind that the traditional colloquy between court and defendant is not without its problems, since the defendant is attempting to preserve a bargain in many instances. Hence, even though the defendant may be under oath and uncoerced in any constitutional sense, he is under great pressure to conform his answers to the plea agreed to, in order to satisfy the judge that "there is a reasonable basis for the plea" under Alaska R. Crim. P. 11(f). Such statements by the defendant are neither clarified by defense counsel nor qualified by the defendant.

At first blush it may appear that this rule is inconsistent with Rule 408 with respect to the use of statements made during bargaining for impeachment purposes. But the inconsistency is more apparent than real. In both rules, statements made during private bargaining sessions are not admissible for impeachment purposes. This rule reflects the fact that statements made in court can be especially reliable, especially with the safeguards provided herein. No such in-court procedure exists in most civil cases. In both civil and criminal cases parties should be able to negotiate freely without fear that a slip of the tongue will be unfairly damaging should no bargain be made. But Rule 410 adopts the view that once the informal bargaining is over and the solemn procedure of pleading in court begins, it is both fair and wise to hold a criminal defendant responsible for statements made to the court when the defendant takes a different position later and the plea statements are used for impeachment.

To provide balance, statements made by the prosecutor during the bargaining process are not admissible against the government in any proceeding, except that the defendant may use the prosecutor's statements as evidence in a hearing to enforce a plea agreement *see generally Santobello v. New York*, 404 U.S. 257, 30 L.Ed. 2d 427 (1971) or to set aside a plea or judgment. In most common law jurisdictions this rule might not be necessary, because statements by an agent of a party would not be admissible against the party unless the agent

were specifically authorized to make such statements; the prosecutor may not be so authorized. But under Rule 801 (d) (2) (D) the admissibility of agents' statements is expanded. Rule 410 makes it clear that the prosecutor is as free to negotiate without watching for every slip of the tongue as the defendant is. Nothing in this section prohibits the introduction of statements made by a prosecutor during plea bargaining in a disciplinary action against the prosecutor, or even in a criminal action against the prosecutor. The prosecutor who abuses the public trust is not protected by this Rule.

Statements made by defense counsel on behalf of an accused can be used against counsel in a subsequent civil case or disbarment proceeding, since the rule is not designed to protect from disclosure malpractice or ethical violations.

Nothing in this rule makes *nolo contendere* pleas admissible as admissions. But Rule 609 does make certain *nolo contendere* pleas admissible for impeachment purposes.

Rule 411. Liability Insurance.

The courts have with substantial unanimity rejected evidence of liability insurance for the purpose of proving fault, and absence of liability insurance as proof of lack of fault. *See* Annot., 4 A.L.R.2d 761 (1949). Because the inference of fault from the fact of insurance coverage is a tenuous one, as is its converse, evidence of insurance coverage or of the absence of such coverage lacks great probative value on the issue of fault. More importantly, perhaps, the rule is designed to prevent a jury from deciding a close case on an improper basis—i.e., whether or not a party is insured. There is a danger that insurance evidence might skew the decision-making process of the jury by making it regret a possibly wrong decision against an uninsured person much more than a similar decision under identical facts against a person whose insurance status is unknown, or by making the jury regret any erroneous decision against an insured party less than it would an erroneous decision against a person whose insurance status is unknown. This is not to suggest that a jury will intentionally make a mistake. It suggests only that in close cases someone must bear the risk of error, that the presence or absence of insurance is not regarded as an appropriate guide for allocating the risk, and that it is possible that a jury will misuse insurance evidence. This rule, identical to the federal rule, is drafted in broad terms so as to include contributory negligence or other fault of a plaintiff as well as fault of a defendant.

The second sentence of this rule describes the limitations on it. Whereas evidence of insurance coverage is inadmissible to prove negligence, there are several well established issues for which evidence of insurance coverage, or the lack of it, has probative value and is therefore admissible. Evidence of insurance of an object often indicates the person who controls or owns the object in question. Or, if A has insured B, there is some reason to draw the inference that A considers himself responsible for B's acts. While it is inconclusive proof of an agency relationship, the existence of such insurance has evidentiary value in helping to establish such a relationship.

Bias or prejudice of a witness or juror is a common concern when a witness or juror is connected with an insurance company. Such information often has been elicited during voir dire when a prospective juror is asked whether or not he has any connection with the insurance business. Although this is often a legitimate question, it may serve to remind the jury that a party may be insured. Similarly, questions as to a witness' affiliation with insurance interests may be legitimate impeachment tools, despite the danger of misuse of the insurance evidence.

But, the fact that evidence of insurance is sometimes admissible does not mean that it must be admitted whenever offered for a proper purpose. The danger of misuse of the evidence by the jury does not totally disappear when the evidence is introduced for a reason other than to prove fault or absence thereof, even though a limiting instruction will be given upon request under Rule 105. Rule 403 requires the trial judge to balance the probative value of the evidence on one issue against the potential danger that the jury will favor uninsured defendants and disfavor insured defendants.

Trial lawyers are on notice that insurance is admissible for some purposes and not others. Alaska R. Civ. P. 26(b) (2) allows discovery of insurance agreements, and the parties should be able to obtain a judicial decision on whether insurance evidence is to be admitted or otherwise utilized and for what purposes before such evidence is brought to the attention of the jury. *Poulin v. Zartman*, 542 P.2d 251, 265 (Alaska 1975).

If this rule is to have maximum effectiveness, it must be enforced by the trial judge. Inadvertent or deliberate tactical references to insurance should be cured immediately, if possible, with instructions to the jury to disregard the information. The trial judge is vested with wide discretion to grant a new trial where such slips are not easily cured. *See Peters v. Benson*, 425 P.2d 149, 152-153 (Alaska 1967).

Rule 412. Evidence Illegally Obtained.

Although illegally obtained evidence may be highly probative, this rule recognizes that such evidence must generally be excluded in order to breathe life into constitutional guarantees and to remove incentives for governmental intrusion into protected areas. While these rules of evidence generally do not incorporate constitutional doctrine, Rule 412 will go beyond what federal constitutional decisions require in protecting the rights of those accused of crime. Thus, for example, in *Harris v. New York*, 401 U.S. 222, 28 L.Ed.2d 1 (1971), the United States Supreme Court approved the use of statements obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 695 (1966), for impeachment purposes but not as part of the prosecutor's case-in-chief. *Walder v. United States*, 347 U.S. 62, 98 L.Ed. 503 (1954), sanctioned the introduction of testimony on illegally seized heroin to rebut the defendant's denial of prior drug possession. Rule 412 would forbid such uses as long as proper objection is made by the defendant. This last proviso is a change from Criminal Rule 26 (g).

This ban on the use of both testimonial and physical evidence for impeachment purposes should not amount to a significant incentive for defendants to commit perjury. The prosecution will still be able to cross-examine the defendant on his claims, if it believes in good faith that the defendant's testimony is false. And, as discussed below, some otherwise inadmissible evidence will still be permitted in perjury

prosecutions.

Rule 412 also does not bar the use as impeachment evidence of statements made by a defendant who testifies on a preliminary question of fact as permitted by Rule 104(d). If the preliminary question of fact involves a constitutional question, the argument could be made that a ruling favorable to the defendant renders any statements made during the preliminary hearing "fruit of the poisonous tree" and therefore inadmissible. *Cf. Harrison v. United States*, 392 U.S. 219 (1968) (use of evidence in case-in-chief). *But see People v. Sturgis*, 317 N.E.2d 545 (Ill. 1974), *cert. denied*, 420 U.S. 936, 43 L.Ed.2d 412 (1975). *See also United States v. Kahan*, 415 U.S. 239, 39 L.Ed.2d 297 (1974); *United States v. Mandujano*, 425 U.S. 564, 584, 48 L.Ed.2d 212, 277 (1976) (Brennan, J., concurring in the judgment). Where the defendant is successful in suppressing evidence the underlying constitutional right is protected. It seems an extravagant extension of constitutional protection to permit one version of facts from the defendant's mouth to keep evidence from a tribunal and to permit the defendant to offer another version at trial. If the motion to suppress is unsuccessful, there is even less reason to refrain from using the defendant's statements in support of the motion as impeachment evidence. The decision to take the oath and testify is attenuation enough to remove the taint of the initial illegality. The record of the statements, the advice of counsel, and the oath together remove many of the problems associated with *Harris v. New York, supra.*

In perjury prosecutions, the government's interest in convicting guilty defendants and the extreme difficulty of obtaining reliable evidence warrant controlled use of illegally obtained evidence. Hence Rule 412 contains two narrow exceptions to the blanket prohibition on the use of illegally obtained evidence properly objected to.

The first exception governs statements obtained in violation of the right to warnings under *Miranda*, if the statement whose admission is sought is relevant to the issue of guilt or innocence and shown to be otherwise voluntary and not coerced. The latter limitation, meant to guarantee the statement's reliability, is derived from *Harris v. New York, supra*, where the U.S. Supreme Court observed, "Petitioner makes no claim that the statements made to the police were coerced or involuntary." 401 U.S. at 224, 28 L.Ed.2d at 4.

The second exception governs evidence obtained in violation of the fourth amendment and/or its Alaska counterpart, article I, section 14. Again a limitation is imposed: the evidence must be relevant to the issue of guilt or innocence, and must not have been obtained "in substantial violation of rights." This limitation is not imposed to ensure reliability of the evidence, but rather recognizes that judicial integrity requires the exclusion of evidence for all purposes if the police misconduct involved in obtaining it was flagrant. The concept of a "substantial violation of rights" is necessarily flexible, and whether or not such a violation occurred will depend on the facts of each case. The simple reference to "rights" is intended to emphasize that this section has no bearing on the law of standing in search and seizure cases.

ARTICLE V. PRIVILEGES

Introductory Comment

Article V provides for eight different privileges and recognizes that other privileges may be created by statute or court rule. Because most of the privileges covered by Article V were recognized before the adoption of these Rules, the Reporter's Comments do not attempt to state the rationales for the various privileges and to justify them. Most of the privileges have been debated elsewhere, and the privileges have survived the debate. The Reporter's Comments accompanying the various rules do explain, however, why particular approaches to defining rules were taken and why others were rejected.

Two rules of privilege which are found in several jurisdictions are omitted from these rules. One is the privilege for official information; the other is the privilege previously provided by Rule 43 (h) (7), Alaska R. Civ. P., covering evidence tending to degrade the character of a witness. This Comment explains the omissions.

The Wigmore treatise, 8 Wigmore on Evidence § 2378, at 807-08, (J. McNaughton rev. 1961), states that the best collection of arguments in favor of an official information privilege is as follows (quoting Gellhorn & Byse, Administrative Law Cases and Comments 617-18 (4th ed. 1960):

> [The discussion relates to the SEC and summarizes that agency's brief in a federal case]. The documents and testimony relating to intra-agency discussions, communications, memoranda, reports, recommendations, positions taken at staff and Commission level with respect to the investigation and possible injunctive or criminal action are protected for the following reasons: (a) Section 6(b) of the Administrative Procedure Act authorizes restrictions upon the delivery of data such as that involved here even to the person who furnished it, and, as stated in the Attorney General's manual on the Administrative Procedure Act in connection with section 3(c) of the Act, "intra-agency memoranda and reports prepared by agency employees for use within the agency are not official records since they merely reflect the research and analysis preliminary to official agency action." (b) The action or non-action of the SEC and other federal agencies with respect to an investigative matter is not subject to direct court review. A fortiori, it cannot be reviewed in a purely private action to which the Commission is not a party through subpoenas and other demands designed to "flush out" the internal deliberations of the Commission concerning an investigative matter. (c) The investigative functions of the Commission are like those of a grand jury and similarly immune from public scrutiny. (d) The "work product" doctrine of Hickman v. Taylor, 329 U.S. 495 (1947), makes these matters immune from compulsory disclosure. (e) The decisional process of the Commission is immune from judicial probing…(f) Much of the information sought is covered by the attorney client privilege. (g) Compulsory disclosure of the information sought would do violence to the philosophy underlying the tripartite nature of our government. The executive branch traditionally has declined to hand over confidential files to other branches when it has been considered contrary to the public interest to do so. (h) Investigative files often contain hearsay, gossip, and other remote information from which the government hopes to develop leads. Public disclosure of such trivia and possible

falsehoods might work grave injury and injustice to those involved.

Assuming that similar arguments would be made by state officials and by most government officers and agencies in favor of a privilege, the fact is that these arguments are not convincing. The first argument is that intra-agency memoranda and reports are not official records. This begs the question. Such reports and memoranda may not be legally binding on third persons, but they may be admissible, if relevant, against the agency in litigation. The important thing is that they will rarely be relevant and thus will not often be disclosed under governing discovery rules. The second argument is that since courts cannot control non-action, the court cannot review non-public aspects of agency work. But if non-public aspects of agency work are relevant to a lawsuit, the court is not reviewing the action of the agency under an Administrative Procedure Act; it is deciding a lawsuit which is something that lies within the powers granted the state judiciary under the Alaska Constitution. The third argument is that investigative functions of agencies are like those of a grand jury and are therefore immune from scrutiny. Once again the question is begged and the analogy inappropriate since grand jury proceedings are disclosed under some circumstances. The work product argument fails because the "work product" doctrine can exist in the absence of an absolute privilege. Another argument, that the decisional process of an agency is immune from judicial probing, states a conclusion, not an argument. The opposite conclusion is available also. That much of the information is covered by the attorney-client privilege suggests that another privilege may not be necessary. The next to the last argument is that a government based on separation of powers requires that the judiciary stay its hand when asked to intervene into the internal affairs of an agency. But checks and balances are as real as separation of powers. In fact, the ultimate judicial check of review over agency matters suggests that the agency is not beyond the reach of the courts. Finally, the notion that public disclosure of trivia and possible falsehoods might work grave injury and injustice to members of the community assumes that courts are without power to protect against oppressive disclosure, something which is not true.

It is difficult to see why a government agency should be given a greater privilege than a corporation is given to protect its secrets. Yet, the Model Code of Evidence rule 228 and Uniform Rule 34 (1953) recognized a privilege for official information. Proposed Federal Rule 509 also recognized such a privilege, as do Rule 508, Maine Rules of Evidence (West 1978); Nebraska Rule 509; N.J. Stat. Ann. 2A: 84A-34 (West 1976); Rule 34, Utah Rules of Evidence (1977); and V.I. Code Ann. tit. 5, § 862 (1967) (Virgin Islands). In refusing to recognize an official information privilege, Alaska rules take the view that in the rare case when internal government documents would be relevant to litigation, they should be disclosed. Protective orders under the discovery rules are available to mitigate any unfortunate consequences that might flow from this position. Also, the legislature remains free to enact statutes to protect certain information that may be especially sensitive.

Nothing in these Rules speaks to the various constitutional issues that may arise when a privilege is claimed. For example, these rules do not attempt to decide whether the doctrine of separation of powers implies a constitutionally based executive privilege. *See generally United States v. Nixon,* 418 U.S. 683, 41 L. Ed. 2d 1039 (1974). Nor do these rules discuss constitutionally based claims of legislative privilege. *See generally Gravel v. United States,* 408 U.S. 606, 33 L. Ed. 2d 583 (1972).

The other privilege that is omitted by these rules is the one that would allow a witness to refuse to disclose in any action "any matter that will have a direct tendency to degrade his character" unless the exercise of the privilege would prevent a party from obtaining information relating to a fact in issue or to a fact from which the fact in issue would be presumed. Since Rule 404 is designed to protect against certain embarrassing disclosures, and Rule 608 bars any inquiry into prior bad acts not the subject of a criminal conviction used for impeachment purposes, no privilege is necessary under these Rules. Were it not for these two rules, it might be necessary to add some sort of a privilege to make it clear that the court is to balance the impact of questioning on a witness against the need of a party for evidence, as well as to balance the prejudicial effect of certain evidence on one party against the beneficial effect on another party. While there may be embarrassing details not covered by Rules 404 and 608, they do not seem to present a sufficient danger to warrant the creation of a privilege.

Rule 501 speaks of statutory privileges. Whether any particular privilege is more substantive or procedural need not be decided. The purposes served by most privileges are such that they can be equally well served by the creation of substantive rights by the legislature or procedural rights by the courts. There may be cases in which a determination of their character—*i.e.,* procedural or substantive—will have to be made in order to decide whether article IV, section 15 of the Alaska Constitution has been satisfied (requiring a two-thirds vote of the legislature to supersede rules of practice and procedure promulgated by the Supreme Court). But such cases may never arise and it would be premature to comment upon them in advance.

Rule 501. Privileges Recognized Only As Provided.

This rule codifies the existing law that privileges are not recognized in the absence of statutes or rules specifically providing for them. No attempt is made in these rules to incorporate the constitutional provisions which relate to the admission and exclusion of evidence, whether denominated as privileges or not. Similarly, privileges created by specific statutes generally are not within the scope of these rules. *E.g.,* AS 09.25.150-220 (public officials, reporters); AS 24.55.260 (ombudsman).

Although Federal Rule 501 adopts state created privileges whenever state law governs with respect to any element of a claim of defense, this Rule does not adopt the converse; i.e., except in unusual cases, federal privileges will not govern in Alaska courts even though federal law provides the rule of decision with respect to any element of a claim or defense. Some commentators have suggested that the approach taken by this rule is so plainly correct that explanation is unnecessary. *See, e.g., Hart, The Relations Between State and Federal Law,* 54 Colum. L. Rev. 489, 508 (1954) ("The general rule…is that

federal law takes the state courts as it finds them…[S]tate rules…may ordinarily be applied also to federal claims and defense…"; Ladd, *Privileges,* 1969 Law & Social Order 555, 560 ("If the action arose in a state court upon a matter involving a federal question, it would appear impossible to prevent the state court from using state privileges…\m). But, in view of *Dice v. Akron, Canton & Youngstown R.R.,* 342 U.S. 359, 96 L. Ed. 398 (1952), and *Brown v. Western Ry.,* 338 U.S. 294, 94 L. Ed. 100 (1949), a few words are in order.

In the vast majority of federal cases, state law issues are not so intertwined with federal questions that deference to state policies that both govern primary human conduct and possibly affect the outcome of litigation in important ways imposes much of an incremental burden on the judges who must determine state substantive law. Indeed, Congress has not only restricted the power of the Supreme Court to modify state created substantive rights, 28 U.S.C.A. § 2072 (West Cum. Supp. 1978), but has itself demonstrated respect for state law in Rule 501. On the other hand, federal law, especially federal constitutional questions, may arise throughout state litigation. To separate federal and state issues could be an enormous burden on state judges. Federal issues have been decided by state courts from the nation's beginning. There is no indication that the Congress is unhappy with the results. Since state law governs most conduct of most citizens, its rules of privilege are especially important to citizens seeking guidance as to what is and is not privileged. Hence, state privilege law will govern in all litigation in Alaska state courts, unless the supremacy clause of the United States Constitution requires otherwise.

This rule is drawn from proposed federal rule 501. However, it adds language to make clear that *persons* protected by privileges can include organization and government entities.

Despite these rules, claims of privilege at times may have to give way to constitutionally protected rights, especially in criminal cases. *See, e.g., Salazar v. State,* 559 P.2d 66 (Alaska 1976).

On the other hand, claims of privilege themselves may have roots in the Constitution. The attorney-client privilege is not unrelated to the right to counsel guaranteed all citizens in all but the most petty criminal cases. And the marital communications privilege reflects an ideal of privacy and special relationship that has received constitutional protection in other contexts. *See, e.g., Griswold v. Connecticut,* 381 U.S. 479, 14 L.Ed.2d 510 (1965). The communications to clergymen privilege and the political vote privilege are related to first amendment concepts. Recently, the Alaska Supreme Court has suggested that the doctor-patient privilege has constitutional overtones. *See, e.g., Falcon v. Alaska Public Offices Commission,* 570 P.2d 469 (Alaska 1977).

Rule 502. Required Reports Privileged by Statute.

This rule provides that any person, organization, or entity required by law to furnish certain information to the government has a privilege to refuse to disclose the information provided, if such a privilege is provided for by the governing statute. A claim of privilege can be invoked to prevent any person from disclosing the information, and a public officer or agency that receives information may refuse to disclose it if the governing legislation so provides. The rule extends to reports required by the federal government, the State of Alaska, and other states.

In light of Rule 501, Rule 502 is redundant in its reference to the State of Alaska. Rule 501 establishes that privileges can be created by these rules or by enactments of the Alaska legislature. It is therefore clear that even without Rule 502 any privilege provided for by statute would be recognized. *See, e.g.,* AS 28.35.120. Despite the redundancy, Rule 502 serves two purposes not served by Rule 501 in connection with Alaska law. First, it serves to remind the legislature that these rules will not generally provide a privilege in circumstances where the government is requiring a person, organization, or entity to supply information. If a privilege is to be forthcoming, it must be legislatively created. Second, it establishes that no privilege exists in actions for perjury, false statement, and the like.

When the federal government creates a privilege in a statute that requires the submission of reports or records to the government, that privilege must be recognized by the states under the supremacy clause of the United States Constitution. No such clause requires that one state defer to the judgment of another state as to the wisdom of compelling disclosure of certain information. For reasons of comity, however, Rule 502 recognizes the privileges for required reports created by sister states. "[A]n argument can be made that where a document is prepared on order of the state and on the promise of privilege, the privilege should be enforced because but for the promised privilege the document would not have been produced." Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence,* 69 Colum. L. Rev. 353, 371 n.80 (1969). The legislative purpose in requiring certain reports—to encourage full and complete disclosure of required information—requires mutual recognition of a required reports privilege among sister states. The last sentence of this rule, which has application to Alaska statutes, has no application to the laws of sister states or the federal government; it makes clear that the privilege is not a license for perjury, that, insofar as the State of Alaska has the power to punish for perjury and related actions, this rule will provide no protection.

It should be plain that the existence and scope of required records, laws and privileges are dependent upon legislative action. The legislature can eliminate any privilege that would exist under this rule.

Rule 503. Lawyer-Client Privilege.

(a) **Definitions.**

(1) The definition of "client" extends the status of client to one consulting a lawyer preliminarily with a view to retaining him, even though actual employment does not result. McCormick (2d ed.) § 88, at 179. The client need not be involved in litigation; the rendition of legal service or advice under any circumstances suffices. 8 Wigmore Evidence § 2294 on (J. McNaughton rev. 1961). The services must be professional legal services; purely business or personal matters do not qualify. McCormick (2d ed.) § 88, at 179-80. Under this subdivision, the term "organization" should be given a broad interpretation. Several words are omitted from the draft of proposed Federal Rule 503; this is only a matter of style.

(2) The proposed Federal Rules of Evidence as submitted to Congress by the United States Supreme Court did not contain a definition of "representative of the client." Because of uncertainty about the extent of the privilege to be granted to corporate clients, the Advisory Committee came out in favor of a case-by-case analysis. This approach is rejected here. "An ad hoc approach to privilege pursuant to a vague standard achieves the worst of possible worlds: harm in the particular case because information may be concealed; and a lack of compensating long-range benefit because persisting uncertainty about the availability of the privilege will discourage some communications." Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 Harv. L. Rev. 424, 426 (1970). No definition of "representative of the client" will be perfect, but the best approach to corporate privilege developed to date is the "control group" test as adopted in Alaska Rule 503(a) (2). *See City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962). The "control group" test is admittedly restrictive and has been criticized by some courts. *See, e.g., Harper & Row Publishers, Inc., v. Decker,* 423 F.2d 487, 491-92 (7th Cir. 1970), *aff'd by an equally divided court per curiam,* 400 U.S. 348, 27 L.Ed.2d 433 (1971). However, the restrictive view brings the corporate privilege more in line with the privilege available to unincorporated business concerns. Business organizations should not receive different treatment on evidence questions in courts of law merely because of differences in financial structure.

If, for example, A runs a taxi service as a sole proprietorship with several employees, and one employee driver is involved in an accident for which A is sued, the employee's statements to A's attorney are not within the attorney-client privilege, even though A may order his employee to talk with the lawyer. If A incorporates, the ruling should not change. It should be sufficient that A and other corporate officers having the capacity to seek legal advice and to act on it can claim the benefits of the privilege for private communications with counsel. A more permissive privilege would result in suppression of information conveyed to attorneys by employees who are more like witnesses than clients and who have no personal desire for confidentiality.

(3) A "lawyer" is a person licensed to practice law in any state or nation. There is no requirement that the licensing state or nation recognize the attorney-client privilege, thus avoiding excursions into conflict of laws questions. "Lawyer" also includes a person reasonably believed to be a lawyer. For similar provisions, *see*, Cal. Evid. Code § 950 (West 1966). Administrative practitioners are not lawyers under Rule 503 (a) (3), but may be included as "representatives of the lawyer" under Rule 503(b) (4).

(4) The definition of "representative of the lawyer" recognizes that the lawyer may, in rendering legal services, utilize the services of assistants in addition to those employed in the process of communicating. Thus the definition includes an expert employed to assist in rendering legal advice. It also includes an expert employed to assist in the planning and conduct of litigation, though not one employed to testify as a witness. The definition does not, however, limit "representative of the lawyer" to experts. Whether his compensation is derived immediately from the lawyer or the client is not material.

Rule 503 does not expressly deal with communications from an insured to his insurance company. If the insurance agent to whom the information is forwarded were viewed as a "representative of the lawyer" under Rule 503(a) (4), the privilege would apply. This is the rule in most state courts. *See* McCormick (2d ed.) § 91 at 190. Some federal courts have been unsympathetic to this line of reasoning because of the peculiar nature of the insurance "situation." *See, e.g., Gottlieb v. Bresler,* 24 F.R.D. 371 (D.D.C. 1959). The demand for privilege is greater when there is a close connection between lawyer and agent and they rely upon confidentiality in their relationship. Thus, the result in any particular case may turn on the specific facts involved. However, it is clear that no privilege is available when a statement is being sought in a controversy between the insured, or one claiming under the insured, and the insurance company. McCormick (2d ed.) § 91, at 190-91; Annot., *Privilege of Communications or Reports Between Liability or Indemnity Insurer and Insured,* 22 A.L.R.2d 659 (1952).

(5) The requisite confidentiality of communication is defined in terms of intent. A communication made in public or meant to be relayed to outsiders or which is divulged by the client to third persons can scarcely be considered confidential. *See LaMoore v. United States,* 180 F.2d 49, 9th Cir. (1950); McCormick (2d ed.) § 95. The intent is inferable from the circumstances. Unless intent to disclose is apparent, the attorney-client communication is confidential. Taking or failing to take precautions may be considered as bearing on intent. "Communications which were intended to be confidential but were intercepted despite reasonable precautions remain privileged." *See* Subdivision (b) *infra; see also* J. Weinstein & M. Berger, Weinstein's Evidence, § 503(a) (4) [01] (1979).

Practicality requires that some disclosure be allowed beyond the immediate circle of lawyer-client and their representatives without impairing confidentiality. Hence the definition allows disclosure to persons to whom disclosure is in furtherance of the rendition of professional legal services to the client, contemplating those in such relation to the client as "spouse, parent, business associate, or joint client." Cal. Evid. Code § 952, Comment (West 1966).

(b) **General Rule of Privilege.** This subdivision sets forth the privilege, using the previously defined terms: client, representative of the client, lawyer, representative of the lawyer, and confidential communication. It is in accord with the Alaska rules on the subject that are superseded by this rule: Rule 43(h) (2), Alaska R. Civ. P., and Rule 26(b) (3), Alaska R. Crim. P.

Common law decisions frequently allowed an eavesdropper to testify to overheard privileged conversations and approved admission of intercepted privileged letters. Today the evolution of more sophisticated techniques of eavesdropping and interception calls for abandonment of this position. The rule accordingly adopts a policy of protection against these kinds of invasion of the privilege.

The privilege extends to communications (1) between client or his representative and lawyer or his representative, (2) between lawyer and lawyer's representative, (3) by client or his lawyer to a lawyer representing another in a matter of

common interest, (4) between representatives of the client or the client and a representative of the client, and (5) between lawyers representing the client. All these communications must be specifically for the purpose of obtaining legal services for the client; otherwise the privilege does not attach.

When clients represented by different lawyers pursue a "joint defense" or "pool information," subdivision (b) (3) provides that each client has a privilege as to his own statements, but that any client wishing to disclose his own statements made at the joint conference may do so.

When there is no common interest to be promoted by a joint consultation, the Rule does not apply. *Compare*, this subdivision to subdivision (d) (5). The privilege is waived by the client if he or she raises an issue whose resolution requires disclosure of otherwise confidential communications. *Lewis v. State*, 565 P.2d 846, 850 n.4 (Alaska 1977).

(c) **Who May Claim the Privilege.** The privilege is, of course, that of the client, to be claimed by him or by his personal representative. The successor of a dissolved corporate client may claim the privilege. N.J. Stat. Ann. § 2A:84A-20(1) (West 1976).

The lawyer may not claim the privilege on his own behalf. However, he may claim it on behalf of the client. It is assumed that the ethics of the profession will require him to do so except under most unusual circumstances. American Bar Association Code of Professional Responsibility, Canon 4. His authority to make the claim is presumed unless there is evidence to the contrary, as would be the case if the client were now a party to litigation in which the question arose and were represented by other counsel.

(d) **Exceptions.** In general this subdivision incorporates well established exceptions.

(1) *Furtherance of Crime or Fraud.* The privilege does not extend to advice in aid of future wrongdoing. 8 Wigmore § 2298. *See United Services Automobile Association v. Werley*, 526 P.2d 28 (Alaska 1974). The wrongdoing need not be that of the client. The provision that the client knew or reasonably should have known of the criminal or fraudulent nature of the act is designed to protect the client who is erroneously advised that a proposed action is within the law. No preliminary finding that sufficient evidence aside from the communication has been introduced to warrant a finding that the services were sought to enable the commission of a wrong is required. While any general exploration of what transpired between attorney and client would, of course, be inappropriate, it is sometimes feasible, either at the discovery stage or during trial, so to focus the inquiry by specific questions as to avoid any broad inquiry into attorney-client communications. In some cases it will not be possible to probe without substantially invading the privileged area. When these cases arise, the court may require that a prima facie case of wrongdoing be established by independent evidence before the privilege is denied. Even where the perimeter of the privileged relationship can be analyzed without probing too deeply into confidential communications, such analysis will not be necessary if independent evidence of wrongdoing is available.

The words "or used" are added to the proposed federal version of the rule to cover the case of the client who decides to use legal advice for an improper purpose, when he knew or should have known he was committing a crime or fraud.

(2) *Claimants Through Same Deceased Client.* Normally the privilege survives the death of the client and may be asserted by his representative. *See* Subdivision (c) *supra.* When, however, the identity of the person who steps into the client's shoes is in issue, as in a will contest, the identity of the person entitled to claim the privilege remains undetermined until the conclusion of the litigation. The choice is thus between allowing both sides or neither to assert the privilege, with authority and reason favoring the latter view. McCormick (2d ed.) § 94 Uniform Rule of Evidence 502(d) (2) (1974); Cal. Evid. Code § 957 (West 1966); Kan. Cir. Pro. Stat. Ann. § 60426 (b) (2) (1976); N.J. Stat. Ann. § 2A:84A-20(2) (b) (West 1976).

(3) *Breach of Duty by Lawyer or Client.* The exception is required by considerations of fairness and policy when questions arise out of dealings between attorney and client, as in cases of controversy over attorney's fees, claims of inadequacy of representation, or charges of professional misconduct. McCormick (2d ed.) § 91; Uniform Rule of Evidence 502(d) (3) (1974); Cal. Evid. Code § 958 (West 1966); Kan. Civ. Pro. Stat. Ann. § 60-426 (b) (3) (1976); N.J. Stat. Ann. § 2A:84A20 (2) (c) (West 1976).

(4) *Document Attested by Lawyer.* When the lawyer acts as attesting witness, the approval of the client to his so doing may safely be assumed, and waiver of the privilege as to any relevant lawyer-client communications is a proper result. McCormick (2d ed.) § 80, at 180; Uniform Rule of Evidence 502(d) (4) (1974); Cal. Evid. Code § 959 (West 1966); Kan. Civ. Pro. Stat. Ann. § 60-426 (b) (4) (1976).

(5) *Joint Clients.* The subdivision states existing law. McCormick (2d ed.) § 91, at 189-190. For similar provisions, see Uniform Rule of Evidence 502(d) (5) (1974); Cal. Evid. Code § 962 (West 1966); Kan. Civ. Pro. Stat. Ann. § 60-426(b) (5) (1976); N.J. Stat. Ann. § 2A:84A-20(2) (West 1976). The situation with which this provision deals is to be distinguished from the case of clients with a common interest who retain different lawyers. *See* subdivision (b) (3) of this rule *supra.*

Rule 504. Physician and Psychotherapist—Patient Privilege.

(a) **Definitions.**

(1) "Patient" means a person who consults a physician for the purpose of diagnosis or treatment.

There seems to be little reason to perpetuate the distinction made between consultations for the purpose of diagnosis and consultations for the purpose of treatment. Persons do not ordinarily consult physicians from idle curiosity. They may be sent by their attorney to obtain a diagnosis in contemplation of some legal proceeding—in which case the attorney-client privilege will afford protection. They may submit to an examination for insurance purposes—in which case the insurance contract will contain appropriate waiver provisions. They may seek diagnosis from one physician to check the diagnosis made by another. They may seek diagnosis from one physician in contemplation of seeking treatment from another. Communications made under such circumstances are as deserving of protection as are communications made to a treating physician. *See* Cal. Evid. Code § 991 (West 1966).

The definition of "patient" does not include a person submitting to examination for scientific purposes.

(2) The definition of "physician" is extended to include not only a licensed physician, but a person who the patient has reasonable grounds to believe is a physician, a psychotherapist or psychologist. The patient should be protected from reasonable mistakes as to unlicensed practitioners. The burden is placed on the patient to satisfy the court that he in fact had reasonable grounds to believe that the person he made the communication to or disclosed information to was a physician before the patient can invoke the privilege.

The privilege also should be applicable to communications made to a physician authorized to practice in any state or nation. When an Alaska resident travels outside the state and has occasion to visit a physician during such travel, or when a physician from another state or nation participates in the treatment of a person in Alaska, the patient should be entitled to assume that his communications will be given as much protection as they would be if he consulted an Alaska physician in Alaska. A patient should not be forced to inquire about the jurisdictions where the physician is authorized to practice medicine and whether such jurisdictions recognize the physician-patient privilege before he may safely communicate with the physician.

(3) The definition of psychotherapist embraces a medical doctor while engaged in the diagnosis or treatment of mental or emotional conditions, including alcohol and drug addiction, in order not to exclude the general practitioner and to avoid the making of needless refined distinctions concerning what is and what is not the practice of psychiatry.

Medical doctors are generally covered under the definition in (2) above. When treating mental or emotional conditions, medical doctors are included under the definition of "psychotherapist" for purposes of the criminal proceeding exception. *See* subdivision (d) (7) *infra*.

A psychotherapist-patient privilege was recognized in *Allred v. State*, 554 P.2d 411 (Alaska 1976), although the supreme court divided on the source of the privilege and its scope. Since the court has power under the Alaska Constitution to create testimonial privileges, the source of power to create Rule 504 is beyond question. Defining the proper scope presents greater difficulty, however. While it is impossible to fashion a perfect rule because we will never know exactly how much of a return we get from a privilege—e.g., how much better is psychiatric care because of the privilege—and because we cannot be certain of either the optimal return or the marginal return for any expansion of a privilege, it is both necessary and practicable to establish a scope that appears to be as consistent as possible with the aims of the privilege.

Because the psychotherapist-patient privilege is designed to encourage those with mental or emotional problems to seek help, Rule 504(a) (3) provides that the privilege will attach if a patient sees someone reasonably believed by the patient to be licensed to practice medicine. Given the facts that Allred asked to see either one of two persons and that he apparently knew that one of them was a psychiatrist, it is probable that he believed that the person with whom he spoke was also licensed to practice medicine. If Allred was asking for psychiatric help, his communications would have been protected under the views of all members of the court. In fact Rule 504 (a) (3) satisfies both the concerns of the two members of the court who wished to prevent the privilege from attaching to all counseling and the two members of the court who wished to ensure that the patient who relies upon an apparent confidential relationship is not disappointed. Moreover, the social worker might have qualified under Rule 504 (a) (4) as a person reasonably necessary for the transmission of information, depending on the precise facts, without threatening the competing interest identified in the various opinions in *Allred*.

Because this rule focuses on the reasonable belief of the patient, it assumes throughout that the patient is capable of making the necessary choices to create and destroy the privilege. The question whether there are instances in which fairness requires a recognition of a right in the psychotherapist to claim the privilege for a patient who is not inclined to seek the benefits of non-disclosure is left for adjudication. See *Allred v. State*, 554 P.2d 411, 428 (Alaska 1976) (Dimond, J., concurring).

(4) Confidential communication is defined in terms conformable with those of the lawyer-client privilege, Rule 503 (a) (5), with changes appropriate to the difference in circumstance. *See* Reporter's Comment to Rule 503 (a) (5). In addition, Rule 504(a) (4) treats as confidential communications made to the physician or psychotherapist in the presence of those "who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family." "Communications from members of the family…should be given broad protection…because effective treatment presupposes family participation." 2 Weinstein's *Evidence* § 504[05]. *See Falcon v. Alaska Public Offices Commission*, 570 P.2d 469 (Alaska 1977).

Participants in group therapy programs in the presence of a psychotherapist may be covered under the definition of "confidential communication." *See Cross, Privileged Communications Between Participants in Group Psychotherapy*, 1970 L. & Soc. Order 191.

(b) and (c) **General Rule of Privilege—Who May Claim the Privilege.** The phrasing of the general rule of privilege and the determination of those who may claim it draws heavily upon the attorney-client privilege rule. *See* Rule 503(b) & (c). Rule 504 supersedes the physician-patient privilege of Rule 43(h) (4), Alaska Rules of Civil Procedure. For a related provision, see AS 08.86.200 (confidential communications to psychologists).

(d) **Exceptions.**

(1) *Condition or Element of Claim or Defense.* The patient-litigant exception provides that the physician-patient privilege does not exist in any proceeding in which an issue concerning the condition of the patient has been tendered by the patient. If the patient himself tenders the issue of his condition, he should not be able to withhold relevant evidence from the opposing party by the exercise of the physician-patient privilege. By injecting his condition into litigation, the patient must be said to waive the privilege, in fairness and to avoid abuses. *See Mathis v. Kilderbrand*, 416 P.2d 8 (Alaska 1966); *Trans-World Investments v. Drobny*, 554 P.2d 1148 (Alaska 1976). Those who claim through the patient stand in the

patient's shoes for purposes of this Rule. After the patient's death, the policies of confidentiality give way to a party's need for information and any party may place the condition of a deceased patient in issue and obtain the benefits of the exception. Only information relevant to the patient's condition should be disclosed under this exception. *See Arctic Motor Freight Inc. v. Stover,* 571 P.2d 1006 (Alaska 1977).

(2) *Crime or Fraud.* The crime or fraud exception corresponds to, but is broader than, the similar provision under attorney-client privilege. *See* Rule 503(d) (1) and Reporter's Comment.

(3) *Breach of Duty Arising Out of Physician-Patient Relationship.* The breach of duty exception also corresponds to a similar attorney-client privilege provision. *See* Rule 503(d) (3) and Reporter's Comment.

(4) *Proceedings for Hospitalization.* The interests of both patient and public call for a departure from confidentiality in commitment proceedings. Since disclosure is authorized only when the physician or psychotherapist determines that hospitalization is needed, control over disclosure is placed largely in the hands of a person in whom the patient has already manifested confidence. Hence damage to the relationship is unlikely. Usually, this exception will rise in psychotherapist-patient situations. Court-ordered appointments are treated in subdivision (d) (6) *infra.*

(5) *Required Report.* The required report exception enables a physician or psychotherapist to testify as to the contents of reports required by statute or administrative rule to be made to public officials. No valid purpose is served by preventing the use of relevant information when the law or rule requiring the information to be reported to a public office does not restrict disclosure.

(6) *Examination by Order of Judge.* In a court ordered examination, the relationship is likely to be an arm's length one, though not necessarily so. In any event, an exception is necessary for the effective utilization of this important and growing procedure. When the psychotherapist is appointed by the court, it is most often for the purpose of having the psychotherapist testify concerning his conclusions as to the patient's condition. It would be inappropriate to have the privilege apply in this situation. The exception, it will be observed, deals with a court ordered examination rather than with a court appointed physician or psychotherapist. Also, the exception is effective only with respect to the particular purpose for which the examination is ordered. The final sentence of the exception provides that an accused in a criminal case may have the benefits of private counseling with a psychotherapist. Of course, if the accused does place mental condition in issue, exception (1) will govern.

(7) *Criminal Proceeding.* Under the superseded Alaska Rules of Court concerning privileges (Rule 43(h), Alaska R. Civ. P., and Rule 26(b), Alaska R. Crim. P.), a physician-patient privilege was recognized in civil cases (Civil Rule 43 (h) (4)), but not in criminal cases. This distinction is followed here. However, the psychotherapist-patient relationship, with its more compelling need for confidential communication, demands that the privilege apply to criminal proceedings as well as civil cases, *see Schade v. State,* 512 P.2d 907, (Alaska 1973), although exception (6) will govern some aspects of the use of psychotherapists in criminal cases. Rule 13, Alaska R. Children's P., governs juvenile proceedings.

Rule 505. Husband-Wife Privileges.

Evidence Rule 505 has been substantially revised since this commentary was first published.

In most states the marital relationship gives rise to two distinct privileges. One, the spousal immunity privilege, enables a party to bar a current spouse from testifying against that party. The other, the privilege for marital communications, protects confidential communications made to one's spouse during the course of a marriage. Although the Proposed Federal Rule of Evidence dealing with Husband-Wife privilege (PFRE 505) adopted only the spousal immunity privilege, Rule 43(h) (1), Alaska R. Civ. P., and Rule 26(b) (2), Alaska R. Crim. P., both superseded by this Rule, recognized both privileges. This Rule makes no change in the basic state of the law. Both marital privileges are recognized in civil and criminal cases.

(a) **Spousal Immunity.**

(1) *Spouse Immunity.* The spousal immunity privilege belongs to the party spouse. *See Hawkins v. United States,* 358 U.S. 74, 3 L.Ed.2d 125 (1958). If the party fails to object to a spouse being called to testify, the party waives any right to object to any portion of the testimony on the ground of spousal immunity.

Spousal immunity applies only to testimony by a spouse. If the marriage is a sham or has been terminated by divorce, annulment, or death, there is no privilege. *See* AS 25.05.011–25.05.391.

(2) *Exceptions.*

(A) This is a standard exception in modern statutes. Model Code of Evidence rule 216 (1942); Cal. Evid. Code § 984 (West). "[H]usband and wife, while they would desire that their confidences be shielded from the outside world, would ordinarily anticipate that if a controversy between themselves should arise in which their mutual conversations would shed light on the merits, the interests of both would be served by full disclosure." McCormick (2d ed.) § 84, at 171. This exception covers custody battles.

(B) and (C). Commitment and competency proceedings are undertaken for the benefit of the subject person. Frequently, much or all of the evidence bearing on a spouse's competency or lack of competency will consist of communications to the other spouse. It would be undesirable to permit either spouse to invoke a privilege to prevent the presentation of this vital information inasmuch as these proceedings are of such vital importance both to society and to the spouse who is the subject of the proceedings. *See* Cal. Evid. Code §§ 982 and 983 (West); Rule 504(d) (4) *supra.*

(D) The need of limitation upon the privilege in order to avoid grave injustice in cases of offenses against the other spouse or child of either can scarcely be denied. The rule therefore disallows any privilege against spousal testimony in these cases. See Proposed Federal Rule of Evidence 505 (c) (1); 8 Wigmore § 2239; Model Code of Evidence rule 216 (1942). For relevant Alaska law see AS 25.25.230 (pimping) and 11.40.430 (non-support). Subdivision (a) (2) (D) (iii) is not

limited to natural or adoptive children of the spouse. Subdivision (a) (2) (D) (iv) is directed at the case where the defendant marries the prosecution's star witness to prevent him or her from testifying.

(E) In custody cases under subdivision (a)(2)(E), the spouse is treated as if they were opposing parties.

(F) In business cases under subdivision (a) (2) (F), the need for third parties to have information outweighs the spouse's need for protection, especially about non-personal, commercial matters.

(b) **Confidential Marital Communications.**

(1) *General Rule.* Under this subdivision, both spouses are the holders of the privilege and either spouse may claim it. *See* Cal. Evid. Code § 980 (West); superseded Alaska R. Crim. P. 26(b) (2) and R. Civ. P. 43(h) (1); *cf.* 8 Wigmore § 2340. A guardian of an incompetent spouse may claim the privilege on behalf of that spouse. However, when a spouse is dead, no one can claim the privilege for him; the privilege, if it is to be claimed at all, can be claimed only by or on behalf of the surviving spouse. *See Comment, Cal.* Evid. Code § 980 (West).

The concept of "confidential communication" is analogous to a similar concept used in lawyer-client and physician/psychotherapist-patient privileges (Rule 503(a) (5) and 504(a) (4)). Thus, the intent of the communicator plays a key role. Communications between spouses made during the marriage outside the presence of third persons are presumptively confidential.

(2) *Exceptions.*

(A) All of the exceptions under the spousal immunity privilege apply to the confidential marital communications privilege.

(B) This exception is applied to all confidential communication privileges. See Rule 503(d) (1) and 504(d) (2); Model Code of Evidence Rule 217 (1942). In many cases, the evidence which would be admissible under this exception will be vital in order to do justice between the parties to a lawsuit. *See Comment,* Cal. Evid. Code § 981 (West). The importance of protecting the marriage explains why this exception is confined to subdivision (b).

This exception does not permit disclosure of communications that merely reveal a plan to commit a crime or fraud; it permits disclosure only of communications made to *enable or aid* anyone to commit or plan to commit a crime or fraud.

(C) Both the surviving spouse and the competing claimant are attempting to vindicate claims through the deceased spouse. Since the competing claimant urges that the deceased spouse had an intent regarding transfer of property different from that being urged by the surviving spouse, the case is treated as a dispute between the spouses and the privilege disappears.

(D) When a married person is the defendant in a criminal proceeding and seeks to introduce evidence which is material to his defense, his spouse (or his former spouse) should not be privileged to withhold the information. *See,* Model Code of Evidence rule 216 (1942); Cal. Evid. Code § 987 (West). "It is plain that *where an accused spouse needs the evidence of* communications (by either spouse to the other), the privilege should cease or a cruel injustice may be done." 8 Wigmore § 2338 (emphasis in original).

(E) Alaska's Children's Rules are designed to secure for each child the same care, correction and guidance that he should receive from his parents. (Rule 1(c)). The interests of the child and of society require that parental confidences bow to the need of juvenile court judges for full information concerning the activities and problems of the child, and his relationship with his parents together with the parents' relationship with each other.

(F) In order to avoid the unfairness of spouses doing business together and then invoking the husband-wife privilege to prevent an inquiry into the business relationship, exception (F) provides that a communication is not confidential if it is made in the context of an agency relationship between the spouses, or in the context of any primarily business and nonmarital relationship. This is a special application of the principle that spouses who do not intend their communications to remain private cannot claim the privilege. Once spouses enter into business relationships with third parties, the Rule presumes that they do not intend that the third parties will be excluded from inquiring about the business arrangements of the spouses as they affect the third party's interests.

It should also be noted that at times privilege rules may have to give way to confrontation rights. *See, e.g., Salazar v. State,* 559 P.2d 66 (Alaska 1976).

Rule 506. Communications to Clergymen.

The considerations which dictate the recognition of privileges generally seem strongly to favor a privilege for confidential communications to clergymen. During the period when most of the common law privileges were taking shape, no clear-cut privilege for communications between priest and penitent emerged. 8 Wigmore § 2394. The English political climate of the time may well furnish the explanation. In this country, however, the privilege has been recognized by statute in about two-thirds of the states and occasionally by the common law process of decision.

(a) **Definitions.** Paragraph (1) defines a clergyman as a "minister, priest, rabbi, or other similar functionary of a religious organization." This concept is not so broad, however, to include all self-denominated "ministers." A fair construction of the language requires that the person to whom the status is sought to be attached be regularly engaged in activities conforming at least in a general way with those of a Catholic Priest, Jewish rabbi, or minister of an established Protestant denomination, though not necessarily on a full-time basis. No further specification seems possible in view of the lack of licensing and certification procedures for clergymen. However, this lack seems to have occasioned no particular difficulties in connection with the solemnization of marriages, which suggests that none may be anticipated here. For similar definitions of "Clergyman" see Cal. Evid. Code § 1030 (West); N.J. Rev. Stat. or Stat Ann. (West) § 29.

The "reasonable belief" provision finds support in similar provisions for lawyer-client in Rule 503 and for physician and psychotherapist-patient in Rule 504. A parallel is also found in the recognition of the validity of marriages performed by unauthorized persons if the parties reasonably believed them

legally qualified.

(2) The definition of "confidential" communication is consistent with the use of the term in Rule 503(a) (5) for lawyer-client and in Rule 504(a) (4) for physician and psychotherapist-patient, suitably adapted to communications to clergymen.

(b) **General Rule of Privilege.** The choice between a privilege narrowly restricted to doctrinally required confessions and a privilege broadly applicable to all confidential communications with a clergyman in his professional character as spiritual adviser has been exercised in favor of the latter. Many clergymen now receive training in marriage counseling and the handling of personality problems. Matters of this kind fall readily into the realm of the spirit. The same considerations which underlie the physician and psychotherapist-patient privilege of Rule 504 suggest a broad application of the privilege for communications to clergymen. This is a departure from the concept of "confession" as employed in two Alaska Rules of Court, Civil Rule 43(h) (3) and Criminal Rule 26(b) (4), which are superseded by this Rule. The broader privilege is more in line with current trends. *See, e.g.,* Rule 504 *supra;* Maine Rules of Evidence, § 506; Neb. Rev. Stat. §§ 27-506; and Wisc. Stat. § 905.06. It recognizes that the need for a private enclave for spiritual counseling is not confined to those whose religion requires confession, but extends to all who attempt to lead righteous lives with the aid and comfort of their religion and religious advisers.

Under the privilege as phrased, the communicating person is entitled to prevent disclosure not only by himself but also by the clergyman and by eavesdroppers.

The nature of what may reasonably be considered spiritual advice makes it unnecessary to include in the rule a specific exception for communications in furtherance of crime or fraud, as in Rule 503(d) (1).

(c) **Who May Claim the Privilege.** This subdivision makes clear that the privilege belongs to the communicating person. However, a prima facie authority on the part of the clergyman to claim the privilege on behalf of the person is recognized. The discipline of the particular church and the discreetness of the clergyman are believed to constitute sufficient safeguards for the absent communicating person.

Rule 507. Political Vote.

Every person has a privilege to refuse to disclose the tenor of his vote at a political election conducted by secret ballot unless the vote was cast illegally.

Secrecy in voting is an essential aspect of effective democratic government, insuring free exercise of the franchise and fairness in elections. Secrecy after the ballot has been cast is as essential as secrecy in the act of voting. Nutting, *Freedom of Silence: Constitutional Protection Against Governmental Intrusion in Political Affairs,* 47 Mich. L. Rev. 181, 191 (1948). Consequently a privilege has long been recognized on the part of a voter to decline to disclose how he voted. Required disclosure would be the exercise of "a kind of inquisitorial power unknown to the principles of our government and constitution, and might be highly injurious to the suffrages of a free people, as well as tending to create cabals and disturbances between contending parties in popular elections." *Johnson v. Charleston,* 1 Bay 441, 442 (S.C. Sup. Ct. 1795).

The exception for illegally cast votes is a common one under both statutes and case law, Nutting, supra, at 192; 8 Wigmore § 2214, at 163. The policy considerations which underlie the privilege are not applicable to the illegal voter. However, nothing in the exception purports to foreclose an illegal voter from invoking the privilege against self-incrimination under appropriate circumstances.

For similar provisions, see Uniform Rule of Evidence 31; Cal. Evid. Code § 1050 (West); Kan. Civ. Pro. Stat. Ann. §§ 60-431 (Vernon); New Jersey Evidence Rule 31.

Rule 508. Trade Secrets.

The trade secret privilege "fosters the public interest by encouraging technological advancement, encouraging innovativeness in business methods, and facilitating freedom of employment by assuring an employer that a former employee cannot reveal secrets to a competitor." 2 J. Weinstein & M. Berger, Weinstein's Evidence Paragraph 508 [02] (1979). Nevertheless, there are dangers in the recognition of such a privilege. Disclosure of the matters protected by the privilege may be essential to disclose unfair competition or fraud or to reveal the improper use of dangerous materials by the party asserting the privilege. Therefore, the privilege exists under this Rule only if its application will not tend to conceal fraud or otherwise work injustice. *See Comment,* Cal. Evid. Code § 1060 (West).

The term "trade secret" is not defined by this rule. By definition it is limited to knowledge, skill or the like relating to a trade or business — kept confidential by the trade or business for purposes of obtaining or retaining a competitive advantage. One useful definition of a "trade secret" describes it as

> "any formula, pattern, device or compilation of information which is used in one's business and which gives [the holder] an opportunity to obtain an advantage over competitors who do not know or use it."

4 Restatement of Torts § 757, Comment b at 5 (1939). Such definitions present a danger that the privilege will be confined too narrowly, whereas "both policy and logic suggest a broad concept including all business data which gives a better competitive position and whose value is substantially enhanced by secrecy." 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 508[03] (1979). *See also* 8 Wigmore § 2212(3). It must always be kept in mind however, that this privilege is not absolute; whenever any injustice will result from its innovation, the privilege will not be recognized.

In many commercial cases, the need for the trade secret will be obvious and the key issue will not be whether the information will be disclosed but under what conditions. "The most common technique is to take testimony in camera with perhaps a requirement for sealed records. This preserves secrecy while allowing the court to reach a decision on all the facts. Other methods involve appointing a master to determine the relevancy of the trade secret to the issues of the case and the degree of disclosure necessary, appointing an independent expert, revealing the trade secret only to the judge or trial examiner, omitting the trade secret from the record of the case,

and disclosing to the opposing party's attorney but not to his client." 2 J. Weinstein & M. Berger, Weinstein's Evidence Paragraph 508[03] (1979) (footnotes omitted). The choice of which protective device (or combination of devices) to use lies with the trial court.

Usually, the problem of trade secrets will first arise during the pre-trial discovery stage. The pertinent discovery rule is Rule 26(c) of the Alaska Rules of Civil Procedure, which allows the court to issue a protective order " . . . . to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: … (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way…" The language of Rule 508 was deliberately chosen to be congruent with Rule 26(c) (7). While the instant evidence rule extends the underlying policy of the discovery rule into the trial, the difference in circumstances between the discovery stage and trial may well be such as to require a different ruling at the trial.

Rule 509. Identity of Informer.

The rule recognizes the use of informers as an important aspect of law enforcement, whether the informer is a citizen who steps forward with information or a paid undercover agent. In either event, the basic importance of anonymity in the effective use of informers is apparent, and the privilege of withholding their identity was well established at common law. McCormick (2d ed.) § 111; 8 Wigmore § 2374.

(a) **Rule of Privilege.** The public interest in law enforcement requires that the privilege be that of the government rather than that of the witness. The rule blankets in as an informer anyone who tells a law enforcement officer about a violation of law without regard to whether the officer is one charged with enforcing the particular law. The Rule also applies to disclosures to legislative investigating committees and their staffs, and is sufficiently broad to include continuing investigations.

Although the tradition of protecting the identity of informers has evolved in an essentially criminal setting, noncriminal law enforcement situations involving possibilities of reprisal against informers fall within the purview of the considerations out of which the privilege originated.

Only identity is privileged; communications are not included except to the extent that disclosure would operate also to disclose the informer's identity. The common law was to the same effect, 8 Wigmore § 2374.

The rule does not deal with the question of when access to presentence reports made under Alaska Rule of Criminal Procedure 32(c) should be denied an accused.

(b) **Who May Claim.** The privilege may be claimed only by the public entity to which the information was furnished by the informer. Thus, a state representative may not claim this privilege if the informer has dealt solely with federal officers. The informant depends for protection upon the government with which he deals directly; if the government refuses to protect him, no other government can safeguard his identity. In situations of joint enforcement by different public entities, all of those that dealt directly with the informant may claim the informer's privilege to protect their information source.

Normally the "appropriate representative" to make the claim will be government counsel. However, it is possible that disclosure of the informer's identity will be sought in proceedings to which the government entity with the power to claim a privilege is not a party. Under these circumstances effective implementation of the privilege requires that other representatives be considered "appropriate."

(c) **Exceptions.** This section deals with situations in which the informer privilege either does not apply or is curtailed.

(1) *Voluntary Disclosure—Informer a Witness.* If the identity of the informer is disclosed, nothing further is to be gained from efforts to suppress it. Disclosure may be direct, or the same practical effect may result from action revealing the informer's interest in the subject matter. While allowing the privilege in effect to be waived by one not its holder, *i.e.*, the informer himself, is something of a novelty in the law of privilege, if the informer chooses to reveal his identity further efforts to suppress it are scarcely feasible. *See* 8 Wigmore § 2274(2).

The exception is limited to disclosure to "those who would have cause to resent the communication," in the language of *Roviaro v. United States*, 353 U.S. 53, 60, 1 L.Ed.2d 639, 644645 (1957), since the disclosure otherwise, e.g., to another law enforcement agency, is not calculated to undercut the objects of the privilege.

If the informer becomes a witness for the government, the interests of justice in disclosing his status as a source of bias or possible support are believed to outweigh any remnant of interest in nondisclosure which then remains. The purpose of the limitation to witnesses for the government is to avoid the possibility of the defendant's calling persons as witnesses as a means of discovering whether they are informers.

(2) and (3) *Testimony on Merits—Legality of Obtaining Evidence.* This exception and the following one are drafted to accomplish the same things that the United States Supreme Court hoped to accomplish when it approved proposed federal rule 510. But language of the proposed Federal Rule was heavily criticized by the Committee on the Rules appointed by the Alaska Supreme Court and by various persons contacted for comments by the Committee. Thus, the problem areas, this exception and the next, have been completely reworked.

Both exceptions provide that an initial opportunity to be heard on a claim of privilege will be granted the parties in civil and criminal cases, and that this opportunity will be with counsel present. There is a point under both exceptions at which the trial judge considers a submission by the government outside the presence of the parties and their counsel. The idea of the exceptions is to provide judicial screening of privilege claims without destroying the utility of the privilege.

Both exceptions specify the procedures to be followed by the trial judge, the standards to be used in judging the privilege claims, and the manner in which the record is to be preserved for appeal.

The informer privilege, it was held by the leading case, may not be used in a criminal prosecution to suppress the identity of a witness when the public interest in protecting the flow of

information is outweighed by the individual's right to prepare his defense. *Roviaro v. United States, supra.* The Rule extends this balancing to include civil as well as criminal cases and phrases it in terms of a reasonable possibility that the informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case. Once the privilege is invoked a procedure is provided for determining whether the informer can in fact supply testimony of such nature as to require disclosure of his identity, thus avoiding a "judicial guessing game" on the question. An investigation *in camera* is calculated to accommodate the conflicting interests involved. The rule also spells out specifically the consequences of a successful claim of privilege in a criminal case when the informant has information that might reasonably help the defendant on the merits. The wider range of possible harm to the non-government party demands more flexibility in criminal cases when the informant has nothing to add on the merits and in civil cases. *Cf.* Alaska R. Civ. P. 37. It should be noted that exception (3) does not speak of a remedy for nondisclosure, since the remedy is obvious; *i.e.*, granting the motion to suppress the evidence.

Obviously, the defendant will always have an argument that it is impossible for the trial judge to foresee all "reasonable possibilities" that an informant can provide testimony helpful to the defense. *Cf., Alderman v. United States,* 394 U.S. 165, 22 L.Ed.2d 176 (1969). But acceptance of this argument would mean that the identity of many informants who would offer no help to the defense would be revealed to ensure that those few who might be helpful do not go undetected. The counterargument begins with the premise underlying the informer's privilege, which is that a grave danger may exist when an informant is identified. This danger requires that many informants who might face no real danger be protected to ensure that those actually in danger are protected, and it suggests that the defendant should bear a burden of showing that an informant would be helpful to the defense before identity is revealed. While the rule rejects both arguments it errs on the side of the defendant by providing that reasonable doubts as to the utility to the defense of an informant's testimony be decided in favor of exposing the informant. *See United States v. Jackson,* 442 F.2d 975 (6th Cir. 1970); *United States v. Lloyd,* 400 F.2d 414 (6th Cir. 1968). Since the *in camera* procedure takes place after some showing is made that an informant might be able to supply testimony relating to the merits, it is to be expected that trial judges will require the government to show by affidavit or otherwise exactly what the informant knows about the case.

Although Rule 509 extends to all civil and criminal cases, there is no reason to suppose that the government will attempt to invoke the privilege improperly in circumstances where an informant is not threatened by exposure. The rule recognizes that it is the informant's perception of danger that often leads the government to protect identity. To assure cooperation, the government reasonably may assuage unreasonable fears as long as it obtains no advantage in litigation in doing so. Moreover, it will be to the government's advantage in many cases to bring forth all witnesses, including informants, who have favorable testimony to offer, since this maximizes the government's chances of prevailing.

One of the acute conflicts between the interest of the public in nondisclosure and the avoidance of unfairness to the accused as a result of nondisclosure arises when information from an informer is relied upon to legitimate a search and seizure by furnishing probable cause for an arrest without a warrant or for the issuance of a warrant for arrest or search.

The Supreme Court has held that an informant's identity need not be revealed if the only information the informant can supply relates to probable cause for an arrest. *McCray v. Illinois,* 386 U.S. 300, 18 L.Ed.2d 62 (1967). This Rule recognizes the wisdom of compelling disclosure to the court when the government's proof of the circumstances under which evidence was obtained fails to satisfy the court that the government's conduct conformed to law. In light of the policy of the rule to protect an informant who has "fingered" a defendant, the rule provides for disclosure *in camera* to accommodate the conflicting interests. The limited disclosure to the judge avoids any significant impairment of secrecy, while affording the accused a substantial measure of protection against arbitrary police action.

Government counsel should bear in mind that the duty to disclose exculpatory evidence to a criminal defendant is not affected by this Rule.

Rule 510. Waiver of Privilege by Voluntary Disclosure.

The central purpose of most privileges is the promotion of some interest or relationship by endowing it with a supporting secrecy or confidentiality. It is evident that the privilege should terminate when the holder by his own act destroys this confidentiality. McCormick (2d ed.) §§ 83, 93, 103; 8 Wigmore §§ 2242, 2327-2329, 2374, 2389-2390. Rule 510 codifies standard practice in acknowledging that a privilege can be waived. It follows the approach of Rule 231 of the Model Code of Evidence, Rule 37 of the Uniform Rules of Evidence, and section 912 of the California Evidence Code (West). *See* 2 J. Weinstein & M. Berger, Weinstein's Evidence Paragraph 511[02] (1979).

The rule is designed to be read with a view to what it is that the particular privilege protects. For example, the lawyer-client privilege covers only communications, and the fact that a client has discussed a matter with his lawyer does not insulate the client against disclosure of the subject matter discussed, although he is privileged not to disclose the discussion itself. *See* McCormick (2d ed.) § 93. The waiver here provided for is similarly restricted. Therefore a client, merely by disclosing a subject which he had discussed with his attorney, would not waive the applicable privilege; he would have to make disclosure of the communication itself in order to effect a waiver.

By traditional doctrine, waiver is the intentional relinquishment of a known right. However, in the confidential privilege situations, once confidentiality is destroyed through voluntary disclosure no subsequent claim of privilege can restore it, and knowledge or lack of knowledge of the existence of the privilege appears to be irrelevant. 8 Wigmore § 2327.

Rule 511. Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege.

Ordinarily a privilege is invoked in order to forestall disclosure. However, under some circumstances consideration must be given to the status and effect of a disclosure already made. Rule 510, immediately preceding, gives voluntary disclosure the effect of a waiver, while the present rule covers the effect of a disclosure made under compulsion or without opportunity to claim the privilege. "[Rule 511] is the converse of [Rule 510]. [Rule 510] deals with waiver and its consequences; [Rule 511] deals with the consequences of disclosure in the absence of waiver." 2 J. Weinstein & M. Berger, Weinstein's Evidence Paragraph 512[02] (1979).

Confidentiality, once destroyed, is not susceptible of restoration, yet some measure of repair may be accomplished by preventing use of the evidence against the holder of the privilege. The remedy of exclusion is therefore made available when the earlier disclosure was compelled erroneously or without opportunity to claim the privilege.

With respect to erroneously compelled disclosure, the argument may be made that the holder should be required in the first instance to assert the privilege, stand his ground, refuse to answer, perhaps incur a judgment of contempt, and exhaust all legal recourse, in order to sustain his privilege. However, this exacts of the holder greater fortitude in the face of authority than ordinary individuals are likely to possess, and assumes unrealistically that a judicial remedy is always available. In self-incrimination cases, the writers agree that erroneously compelled disclosures are inadmissible in a subsequent criminal prosecution of the holder, Maguire, Evidence of Guilt 66 (1959) McCormick (2d ed.) E 127; 8 Wigmore § 2270, and the principle is equally sound when applied to other privileges.

The second circumstances stated as a basis for exclusion is a disclosure made without opportunity to the holder to assert his privilege. Illustrative possibilities are disclosure by an eavesdropper, by a person used in the transmission of a privileged communication, by a family member participating in psychotherapy, or privileged data improperly made available from a computer bank. The advent of increasingly sophisticated interception techniques for confidential communications makes this basis for exclusion especially important. See the Reporter's Comment accompanying Rule 503 (b).

Rule 512. Comment Upon or Inference From Claim of Privilege—Instruction.

Rule 512, like Rule 511, "is a rule designed to ensure that a privilege will be given its maximum effect. It seeks to eliminate any possibility of prejudice arising against the holder, which would either intimidate him into waiving his privilege, or penalize him for exercising a right given to him by law." 2 J. Weinstein & M. Berger, Weinstein's Evidence Paragraph 513 [02] (1979). There has been some controversy on the desirability of maximizing the effects of privileges by disallowing comment and inference. The Model Code of Evidence, in the comment to Rule 233, permitted both comment and inference upon the invocation of a privilege. However, the better view is that "if privileges are considered valuable enough to adopt, then they are also worth effectuating." Comments, *Federal Rules of Evidence and the Law of Privileges,* 15 Wayne L. Rev. 1286, 1370-1371 (1969). This is the approach followed by Rule 39 of the Uniform Rules of Evidence and Section 913 of the California Evidence Code.

(a) **Comment or Inference Not Permitted.** This subdivision prohibits judge and counsel from commenting upon a claim of privilege and the trier of fact from drawing any inference therefrom. It is in accord with the weight of authority. 8 Wigmore §§ 2243, 2322, 2386; Barnhart, *Privilege in the Uniform Rules of Evidence,* 24 Ohio St. L. J. 131, 137-138 (1963). Subdivision (a) is probably not constitutionally required for privileges not required to be recognized by the constitution. Nevertheless, its policy is sound, for "it furthers the value judgments which underlie the creation of privileges." 2 J. Weinstein & M. Berger, Weinstein's Evidence, Paragraph 513 [02] (1979).

(b) **Claiming Privilege Without Knowledge of Jury.** The value of a privilege may be greatly depreciated by means other than expressly commenting to a jury upon the fact that it was exercised. Thus, the calling of a witness in the presence of the jury and subsequently excusing him after a side-bar conference may effectively convey to the jury the fact that a privilege has been claimed, even though the actual claim has not been made in its hearing. Whether a privilege will be claimed is usually ascertainable in advance and the handling of the entire matter outside the presence of the jury is feasible. Destruction of the privilege by innuendo can and should be avoided. 6 Wigmore § 1808. This position is in accord with the general agreement of the authorities that an accused cannot be forced to make his election not to testify in the presence of the jury. 8 Wigmore § 2268, at 407.

Unanticipated situations are, of course, bound to arise, and much must be left to the discretion of the judge and the professional responsibility of counsel.

(c) **Jury Instruction.** Opinions will differ as to the effectiveness of a jury instruction not to draw an adverse inference from the making of a claim of privilege. Whether an instruction shall be given is left to the sound judgment of counsel for the party against whom the adverse inference may be drawn. The instruction is a matter of right, if requested.

The right to the instruction is not impaired by the fact that the claim of privilege is by a witness, rather than by a party, provided an adverse inference against the party may result.

(d) **Application—Self-Incrimination.** This subdivision is a departure from Proposed Federal Rule of Evidence 513, which is the counterpart of Rule 512. Subdivision (d), adopted from Wisconsin Statute § 905.13, attempts to deal with the problem presented when a party in a civil case claims a privilege against self-incrimination. It provides that a party to a civil suit who claims a privilege against self-incrimination may not take advantage of subdivisions (a)—(c) to avoid comment and inference from his privilege claim. See *Grognet v. Fox Valley Trucking Service,* 172 N.W.2d 812 (Wis. 1979); *Molloy v. Molloy,* 176 N.W.2d 292 (Wis. 1970).

Although the privilege against self-incrimination does not apply to protect disclosures that might tend to establish one's liability for civil damages, *see, e.g.,* McCormick (2d ed.)

§ 121, at 257-58, the privilege not to incriminate oneself in future criminal matters may be raised in any judicial proceeding, *see e.g., McCarthy v. Arndstein*, 266 U.S. 34, 69 L.Ed.2d 34 (1924). While comment on a defendant's silence in a criminal proceeding is proscribed by the constitution, *Griffin v. California*, 380 U.S. 609, 14 L.Ed.2d 106 (1965), comment in other settings is not barred by the constitution. *Baxter v. Palmigiano*, 425 U.S. 308, 47 L.Ed2d 810 (1976). The position taken by this rule protects civil litigants from being disadvantaged because an opposing party's invocation of the privilege against self-incrimination suppresses relevant evidence. The party claiming the privilege retains protection against government prosecution but cannot insulate himself from civil liability. *See Baxter v. Palmigiano, id.*, at 425 U.S., 426-430 (Brennan, J., dissenting). This rule does not address the subject of continuances in civil cases to accommodate a party's desire to remain silent in a criminal prosecution but to testify in a later civil case. Such continuances are possible under Alaska Rule of Civil Procedure 40. Because a criminal defendant has a right to a speedy trial, criminal cases often will be disposed of before related civil cases as a matter of course. An uncomfortable situation might arise when no criminal prosecution is pending or even contemplated but testimony in a civil case might lead to a prosecution. This rule allows a comment on the invocation of a privilege and permits adverse inferences to be drawn despite the attendant discomfort. Some of the policies of the privilege are concededly disserved, but such disservice must be balanced against fairness to civil litigants who need the evidence suppressed by the privilege.

This rule does not address the question of whether it is constitutionally permissible for the government to bring a civil action before a criminal action in order to put the defendant to the choice of costly silence or possible incrimination. When the government is plaintiff in both actions, the balance struck here is more tenuous. Whether it is constitutional remains to be decided if the issue ever arises.

ARTICLE VI. WITNESSES

Rule 601. Competency of Witnesses.

Rule 601 is similar to former Alaska R. Civ. P. 43(g) (1) which it supersedes. It is almost identical to Rule 101 of the Model Code of Evidence and Uniform Rule 17 (1953). The Comment to the Model Code's Rule outlines the way Rule 601 will work:

> When there is a dispute concerning a person's capacity to be a witness, the judge must determine whether the proposed witness can express himself understandably and understands his duty to tell the truth. The opponent has the burden of seeing that the question is raised and that there is evidence before the judge which would justify him in finding incapacity. The appearance of the witness or his conduct in court may be such as to impel the judge to raise the question and to lead him to treat the appearance or conduct as persuasive evidence of incapacity, and consequently to bring forward evidence of capacity. Ordinarily, however, the opponent must raise the objection and support it.

The policy of the rule "is that matters of the witness's opportunity for perception, knowledge, memory, experience and the like go to the weight to be given to his testimony rather than to his right to testify." Commissioner's Note to Uniform Rule 17 (1953). But the rule recognizes that some witnesses should not be permitted to appear before the trier of fact because their testimony is entitled to no consideration.

Federal Rule 601 states that "[e]very person is competent to be a witness." The drafters may have held the view that all witnesses are capable of being understood and able to understand the meaning of an oath, or they may have assumed that other rules would screen out those persons deemed to be incompetent by Alaska Rule 601. *See, e.g.*, Federal Rules 403 and 603; K. Redden & S. Saltzburg, Federal Rules of Evidence Manual 268-69 (2d ed. 1977). *See also United States v. Killian*, 524 F.2d 1268 (5th Cir. 1975). Alaska Rule 601 is clear on its face. It provides a direct approach to the problems of dealing with young children and with older persons whose condition, whether permanent or temporary, raises questions about their capacity to assist the trier of fact.

The Rule rejects any argument that one who is unable to understand the duty to tell the truth may still present evidence that a trier of fact could use to support a judgment. It also requires exclusion of a witness whose expressions cannot be understood by the trier of fact, thereby insuring that leading questions do not serve to put words in an uncommunicative witness's mouth that may not accurately express the knowledge possessed by the witness.

Like former Alaska R. Civ. P. 43(g) (1), Rule 601 has no provision resembling a Dead Man's Act.

Rule 602. Lack of Personal Knowledge.

Rule 602 copies Federal Rule 602, stating the uncontroversial requirement that unless a witness is an expert, in which case he is subject to the provisions of Rule 703, discussed infra, a witness must have personal knowledge of the matters about which he testifies. The fact that new Rule 701 allows a lay witness to testify in opinion form does not undercut the requirement of personal knowledge.

"[T]he rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact" is a "most pervasive manifestation" of the common law insistence upon "the most reliable sources of information." McCormick (2d ed.) § 10, at 19. These foundation requirements may, of course, be furnished by the testimony of the witness himself; hence personal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception. 2 Wigmore § 650. As long as there is some evidence that the witness has personal knowledge, the court must let the jury decide whether or not the witness is really knowledgeable. If the jury believes that the witness has no personal knowledge, it will disregard his testimony. The court may reject testimony of a witness if it finds that no trier of fact could reasonably believe that the witness has personal knowledge of the matter. The court may receive the testimony conditionally, subject to evidence of personal knowledge being later supplied in the course of trial. Rule 602 is in fact a specialized application of Rule 104(b) on conditional relevancy.

This rule does not govern the situation of a witness who testifies to a hearsay statement as such, if he has personal knowledge of the making of the statement. Rules 801 and 805 would be applicable. This would, however, prevent him from testifying to the subject matter of the hearsay statement, as he has no personal knowledge of it.

> If a police officer, for example, testifies that the defendant confessed to murdering a spouse, the evidence is admissible, assuming that the confession is voluntary of course, even though the officer is not personally knowledgeable about the murder. The officer is saying in effect: "Defendant claimed responsibility for the murder." He has personal knowledge of what the defendant said. The officer cannot say "Defendant committed the murder," since he does not know this to be true. He only has personal knowledge of what he heard.

K. Redden & S. Saltzburg, Federal Rules of Evidence Manual 245 (2d ed. 1977).

The reference to Rule 703 is designed to avoid any question of conflict between the present rule and the provisions of that rule allowing an expert to express opinions based on facts of which he does not have personal knowledge.

Nebraska, New Mexico and Maine have adopted Federal Rule 602 verbatim also.

Rule 603. Oath or Affirmation.

Rule 601 requires that a witness be capable of understanding the duty to tell the truth. This rule requires the witness to express a willingness to undertake that duty before testifying. The purpose behind requiring an oath or affirmation is to ensure that every witness gives accurate and honest testimony.

In earlier times the purpose of the oath, to deter false testimony, became overshadowed by a second use: to exclude qualified witnesses who were not of "proper" religious persuasions and who, therefore, were morally incapable of truthtelling. However,

> It came gradually to be perceived that the use of the oath, not to increase testimonial efficiency, but to exclude qualified witnesses, was not only an abuse of its true principle, but also a practical injustice to suitors who needed such testimony. This injustice is clearly enough seen today; but its perception was naturally slow in coming so long as in the community at large the profession of belief in deism or atheism was associated closely with the notion of moral defects.

Wigmore § 1827, at 414.

This rule permits affirmation by a witness as an alternative to swearing an oath. This alternative was provided for in Alaska R. Civ. P. 43(d), superseded by this rule, and has been generally recognized throughout the United States. *See* Uniform Rule 18 (1953); Kansas Rule 60-418; New Jersey Rule 18; Nebraska Rule 27-603; Maine Rule 603 for similar provisions. By permitting affirmation as well as an oath, many of the difficulties faced by certain religious or other sects should be alleviated. Witnesses should not be barred from testifying because of their religion or the lack of it.

Rule 604. Interpreters.

This rule builds upon former Rule 43(g) (2) of the Alaska Rules of Civil Procedure which provides that when a witness does not understand and speak the English language, an interpreter shall be sworn to interpret for him. The interpreter must be qualified and sworn like any other expert witness.

In both civil and criminal cases the party offering the witness with the language problem generally will have to supply an interpreter and pay the interpreter's fee. Presumably, an indigent criminal defendant may compel the government to pay such a fee. In civil cases the trial court has the power under Rule 706 to appoint an interpreter, to assess the fee against one or more parties, or to provide for payment of the fee from funds available to the court.

Appointment of an interpreter for the indigent defendant is probably constitutionally required if the defendant's understanding of the proceedings against him depends upon it. A handicapped person (deaf, mute, or having a speech impairment) has as much of a right to an interpreter as a person speaking only a foreign language.

Only the interpreter's oath differs from procedure followed with other witnesses: the interpreter swears or affirms that he will make a true translation. *See, e.g.*, the model interpreter's oath, Chapter 37, XIII, Magistrate's Handbook.

Rule 605. Competency of Judge as Witness.

This rule eliminates the possibility that a judge who is presiding at a trial may be called to testify at the same trial. There are two concerns underlying this provision. (1) Someone must rule on objections while the judge is testifying. (2) The jury may favor the side with whom the judge is identified.

The first concern is largely a pragmatic one focusing on the procedural questions that would be likely to arise when the judge abandons the bench for the witness stand.

The second concern involves the potential prejudice to the party against whom the presiding judge testifies in that the jury may believe that the judge is aligned with the party helped by his testimony. The possibility that the jury may perceive partiality on the part of a judge is of sufficient magnitude to prohibit any judicial comment on the evidence. The possibility of unfairness when the judge is a witness also is sufficient to require a broad rule to control behavior. *See* Report of the Special Committee on the Propriety of Judges Appearing as Witnesses, 36 A.B.A.J. 630 (1950); Annot., 157 A.L.R. 311 (1945).

Nothing in this rule prevents a judge from testifying at a trial or proceeding at which he is not the presiding judge. For example, the trial judge is sometimes called to testify about the events of an earlier trial in a habeas corpus proceeding. This is especially necessary where the attack on the conviction comes in the form of an attack on the actions or motives of the trial judge. The danger of prejudice largely disappears where a trial judge testifies at a collateral proceeding since another jurist presides.

The second sentence of the rule indicates the importance of this incompetency rule. No objection need be made in order to preserve the point. In part, this stems from the belief that an immediate objection raised against the trial judge who decides

to testify may prejudice the objecting party's chances of obtaining a fair trial. This follows New Jersey's Rule 42 rather than Uniform Rule 42 as promulgated in 1953, which prevented a judge from simultaneously testifying and presiding only if a party objected. The wisdom of disqualifying the presiding judge is so apparent, the likelihood of inadvertent judicial error is so low, and the dilemma facing the attorney who would like to object to testimony by the presiding officer is so real, that no violations of this rule will be tolerated.

Rule 606. Competency of Juror as Witness.

(a) **At the Trial.** At common law a juror otherwise qualified as a witness was not rendered incompetent because of his position on the jury although there is a conflict of authority as to whether a juror may remain on the jury after testifying. Uniform Rule 43 (1953) resolved the dispute by prohibiting testimony of a juror altogether. This rule, like the Federal Rule after which it is modeled, follows the lead of the Uniform Rule and adopts the view that participation in a trial as a witness compromises the impartiality of a juror sitting as factfinder in that trial. This view is very similar to the position articulated in Rule 605, which bars a trial judge from testifying in a trial in which he presides.

The second sentence of subdivision (a) departs from Federal Rule 606 which provides that should a juror be called to testify, the opposing party shall be afforded an opportunity to object out of the hearing of the jury. This is very different from Federal Rule 605 which provides that when a judge is called as a witness, no objection is needed to preserve a claim of error. The Advisory Committee's Note to Federal Rule 606 distinguishes the two rules on the ground that when a juror is called to testify, the judge is not so involved as to call for departure from the usual principles requiring an objection to be made. Alaska Rule 606 rejects this distinction and recognizes that any objection to the competency of the factfinder called to testify might jeopardize the integrity of the factfinding process. Under the Federal Rule, only after the witness' name is called is the objection raised. The other jurors may suspect that if the witness does not testify it is because counsel has objected. Jurors are less likely to be able to understand why they cannot testify than are judges: this rule is designed to eliminate the need for jury speculation. If voir dire is handled carefully, counsel should be alerted to situations in which a potential juror could develop into a witness later in the trial and counsel should be able to disqualify such potential jurors. There is no reason to expect that this rule will be unduly burdensome for trial lawyers and there is no need to tolerate any possibility that the integrity of the factfinders will be compromised.

(b) **Inquiry Into Validity of Verdict on Indictment.** Generally there has been agreement among common law jurisdictions that the mental operations and the emotional reactions of jurors during the deliberative process should not be the subject of later inquiry. There has been substantial disagreement as to whether a juror should be able to impeach a verdict in which he participated by testifying about other matters. *See* 8 Wigmore §§ 2352, 2353, 2354. This rule, like the Federal Rule after which it is modeled, limits impeachment of jury verdicts to inquiries about extraneous prejudicial information and outside influences which may have been improperly brought to bear upon any juror.

The policy reasons underlying the exclusion of jurors' affidavits or testimony impeaching verdicts include protection of jurors against annoyance or embarrassment, freedom of deliberation, and finality of verdicts. Allowing inquiry into the mental operations and emotional reactions of jurors in reaching a given verdict would invite constant review as a result of tampering and harassment. Moreover, even without pressure by counsel or litigants, many jurors are likely to have second thoughts about their verdicts after they are excused by the Court and the influence of fellow jurors dissipates. Such second thoughts might cause jurors to question their verdicts if permitted to do so. Yet these policy reasons are not promoted by a blanket prohibition against inquiry into irregularities which occur in the jury process when such irregularities result from prejudicial extraneous information or influences injected into or brought to bear upon the deliberative process. If the judicial system is operating properly, such inquiries should rarely be necessary. Failure to examine the relatively few cases that may arise would permit injustices to go uncorrected without reason.

The line between what is the proper subject of subsequent inquiry and what is to be insulated from review is a fine one. The federal decisions have sought to protect the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and any other features of the process. Alaska cases draw similar lines between permissible and impermissible inquiry. Like most federal courts before the adoption of the Federal Rules, Alaska law generally provides that a juror cannot impeach a verdict by testimony or affidavit, but it recognizes exceptions.

> Exceptions to the general rule have been made and it has been held that the type of misconduct which may impeach a verdict is fraud, bribery, forcible coercion or any other obstruction of justice. Whether the verdict should be set aside and a new trial ordered rests in the sound discretion of the trial judge, but generally the verdict should stand unless the evidence clearly establishes a serious violation of the juror's duty and deprives a party of a fair trial.

West v. State, 409 P.2d 847, 852 (Alaska 1966). The effect of this approach is to restrict inquiry into the deliberations of the jury and to permit inquiry into extraneous matters.

This rule reflects the same spirit as the decided cases. For example, exposure of some jurors in the jury room to a newspaper article concerning the case has been viewed as an exception to the general rule against impeachment. *See Watson v. State*, 413 P.2d 22, 24 (Alaska 1966). This falls within the contemplated interpretation of the language of this rule as "extraneous prejudicial information."

This rule does not purport to set out the substantive grounds requiring verdicts to be set aside for irregularity. It does attempt to define the guidelines concerning the competency of jurors to testify as to those grounds. Can a verdict be impeached if a juror has falsely denied bias or prejudice during voir dire? *See Poulin v. Zartman*, 542 P.2d 251, 264 (Alaska 1975). Hard cases remain and must be decided with policies underlying the rule in mind: to insulate the deliberative process and to promote finality of verdicts while not foreclosing testimony as to the extrinsic forces erroneously injected into the process.

Rule 607. Who May Impeach or Support.

(a) Rule 607 follows both Federal Rule 607 and existing Alaska authorities in rejecting the wooden common law rule that a party may not impeach his own witness. *See Beavers v. State*, 492 P.2d 88, 91 (Alaska 1971), *Johnston v. State*, 489 P.2d 134, 137 (Alaska 1971), and *Hobbs v. State*, 359 P.2d 956, 966 (Alaska 1961). Rule 43(g)(11) [a] of the Alaska Rules of Civil Procedure, which this rule supersedes, provided that a party could impeach his own witness with evidence of a prior inconsistent statement. Rule 26(a) of the Alaska Rules of Criminal Procedure extended this provision to criminal trials. A similar provision is Civil Rule 32(a) (1) allowing any party to impeach a witness by means of his deposition. Thus, Alaska's policy toward impeachment is basically unchanged by Rule 607.

Rule 607 recognizes that a party should not be held to vouch for the trustworthiness of his witnesses since he rarely has a free choice in selecting them, and further recognizes that to deny the right to impeach is to leave the party at the mercy of the witness and the adversary.

> If the truth lies on the side of the calling party, but the witness's character is bad, the witness may be attacked by the adversary if he tells the truth; but if the witness tells a lie, the adversary will not attack him, and the calling party, under the rule [forbidding impeachment] cannot. Certainly it seems that if the witness has been bribed to change his story, the calling party should be allowed to disclose this fact to the court.

McCormick (2d ed.) § 38, at 75.

Instead of classifying a witness as belonging to one party, Rule 607 "makes the witness the witness of the court as a channel through which to get at the truth." Comment to Rule 20, Uniform Rules of Evidence, Vol. 9A ULA 607 (1965).

Nothing in this or any other rule specifically bars impeachment by presenting extrinsic evidence on a collateral issue. The word "collateral" has so many meanings that it tends to be confusing. Rule 403, in providing that evidence may be excluded if the time required for its presentation is not warranted by its probative value, will permit exclusion of impeachment evidence that sheds little, if any, light on the credibility of a particular witness in a particular case.

See Maine Rule of Evidence 607, Nebraska Rule 27-607, Nevada Rule 50.075, and New Mexico Rule 20-4-607 for provisions similar to subdivision (a).

(b) Subdivision (b) recognizes generally the right of a party to rehabilitate a witness whose credibility has been attacked.

Support evidence is not permitted until credibility has been attacked; its function in the adversary system is to serve as a counterblow, and such a blow is not to be struck until an opposing party takes the offensive.

A second basic limitation imposed by the requirement that support evidence "meet an attack" on credibility is that the support evidence respond to the impeaching fact. "The rehabilitating facts must meet a particular method of impeachment with relative directness. The wall, attacked at one point, may not be fortified at another and distinct point." McCormick (2d. ed.) § 49, at 103. This by no means meant to say that impeachment by showing a conviction of a crime, for example, could be responded to only by evidence that the witness was not guilty of that crime. What is meant is that the insinuation to which the attack is directed must be addressed by the support evidence. For example, the ground for disbelieving a witness afforded by prior conviction of a crime is the suggestion of a general readiness to do evil; evidence of the witness' reputation for veracity would generally be relevant to meet this attack, as noted by Justice Holmes in *Gerts v. Fitchburg R. Co.*, 137 Mass. 77 (1884). Whether a particular type of support evidence is relevant to a particular mode of impeachment cannot be delineated by an inflexible rule; decisions must be left to the discretion of the court for case-by-case consideration. Such decisions are extremely fact-specific, depending, *inter alia* on the vehemence of the attack, the nature of the impeaching evidence, and the nature of the support evidence proffered.

Rule 608. Evidence of Character and Conduct of Witness.

(a) **Opinion and Reputation Evidence of Character.** Rule 404(a) states the general proposition that character evidence is not admissible for the purpose of proving that a person acted in conformity therewith. That rule is subject to several exceptions, one of which is relevant here: character evidence may be admissible if it bears upon the credibility of a witness. This rule develops that exception.

In accordance with the bulk of judicial authority, the inquiry is strictly limited to character for truth and veracity rather than allowing evidence as to character generally. The result is to sharpen relevancy, to reduce surprise and confusion, and to make the lot of the witness somewhat less unattractive. *See* McCormick (2d ed.) § 44 and the Reporter's Comment accompanying Rule 404(a). "Attacking a witness' character is often but a feeble and ineffective contribution to the proof of the issue; and its drawbacks appear in their most emphasized form where the broader method of attack is allowed." 3 Wigmore § 923, at 728.

Character evidence in support of credibility is admissible only after the witness' character has first been attacked. *See* Rule 607(b). This is also in accord with the common law rule. McCormick (2d ed.) § 49, at 105; 4 Wigmore § 1104. Opinion or reputation testimony to the effect that the witness is untruthful specifically qualifies as an attack as would evidence of conviction of crime. Whether character evidence should be admitted to meet other forms of attack is, as the Reporter's Comment to Rule 607(b) suggests, best left to the discretion of the trial judge who has Rule 403 for guidance.

(b) **Specific Instances of Conduct.** This rule allows inquiry into specific acts of conduct of the primary witness in order to probe the knowledge of a character witness on cross-examination. The conduct inquired into must be reasonably calculated to reflect on the primary witness' truth-telling capacity. A sound exercise of judicial discretion is required here to ensure that cross-examination focuses on credibility, not on the general character of the witness. Determining whether a character witness' opinion or reputation testimony is based on knowledge of the primary witness' prior conduct may be very influential in assessing the credibility of the testimony. The leading case on the general issue of testing

reputation or character witnesses for knowledge of specific acts is *Michelson v. United States*, 335 U.S. 469, 93 L.Ed. 168 (1948).

Rule 607(a) permits either party to impeach a witness. This rule, however, limits inquiry into specific acts when testing the knowledge of character witnesses to cross-examination. The rationale behind the limitation is to bar the direct examiner from the inquiry when "impeachment" of one's own witness becomes a disguise for using specific acts to prove character rather than the required reputation or opinion evidence. Because a party does have a choice as to character witnesses the need to impeach such witness by inquiring into specific acts should not arise. This rule follows Alaska R. Civ. P. 43 (g) (11) [a], superseded by this rule.

The second sentence of this subdivision bars the use of evidence of specific incidents to impeach or support the credibility of a witness, unless otherwise provided in a rule of court or legislative enactment. *See, e.g.*, Rule 609 (prior conviction), Rule 613 (inconsistent statement and bias). This follows Alaska R. Civ. P. 43(g) (11), superseded by this rule, and a trend in some jurisdictions to prohibit impeachment by "bad acts" other than criminal convictions. This is consistent with Rule 405 which forecloses use of evidence of specific incidents as proof of character unless character is an issue in the case. *See also* Uniform Rule 22(d); Kansas Rule 60-422, for similar provisions.

This subdivision departs from the Federal Rule which permits evidence of specific instances of conduct, if probative of the trait of truthfulness or untruthfulness, to support or attack a witness' credibility. The Federal Rule was adopted with little debate or attention although it expresses what was previously a minority view among the federal circuits. By eliminating this type of evidence, the need to protect witnesses against waiving their privilege against self-incrimination when examined with respect to matters relating to credibility is also eliminated.

(c) **Admissibility.** Because cross-examination concerning what a witness has heard or knows can be highly prejudicial, this subdivision assures that before unfair questions are asked, the trial judge is able to screen them out. The balance here is the same as under Rule 403.

Rule 609. Impeachment by Evidence of Conviction of Crime.

(a) **General Rule.** In every common law jurisdiction some prior criminal convictions may be used to impeach the credibility of a witness. This subdivision, identical to Alaska R. Crim. P. 26(f) (1) which it supersedes, allows prior convictions to be used for impeachment purposes only if the crime involved dishonesty or false statement. Favored by the House of Representatives, this limitation was rejected by the Senate. The Federal Rule reflects the Senate view; it permits all impeachment that this subdivision would permit plus impeachment on the basis of any other conviction, if the crime was punishable by death or imprisonment in excess of one year in the jurisdiction in which the witness was convicted and is more probative than prejudicial.

Limiting admissibility to convictions involving crimes such as perjury, fraud, forgery, false statement, and other crimes in the nature of crimen falsi sharpens the inquiry and ensures that prior convictions are not used as evidence of the general character of the witness in contravention of Rule 404 and 405, but are used properly, *i.e.*, to impeach credibility. *See* Uniform Rule 21 for a similar provision.

This rule does not govern the competency of witnesses or operate to disqualify anyone on the basis of prior convictions.

Federal courts have divided on the question whether larceny offenses qualify as crimes involving dishonesty or false statements. *In Lowell v. State*, 574 P.2d 1281 (Alaska 1978), the supreme court held that "larceny and embezzlement…disclose the kind of dishonesty and unreliability which bear upon the veracity of persons perpetrating those crimes." (Footnote omitted.) It must be remembered, however, that the trial judge must strike a balance between probative value and prejudicial effect. Hence, the fact that the trial judge may admit larceny convictions for impeachment purposes does not mean such convictions must be admitted.

One federal court noted that

> [e]ven the courts that reject the view that stealing, without more, involves "dishonesty" that bears upon a witness's veracity recognize that modern theft statutes may encompass criminal conduct that does not fall within the gambit of Rule 609(a) (2) [federal equivalent of Alaska Rule 609(a) (2)], for a theft conviction may well be based on fraudulent or deceitful conduct that would previously have been prosecuted as larceny by trick, embezzlement, or the taking of money by false pretenses, etc. Accordingly, these courts have adopted the rule that, when the statutory offense of which the witness was convicted does not require proof of fraud or deceit as an essential element of the crime, a prior conviction may be admitted under Rule 609(a) (2) [federal equivalent of Alaska Rule 609(a)] if the proponent of the evidence bears the burden of showing that the conviction "rested on facts warranting the dishonesty or false statement description."

United States v. Papia, 560 F.2d 827 (7th Cir. 1977). *Accord, United States v. Hayes*, 553 F.2d 824 (2d Cir. 1977).

Presumably, a party who successfully bears the burden of showing that a crime, which on its face would not indicate dishonesty or false statement, involved the deceit envisioned by the rule will be able to qualify a prior conviction for impeachment use.

In *Lowell v. State, supra*, the supreme court rejected the argument that any use of prior convictions to impeach a criminal defendant is fundamentally unfair. But the court emphasized the limited nature of the impeachment evidence permitted by the predecessor Criminal Rule and the balancing test included in the rule in concluding that it was fair and that it did not impermissibly burden the defendant's right to testify. The new rule should receive the same approbation.

(b) **Time Limit.** The five year time limit set forth here is an attempt to balance competing concerns: concern, on the one hand, for both the privacy of witnesses and the acute danger of prejudice when a party-witness is impeached by a prior conviction, and, on the other hand, the need for the trier of fact to know whether a witness previously has demonstrated dishonesty in order to fairly assess the credibility of the

witness. An assumption underlying the time limit is that older convictions are less probative than more recent ones in determining the likelihood that a witness will tell the truth. The rule specifically provides that convictions that are more than five years old are stale and generally are not very probative of the credibility of a witness. While any time limit is arbitrary, a five year limit was recognized by Alaska R. Crim. P. 26(f) (2)), superseded by this rule.

> We assume that the ten year limitation of the proposed Federal Rules of Evidence…is not of constitutional import and that Alaska's five year limitation is constitutionally valid. In particular cases, of course, the trial courts may see fit to relax the prohibition where the accused's right of confrontation so requires.

Gonzales v. State, 521 P.2d 512, 515 n.5 (Alaska 1974).

The second sentence of this subdivision provides the trial judge with the necessary discretion to ignore the time limit in the interest of justice. There may be cases, for example, in which the accused's right of confrontation will override the five year limitation. Except in rare cases where limiting impeachment as to prior convictions threatens to deny a party a fair trial or to infringe upon a constitutionally protected right, the time limit should be respected.

(c) **Admissibility.** As noted earlier, evidence of prior convictions may be especially prejudicial when a party takes the stand and is impeached. Prejudice is also likely when a witness who is closely identified with a party is impeached by prior convictions. In these and other cases when there is a real danger of prejudice, the court shall weigh the danger against the probative value of the evidence, and if the danger is greater, shall rule the evidence inadmissible. To permit claims of prejudice to be raised before the jury learns of a conviction, the judge shall be advised of the existence of the conviction before it is used as impeachment evidence.

(d) **Effect of Pardon, Annulment, or Certificate of Rehabilitation.** At common law, the effect of a pardon, whether conditional or unconditional, generally is not to preclude the use of the conviction for the purpose of impeaching the credibility of the witness who was convicted and pardoned. *See* Annot., 30 A.L.R.2d 893 (1953). Although pardons may reinstate many of the civil disabilities accompanying a conviction, they do not presuppose rehabilitation or innocence. This subdivision renders evidence of a conviction that has been the subject of a pardon, annulment, certificate of rehabilitation, or an equivalent procedure inadmissible if accompanied by a showing of innocence or rehabilitation. Absent specific procedures entailing findings as to the innocence or rehabilitation of pardoned witnesses, pardons pursuant to the authority conferred upon the governor by Alaska Constitution, Article 3, Section 21 and AS 33.20.070 are not prima facie evidence of innocence or rehabilitation. The burden of demonstrating the rationale for a pardon or other procedure in a given case is on the party relying upon the pardon or other procedure to prevent impeachment.

(e) **Juvenile Adjudications.** Most jurisdictions are in accord that evidence of juvenile adjudications is generally inadmissible. *See* Annot., 63 A.L.R.3d 1112 (1975). The state has an interest in preserving the confidentiality of juvenile adjudications of delinquency. *See* Alaska Children's Rule 23 and AS 47.10.080. Some of the policy considerations are akin to those underlying the exclusion of adult convictions after the issuance of a certificate of rehabilitation.

This subdivision, based on Federal Rule 609, recognizes that in certain cases the strategic importance of a witness may be so great and the prior adjudication so probative on the issue of credibility that the interests of justice require admissibility of the adjudication.

The United States Supreme Court, in *Davis v. Alaska*, 415 U.S. 308, 39 L.Ed.2d 347 (1974), ruled that the state's interest in preserving the confidentiality of juvenile adjudications had to give way to the defendant's interest in introducing evidence of the prosecution's key witness' probationary status to show bias. The sixth amendment's confrontation clause requires that the defendant be given the chance to cross-examine witnesses in a meaningful way. Although evidence of bias is especially compelling, there may be other cases where the Constitution requires that a defendant be able to impeach the credibility of a key witness by introducing evidence of prior juvenile adjudications. The second sentence of this subdivision is written with those cases in mind. It also recognizes the possibility that there may be civil cases in which evidence of a prior juvenile adjudication may be required in order to prevent grave injustice.

(f) **Pendency of Appeal.** Where an appeal from a conviction offered to impeach a witness is pending, the trial judge faces a dilemma: if the conviction is not admitted the jury may believe a witness whose credibility would be suspect if the conviction were made known, and if the conviction is admitted but is reversed on appeal a new trial may be necessary. The more important a witness is to the case, the more difficult the dilemma. One escape is to postpone the trial of a case until the appeal of the prior conviction is determined. When this is not practicable, the court must focus on the probative value of the prior conviction, the likely prejudicial effect of the conviction, alternative impeachment devices that may be available, and perhaps even on the likelihood that the prior conviction will be reversed.

Smith v. Beavers, 554 P.2d 1167 (Alaska 1976), makes clear that the same limitations apply to a direct examiner impeaching his own witness as to a cross-examiner.

Rule 610. Religious Beliefs or Opinions.

Rule 610 copies Federal Rule 610 in providing that a witness's religious beliefs or lack of them may not be used to attack or support his credibility. While this sort of evidence may bear some relevance to credibility it is not highly probative and often is capable of creating unfair jury bias for or against the witness. Moreover, it is highly personal information and should not be inquired into without a good reason for believing that it will aid in accurate factfinding.

As the Advisory Committee on the Federal Rules observed, while the rule forecloses inquiry into the religious beliefs or opinions of a witness for the purpose of showing that his character for truthfulness is affected by their nature, an inquiry for the purpose of showing interest or bias because of them is not within the prohibition. Thus disclosure of affiliation with a church which is a party to the litigation would be allowable under the rule. *Cf. Tucker v. Reil*, 77 P.2d 202 (Ariz. 1938).

Maine, Nebraska and New Mexico have identical provisions in their rules of evidence.

Rule 611. Mode and Order of Interrogation and Presentation.

(a) **Control by Court.** Subdivision (a) mirrors Federal Rule 611(a). The Advisory Committee's Note on that subdivision comprises the bulk of this comment.

Spelling out detailed rules to govern the mode and order of interrogating witnesses and presenting evidence is neither desirable nor feasible. The ultimate responsibility for the effective working of the adversary system rests with the judge. The rule sets forth the objectives which he should seek to attain.

Item (1) restates in broad terms the power and obligation of the judge as developed under common law principles. It covers such concerns as whether testimony shall be in the form of a free narrative or responses to specific questions, McCormick (2d ed.) § 5, the order of calling witnesses and presenting evidence, 6 Wigmore § 1867, the use of demonstrative evidence, McCormick (2d ed.) § 179, and the many other questions arising during the course of a trial which can be solved only by the judge's common sense and fairness in view of the particular circumstances.

Item (2) is addressed to avoidance of needless consumption of time, a matter of daily concern in the disposition of cases. A companion piece is found in the discretion vested in the judge to exclude evidence as a waste of time in Rule 403.

Item (3) calls for a judgment under the particular circumstances whether interrogation tactics entail harassment or undue embarrassment. Pertinent circumstances include the importance of the testimony, the nature of the inquiry, its relevance to credibility, waste of time, and confusion. McCormick, (2d ed.) § 42.

(b) **Scope of Cross-Examination.** Alaska authorities are in agreement with the Federal Rule limiting cross-examination to matters testified to on direct examination, along with matters concerning the credibility of the witness. In a civil case the main import of this rule is on the order of presentation of the evidence, since counsel may later, as part of his own case-in-chief, recall a witness who has previously testified and ask about matters not touched upon by his adversary. In criminal cases the privilege against self-incrimination and its policies are a special problem.

The rule of limited cross-examination promotes orderly presentation of the case and therefore contributes to jury comprehension of the issues. When comprehension would be enhanced by allowing the cross-examiner to explore matters not touched upon on direct examination, the trial judge may allow departure from the traditional order of presentation; however, any inquires beyond the scope of the direct must be non-leading questions. If no such limitations were imposed on the form of cross-examination, counsel might be tempted to question the witness on matters that properly belong in his case-in-chief, solely to take advantage of the ability to ask leading questions.

Rule 611(b)'s provision that the judge may in the interests of justice permit inquiry into new matters on cross-examination is designed for those situations in which the result otherwise would be confusion, complication, or protraction of the case, not as a matter of rule but as demonstrable in the actual development of the particular case.

(c) **Leading Questions.** Subdivision (c) conforms to the traditional view that the suggestive powers of the leading questions are as a general proposition undesirable. The rule recognizes the traditional exceptions to this proposition. Undisputed preliminary matters may be speedily established by leading questions. The witness whose memory has failed may be assisted by them. In the case of the witness having difficulty communicating, either because of immaturity or a disability, leading questions can be beneficial in eliciting cogent testimony. In the case of the witness who is hostile, unwilling or biased, leading questions may be necessary to get at the truth. The phrase of the rule, "witness identified with" an adverse party, is designed to enlarge the category of witnesses treated as hostile, subject to the discretion of the court.

Closely related to items (2) and (3) is item (4), which was added in response to Rule 607(a) allowing a party to impeach his own witness. Item (4) recognizes that leading questions may be a permissible method of impeaching a witness's testimony. Of course the court should be vigilant in confining the use of leading questions to true attempts to impeach. This is most easily accomplished by permitting leading questions only when they are part of an attack on testimony previously elicited from the witness by the direct examiner.

The rule presumes that leading questions are a proper part of cross-examination. The purpose of the qualification "ordinarily" in this subdivision is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the "cross-examination" of a party by his own counsel after being called by the opponent (savoring more of redirect) or of an insured defendant who proves to be friendly to the plaintiff.

Rule 612. Writing Used to Refresh Memory.

(a) **While Testifying.** Rule 612 follows Federal Rule 612 in acknowledging the long-established common law practice of allowing parties to refresh the recollection of a witness by showing the witness a writing or other object. The rule applies to all such materials. The term "objects" is intended to cover all unwritten memory aids—*e.g.*, photographs or tape recordings.

Alaska Rule of Civil Procedure 43(g) (9), superseded by this rule, allowed materials to be used to refresh the recollection of a witness on the stand only if they were written by the witness himself or under his direction at a time when the fact was fresh in his memory. Presumably this rule was thought to guard against the power of suggestion. But because it addressed only activities taking place in court, saying nothing about the more prevalent and potentially more harmful practice of pre-trial preparation of witnesses, Rule 43(g) (9) could not provide meaningful protection in this regard. It was effective only in preventing trial judges and juries from benefiting from the firsthand knowledge of witnesses who might readily have their memories jogged by a quick reading of a news article or other writing.

Rule 612 follows the prevailing view as reflected by its federal counterpart; it rejects limitations on the kinds of writings or objects that may be shown to witnesses to refresh recollection. Adequate safeguards against undue influence on a witness are afforded by: (1) Rule 602, which requires a witness to have personal knowledge of the facts; (2) the court's power to determine that a witness is reading a prior statement, rather than testifying from present memory; and (3) the right of an impeaching party to demand inspection of the material.

The right to inspect material used at trial enables the impeaching party to object to its use if there are grounds to do so and to refer to it during his examination. This party can thereby probe any discrepancies between the testimony and the material and test the witness' assertion that his memory has become clear.

Thus, the rule now makes it clear that anything can be used to refresh the memory of a witness. The foundation requirements for past recollection recorded, an exception to the hearsay rule found under Rule 803 are *not* relevant under this rule.

Rule 612(a) uses the phrase "seeking to impeach the witness" to define parties who may benefit from the rule's protections; the Federal Rule uses the term "adverse" parties. Because any party may impeach any witness under Rule 607, a party may need to examine his own witness concerning reliance on memory-refreshing devices. This rule permits such an examination, although the trial judge must ensure that a good faith effort to impeach is being made, not an attempt to offer prior recorded recollection that does not otherwise qualify as an exception to the hearsay rule. The same phrase "seeking to impeach the witness" is used in subdivision (b) also.

(b) **Before Testifying.** While almost the same advantages are afforded by inspection of materials used before trial as by inspection of materials used at trial, traditionally there has been no right to inspect the former. A fear has persisted that a right to inspect such material could easily be used as a pretext for wholesale exploration of an opposing party's files. Rule 612(b) is carefully worded to protect the right to inspect from abuse. The purpose of the phrase "for the purpose of testifying" is to limit counsel's access to his opponent's files to those writings which may fairly be said in fact to have an impact upon the testimony of the witness. Moreover, the right to inspect is conditional upon a judicial finding that it is required to do justice in the particular situation.

If production of the writing or object is impracticable, subdivision (b) provides that the court may order instead that the writing or object be made available for inspection. The court may, of course, decline to issue such an order if justice does not require it; the rule does not require any one approach for all cases.

(c) **Claims of Privilege or Irrelevance.** This section outlines the proper procedure for handling material used to refresh recollection that is to be made available to a party for impeachment use. The procedure is similar to that prescribed by Rule 106 for related writings: first a ruling on any claim of privilege is made, then an examination of the material in chambers follows for the purpose of excising irrelevant material.

(d) **Failure to Produce.** Sanctions for non-production are left generally to the discretion of the court. Rule 16 of the Rules of Criminal Procedure and Rule 37 of the Rules of Civil Procedure suggest appropriate sanctions. But the rule recognizes both the sensitive nature of some government files, especially those used in criminal cases, and the importance in criminal litigation of treating the defendant fairly, *e.g.,* by making all potentially exculpatory evidence available to the defendant. Unlike the Federal Rule, Alaska Rule 612 allows the court in its discretion to dismiss a prosecution for failure to comply with this rule. In some situations striking the testimony may be woefully inadequate. For example, if the defense calls a government officer or agent or witness associated with the government, who has personal knowledge of the facts of a case, to obtain evidence helpful to the defense, counsel for the defense may wish to attack the witness by showing that he is parroting information provided by the prosecutor. A successful attack might well be followed by the elicitation of facts helpful to the defense. If the prosecutor should refuse to disclose writings or objects used to refresh the witness' recollection despite a finding that disclosure is required in the interests of justice, dismissal may be the only appropriate remedy. Striking the testimony of the witness may deny the defendant helpful evidence, and declaring a mistrial will not help the defendant get the possibly exculpatory material. Moreover, unnecessary granting of a mistrial may violate the double jeopardy clause of the United States Constitution. *See United States v. Jorn*, 400 U.S. 470, 27 L.Ed.2d 543 (1971). Consequently, Rule 612 allows dismissal of the prosecution as a sanction for refusal to comply with the order of the court if the court determines that justice requires dismissal. Dismissal is, however, a drastic remedy and ought not be invoked until all alternatives have been assessed and deemed insufficient to remedy harm occasioned by the refusal to comply. Where the government's refusal is coupled with an effort to seek and obtain interlocutory relief by way of a petition for review or otherwise, dismissal ought not be entered without permitting the government an opportunity to exhaust that avenue of relief.

Rule 613. Prior Inconsistent Statements, Bias and Interest of Witnesses.

(a) **General Rule.** At common law, the traditional ways of impeaching witnesses include the introduction of evidence of prior inconsistent statements and evidence to prove bias or interest. Although Federal Rule 613 governs the manner in which prior inconsistent statements must be offered in federal courts, the Federal Rules never explicitly state that inconsistent statements are admissible and never mention bias or interest as impeachment tools. Alaska Rule 613 specifically states that evidence of prior inconsistent statements and evidence of bias or interest are permissible ways of impeaching a witness. This subdivision governs methods of impeachment and is not intended to alter the rule in *Beavers v. State*, 492 P.2d 88 (Alaska 1971), allowing impeachment evidence to be considered as substantive evidence.

The right of the criminal defendant to probe a witness for evidence of bias or interest has been recognized by the Supreme Court as being essential to the right of confrontation guaranteed by the sixth amendment. *See Davis v. Alaska*, 415 U.S. 308, 39 L.Ed.2d 347 (1974). Alaska cases have noted that

the mere possibility of future criminal charges against a witness is sufficient to permit counsel wide latitude in probing the possibility of bias or interest.

> [G]reat liberality should be given defense counsel in cross-examination of a prosecution witness with respect to his motive for testifying. Cross-examination to show bias because of expectation of immunity from prosecution is one of the safeguards essential to a fair trial, and undue restriction in such cross-examination is reversible error without any need for a showing of prejudice.

R.L.R. v. State, 487 P.2d 27, 44 (Alaska 1971). *See also Evans v. State*, 550 P.2d 830, 836-40 (Alaska 1976), and the second appeal, 574 P.2d 24 (Alaska 1978).

(b) **Foundation Requirements.** This rule partially reinstates the foundation requirement necessary at common law as a precondition to the introduction of extrinsic evidence to prove prior inconsistent statements of bias or interest. *See generally* Ladd, Some Observations on Credibility: Impeachment of Witnesses, 52 Cornell L.Q. 239, 247 (1967). While fairness and efficiency generally are promoted by laying a foundation, this rule recognizes that at times the requirement must be modified or waived in the interests of justice.

Laying a foundation for impeachment by prior inconsistent statements generally requires asking the testifying witness to identify the statement after being reminded of its substance and to whom it was made, and either to admit having made the statement and explain the circumstances, or to deny it. *See* McCormick (2d ed.) § 37, at 72.

Federal Rule 613(b) greatly relaxes the rigid common law foundation requirement in an attempt to solve the following problems:

(1) the laying of a foundation may inadvertently have been overlooked;

(2) the impeaching statement may not have been discovered until later;

(3) premature disclosure may on occasion frustrate the effective impeachment of collusive witnesses.

Letter from Edward W. Cleary to Hon. William L. Hungate, May 8, 1973, in Supp. to Hearings Before the Subcommittee on Criminal Justice to the House Comm. on the Judiciary, 93rd Congress, 1st Sess., at 74-75 (1973).

Section (b)(1) of this rule alleviates these problems giving the trial judge the discretion to permit witnesses to be recalled for the purpose of laying a foundation when, (1) the failure to do so earlier was not intentional, as in the situation where discovery of the prior inconsistent statement was late; or (2) the failure to do so earlier was intentional, but for good cause: for example, when prematurely alerting collusive witnesses to evidence would work a substantial tactical disadvantage. Section (b)(1) also permits the trial judge to dispense with the foundation requirement altogether if the interests of justice would be served. The negligent omission of counsel to lay a foundation could be excused here if a barring of the evidence would lead to an unjust result.

Section (b)(2) eliminates the rule in *Queen Caroline's Case*, 2 B. & B. 284, 286-90, 129 Eng. Rep. 976 (1820), which required that the examiner show a witness a prior written statement before questioning him about it.

The rule requiring the writing to be shown allowed the witness to refresh his memory and thus protected the witness from the embarrassment of denying an inconsistent statement, only to be confronted with it in writing. It has been criticized as giving the witness too much opportunity to fabricate explanations of apparent inconsistencies. *See* Wigmore §§ 1259-1263; McCormick (2d ed.) § 28, at 55-57. Alaska R. Civ. P. 43(g) (11) [c], superseded by this rule, followed the Queen's Rule. This rule, however, anticipates that the foundation requirement shall provide the witness with a fair opportunity to refresh his memory with the prior statement without providing the witness with an unfair advantage over the impeaching party.

Subdivision (b) (2) provides that opposing counsel may see or learn of any statement used for impeachment purposes when it is actually used. Hence, the lawyer who believes that the cross-examiner is attempting to distort a prior statement or misuse it can ask the court to prevent improper tactics.

Rule 614. Calling and Examination of Witnesses by Court.

(a) **Calling by Court.** Rule 614 is in accord with the common law in providing that the court may call witnesses. While exercised more frequently in criminal than in civil cases, this power of the judge is well-established. McCormick (2d ed.) § 8, at 13-14; 9 Wigmore § 2484.

Just as it is proper for the court to ask questions in order to clear up confusion created by the parties (see subdivision (b)), the court may, on its own motion, call witnesses who may add facts that are helpful in the search for truth; the court is not entirely a prisoner of the parties' approach to a case. In the same spirit, Rule 706 provides that the court may appoint independent experts in civil or criminal litigation. In a trial before a jury, however, it is important for the court to refrain from suggesting its views on the merits of a case or on the credibility of a witness through its choice of witnesses. For recent appellate discussion of the appearance of impartiality required of the trial court, *see United States v. Karnes*, 531 F.2d 214 (4th Cir. 1976).

The court may also call witnesses at the suggestion of any party. At common law the most common reasons for a party to suggest that the court call a witness are, first, to avoid the rigid ban on impeachment of one's own witness, and, second, to avoid the rule limiting the use of leading questions in cross-examination, an especially annoying rule when dealing with an uncooperative witness. Since Alaska Rule 607 now allows impeachment of one's own witness, and Rule 611 allows the court discretion to permit the use of leading questions on direct examination, it is doubtful that future instances of the court calling witnesses at the suggestion of a party will be numerous. But the practice may still be useful on occasion, *e.g.*, where a witness is much more cooperative if summoned by the court than by a particular party, or where a party fears guilt by association in calling a witness.

(b) **Examination by Court.** The authority of the court to question witnesses is also well-established. McCormick (2d ed.) § 8, at 12-13; 3 Wigmore § 784. The court may interrogate

any witness, whether called by itself or by a party. In trials before a jury, however, the court's questioning should be cautiously guarded so as not to constitute an implied comment. The court should bear in mind its proper role and the limitations on that role; the court abuses its authority when it plays the part of the advocate. As the manner in which interrogation should be conducted and the proper extent of its exercise are not susceptible of formulation in a rule, their omission in this rule in no sense precludes courts of review from continuing to reverse for abuse.

(c) **Objections.** The provision relating to objections is designed to relieve counsel of the embarrassment attendant upon objecting to questions by the judge in the presence of the jury, while at the same time assuring that objections are made in apt time to afford the opportunity to take possible corrective measures. Compare the "automatic" objection feature of Rule 605 when the judge is called as a witness, and the similar feature of Rule 606 when a juror is called as a witness.

When the court calls witnesses and when it questions witnesses, regardless of who called them, the court easily can interfere with the proper workings of the adversary system and the court can threaten the independence of the jury. Thus, the powers conferred by this rule should be exercised with great care. Before utilizing these powers the court should be certain that the parties are incapable of acting to fully protect their interests. *See* Saltzburg, The Unnecessarily Expanding Role of the American Trial Judge, 64 Va. L. Rev. (1978).

Rule 615. Exclusion of Witnesses.

The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy and collusion. These are compelling reasons for exclusion in both criminal and civil trials. *See* 6 Wigmore §§ 1837-1838.

This rule, similar to both Alaska R. Civ. P. 43(g) (3), which it supersedes, and AS 09.20.180, differs in a few respects. First, it not only provides the court with the traditional power to order exclusion at the request of a party, but also provides that the court may order exclusion on its own motion. Secondly, it permits a party to request exclusion of any witness, not just a witness called by an adverse party. A witness called by a party may not be aligned with that party for all purposes, so that the party calling him may still have an interest in preventing him from hearing the testimony of other witnesses.

Federal Rule 615 makes exclusion upon request by a party a matter of right. Following the prevailing view, that expressed in AS 09.20.180, this rule permits the trial judge discretion in granting requests. The practical difference between the rules should be minimal, since there is rarely a good reason to deny a sequestration request; the procedure is simple and the possible benefit to be derived by a party is enormous. Inconsistent testimony as a result of sequestering witnesses gives rise to two possible inferences: (1) that an honest mistake was made, suggesting inaccuracy to the factfinder, or, (2) that collusion or perjury has taken place. Both of these inferences may greatly influence the trial. Although it is often difficult to assess the likelihood that sequestration will elicit inconsistent testimony that could not be elicited from witnesses who heard each other testify, the possibility exists in virtually every case. The most honest witness may shade testimony, perhaps only subconsciously, to make it fit the pattern established by other witnesses. Only in exceptional circumstances are there sufficient reasons for denying exclusion.

Several categories of persons are excepted from exclusion, by this rule. (1) Exclusion of persons who are parties would raise a serious sixth amendment confrontation problem in criminal trials and present a fundamental fairness question even in civil cases. Under accepted practice they are not subject to exclusion. 6 Wigmore § 1841. (2) As the equivalent of the right of a natural-person (party) to be present, a party which is not a natural person is entitled to have a representative present. Most of the cases have involved allowing a police officer who has been in charge of an investigation to remain in court despite the fact that he will be a witness. *See Dickens v. State*, 398 P.2d 1008 (Alaska 1965). *See also* California Evidence Code § 777. (3) The final category contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation. *See* 6 Wigmore § 1841, n.4. Whether the assistance of such a person is "essential" is something that the trial judge must decide by weighing the benefits of assistance to one party against the possible benefits of another party of excluding the person as a future witness.

To assure that the rule works as intended, under normal circumstances the court should instruct the witnesses to refrain from discussing their testimony with other witnesses outside the courtroom.

ARTICLE VII. OPINION TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses.

Rule 701 follows the Federal Rule in departing from the impracticable common law prohibition of opinion testimony by lay witnesses. In the words of Judge Learned Hand:

> The truth is, as Mr. Wigmore has observed at length . . . that the exclusion of opinion evidence has been carried beyond reason in this country, and that it would be a large advance if courts were to admit it with freedom. The line between opinion and fact is at best only one of degree, and also depends solely upon practical considerations, as, for example, the saving of time and the mentality of the witness….It is a good rule as nearly as one can, to reproduce the scene as it was, and so to correct the personal equations of the witnesses. But one must be careful not to miss the forest for the trees, as generally happens, unless much latitude is allowed.

Central Railroad Co. v. Monahan, 11 F.2d 212, 213-214 (2d Cir. 1926). The rule retains the traditional objective of putting the trier of fact in possession of an accurate reproduction of the event.

Limitation (a) is the familiar requirement of firsthand knowledge or observation.

Limitation (b) is phrased in terms of requiring testimony to be helpful in resolving issues. Witnesses often find difficulty in expressing themselves in language which is not that of an opinion or conclusion. While the courts have made

concessions in certain recurring situations, necessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration. McCormick (2d ed.) § 11. Moreover, the practical impossibility of determining by rule what is a "fact," demonstrated by a century of litigation of the question of what is a fact for purposes of pleading under the Field Code extends into evidence also. 7 Wigmore § 1919. The rule assumes that the natural characteristics of the adversary system will generally lead to an acceptable result, since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness. *See,* Ladd, Expert Testimony, 5 Vand. L. Rev. 414, 415-417 (1952). If, despite these considerations, attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule.

Rule 702. Testimony by Experts.

Common law courts traditionally have permitted expert testimony on subjects "beyond the lay comprehension." This rule continues the tradition with two modifications: 1) Rule 702 permits expert testimony if it would be helpful to the trier of fact in understanding evidence that is difficult, but perhaps not beyond ordinary comprehension. 2) The rule provides that an expert may provide background information to a jury without offering an opinion on any issue in the case.

By allowing testimony "in the form of an opinion or otherwise," the rule allows an expert to give testimony in the form of a dissertation on a given topic thereby allowing the trier of fact to draw his own inferences by applying the specialized knowledge to the facts of the case at hand. Since this approach avoids complaints that the expert is usurping the function of the jury, it should be welcome in many courtrooms. Indeed, it is difficult to understand why some common law authorities are reluctant to use expert evidence in this manner. If the rationale were that the trier of fact might have difficulty in drawing inferences from specialized evidence, it would not be persuasive, because it would suggest that the trier of fact is incapable of rejecting expert opinions. If expert evidence is to assist the trier of fact, the trier must always understand how the expert evidence is derived.

This provision is identical to Federal Rule 702 which was broadly written to encompass fields of expertise that require "specialized" knowledge. In addition to witnesses skilled in scientific and technical matters, this rule recognizes that witnesses qualified by "knowledge, skill, experience, training, or education" in areas such as banking or even real estate values are similarly capable of aiding the trier of fact.

Whether a particular case is suitable for the use of expert testimony is determined by the trial judge's assessment of the likelihood that specialized help would assist the trier of fact. *See Leavitt v. Gillaspie,* 443 P.2d 61 (Alaska 1968). *See also Bachner v. Rich,* 554 P.2d 430 (Alaska 1976) (finding error in admission of expert testimony). Whether or not a witness qualifies as an expert is also a determination that is made by the trial judge. After a ruling that a witness does qualify, counsel for the opposing party may question the qualifications of the expert before the jury. This goes to the weight of the testimony, assessment of which is the province of the trier of fact.

In deciding whether or not an expert is qualified to testify, the trial judge must be aware of the substantive law to be applied in a given case. *See, e.g., Priest v. Lindig,* 583 P.2d 173 (Alaska 1978) (discussing the standard of care to be employed in a medical malpractice case and the qualification of a physician to testify).

For similar provisions *see,* Nebraska Rule 27-702, New Mexico Rule 20-4-702, and Maine Rule 702.

Rule 703. Basis of Opinion Testimony by Experts.

Rule 703 follows the Federal Rule. For the most part it works no change in existing law, but it does make one break with the common law in expanding the category of permissible bases for an expert opinion.

Under the rule, expert opinions may be based upon facts or data derived from three possible sources. The first is the firsthand observation of the witness; opinions based thereon are traditionally allowed at common law. For example, a treating physician whose opinion is based on firsthand sense impressions may use these impressions as the basis of an expert opinion. Rheingold, The Basis of Medical Testimony, 15 Vand. L. Rev. 473, 480 (1962). Whether he must first relate his observations is treated in Rule 705.

The second source, presentation at trial, also reflects existing practice. Generally the expert can be informed of facts of trial in one of two ways: counsel may pose the familiar hypothetical question grounded in evidence offered to the trier of fact, or counsel may have the expert attend the trial and hear the testimony establishing the facts. In cases of conflicting testimony the hypothetical question will be the appropriate technique, as the expert should not be put in the position of deciding questions of witness credibility.

When the expert purports to base his opinion on testimony offered in court, Rule 705 will provide a means of discovering whether the expert is assuming the truth of certain disputed facts. As long as the expert's hypothesis is clarified for the trier of fact, the hybrid techniques is acceptable.

The third source contemplated by the rule consists of presentation of data to the expert outside of court and other than by his own perception. In this respect the rule is designed to broaden the basis for expert opinion, in accordance with the belief that when an expert is deemed skilled enough to assist the trier of fact, the expert should be allowed to utilize the tools that he normally uses to practice his skills outside of the court. Thus, a physician in his own practice bases his diagnosis on general information obtained from medical journals and treatises and on information about the patient 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. Some of these sources would be inadmissible in evidence; most of them are admissible, 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. Rheingold, *supra*, at 531. McCormick (2d ed.) § 15. The rule may be most beneficial in the examination of psychiatrists, who may often rely on data that is technically hearsay. Rule 705 controls the admissibility of facts or data not in evidence but relied upon by an expert.

The rule also offers a more satisfactory basis for ruling upon the admissibility of public opinion poll evidence. If an expert pollster is called to testify, the court will focus on the validity of the techniques employed by the pollster, rather than on relatively fruitless inquiries into whether hearsay is involved.

There are two major aims accomplished by providing that an expert may base an opinion on inference upon facts or data whether or not admissible in evidence if the facts or data are of a type reasonably relied upon by experts in the expert's particular field. First, it prevents experts from explicitly relying upon facts unless these facts are of a type reasonably relied upon by similar experts. Second, it has the effect of excluding altogether some experts who would appear to qualify under Rule 702. If an expert cannot ground an opinion in facts or data "reasonably relied upon," the opinion or inference as well as the facts and data must be excluded. Thus, some scientific or expert evidence that would not be excluded on relevance grounds will be excluded by Rule 703. While a consensus of all experts in the field that a particular test is failsafe is unnecessary, the court must be convinced that the data is a type on which those in the field would reasonably rely.

The rule attempts to chart a path between the rigid approach of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) ("the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field to which it belongs") and the minimal relevance approach of Rule 401. Even though Rule 403 might be deemed sufficient protection against the dangers of relatively untested evidence, Rule 703 is drafted so as to remind trial judges that innovative attempts to offer expert evidence may involve evidence that is superficially attractive, but which is problematic for one or more of the following reasons: 1) the party against whom the evidence is offered has had insufficient time to rebut the validity of the offered evidence, which may be the product of years of research; 2) the party against whom the evidence is offered has been unable to secure the assistance of expert help necessary to understand and attack the offered evidence; 3) while the expert evidence is plainly relevant, the rate of error associated with the technique that produced the evidence is unknown and the trier of fact is therefore unable to properly evaluate the evidence; 4) the expert evidence is the subject of great controversy among the nation's experts and it would be inappropriate for a court or jury to resolve the controversy in any particular case. *See, e.g., People v. Kelly*, 549 P.2d 1240 (Cal. 1976) (rejecting voiceprint evidence).

In most instances when a new technique is utilized, witnesses other than the creator of the technique will be needed to satisfy the "reasonable reliance" requirement. If the new technique is closely related to one already accepted by the courts, less foundation proof will be required.

Rule 704. Opinion on Ultimate Issue.

The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called "ultimate issue" rule is specifically abolished by the instant rule. This provision is identical to Federal Rule 704 which followed the lead of Uniform Rule 56(4).

The older cases in other jurisdictions often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The basis usually assigned for the rule, to prevent the witness from "usurping the province of the jury," is aptly characterized as "empty rhetoric." 7 Wigmore § 1920 at 17. Efforts to meet the felt needs of particular situations led to odd verbal circumlocutions which were said not to violate the rule. Thus a witness could express his estimate of the criminal responsibility of an accused in terms of sanity or insanity, but not in terms of ability to tell right from wrong or other more modern standards. And in cases of medical causation, witnesses were sometimes required to couch their opinions in cautious phrases of "might or could," rather than "did," though the result was to deprive many opinions of the positiveness to which they were entitled, accompanied by the hazard of a ruling of insufficiency to support a verdict. In other instances the rule was simply disregarded, and, as concessions to need, opinions were allowed upon such matters as intoxication, speed, handwriting, and value, although more precise coincidence with an ultimate issue would scarcely be possible.

The modern trend, reflected both in judicial decisions and in codifications of evidence law, has been toward complete abandonment of the rule prohibiting opinions embracing ultimate issues. According to McCormick the change has resulted from

> the fact that the rule excluding opinion on ultimate facts in issue is unduly restrictive, pregnant with close questions of application and the possibility of misapplication, and often unfairly obstructive to the presentation of a party's case, to say nothing of the illogic of the idea that these opinions usurp the function of the jury.

McCormick (2d ed.) § 12, at 27-28. *See also Bachner v. Rich*, 554 P.2d 430 (Alaska 1976).

The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact. Rule 703 requires an opinion based on facts or data reasonably relied upon, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oathhelpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed. McCormick (2d ed.) § 12.

For similar provisions see California Evidence Code § 805; New Jersey Rule 56(3); Maine Rule 704; Nevada Rule 50.295; Nebraska Rule 27-704; Kansas Rule 60-456 (d).

Under this rule an opinion of any person that a criminal defendant is guilty or innocent would not be admissible.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion.

(a) **Disclosure of Facts.** Rule 705 follows the Federal Rule in eliminating the requirement of disclosure at trial of underlying facts or data before an expert testifies in terms of opinion or inference. Previously, the examination of an expert for the purpose of obtaining an opinion had to be phrased in the form of a hypothetical question with two principal exceptions: Where the witness had personal knowledge of the facts or where the witness listened to undisputed courtroom testimony. In the case of these exceptions, it has been common practice to precede the opinion with a description of its factual basis. This practice has not caused many problems. But the examination by hypothetical question has been a cause for concern. The hypothetical question has been the target of a great deal of criticism as encouraging partisan bias, affording an opportunity for summing up in the middle of the case, and as complex and time consuming. Ladd, Expert Testimony, 5 Vand. L. Rev. 414, 426-427 (1952).

The elimination of the requirement of preliminary disclosure at the trial of underlying facts or data has a long background of support. In 1937 the Commissioners on Uniform State Laws incorporated a provision to this effect in their Model Expert Testimony Act, which furnished the basis for Uniform Rules 57 and 58. Rule 4515, N.Y. Civ. Prac. Law (McKinney), provides:

> Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data . . . .

See also California Evidence Code § 802; Kansas Code of Civil Procedure §§ 60-456, 60-457; New Jersey Evidence Rules 57, 58, Federal Rule 705.

Since the criticisms of the hypothetical question cited earlier suggest that it may provide unfair advantages to the direct examiner, the question arises whether to ban hypothetical questions altogether. This rule chooses not to do so. In some instances the hypothetical question works well; indeed sometimes it is the only way to elicit expert testimony. Therefore, the rule adopts Wigmore's suggestion and *permits* an examiner to utilize a hypothetical approach in questioning an expert, subject to Rule 403.

Many lawyers will welcome the invitation to abandon hypothetical questions, since they involve pitfalls as well as advantages for the direct examiner. In asking hypothetical questions the examiner must ensure "that the facts assumed [are] supported by the evidence in the case." McCormick (2d ed.) § 14. "[B]ungling of the hypothesis by confusing it with factual material stated to the expert witness out of court demand heroic remedies." J. Maguire et al., Cases and Materials on Evidence 265 (5th ed. 1965). Moreover, the examiner runs the risk that the question will "confuse the jury, so that its employment becomes a mere waste of time and a futile obstruction," 2 Wigmore § 686, at 812.

The adverse party may require the expert to disclose facts or data underlying his opinion or inference upon cross-examination. But the cross-examiner is under no compulsion to seek disclosure and may, if disclosure is sought, seek to bring out only facts or data casting doubt upon the reliability of the opinion. Normally the cross-examiner will have enough advance knowledge to cross-examine effectively.

This advance knowledge has been afforded, though imperfectly, by the traditional foundation requirement. Rule 26 (b) (4) of the Alaska Rules of Civil Procedure, as revised, provides for substantial discovery in this area, obviating in large measure the obstacles which have been raised in some instances to discovery of findings, underlying data, and even the identity of the experts. *See* Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan. L. Rev. 455 (1962), discussing the identical Federal Rule of Civil Procedure.

These safeguards are reinforced by the discretionary power of the judge, either on its own motion or upon request, to require preliminary disclosure *in camera* if the adverse party so requests.

(b) **Admissibility.** In the spirit of Rule 103, this subdivision provides that the adverse party may request a judicial determination of whether the requirements of Rule 703 are met before the expert is allowed to give his opinion or inference. This provision allows the adverse party who believes an opinion is ill-founded to assert this challenge without running the risk that facts or data once disclosed to the jury may never be forgotten.

Just as an offer of proof under Rule 103 may take different forms, depending on the issue before the court, the judicial hearing under this subdivision also may differ as issues change from case to case. In some cases the judge may be able to rule after a quick side-bar conference. In other cases the jury may have to be excused, or the parties may have to join the judge in chambers. Sometimes counsel's representations as to the witness's testimony will be sufficient. At other times testimony out of the hearing of the jury may be required. The trial judge is vested with broad discretion to assure that experts are permitted to testify on the basis of proper data under Rule 703 without using this rule to take an unfair advantage. *Cf., Kaps Transport, Inc. v. Henry*, 572 P.2d 72 (Alaska 1977).

(c) **Balancing Test—Limiting Instructions.** This part of the rule requires that the court guard against any attempt to use this rule, in connection with Rule 703, to put inadmissible evidence before the jury for an improper purpose. Since facts or data need not be admissible to provide the basis for an expert's opinion under Rule 703, disclosure of facts or data, not otherwise admissible, to explain an expert's opinion might lead to use the facts or data as the basis for an independent judgment on issues in a case. If an objection is made to disclosure of facts or data not otherwise admissible in evidence, before allowing disclosure the court should hear the facts or data outside the hearing of the jury and balance the value of the facts or data as support for the expert's opinion against the danger that they will be used for an improper purpose. The balancing test used here is similar to those used in Rules 403 and 609. The danger must outweigh the value before exclusion is warranted. Whenever facts or data that

would have been admissible for any other purpose are disclosed to the jury to support an expert's opinion, an instruction should be given, upon request, admonishing the jury to consider the facts or data only for the purpose for which they were disclosed. This is in accord with the policy concerning limiting instructions expressed in Rule 105.

Rule 706. Court Appointed Experts.

(a) **Appointment.**

This provision recognizes judicial power to appoint experts and outlines the procedures to be followed when courts exercise such power. Like its federal counterpart, this subdivision is largely drawn from a rule of criminal procedure which it supersedes. *See* Rule 28 Alaska R. Crim. P.

In the Model Expert Testimony Act of 1937, the National Commissioners on Uniform State Laws expressed the view that court appointed experts would strike at the "biased testimony which prevails under the present system." Arguments to the contrary have contended that court appointed experts may be erroneously considered infallible, especially when offered to resolve so-called "battles of the experts." *See* Levy, Impartial Medical Testimony—Revisited, 34 Temple L.Q. 416 (1961). This rule recognizes the wisdom of appointing independent experts in some cases, but also acknowledges that there are dangers associated with these appointments. Subdivision (c) further addresses these issues.

Alaska Rule 706 differs substantially from Federal Rule 706 and from superseded Alaska R. Crim. P. 28 in limiting the right of a party calling a court appointed expert to cross-examine that witness. With increased information about an expert's testimony available through the use of depositions, if counsel were to call an expert known to be favorable to his client and also to receive the benefit of leading questions, the consequences to an adverse party may be unduly severe. Moreover, since nothing in the rule prohibits a court appointed expert from cooperating with the parties in preparation for trial, there will be cases in which the party who benefits from the testimony of a court appointed expert has as much opportunity to consult with him before trial as with any other witness.

Where the court determines that justice so requires, the party calling the witness will be permitted to cross-examine him. Two important factors to be considered in making this determination are: whether the party was able to depose the expert and whether the expert cooperated with the party calling him. In other words, the less information the party has, the greater the need to cross-examine. The less cooperation afforded by the expert, the greater the need of the party to cross-examine him. *See* Rule 611(c), which rule also applies to court appointed experts, for similar consideration allowing the trial judge to permit the direct examiner to ask leading questions.

Where the court calls the expert, Rule 614 governs and both parties may cross-examine the witness.

See Uniform Rule 50; California Evidence Code §§ 730, 732; Nebraska Rule 27-706; Maine Rule 706.

Although this rule is based on Federal Rule 706, it has no provision for compensation of experts comparable to subdivision (b) of the Federal Rule. Compensation of experts is a subject covered by Administrative Rule 7(c). However, once Rule 706 takes effect it may be necessary to reconsider the question of how best to compensate expert witnesses to assure that sufficient compensation is provided so that experts are not reluctant to testify.

(b) **Disclosure of Appointment.** The court may, in its discretion, disclose to the jury the fact that the court appointed the expert witness. This subdivision is identical to its counterpart in the Federal Rule.

The Model Expert Testimony Act (§ 8) made disclosure to the jury mandatory. In Uniform Rule 61 disclosure was changed to discretionary, but the Commissioners' Note following the rule indicates that the change may not have been significant.

> Since experts appointed by the judge will ordinarily be impartial witnesses, the fact of their appointment should be disclosed to the trier of the facts in order that their testimony may be properly valued.

9A Uniform Laws Annotated 633 (1965).

The Commission's Note assumed that disclosure that an expert is aligned with the court will influence the jury by enhancing the expert's credibility. This assumption is probably valid, but there is always cause for concern when the credibility of a witness is bolstered not by anything that the witness does or says, but by being identified with the court. Assuming that impartiality justifies enhanced credibility, the questions that arise are 1) how much more credible impartiality makes a witness, and 2) who answers the first question. The court can choose only to reveal or not to reveal the nature of an appointment. If the court elects nondisclosure, neither question will have to be answered. Making a wise choice requires an assessment of several factors: the independent weight of the expert's credentials, whether both parties agreed on the expert, the relationship of the court appointed expert's testimony to other expert testimony in the case, the existence of divisions of opinion on important matters among leading experts in a field, and the reasons why the court appointed an expert in the first place.

(c) **Parties' Experts of Own Selection.** This subdivision follows superseded Alaska R. Crim. P. 28. It permits the court to supplement evidence by calling witnesses, but does not permit the court to abrogate the responsibilities of counsel in an adversary system.

ARTICLE VIII. HEARSAY

Introductory Reporter's Comment

Like Article V, this Article and the Reporter's Comments that accompany it, do not attempt to analyze the history of the hearsay rule and to assess the strengths and weaknesses of hearsay exceptions that have withstood the test of time. This is not to say that Article VIII is nothing more than a codification of common law rules; departures from the common law tradition are frequent, and they are explained in the comments accompanying the relevant sections of the rules. When the common law is carried forward in the rules, only brief mention is made of the rationale for the relevant provisions.

The comments accompanying the rules draw heavily, and at times are verbatim copies, of the Advisory Committee's Notes accompanying the Federal Rules of Evidence. Conspicuously different is the approach of the introductory note on hearsay found in both the Federal and the Alaska Rules. The latter is shorter and assumes greater knowledge on the part of the reader. Practicing lawyers are quite familiar with the rationale for a hearsay rule that begins with the assumption that evidence not tested by cross-examination should be excluded. No matter what the exact words used, problems of sincerity, ambiguity of narration, memory and perception are familiar ones. The Advisory Committee argued that sincerity is "merely…an aspect of the three [otherwise] mentioned." To the extent that some courtroom observers believe that perjury is common even in court, problems of perjury outside of court when there is no cross-examination also are likely to exist. Thus, the Advisory Committee was probably wrong. Aside from cross-examination, other reasons for a hearsay rule include the desirability of having evidence taken under oath and the importance of viewing the demeanor of a witness.

> The Advisory Committee is undoubtedly correct in noting that the logic of the argument [supporting a hearsay rule] …might suggest that no testimony be received unless in full compliance with the three ideal conditions. [Cross-examination, oath, and demeanor.] No one advocates this position. Common sense tells that much evidence which is not given under the three conditions may be inherently superior to much that is. Moreover, when the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without. The problem thus resolves itself into effecting a sensible accommodation between these considerations and the desirability of giving testimony under the ideal conditions.
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> The solution evolved by the common law has been a general rule excluding hearsay but subject to numerous exceptions under circumstances supposed to furnish guarantees of trustworthiness. Criticisms of this scheme are that it is both bulky and complex, fails to screen good from bad hearsay realistically, and inhibits the growth of the law of evidence.

The Advisory Committee goes on at great length to explain why it decided not to abandon the hearsay rule or to greatly simplify it. The shorter, but similar, answer provided by these rules is that the dangers associated with hearsay are real and continue to plague trial courts today as they have in the past. In addition, arguments for simplification such as those advocated by Weinstein, The Probative Force of Hearsay, 46 Iowa L. Rev. 331 (1961), assume greater faith in trial judges than yet can be justified. Moreover, a more flexible rule might tend to confer an unfair advantage on the government in criminal cases and wealthy parties in civil cases who have ready and efficient means for preparing their hearsay evidence for use at trial. Finally, it is likely that a more flexible rule would tend to produce categories of exceptions for the guidance of trial judges that resemble those that are presented in these rules, which are themselves the out-growth of adjudication and many years of debate. Thus, as the Advisory Committee helpfully observed

> [t]he approach to hearsay in these rules is that of the common law, i.e., the general rule excluding hearsay, with exceptions under which evidence is not required to be excluded even though hearsay. The traditional hearsay exceptions are drawn upon for the exceptions, collected under two rules, one dealing with situations where availability of the declarant is regarded as immaterial and the other with those whose unavailability is made a condition to the admission of the hearsay statement. Each of the two rules concludes with a provision for hearsay statements not within one of the specified exceptions "but having comparable [equivalent] circumstantial guarantees of trustworthiness."

In its introductory note, the Advisory Committee wrote at length on the subject of confrontation. Although the United States Supreme Court has recognized that the roots of the confrontation protection and the hearsay rule are common, the constitutional protection and the evidence protection are not identical. Clearly, the confrontation clause speaks to subjects not addressed by the hearsay rule: e.g., the confrontation clause mandates that a defendant be given the opportunity to be present at trial, while the hearsay rule does not address this question; and the confrontation requirement may control the scope of cross-examination and impeachment, while the hearsay rule may not. It is just as clear that the hearsay rule goes beyond minimal confrontation requirements in protecting litigants against unfairness. It is difficult to ascertain precisely what limits the confrontation clause, as applied to the states through the fourteenth amendment, places on states in drafting evidence rules. *California v. Green*, 399 U.S. 149, 26 L.Ed.2d 489 (1970) and *Dutton v. Evans*, 400 U.S. 74, 27 L.Ed.2d 213 (1970) indicate that the highwater marks of the confrontation clause—*Pointer v. Texas*, 380 U.S. 400, 13 L.Ed.2d 923 (1965), *Douglas v. Alabama*, 380 U.S. 415, 13 L.Ed.2d 934 (1965), *Burton v. United States*, 389 U.S. 818, 19 L.Ed.2d 70 (1968), and *Barber v. Page*, 390 U.S. 719, 20 L.Ed. 2d 255 (1968)—can no longer be read to expand the protection of the confrontation clause in criminal cases to resemble very closely the protection afforded by hearsay rules. There is no need in these rules to answer the question whether some common law hearsay exceptions violate the confrontation requirement, and if so, which ones. It is sufficient to note that the Alaska Rules are drafted with the confrontation requirement in mind and in an attempt to avoid constitutional difficulties. The federal Advisory Committee made a comment that is appropriate here:

> Under the earlier cases, the confrontation clause may have been little more than a constitutional embodiment of the hearsay rule, even including traditional exceptions but with some room for expanding them along similar lines. But under the recent cases the impact of the clause clearly extends beyond the confines of the hearsay rule. These considerations have led the Advisory Committee to conclude that a hearsay rule can function usefully as an adjunct to the confrontation right in constitutional areas and independently in non-constitutional areas. In recognition of the separateness of the confrontation clause and the hearsay rule, and to avoid inviting collisions between them or between the hearsay rule and other exclusionary principles, the exceptions set forth in Rules 803 and 804 are stated in terms of exemption from the general exclusionary mandate of the hearsay rule, rather than in positive terms of admissibility.

For a recent case involving an overlap between hearsay and constitutional issues, see *Benefield v. State,* 559 P.2d 91 (Alaska 1977).

Rule 801. Definitions.

(a) **Statement.** The definition of "statement" assumes importance because the term is used in the definition of hearsay in subdivision (c). The effect of the definition of "statement" is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one. This follows present Alaska law. See *Clary v. Fifth Ave. Chrysler Center, Inc.,* 454 P.2d 245, 250-51 (Alaska 1969).

It can scarcely be doubted that an assertion made in words is intended by the declarant to be an assertion. Hence verbal assertions readily fall into the category of "statement." Whether nonverbal conduct should be regarded as a statement for purposes of defining hearsay requires further consideration. Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement. Other nonverbal conduct, however, may be offered as evidence that the person acted as he did because of his belief in the existence of the condition sought to be proved, from which belief the existence of the condition may be inferred. This sequence is, arguably, in effect an assertion of the existence of the condition and hence properly includable within the hearsay concept. See Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177, 214, 217 (1948), and the elaboration in Finman, Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence, 14 Stan. L. Rev. 682 (1962). Arguments found in these sources were rejected, however, in *Clary, supra.* Admittedly evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor. See generally Tribe, Triangulating Hearsay, 87 Harv. L. Rev. 957 (1975). But the rule adopts the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity. Motivation, the nature of the conduct, and the presence or absence of reliance will bear heavily upon the weight to be given the evidence. Falknor, The "Hear-Say" Rule as a "See-Do" Rule: Evidence of Conduct, 33 Rocky Mt. L. Rev. 133 (1961). Similar considerations govern nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted, also excluded from the definition of hearsay by the language of subdivision (c).

When evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary determination will be required to determine whether an assertion is intended. The rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility. The determination involves no greater difficulty than many other preliminary questions of fact. Maguire, The Hearsay System: Around and Through the Thicket, 14 Vand. L. Rev. 741, 765-67 (1961).

For similar approaches, see Uniform Rule 62(1); California Evidence Code §§ 225, 1200; Kansas Code of Civil Procedure § 60-459 (a); New Jersey Evidence Rule 62 (1).

(b) **Declarant.** The definition of "declarant" is straightforward and requires no elaboration.

(c) **Hearsay.** The definition follows along familiar lines in including only statements offered to prove the truth of the matter asserted. McCormick (2d ed.) § 225; 5 Wigmore § 1361, 6 Wigmore § 1766. If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. *Cf., e.g., Clary v. Fifth Ave. Chrysler Center, Inc.,* 454 P.2d 244, 250-51 (Alaska 1969); *P.H. v. State,* 504 P.2d 837, 842-43 (Alaska 1972). Although neither case turned on an interpretation of an offer of a statement "to prove the truth of the matter asserted"—the first case holding that non-assertive conduct was not hearsay and the second holding that a rule of testimonial completeness may override the hearsay rule—arguably both cases involve evidence not offered for its truth. The effect of this subdivision is to exclude from hearsay the entire category of "verbal acts" and "verbal parts of an act," in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights.

The definition of hearsay must, of course, be read with reference to the definition of statement set forth in subdivision (a).

Testimony given by a witness in the court of court proceedings is excluded since there is compliance with all the ideal conditions for testifying.

(d) **Statements Which are not Hearsay.** Several types of statements which would otherwise literally fall within the definition are expressly excluded from it:

(1) *Prior Statement by Witness.* Considerable controversy has attended the question whether a prior out-of-court statement by a person now available for cross-examination concerning it, under oath and in the presence of the trier of fact, should be classed as hearsay. If the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no hearsay problem. The hearsay problem arises when the witness on the stand denies having made the statement or admits having made it but denies its truth. The traditional argument in favor of treating these latter statements as hearsay is based upon the ground that the conditions of oath, cross-examination, and demeanor observation did not prevail at the time the statement was made and cannot adequately be supplied by the later examination. The logic of the situation is subject to attack. So far as concerns the oath, its mere presence has never been regarded as sufficient to remove a statement "from the hearsay category, and it receives much less emphasis than cross-examination as a truth-compelling device." While strong expressions are found to the effect that no conviction can be had or important right taken away on the basis of statements not made under fear of prosecution for perjury, *Bridges v. Wixon,* 326 U.S. 135, 89 L.Ed. 2103 (1945), the fact is that, of the many common law exceptions to the hearsay rule, only that for reported testimony has required the statement to have been made under oath.

Some have argued that no one has satisfactorily explained why cross-examination cannot be conducted subsequently with success, and that the decisions contending most vigorously for its inadequacy in fact demonstrate quite thorough exploration of the weaknesses and doubts attending the earlier statement. *State v. Saporen*, 285 N.W. 898 (Minn. 1939); *Ruhala v. Roby*, 150 N.W.2d 146 (Mich. 1967); *People v. Johnson*, 441 P.2d 111 (Cal. 1968). In respect to demeanor, Judge Learned Hand observed in *Di Carlo v. United States*, 6 F.2d 364 (2d Cir. 1925), when the jury decides that the truth is not what the witness says now, but what he said before, they are still deciding from what they see and hear in court. The bulk of the case law nevertheless has been against allowing prior statements of witnesses to be used generally as substantive evidence. Most of the writers and Uniform Rule 63(1) have taken the opposite position.

(A) The Advisory Committee on the Federal Rules chose to treat prior inconsistent statements as substantive evidence. In doing so it adopted the position of California in section 1235 of its Evidence Code, which is supported by the following remarks of the California Law Revision Commission:

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

The Congress was concerned about the broadened use of inconsistent statements. The House of Representatives attempted to limit inconsistent statements admissible for substantive use to those made under oath and subject to cross-examination, but the Senate took the position that the requirement of a prior opportunity for cross-examination was too great a restriction on the use of probative and trustworthy evidence. The compromise in the Federal Rules was to admit prior statements made "under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition."

Existing Alaska law is consistent with the California approach. *See Beavers v. State*, 492 P.2d 88, 94 (Alaska 1971); *Eubanks v. State*, 516 P.2d 726, 729 n.6 (Alaska 1973); *Gray v. State*, 525 P.2d 524, 526 n.6 (Alaska 1974). *See also Hobbs v. State*, 359 P.2d 956 (Alaska 1961); *Johnston v. State*, 489 P.2d 134 (Alaska 1971). Subdivision (d) (1) continues in effect existing Alaska law. Subsection (d) (1) does not alter the holding of *Beavers* that permits admission of prior inconsistent statements in the discretion of the trial judge as substantive evidence regardless of whether the prior statement was under oath and/or subject to cross-examination. Except in special cases, counsel should lay the foundation for an inconsistent statement while the witness who made the statement is testifying, as under Rule 613.

(B) Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motives but not as substantive evidence. *See* Rule 607(b). Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.

(C) Some of the same dangers discussed in connection with prior inconsistent statements surround the use of identification evidence. But the rule provides that only the identification itself, not statements made about the crime, is to be admitted. Thus, this section is more limited than that on inconsistent statements, which covers all statements regardless of their length, detail and completeness. Constitutional limitations protect against undue suggestiveness. *See, e.g., Neil v. Biggers*, 409 U.S. 188, 34 L.Ed.2d 401 (1972); *Simmons v. United States*, 390 U.S. 377, 19 L.Ed.2d 1247 (1960); *Stovall v. Denno*, 388 U.S. 293, 18 L.Ed.2d 1199 (1967); *United States v. Wade*, 388 U.S. 218, 18 L.Ed.2d 1149 (1967); and *Gilbert v. California*, 388 U.S. 263, 18 L.Ed.2d 1178 (1967), restricted by *Kirby v. Illinois*, 406 U.S. 682, 32 L.Ed.2d 411 (1972). "An early, out-of-court identification provides fairness to defendants by ensuring accuracy of the identification. At the same time, it aids the government by making sure that delays in the criminal justice system do not lead to cases falling through because the witness can no longer recall the identity of the person he saw commit the crime." S.R. No. 94-199, 94th Cong., 1st Sess. (1975). *Accord, Buchanan v. State*, 554 P.2d 1153, 1158 (Alaska 1976). For recent cases discussing eyewitness identifications, *see Buchanan v. State*, 561 P.2d 1197 (Alaska 1977); *Benefield v. State*, 559 P.2d 91 (Alaska 1977); *Blue v. State*, 558 P.2d 636 (Alaska 1977); *Noble v. State*, 552 P.2d 142 (Alaska 1976).

(2) *Admissions.* Federal Rule 801 provides that admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. Strahorn, A Reconsideration of the Hearsay Rule and Admissions, 85 U. Pa. L. Rev. 484, 564 (1973); Morgan, Basic Problems of Evidence 265 (1962); 4 Wigmore § 1048. No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring first-hand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.

While the classification of admissions as non-hearsay makes some sense if confined to personal admissions, there is no good reason to treat all the admissions covered by subsection (C), (D), and (E) as non-hearsay. In fact, if these rules were written on a clean slate without reference to the Federal Rules, admissions would be treated as exceptions to the hearsay rule

and placed under Rule 803. But for the convenience of the bar the Federal Rule is followed. The end result is the same, and the slight confusion engendered by the treatment of admissions as non-hearsay is a small price to pay for uniformity.

The rule specifies five categories of statements for which the responsibility of a party is considered sufficient to justify reception in evidence against him.

(A) A party's own statement is the classic example of an admission. *See Jordan v. State,* 481 P.2d 383, 386 (Alaska 1971). If he has a representative capacity and the statement is offered against him in that capacity, no inquiry whether he was acting in the representative capacity in making the statement is required; the statement need only be relevant to representative affairs. To the same effect is California Evidence Code 1220. *Cf.,* Uniform Rule 63(7), requiring a statement to be made in a representative capacity to be admissible against a party in a representative capacity.

(B) Under established principles an admission may be made by adopting or acquiescing in the statement of another. While knowledge of contents would ordinarily be essential, this is not inevitably so: "X is a reliable person and knows what he is talking about." *See,* McCormick (2d ed.) § 246, at 527, n.15. Adoption or acquiescence may be manifested in any appropriate manner. When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue. *See, e.g., Beavers v. State,* 492 P.2d 88, 96 (Alaska 1971). The decision in each case calls for an evaluation in terms of probable human behavior. In civil cases, the results have generally been satisfactory. In criminal cases, however, troublesome questions have been raised by decisions holding that failure to deny is an admission: the inference is a fairly weak one, to begin with; silence may be motivated by advice of counsel or realization that "anything you say may be used against you"; unusual opportunity is afforded to manufacture evidence; and encroachment upon the privilege against self-incrimination seems inescapably to be involved. However, recent decisions of the Supreme Court relating to custodial interrogation and the right to counsel appear to resolve these difficulties. *See, e.g., Doyle v. Ohio,* 426 U.S. 610, 49 L.Ed.2d 91 (1976). Hence the rule contains no special provisions concerning failure to deny in criminal cases.

(C) No authority is required for the general proposition that a statement authorized by a party to be made should have the status of and admission by the party. However, the question arises whether only statements to third persons should be so regarded, to the exclusion of statements by the agent to the principal. This is the new Maine Rule. The Alaska rule is phrased broadly so as to encompass both. While it may be argued that the agent authorized to make statements to his principal does not speak for him, Morgan, Basic Problems of Evidence 273 (1962), communication to an outsider has not generally been thought to be an essential characteristic of an admission. Thus, a party's books or records are usable against him, without regard to any intent to disclose to third persons. 5 Wigmore § 1557. *See also* McCormick (2d ed.) § 78, at 159161. In accord is New Jersey Evidence Rule 63(8)(a). *Cf.,* Uniform Rule 63(8) (a) and California Evidence Code § 1222 which limit status as an admission in this regard to statements authorized by the party to be made "for" him, which is perhaps an ambiguous limitation to statements to third persons. Falknor, Vicarious Admissions and the Uniform Rules, 14 Vand. L. Rev. 855, 860-61 (1961).

(D) The tradition has been to test the admissibility of statements by agents, as admissions, by applying the usual test of agency. Was the admission made by the agent acting in the scope of his employment? Since few principals employ agents for the purpose of making damaging statements, the usual result was exclusion of the statement. Dissatisfaction with this loss of valuable and helpful evidence has been increasing. A substantial trend favors admitting statements related to a matter within the scope of the agency or employment. *Grayson v. Williams,* 256 F.2d 61 (10th Cir. 1958); *Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines v. Tuller,* 292 F.2d 775, 784 (D.C. Cir. 1961); *Martin v. Savage Truck Lines, Inc.,* 121 F.Supp. 417 (D.D.C. 1954), and numerous state court decisions collected in 4 Wigmore, 1964 Supp., at 66-73, with comments by the editor that the statements should have been excluded as not within the scope of agency. For the traditional view, *see, Northern Oil Co. v. Socony Mobil Oil Co.,* 347 F.2d 81, 85 (2d Cir. 1965) and cases cited therein. Similar provisions are found in Uniform Rule 63(9) (a), Kansas Code of Civil Procedure § 60-460(i) (1), and New Jersey Evidence Rule 63(9) (a). The proposed Alaska rule was cited favorably in *P.R.& S. Inc. v. Pellack,* 583 P.2d 195 (Alaska 1978).

(E) The limitation upon the admissibility of statements of co-conspirators to those made "during the course and in furtherance of the conspiracy" is in the accepted pattern. While the broadened view of agency taken in item (D) might suggest wider admissibility of statements of co-conspirators, the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established. *See* Levie, Hearsay and Conspiracy, 52 Mich. L. Rev. 1159 (1954); Comment, 25 U. Chi. L. Rev. 530 (1958). The rule is consistent with the position of the United States Supreme Court in denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved. *Krulewitch v. United States,* 336 U.S. 440, 93 L.Ed. 790 (1949); *Wong Sun v. United States,* 371 U.S. 471, 9 L.Ed. 2d 441 (1963). For similarly limited provisions *see* California Evidence Code § 1223 and New Jersey Rule 63(9) (b). *Cf.,* Uniform Rule 63(9) (b). While the rule refers to a co-conspirator, it should be clear that the rule is meant to carry forward the universally accepted doctrine that a joint venturer is considered as a co-conspirator for the purposes of this rule even though no conspiracy has been charged. *See Amidon v. State,* 565 P.2d 1248 (Alaska 1977). Traditionally the hearsay exception requires independent evidence of conspiracy. This tradition is implicitly carried forward under the rule. *See* K. Redden & S. Saltzburg, *Federal Rules of Evidence Manual* 461-68 (2d ed.1977).

Rule 802. Hearsay Rule.

Under existing Alaska law "hearsay is inadmissible upon objection unless it falls within one of the exceptions to the hearsay rule." *Burkholder v. State*, 491 P.2d 754, 757 (Alaska 1971). Many exceptions are listed in Rules 803 and 804, but exceptions to the hearsay rule may be found outside of Article VIII of these rules. The provision excepting from the operation of the rule hearsay which is made admissible by these rules or others adopted by the Alaska Supreme Court or by the legislature recognizes that it may be convenient to place a hearsay exception outside of this Article. When the supreme court or the legislature does so, the exception is every bit as valid as those located in Rules 803 and 804. The following examples illustrate hearsay that is rendered admissible by provisions outside of these two rules.

ALASKA RULES OF CIVIL PROCEDURE

Rule 4 (f): proof of service by affidavit.

Rule 32 (a): admissibility of depositions.

Rule 43(e): affidavits when motion based on facts not appearing of record, now found in Rule 43.

Rule 56: affidavits in summary judgment proceedings.

Rule 65(b): showing by affidavit for temporary restraining order.

ALASKA RULES OF CRIMINAL PROCEDURE

Rule 4(a) (1): affidavits to show grounds for issuing warrants.

Rule 5.1(d): written reports of experts in preliminary examination.

ENACTMENTS OF ALASKA LEGISLATURE

AS 03.40.070: certified copy of instrument evidencing sale of brand or mark.

AS 21.06.070: certificate of insurance director.

AS 32.05.060: partner's admission against partnership.

Rule 802 is also not intended to alter the substantive rule of evidence that hearsay not objected to at trial is competent evidence. *Reese v Geierman*, 574 P.2d 445 (Alaska 1978); *City of Anchorage v. Nesbett*, 530 P.2d 1324, 1336 (Alaska 1975); *Gregory v. Padilla*, 379 P.2d 951, 953 (Alaska 1963).

Rule 803. Hearsay Exceptions—Availability of Declarant Immaterial.

The exceptions are phrased in terms of non-application of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration.

The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify non-production of the declarant in person at the trial even though he may be available. The theory finds vast support in the many exceptions to the hearsay rule developed by the common law in which unavailability of the declarant is not a relevant factor. The present rule is a synthesis of them, with revision where modern developments and conditions are believed to make that course appropriate.

In a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge. It may appear from his statement or be inferable from circumstances. *See* Rule 602.

(1) and (2) **Present Sense Impression—Excited Utterance.** In considerable measure these two examples overlap, though based on somewhat different theories. The most significant practical difference will lie in the time lapse allowable between event and statement.

The underlying theory of Subdivision (1) is that substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation. Moreover, if the witness is the declarant, he may be examined on the statement. If the witness is not the declarant, he may be examined as to the circumstances as an aid in evaluating the statement. Morgan, Basic Problems of Evidence 340-41 (1962).

The theory of Subdivision (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. 6 Wigmore § 1747, at 135. Spontaneity is the key factor in each instance, though arrived at by somewhat different routes. Both are needed in order to avoid needless niggling.

While the theory of Subdivision (2) has been criticized on the ground that excitement impairs accuracy of observation as well as eliminating conscious fabrication, Hutchins and Slesinger, Some Observations on the Law of Evidence: Spontaneous Exclamations, 28 Colum. L. Rev. 432 (1928), it finds support in cases without number. *See* cases in 6 Wigmore § 1750; Annot. 53 A.L.R.2d 1245 (statements as to cause of or responsibility for motor vehicle accident); Annot., 4 A.L.R.3d 149 (accusatory statements by homicide victims). It is well grounded in Alaska case law. *See Torres v. State*, 519 P.2d 788, 792-93 (Alaska 1974); *Watson v. State*, 387 P.2d 289 (Alaska 1963). Since unexciting events are less likely to evoke comment, decisions involving Subdivision (1) are far less numerous. Illustrative are *Tampa Elec. Co. v. Getrost*, 10 So.2d 83 (Fla. 1942); *Houston Oxygen Co. v. Davis*, S.W.2d 474 (Tex. 1942); and cases cited in McCormick (2d ed.) § 278, at 709-11. *See also Beech Aircraft Corp. v. Harvey*, 558 P.2d 879, 884 (Alaska 1976).

With respect to the time element, Subdivision (1) recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable. Under Subdivision (2) the standard of measurement is the duration of the state of excitement. "How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor." Slough, Spontaneous Statements and State of Mind, 46 Iowa L. Rev. 224, 243 (1961); McCormick (2d ed.) § 297, at 706-07.

Participation by the declarant is not required: a non-participant may be moved to describe what he perceives, and one may be startled by an event in which he is not an actor. Slough, *supra;* McCormick, *supra;* 6 Wigmore § 1755; Annot., 78 A.L.R.2d 300.

Whether proof of the startling event may be made by the statement itself is largely an academic question, since in most cases there is present at least circumstantial evidence that something of a startling nature must have occurred. Nevertheless, on occasion the only evidence may be the content of the statement itself and rulings that it may be sufficient are described as "increasing," Slough, *supra* at 246, and as the "prevailing practice," McCormick (2d ed.) § 299, at 705. Moreover, under Rule 104(a) the judge is not limited by the hearsay rule in passing upon preliminary questions of fact.

Proof of declarant's perception by his statement presents similar considerations when declarant is identified. *People v. Poland*, 174 N.E.2d 804 (Ill. 1961). However, when declarant is an unidentified bystander, the cases indicate hesitancy in upholding the statement alone as sufficient, *Garrett v. Howden*, 387 P.2d 874 (N.M. 1963); *Beck v. Dye*, 92 P.2d 1113 (Wash. 1939), a result which would under appropriate circumstances be consistent with the rule.

Permissible subject matter of the statement is limited under Subdivision (1) to description or explanation of the event or condition, the assumption being that spontaneity, in the absence of a startling event, may extend no farther. In Subdivision (2), however, the statement need only "relate" to the startling event or condition, thus affording a broader scope of subject matter coverage. 6 Wigmore §§ 1750, 1754. *See* Quick, Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4), 6 Wayne L. Rev. 204, 206-09 (1960).

Similar provisions are found in Uniform Rule 63(4) (a) and (b); California Evidence Code § 1240 (as to Subdivision (2) only); Kansas Code of Civil Procedure § 60-460(d) (1) and (2); New Jersey Evidence Rule 63 (4).

(3) **When Existing Mental, Emotional, or Physical Condition.** Subdivision (3) is essentially a specialized application of Subdivision (1), presented separately to enhance its usefulness and accessibility.

The exclusion of "statements of memory or belief to prove that fact remembered or believed" is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind. *Shepard v. United States*, 290 U.S. 96, 78 L.Ed. 196 (1933); Maguire, The Hillmon Case: Thirty-three Years After, 38 Harv. L. Rev. 709, 719-731 (1925); Hinton, States of Mind and the Hearsay Rule, 1 U. Chi. L. Rev. 394, 421-423 (1934). The rule of *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 36 L.Ed. 706 (1892), allowing evidence of intention as tending to prove the doing of the act intended, is of course, left undisturbed as applied to a declarant.

The carving out, from the exclusion mentioned in the preceding paragraph, of declarations relating to the execution, revocation, identification, or terms of a declarant's will represents an ad hoc judgment which finds ample reinforcement in the decisions, resting on practical grounds of necessity and expediency rather than logic. A similar recognition of the need for and practical value of this kind of evidence is found in California Evidence Code § 1260.

The addition of the words "offered to prove his present condition or future action" limits the exception to avoid results like *People v. Alcalde*, 148 P.2d 627 (Cal. 1944). For the statements of one person as to his mental or emotional condition to be used against another, Subdivision (23) must be satisfied. This modifies the *Hillmon* rule.

(4) **Statements for Purposes of Medical Diagnosis or Treatment.** Even those few jurisdictions which have shied away from generally admitting statements of present condition have allowed them if made to a physician for purposes of diagnosis and treatment in view of the patient's strong motivation to be truthful. The same guarantee of trustworthiness extends to statements of past conditions and medical history, made for purposes of diagnosis or treatment. It also extends to statements as to causation, reasonably pertinent to the same purposes, in accord with the current trend, *Shell Oil Co. v. Industrial Commission*, 119 N.E.2d 224 (Ill. 1954); New Jersey Evidence Rule 63(12) (c). Statements as to fault would not ordinarily qualify under this latter language. Thus, a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light. Under the exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included.

Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. The rule accordingly rejects the limitation. This position is consistent with the provision of Rule 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field.

(5) **Recorded Recollection.** A hearsay exception for recorded recollection is generally recognized and has been described as having "long been favored by the federal and practically all the state courts that have had occasion to decide the question." *United States v. Kelly*, 349 F.2d 720, 770 (2d Cir. 1965), citing numerous cases and sustaining the exception against a claimed denial of the right of confrontation. Many additional cases are cited in Annot., 82 A.L.R.2d 473, 520. The guarantee of trustworthiness is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them.

The principal controversy attending the exception has centered, not upon the propriety of the exception itself, but upon the question whether a preliminary requirement of impaired memory on the part of the witness should be imposed. The authorities are divided. If regard be had only to the accuracy of the evidence, admittedly impairment of the memory of the witness adds nothing to it and should not be required. Nevertheless, the absence of the requirement, it is believed, would encourage the use of statements carefully prepared for purposes of litigation under the supervision of attorneys, investigators, or claim adjusters. *Cf.*, Reporter's Comment accompanying Rule 801(d) (1) (A). Hence, the

example includes a requirement that the witness not have "sufficient recollection to enable him to testify fully and accurately." To the same effect are California Evidence Code § 1237 and New Jersey Rule 63(1) (b), and this has been the position of the federal courts.

No attempt is made in the exception to spell out the method of establishing the initial knowledge or the contemporaneity and accuracy of the record, leaving them to be dealt with as the circumstances of the particular case might indicate. Multiple person involvement in the process of observing and recording, as in *Rathbun v. Brancatella*, 107 A. 279 (N.J. 1919), is entirely consistent with the exception.

Locating the exception at this place in the scheme of the rules is a matter of choice. There were two other possibilities. The first was to regard the statement as one of the group of prior statements of a testifying witness which are excluded entirely from the category of hearsay by Rule 801(d) (1). That category, however, requires that declarant be "subject to cross-examination," as to which the impaired memory aspect of the exception raises doubts. The other possibility was to include the exception among those covered by Rule 804. Since unavailability is required by that rule and lack of memory is listed as a species of unavailability by the definition of the term in Rule 804(a) (3), that treatment at first impression would seem appropriate. The fact is, however, that the unavailability requirement of the exception is of a limited and peculiar nature. Accordingly, the exception is located at this point rather than in the context of a rule where unavailability is conceived of more broadly.

(6) **Business Records.** This exception continues in effect the business records exception to the hearsay rule previously found in Alaska R. Civ. P. 44(a) (1) and Alaska R. Crim. P. 26(e). While the language is slightly different, the basic thrust of the new rule is identical to the old.

The background of this exception is set forth in the Advisory Committee's Note accompany Federal Rule 803(6). The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation.

Sources of information present no substantial problem with ordinary business records. All participants, including the observer or participant furnishing the information to be recorded, are acting routinely, under a duty of accuracy, with employer reliance on the result, or in short "in the regular course of business." If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. An illustration is the police report incorporating information obtained from a bystander: the officer qualifies as acting in the regular course but the informant does not. The leading case, *Johnson v. Lutz*, 170 N.E. 517 (N.Y. 1930), held that a report thus prepared was inadmissible. Most of the authorities have agreed with the decision. Subdivision (6) has been drafted to eliminate the confusion caused by Federal Rule 803(6), which could be read to read to abolish the business duty concept although the legislative history plainly indicates that no such thing was intended.

Entries in form of opinions were not encountered in traditional business records in view of the purely factual nature of the items recorded, but they are now commonly encountered with respect to medical diagnoses, prognoses, and test results, as well as occasionally in other areas. In the state courts, the trend favors admissibility. In order to make clear its adherence to the latter position, the rule specifically includes both diagnoses and opinions, in addition to acts, events, and conditions, as proper subjects of admissible entries.

Problems of the motivation of the informant have been a source of difficulty and disagreement. In *Palmer v. Hoffman*, 318 U.S. 109 87 L.Ed. 645 (1943), exclusion of an accident report made by the since deceased engineer, offered by defendant railroad trustees in a grade crossing collision case, was upheld. The report was not "in the regular course of business," not a record of the systematic conduct of the business as a business, said the Court. The report was prepared for use in litigating, not railroading. While the opinion mentions the motivation of the engineer only obliquely, the emphasis on records of routine operations is significant only by virtue of impact on motivation to be accurate. Absence of routineness raises lack of motivation to be accurate.

The lower court had concluded that the engineer's statement was "dripping with motivations to misrepresent." *Hoffman v. Palmer*, 129 F.2d 976, 991 (2d Cir. 1942). Other courts also have focused on a motive to misrepresent, although many business records are potentially self-serving. The formulation of specific terms which would assure satisfactory results in all cases is not possible. Consequently the rule proceeds from the base that records made in the course of a regularly conducted activity will be taken as admissible but subject to authority to exclude if "the sources of information or other circumstances indicate lack of trustworthiness." *See generally Patrick v. Sedwick*, 391 P.2d 453, 458-59 (Alaska 1964); *Commercial Union Companies v. Smallwood*, 550 P.2d 1261 (Alaska 1976).

The form which the "record" may assume under the rule is described broadly as a "memorandum, report, record, or data compilation, in any form." The expression "data compilation" is used as broadly descriptive of any means of storing information other than the conventional words and figures in written or documentary form. It includes, but is by no means limited to, electronic computer storage.

(7) **Absence of Records.** Failure of a record to mention a matter which would ordinarily be mentioned is satisfactory evidence of its nonexistence. Uniform Rule 63(14), Comment. While probably not hearsay as defined in Rule 801, supra, decisions may be found which class the evidence not only as hearsay but also as not within any exception. In order to set the question at rest in favor of admissibility, it is specifically treated here. McCormick (2d ed.) § 307; Morgan, Basic Problems of Evidence 314 (1962); 5 Wigmore § 1531; Uniform Rule 63(14); California Evidence Code § 1272; Kansas Code of Civil Procedure § 60-460(n); New Jersey Evidence 63(14). This Rule supersedes Alaska R. Civ. P. 44(a) (2) and Alaska R. Crim. P. 26 (e); it provides for identical results.

(8) **Public Records and Reports.** "The reliability and trustworthiness of official documents and also the desire to keep officials from having to testify personally in every instance have generally been established as the policies underlying this hearsay exception." *Webster v. State*, 528 P.2d 1179, 1181 (Alaska 1974). The exception was recognized in Alaska R. Civ. P. 44(b) and Alaska R. Crim. P. 26(e), which are superseded by this rule.

Subdivision (8) follows Maine Rule 803(8), rather than its federal counterpart. The Maine rule is clearer, easier to apply, and avoids some of the confrontation problems presented by the Federal Rule. *See generally, United States v. Smith*, 521 F.2d 957 (D.C. Cir. 1975). It recognizes that government records that are compiled for purposes other than presentation on the government's behalf at trial are generally reliable (part (a)), but that reliability is substantially diminished when the government stands to gain an edge in litigation through the introduction of a record or report it has prepared (parts (b) (ii) & (iii)). Similarly, the rule differentiates factual findings made by the government in the process of carrying out public responsibilities, which are presumed to be reliable, from factual findings resulting from a special investigation of a particular complaint, case or incident, which are not within this exception, since there is no reason to believe that the government would itself rely on its findings outside the litigation context (part (b) (iv)). Finally, investigative reports by police and law enforcement personnel are excluded because they are often unreliable. *See Menard v. Acevedo*, 418 P.2d 766 (Alaska 1966).

While this rule may appear, at first blush anyway, to be at odds with *Webster v. State, supra*, that case would be decided the same way under these rules. Presumably the breathalyzer test would be admissible as a business record under Subdivision (6). *Menard v. Acevedo, supra*, is in accord with this Subdivision.

More leeway is provided for admission of public reports involving factual findings in civil cases than criminal cases. In this way deference is paid the confrontation clause. But records and reports not involving investigations into particular events and findings of fact are admissible under this Subdivision even in criminal cases.

There is no doubt that Subdivision (8) differs from former Alaska R. Civ. P. 44(b), but the goals of both rules are similar. When Subdivisions (6) and (8) of the rules are read together, it should be apparent that the admissibility of official records is not unduly circumscribed by the rule.

The notice requirement, formally found in Alaska R. Civ. P. 44(b) (2) is carried forward, but the authentication provisions of Alaska R. Civ. P. 44(b) (4) & (5) and the regulation of copies under Alaska R. Civ. P. 44(b) (6) & (c) are eliminated as these subjects are covered by Articles IX and X of these rules.

(9) **Records of Vital Statistics.** Records of vital statistics are commonly the subject of particular statutes making them admissible in evidence, Uniform Vital Statistics Act, 9C U.L.A. 350 (1957). The rule is in principle narrower than Uniform Rule 63(16) which includes reports required of persons performing functions authorized by statute, yet in practical effect the two are substantially the same. Comment, Uniform Rule 63(16). The exception as drafted is in the pattern of California Evidence Code § 1281. It is consistent with the previous exception and may overlap with it in some instances.

(10) **Absence of Public Record or Entry.** The principle of proving nonoccurrence of an event by evidence of the absence of a record which would regularly be made of its occurrence, developed in Subdivision (7) with respect to regularly conducted business activities, is here extended to public records of the kind mentioned in Subdivisions (8) and (9). 5 Wigmore § 1633(6), at 519. Some harmless duplication no doubt exists with Subdivision (7). This continues in effect the policy of former Alaska R. Civ. P. 44 (b) (3).

The rule includes situations in which absence of a record may itself be the ultimate focal point of inquiry; *e.g., People v. Love*, 142 N.E. 204 (Ill. 1923) (certificate of Secretary of State admitted to show failure to file documents required by Securities Law); as well as cases where the absence of a record is offered as proof of the nonoccurrence of an event ordinarily recorded.

(11) **Records of Religious Organizations.** Records of activities of religious organizations are currently recognized as admissible at least to the extent of the business records exception to the hearsay rule, 5 Wigmore § 1523, at 371, and Subdivision (6) would be applicable. However, both the business record doctrine and Subdivision (6) require that the person furnishing the information be one in the business or activity. The result is such decisions as *Daily v. Grand Lodge*, 142 N.E. 478 (Ill. 1924), holding a church record admissible to prove fact, date, and place of baptism, but not age of child except that he had at least been born at the time. In view of the likelihood that false information would be furnished on occasions of this kind, the rule contains no requirement that the informant be in the course of the activity. *See* California Evidence Code § 1315 and Comment.

(12) **Marriage, Baptismal, and Similar Certificates.** The principle of proof by certification is recognized as to public officials in Subdivisions (8) and (10), and with respect to authentication in Rule 902. The present exception is a duplication to the extent that it deals with a certificate by a public official, as in the case of a judge who performs a marriage ceremony. The area covered by the rule is, however, substantially larger and extends the certification procedure to clergymen and the like who perform marriages and other ceremonies or administer sacraments. Thus certificates of such matters as baptism or confirmation, as well as marriage, are included. In principle they are as acceptable evidence as certificates of public officers. *See* 5 Wigmore § 1645, as to marriage certificates. When the person executing the certificate is not a public official, the self-authenticating character of documents purporting to emanate from public officials (*see*, Rule 902) is lacking and proof is required that the person was authorized and did make the certificate. The time element, however, may safely be taken as supplied by the certificate, once authority and authenticity are established, particularly in view of the presumption that a document was executed on the date it bears.

For similar rules, some limited to certificates of marriage, with variations in foundation requirements, *see*, Uniform Rule 63(18); California Evidence Code § 1316; Kansas Code of

Civil Procedure § 60-460(p); New Jersey Evidence Rule 63(18).

(13) **Family Records.** Records of family history kept in family bibles have by long tradition been received in evidence. 5 Wigmore §§ 1495, 1496, citing numerous statutes and decisions. Opinions in the area also include inscriptions on tombstones, publicly displayed pedigrees, and engravings on rings. Wigmore, *supra.* The rule is substantially identical in coverage with California Evidence Code § 1312. In approving the Federal Rule counterpart to Alaska Rule 803(13), the House of Representatives' Judiciary Committee approved this rule in the form submitted by the Court, intending that the phrase "Statements of fact concerning personal or family history" be read to include the specific types of such statements enumerated in Rule 803(11). This is a sensible approach to the Subdivision and accurately describes the purpose of the Alaska rule. *See* also, Annot., 39 A.L.R. 372 (1924).

(14) **Records of Documents Affecting an Interest in Property.** The recording of title documents is a purely statutory development. Under any theory of the admissibility of public records, the records would be receivable as evidence of the contents of the recorded document, else the recording process would be reduced to a nullity. When, however, the record is offered for the further purpose of proving execution and delivery, a problem of lack of firsthand knowledge by the recorder, not present as to contents, is presented. This problem is solved, seemingly in all jurisdictions, by qualifying or recording only those documents shown by a specified procedure, either acknowledgement or a form of probate, to have been executed and delivered. 5 Wigmore §§ 1647-1651. *See* AS 34.15.260. *See also,* AS 34.15.300 and AS 35.25.060. *See generally* Hearsay Under the Proposed Federal Rules: A Discretionary Approach, 15 Wayne L. Rev. 1077, 1172-73 (1968).

(15) **Statements in Documents Affecting an Interest in Property.** Dispositive documents often contain recitals of fact. Thus a deed purporting to have been executed by an attorney in fact may recite the existence of the power of attorney, or a deed may recite that the grantors are all the heirs of the last record owner. Under the rule, these recitals are exempted from the hearsay rule. The circumstances under which dispositive documents are executed and the requirement that the recital be germane to the purpose of the document are believed to be adequate guarantees of trustworthiness, particularly in view of the nonapplicability of the rule if dealings with the property have been inconsistent with the document. Although there is authority restricting this exception to ancient documents, there is no good reason to so limit it. It should not be surprising, however, to see that in practical application the document will most often be an ancient one. *See* Uniform Rule 63(29), Comment. The fact that the Alaska Rule and Federal Rule 803(15) are identical removes any question whether the Federal Rule violates the policy of *Erie* recognized in other Federal Rules (*e.g.,* 301, 501, 601). *See* K. Redden and S. Saltzburg, Federal Rules of Evidence Manual 334 (2d ed. 1977).

Similar provisions are contained in Uniform Rule 63(29); California Evidence Code § 1330; Kansas Code of Civil Procedure § 60-460(aa); New Jersey Evidence Rule 63(29).

(16) **Statements in Ancient Documents.** Authenticating a document as ancient, essentially in the pattern of the common law, as provided in Rule 901(b) (8), leaves open as a separate question the admissibility of assertive statements contained therein as against a hearsay objection. 7 Wigmore § 2145a. Wigmore further states that the ancient document technique of authentication is universally conceded to apply to all sorts of documents, including letters, records, contracts, maps, and certificates, in addition to title documents, citing numerous decisions. 7 Wigmore § 2145. Since most of these items are significant evidentially only insofar as they are assertive, their admission in evidence must be as a hearsay exception. *But see* 5 Wigmore § 1573, at 429, referring to recitals in ancient deeds as a "limited" hearsay exception. The former position is believed to be the correct one in reason and authority. As pointed out in McCormick (2d ed.) § 323, danger of mistake is minimized by authentication requirements, and age affords assurance that the writing antedates the present controversy. Nebraska followed the usual common law view in defining ancient documents as those in existence more than 30 years. Most other states that have adopted rules based on the federal model agree with the federal provision reducing the number of years to 20. Subdivision (16) also reduces the number of years on the theory that twenty years should be sufficient to counteract fraud.

For a similar provision, but with the added requirement that "the statement has since generally been acted upon as true by persons having an interest in the matter," *see* California Evidence Code § 1331.

(17) **Market Reports, Commercial Publications.** Ample authority at common law supported the admission in evidence of items falling in this category. While Wigmore's text is narrowly oriented to lists, etc., prepared for the use of a trade or profession, 6 Wigmore § 1702, authorities are cited which include other kinds of publications, for example, newspaper market reports, telephone directories, and city directories. 6 Wigmore §§ 1702-1706. The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate.

For similar provisions, *see* Uniform Rule 63(30); California Evidence Code § 1340; Kansas Code of Civil Procedure § 60-460(bb); New Jersey Evidence Rule 63(30). Uniform Commercial Code § 2-724 provides for admissibility in evidence of "reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such [established commodity] market." This rule is consistent with AS 45.05.240.

(18) **Learned Treatises.** Commentators have generally favored the admissibility of learned treatises; *See* McCormick (2d ed.) 321; Morgan, Basic Problems of Evidence 366 (1962); 6 Wigmore § 1692. *See also* Uniform Rule 63(31); Kansas Code of Civil Procedure § 60-460(cc). But the great weight of authority has been that learned treatises are not admissible as substantive evidence though usable in the cross-examination of experts. The foundation of the minority view is that the hearsay objection must be regarded as unimpressive when directed against treatises since a high standard of accuracy is engendered by various factors: the treatise is written primarily and impartially for professionals, subject to scrutiny and

exposure for inaccuracy, with the reputation of the writer at stake. 6 Wigmore § 1692. Sound as this position may be with respect to trustworthiness, there is, nevertheless, an additional difficulty in the likelihood that the treatise will be misunderstood and misapplied without expert assistance and supervision. This difficulty is recognized in the cases demonstrating unwillingness to sustain findings relative to disability on the basis of judicially noticed medical texts. The rule avoids the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which an expert is on the stand and available to explain and assist in the application of the treatise if desired. The limitation upon receiving the publication itself physically in evidence, contained in the last sentence, is designed to further this policy.

The relevance of the use of treatises on cross-examination is evident. This use of treatises has been the subject of varied views. The most restrictive position is that the witness must have stated expressly on direct his reliance upon the treatise. A slightly more liberal approach still insists upon reliance but allows it to be developed on cross-examination. Further relaxation dispenses with reliance but requires recognition as an authority by the witness, developable on cross-examination. The greatest liberality is found in decisions allowing use of the treatise on cross-examination when its status as an authority is established by any means. Annot., 60 A.L.R.2d 77. The exception is hinged upon this last position, which is that of the United States Supreme Court, *Reilly v. Pinkus*, 338 U.S. 269, 94 L.Ed. 63 (1949), and of recent well considered state court decisions, *City of St. Petersburg v. Ferguson*, 193 So.2d 648 (Fla. App. 1967), *cert. denied*, 201 So.2d 556 (Fla. 1968); *Darling v. Charleston Memorial Community Hospital*, 211 N.E.2d 253 (Ill. 1965); *Dabroe v. Rhodes Co.*, 392 P.2d 317 (Wash. 1964).

Nebraska did not adopt such a provision in its rules, but other states following the Federal model did.

(19), (20), and (21) **Reputation Concerning Personal or Family History—Reputation Concerning Boundaries or General History—Reputation as to Character.** 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's conclusion, if any has been formed, is likely to be a trustworthy one." 5 Wigmore § 1580, at 444, and *see also*, § 1583. On this common foundation, reputation as to land boundaries, customs, general history, character, and marriage have come to be regarded as admissible. The breadth of the underlying principle suggests the formulation of an equally broad exception, but tradition has in fact been much narrower and more particularized, and this is the pattern of these exceptions in the rule.

Subdivision (19) is concerned with matters of personal and family history. Marriage is universally conceded to be a proper subject of proof by evidence of reputation in the community. 5 Wigmore § 1602. As to such items as legitimacy, relationship, adoption, birth, and death, the decisions are divided. 5 Wigmore § 1605. All seem to be susceptible to being the subject of well founded repute. The "world" in which the reputation may exist may be family, associates, or community. This world has proved capable of expanding with changing times from the single uncomplicated neighborhood, in which all activities take place, to the multiple and unrelated worlds of work, religious affiliation, and social activity, in each of which a reputation may be generated. The family has often served as the point of beginning for allowing community reputation. 5 Wigmore § 1488. For comparable provisions *see*, Uniform Rule 63(26), (27) (c); California Evidence Code §§ 1313, 1314; Kansas Code of Civil Procedure § 60-460(x), (y) (3); New Jersey Evidence Rule 63 (26), (27) (c).

The first portion of Subdivision (20) is based upon the general admissibility of evidence of reputation as to land boundaries and land customs, expanded in this country to include private as well as public boundaries. McCormick (2d ed.) § 324. The reputation is required to antedate the controversy, though not to be ancient. The second portion is likewise supported by authority, McCormick (2d ed.) § 324, and is designed to facilitate proof of events when judicial notice is not available. The historical character of the subject matter dispenses with any need that the reputation antedate the controversy with respect to which it is offered. For similar provisions *see*, Uniform Rule 63 (27) (a), (b); California Evidence Code §§ 1320-1322; Kansas Code of Civil Procedure § 60-460(y), (1), (2); New Jersey Evidence Rule 63(27) (a), (b).

Subdivision (21) recognizes the traditional acceptance of reputation evidence as a means of proving human character. McCormick (2d ed.) §§ 44, 186. The exception deals only with the hearsay aspect of this kind of evidence. Limitations upon admissibility based on other grounds will be found in Rules 404, relevancy of character evidence generally, and 608, character of witness. The exception is in effect a reiteration, in the context of hearsay, of Rule 405(a). Similar provisions are contained in Uniform Rule 63(28); California Evidence Code § 1324; Kansas Code of Civil Procedure § 60-460(z); New Jersey Evidence Rule 63 (28).

(22) **Judgment as to Personal, Family, or General History, or Boundaries.** A hearsay exception in this area was originally justified on the ground that verdicts were evidence of reputation. As trial by jury graduated from the category of neighborhood inquests, this theory lost its validity. It was never valid as to chancery decrees. Nevertheless the rule persisted, though the judges and writers shifted ground and began saying that the judgment or decree was as good evidence as reputation. *See City of London v. Clerke*, Carth. 181, 90 Eng. Rep. 710 (K.B. 1691); *Neill v. Duke of Devonshire*, 8 App. Cas. 135 (1882). The shift appears to be correct, since the process of inquiry, sifting, and scrutiny which is relied upon to render reputation reliable is present in perhaps greater measure in the process of litigation. While this might suggest a broader area of application, the affinity to reputation is strong, and subdivision (22) goes no further, not even including character.

(23) **Other Exceptions.** Whether or not to include a general section like this divided the United States Congress during its consideration of the Federal Rules of Evidence. At first the House Committee on the Judiciary deleted draft rules [803 (24) and 804 (b) (5)] intended to allow courts flexibility in creating hearsay exceptions to fit particular cases. Such rules were viewed "as injecting too much uncertainty into the law of evidence and impairing the ability of practitioners to prepare

for trial." The Senate Committee on the Judiciary believed

> that there are certain exceptional circumstances where evidence which is found by a court to have guarantees of trustworthiness equivalent to or exceeding the guarantees reflected by the presently limited exceptions, and to have a high degree of probativeness and necessity could properly be admissible.

The Senate Committee "intended that the residual hearsay exception will be used very rarely, and only in exceptional circumstances." Thus, it modified the rule proposed by the Advisory Committee and approved by the United States Supreme Court to narrow the exception. House and Senate Conferences finally agreed on the Senate's approach but added a provision that a party intending to request the Court to use a statement under this subdivision must notify, sufficiently in advance of trial to allow for a fair contest on the issue of whether the statement should be used, any adverse party of the intent as well as of the particulars of the statement.

Some states that adopted rules based on the federal model rejected any residual exception (*e.g.*, Maine and Nebraska), or modified the Federal Rule (*e.g.*, Nevada and New Mexico). Alaska Rule 803(23) copies the Federal Rule in the belief that the Senate Judiciary Committee was correct in concluding that the specific exceptions provided for in Rule 803, "while they reflect the most typical and well recognized exceptions to the hearsay rule may not encompass every situation in which the reliability and appropriateness of a particular piece of hearsay evidence made clear that it should be heard and considered by the trier of fact." *Cf., Beech Aircraft Corp. v. Harvey*, 558 P.2d 879 (Alaska 1976). The intent of the rule is that it should be used sparingly. It has been cited with favor in *Alaska Airlines, Inc. v. Sweat*, 584 P.2d 544 (Alaska 1978).

Note on Omission — Omitted from this rule is an exception for judgments of previous conviction. *See* Federal Rule 803 (22). Since guilty pleas and statements in connection therewith are admissible under Rule 801(d) (2) (a), unless banned under Rule 410, the only reason to include an exception for judgments of previous conviction is to permit a finding of one trier of fact to come before another. If a judgment of guilty in a criminal case, which follows proof beyond a reasonable doubt, is to have impact in subsequent cases, the impact should be by way of collateral estoppel, not by admitting the previous judgment. The judgment tells the second trier of fact nothing; that trier will either disregard it or defer to it, neither of which tactic is intended by the Federal Rule. There are strong arguments to the effect that facts once proved beyond a reasonable doubt should be binding in subsequent proceedings, especially subsequent civil proceedings. But such a rule is beyond the scope of rules of evidence. The only argument in favor of the Federal Rule is that it might be unconstitutional to attempt to invoke the doctrine of collateral estoppel against a defendant in subsequent criminal cases and Federal Rule 803 (22) is an attempt to use a prior finding in *some* way. But the fact remains that the trier of fact in the second case cannot know how to use the first finding. There is no reason to adopt a rule that can only confuse the trial process. In *Scott v. Robinson*, 583 P.2d 188 (Alaska 1978), the Supreme Court held that a conviction in a criminal case would be conclusive in a subsequent civil case as to the facts necessarily decided in the criminal case under certain circumstances, to wit: the prior conviction was for a serious criminal offense, the defendant had a full and fair hearing, and the issue on which the judgment is offered was necessarily decided in the previous trial.

Rule 804. Hearsay Exceptions—Declarant Unavailable.

(a) **Definition of Unavailability.** The definition of unavailability implements the division of hearsay exceptions into two categories: Rules 803 and 804(b).

At common law the unavailability requirement was evolved in connection with particular hearsay exceptions rather than along general lines. However, no reason is apparent for making distinctions as to what satisfies unavailability for the different exceptions.

Five instances of unavailability are specified:

(1) Substantial authority supports the position that exercise of a claim of privilege by the declarant satisfies the requirement of unavailability (usually in connection with former testimony). *Wyatt v. State*, 46 So.2d 837 (Ala. App. 1950); *State v. Stewart*, 116 P. 489 (Kan. 1911); Annot., 45 A.L.R.2d 1354; Uniform Rule 62(7) (a); California Evidence Code § 240 (a) (1); Kansas Code of Civil Procedure § 60-459(g) (1). A ruling by the judge is required, which clearly implies that an actual claim of privilege must be made.

(2) A witness is rendered unavailable if he simply refuses to testify concerning the subject matter of his statement despite judicial pressures to do so, a position supported by similar considerations of practicality. *Johnson v. People*, 384 P.2d 454 (Colo. 1963); *People v. Pickett*, 63 N.W.2d 681, 45 A.L.R.2d 1341 (Mich. 1954). *Contra, Pleau v. State*, 38 N.W.2d 496 (Wis. 1949).

(3) The position that a lack of memory by the witness of the subject matter of his statement constitutes unavailability likewise finds support in the cases, though not without dissent. If the claim is successful, the practical effect is to put the testimony beyond reach, as in the other instances. In this instance, however, it will be noted that the lack of memory must be established by the testimony of the witness himself, which clearly contemplates his production and subjection to cross-examination. However, the court may choose to disbelieve the declarant's testimony as to his lack of memory. To make this clear, Rule 804(a) (3) begins with the word "establishes" rather than the words "testifies to" which begin its federal counterpart. *See United States v. Insana*, 423 F.2d 1165, 1169-1170 (2nd Cir.), *cert. denied*, 400 U.S. 841 (1970). A preliminary finding is required under Rule 104(a).

(4) Death and infirmity find general recognition as grounds. Uniform Rule 62(7) (c); California Evidence Code § 240(a) (3); Kansas Code of Civil Procedure § 60-459(g) (3); New Jersey Evidence Rule 62(6) (c). *See also* the provisions on use of depositions in Rule 32(a) (3) of the Alaska Rules of Civil Procedure and Rule 15(e) of the Alaska Rules of Criminal Procedure.

(5) Absence from the hearing coupled with inability to compel attendance by process or other reasonable means or to depose the declarant in order to provide an opportunity for oath and cross-examination also satisfies the requirement. Uniform

Rule 62(7) (d) and (e); California Evidence Code § 240(a) (4) and (5); Kansas Code of Civil Procedure § 60-459(g) (4) and (5); New Jersey Rule 62(6) (b) and (d). If the conditions otherwise constituting unavailability result from the procurement or wrongdoing of the proponent of the statement, the requirement is not satisfied.

The requirement that an attempt to depose a witness have been made, if possible, was added by the Committee on the Judiciary of the House of Representatives when it considered the Federal Rules. The Senate Committee on the Judiciary was not enthusiastic about the addition, arguing:

> Under the House amendment, before a witness is declared unavailable, a party must try to depose a witness (declarant) with respect to dying declarations, declarations against interest, and declarations of pedigree. None of these situations would seem to warrant this needless, impractical and highly restrictive complication. A good case can be made for eliminating the unavailability requirement entirely for declarations against interest cases.
>
> In dying declaration cases, the declarant usually, though not necessarily, will be deceased at the time of trial. Pedigree statements which are admittedly and necessarily based largely on word of mouth are not greatly fortified by a deposition requirement.
>
> Depositions are expensive and time-consuming. In any event, deposition procedures are available to those who wish to resort to them. Moreover, the deposition procedures of the Civil Rules and Criminal Rules are only imperfectly adapted to implementing the amendment. No purpose is served unless the deposition, if taken, may be used in evidence…. [Footnote omitted.]

But the Senate Committee concluded with a statement indicating it did not completely disagree with the goals of the House Committee:

> The committee understands that the rule as to unavailability, as explained by the Advisory Committee "contains no requirement that an attempt be made to take the deposition of a declarant." In reflecting the committee's judgment, the statement is accurate insofar as it goes. Where, however, the proponent of the statement, with knowledge of the existence of the statement, fails to confront the declarant with the statement at the taking of the deposition, then the proponent should not, in fairness, be permitted to treat the declarant as "unavailable" simply because the declarant was not amenable to process compelling his attendance at trial. The committee does not consider it necessary to amend the rule to this effect because such a situation abuses, not conforms to, the rule. Fairness would preclude a person from introducing a hearsay statement on a particular issue if the person taking the deposition was aware of the issue at the time of the deposition but failed to depose the unavailable witness on that issue.

Despite the fact that several states have abjured the provision requiring an effort to depose, this rule follows the federal lead in requiring that oath and cross-examination are utilized whenever reasonably possible. An opportunity for oath and cross-examination is favored despite its costs.

Paragraph (b) (1) is not included under (a) (5) for an obvious reason; there has already been an opportunity for oath and cross-examination. The Federal Rule excluded (b) (5) as well, but no good reason argues why statements falling within the general exception should be admitted if an opportunity to depose has been foregone. Indeed, since this paragraph involves controversial evidence not within traditional exceptions, there is more, not less, reason to include it in (a) (5).

(b) **Hearsay Exceptions.** Rule 803, *supra*, is based upon the assumption that a hearsay statement falling within one of its exceptions possesses qualities which justify the conclusion that whether the declarant is available or unavailable is not a relevant factor in determining admissibility. The instant rule proceeds upon a different theory: hearsay which admittedly is not equal in quality to testimony of the declarant on the stand may nevertheless be admitted if the declarant is unavailable and if his statement meets a specified standard. The rule expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant. The exceptions evolved at common law with respect to declarations of unavailable declarants furnish the basis for the exceptions enumerated in the proposal. The term "unavailable" is defined in subdivision (a).

(1) *Former Testimony.* Former testimony does not rely upon some set of circumstances to substitute for oath and cross-examination, since both oath and opportunity to cross-examine were present in fact. The only missing one of the ideal conditions for the giving of testimony is the presence of the trier ("demeanor evidence"). This is lacking with all hearsay exceptions. Hence it may be argued that former testimony is the strongest hearsay and should be included under Rule 803, *supra*. However, opportunity to observe demeanor is what in a large measure confers depth and meaning upon oath and cross-examination. Thus, in cases under Rule 803 demeanor lacks the significance which it possesses with respect to testimony. In any event, the tradition, founded in experience, uniformly favors production of the witness if he is available. The exception indicates continuation of the policy. This preference for the presence of the witness is apparent also in rules and statutes on the use of depositions, which deal with substantially the same problem.

Under the exception, the testimony may be offered (1) *against* the party against whom it was previously offered or (2) against the party *by* whom it was previously offered. In each instance the question resolves itself into whether fairness allows imposing, upon the party against whom now offered, the handling of the witness on the earlier occasion. (1) If the party against whom now offered is the one against whom the testimony was offered previously, no unfairness is apparent in requiring him to accept his own prior conduct of cross-examination or decision not to cross-examine. Only demeanor has been lost, and that is inherent in the situation. (2) If the party against whom now offered is the one *by* whom the testimony was offered previously, a satisfactory answer becomes somewhat more difficult. One possibility is to proceed somewhat along the line of an adoptive admission, *i.e.*, by offering the testimony proponent in effect adopts it. However, this theory savors of discarded concepts of witnesses' belonging to a party of litigants' ability to pick and

choose witnesses, and of vouching for one's own witnesses. A more direct and acceptable approach is simply to recognize direct and redirect examination of one's own witness as the equivalent of cross-examining an opponent's witness. Allowable techniques for dealing with hostile, double-crossing, forgetful, and mentally deficient witnesses leave no substance to a claim that one could not adequately develop his own witness at the former hearing. An even less appealing argument is presented when failure to develop fully was the result of a deliberate choice.

The common law did not limit the admissibility of former testimony to that given in an earlier trial of the same case, although it did require identity of issues as a means of insuring that the former handling of the witness was the equivalent of what would now be done if the opportunity were presented. Modern decisions reduce the requirement to "substantial" identity. Since identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness, expressing the matter in the latter terms is preferable. Testimony given at a preliminary hearing was held in *California v. Green,* 399 U.S. 149, 26 L.Ed.2d 489 (1970), to satisfy confrontation requirements in this respect. The opportunity to prepare will have to be examined in all cases, however.

Rule 804(b) (1), as submitted by the Supreme Court to the Congress, allowed prior testimony of an unavailable witness to be admissible if the party against whom it is offered or a person "with motive and interest similar" to his had an opportunity to examine the witness. The Congress concluded that it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party; the sole exception to this is when a party's predecessor in interest in a civil action or proceeding had an opportunity and similar motive to examine the witness. Congress amended the rule to reflect these policy determinations. Alaska Rule 804(b) (1) follows the lead of Congress, although several states have adopted the broader exception proposed by the Advisory Committee and approved by the United States Supreme Court.

It has been noted that the paragraph (b) (1) when read in conjunction with paragraph (a)(5) is more limited than Alaska R. Civ. P. 32 (a) (limited to depositions; broader definition of unavailability). *Cf.,* K. Redden & S. Saltzburg, Federal Rules of Evidence Manual 731 (2d ed. 1977). This procedural rule remains effective, as does Alaska R. Crim. P. 15(e) (limited to depositions; virtually identical to Rule 801 (a) (5) & (b) (1) in application to depositions). These procedural rules "create of their own force exceptions to the hearsay rule in the case of unavailable deponents, which Rule 802 continues. Rule 804(b) (1) applies to depositions only to the extent that they are offered in a proceeding different from the one in connection with which they are taken." 4 Weinstein's Evidence ¶ 804(b) (1) [01] (1975). Rule 804(b) (1) amends the Federal Rule to make it clear that it does not cover depositions taken by parties in the same case that goes to trial.

It is important to keep in mind that Rule 801(d) (1) (A) may authorize admission of former testimony for its truth even when a witness is present. And Rule 801(d) (2) may do the same.

(2) *Statement Under Belief of Impending Death.* The exception is the familiar dying declaration of the common law, expanded beyond its traditional limits. While the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present. *See* 5 Wigmore § 1443 and the classic statement of Chief Baron Eyre in *Rex v. Woodcock,* 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (K.B. 1789).

The common law required that the statement be that of the victim, offered in a prosecution for criminal homicide. Thus declarations by victims in prosecution for other crimes, e.g., a declaration by a rape victim who dies in childbirth, and all declarations in civil cases were outside the scope of the exception. An occasional statute has removed these restrictions or has expanded the area of offenses to include abortions, 5 Wigmore § 1432, at 224, n.4. While the common law exception no doubt originated as a result of the exceptional need for the evidence in homicide cases, the theory or admissibility applies equally in civil cases. The same considerations suggest abandonment of the limitation to circumstances attending the event in question, yet when the statement deals with matters other than the supposed death, its influence is believed to be sufficiently attenuated to justify the limitation. Unavailability is not limited to death. *See* subdivision (a) of this rule. Any problem as to declarations phrased in terms of opinion is laid at rest by Rule 701, and continuation of a requirement of firsthand knowledge is assured by Rule 602.

Comparable provisions are found in Uniform Rule 63(5); California Evidence Code § 1242; Kansas Code of Civil Procedure § 60-460(e); New Jersey Evidence Rule 63(5).

Federal Rule 804(b) (2) is limited to homicide cases and civil cases. While the United States Supreme Court approved a rule like Alaska's the Congress limited the exception in the belief that dying declarations are not among the most reliable forms of hearsay and should only be admitted when necessary. Admittedly, there are problems with this exception; imminent death may distort perception, jumble narration and disrupt memory. At best, the prospect of death will generate sincerity. But once the balance is struck in favor of admission where the penalty is greatest, there is no reason to distinguish among classes of cases. It is difficult to defend the argument that dying declarations are more necessary in a homicide case than in an abortion prosecution. If the dying declarant is the only or best witness, any case with issues turning on the cause of the death needs dying declarations.

(3) *Statement Against Interest.* The circumstantial guarantee of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true. If the statement is that of party, offered by his opponent, it comes in as an admission, Rule 801 (d) (2), and there is no occasion to inquire whether it is against interest, this not being a condition precedent to admissibility of admissions by opponents.

The common law required that the interest declared against be pecuniary or proprietary. The exception discards the common law limitation and expands to the full logical limit. One result is to remove doubt as to the admissibility of

declarations tending to establish a tort liability against the declarant or to extinguish one which might be asserted by him, in accordance with the trend of the decisions in this country. McCormick (2d ed.) § 277, at 671-72. And finally, exposure to criminal liability satisfies the against-interest requirement. The refusal of common law to concede the adequacy of penal interest was no doubt indefensible in logic. *See* the dissent of Mr. Justice Holmes in *Donnelly v. United States*, 228 U.S. 243, 57 L.Ed. 820 (1913), but one senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant. Nevertheless, an increasing amount of decisional law recognizes exposure to punishment for crime as a sufficient stake. Annot., 162 A.L.R. 456. The requirement of corroboration is included in the rule in order to effect an accommodation between these competing considerations. When the statement is offered by the accused by way of exculpation, the resulting situation is not adapted to control by rulings as to the weight of the evidence, and hence the provision is cast in terms of a requirement preliminary to admissibility. *Cf.*, Rule 104(a). The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication.

Maine added a sentence to its declaration against interest exception: "A statement or confession offered against the accused in a criminal case, made by a co-defendant or other person implicating both himself and the accused, is not within this exception." Apparently, this was a response to the following comment by the Federal Advisory Committee on its rule:

> Ordinarily the third-party confession is thought of in terms of exculpating the accused, but this is by no means always or necessarily the case: it may include statements implicating him, and under the general theory of declarations against interest they would be admissible as related statements. *Douglas v. Alabama*, 380 U.S. 415 (1965), and *Bruton v. United States*, 389 U.S. 818 (1968), both involved confessions by codefendants which implicated the accused. While the confession was not actually offered in evidence in *Douglas*, the procedure followed effectively put it before the jury, which the Court ruled to be error. Whether the confession might have been admissible as a declaration against penal interest was not considered or discussed. *Bruton* assumed the inadmissibility, as against the accused, of the implicating confession of his codefendant, and centered upon the question of the effectiveness of a limiting instruction. These decisions, however, by no means require that all statements implicating another person be excluded from the category of declarations against interest. Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. See the dissenting opinion of Mr. Justice White in *Bruton*. On the other hand, the same words, spoken under different circumstances, e.g., to an acquaintance, would have no difficulty in qualifying. The rule does not purport to deal with questions of the right of confrontation. (multiple citations omitted).

Without deciding the confrontation question, it is fair to say that it is not highly probable that the Constitution will be read to allow one non-testifying defendant's declarations against interest made to the police to be used against another defendant. *But see, Dutton v. Evans*, 400 U.S. 74, 27 L.Ed.2d 213 (1970). Once the decision is made to cooperate with the government, statements by one accused are suspect if offered against another who refuses to cooperate. *Cf.*, Rule 410 and its Reporter's Comment. But declarations against interest made outside of the formal interrogation process may, and perhaps should, be treated differently. To the extent that they are truly disserving to the declarant and only tangentially refer to another, the statements may be thought to be reliable as to both. In custody, statements are difficult to classify as totally disserving; they are disserving, but often are made with a hope of some benefit. To the extent that the Advisory Committee suggests that even declarations against interest made in custody might be admissible against someone other than the declarant if the declarant does not testify, it is probably wrong. Such an approach would cut the heart out of *Bruton*. To the extent that it suggests that other declarations against interest might be admissible irrespective of whether the declarant testifies, it may be correct. This rule is not as quick to close the door to such statements as Maine's is, although it is not easy to imagine many statements intended to be against interest being made by participants in crime outside of custody.

Maine also added to its rule a provision qualifying statements tending to make the declarant an object of hatred, ridicule or disgrace as declarations against interest. Such a provision was found in earlier drafts of the Federal Rule. Alaska Rule 804(b) (3) rejects this expansion because it is not clear whether the hatred, ridicule, or disgrace that the declarant must fear to qualify his statements under the hearsay exception must be widespread in the community, or in some subgroups, or can be limited to the person to whom the statement is made. Nor is it clear how intense the negative reaction must be thought to be. Proprietary, pecuniary and penal liability offer more objective criteria with which to work. Subdivision (b) (5) allows especially reliable statements to be admitted.

(4) *Statement of Personal or Family History.* The general common law requirement that a declaration in this area must have been made *ante litem motam* has been dropped, as bearing more appropriately on weight than admissibility. *See* 5 Wigmore § 1483, Item (A) specifically disclaims any need of firsthand knowledge respecting a declarant's own personal history. In some instances it is self-evident (marriage) and in other impossible and traditionally not required (date of birth). Item B deals with declaration concerning the history of another person. As at common law, declarant is qualified if related by blood or marriage. 5 Wigmore § 1489. In addition, and contrary to the common law, declarant qualifies by virtue of intimate association with the family. 5 Wigmore § 1487. The requirement sometimes encountered that when the subject of the statement is the relationship between two other persons the declarant must qualify as to both is omitted. Relationship is reciprocal. 5 Wigmore § 1491.

For comparable provisions, see, Uniform Rule 63(23), (24), (25); California Evidence Code §§ 1310, 1311; Kansas Code of Civil Procedure § 60-460(v), (w); New Jersey Evidence Rules 63(23), 63(24), 63(25).

(5) *Other Exceptions.* In language and purpose, this exception is identical with Rule 803. See Reporter's Comment to that provision.

EDITOR'S NOTE: Section 3, Chapter 67, Session Laws of Alaska 1982, provides that "AS 12.45.047 added by sec. 2 of this Act [Chapter 67, Session Laws of Alaska, 1982] has the effect of changing Rule 804, Rules of Evidence, by adding the videotaped evidence of a young victim of a violation of AS 11.41.410–11.41.455 to the list of exceptions to the hearsay rule."

Rule 805. Hearsay Within Hearsay.

On principle it scarcely seems open to doubt that the hearsay rule should not call for exclusion of a hearsay statement which includes a further hearsay statement when both conform to the requirements of a hearsay exception. Thus a hospital record might contain an entry of the patient's age based on information furnished by his wife. The hospital record would qualify as a regular entry except that the person who furnished the information was not acting in the routine of the business. However, her statement independently qualifies as a statement of pedigree (if she is unavailable) or as a statement made for purposes of diagnosis or treatment, and hence each link in the chain falls within a recognized exception. Or, further to illustrate, a dying declaration may incorporate a declaration against interest by another declarant. Rule 403 may come into play, however, and lead the trial judge to exclude compound hearsay when it is more prejudicial than probative.

Rule 806. Attacking and Supporting Credibility of Declarant.

The declarant of a hearsay statement, or a statement defined by Rule 801(d)(2)(C), (D), or (E) as non-hearsay (throughout this Comment the reader should take the word "hearsay" to include these statements), which is admitted in evidence, is in effect a witness. The Supreme Court's confrontation cases make this point clear. *See, e.g., Douglas v. Alabama,* 380 U.S. 415, 13 L.Ed.2d 934 (1965); *Bruton v. United States,* 389 U.S. 818, 19 L.Ed.2d 70 (1968). His credibility should in fairness be subject to impeachment and support as though he had in fact testified. *See* Rules 608 and 609. This ensures that hearsay declarants who are cross-examined in the presence of the jury are not presumed to be truthful while live witnesses are subject to attack. There are, however, some special aspects of the impeaching of a hearsay declarant which require consideration. These special aspects center upon impeachment by inconsistent statement, arise from factual differences which exist between the use of hearsay and an actual witness and also between various kinds of hearsay, and involve the question of applying to declarants the general rule disallowing evidence of an inconsistent statement to impeach a witness unless he is afforded an opportunity to deny or explain. *See* Rule 613(b).

The principal difference between using hearsay and an actual witness is that the inconsistent statement will in the case of the witness almost inevitably be a prior statement, which it is entirely possible and feasible to call to his attention, while in the case of hearsay the inconsistent statement may well be a *subsequent* one, which practically precludes calling it to the attention of the declarant. The result of insisting upon observation of this impossible requirement in the hearsay situation is to deny the opponent, already barred from cross-examination, the benefit of this important technique of impeachment. The writers favor allowing the subsequent statement. *E.g.,* McCormick (2d ed.) § 37. The cases, however, are divided. Cases allowing the impeachment include *People v. Collup,* 167 P.2d 714 (Cal. 1946); *People v. Rosoto,* 373 P.2d 867 (Cal. 1962); *Carver v. United States,* 164 U.S. 694, 41 L.Ed. 602 (1897). *Contra, Mattox v. United States,* 156 U.S. 237, 39 L.Ed. 409 (1895); *People v. Hines,* 29 N.E.2d 483 (N.Y. 1940). The force of *Mattox,* where the hearsay was the former testimony of a deceased witness and the denial of use of a subsequent inconsistent statement was upheld, is much diminished by *Carver,* where the hearsay was a dying declaration and denial of use of a subsequent inconsistent statement resulted in reversal. The difference in the particular brand of hearsay seems unimportant when the inconsistent statement is a *subsequent* one. Although it is true that the opponent is not totally deprived of cross-examination when the hearsay is former testimony or a deposition, the fact remains that he is deprived of cross-examining on the statement or along lines suggested by it.

One commentary on Federal Rule 806 is also apropos of the Alaska rule.

> It would have been possible for the draftsmen of the Rule to distinguish situations outside of a formal judicial proceeding or deposition from proceedings where a witness is sworn and a formal statement is made and recorded, and to distinguish statements made prior to a judicial proceeding (including deposition) from those made afterwards. When a deposition is taken, for instance, it is possible to require that any party having knowledge of a statement made prior to deposing the witness and inconsistent with the witness' statement must give the witness a chance to explain the inconsistency at the deposition upon penalty of being unable to demonstrate the inconsistency at trial if the person who was deposed is unable to appear.

The Advisory Committee rejected drawing this line between informal and formal statements on the ground that deposition procedures are cumbersome and expensive enough, and to require the laying of the foundation might impose undue burdens. Moreover, the Committee appears to have concluded that a distinction based on the timing of inconsistent statements was more complex than beneficial. The Committee was not inclined to adopt a general Rule requiring a foundation with an exception for special circumstances.

K. Redden & S. Saltzburg, Federal Rules of Evidence Manual 634 (2d ed. 1977).

For similar provisions, *see,* Uniform Rule 65; California Evidence Code § 1202; Kansas Code of Civil Procedure § 60-462; New Jersey Evidence Rule 65.

The provision for cross-examination of a declarant upon his hearsay statement is a corollary of general principles of cross-examination. A similar provision is found in California Evidence Code § 1203.

The Senate Committee on the Judiciary explained why the Rule does not cover statements defined by Rule 801 (d) (2) (A) & (B):

> The committee considered it unnecessary to include statements contained in rule 801(d) (2) (A) and (B)—the statement by the party-opponent himself or the statement of which he has manifested his adoption—because the credibility of the party-opponent is always subject to an attack on his credibility.

The Alaska rule is in accord.

ARTICLE IX. DOCUMENTARY EVIDENCE

Rule 901. Requirement of Authentication or Identification.

The Advisory Committee's Notes to Federal Rule 901 describes the process of authentication in the following way:

> Authentication and identification represent a special aspect of relevancy. Michael and Adler, Real Proof, 5 Vand. L. Rev. 344, 362 (1952); McCormick §§ 179, 185; Morgan, Basic Problems of Evidence 378 (1962). Thus a telephone conversation may be irrelevant because of an unrelated topic or because the speaker is not identified. The latter aspect is the one here involved…
>
> This requirement of showing authenticity or identity falls in the category of relevancy dependant upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b).

But sometimes authentication is more than a relevancy concern. Alaska Rule 901 recognizes this and

> the confusion that exists even in common law jurisdictions over whether authentication is a problem involving a question of "competency" which must be resolved by preliminary fact-finding and decision-making by the Trial Judges or whether it involves a question of conditional relevancy…. In fact, common law jurisdictions, without saying as much, have divided up authentication problems so that some are really problems of relevancy and some involve requirements of preliminary fact-finding and judicial screening to ensure a minimal level of reliability and safety.

K. Redden & S. Saltzburg, *Federal Rules of Evidence Manual* 643-44 (2d ed. 1977).

Thus, Article IX of these rules—especially Rule 903—abandons most special foundation rules altogether, in the belief that today procedures like requests to admit and pretrial conferences afford the means of eliminating much of the need for authentication and identification. Rule 901 takes an intermediate step between common law requirements and the Federal Rule; it follows the Federal Rule in abandoning rigid rules in the introductory language, but it recognizes the wisdom of some common law authentication requirements and provides that courts must be especially careful in handling certain kinds of evidence.

Paragraph (a) requires that before offering evidence of a type not readily identifiable, or susceptible to adulteration, contamination, modification, or tampering, etc., the Government in a criminal case must demonstrate as a matter of reasonable certainty that the evidence is properly identified and untainted. This is similar to the "chain of custody" foundational requirement imposed by the common law. The stringency of the requirement will depend on the degree of susceptibility to change by accident or fraud of the particular piece of evidence, as well as its importance to the Government's case. But in any case Rule 901(a) does not change the well-settled rule.

> that in setting up a chain of evidence, the prosecution need not call upon every person who had an opportunity to come in contact with the evidence sought to be admitted. Similarly, every conceivable possibility of tampering need not be eliminated… . '[T]he presumption of regularity supports the official acts of public officers; and the courts presume that they have properly discharged their official duties.' [Footnote omitted.]

Wright v. State, 501 P.2d 1360, 1372 (Alaska 1972), *quoting Gallego v. United States*, 276 F.2d 914, 917 (9th Cir. 1960). *Wright* held that where a Federal Bureau of Narcotics chemist identified initials on an envelope in which LSD had been mailed as those of a Bureau secretary and identified the signature on the postal receipt from the envelope as another secretary's and there was no indication of any deviation from the Bureau routine of initialing registered letters and placing them in a particular safe, there was sufficient showing of the whereabouts of the LSD from the time received by the Bureau to the time analyzed by the chemist.

Wester v. State, 528 P.2d 1179 (Alaska 1974), held that the personal testimony of individuals who calibrated a breathalyzer machine and who tested sample ampules was not necessary as a foundational basis for admission of breathalyzer test results, and held that a showing of substantial compliance with the fifteen-minute observation period prior to the administration of the test was a prima facie showing of the authenticity of the test. The court remarked that the defendant could have called the calibrators and test administrators as her own witnesses if she had reason to suspect impropriety.

These cases illustrate that Rule 901(a) does not hold the Government to an onerous standard of proof, but merely to the same reasonable requirement that it is used to fulfilling. *See also Lee v. State*, 511 P.2d 1076 (Alaska 1973); *Selman v. State*, 411 P.2d 217 (Alaska 1966).

Including paragraph (a) in Rule 901 ensures that real evidence is reliable, burdens prosecutors and police only slightly, and avoids the need to create additional prophylactic constitutional rules to protect criminal defendants.

Paragraph (b) of Rule 901 allows the court discretion to require a greater degree of proof for authentication or identification of evidence not readily identifiable or of a kind particularly susceptible to adulteration, contamination, modification, tampering, etc. Leeway is provided for courts to deal with situations in which evidence is introduced sufficient to support a finding that the matter in question is what its proponent claims, but is nonetheless 1) suspect, 2) of great importance to the case or 3) not easily attacked by the adversary because the proponent of the evidence has control over means of establishing or attacking its authenticity, and/or introduction of the suspect evidence may threaten a fair trial even if subsequent evidence is offered on the issue of weight. In addition to satisfying the threshold authentication and identification inquiry, additional proof may aid the court in ruling on the relevance of the evidence under Rule 403.

Federal Rule 901 has a subdivision (b) which presents examples of ways in which evidence can be authenticated. Since these examples are for purposes of illustration and are really not an addition to the Rule itself, they are included in this Comment rather than in the text of Alaska Rule 901. These are only illustrative; they are not intended to limit the ways in which evidence might be authenticated. Following each example is a brief explanation.

Example

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

Explanation

Example (1). contemplates a broad spectrum ranging from testimony of a witness who was present at the signing of a document to testimony establishing narcotics as taken from an accused and accounting for custody through the period until trial, including laboratory analysis.

Example

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

Explanation

Example (2). states conventional doctrine as to lay identification of handwriting, which recognizes that a sufficient familiarity with the handwriting of another person may be acquired by seeing him write, by exchanging correspondence, or by other means, to afford a basis for identifying it on subsequent occasions. McCormick (2d. ed.) § 221. *See also* California Evidence Code § 1416. Testimony based upon familiarity acquired for purposes of the litigation is reserved to the expert under the example which follows.

Example

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

Explanation

Example (3). The history of common law restrictions upon the technique of proving or disproving the genuineness of a disputed specimen of handwriting through comparison with a genuine specimen, by either the testimony of expert witnesses or direct viewing by the triers themselves, is detailed in 7 Wigmore §§ 1991-1994. In breaking away, the English Common Law Procedure Act of 1854, 17 and 18 Vict., c. 125, § 27, cautiously allowed expert or trier to use exemplars "proved to the satisfaction of the judge to be genuine" for purposes of comparison. The language found its way into numerous statutes in this country e.g., California Evidence Code §§ 1417, 1418. While explainable as a measure of prudence in the process of breaking with precedent in the handwriting situation, the reservation to the judge of the question of the genuineness of exemplars and the imposition of an unusually high standard of persuasion are at variance with the general treatment of relevancy which depends upon fulfillment of a condition of fact. Rule 104(b). No similar attitude is found in other comparison situations, *e.g.*, ballistics comparison by jury, as in *Evans v. Commonwealth*, 19 S.W.2d 1091 (Ky. 1929), or by experts, Annot., 26 A.L.R.2d 892, and no reason appears for its continued existence in handwriting cases. Consequently Example (3) sets no higher standard for handwriting specimens and treats all comparison situations alike, to be governed by Rule 104(b). This approach is consistent with 28 U.S.C. § 1731: "The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person."

Example

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

Explanation

Example (4). The characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety. Thus a document or telephone conversation may be shown to have emanated from a particular person by virtue of its disclosing knowledge of facts known peculiarly to him; *Globe Automatic Sprinkler Co. v. Braniff*, 214 P. 127 (Okla. 1923); California Evidence Code § 1421. Similarly, a letter may be authenticated by content and circumstances indicating it was in reply to a duly authenticated one. McCormick § 225, California Evidence Code § 1420. Language patterns may indicate authenticity or its opposite. *Magnuson v. State*, 203 N.W. 749 (Wis. 1924); Arens and Meadow, *Psycholinguistics and the Confession Dilemma*, 56 Colum. L. Rev. 19 (1956).

Example

(5) *Voice identification.* Identification of a voice, whether heard firsthand 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.

Explanation

Example (5). Since aural voice identification is not a subject of expert testimony, the requisite familiarity may be acquired either before or after the particular speaking which is the subject of the identification, in this respect resembling visual identification of a person rather than identification of handwriting. If voiceprints are deemed admissible at some future time, consideration will have to be given to limiting to experts voice comparisons made solely for purposes of litigation. Compare Examples 2 and 3, *supra*.

Example

(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.

Explanation

Example (6). The cases are in agreement that a mere assertion of his identity by a person talking on the telephone is not sufficient evidence of the authenticity of the conversation and that additional evidence of his identity is required. The additional evidence need not fall in any set pattern. Thus the

content of his statements or the reply technique, under Example (4), *supra,* or voice identification under Example (5), may furnish the necessary foundation. Outgoing calls made by the witness involve additional factors bearing upon authenticity. The calling of a number assigned by the telephone company reasonably supports the assumption that the listing is correct and that the number is the one reached. If the number is that of a place of business, the mass of authority allows an ensuing conversation if it relates to business reasonably transacted over the telephone, on the theory that the maintenance of the telephone connection is an invitation to do business without further identification. *Matton v. Hoover Co.,* 166 S.W.2d 557 (Mo. 1942); *City of Pawhuska v. Crutchfield,* 293 P. 1095 (Okla. 1930); *Zurich General Acc. & Liability Ins. Co. v. Baum,* 165 S.E. 518 (Va. 1932). Otherwise, some additional circumstances of identification of the speaker is required. The authorities divide on the question whether the self-identifying statement of the person answering suffices. Example (6) answers in the affirmative on the assumption that usual conduct respecting telephone calls furnishes adequate assurances of regularity, bearing in mind that the entire matter is open to exploration before the trier of fact. *See generally* McCormick (2d. ed.) § 226; 7 Wigmore § 2155; Annot., 71 A.L.R. 5; Annot., 105 A.L.R. 326.

Example

(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.

Explanation

Example (7). Public records are regularly authenticated by proof of custody, without more. McCormick (2d. ed.) § 224; 7 Wigmore §§ 2158, 2159. The example extends the principle to include data stored in computers and by similar methods, of which increasing use in the public records area may be expected. *See,* California Evidence Code §§ 1532, 1600.

Example

(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.

Explanation

Example (8). The familiar ancient document rule of the common law is extended to include data stored electronically or by other similar means. Since the importance of appearance diminishes in this situation, the importance of custody or place where found increases correspondingly. This expansion is necessary in view of the widespread use of methods of storing data in forms other than conventional written records.

Any time period selected is bound to be arbitrary. The common law period of 30 years is here reduced to 20 years, with some shift of emphasis from the probable unavailability of witnesses to the unlikeliness of a still viable fraud after the lapse of time. The shorter period is specified in the English Evidence Act of 1938, 1 & 2 Geo. 6, c. 28, and in Oregon R.S. 1963, § 41.360(34). *See also* the numerous statutes prescribing periods of less than 30 years in the case of recorded documents. 7 Wigmore § 2143. *See also* Reporter's Comment accompanying Rule 803(16).

Example

(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.

Explanation

Example (9). If the accuracy of a result is dependent upon the process or system which produces it, the process or system must be shown to be reliable. Judicial notice under Rule 201 may be sufficient to authenticate a process or system. Expert testimony under Rule 703 may be sufficient. Judicial precedents will establish that some processes or systems are acceptable.

Example

(10) *Methods provided by statute or rule.* Any method of authentication or identification provided by an enactment of the Alaska Legislature or by rules prescribed by the Supreme Court of Alaska or an administrative agency.

Explanation

Example (10). Other methods of authentication found in statutes or rules are also valid. *See, e.g.,* Alaska R. Civ. P. 30(f) (depositions); Alaska R. Civ. P. 75(b) (transcript of evidence); AS 21.06.070 (certificates of insurance director); AS 34.15.300 (record of conveyance). Rules of court and administrative rules also can provide for ways of authenticating evidence.

Rule 902. Self-Authentication.

By providing for self-authentication of certain documents and other items of real evidence this Rule dispenses with the need to produce extrinsic evidence of authenticity as a condition precedent to admissibility. The move to decrease the foundation requirements for some real evidence is a move towards a more efficient trial system. All of the subdivisions of this Rule govern types of evidence which can be presumed to be authentic and free from taint without much danger that the rate of error in litigation will be appreciably affected. By eliminating the costs of laying a foundation, the expense of litigation to the parties and to the taxpayers should be reduced to some significant extent.

While a presumption of authenticity dispenses with the need to introduce extrinsic evidence as a condition precedent to admissibility, it does not preclude a dispute about authenticity by the parties, who are free to attack the genuineness of the real evidence. When evidence is introduced to dispute the authenticity of an official seal or signature, the jury will determine its validity unless the trial judge finds that reasonable minds could not differ on the question, in which case a directed verdict or peremptory instruction should result in a civil case. In a criminal case the same is true, except that the trial judge cannot direct a verdict against, or instruct the jury that it must make a finding against, the defendant. See Reporter's Comment to Rule 201. *See also* Reporter's Comment to Rule 303.

The Advisory Committee's Note to the Federal Rule, which is similar with respect to most of the provisions except subdivision (3) (a), is heavily relied upon in this Comment.

(1) **Domestic Public Documents Under Seal.** The acceptance of documents bearing a public seal and signature, most often encountered in practice in the form of acknowledgements or certificates authenticating copies of public records, is actually of broad application. Whether theoretically based in whole or in part upon judicial notice, the practical underlying considerations are that forgery is a crime and detection is fairly easy and certain, due to the easy ascertainment of the validity of the seal. *See* 7 Wigmore § 2161; California Evidence Code § 1452.

(2) **Domestic Public Documents Not Under Seal.** While statutes are found which raise a presumption of genuineness of purported official signatures in the absence of an official seal, 7 Wigmore § 2167; California Evidence Code § 1453, the greater ease of effecting a forgery under these circumstances is apparent. Hence this paragraph of the rule calls for authentication by an officer who has a seal. *See also* N.Y. Civ. Prac. Law, Rule 45421 (McKinney).

(3) **Foreign Public Documents.** Paragraph (a) provides that documents bearing the seal of state of a foreign nation are presumptively valid. Although the Federal Rule does not so provide, this is in accord with California Evidence Code § 1452 and with some common law authority. *See* 7 Wigmore § 2163, at 645. Unlike the California provision, the seal of a public entity of a foreign nation is not presumed to be self-authenticating under this rule. The concern for forgery is greater where the seal is more difficult to ascertain as in the case of departments, agencies and officers of foreign nations. See Reporter's Comment to Alaska Evidence Rule 202(c) (4) for related treatment of judicial notice of foreign law and a discussion of the problem associated with ascertaining foreign law. Paragraph (b) provides a method for extending the presumption of authenticity to foreign official documents which are not under the seal of state by a procedure of certification. It is largely based on Fed. R. Civ. P. 44(a) (2) but applies to public documents in addition to public records. It is important to note that an American officer can supply the necessary verification, whether or not he or she is located in the foreign country whose record or document is introduced. Also important is the fact that the Rule provides several different ways of authenticating foreign public documents. This section also provides that where reasonable opportunity exists for the parties to investigate authenticity, the court may order that foreign public documents be presumed to be authenticated without final certification. This is similar to Rule 1003 in its impact. It is important that the adjective "reasonable" be deemed to include financial and logistical concerns, as well as concern about time.

(4) **Certified Copies of Public Records.** The common law has provided that official records and reports recorded or filed in a public office may be authenticated by a certificate of a custodian or other person authorized to make the certification. Under this provision the certificate must comply with sections (1)–(3) previously discussed. It will be observed that the certification procedure here provided extends only to public records, reports, and recorded documents, all including data compilations, and does not apply to public documents generally. Hence documents provable when presented in original form under subdivisions (1), (2), or (3) may not be provable by certified copy under subdivision (4).

(5) **Official Publication.** The chance to dispense with preliminary proof of the genuineness of purportedly official publications, most commonly encountered in connection with statutes, court reports, rules, and regulations, has been greatly enlarged by statutes and decisions. 5 Wigmore § 1684. Subdivision (5), it will be noted, does not confer admissibility upon all official publications; it merely provides a means whereby their authenticity may be taken as established for purposes of admissibility. Where other considerations bar a given official publication from admissibility—if, for example, a hearsay problem exists—this section will not help the offering party escape the relevant exclusionary rule.

(6) **Newspapers and Periodicals.** The likelihood of forgery of newspapers or periodicals is slight. Hence no danger is apparent in receiving them. Establishing the authenticity of the publication may, of course, still leave open questions of authority and responsibility for items therein contained. *See* 7 Wigmore § 2150. Again, although production of materials purporting to be a newspaper or periodical amounts to self-authentication, admissibility depends upon other factors as well.

(7) **Trade Inscriptions and the Like.** As in the case of domestic seals and foreign seals of state, the serious penalties associated with forgery and trademark infringement justify less concern with fraud in allowing trade inscriptions and the like to be self-authenticating.

(8) **Acknowledged Documents.** In virtually every state, acknowledged title documents are receivable in evidence without further proof. *See* 5 Wigmore § 1676. If this authentication suffices for documents of the importance of those affecting titles, logic scarcely permits denying this method when other kinds of documents are involved. *See* California Evidence Code § 1451. This is an expansion of self-authentication, but one that is logically impelled from existing law.

(9) **Commercial Paper and Related Documents.** Commercial paper, signatures thereon, and documents relating thereto are authenticated to the extent provided by general commercial law. Where federal commercial paper is involved, federal commercial law will apply. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 87 L.Ed. 838 (1943). *See* C.

Wright, Handbook of the Law of Federal Courts § 45, at 174 (2d ed. 1970).

(10) **Presumptions Created by Law.** This section recognizes that whenever the legislature or the Supreme Court of Alaska pursuant to its rulemaking authority determines to make any signature, document, or other matter presumptively genuine, self-authentication can be accomplished in the manner provided by such statute or rule. Should the United States Congress confer presumptive validity on some item of proof with the intent of covering both state and federal courts, or should the federal courts interpret a statute that is enforced in both state and federal courts so as to require that an item of proof be deemed presumptively admissible, the Supremacy Clause would require the several states to be bound by such legislation, as long as the scope of the federal law does not exceed the reach of federal power.

Rule 903. Subscribing Witness' Testimony Unnecessary.

At common law an attesting witness was a preferred witness who had to be produced or accounted for in proving the execution of an attested document. Once the absence of the attesting witness was satisfactorily explained, the next best evidence could be received. Evidence of his handwriting was generally the next best evidence. If all attesters were present and denied having witnessed the execution, the proponent of the document was permitted to introduce other evidence to prove that the attesters had witnessed the execution.

The modern trend is to abolish the common law requirement unless the law governing the validity of the writing requires a subscribing or attesting witness.

This Rule is identical to Alaska R. Civ. P. 43 (k) which it supersedes. Substantially similar to the Federal Rule, it provides that no attester is a necessary witness to prove the valid execution of a document unless the statute governing the validity of the attestation provides otherwise. *See* AS 34.15.200; AS 34.15.210; AS 34.15.220, providing for proof of an execution of a conveyance.

For similar provisions see Uniform Rule 71; California Evidence Code § 1411; N.Y. Civ. Prac. Law, Rule 4537; (McKinney) Maine Rule 903; Nebraska Rule 27-903.

ARTICLE X. WRITINGS

Rule 1001. Definitions.

Rule 1001 follows the Federal Rule verbatim, as did virtually all other State provisions drafted after the Federal Rule was adopted. *But see* Maine Rules 1001 & 1003. The Advisory Committee's Note, which accompanied the Federal Rule, comprises the rest of this comment with minor changes.

In an earlier day, when discovery and other related procedures were strictly limited, the misleadingly named "best evidence" rule afforded substantial guarantees against inaccuracies and fraud by its insistence upon production of original documents. The great enlargement of the scope of discovery and related procedures in recent times has measurably reduced the need for the rule. Nevertheless important areas of usefulness persist: discovery of documents outside the jurisdiction may require substantial outlay of time and money; the unanticipated document may not practicably be discoverable; criminal cases have built-in limitations on discovery. Cleary and Strong, *The Best Evidence Rule: An Evaluation in Context*, 51 Iowa L. Rev. 825 (1966).

(1) **Writings and Recordings.** Traditionally the rule requiring the original centered upon accumulations of data and expressions affecting legal relations set forth in words and figures. This meant that the rule was one essentially related to writings. Present day techniques have expanded methods of storing data, yet the essential form which the information ultimately assumes for usable purposes is words and figures. Hence the considerations underlying the rule dictate its expansion to include computers, photographic systems, and other modern developments.

(2) **Photographs.** This subdivision is self-explanatory.

(3) **Original.** In most instances, what is an original will be self-evident and further refinement will be unnecessary. However, in some instances particularized definition is required. A carbon copy of a contract executed in duplicate becomes an original, as does a sales ticket carbon copy given to a customer. While strictly speaking the original of a photograph might be thought to be only the negative, practicality and common usage require that any unretouched print from the negative be regarded as an original. Similarly, practicality and usage confer the status of original upon any computer printout. *Transport Indemnity Co. v. Seib*, 132 N.W.2d 871 (Neb. 1965). However, a printout that summarizes the raw data stored in the computer without listing all the data may be treated under Rule 1006. Distinguishing summaries from raw data may present difficulties for litigants and courts unschooled in computers, but reliance upon Rule 1006 in close cases should ensure fairness and impose no undue burdens on parties utilizing computers.

(4) **Duplicate.** The definition describes "copies" produced by methods possessing an accuracy which virtually eliminates the possibility of error. Copies thus produced are given the status of originals in large measure by Rule 1003, *infra.* Copies subsequently produced manually, whether handwritten or typed, are not within the definition. It should be noted that what is an original for some purposes may be a duplicate for others. Thus a bank's microfilm record of checks cleared is the original as a record. However, a print offered as a copy of a check whose contents are in controversy is a duplicate. This result substantially comports with Title 40 of the Alaska Code governing Public Records.

Rule 1002. Requirement of Original.

This rule, modeled after Federal Rule 1002, is the familiar part of the Best Evidence Rule requiring the production of the original to prove the contents of a writing, recording or photograph. See Rule 1001(1) and 1001(2) for definitions of the terms used in this rule.

Application of the rule requires a resolution of the question whether the contents are sought to be proved. Thus an event may be proved by nondocumentary evidence, even though a written record of it was made. If, however, the event is sought to be proved by the written record, the rule applies. For example, payment may be proved without producing the written receipt which was given. Earnings may be proved

without producing books of account in which they are entered. McCormick (2d ed.) § 233, at 564; 4 Wigmore § 1245.

The assumption should not be made that the rule will come into operation on every occasion when use is made of a photograph in evidence. On the contrary, the rule will seldom apply to ordinary photographs. In most instances a party *wishes* to introduce the item and the question raised is the propriety of receiving it in evidence. Cases in which an offer is made of the testimony of a witness as to what he saw in a photograph or motion picture, without producing the same, are most unusual. The usual course is for a witness on the stand to identify the photograph or motion picture as a correct representation of events which he saw or of a scene with which he is familiar. In fact he adopts the picture as his testimony, or, in common parlance, uses the picture to illustrate his testimony. Under these circumstances, no effort is made to prove the contents of the picture, and the rule is inapplicable. *See* Paradis, *The Celluloid Witness*, 37 U. Colo. L. Rev. 235, 249-251 (1965).

On occasion, however, situations arise in which the contents of a photograph are sought to be proved. Copyright, defamation, and invasion of privacy by photograph or motion picture fall in this category. Similarly this applies to situations in which the picture is offered as having independent probative value, *e.g.* an automatic photograph of a bank robber. *See* Mouser and Philbin, *Photographic Evidence — Is There a Recognized Basis for Admissibility?* 8 Hastings L.J. 310 (1957). The most commonly encountered of this latter group is, of course, the X-ray, with substantial authority calling for production of the original. *Daniels v. Iowa City*, 183 N.W. 415 (Iowa 1921); *Cellamare v. Third Avenue Transit Corp.*, 77 N.Y.S.2d 91 (1948); *Patrick & Tilman v. Matkin*, 7 P.2d 414 (Okla. 1932); *Mendoza v. Rivera*, 78 P.R.R. 569 (P.R. 1955).

Hospital records which may be admitted as business records under Rule 803(6) commonly contain reports interpreting x-rays by the staff radiologist, who qualifies as an expert, and these reports need not be excluded from the records by the instant Rule. Rule 803(6) allows opinions in business records to be admitted. And it should be noted that Rule 703 allows an expert to give an opinion on matters not in evidence. Rule 1002 must be read in conjunction with these other Rules. Of course, the trial judge might decide to require testimony, relying on the last clause of Rule 803 (6) and Rule 705.

The Advisory Committee's Note accompanying Federal Rule 1002 states that "the rule [does not] apply to testimony that books or records have been examined and found not to contain any reference to a designated matter." This comment can be very misleading.

In a dispute between *A* and *B* over the terms of a contract—specifically whether *A* would pay liquidated damages for delays in delivering goods to *B*—before *A*, who possesses the original contract, will be permitted to testify that the contract has no liquidated damages clause, A must produce the original or account for its nonproduction. It is plain that the claim of the absence of a contract provision is the converse of the claim of a provision's inclusion. Rule 1002 applies to both claims. In some instances a writing or recording will be collateral and this Rule will not apply because of 1004(d). In other instances where documents are voluminous and it would be unduly burdensome to show the absence of a certain provision in all, Rule 1006 should provide a satisfactory solution. While there is some support in the cases for the Advisory Committee's comment, it is unwarranted in view of the other provisions of this Article.

Rule 1002 states the general rule that the original is to be supplied when a writing or recording is offered for proof of its contents. But other provisions of Article X of these rules soften the impact of Rule 1002. Rule 1003 makes duplicates presumptively admissible. Rule 1004 provides for admission of secondary evidence under certain conditions. Rule 1005 creates a special provision for public records. Special provision is also made for voluminous documents in Rule 1006. And Rule 1007 provides for the substitution of certain party admissions for proof of an original writing or recording.

Rule 1003. Admissibility of Duplicates.

Rule 1003 follows the Federal Rule in its departure from the common law "best evidence" rule, which requires that "in proving the terms of a writing, where the terms are material, the original writing must be produced unless it is shown to be unavailable for some reason other than the serious fault of the proponent." McCormick, (2d ed.) § 230, at 560. In recognition of the great legal significance attaching to the exact words of a document, the "best evidence" rule was designed to prevent fraud and protect against inaccuracy. The rule served a purpose when duplicates were made by a scrivener instead of an electronic duplicating machine. However, when the sole aim is to present the words or other contents in question to the court with accuracy and precision, a copy serves equally as well as the original, if the copy is the product of a method which ensures accuracy and genuineness. By definition in Rule 1001 (d), *supra*, a "duplicate" is such a copy.

Therefore, Rule 1003 provides that if there is no genuine question as to authenticity, and no other reason for requiring the original, a duplicate is admissible. The Advisory Committee's Note to Federal Rule 1003 cites the following cases in support of this position:

> *Myrick v. United States*, 332 F.2d 279 (5th Cir. 1964), no error in admitting photostatic copies of checks instead of original microfilm in absence of suggestion to trial judge that photostats were incorrect; *Johns v. United States*, 323 F.2d 421 (5th Cir. 1963), not error to admit concededly accurate tape recording made from original wire recording; *Sauget v. Johnston*, 315 F.2d 816 (9th Cir. 1963), not error to admit copy of agreement when opponent had original and did not on appeal claim any discrepancy.

An example of a situation in which it would be unfair to admit the duplicate in lieu of the original is when only a part of the original is reproduced and the remainder is needed for cross-examination or may disclose matters qualifying the part offered or be otherwise useful to the opposing party. *United States v. Alexander*, 326 F.2d 736 (4th Cir. 1964). *See also Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd.* 265 F.2d 418 (2d Cir. 1959).

In ruling on the admissibility of a duplicate, the court should "examine the quality of the duplicate, the specificity and sincerity of the challenge, the importance of the evidence to the case, and the burdens of producing the original before

determining whether a genuine question is raised as to authenticity." K. Redden & S. Saltzburg, Federal Rules of Evidence Manual 368. This approach is consistent with Rule 1004. It is also important to keep in mind that oral testimony about a document is not a "duplicate."

When Rule 1003 applies, the original need not be produced under Rule 1002. Rule 1003 applies generally, but is superseded with respect to public records by Rule 1005. If Rule 1007 is satisfied, there is no need to satisfy Rule 1003.

Rule 1004. Admissibility of Other Evidence of Contents.

This rule is identical to its federal counterpart and is very similar to Uniform Rule 70(1) (a)—(d). It is based on a common law tradition which permits secondary evidence to be used to prove the contents of a writing, recording, or photograph when failure to produce the original can be explained satisfactorily. The Commissioner's Note following the Uniform Rule expresses the concerns underlying this rule:

> The "Best Evidence Rule" at common law as well as here is a preferential rather than an exclusionary rule. Its object is to prevent a litigant from depriving the trier of fact, by fraudulent design, of the benefit of the only certain proof of the content of a writing, the writing itself.

9A Uniform Laws Annotated 654 (1965).

When the requirements of one of the four subdivisions are satisfied, there is little or no reason to fear fraud or other sharp practices. Thus, secondary evidence is deemed admissible.

(a) **Original Is Lost or Destroyed.** This subdivision permits secondary evidence if a proponent can show that the originals are lost or have been destroyed without bad faith on his part. Evidence of a search made in good faith of the places where an original would be found if it existed should be sufficient foundation to prove loss when no direct evidence is available. The important factor here is that a proponent should not benefit by admitting secondary evidence where the original was lost or suppressed at his own instance. This extends to situations where third parties have destroyed the original acting at the direction of the proponent. *See* McCormick (2d ed.) § 237.

(b) **Original Not Obtainable.** When the original is in the possession of a third party who is not a party to the case, the original should be obtained by judicial process, *i.e.*, such as a subpoena duces tecum. Where the third party is beyond the subpoena power of the trial court and no judicial process or procedure can avail, secondary evidence can be introduced. Great expense or difficulty are not sufficient to establish excuse under this provision. *See* McCormick (2d ed.) § 238. This may seem harsh, but the originals are by definition, *see* subdivision (d), closely related to a controlling issue in a case.

(c) **Original in Possession of Opponent.** If an adverse party is put on notice that the contents of a writing, recording or photograph are to be proved at trial and the original is in his control, if he fails to produce it secondary evidence can be introduced. The party against whom it is being offered has the ability to supply the original and failure to do so indicates lack of concern. The notice requirement must afford the party a reasonable chance to produce the original. This requirement can be met in the pleadings or otherwise, if calculated to alert the party that the original is necessary. Note that unlike discovery procedures such as orders to produce, there is no compulsion to produce, only the timely chance to substitute an original for secondary evidence. *See* McCormick (2d ed.) § 239.

(d) **Collateral Matters.** When the contents of the writing, recording or photograph are not closely related to a controlling issue in the trial, secondary evidence will be permitted. This is often referred to as the exception for collateral evidence. The trial judge will exercise some discretion in determining whether evidence is related to collateral issues by considering such factors as (a) the centrality to principal issues of litigation; (b) the complexity of relevant features of the writing; and (c) the existence of genuine dispute as to the contents. McCormick (2d ed.) § 234 at 565-566.

If Rules 1003, 1005, 1006, or 1007 are utilized, there is no reason to use Rule 1004. Rule 1004 applies when there is no other rule allowing secondary evidence and the proponent of the evidence must justify its admission in lieu of the original.

Rule 1005. Public Records.

Rule 1005 follows the Federal Rule in establishing a treatment of public records different from the treatment of other documents. As the Advisory Committee notes, public records call for different treatment, since requiring removal of the original record whenever the contents of that record are in question would be attended by serious inconvenience to the public and to the custodian. Judicial decisions and statutes often hold that no explanation need be given for failure to produce the original of a public record. McCormick (2d ed.) § 240. *See, e.g.* Alaska R. Civ. P. 44(b) (superseded by these Rules) and AS 40.21.150 and AS 40.15.040, providing for the use of copies of public records as evidence. While the original document need not be produced, Rule 1005 protects against the indiscriminate introduction of all sorts of secondary evidence by establishing a preference for certified or compared and verified copies. Usually such copies of public records are readily available, so it will seldom be necessary to produce any other sort of secondary evidence.

This rule supersedes Rule 1003 with respect to public documents. Rule 1007 provides an alternative way of satisfying best evidence concerns.

Rule 1006. Summaries.

This rule continues the tradition of permitting summaries to be introduced in lieu of voluminous writings, recordings, or photographs, which cannot be easily examined in court. In many cases summaries are the only practical means of making information available to the judge and jury. The proponent of the summary must make the originals or duplicates available for examination or copying, thus affording the other parties the opportunity to assess the degree of accuracy with which the summary captures the contents of the originals. Should the accuracy be in dispute by the parties, the trial judge may order

For similar provisions see Nevada Rule 52.275 and Nebraska Rule 27-1006.

Rule 1007. Testimony or Written Admission of Party.

American courts have held that in some circumstances if the secondary evidence offered to prove the contents of a document consists of an admission by the party against whom it is offered, no showing is required of why the original is not produced. But it has not been clear whether *all* admissions, irrespective of the circumstances in which made, serve to prove the contents of an item otherwise covered by the "Best Evidence" Rule. The seminal case, *Slatterie v. Pooley,* 6 M. & W. 664, 151 Eng. Rep. 579 (Exch. 1840), allowing proof of contents by evidence of an oral admission by the party against whom offered, without accounting for nonproduction of the original, has been criticized as involving a substantial risk of inaccuracy and as being in contravention of the purpose of the "Best Evidence" Rule. *See, e.g.,* 4 Wigmore § 1255; McCormick (2d ed.) § 242, at 577. Federal Rule 1007, which this rule copies, followed McCormick's suggestion of limiting the use of admissions to prove the content of writings, recordings or photographs to those admissions made in the course of giving testimony or in writing.

It should be observed that Rule 1007 does not call for the exclusion of evidence of an oral admission when nonproduction of the original has been accounted for and secondary evidence generally has become admissible under Rule 1004.

Also, an admission that could be introduced under Rule 801 (d) (2) (C), (D), or (E) against a party and otherwise qualifying under this rule may be used to prove the contents of writings, recordings, or photographs without accounting for nonproduction of the original. "[W]hatever reasons justify the use of ordinary 801(d)(2) admissions as substantive evidence on the merits would seem to carry over to the often less significant question of proving the content of a writing or recording." K. Redden and S. Saltzburg, Supplement to Federal Rules of Evidence Manual 697 (2d ed. 1977).

This rule provides an exception to Rule 1002. It is clear, however, that there is no requirement that Rule 1007 be used. Rules 1003, 1005, 1006 and other statutes may provide easier ways to satisfy best evidence concerns.

Rule 1008. Functions of Court and Jury.

The application of the rule preferring the original of a writing, recording, or photograph to prove its contents often depends on the determination of preliminary questions of fact. Such preliminary factfinding is usually undertaken by the judge in accordance with Rule 104. *See* Reporter's Comment to Rule 104 for the considerations underlying preliminary questions of admissibility.

Rules 1003 and 1004 present numerous findings of fact which must be made precedent to the admissibility of secondary evidence. In Rule 1003 the trial judge must initially decide whether (a) a given item of evidence qualifies as a duplicate; (b) whether a genuine question is raised as to the authenticity of the original; and (c) whether it would be unfair to admit a duplicate in lieu of an original. Rule 1004 calls for the trial judge to determine whether or not failure to produce the original can be satisfactorily explained so as to permit proof of the contents by secondary evidence.

However, when the contention is raised that the asserted writing never existed, or that the evidence produced at trial is not the original, or that the evidence of the contents does not correctly reflect the contents, the resolution of the dispute should not be by the trial judge as a preliminary question of fact. These contentions relate to the existence of a document or its contents, not its admissibility, and hence they raise ultimate issues of fact which should be determined by the jury as factfinder.

In practical terms this means that the trial judge, when making a preliminary finding of excuse under Rule 1004, may permit secondary evidence to come in to prove the contents of an original whose very existence is in dispute. The judge must determine the validity of the excuse while assuming arguendo the existence of the document. A preliminary determination to the effect that the document never existed would preclude a jury decision on the central issue of the case. The jury may be called upon to decide a case between a party proffering secondary evidence of the contents of a contract after a preliminary finding by the judge that the original was destroyed, and a party who claims that the contract never existed.

This rule is identical to Federal Rule 1008. For similar provisions see Uniform Rule 70(2); New Jersey Rule 70(3); Nevada Rule 52.295; and Nebraska Rule 27-1008.

ARTICLE XI. TITLE

Rule 1101. Title.

The abbreviation for the Alaska Rules of Evidence shall be A.R.E.