COLORADO SUPREME COURT
EVIDENCE COMMITTEE

Agenda

Friday, May 21, 2010, at 2:30 pm
Denver News Agency Building, 5th Floor
101 West Colfax

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1. Approval of minutes of last meeting, attached as pages 1-4.

2. Chairman's Report. Update membership list.

3. **CRE 804(b)(3):** Should we recommend a change to the hearsay exception for statements against interest?

    a. CRE 804 attached as page 5.

    b. E-mail proposal from Liz Griffin attached as page 6.

    c. Memorandum from Sheila Hyatt attached as pages 7-9.

    d. More e-mails from Liz Griffin attached as pages 10-11.

    e. People v. Newton, 966 P.2d 563 (Colo. 1998), attached as pages 12-35.

4. **FRE 502:** Should we recommend adoption of the federal rule on limitations on waiver of attorney-client privilege and work product?

    a. FRE 502 and comments, attached as pages 36-41.

5. **Committee Comments:** Should we recommend the removal of "old" committee comments in the Colorado Rules of Evidence?

    a. Examples from CRE 410, 607, 613, 701, 703, 704, and 803, attached as pages 42-47.

6. The FRE "Style" Amendments are on the Horizon.

    a. Federal Committee reports and samples of proposed "style" changes are attached as pages 48-78.

COLORADO SUPREME COURT
COMMITTEE ON RULES OF EVIDENCE

MINUTES OF MEETING
January 18, 2008

David R. DeMuro called the meeting to order at 2:33 p.m. in the Supreme Court Conference Room on the fifth floor at the Colorado Judicial Building at Two East 14th Avenue in Denver, Colorado.

The following members were present:

Catherine P. Adkisson
Judge Rebecca Bromley
Philip A. Cherner
Judge Janice Davidson
David R. DeMuro, Chair
Elizabeth F. Griffin
Professor Sheila Hyatt
Professor Christopher B. Mueller
Judge Robert M. Russel

The following members were excused:

Judge Harlan Bockman
Justice Nathan B. Coats
Judge Martin Egelhoff
Carol M. Haller
Henry R. Reeve

CRE 804 (b) (6): SHOULD THE COMMITTEE RECOMMEND THE ADOPTION OF THE 1997 AMENDMENT TO FRE 804 WHICH ADDED A HEARSAY EXCEPTION ON FORFEITURE BY WRONGDOING?

During the last meeting of November 2, 2007 the Committee decided not to recommend adoption of F.R.E 804(b)(6). This may be the right time to make a recommendation about F.R.E. 804, as the Colorado Supreme Court issued a decision on Vasquez which addresses confrontation and hearsay issues. In addition, the U.S. Supreme Court is dealing with another relevant case, Giles.

There was some skepticism from members about adopting F.R.E. 804(b)(6). The federal courts adopted the rule in 1997 on the rationale that defendants should not profit from wrongdoing. This is a punishment for misconduct. This hearsay exception of tampering with and deterring the witness is the only exception not based on a statement being more reliable than another. There is skepticism about this as a hearsay exception. Members offered various views as follows.

A committee member argued that the Colorado Supreme Court expressed its opinion on the reliability of hearsay in Vasquez. Evidence must be reliable. There was discussion about the possibility that the Colorado Supreme Court may be looking for a hearsay exemption.

F.R.E. is inconsistent with the court's opinion. The proposed rule would pre-empt what the intent is supposed to be. The proposed rule change undermines Vasquez. In

Colorado, hearsay is not admitted unless reliability is determined. The rule would not fit the case law.

A rule could coexist with the Vasquez opinion. However, the court may have to change the opinion with regards to the reliability of hearsay.

The federal courts don't test reliability. An exception can't be created unless something is written into the rule and that changes the nature of the exception. If the exception is adopted one can't worry about reliability. Intent would have to be written into the rule.

What if in the sample case the confrontation clause was satisfied, but hearsay was not? The statement is inadmissible. Perhaps the statement is needed in relationship to motive and is not admitted for its truth.

In looking at the confrontation clause there seem to be no cases where it was waived and the statement came in under a hearsay exception. The battle is over intent. The Colorado Supreme Court made the correct decision on intent. A more robust intent clause provides more protection for the defendant, rather than a reliability requirement. The hearsay exception is better.

This issue must be developed by case law, rather than through a rule.

There may be some pressure on the trial court judge where the confrontation clause is waived, the witness is rendered unavailable, and there is a finding that the statement of the witness is available under hearsay. The decision may be reviewed for abuse of discretion. There is no hearsay exception if the defendant frightens the witness. The intent is for the defendant to lose protection if he/she intentionally prevents a witness from testifying.

There was discussion about intent. An example was used where a defendant is selling drugs and says to his wife, "don't go to the police." The wife goes to the police and the husband kills her to keep her from testifying. Are statements related to domestic abuse two years earlier admitted? Intent has to relate to statements offered.

There was discussion about language. Use the same language from Vasquez. There may be problems when different language is used. The court uses the language "with the intent to deprive the criminal justice system of evidence." This language indicates that the statement doesn't have to apply to this murder trial.

The federal courts deleted the intent requirement for hearsay forfeiture. A member wondered if intent was softened in Vasquez. Widening the reference to the criminal justice system seems softer on intent. It's easier to show intent, as it is broadened.

The committee discussion reliability and hearsay exceptions. F.R.E. 804 is not about reliability. It's a forfeiture of a hearsay exception due to the defendant's actions to quiet a witness. Reliability is not an issue in confrontation. Cross examination tests reliability. The Colorado Supreme Court said that a reliability test will be done on non-testimonial

evidence. If a rule is adopted there may be different requirements and language for confrontation and hearsay.

A motion was made, seconded and defeated 2:6 to adopt Michigan's version of C.R.E. 804 (b) (6).

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

(6) Statement by declarant made unavailable by opponent. A statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Discussion about the language in the motion included "involved in or responsible for." The word "involve" seemed loose. This option lets in evidence not already admissible. The only gain is intent, as reliability exists.

A motion was made, seconded and defeated 2:7 to adopt Michigan's version of F.R.E. 804 with the addition of "unless the statement is found to be unreliable or untrustworthy" at the end of the second sentence.

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

(6) Statement by declarant made unavailable by opponent. A statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness unless the statement is found to be unreliable or untrustworthy.

Discussion about the motion yielded problems with differences in the language between the proposed rule and the case law that may confuse practitioners. A member indicated that reliability requirements should be the burden of the prosecution. This option may fortify abandonment of intent requirements.

A motion was made, seconded and defeated 4:5 to adopt Michigan's version of C.R.E. 804 (b) (6) with the addition of "that is reliable and" after the word "statement."

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

(6) Statement by declarant made unavailable by opponent. A statement that is reliable and offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Another motion was made to modify the Michigan rule by adding "that is reliable and" after "statement." This was defeated 4:5 with the chair voting to break the tie.

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A motion was then made, seconded and approved 5:1 not to propose a version of federal C.R.E. 804(b)(6). Discussion about the motion included a suggestion that the issue be brought up at a later time. A memo could be sent to Justice Coats indicating that the issue was discussed; a federal rule was passed and the committee decided not to adopt a rule.

Mr. DeMuro will pass on the committee's comments to the Court.

The meeting was adjourned at 4:42 p.m.

Respectfully submitted,

April Bernard

RULE 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

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

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

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

(3) testifies to a lack of memory of the subject matter of his statement; or

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

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

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

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

(1) **Former Testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Committee Comment

The Federal rule is substantially the same as the Colorado Rule; except there is no reference to subsection (b)(2) in the Colorado Rule, as there is no Colorado subsection (b)(2). As to testimony given at a preliminary hearing, *see* People v. Smith, 198 Colo. 120, 597 P.2d 204 (1979). This rule expands upon the former rule of evidence in Colorado. For authorities on the use of such evidence in Colorado, *see:* Rule 32 of Colorado Rules of Civil Procedure; Emerson v. Burnett, 11 Colo. App. 86, 52 P. 752 (1898); Daniels v. Stock, 23 Colo. App. 529, 130 P. 1031 (1913); Woodworth v. Gorsline, 30 Colo. 186, 69 P. 705 (1902); Henwood v. People, 57 Colo. 544, 143 P. 373 (1914); Gibson v. Gagnon, 82 Colo. 108, 257 P. 348 (1927); Duran v. People, 156 Colo. 385, 399 P.2d 412 (1965); Insul-Wool Insulation Corp. v. Home Insulation, Inc., 176 F.2d 502 (10th Cir. 1949).

(2) [There is no paragraph (b)(2).]

Committee Comment

The Federal rule relates to a statement under belief of impending death. The admissibility of the dying declarations of a deceased person is governed by § 13-25-119, C.R.S.

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

Committee Comment

Colorado precedent concerning statements against interest is sparse, with possible limitation to statements against declarant's pecuniary or proprietary interest. Colorado had not applied this hearsay exception in criminal cases prior to the adoption of this rule. Moya v. People, 79 Colo. 104, 244 P. 69 (1926).

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

Committee Comment

This rule expanded the former Colorado rule to admit statements of unrelated associates. Some independent proof of relationship under (B) will continue to be required.

(5) [Transferred to Rule 807]

This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

Amended eff. April 1, 1985; Jan. 1, 1999; July 1, 2002.

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David R DeMuro

From: Griffin, Liz [Liz.Griffin@coloradodefenders.us]
Sent: Tuesday, January 05, 2010 4:11 PM
To: 'ddemuro@vaughandemuro.com'
Subject: CRE 804(b)(3) statements against interest

Hi Dave. Hope your holidays were good!

I was just looking at rule 804(b)(3) and noticed that it's not up to date with current law and is actually pretty misleading. The rule currently says the proponent of a statement against interest needs to provide corroboration if the statement is offered to exculpate the defendant. This implies that no corroboration is required for a statement inculpating the defendant. To the contrary, the supreme court ruled in Newton that not only is corroboration necessary, but they are more picky about the type of corroboration that will satisfy the rule. Many practitioners know this but it is a trap for the unwary. Seems like a good one to revise. Here's a blurb:

People v. Newton 966 P.2d 563, 576 (Colo.1998):

In summary, then, a trial court should follow a three-part test before relying on CRE 804(b)(3) to admit a third party witness's statement that inculpates the defendant. First, the witness must be unavailable as required by CRE 804(a). Second, the statement must tend to subject the declarant to criminal liability. On this point, the trial court must determine whether a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. Third, the People must show by a preponderance of evidence that corroborating circumstances demonstrate the trustworthiness of the statement. In conducting this third inquiry, a trial court should limit its analysis to the circumstances surrounding the making of the statement and should not rely on other independent evidence that also implicates the defendant. Appropriate factors for a trial court to consider include: where and when the statement was made, to whom the statement was made, what prompted the statement, how the statement was made, and what the statement contained. *See State v. Wilson,* 323 Or. 498, 918 P.2d 826, 837-39 (Or.1996) (outlining the above factors).

Liz Griffin
Deputy State Public Defender
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Memorandum

To: David DeMuro
From: Sheila Hyatt
Re: Possible Amendment to Rule 804(b)(3).
Date: Jan. 24, 2010

Liz says the following: to the extent that the language of 804(b)(3) suggests or implies there is no corroboration requirement for the admission of statements against interest that inculpate the accused, the rule is misleading.

Rule 804(b)(3) Statement Against Interest.

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

This is an interesting and complicated issue!

At first reading, one must agree with Liz's critique, because, as she points out, People v. Newton[1] does require that statements against interest inculpating an accused be supported by "corroborating circumstances." The portion of the case quoted by Liz demanding this inquiry states:

> " . . . a trial court should follow a three-part test before relying on CRE 804(b)(3) to admit a third party witness's statement *that inculpates the defendant*. First, the witness must be unavailable as required by CRE 804(a). Second, the statement must tend to subject the declarant to criminal liability. On this point, the trial court must determine whether a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. Third, the People must show by a preponderance of evidence that corroborating circumstances demonstrate the trustworthiness of the statement." *Newton* at 574.

When reading the entirety of the *Newton* decision, however, one sees that the Court actually refined or established two different corroboration standards, one applicable to statements offered to exculpate the accused, and one for statements offered to inculpate the accused.

1. **Statements against interest offered to exculpate the accused,** which is recognized by Rule 804(b)(3) itself, and states that such statements should not be admitted unless "corroborating circumstances clearly indicate the trustworthiness of the statement." Newton explains that,

> "In conducting the corroboration inquiry, the trial court may examine both the circumstances surrounding the statement as well as other independent evidence that supports the statement." *Newton,* at 574.

[1] People v. Newton, 966 P.2d 563 (Colo. 1998).

Thus, the trial court may examine other evidence that renders the declarant's statement plausible or credible (was the declarant at the scene? did the declarant know the victim?), and (perhaps) may extend its inquiry to the veracity of the witness, although this raises other issues. The broader inquiry is justified by the rationale stated by the Advisory Committee Notes to the FRE:

> ". . . 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. . . . 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 406(a). The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication."

2. **Statements against interest offered to inculpate the accused.** In *Newton*, the Court recognized that despite the lack of language in the text of the rule, an implicit corroboration requirement existed for statements against interest offered to inculpate the accused, but it was different from the corroboration requirement for statements exculpating the accused. The Court stated:

> "After examining the case law, we conclude that the corroboration requirement for a statement that inculpates the accused is not the same as the corroboration requirement that exculpates the accused. *Newton,* 966 P.2d at 575 (emphasis added).
>
> . . .
>
> "In conducting [the corroborating circumstances] inquiry, a trial court should limit its analysis to the circumstances surrounding the making of the statement and should not rely on other independent evidence that also implicates the defendant. Appropriate facts for a trial court to consider include: where and when the statement was made, to whom the statement was made, what prompted the statement, how the statement was made, and what the statement contained." *Newton,* 966 P.2d at 576.

The use of the term "corroborating circumstances" is unfortunate. "Corroboration" typically means independent evidence that points in the same direction, or proves the same facts. The "corroborating circumstances" described above, however, simply assesses the trustworthiness of the declarant's statement by looking at circumstances surrounding the making of the statement. Much like excited utterances, the trial court must decide if the statement was made under circumstances that make it more likely the declarant is being truthful and accurate; the trial court does not consider whether other evidence "corroborates" the statement in order to determine admissibility. The *Newton* court expressly recognized this difference, and thus imposed two different forms of "corroboration," one of which includes independent evidence that confirms the truth of the statement (for statements that exculpate the accused) and the other which does not include independent evidence (for statements that inculpate the accused). The implicit and more limited corroboration requirement for the latter was thought to be "rooted in the confrontation clause." *Newton,* 966 P.2d at 575.

The majority of the cases grappling with Rule 804(b)(3) involve statements to police by actual or potential accomplices or codefendants. Under these circumstances, the courts have been consistently wary that declarants would be self-serving, shifting blame or currying favorable treatment, even as they admitted to some liability. Such statements are properly excluded as

unreliable because of the circumstances under which they were made; their admissibility should not depend on whether there is other independent evidence of the defendant's guilt. Under *Newton,* courts could reject such third party confessions inculpating the defendant on the basis of these circumstances.

3. **Effect of *Crawford.*** One must remember that the *Newton* decision predates *Crawford v. Washington,*[2] so that Rule 804(b)(3) can no longer be used to admit testimonial statements made to police, whether or not the circumstances indicate their trustworthiness. The statements admitted in *Newton* would not be admissible today, and the case is overruled to that extent. (One might question on that basis the entire rubric developed by the *Newton* Court). However, Colorado has been particularly loyal to the idea that any hearsay not falling within a "firmly rooted hearsay exception" should be vetted for "circumstantial guarantees of trustworthiness," and the Colorado Supreme Court has required all nontestimonial statements to be subjected to a trustworthiness test.[3] Therefore, under current Colorado confrontation law, courts would perform a reliability or trustworthiness test for the nontestimonial statements against interest of unavailable declarants when offered against criminal defendants.[4]

   It might be difficult to amend Rule 804(b)(3) in a way that accounts for *Crawford.* The "corroborating circumstances" proof that *Newton* demanded is similar to the reliability test that *Compan/Dement* demands, but it is still different from the corroborating circumstances standard applied to exculpatory statements.

Conclusion. In my opinion, any amendment to Rule 804(b)(3) designed to warn readers that there is a "corroboration" requirement for statements inculpating the accused would need to take account of the following:

a) Calling the scrutiny an inquiry into "corroborating circumstances," might mislead as well, because it is different from the scrutiny described in *Newton* for exculpatory statements (so I would hesitate to just add "or inculpate" after "exculpate" in Rule 804(b)(3)). It's really a limited reliability or trustworthiness inquiry.
b) *Newton* itself is abrogated to the extent it might allow testimonial statements made to the police. The scrutiny (I hesitate to call it corroboration) is more appropriately required by *Compan/Dement* rather than *Newton.*
c) The scrutiny is limited to nontestimonial statements, which appear to be much rarer that statements made to police under this rule, making it harder still to work into an amendment.

I certainly agree that there's a lot one needs to know about Rule 804(b)(3) that doesn't appear in its language. But the same can be said of just about all the hearsay rules in light of *Crawford,* or Rule 702 (which barely hints at the *Shreck* tests). I have not even tried to fashion an amendment to Rule 804(b)(3), but I would not be averse to considering one if someone wants to give it a try!

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[2] 541 U.S. 26 (2004).

[3] Compan v. People, 121 P.3d 876 (Colo. 2005), even though the United States Supreme Court has abandoned this requirement. Whorton v. Bockting, 127 S.Ct. 1173 (2007). The *Compan* case reinforced the trustworthiness requirement imposed earlier in People v. Dement, 661 P.2d 675 (Colo. 1983), which had incorporated the reliability test set forth in Ohio v. Roberts. 448 U.S. 56 (1980)(abrogated by Crawford v. Washington).

[4] A statement against penal interest is not a firmly rooted hearsay exception., being of relatively recent vintage. People v. Newton, 966 P.2d at 574 n. 13.

David R DeMuro

From: Griffin, Liz [Liz.Griffin@coloradodefenders.us]
Sent: Thursday, January 28, 2010 1:17 PM
To: 'David R DeMuro'
Subject: RE: CRE 804(b)(3) statements against interest

Thanks Dave. I will have to read Newton again because I think Sheila and I have interpreted it very differently.

The way I read it, it should be easier for the proponent of a statement exculpating the accused to establish admissibility because he can corroborate by way of circumstances surrounding the making of the statement that indicate reliability or by way of factual corroboration of the statement; the court may consider both.

In contrast, the proponent of a statement inculpating the accused must stand or fall on the circumstances surrounding the making of the statement; he may "not rely on other independent evidence that also implicates the defendant," per Newton at 576.

My reading is consistent with Newton's statement that the "more limited corroboration requirement" for inculpatory statements "was thought to be 'rooted in the confrontation clause.'" *Newton*, 966 P.2d at 575. I.e., the corroboration requirement for inculpatory statements is "more limited" in the sense that it is a less flexible standard and thus more difficult to satisfy.

If I understand Sheila's memo correctly, she views Newton as requiring the proponent of a statement exculpating the accused to prove both factual corroboration and circumstantial reliability, thus making it more difficult for the defendant to admit hearsay in his defense than for the prosecution to admit hearsay against him. That's inconsistent with the idea that the "more limited corroboration requirement" for inculpatory statements is "rooted in the confrontation clause."

I looked at Newton pretty quickly and maybe I'm totally wrong. I agree that their use of the word "corroboration" to address two different matters—factual corroboration versus indicia of reliability—is confusing, but maybe more confusing is their characterization of the "corroboration requirement" for inculpatory statements as "more limited." I think what they mean is that the proponent of inculpatory statements is more limited in how he can make the corroboration showing.

I don't necessarily agree that 804(b)(3) won't be used to admit testimonial hearsay after Crawford. If the declarant testifies, Crawford has no effect, but the prosecution still must satisfy a hearsay rule to admit out-of-court statements. Not every statement fits under prior inconsistent or prior consistent offered to rebut an inference of recent fabrication. If they did, we would just have one rule that said all prior statements of a testifying witness are admissible hearsay.

On the other hand, as Sheila points out, non-testimonial statements of a non-testifying declarant admitted against the accused are still subject to the Compan requirements of unavailability and reliability. If defense counsel makes a confrontation objection and the prosecutor has to prove reliability, does that take care of everything, at least with regard to these statements? (I'm not sure what Compan requires for a showing of trustworthiness or reliability).

I'd be interested in Sheila's thoughts, and especially where I'm wrong!

Thanks Dave!

Liz Griffin
Deputy State Public Defender

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David R DeMuro

From: Griffin, Liz [Liz.Griffin@coloradodefenders.us]
Sent: Thursday, January 28, 2010 5:22 PM
To: 'David R DeMuro'
Subject: RE: CRE 804(b)(3) statements against interest

Hi Dave. I read Newton again. I think the defendant's fundamental due process right to present evidence in his defense also (in addition to his confrontation right) cuts against a reading in which it is more difficult for the defense to present hearsay in his defense.

I guess it will not come up nearly as often post-Crawford, but it seems very wrong that the rule is so misleading.

Here's what I would add to the rule, it's pretty much verbatim Newton, just rephrased so it makes more sense:

A statement tending to expose the declarant to criminal liability and offered to inculpate the accused is not admissible unless the prosecution establishes that the circumstances surrounding the making of the statement (e.g., where and when the statement was made, to whom the statement was made, what prompted the statement, how the statement was made, and what the statement contained) demonstrate its trustworthiness. If the court determines that the declarant had a significant motivation to curry favorable treatment, for example, the entire narrative is inadmissible.

Or the list of factors in parentheses and last sentence (which is a direct quote, except for "for example", see Newton at 578-79) could just go into a committee note also containing Newton's explanation of the different ways of showing "corroboration" for inculpatory vs. exculpatory statements. Then only this would be added to the text:

A statement tending to expose the declarant to criminal liability and offered to inculpate the accused is not admissible unless the prosecution establishes that the circumstances surrounding the making of the statement demonstrate its trustworthiness.

Maybe it's much ado about nothing. Please do forward both of my emails to Sheila and thank her (thanks Sheila!) for looking into this!

Liz Griffin
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966 P.2d 563, 98 CJ C.A.R. 4880
(Cite as: 966 P.2d 563)

Supreme Court of Colorado.
The PEOPLE of the State of Colorado, Petitioner,
v.
Lester L. NEWTON, Respondent.
No. 97SC85.

Sept. 14, 1998.

Defendant was convicted in the District Court, Arapahoe County, Michael L. Bieda, J., of aggravated robbery, theft and menacing. Defendant appealed, and the Court of Appeals reversed, 940 P.2d 1065. Granting certiorari, the Supreme Court, Mullarkey, held that: (1) trial court erred reversibly in allowing prosecution to call defendant's girlfriend as witness, where she repeatedly invoked Fifth Amendment privilege not to testify; (2) precise statement against penal interest and related, collaterally neutral statements contained in a declarant's narrative are admissible under hearsay exception, provided statements are not so self-serving as to be unreliable and declarant did not have significant motivation to curry favorable treatment; and (3) girlfriend's entire out-of-court narrative to detective inculpating defendant would be admissible as statement against penal interest if girlfriend did not make statement in order to curry favorable treatment.

Kourlis, J., concurred and specially concurred and filed an opinion in which Scott, J., joined.

West Headnotes

[1] Criminal Law 110 ⚖2038

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)5 Presentation of Evidence
110k2038 k. Calling Witnesses; Compelling Assertion of Privilege. Most Cited Cases
(Formerly 110k706(7))
Allowing the People to call prosecution witness who repeatedly invoked right not to testify under Fifth Amendment was error. U.S.C.A. Const.Amend. 5.

[2] Criminal Law 110 ⚖662.6

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.6 k. Refusal of Codefendants or Others to Testify. Most Cited Cases

Criminal Law 110 ⚖1168(2)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1168 Rulings as to Evidence in General
110k1168(2) k. Reception of Evidence. Most Cited Cases

Criminal Law 110 ⚖1171.8(1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171.8 Presentation of Evidence
110k1171.8(1) k. In General. Most Cited Cases

Criminal Law 110 ⚖2038

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)5 Presentation of Evidence
110k2038 k. Calling Witnesses; Compelling Assertion of Privilege. Most Cited Cases
(Formerly 110k706(7))

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Prosecution witness's assertion of Fifth Amendment right not to testify may constitute reversible error in two instances: (1) when prosecution engages in prosecutorial misconduct, which is a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege; or (2) when, in the circumstances of a given case, inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant. U.S.C.A. Const.Amends. 5, 6.

[3] Criminal Law 110 ⚿1171.8(1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171.8 Presentation of Evidence
110k1171.8(1) k. In General. Most Cited Cases

In determining whether prosecution witness' assertion of Fifth Amendment privilege not to testify unfairly prejudiced defendant by adding weight to prosecution's case in a form not subject to cross-examination, reviewing court should consider prosecutor's intent in calling the witness, number of questions asked, their importance to state's case, whether prosecutor drew any inference in his closing argument from witness' refusal to answer, and whether trial judge gave curative instruction. U.S.C.A. Const.Amends. 5, 6.

[4] Criminal Law 110 ⚿1171.8(1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171.8 Presentation of Evidence
110k1171.8(1) k. In General. Most Cited Cases

Criminal Law 110 ⚿2038

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)5 Presentation of Evidence
110k2038 k. Calling Witnesses; Compelling Assertion of Privilege. Most Cited Cases
(Formerly 110k706(7))

Criminal Law 110 ⚿2194

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2191 Action of Court in Response to Comments or Conduct
110k2194 k. Presentation of Evidence. Most Cited Cases
(Formerly 110k730(3))

Allowing state to call defendant's girlfriend as prosecution witness, after which she invoked Fifth Amendment privilege not to testify about events on day of charged aggravated robbery, was reversible error, where prosecution asked girlfriend leading questions allowing it to advance its theory of case, girlfriend invoked privilege 15 times, court failed to instruct jury not to draw adverse inferences from refusal to testify, and testimony sought from girlfriend had significant bearing on defendant's contention that there were three rather than four robbers. U.S.C.A. Const.Amends. 5, 6; West's C.R.S.A. § 18-4-302.

[5] Criminal Law 110 ⚿417(14)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k416 Declarations by Third Persons
110k417 In General
110k417(14) k. Statements Corroborating or Impeaching Testimony of Witness. Most Cited Cases

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Prosecution witness' invocation of Fifth Amendment right not to testify did not constitute "testimony" so as to allow admission of a statement to police officer as a prior inconsistent statement. U.S.C.A. Const.Amend. 5; Rules of Evid., Rule 801(d)(1)(A).

[6] Criminal Law 110 ⚿417(15)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k416 Declarations by Third Persons
110k417 In General
110k417(15) k. Self-Incriminating or Exculpating Declarations. Most Cited Cases
Precise statement against penal interest and related, collaterally neutral statements contained in a declarant's narrative are admissible subject to two limitations: (1) the trial court should exclude statements that are so self-serving as to be unreliable, and (2) if the trial court determines that the declarant had a significant motivation to curry favorable treatment, then the entire narrative is inadmissible. Rules of Evid., Rule 804(b)(3).

[7] Criminal Law 110 ⚿419(1)

110 Criminal Law
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
110k419(1) k. In General. Most Cited Cases
Rule against hearsay exists because hearsay statements are presumptively unreliable since the declarant is not present to explain the statement in context; moreover, since the declarant is not subjected to cross-examination, the truthfulness of the statement is questionable. Rules of Evid., Rule 802.

[8] Criminal Law 110 ⚿419(1.10)

110 Criminal Law
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
110k419(1.10) k. Exceptions to Hearsay Rule, and Non-Hearsay Distinguished in General. Most Cited Cases

Criminal Law 110 ⚿662.8

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.8 k. Out-Of-Court Statements and Hearsay in General. Most Cited Cases
In order for hearsay to be admissible against defendant in criminal prosecution, proffered hearsay statement must comply with the specific exception to the hearsay rule under which the statement is offered and must not offend the right to confrontation as guaranteed by the United States and Colorado Constitutions. U.S.C.A. Const.Amend. 6; West's C.R.S.A. Const. Art. 2, § 16.

[9] Criminal Law 110 ⚿419(1.10)

110 Criminal Law
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
110k419(1.10) k. Exceptions to Hearsay Rule, and Non-Hearsay Distinguished in General. Most Cited Cases

Criminal Law 110 ⚿662.8

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.8 k. Out-Of-Court Statements and Hearsay in General. Most Cited Cases
Requirements for admission of hearsay statement against criminal defendant, that it comply with specific exception to hearsay rule and it not offend right of confrontation, do not necessarily involve

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identical inquiries. U.S.C.A. Const.Amend. 6; West's C.R.S.A. Const. Art. 2, § 16.

[10] Criminal Law 110 ⚖417(15)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k416 Declarations by Third Persons
110k417 In General
110k417(15) k. Self-Incriminating or Exculpating Declarations. Most Cited Cases

Criminal Law 110 ⚖662.8

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.8 k. Out-Of-Court Statements and Hearsay in General. Most Cited Cases
When hearsay statement is offered to exculpate the defendant under hearsay exception for statements against interest, trial court should proceed as follows: first, it must determine whether statement complies with the rule, including whether corroborating circumstances clearly indicate trustworthiness of statement; second, if defendant opposes rather than seeks admission of statement, trial court must determine whether admission of statement violates defendant's rights to confrontation. U.S.C.A. Const.Amend. 6; West's C.R.S.A. Const. Art. 2, § 16; Rules of Evid., Rule 804(b)(3).

[11] Criminal Law 110 ⚖417(15)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k416 Declarations by Third Persons
110k417 In General
110k417(15) k. Self-Incriminating or Exculpating Declarations. Most Cited Cases
In determining whether corroborating circumstances clearly indicate the trustworthiness of a hearsay statement which is offered to exculpate defendant under exception for statements against interest, trial court may examine both the circumstances surrounding the statement as well as other independent evidence that supports statement. Rules of Evid., Rule 804(b)(3).

[12] Criminal Law 110 ⚖662.8

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.8 k. Out-Of-Court Statements and Hearsay in General. Most Cited Cases
In determining whether another persons's out-of-court statement against interest, offered at trial to exculpate criminal defendant, possesses inherent trustworthiness so as not to offend Confrontation Clause, trial court should examine only the circumstances surrounding the making of the statement. U.S.C.A. Const.Amend. 6; West's C.R.S.A. Const. Art. 2, § 16; Rules of Evid., Rule 804(b)(3).

[13] Criminal Law 110 ⚖417(15)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k416 Declarations by Third Persons
110k417 In General
110k417(15) k. Self-Incriminating or Exculpating Declarations. Most Cited Cases
Trial court should follow a three-part test before relying on hearsay exception for statements against penal interest to admit a third party witness' statement that inculpates criminal defendant: first, the witness must be unavailable; second, the statement must tend to subject declarant to criminal liability; and third, the People must show by a preponderance of evidence that corroborating circumstances demonstrate the trustworthiness of the statement. Rules of Evid., Rule 804(a), (b)(3).

[14] Criminal Law 110 ⚖417(15)

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110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k416 Declarations by Third Persons
110k417 In General
110k417(15) k. Self-Incriminating or Exculpating Declarations. Most Cited Cases
In determining whether out-of-court statement inculpating defendant subjected the declarant to criminal liability, as necessary for admissibility under hearsay exception for statements against penal interest, trial court must determine whether a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. Rules of Evid., Rule 804(b)(3).

[15] Criminal Law 110 ⇐417(15)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k416 Declarations by Third Persons
110k417 In General
110k417(15) k. Self-Incriminating or Exculpating Declarations. Most Cited Cases
Inquiry into trustworthiness of another person's out-of-court statement against interest, when offered to inculpate criminal defendant, should be limited to an assessment of the circumstances surrounding the statement; appropriate factors to consider include where and when statement was made, to whom statement was made, what prompted statement, how statement was made, and what statement contained. U.S.C.A. Const.Amend. 6; West's C.R.S.A. Const. Art. 2, § 16; Rules of Evid., Rule 804(b)(3).

[16] Courts 106 ⇐97(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k97 Decisions of United States Courts as Authority in State Courts
106k97(1) k. In General. Most Cited Cases
In applying Colorado rules of evidence, Colorado Supreme Court is not bound to follow interpretations of identical federal rules.

[17] Criminal Law 110 ⇐417(15)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k416 Declarations by Third Persons
110k417 In General
110k417(15) k. Self-Incriminating or Exculpating Declarations. Most Cited Cases
Out-of-court narrative's precise statement against penal interest and related, collaterally neutral statements contained in narrative are admissible under hearsay exception, subject to two limitations: first, statements that are so self-serving as to be unreliable should be excluded; second, if trial court determines that declarant had significant motivation to curry favorable treatment, then entire narrative is inadmissible. Rules of Evid., Rule 804(b)(3).

[18] Criminal Law 110 ⇐417(15)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k416 Declarations by Third Persons
110k417 In General
110k417(15) k. Self-Incriminating or Exculpating Declarations. Most Cited Cases
Defendant's girlfriend was an unavailable witness in armed robbery prosecution, for purposes of determining admissibility of her prior statement to police detective under hearsay exception for statements against penal interest, where she refused to answer prosecution's questions despite an offer of immunity and an order by trial court to testify. Rules of Evid., Rule 804(a)(2), (b)(3).

[19] Criminal Law 110 ⇐417(15)

110 Criminal Law

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110XVII Evidence
110XVII(M) Declarations
110k416 Declarations by Third Persons
110k417 In General
110k417(15) k. Self-Incriminating or Exculpating Declarations. Most Cited Cases
Determination of whether a witness is unavailable, as possible basis for admission of prior statements under hearsay exception, must be made at time of trial. Rules of Evid., Rule 804(a)(2).

[20] Criminal Law 110 ⇐417(15)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k416 Declarations by Third Persons
110k417 In General
110k417(15) k. Self-Incriminating or Exculpating Declarations. Most Cited Cases
Statements by defendant's girlfriend inculpating defendant in robbery either subjected girlfriend to liability as an accessory or were collaterally neutral, thus making her entire narrative admissible as statement against penal interest unless it was made to curry favorable treatment, where girlfriend told detective she was aware of a robbery that had just occurred, that she knew the persons involved, that she witnessed the robbers enter apartment she was occupying, that she left apartment and saw police surround apartment, and that she informed robbery participants of police officers' presence. U.S.C.A. Const.Amend. 6; West's C.R.S.A. Const. Art. 2, § 16; West's C.R.S.A. § 18-8-105; Rules of Evid., Rule 804(b)(3).

***565** Gale A. Norton, Attorney General, Martha Phillips Allbright, Chief Deputy Attorney General, Richard A. Westfall, Solicitor General, John Daniel Dailey, Deputy Attorney General, Robert Mark Russell, First Assistant Attorney General, Clemmie P. Engle, Senior Assistant Attorney General, Criminal Enforcement Section, Denver, for Petitioner.

Gerash, Miranda & Gerash, P.C., Walter L. Gerash, Lia A. Fazzone, Denver, for Respondent.

Chief Justice MULLARKEY delivered the Opinion of the Court.

Lester Newton, the defendant in this case, was tried in the Arapahoe County District Court (trial court) for his involvement in an armed robbery of a local grocery store in Aurora, Colorado. Ronald Riley, a co-defendant, was tried jointly with Newton. At trial, the People called Evonne Cummins, who was Newton's girlfriend at the time of the robbery, to testify about her knowledge of the robbery. Cummins refused to answer the prosecutor's questions, repeatedly invoking her right not to testify under the Fifth Amendment to the United States Constitution in the presence of the jury. After Cummins refused to testify, the People called a police detective to whom Cummins had provided a statement shortly after the robbery. In that statement, Cummins indicated her knowledge of the robbery and Newton's involvement in it. Over defense counsel's objection, the trial court allowed the People to ***566** question the detective regarding what Cummins had told him.

A jury convicted Newton of aggravated robbery, theft, and menacing. The court of appeals reversed Newton's conviction and remanded the case to the trial court for a new trial. *See People v. Newton,* 940 P.2d 1065 (Colo.App.1996). In its opinion, the court of appeals adopted the United States Supreme Court's interpretation of Fed.R.Evid. 804(b)(3) in *Williamson v. United States,* 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994), for purposes of CRE 804(b)(3), which provides for the admission of a declarant's hearsay statement that is against the declarant's interest. [FN1] The court of appeals explained that under *Williamson,* the trial court may admit only an individual remark that inculpates the declarant. Applying its construction of CRE 804(b)(3) to this case, the court of appeals held that Cummins's statement to the police detective was not admissible, with the possible exception of one remark.

FN1. CRE 804(b)(3) provides in relevant part:

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> A statement which was at the time of its making ... so far tended to subject [the declarant] to ... criminal liability ... that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

We granted certiorari to review the court of appeals' adoption and application of the *Williamson* decision to CRE 804(b)(3).[FN2] Although we affirm the court of appeals' judgment reversing Newton's convictions, we reject the court of appeals' interpretation of CRE 804(b)(3). We hold that under CRE 804(b)(3), a trial court should admit the precise statement against penal interest contained in a declarant's narrative as well as related, collaterally neutral statements. Admission of a declarant's statement against penal interest is subject to two limitations. First, a trial court should exclude any of the declarant's remarks that are so self-serving as to be unreliable. Second, if the trial court determines that the statement is unreliable because the declarant had a significant motivation to curry favorable treatment, then the entire narrative is inadmissible.

> FN2. We granted certiorari on the following two issues:
>
> 1. Whether the court of appeals erred in adopting the rule of *Williamson v. United States,* 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994), regarding the hearsay exception for statements against penal interest.
>
> 2. Whether the court of appeals erred in its application of the *Williamson* rule.
>
> Because we hold that the court of appeals erroneously adopted *Williamson* for purposes of CRE 804(b)(3), it is unnecessary to reach the second issue upon which we granted certiorari.

I.

On the morning of April 1, 1993, several men entered a King Soopers grocery store in Aurora and robbed a Wells Fargo guard who was delivering approximately $78,500 in cash and $7,800 in King Soopers gift certificates to the store. According to the Wells Fargo guard's trial testimony, three men wearing masks approached him as he was heading toward the office located in the store. At least two of the three suspects were armed. One suspect told the guard to drop the bag containing the funds and to raise his hands. Another suspect removed the guard's revolver and took the bank bag containing the funds.

Shortly after the robbery, the Aurora police located a vehicle matching witnesses' description of the getaway car at a nearby apartment complex. The police established a perimeter search of the complex and began searching individual apartments. Shervin Bunch, the lessee of apartment # 10, consented to a search of his apartment. The police found four persons inside apartment # 10: Shervin Bunch, Samuel Bunch (Shervin Bunch's brother), Lester Newton, and Evonne Cummins. In addition, the police found several handguns, approximately $2,700 in cash, several thousand dollars in King Soopers certificates, and bank bags inside the apartment.

Meanwhile, three men were seen fleeing from apartment # 10 through a window. The police subsequently found them in ***567** bushes close to the apartment and identified them as Ronald Riley, Gregory McCoy, and Tyree Bronson. In their search of McCoy, the police found approximately $20,000 stuffed in McCoy's pockets, socks, shorts, and shirt. The police also found a bag containing several thousand dollars in money orders on the roof above the suspects.

After questioning the four persons inside the apart-

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ment, the police arrested, processed, and then released Cummins and Newton. The police also arrested Riley, McCoy, and Bronson for aggravated robbery. In an affidavit in support of a warrantless arrest of Newton, an Aurora police officer stated that McCoy gave a confession after receiving his *Miranda* advisement. According to the officer, McCoy admitted his involvement in the robbery and stated that Newton, Riley, and Bronson were co-participants. As a result, the police then arrested Newton again for aggravated robbery.[FN3]

> FN3. Newton and Riley were tried separately from McCoy. McCoy's confession was not introduced into evidence in Newton and Riley's trial.

Six days following the April 1, 1993 incident, Cummins, who was then 17 years old, came voluntarily to the Aurora police station with her mother. Detectives Parker and Callahan interviewed Cummins in the presence of her mother. According to Detective Parker's testimony, Cummins informed him about the following events that occurred on April 1. Cummins stated that she was at apartment # 10 on the morning of April 1. She heard a knock on the door and Newton and Bronson then entered the apartment, followed by Riley and McCoy. Newton, Bronson, Riley, and McCoy then went to the bedroom of the apartment. Shervin Bunch asked her what happened and she informed him that the four persons had just committed a robbery. Bunch then went into the bedroom for approximately five minutes. Newton, who had entered the bedroom wearing a black hooded sweatshirt and black sweatpants, came out of the bedroom wearing white boxer shorts and a white T-shirt. Cummins then went to take the trash out from the apartment and observed that the police had surrounded the building. She returned to the apartment and informed everyone that the police had surrounded the building. Newton told everyone "to be cool because the cops couldn't come in." When the police knocked at the door, Bronson, McCoy, and Riley went out the window and started running.

At trial, the People sought unsuccessfully to have Cummins testify about the statement she provided to Detective Parker. Although the People granted Cummins immunity, Cummins informed the court outside the presence of the jury that she would invoke her Fifth Amendment right not to testify.[FN4] The prosecution argued, and the trial court agreed, that the People could call Cummins to the witness stand and that if she refused to testify, the People could question Detective Parker about the statement Cummins made to him as a prior inconsistent statement under CRE 801(d)(1).[FN5] To establish a foundation for Detective Parker's testimony, the People asked Cummins leading questions about the statement she made to Detective Parker. Cummins refused to answer the People's questions, asserting her Fifth Amendment right not to testify a total of fifteen times in front of the jury. Immediately after questioning Cummins, the People called Detective Parker, who testified about the statement Cummins gave him.

> FN4. At the in camera hearings in which the trial court considered the issue of Cummins's testimony, counsel for Cummins stated that he advised Cummins not to testify. According to Cummins's counsel, he believed that Cummins would be subject to criminal prosecution for violating federal law in spite of the district attorney's grant of immunity.
>
> FN5. CRE 801(d) exempts certain statements from the hearsay definition. CRE 801(d)(1) provides in relevant part:
>
> > Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony.

During the course of the trial, the People advanced a theory of the case which differed significantly from that advanced by Newton. According to the People, although no witness saw more than three

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robbers together, the ***568** cumulative effect of the testimony demonstrated that there were four robbers involved. Specifically, the People argued that three persons went inside the King Soopers store, while a fourth person waited outside in the getaway car. The People asserted that no witness saw all four persons because passengers in the getaway car were "ducking down." By contrast, Newton argued that the evidence did not demonstrate that four persons were involved in the robbery and disputed the People's "duck down" argument.

Additionally, the evidence was conflicting as to when Newton arrived at apartment # 10. The People pointed to evidence showing that Newton arrived at the apartment after the robbery. In addition to Cummins's statement to Detective Parker, Shervin Bunch testified that he, Samuel Bunch, and Cummins were eating breakfast when Newton and three other men whom he did not know entered the apartment. According to Bunch, the four men proceeded to the bedroom. After a while, he entered the bedroom and saw that the four men had guns and money. Bunch asked for some of the money, which Newton gave him. Bunch also testified that Newton told him he "took care of business ." After Newton and Riley's counsel impeached Bunch,[FN6] Detective Parker testified that Bunch told him essentially the same story during an interview the day after the robbery. To dispute the People's theory, Newton's counsel highlighted contrary evidence indicating that Newton had been at the apartment all morning. To that effect, Bronson testified that only he and two other persons committed the robbery and that there was not a fourth person in the getaway car. According to Bronson, Newton was already in apartment # 10 when he and the other two robbers entered.

> FN6. This impeachment included, among other things, Bunch's admission that he was not truthful to the police when they first arrived at apartment # 10 and questioned him about who was at the apart- ment.

Following a six-day jury trial, the jury found Newton guilty of two counts of aggravated robbery, *see* § 18-4-302, 6 C.R.S. (1997), one count of theft, *see* § 18-4-401, 6 C.R.S. (1997), and three counts of menacing, *see* § 18-3-206, 6 C.R.S. (1997).

On appeal, the court of appeals reversed the convictions and remanded the case for a new trial. *See Newton,* 940 P.2d at 1067-70. The court of appeals first explained that the trial court erred by allowing the People to call Cummins as a witness, knowing that Cummins would assert her right not to testify in the jury's presence. *See id.* at 1067. Rejecting the People's argument that the error did not prejudice Newton, the court of appeals went on to explain that Cummins's statement was not admissible under CRE 801(d)(1)(A) as a prior inconsistent statement, nor was it admissible under CRE 804(b)(3) as a statement against penal interest. *See id.* at 1068-70. In its analysis, the court of appeals adopted the United States Supreme Court's interpretation of Fed.R.Evid. 804(b)(3) in *Williamson.* The court of appeals stated that, under its reading of *Williamson,* the only part of Cummins's statement that "might be considered against her penal interest" was her indication that she knew that Newton and others had just committed a robbery. *Id.* at 1069. The court of appeals refused to address whether that part of Cummins's statement was admissible, however, because the court of appeals indicated that the People did not argue at the trial court level that the statement was admissible under CRE 804(b)(3).[FN7] *See id.* After concluding that the admission of Detective Parker's testimony was erroneous, the court of appeals also rejected the People's argument that the statement was merely cumulative to other evidence in the case. *See id.* at 1069-70. Thus, the court of appeals ***569** held that the extensive questioning of Cummins and the admission of Detective Parker's testimony describing Cummins's statement to him were not harmless error.

> FN7. The court of appeals' explanation that the People did not argue that the statement

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> was admissible under CRE 804(b)(3) is not consistent with the record. In the context of arguing that Detective Parker's testimony would not violate Newton's rights under the Confrontation Clause, the prosecutor made the following argument to the trial court:
>
> > They are also statements against her interest because they implicate her in this particular crime in this particular situation as an aider and abetter, and she's sorry after the fact. So they are statements against interest. And it would also fall within the exception under 804 for that purpose.

II.

[1] Before considering the People's argument that this court should not follow *Williamson,* we address the consequences that follow from the trial court's error in allowing the People to call Cummins as a witness when the trial court knew Cummins would refuse to testify on Fifth Amendment grounds. In the court of appeals and in this court, the People conceded that the trial court erred by allowing the People to call Cummins to the witness stand where she repeatedly invoked her right not to testify. *See id.* at 1067. As they argued in the court of appeals, the People contend here that the error was not prejudicial and that a new trial is not necessary. *See id.* at 1068-70. In rejecting the People's argument, the court of appeals implicitly recognized that the trial court's error did not automatically require reversal. *See id.* While we agree that the trial court's error in this case did not automatically require a new trial, it is necessary to clarify the factors that an appellate court should consider when reviewing this type of error.

A.

In *DeGesualdo v. People,* 147 Colo. 426, 432-33, 364 P.2d 374, 378 (1961), this court held that the trial court erred when it allowed the prosecutor to call as a witness the defendant's alleged accomplice for the purpose of extracting from the accomplice a claim of privilege. In *DeGesualdo,* we explained that if the prosecutor called the witness in good faith or if the court instructed the jury to disregard the witness's invocation of the right not to testify, then "the conduct could be overlooked." *DeGesualdo,* 147 Colo. at 430, 364 P.2d at 377.

Following *DeGesualdo,* we addressed similar errors in other cases. For example, in *Billings v. People,* 171 Colo. 236, 242-44, 466 P.2d 474, 477-78 (1970), the defendant asserted that the trial court erred by allowing the prosecutor to call the defendant's wife to the witness stand knowing that she would assert her constitutional right not to testify. We stated:

> The rule of *DeGesualdo* is that a prosecutor commits reversible error if, knowing that an accomplice will claim the privilege against self-incrimination, he calls the accomplice to the stand for the purpose of extracting the claim of privilege from him.

Billings, 171 Colo. at 242, 466 P.2d at 477.

In *People v. Scheidt,* 182 Colo. 374, 383-84, 513 P.2d 446, 451 (1973), we rejected the defendant's argument that the trial court committed reversible error when it allowed the People to call a witness to whom it had granted immunity. In that case, we explained that once the People have granted a witness immunity, the prosecution does not have to assume that the witness will violate the law by not testifying. *See Scheidt,* 182 Colo. at 383-84, 513 P.2d at 451. Rather, a reviewing court should determine whether, under the totality of the circumstances, the error required reversal. *See id.*

B.

[2] *Scheidt* did not fully explain what factors a court should analyze under the totality of circumstances test when reviewing this type of error, al-

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though it recognized there is controlling precedent from the United States Supreme Court. *See id.* (citing *Namet v. United States,* 373 U.S. 179, 83 S.Ct. 1151, 10 L.Ed.2d 278 (1963)). In *Namet,* the Supreme Court articulated two principles upon which a prosecution witness's assertion of the Fifth Amendment right not to testify may constitute reversible error. *See Namet,* 373 U.S. at 186-87, 83 S.Ct. 1151. First, reversible error exists when the prosecution engages in prosecutorial misconduct, which is a "conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege." *Id.* at 186, 83 S.Ct. 1151. Second, it is reversible error when, "in the circumstances of a given case, inferences from a witness'[s] refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant." *Id.* at 187, 83 S.Ct. 1151. The Supreme Court ***570** subsequently gave the *Namet* decision constitutional status in *Douglas v. Alabama,* 380 U.S. 415, 420, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), where the Court held that the defendant's rights secured by the Confrontation Clause of the Sixth Amendment were violated when the prosecutor called to the witness stand a previously tried and convicted co-defendant who refused to testify under the Fifth Amendment. *See generally Rado v. Connecticut,* 607 F.2d 572, 581 (2d Cir.1979) (explaining that the *Namet* principles "were given constitutional significance and made applicable to the states" in *Douglas*). Thus, we are bound by *Douglas* to follow *Namet.*

[3] Federal appellate decisions give helpful guidance in applying *Namet.* In *Rado,* the Second Circuit reviewed various factors that courts have considered under *Namet. See Rado,* 607 F.2d at 581. The *Rado* court explained:

> In applying the *Namet* rule to particular cases, the courts have analyzed various factors, including the prosecutor's intent in calling the witness, the number of questions asked, their importance to the state's case, whether the prosecutor draws any inference in his closing argument from the witness'[s] refusal to answer ... and whether the trial judge gives a curative instruction.

Id. (citations omitted). *See also United States v. Victor,* 973 F.2d 975, 979 (1st Cir.1992) (applying similar factors under *Namet*). In our view, the totality of circumstances test for reviewing this type of error should include the factors summarized by the *Rado* court.

C.

[4][5] Applying the totality of circumstances test here, we conclude that the trial court's error requires reversal of Newton's conviction. [FN8] On the one hand, it does not appear that the prosecutor acted in bad faith by calling Cummins solely to raise adverse inferences from her refusal to testify. Rather, the prosecutor erroneously believed that Cummins's refusal to answer questions constituted "testimony" and that her statement to Detective Parker then would be admissible as a prior statement that was inconsistent with her trial testimony. [FN9] The record reflects***571** that, with the trial court's consent, the prosecutor called Cummins in order to lay a foundation for Detective Parker's testimony regarding the statement Cummins gave to him. Additionally, while the prosecutor referred to the substance of Cummins's statement in closing arguments, the prosecutor neither referred to Cummins's refusal to testify, nor attempted to draw adverse inferences from Cummins's refusal to testify. [FN10]

> FN8. Although it is possible to remand this case to the court of appeals to consider whether a new trial was warranted under *Namet,* we proceed to address this issue in the interest of judicial economy. *See Romer v. Colorado Gen. Assembly,* 810 P.2d 215, 225 (Colo.1991) (explaining that the supreme court could apply the legal test to the uncontroverted evidence in the record and that "[i]n the interest of judicial

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economy, we choose to settle that question rather than remand"); *Kane v. Town of Estes Park,* 786 P.2d 412, 414 n. 2 (Colo.1990) ("In the interest of judicial economy, we elect to address the issues remaining instead of remanding the case to the Colorado Court of Appeals."). Our decision to address this issue is also consistent with the People's position taken at oral argument when the question of this court's disposition of the case arose. Counsel for the People expressly stated that even if we decide that Cummins's statement could have been admitted under CRE 804(b)(3), this court "may want to determine that the prejudicial effect of having her [Evonne Cummins] claim the Fifth in the presence of the jury in and of itself is enough to warrant reversal." Additionally, the People prefaced this suggested disposition by referring to the People's reply brief submitted in response to Newton's brief opposing the People's petition for certiorari. Indeed, in that brief, the People argued that the applicable standard for reversal under *Namet* is the one we adopt here. Thus, in our view, it is appropriate for this court to apply *Namet* and Douglas to the circumstances of this case and to consider whether reversal is required due to the trial court's error in allowing the People to call Cummins to the stand where she repeatedly invoked her right not to testify.

FN9. Although the reasoning was clearly wrong, the prosecutor's argument apparently was not unique to this case. During an in camera hearing in which the trial court considered the issue of whether the People could call Cummins to the stand, the following colloquy took place:

> [Prosecutor]: I can't lay claim to this idea myself. It's something that we use in a large majority of trials out of Limon, quite frankly, because that's where most frequently we have situations where we have other witnesses, primarily in that instance, prisoners from the prison who don't want to talk anymore. We use the same technique with them. That's where this idea came from for this trial.
>
> [The court]: You said you did it where?
>
> [Prosecutor]: In Limon. It is-I have done it myself, Judge. [Another prosecutor] from my office, it was his idea.

The court of appeals correctly concluded that admitting evidence under this theory was error. *See Newton,* 940 P.2d at 1068 ("[B]ecause the girlfriend did not give testimony when she refused to answer the prosecutor's questions, she gave no testimony with which any prior statement could be inconsistent.").

FN10. During closing arguments, the prosecutor made the following statement related to Cummins's statement to Detective Parker:

> [Prosecutor]: Now at this point inside G-10 already there are Samuel and Shervin Bunch. Shervin lives there, his brother Samuel lives there. Also inside G-10 is Evon[ne] Cummins. And Evon[ne] Cummins tells us that Lester Newton, Gregory McCoy, Ronald Riley, and Tyree Bronson all come in.
>
> During the prosecutor's closing rebuttal argument, the following exchange took place:
>
> [Prosecutor]: Evon[ne], who is Lester's girlfriend, is interviewed with her mother present. And during that interview what does she say? Lester Newton, Greg McCoy, Tyree Bronson, and Ronald Riley came into that apartment together,

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> and she's still a girlfriend when she's saying this. She's still a girlfriend of Mr. Newton. Why is she willing to burn Mr. Newton by saying that unless it's true? She has no reason-
>
> [Counsel for Riley]: I'm sorry. I have to object. She didn't use names. The evidence was that Detective Parker filled names in.
>
> [The Court]: Overruled. That's for the jury to determine.
>
> [Counsel for Riley]: Okay. Thank you.
>
> [Prosecutor]: Remember the testimony, because the Judge is right, you got to remember that, not what Detective Parker said, that Evon[ne] knew everybody's name but Riley, and she knew Lester Newton's name. He's her boyfriend. He didn't have to fill that in. She knew McCoy, she knew Bronson, she didn't know Riley, but it's very clear that she said Lester Newton came in with them.

On the other hand, however, the prosecutor compelled Cummins to invoke her right not to testify in front of the jury not once or twice, but a total of fifteen times. Further, dispute over whether the prosecutor could call Cummins to the witness stand and have Detective Parker testify about her statement consumed nearly an entire afternoon session of a six-day trial. At one point, the trial court ordered the jury out of the courtroom for a recess while the court considered the parties' arguments. Once Cummins took the stand, counsel for both Newton and Riley strongly objected to the prosecutor's questions and requested a mistrial. During the questioning, the trial court also held several side bar conferences out of the jury's hearing. Throughout the long, hotly contested issue of Cummins's testimony, the trial court gave no explanation or cautionary instruction to the jury. For example, it did not instruct the jury not to draw any adverse inferences from Cummins's refusal to testify. The jury was simply left to speculate about what was happening in the courtroom.

Moreover, each of the questions the prosecutor asked Cummins was a detailed, leading question which put the prosecution's version of the facts before the jury. For example, the prosecutor asked Cummins the following:

> Prosecutor: In that statement [that Cummins made to Detective Parker], is it true that you told him that on April 1st of 1993 when Lester arrived at 909 South Peoria Street, Apartment Number 10, that Lester Newton and Tyree Bronson were at the door initially, and that after they entered Shervin went to close the door when two individuals, McCoy and Riley, came in?

Cummins: I refuse to answer any of your questions. It was obvious that Cummins was an important witness because her statement to the detective contradicted Newton's "three robbers" theory. In this context, Cummins's repeated invocation of her Fifth Amendment right could have given rise to an inference that Cummins was criminally liable for what she told Detective Parker and that Detective Parker's testimony should therefore be afforded greater weight than it otherwise would have had if Cummins never took the stand. Thus, given the leading questions which allowed the prosecution to advance its theory of the case, the sheer number of times Cummins invoked her privilege, the lack of any explanation or instruction to the jury from the trial court, the significance of Cummins's testimony, and the possible adverse inferences that a jury could draw from her refusal to answer the questions, we conclude that Newton was unfairly prejudiced in violation of *Namet* and *Douglas*.

***572** III.

In rejecting the People's argument that Cummins's statement to Detective Parker was admissible under CRE 804(b)(3), the court of appeals adopted the

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United States Supreme Court's interpretation in *Williamson* of a "statement" against interest under Fed.R.Evid. 804(b)(3). *See Newton,* 940 P.2d at 1068-69. The court of appeals' interpretation of CRE 804(b)(3) would require a trial court to analyze "each separate remark" that a declarant made within a larger narrative. *Id.* at 1068. It applied this technique by dissecting Cummins's statements into ten separate remarks. *See id.* at 1068-69. Under the court of appeals' opinion, only those individual remarks that are self-inculpatory could be admitted into evidence. *See id.* at 1069. All other remarks, including those that are related and collaterally neutral to the individual self-inculpatory remark, would not be admissible. We disagree with the court of appeals' analysis. Its interpretation of the rule is inconsistent with our case law, inconsistent with the history of CRE 804(b)(3), and unworkable in a practical sense.

[6] In analyzing the admissibility of Cummins's statement, we proceed in the following manner. First, we discuss the requirements of admitting a statement against penal interest under CRE 804(b)(3). CRE 804(b)(3) allows for the admission of statements that exculpate the defendant, as well as statements that inculpate the defendant, such as Cummins's statement here. Because the text of CRE 804(b)(3) explicitly imposes a corroboration requirement for exculpatory statements only, we distinguish the associated requirements for both types of statements. Second, we turn to the scope of an admissible statement under CRE 804(b)(3) and explain that the Supreme Court's interpretation of the analogous federal rule in *Williamson* is inconsistent with the Colorado Rules of Evidence. Accordingly, we delineate a broader approach to admitting statements against penal interest under CRE 804(b)(3) than the Supreme Court's interpretation of Fed.R.Evid. 804(b)(3). Under our interpretation of CRE 804(b)(3), a narrative's precise statement against penal interest and related, collaterally neutral statements are admissible subject to two limitations: 1) the trial court should exclude statements that are so self-serving as to be unreliable and 2) if the trial court determines that the declarant had a significant motivation to curry favorable treatment, then the entire narrative is inadmissible. Finally, because the issue of the admissibility of Cummins's statement is likely to arise on retrial, we apply our interpretation of CRE 804(b)(3) to her statement in order to assist the trial court at Newton's new trial.

A. Admissibility of Hearsay Under CRE 804(b)(3)

[7] As a general rule, parties are prohibited from introducing hearsay statements into evidence. *See* CRE 802; *Blecha v. People,* 962 P.2d 931, 937 (Colo.1998). The rule against hearsay exists because "[h]earsay statements are presumptively unreliable since the declarant is not present to explain the statement in context." *Blecha,* at 937. "Moreover, since the declarant is not subjected to cross-examination, the truthfulness of the statement is questionable ." *Id.*

[8][9] In order for hearsay to be admissible in this context, a proffered hearsay statement must comply with the specific exception to the hearsay rule under which the statement is offered and must not offend the right to confrontation as guaranteed by the United States and Colorado Constitutions. [FN11] These two requirements-i .e., compliance with the specific rule of evidence allowing for the admissibility*573 of the hearsay statement and compliance with the confrontation clauses in the United States and Colorado Constitutions-do not necessarily involve identical inquiries. As the Supreme Court explained in *Idaho v. Wright,* 497 U.S. 805, 814, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), evidence admissible under a hearsay exception may not be admissible under the Confrontation Clause:

> FN11. In our recent decision in *Blecha,* we applied the two-step test in *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), *see infra* note 13, for purposes of determining whether the defendant's right to confrontation under the Colorado Constitution was violated. *See*

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> *Blecha,* 962 P.2d at 940-41. In applying this test, we noted that following its decision in *Roberts,* the United States Supreme Court "substantially limited the two-step federal constitutional analysis." *Id.* at 941. Because both parties in *Blecha* "assumed the continued vitality of the two-part test" under the Colorado Constitution, we followed the *Roberts* analysis. *Id.* We emphasized, however, that "in so doing we reach no decision on whether the two-part test ... retains its vitality in light of Supreme Court decisions and wait for another case to decide this issue." *Id.* at 941.

Although we have recognized that hearsay rules and the Confrontation Clause are generally designed to protect similar values, we have also been careful not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements. The Confrontation Clause, in other words, bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule.
(Citations omitted.) Conversely, in *Williamson,* the Supreme Court narrowly interpreted Fed.R.Evid. 804(b)(3) to require the exclusion of evidence that may otherwise be admissible under the Confrontation Clause. *See Williamson,* 512 U.S. at 600, 114 S.Ct. 2431 (recognizing that its interpretation of Fed. R. 804(b)(3) was not required under the Confrontation Clause and stating that "Congress certainly could, subject to the constraints of the Confrontation Clause, make statements admissible based on their proximity to self-inculpatory statements").[FN12] Recognizing that hearsay statements must comply with both the specific evidentiary rule and the defendant's right to confrontation, we now proceed to examine the requirements of CRE 804(b)(3).

> FN12. In Paul Marcus, *Prosecution and Defense of Criminal Conspiracy Cases* § 5.04[1], at 5-17 (1996), the author provides the following useful description of the interrelationship between the Confrontation Clause and the hearsay rule:
>
> > The reason that the hearsay rule and confrontation clause are not coterminous is not because the two provisions protect different interests, but because the two may balance the relevant interests differently. Thus a particular hearsay rule may admit evidence that offends confrontation rights because the rule favors the need for evidence and its probable reliability over the defendant's confrontation rights. Conversely, a particular hearsay rule may restrict evidence, which nevertheless satisfies the confrontation clause because the rule favors increased protection for the defendant.

CRE 804(b)(3), which is identical to Fed.R.Evid. 804(b)(3), is one of several hearsay exceptions that apply when the declarant is unavailable. *See* CRE 804(a), (b). The 804(b)(3) exception, commonly known as the statement against interest exception, provides:

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

CRE 804(b)(3).

The text of the rule requires that "corroborating circumstances clearly indicate the trustworthiness of the statement" when the statement is offered to *exculpate* the accused. CRE 804(b)(3). While this

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court has not previously addressed the corroboration requirement for exculpatory statements, we note that federal courts and our own court of appeals have looked to both the circumstances surrounding the making of the statement, as well as independent evidence supporting the substance of the statement. *See, e.g., United States v. Lowe,* 65 F.3d 1137, 1146 (4th Cir.1995) (examining the circumstances surrounding the declarant's statement as well as determining whether independent evidence supported the statement); *United States v. Edelin,* 996 F.2d 1238, 1242 (D.C.Cir.1993) (same); *People v. Pack,* 797 P.2d 774, 776-77 (Colo.App.1990) (same). In 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 502, at 851 (2d ed.1994), the authors explain the general approach for determining whether corroborating circumstances clearly indicate the trustworthiness of a statement offered to exonerate the accused:

> ***574** Certainly the requirement [of corroboration for statements that exonerate the accused] is satisfied by independent evidence that directly or circumstantially tends to prove the points for which the statement is offered. But the term "corroborating circumstances" seems much broader, and reaches circumstantial evidence supporting the veracity of the speaker, including indications that the statement was against interest to an unusual or devastating degree or that he repeated the statement or could not have been motivated to falsify for the benefit of the accused.

(Footnotes omitted.)

[10][11] Accordingly, when a statement is offered to exculpate the accused under CRE 804(b)(3), a trial court should proceed as follows. First, the trial court must determine whether the statement complies with the rule, including whether corroborating circumstances clearly indicate the trustworthiness of the statement. In conducting the corroboration inquiry, the trial court may examine both the circumstances surrounding the statement as well as other independent evidence that supports the statement.

[12] Second, if the defendant does not waive his or her right to confrontation (i.e., the defendant opposes rather than seeks admission of the exculpatory statement), the trial court must determine whether admission of the statement violates the defendant's rights to confrontation. In *Wright,* the Supreme Court explained that, in cases involving a hearsay rule that is not firmly rooted, "[t]o be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Wright,* 497 U.S. at 822, 110 S.Ct. 3139. [FN13] Thus, the reliability determination for purposes of Confrontation Clause analysis is narrower than the corroboration inquiry under CRE 804(b)(3). In assessing whether the statement possessed inherent trustworthiness for constitutional purposes, the trial court should examine only the circumstances surrounding the making of the statement. *See infra* pp. 575-576 and accompanying text discussing the appropriate factors.

> FN13. In *People v. Dement,* 661 P.2d 675, 679-82 (Colo.1983), we followed the Supreme Court's two-part test established in *Roberts* for determining whether the admission of out-of-court declarations by an unavailable third party witness violates a defendant's rights under article II, section 16, of the Colorado Constitution. Under *Roberts,* the prosecution must either produce the hearsay declarant for cross-examination or demonstrate the declarant's unavailability. *See Roberts,* 448 U.S. at 66, 100 S.Ct. 2531. In cases where the declarant is unavailable, the prosecution then must demonstrate that the proffered hearsay bears sufficient "indicia of reliability." *Id.* Such reliability may be inferred when the hearsay falls within a "firmly rooted" hearsay exception. *Id.* Otherwise, the prosecution must demonstrate that the

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evidence contains "particularized guarantees of trustworthiness." *Id.*

> In *Williamson,* the Supreme Court noted that courts have split in answering the question of whether the statement against interest exception is firmly rooted. *See Williamson,* 512 U.S. at 605, 114 S.Ct. 2431. This court, however, has implicitly concluded that the statement against interest exception is not firmly rooted. In *People v. Drake,* 785 P.2d 1253, 1256 (Colo.1989), we followed *Roberts* and explained that the reliability of a statement against penal interest may be satisfied by "independent physical and circumstantial evidence." This statement in *Drake* recognized that statements against penal interest inculpating the accused are not firmly rooted exceptions to the hearsay rule. *See also People v. Fincham,* 799 P.2d 419, 422 (Colo.App.1990) ("While it is true that reliability *may* be inferred where the evidence falls within a firmly rooted exception, a declaration against penal interest is too large a class for meaningful Confrontation Clause analysis." (citation omitted)).

This court also has not previously addressed the requirements of statements against penal interest offered to *inculpate* the accused, such as Cummins's statement here. The text of CRE 804(b)(3) does not impose a corroboration requirement for inculpatory statements. However, in *People v. Moore,* 693 P.2d 388, 390 (Colo.App.1984), the court of appeals applied a corroboration requirement to an accomplice's statement that was offered to inculpate the defendant. The *Moore* court stated that "since [the declarant's] statement *inculpates* one besides the declarant, i.e., [defendant], to be admissible the People must show by a preponderance of evidence that the attendant circumstances confirm the trustworthiness of the statement." *Moore,* 693 P.2d at 390 (emphasis*575 added). The *Moore* court's application of the corroborating circumstances requirement to inculpatory statements is consistent with several federal decisions interpreting Fed.R.Evid. 804(b)(3). *See, e.g., United States v. Taggart,* 944 F.2d 837, 840 (11th Cir.1991); *see also United States v. Seeley,* 892 F.2d 1, 2 (1st Cir.1989) (stating that "courts have interpreted the rule as implicitly imposing a similar [corroboration] requirement where the government uses the hearsay to *inculpate* ").[FN14]

> FN14. For other court decisions applying a corroboration requirement for inculpatory statements, see *United States v. Garcia,* 897 F.2d 1413, 1420 (7th Cir.1990); *United States v. Casamento,* 887 F.2d 1141, 1170 (2d Cir.1989); *United States v. Boyce,* 849 F.2d 833, 836 (3d Cir.1988); *United States v. Riley,* 657 F.2d 1377, 1383 (8th Cir.1981); *United States v. Alvarez,* 584 F.2d 694, 701 (5th Cir.1978).

After examining the case law, we conclude that the corroboration requirement for a statement that inculpates the accused is not the same as the corroboration requirement for a statement that exculpates the accused. Courts applying an implicit corroboration requirement for an inculpatory statement have put forth varying views as to the type of corroboration necessary in order to admit the statement. *See* 2 *McCormick on Evidence* § 319, at 347 n. 23 (John W. Strong ed., 4th ed.1992) (citing cases and explaining that "[w]hat corroboration means has been somewhat uncertain"). In determining whether a declarant's statement was sufficiently corroborated, some courts have turned to independent evidence introduced at trial that incriminates the defendant. *See, e.g., United States v. Gio,* 7 F.3d 1279, 1288 (7th Cir.1993) (explaining that the trustworthiness of the statement was corroborated in part by "other evidence presented at trial [that] independently verified [the declarant's] statement incriminating [the defendant]"). Other courts, however, have expressly limited the corroboration inquiry to an as-

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sessment of the circumstances surrounding the declarant's statement. *See, e.g., Casamento,* 887 F.2d at 1170 (explaining that "[i]n determining whether such a statement is trustworthy enough to be admissible, the district court must look to the circumstances in which the declarant made the state- ment").

Because the latter view-i.e., that only the circumstances surrounding the making of the statement should be examined-is constitutionally grounded, we are persuaded that this approach is the better method for analyzing the sufficiency of corroboration for a statement that inculpates the accused. Most courts that have required corroboration for inculpatory statements have done so out of concern that such statements comply with the Confrontation Clause. *See generally United States v. Candoli,* 870 F.2d 496, 510 (9th Cir.1989) ("Those circuits which have read 'the corroboration expressly required for exculpatory statements into the rule as applied to inculpatory statements [have done so] in order to satisfy the confrontation clause.' " (citation omitted) (alteration in *Candoli*)). It therefore makes sense that the corroboration requirement for inculpatory statements, which is rooted in the Confrontation Clause, complies with the Supreme Court's explanation in *Wright* that the Confrontation Clause can only be satisfied by looking to the inherent trustworthiness surrounding the making of the statement. *See McCormick on Evidence, supra,* § 319, at 347 n .23 (indicating that those courts that consider other evidence of guilt in a case as proper corroboration of inculpating statements are inconsistent with *Wright* and that "only the circumstances under which the statement was made, such as its degree of adversity to the declarant's interests and whether made in police custody, should be considered").[FN15] Moreover, this approach is also consistent with *Moore,* where our court of appeals considered only the "circumstances surrounding the making of the statement" to confirm the inculpatory statement's trustworthiness and reliability. *Moore,* 693 P.2d at 390.

FN15. As noted, we explained in *Drake* that the reliability of a statement against penal interest may be satisfied by "independent physical and circumstantial evidence." *Drake,* 785 P.2d at 1256. Our statement in *Drake* that the reliability of an inculpatory statement may be based on independent corroborating evidence was effectively overruled by *Wright.*

[13][14][15] In summary, then, a trial court should follow a three-part test before relying ***576** on CRE 804(b)(3) to admit a third party witness's statement that inculpates the defendant. First, the witness must be unavailable as required by CRE 804(a). Second, the statement must tend to subject the declarant to criminal liability. On this point, the trial court must determine whether a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. Third, the People must show by a preponderance of evidence that corroborating circumstances demonstrate the trustworthiness of the statement. In conducting this third inquiry, a trial court should limit its analysis to the circumstances surrounding the making of the statement and should not rely on other independent evidence that also implicates the defendant. Appropriate factors for a trial court to consider include: where and when the statement was made, to whom the statement was made, what prompted the statement, how the statement was made, and what the statement contained. *See State v. Wilson,* 323 Or. 498, 918 P.2d 826, 837-39 (Or.1996) (outlining the above factors).

B. The Scope of an Admissible "Statement" Under CRE 804(b)(3)

CRE 804(b)(3) provides for the admission of a "statement" against the declarant's interest. The People urge us to construe a statement against interest broadly, arguing that the court of appeals' interpretation of an admissible statement is unnecessarily restrictive and results in an artificial dissection of a declarant's narrative. While we do not

share the People's view that a declarant's entire narrative should be admissible so long as it contains within it a remark inculpating the declarant, we agree with the People that the court of appeals' interpretation of an admissible statement, based on the Supreme Court's decision in *Williamson,* is not a correct statement of Colorado law.

1. *Williamson* and Fed.R.Evid. 804(b)(3)

In *Williamson,* the Supreme Court held that a "statement" for purposes of Fed.R.Evid. 804(b)(3) is limited to an individual self-inculpatory remark. *See Williamson,* 512 U.S. at 599-601, 114 S.Ct. 2431. The *Williamson* Court began its analysis by acknowledging that a "statement" may have a broad meaning, such as a "report or narrative," or may mean more narrowly "a single declaration or remark." *Id.* at 599, 114 S.Ct. 2431. The *Williamson* Court explained that, although the text of the rule does not answer the question of which meaning of "statement" should be followed, the "principle behind the Rule" supports the more narrow reading. *Id.* According to the Court's interpretation of Fed.R.Evid. 804(b)(3), the rule:

> does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory.

Id. at 600-01, 114 S.Ct. 2431. As a result of *Williamson,* statements that are collaterally neutral and related to the inculpatory remark are not admissible under the federal rule.

In his concurring opinion, Justice Kennedy strongly disagreed with the majority's interpretation of Fed.R.Evid. 804(b)(3). *See Williamson,* 512 U.S. at 611-21, 114 S.Ct. 2431 (Kennedy, J., concurring). Justice Kennedy summarized the three generally accepted, competing views regarding the admissibility of a declarant's statements that are collateral, related declarations to the directly inculpatory statement. *See id.* at 611-12, 114 S.Ct. 2431. Dean Wigmore argued, as do the People here, that every fact contained in the statement should be admitted because " 'the statement is made under circumstances fairly indicating the declarant's sincerity and accuracy." ' *Id.* at 612, 114 S.Ct. 2431 (quoting 5 J. Wigmore, *Evidence,* § 1465, at 271 (3d ed.1940)). Dean McCormick took a more guarded view than did Dean Wigmore by arguing that collateral statements of a neutral character should be admitted, while collateral statements of a self-serving character should not. *See id.* (summarizing Dean McCormick's view and citing C. McCormick, *Law of Evidence* § 256, at 552-53 (1954)). Professor Jefferson, taking the most narrow view of the three, argued that only the proof of the fact against interest should be admitted. *See id.* (summarizing Professor Jefferson's view and citing Jefferson, *Declarations *577 Against Interest: An Exception to the Hearsay Rule,* 58 Harv. L.Rev. 1, 62-63 (1944)). Concluding that the majority's view was too narrow, Justice Kennedy advocated an approach similar to Dean McCormick's perspective.

2. The Colorado Rule

[16] The People and Newton agree that Colorado case law has interpreted CRE 804(b)(3) more broadly than the Supreme Court interpreted Fed.R.Evid. 804(b)(3) in *Williamson.*[FN16] For example, the *Moore* court explained that the declarant's statement was admissible under CRE 804(b)(3) "because it would have been probative in a trial against him," which as the People correctly note, is a significantly broader standard than the *Williamson* approach. It is also indisputable that this court is not bound to follow interpretations of federal rules of evidence that are identical to our rules of evidence. *See, e.g., People v. Garner,* 806 P.2d 366, 372 (Colo.1991) (declining to follow the United States Supreme Court's interpretation of Fed.R.Evid. 104 under *Huddleston v. United States,* 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988)). We find for several reasons that a more permissive approach to admitting statements against interest than the one announced by the *Williamson* Court is consistent with Colorado case law

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and represents the better evidentiary policy.

> FN16. In his answer brief, Newton states, "The Colorado construction ... does not require the fact-intensive inquiry or segmented analysis of each separate statement within a narrative." The People similarly note in their reply brief that "the traditional Colorado approach will result in the admission of more evidence, and in the form of broad narratives, while the *Williamson* rule will result in the admission of less evidence, and admission in the form of segmented snippets."

First, a broader reading of CRE 804(b)(3) comports with the type of statement that was admissible under our common law prior to the adoption of the Colorado Rules of Evidence. Our case law allowed for the admission of a statement against interest that included collaterally neutral facts. *See, e.g., Western Auto. Supply Co. v. Washburn,* 112 Colo. 430, 433-39, 149 P.2d 804, 805-08 (1944); *In re Estate of Granberry,* 30 Colo.App. 590, 594-95, 498 P.2d 960, 962-63 (1972). In *Washburn,* this court considered the admissibility of an employee's written and oral statements describing the details of an accident which allegedly caused the employee to sustain an injury. *See Washburn,* 112 Colo. at 433-39, 149 P.2d at 805-08. The statements included a series of collaterally neutral remarks about the employee's history with the employer and details of the events underlying the injury. *See id.* at 433-35, 149 P.2d at 805-06. The statements also contained an acknowledgment that there were no witnesses to the injury, which, as we explained, was against the employee's interest because the type of injury sustained by the employee "requir[ed] certainty of proof." *Id.* at 438, 149 P.2d at 807. Because the statements contained this acknowledgment, we held that the trial court erred by not allowing the employer to admit the broader statements into evidence.[FN17] *See id.* at 439, 149 P.2d at 808. Given the state of the common law concerning statements against interest, the question is whether the Colorado Rules of Evidence intended to narrow this hearsay exception. We answer that question in the negative.

> FN17. The *Washburn* court's analysis was consistent with the general common law, which admitted a declaration against interest "not only to prove the disserving fact stated, but also to prove other facts contained in collateral statements connected with the disserving statement." *Williamson,* 512 U.S. at 615, 114 S.Ct. 2431 (Kennedy, J., concurring) (quoting Jefferson, *supra,* at 57).

Adoption of the Colorado Rules of Evidence codified the common law in some respects and changed it in others. As then-Judge Quinn explained in his exhaustive review of the Colorado Rules of Evidence, CRE 803 and CRE 804 "generally follow the traditional common law exceptions as progressively broadened over the years." Joseph R. Quinn, *Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview,* 50 Colo. L.Rev. 277, 312 (1978-79). If CRE 804(b)(3) effected any change in our common law, the rule actually *expanded* the admissibility of statements against interest by extending it to statements against *penal* ***578** interest. *See* Quinn, *supra,* at 335 (explaining that CRE 804(b)(3) made a "substantial inroad upon the restrictions imposed by case law for admissibility of declarations against interest" by allowing for the admission of statements against penal interest, in addition to statements against pecuniary and proprietary interests); CRE 804(b)(3) advisory committee's note (noting that "Colorado's precedent concerning statements against interest is sparse, with possible limitation to statements against declarant's pecuniary or proprietary interests"). In its decision limiting the admissibility of a statement against interest to each precise self-inculpatory remark, the court of appeals significantly and erroneously departed from the types of admissible statements against interest that existed under common law, which CRE 804 intended to follow.

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Second, severing collaterally neutral statements from each precise self-inculpatory remark deprives the jury of important context surrounding that self-inculpatory remark. In our view, this approach places too great an emphasis on the policy against admitting hearsay while undervaluing the need for meaningful evidence in criminal cases. *See* Juliana Gortner, Note, *The Admissibility of Inculpatory Statements in Washington Under the Rule for Declarations Against Interest After Williamson v. United States,* 70 Wash. L.Rev. 859, 870 (1995) (criticizing *Williamson* for "fail[ing] to accommodate the critical need for meaningful evidence in criminal cases when sufficient protection can be afforded in a more balanced way").[FN18] As the court of appeals' attempt to parse Cummins's statement demonstrates, the surgical precision called for by *Williamson* is highly artificial and nearly impossible to apply.

> FN18. Gortner illuminates the adverse evidentiary consequences that would result from following *Williamson* by posing the following hypothetical confession:
>
> > [Jane]: My boyfriend John was at my house and overheard my mom and me fighting in the kitchen. John came in to intervene and my mom got out of control. I went to my room to get a gun that I keep for protection. When I returned, my mom had pushed John to the ground and was standing over him with a butcher knife. I threw him the gun and he ended up shooting her. When I realized she was still conscious, I grabbed the gun and shot her again.
>
> Gortner, *supra,* at 877. Gortner explains that under *Williamson,* all non-disserving remarks, including all comments incriminating John, would not be admissible "because none of the individual inculpatory remarks in this example are also against the declarant's own penal interest." *Id.* at 878. Thus, only those phrases that directly incriminate Jane, such as her actions to get the gun and her own participation in the shooting, would be admissible. *See id.* For example, a court might apply *Williamson* by reducing the statement to "I went to my room to get a gun .... I threw ... the gun .... When I realized she was still conscious, I grabbed the gun and shot her again." *Id.* at 880. Gortner concludes that this approach "would leave a string of remarks without context, purely against Jane's interest, that would be useless against John in his trial unless other evidence established a conspiracy or joint action between Jane and John." *Id.* at 878.

Third, as Justice Kennedy aptly observed, a narrow interpretation of the rule would apply equally to statements offered by a defendant to exculpate the defendant, as well as those that inculpate the defendant. *See Williamson,* 512 U.S. at 617, 114 S.Ct. 2431 ("Thus, if the declarant said, 'I robbed the store alone,' only the portion of the statement in which the declarant said 'I robbed the store' could be introduced by a criminal defendant on trial for the robbery. That seems extraordinary." (citations omitted)). CRE 804(b)(3) already requires a defendant seeking to admit a statement exculpating the defendant to show that corroborating circumstances clearly indicate the trustworthiness of the statement. The court of appeals' narrow interpretation of the rule would impose an additional hurdle to the admission of such statements, thereby making it more difficult for a defendant to present relevant evidence supporting a theory of non-involvement in the alleged crime.

[17] We therefore reject the court of appeals' interpretation of CRE 804(b)(3). We hold that a narrative's precise statement against penal interest and related, collaterally neutral statements are admissible under CRE 804(b)(3). When a party seeks to introduce a statement under CRE 804(b)(3), a trial court

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should determine whether the statement sought to be introduced contains a fact against the declarant's penal interest. If *579 it does, then the trial court "should admit all statements related to the precise statement against penal interest, subject to two limits." *Williamson,* 512 U.S. at 620, 114 S.Ct. 2431 (Kennedy, J., concurring). First, statements that are so self-serving as to be unreliable should be excluded. Second, if the trial court determines that the declarant had a significant motivation to curry favorable treatment, then the entire narrative is inadmissible.

3. Cummins's Statement to Detective Parker

The admissibility of Cummins's statement to Detective Parker is likely to arise during a retrial. Although further fact-finding and changed circumstances may obviate the need to address this issue, we nevertheless proceed to provide guidance on the admissibility of the statement under our interpretation of CRE 804(b)(3) and the three-part test we announced in part III-A of this opinion. *See, e .g., Goebel v. Colorado Dep't of Insts.,* 764 P.2d 785, 804 (Colo.1988) (offering guidance to the trial court on an issue likely to arise on retrial); *People v. Roark,* 643 P.2d 756, 766-74 (Colo.1982) (same).

a. Unavailability

[18][19] CRE 804(a)(2) includes within the definition of an unavailable witness a declarant who "persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so." As made clear in *Blecha,* the determination of unavailability must be made at the time of trial. *See Blecha,* 962 P.2d at 940. Here, although the People offered Cummins immunity and the trial court ordered her to testify, Cummins refused to answer the prosecution's questions. Accordingly, under the facts existing at the time this case was tried, she was an unavailable witness under CRE 804(a)(2). If Cummins refuses to testify at Newton's retrial, she would be an unavailable witness.

b. Statement Against Penal Interest

[20] Under section 18-8-105(1), 6 C.R.S. (1997), "A person is an accessory to a crime if, with intent to hinder, delay, or prevent the discovery, detection, apprehension, prosecution, conviction, or punishment of another for the commission of a crime, he renders assistance to such person." Rendering assistance includes situations where a person "[w]arn[s] such person of impending discovery or apprehension." § 18-8-105(2)(b), 6 C.R.S. (1997). A person with knowledge that the person she assists "has committed" a crime is punished more severely than a person with knowledge that the person assisted "is suspected of or wanted for" a crime. § 18-8-105(3)-(6), 6 C.R.S. (1997).

Here, Cummins's statement to Detective Parker would subject her to liability as an accessory. Unless she believed the statement to be true, a reasonable person would not inform a police officer that she was aware of a robbery that had just occurred, that she knew the persons involved in that crime, that she witnessed the robbers enter the apartment she was occupying, that she left the apartment and saw the police surround the apartment, and that she informed the robbery participants of the police officers' presence. Taken together, these statements would support a finding that Cummins violated the law and are thus against her penal interests.

If the trial court finds on retrial that Cummins's statements were not made to curry favor, then the entire narrative would be admissible. As discussed, Detective Parker testified that Cummins told him that she was at apartment # 10 on the morning of April 1, 1993 when Newton, Bronson, Riley, and McCoy entered. After these four persons went to the bedroom of the apartment, Cummins informed Shervin Bunch that the four had just committed a robbery. Bunch then went into the bedroom for several minutes. Newton emerged from the bedroom wearing a different outfit from the outfit he was

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wearing when he entered the apartment. Cummins then went to take the trash outside and observed the police. Upon returning to the apartment, she informed everyone about the police's presence. Newton told everyone "to be cool because the cops couldn't come in." When the police knocked at the door, Bronson, McCoy, and Riley left the apartment through the window and started running. All of these remarks either subject Cummins to criminal liability as an accessory ***580** or are collaterally neutral. The statements are not so self-serving as to be unreliable. Hence, the entire narrative would be admissible under CRE 804(b)(3) if Cummins did not make the statement in order to curry favor.

c.

On retrial, the trial court must determine whether the circumstances surrounding Cummins's statement to Detective Parker demonstrate the trustworthiness of that statement. In making this determination, the trial court should apply the factors we described in part III-A of this opinion.

IV.

In summary, we hold that the trial court's error in allowing the People to call Cummins to the stand warrants reversal of Newton's convictions. We therefore affirm the court of appeals' judgment reversing Newton's convictions. However, we reject the court of appeals' adoption of *Williamson* for purposes of CRE 804(b)(3). Under our interpretation of the rule, a trial court should admit all statements related to the precise statement against penal interest subject to the limitations we delineated in this opinion. Accordingly, we affirm the court of appeals and return this case with directions to remand it to the trial court for further proceedings consistent with this opinion.

Justice KOURLIS concurs and specially concurs. Justice SCOTT joins in the concurrence and special concurrence.Justice KOURLIS, concurring and specially concurring.

I concur with the result reached by the majority and with the court's analysis in Parts I and III. I write separately only to express my concern that the majority's analysis in Part II extends beyond the scope of our grant of certiorari.

We granted certiorari in this case to determine whether the court of appeals erred in adopting or applying the rule of *Williamson v. United States,* 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994), regarding the hearsay exception for statements against penal interest. The court of appeals determined that Cummins's statement at issue was improperly admitted into evidence, and reversed and remanded for a new trial on that basis alone. The majority resolves the certiorari issue by concluding that the court of appeals did err. Therefore, the majority affirms the judgment of the court of appeals, but sets forth a new test for admissibility of Cummins's statement on retrial.

In the context of seeking to admit Cummins's hearsay statement at trial, the People called Cummins to the stand knowing that she would invoke her privilege against self-incrimination. In fact, she did repeatedly invoke her privilege in the presence of the jury.

The court of appeals announced at the beginning of its opinion that a "party may not call a witness to testify if that party knows the witness will exercise her privilege against self incrimination." *People v. Newton,* 940 P.2d 1065, 1067 (Colo.App.1996). However, the court of appeals discussed the issue solely in the context of determining whether or not the subsequent admission of Cummins's out-of-court statement was harmless. Since the court of appeals reversed and remanded on the basis of the hearsay statement, it did not specifically address the impact of Cummins's invocation of privilege on the witness stand. It did not speak to the question of when and whether calling a witness to the stand knowing that such witness would invoke the privilege against self-incrimination should constitute reversible error, and it did not address the standards that should govern such an inquiry.

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Because the court of appeals did not fully address the self-incrimination question, neither party sought certiorari on that issue. Neither party briefed the issue of the consequences that should follow from such an error. The People argued merely that this court should reverse the decision of the court of appeals concerning the admissibility of Cummins's narrative and remand for consideration of the remaining appellate claims.[FN1]

> FN1. The majority points out that the People discussed in the People's reply brief on certiorari and during oral arguments the impact of the trial court's decision to allow the prosecution to repeatedly question Cummins despite her claim of Fifth Amendment privilege. According to the majority, these discussions by the People "are consistent" with the majority's decision to take a position on this issue. In the People's reply brief, however, the issue was raised solely to point out that the Respondent's opposition brief had improperly characterized the court of appeals' holding on the *Williamson* issues as dicta, when in fact the court of appeals' analysis of CRE 804 determined the outcome of the case. The interrelationship between the evidentiary issue and the invocation of privilege issue has been contextual only. As such, the invocation of privilege issue is not necessary or subsidiary to our certiorari is- sues.

***581** The majority reads the court of appeals' opinion as implicitly concluding that the error in permitting the People to call Cummins to the stand knowing that she would invoke her privilege was not automatically reversible. *See* maj. op. at 569. The majority then specifically joins the issue of whether such an error was reversible in this instance, and delineates the appropriate standards.

The majority makes that choice in the interests of judicial economy. *See* maj. op. at 570 n. 8. Although I certainly share the goals of minimizing expense and passage of time in litigation and maximizing the use of judicial resources, I nonetheless would decline to reach an issue that is not properly before us. *See In re Marriage of Booker,* 833 P.2d 734, 740 (Colo.1992) (Vollack, J., concurring); *Vigoda v. Denver Urban Renewal Auth.,* 646 P.2d 900, 907 (Colo.1982). The immediate danger is that we do not have the benefit of the parties' briefs and argument on point, as well as the benefit of any amicus briefs that might be tendered. The further danger is more systemic. This court is principally a court of certiorari jurisdiction. When we grant certiorari on a particular issue, our review is then confined to that issue. *See* C.A.R. 53 ("The statement of an issue presented will be deemed to include every subsidiary issue clearly comprised therein. Only the issues set forth or clearly comprised therein will be considered.").

I do not view the issue presented and resolved in Part II of the majority opinion to be included within our grant of certiorari, and I do not think the court has the discretion to entertain issues not properly before it. I would, thus, reverse the court of appeals on the admissibility of Cummins's statement and remand to that court for further resolution of remaining appellate issues, including the impact of Cummins's invocation of the privilege against self-incrimination before the jury.

I am authorized to state that JUSTICE SCOTT joins in this concurrence and special concurrence.

Colo.,1998.
People v. Newton
966 P.2d 563, 98 CJ C.A.R. 4880

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Federal Courts 251–252 (2d ed. 1970); *Holmberg v. Armbrecht*, 327 U.S. 392 (1946); *DeSylva v. Ballentine*, 351 U.S. 570, 581 (1956); 9 Wright & Miller, Federal Rules and Procedure § 2408.

In civil actions and proceedings, where the rule of decision as to a claim or defense or as to an element of a claim or defense is supplied by state law, the House provision requires that state privilege law apply.

The Conference adopts the House provision. House Report No. 93–1597.

Rule 502. Attorney–Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure made in a Federal proceeding or to a Federal office or agency; scope of a waiver.—When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent disclosure.—When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) Disclosure made in a State proceeding.—When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a Federal proceeding; or

(2) is not a waiver under the law of the State where the disclosure occurred.

(d) Controlling effect of a court order.—A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.

(e) Controlling effect of a party agreement.—An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling effect of this rule.—Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.

(g) Definitions.—In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

(Pub.L. 110–322, § 1(a), Sept. 19, 2008, 122 Stat. 3537.)

Explanatory Note (Revised 11/28/2007)

This new rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product—specifically those disputes involving inadvertent disclosure and subject matter waiver.

2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation").

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable. Moreover, if a federal court's confidentiality order is not enforceable in a state court then the burdensome costs of privilege review and retention are unlikely to be reduced.

The rule makes no attempt to alter federal or state law on whether a communication or information is protected under the attorney-client privilege or work-product immunity as an initial matter. Moreover, while establishing some exceptions

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to waiver, the rule does not purport to supplant applicable waiver doctrine generally.

The rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. *See, e.g., Nguyen v. Excel Corp.*, 197 F.3d 200 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burleson*, 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

Subdivision (a). The rule provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g., In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994) (waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver. *See* Rule 502(b). The rule rejects the result in *In re Sealed Case*, 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The language concerning subject matter waiver—"ought in fairness"—is taken from Rule 106, because the animating principle is the same. Under both Rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.

To assure protection and predictability, the rule provides that if a disclosure is made at the federal level, the federal rule on subject matter waiver governs subsequent state court determinations on the scope of the waiver by that disclosure.

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of a communication or information protected as privileged or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any inadvertent disclosure of a communication or information protected under the attorney-client privilege or as work product constitutes a waiver without regard to the protections taken to avoid such a disclosure. *See generally Hopson v. City of Baltimore*, 232 F.R.D. 228 (D.Md. 2005), for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver.

Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal. 1985), set out a multi-factor test for determining whether inadvertent disclosure is a waiver. The stated factors (none of which is dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken "reasonable steps" to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

The rule applies to inadvertent disclosures made to a federal office or agency, including but not limited to an office or agency that is acting in the course of its regulatory, investigative or enforcement authority. The consequences of waiver, and the concomitant costs of pre-production privilege review, can be as great with respect to disclosures to offices and agencies as they are in litigation.

Subdivision (c). Difficult questions can arise when 1) a disclosure of a communication or information protected by the attorney-client privilege or as work product is made in a state proceeding, 2) the communication or information is offered in a subsequent federal proceeding on the ground that the disclosure waived the privilege or protection, and 3) the state and federal laws are in conflict on the question of waiver. The Committee determined that the proper solution for the federal court is to apply the law that is most protective of privilege and work product. If the state law is more protective (such as where the state law is that an inadvertent disclosure can never be a waiver), the holder of the privilege or protection may well have relied on that law when making the disclosure in the state proceeding. Moreover, applying a more restrictive federal law of waiver could impair the state objective of preserving the privilege or work-product protection for disclosures made in state proceedings. On the other hand, if the federal law is more protective, applying the state law of waiver to determine admissibility in federal court is likely to undermine the federal objective of limiting the costs of production.

The rule does not address the enforceability of a state court confidentiality order in a federal proceeding, as that question is covered both by statutory law and principles of

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federalism and comity. *See* 28 U.S.C. § 1738 (providing that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken"). *See also Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 499 (D.Md. 2000) (noting that a federal court considering the enforceability of a state confidentiality order is "constrained by principles of comity, courtesy, and . . . federalism"). Thus, a state court order finding no waiver in connection with a disclosure made in a state court proceeding is enforceable under existing law in subsequent federal proceedings.

Subdivision (d). Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. But the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the communications or information could be used by non-parties to the litigation.

There is some dispute on whether a confidentiality order entered in one case is enforceable in other proceedings. *See generally Hopson v. City of Baltimore*, 232 F.R.D. 228 (D.Md. 2005), for a discussion of this case law. The rule provides that when a confidentiality order governing the consequences of disclosure in that case is entered in a federal proceeding, its terms are enforceable against non-parties in any federal or state proceeding. For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of "claw-back" and "quick peek" arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product. *See Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents"). The rule provides a party with a predictable protection from a court order—predictability that is needed to allow the party to plan in advance to limit the prohibitive costs of privilege and work product review and retention.

Under the rule, a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation. Party agreement should not be a condition of enforceability of a federal court's order.

Under subdivision (d), a federal court may order that disclosure of privileged or protected information "in connection with" a federal proceeding does not result in waiver. But subdivision (d) does not allow the federal court to enter an order determining the waiver effects of a separate disclosure of the same information in other proceedings, state or federal. If a disclosure has been made in a state proceeding (and is not the subject of a state-court order on waiver), then subdivision (d) is inapplicable. Subdivision (c) would govern the federal court's determination whether the state-court disclosure waived the privilege or protection in the federal proceeding.

Subdivision (e). Subdivision (e) codifies the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure between or among them. Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection against non-parties from a finding of waiver by disclosure, the agreement must be made part of a court order.

Subdivision (f). The protections against waiver provided by Rule 502 must be applicable when protected communications or information disclosed in federal proceedings are subsequently offered in state proceedings. Otherwise the holders of protected communications and information, and their lawyers, could not rely on the protections provided by the Rule, and the goal of limiting costs in discovery would be substantially undermined. Rule 502(f) is intended to resolve any potential tension between the provisions of Rule 502 that apply to state proceedings and the possible limitations on the applicability of the Federal Rules of Evidence otherwise provided by Rules 101 and 1101.

The rule is intended to apply in all federal court proceedings, including court-annexed and court-ordered arbitrations, without regard to any possible limitations of Rules 101 and 1101. This provision is not intended to raise an inference about the applicability of any other rule of evidence in arbitration proceedings more generally.

The costs of discovery can be equally high for state and federal causes of action, and the rule seeks to limit those costs in all federal proceedings, regardless of whether the claim arises under state or federal law. Accordingly, the rule applies to state law causes of action brought in federal court.

Subdivision (g). The rule's coverage is limited to attorney-client privilege and work product. The operation of waiver by disclosure, as applied to other evidentiary privileges, remains a question of federal common law. Nor does the rule purport to apply to the Fifth Amendment privilege against compelled self-incrimination.

The definition of work product "materials" is intended to include both tangible and intangible information. *See In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003) ("work product protection extends to both tangible and intangible work product").

Committee Letter

The letter from the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States to the Committee on the Judiciary of the U.S. Senate and House of Representatives, dated September 26, 2007, provided:

On behalf of the Judicial Conference of the United States, I respectfully submit a proposed addition to the Federal Rules of Evidence. The Conference recommends that Congress adopt this proposed rule as Federal Rule of Evidence 502.

The Rule provides for protections against waiver of the attorney-client privilege or work product immunity. The Conference submits this proposal directly to Congress because of the limitations on the rulemaking function of the federal courts in matters dealing with evidentiary privilege. Unlike all other federal rules of procedure prescribed under the Rules Enabling Act, those rules governing evidentiary privilege must by approved by an Act of Congress, 28 U.S.C. § 2074(b).

Description of the Process Leading to the Proposed Rule

The Judicial Conference Rules Committees have long been concerned about the rising costs of litigation, much of which has been caused by the review, required under current law, of every document produced in discovery, in order to determine whether the document contains privileged information. In 2006, the House Judiciary Committee Chair suggested that the Judicial Conference consider proposing a rule dealing with waiver of attorney-client privilege and work product, in order to limit these rising costs. The Judicial Conference was urged to proceed with rulemaking that would:

- protect against the forfeiture of privilege when a disclosure in discovery is the result of an innocent mistake; and
- permit parties, and courts, to protect against the consequences of waiver by permitting disclosures of privileged information between the parties to litigation.

The task of drafting a proposed rule was referred to the Advisory Committee on Evidence Rules (the "Advisory Committee"). The Advisory Committee prepared a draft Rule 502 and invited a select group of judges, lawyers, and academics to testify before the Advisory Committee about the need for the rule, and to suggest any improvements. The Advisory Committee considered all the testimony presented by these experts and redrafted the rule accordingly. At its Spring 2006 meeting, the Advisory Committee approved for release for public comment a proposed Rule 502 that would provide certain exceptions to the federal common law on waiver of privileges and work product. That rule was approved for release for public comment by the Committee on Rules of Practice and Procedure ("the Standing Committee"). The public comment period began in August 2006 and ended February 15, 2007. The Advisory Committee received more that [sic] 70 public comments, and also heard the testimony of more than 20 witnesses at two public hearings. The rule released for public comment was also carefully reviewed by the Standing Committee's Subcommittee on Style. In April 2007, the Advisory Committee issued a revised proposed Rule 502 taking into account the public comment, the views of the Subcommittee on Style, and its own judgment. The revised rule was approved by the Standing Committee and the Judicial Conference. It is enclosed with this letter.

In order to inform Congress of the legal issues involved in this rule, the proposed Rule 502 also includes a proposed Committee Note of the kind that accompanies all rules adopted through the Rules Enabling Act. This Committee Note may be incorporated as all or part of the legislative history of the rule if it is adopted by Congress. *See, e.g.*, House Conference Report 103–711 (stating that the "Conferees intend that the Advisory Committee Note on [Evidence] Rule 412, as transmitted by the Judicial Conference of the United States to the Supreme Court on October 25, 1993, applies to Rule 412 as enacted by this section" of the Violent Crime Control and Law Enforcement Act of 1994).

Problems Addressed by the Proposed Rule

In drafting the proposed Rule, the Advisory Committee concluded that the current law on waiver of privilege and work product is responsible in large part for the rising costs of discovery, especially discovery of electronic information. In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege and work product. The reason is that if a protected document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document but to other cases and documents as well. Moreover, an enormous amount of expense is put into document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver. Advisory Committee members also expressed the view that the fear of waiver leads to extravagant claims of privilege. Members concluded that if there were a way to produce documents in discovery without risking subject matter waiver, the discovery process could be made much less expensive. The Advisory Committee noted that the existing law on the effect of inadvertent disclosures and on the scope of waiver is far from consistent or certain. It also noted that agreements between parties with regard to the effect of disclosure on privilege are common, but are unlikely to decrease the costs of discovery due to the ineffectiveness of such agreements as to persons not party to them.

Proposed Rule 502 does not attempt to deal comprehensively with either attorney-client privilege or work-product protection. It also does not purport to cover all issues concerning waiver or forfeiture of either the attorney-client privilege or work-product protection. Rather, it deals primarily with issues involved in the disclosure of protected information in federal court proceedings or to a federal public office or agency. The rule binds state courts only with regard to disclosures made in federal proceedings. It deals with disclosures made in state proceedings only to the extent that the effect of those disclosures becomes an issue in federal litigation. The Rule covers issues of scope of waiver, inadvertent disclosure, and the controlling effect of court orders and agreements.

Rule 502 provides the following protections against waiver of privilege or work product:

- *Limitations on Scope of Waiver.* Subdivision (a) provides that if a waiver is found, it applies only to the information disclosed, unless a broader waiver is made necessary by the holder's intentional and misleading use of privileged or protected communications or information.
- *Protections Against Inadvertent Disclosure.* Subdivision (b) provides that an inadvertent disclosure of privileged or protected communications or information, when made at the federal level, does not operate as a waiver if the holder took reasonable steps to prevent such a disclosure and employed reasonably prompt measures to retrieve the mistakenly disclosed communications or information.
- *Effect on State Proceedings and Disclosures Made in State Courts.* Subdivision (c) provides that 1) if there is a disclosure of privileged or protected communications or information at the federal level, then state courts must honor Rule 502 in subsequent state proceedings; and 2) if there is a disclosure of privileged or protected communications or information in a state proceeding, then admissibility in a subsequent federal proceeding is determined by the law that is most protective against waiver.
- *Orders Protecting Privileged Communications Binding on Non-Parties.* Subdivision (d) provides that if a federal court enters an order providing that a disclosure of privileged or protected communications or information does not constitute a waiver, that order is enforceable against all

persons and entities in any federal or state proceeding. This provision allows parties in an action in which such an order is entered to limit their costs of pre-production privilege review.

•*Agreements Protecting Privileged Communications Binding on Parties.* Subdivision (e) provides that parties in a federal proceeding can enter into a confidentiality agreement providing for mutual protection against waiver in that proceeding. While those agreements bind the signatory parties, they are not binding on non-parties unless incorporated into a court order.

Drafting Choices Made by the Advisory Committee

The Advisory Committee made a number of important drafting choices in Rule 502. This section explains those choices.

1) **The effect in state proceedings of disclosures initially made in state proceedings.** Rule 502 does not apply to a disclosure made in a state proceeding when the disclosed communication or information is subsequently offered in another state proceeding. The first draft of Rule 502 provided for uniform waiver rules in federal and state proceedings, regardless of where the initial disclosure was made. This draft raised the objections of the Conference of State Chief Justices. State judges argued that the Rule as drafted offended principles of federalism and comity, by superseding state law of privilege waiver, even for disclosures that are made initially in state proceedings—and even when the disclosed material is then offered in a state proceeding (the so-called "state-to-state" problem). In response to these objections, the Advisory Committee voted unanimously to scale back the Rule, so that it would not cover the "state-to-state" problem. Under the current proposal state courts are bound by the Federal Rule only when a disclosure is made at the federal level and the disclosed communication or information is later offered in a state proceeding (the so-called "federal-to-state" problem).

During the public comment period on the scaled-back rule, the Advisory Committee received many requests from lawyers and lawyer groups to return to the original draft and provide a uniform rule of privilege waiver that would bind both state and federal courts, for disclosures made in either state or federal proceedings. These comments expressed the concern that if states were not bound by a uniform federal rule on privilege waiver, the protections afforded by Rule 502 would be undermined; parties and their lawyers might not be able to rely on the protections of the Rule, for fear that a state law would find a waiver even though the Federal Rule would not.

The Advisory Committee determined that these comments raised a legitimate concern, but decided not to extend Rule 502 to govern a state court's determination of waiver with respect to disclosures made in state proceedings. The Committee relied on the following considerations:

- Rule 502 is located in the Federal Rules of Evidence, a body of rules determining the admissibility of evidence in federal proceedings. Parties in a state proceeding determining the effect of a disclosure made in that proceeding or in other state courts would be unlikely to look to the Federal Rules of Evidence for the answer.
- In the Advisory Committee's view, Rule 502, as proposed herein, does fulfill its primary goal of reducing the costs of discovery in *federal* proceedings. Rule 502 by its terms governs state courts with regard to the effect of disclosures initially made in federal proceedings or to federal offices or agencies. Parties and their lawyers in federal proceedings can therefore predict the consequences of disclosure by referring to Rule 502; there is no possibility that a state court could find a waiver when Rule 502 would not, when the disclosure is initially made at the federal level.

The Judicial Conference has no position on the merits of separate legislation to cover the problem of waiver of privilege and work product when the disclosure is made at the state level and the consequence is to be determined in a state court.

2) **Other applications of Rule 502 to state court proceedings.** Although disclosures made in state court proceedings and later offered in state proceedings would not be covered, Rule 502 would have an effect on state court proceedings where the disclosure is initially made in a federal proceeding or to a federal office or agency. Most importantly, state courts in such circumstances would be bound by federal protection orders. The other protections against waiver in Rule 502—against mistaken disclosure and subject matter waiver—would also bind state courts as to disclosures initially made at the federal level. The Rule, as submitted, specifically provides that it applies to state proceedings under the circumstances set out in the Rule. This protection is needed, otherwise parties could not rely on Rule 502 even as to federal disclosures, for fear that a state court would find waiver even when a federal court would not.

3) **Disclosures made in state proceedings and offered in a subsequent federal proceeding.** Earlier drafts of proposed Rule 502 did not determine the question of what rule would apply when a disclosure is made in state court and the waiver determination is to be made in a subsequent federal proceeding. Proposed Rule 502 as submitted herein provides that all of the provisions of Rule 502 apply unless the state law of privilege is more protective (less likely to find waiver) than the federal law. The Advisory Committee determined that this solution best preserved federal interests in protecting against waiver, and also provided appropriate respect for state attempts to give greater protection to communications and information covered by the attorney-client privilege or work-product doctrine.

4) **Selective waiver.** At the suggestion of the House Judiciary Committee Chair, the Advisory Committee considered a rule that would allow persons and entities to cooperate with government agencies without waiving all privileges as to other parties in subsequent litigation. Such a rule is known as a "selective waiver" rule, meaning that disclosure of protected communications or information to the government waives the protection only selectively—to the government—and not to any other person or entity.

The selective waiver provision proved to be very controversial. The Advisory Committee determined that it would not propose adoption of a selective waiver provision; but in light of the request from the House Judiciary Committee, the Advisory Committee did prepare language for a selective waiver provision should Congress decide to proceed. The draft language for a selective waiver provision is available on request.

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Conclusion

Proposed Rule 502 is respectfully submitted for consideration by Congress as a rule that will effectively limit the skyrocketing costs of discovery. Members of the Standing Committee, the Advisory Committee, as well as their reporters and consultants, are ready to assist Congress in any way it sees fit.

Sincerely,

Lee H. Rosenthal

Chair, Committee on Rules of Practice and Procedure

Addendum to Advisory Committee Notes

STATEMENT OF CONGRESSIONAL INTENT REGARDING RULE 502 OF THE FEDERAL RULES OF EVIDENCE

During consideration of this rule in Congress, a number of questions were raised about the scope and contours of the effect of the proposed rule on current law regarding attorney-client privilege and work-product protection. These questions were ultimately answered satisfactorily, without need to revise the text of the rule as submitted to Congress by the Judicial Conference.

In general, these questions are answered by keeping in mind the limited though important purpose and focus of the rule. The rule addresses only the effect of disclosure, under specified circumstances, of a communication that is otherwise protected by attorney-client privilege, or of information that is protected by work-product protection, on whether the disclosure itself operates as a waiver of the privilege or protection for purposes of admissibility of evidence in a federal or state judicial or administrative proceeding. The rule does not alter the substantive law regarding attorney-client privilege or work-product protection in any other respect, including the burden on the party invoking the privilege (or protection) to prove that the particular information (or communication) qualifies for it. And it is not intended to alter the rules and practices governing use of information outside this evidentiary context.

Some of these questions are addressed more specifically below, in order to help further avoid uncertainty in the interpretation and application of the rule.

Subdivision (a)—Disclosure vs. Use

This subdivision does not alter the substantive law regarding when a party's strategic use in litigation of otherwise privileged information obliges that party to waive the privilege regarding other information concerning the same subject matter, so that the information being used can be fairly considered in context. One situation in which this issue arises, the assertion as a defense in patent-infringement litigation that a party was relying on advice of counsel, is discussed elsewhere in this Note. In this and similar situations, under subdivision (a)(1) the party using an attorney-client communication to its advantage in the litigation has, in so doing, intentionally waived the privilege as to other communications concerning the same subject matter, regardless of the circumstances in which the communication being so used was initially disclosed.

Subdivision (b)—Fairness Considerations

The standard set forth in this subdivision for determining whether a disclosure operates as a waiver of the privilege or protection is, as explained elsewhere in this Note, the majority rule in the federal courts. The majority rule has simply been distilled here into a standard designed to be predictable in its application. This distillation is not intended to foreclose notions of fairness from continuing to inform application of the standard in all aspects as appropriate in particular cases—for example, as to whether steps taken to rectify an erroneous inadvertent disclosure were sufficiently prompt under subdivision (b)(3) where the receiving party has relied on the information disclosed.

Subdivisions (a) and (b)—Disclosures to Federal Office or Agency

This rule, as a Federal Rule of Evidence, applies to admissibility of evidence. While subdivisions (a) and (b) are written broadly to apply as appropriate to disclosures of information to a federal office or agency, they do not apply to uses of information—such as routine use in government publications—that fall outside the evidentiary context. Nor do these subdivisions relieve the party seeking to protect the information as privileged from the burden of proving that the privilege applies in the first place.

Subdivision (d)—Court Orders

This subdivision authorizes a court to enter orders only in the context of litigation pending before the court. And it does not alter the law regarding waiver of privilege resulting from having acquiesced in the use of otherwise privileged information. Therefore, this subdivision does not provide a basis for a court to enable parties to agree to a selective waiver of the privilege, such as to a federal agency conducting an investigation, while preserving the privilege as against other parties seeking the information. This subdivision is designed to enable a court to enter an order, whether on motion of one or more parties or on its own motion, that will allow the parties to conduct and respond to discovery expeditiously, without the need for exhaustive pre-production privilege reviews, while still preserving each party's right to assert the privilege to preclude use in litigation of information disclosed in such discovery. While the benefits of a court order under this subdivision would be equally available in government enforcement actions as in private actions, acquiescence by the disclosing party in use by the federal agency of information disclosed pursuant to such an order would still be treated as under current law for purposes of determining whether the acquiescence in use of the information, as opposed to its mere disclosure, effects a waiver of the privilege. The same applies to acquiescence in use by another private party.

Moreover, whether the order is entered on motion of one or more parties, or on the court's own motion, the court retains its authority to include the conditions it deems appropriate In the circumstances.

Subdivision (e)—Party Agreements

This subdivision simply makes clear that while parties to a case may agree among themselves regarding the effect of disclosures between each other in a federal proceeding, it is not binding on others unless it is incorporated into a court order. This subdivision does not confer any authority on a court to enter any order regarding the effect of disclosures. That authority must be found in subdivision (d), or elsewhere.

(1) furnishing or offering or promising to furnish accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) **Permitted uses.** This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

Amended eff. Sept. 27, 2007.

RULE 409. PAYMENT OF MEDICAL AND SIMILAR EXPENSES

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

RULE 410. OFFER TO PLEAD GUILTY; NOLO CONTENDERE; WITHDRAWN PLEAS OF GUILTY

Except as otherwise provided by statutes of the State of Colorado, evidence of a plea of guilty, later withdrawn, or a plea of *nolo contendere,* or of an offer to plead guilty or *nolo contendere* to the crime charged or any other crime, or of statements made in any connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer. This rule shall not apply to the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas or offers where offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement.

This rule shall be superseded by any amendment to the Colorado Rules of Criminal Procedure which is inconsistent with this rule, and which takes effect after the effective date of these Colorado Rules of Evidence.

Committee Comment

The Committee wishes to advise the Court of a proposed Federal Amendment to Rule 410 as follows:

Rule 410. **Inadmissibility of Pleas, Plea Discussions, and Related Statements**

Except as otherwise provided in this rule, evidence of *the following* is not admissible against the person who made the plea or *was a party to the discussions, in any civil or criminal proceeding:*

(1) *a plea of guilty which was later withdrawn;*

(2) *a plea of nolo contendere;*

(3) *plea discussions with the attorney for the government, concerning the crime charged or any other crime, which do not result in a plea of guilty or which result in a plea of guilty later withdrawn; or*

(4) *statements made in the course of or as a consequence of such pleas or plea discussions.* However, *such* a statement is admissible *in any proceeding wherein statements made in the course of or as a consequence of the same plea or plea discussions have been introduced,* or 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.

FRE ADVISORY COMMITTEE NOTE: Present Rule 410 conforms to Rule 11(e)(6) of the Federal Rules of Criminal Procedure. A proposed amendment to Rule 11(e)(6) would clarify the circumstances in which pleas, plea discussions and related statements are inadmissible in evidence; *see* Advisory Committee Note thereto. The amendment proposed above would make comparable changes in Rule 410.

RULE 411. LIABILITY INSURANCE

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

RULE 412. RESERVED

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ARTICLE V. PRIVILEGES

RULE 501. PRIVILEGES RECOGNIZED ONLY AS PROVIDED

Except as otherwise required by the Constitution of the United States, the Constitution of the State of Colorado, statutes of the State of Colorado, rules prescribed by the Supreme Court of the State of Colorado pursuant to constitutional authority, or by the principles of the common law as they may be interpreted by the courts of the State of Colorado in light of reason and experience, no person has a privilege to:

(1) Refuse to be a witness; or

(2) Refuse to disclose any matter; or

(3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

ARTICLE VI. WITNESSES

RULE 601. GENERAL RULE OF COMPETENCY

Every person is competent to be a witness except as otherwise provided in these rules, or in any statute of the State of Colorado.

Committee Comment

The present rule preserves the general Colorado rule under § 13-90-101, *et seq.*, C.R.S.; and the exceptions listed in §§ 13-90-102 through 13-90-108.

RULE 602. LACK OF PERSONAL KNOWLEDGE

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

RULE 603. OATH OR AFFIRMATION

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

RULE 604. INTERPRETERS

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

RULE 605. COMPETENCY OF JUDGE AS WITNESS

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

RULE 606. COMPETENCY OF JUROR AS WITNESS

(a) **At the Trial.** A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. No objection need be made in order to preserve the point.

(b) **Inquiry Into Validity of Verdict or Indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

Amended eff. Sept. 27, 2007.

Committee Comment

Rule 606(b) has been amended to bring it into conformity with the 2006 amendments to the federal rule, providing that juror testimony may be used to prove that the verdict reported was the result of a mistake in entering the verdict on the verdict form. The federal amendment responded to a divergence between the text of the Rule and the case law that had established an exception for proof of clerical errors. See Fed. R. Evid. 606(b) advisory committee notes (2006 Amendments); see also Stewart v. Rice, 47 P.3d 316 (Colo. 2002).

RULE 607. WHO MAY IMPEACH

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

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tions may be used for the purpose of attacking such credibility.

Committee Comment

This rule abandons the traditional position against impeaching one's own witness. The additional sentence in the Colorado version of the rule should assist in resolving conflicts now existing between Rule 43(b) of the Colorado Rules of Civil Procedure and § 13–90–116, C.R.S. A minority opinion concerning Rule 607 feels that this rule should be restricted to civil cases since it may be prosecutorial misconduct for a prosecutor to attack the credibility of his own witness without a showing of hostility or surprise. The likelihood of a defendant's being found guilty because of a "coparticipant" hesitation to testify against the defendant may prejudice the jury to such an extent that a fair trial cannot be obtained.

RULE 608. EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

(a) **Opinion and Reputation Evidence of Character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) **Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness other than conviction of crime as provided in § 13–90–101, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross- examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

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

Amended eff. Jan. 1, 2006.

RULE 609. RESERVED

RULE 610. RELIGIOUS BELIEFS OR OPINIONS

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

RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

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

(b) **Scope of Cross-Examination.** Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

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

RULE 612. WRITING USED TO REFRESH MEMORY

If a witness uses a writing to refresh his memory for the purpose of testifying, either—

(1) while testifying, or

(2) before testifying, if

the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing *in camera*, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

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RULE 613. PRIOR STATEMENTS OF WITNESSES

(a) Examining Witness Concerning Prior Inconsistent Statements for Impeachment Purposes. Before a witness may be examined for impeachment by prior inconsistent statement the examiner must call the attention of the witness to the particular time and occasion when, the place where, and the person to whom he made the statement. As a part of that foundation, the examiner may refer to the witness statement to bring to the attention of the witness any purported prior inconsistent statement. The exact language of the prior statement may be given.

Where the witness denies or does not remember making the prior statement, extrinsic evidence, such as a deposition, proving the utterance of the prior evidence is admissible. However, if a witness admits making the prior statement, additional extrinsic evidence that the prior statement was made is inadmissible.

Denial or failure to remember the prior statement is a prerequisite for the introduction of extrinsic evidence to prove that the prior inconsistent statement was made.

Committee Comment

Concerning prior statements of witnesses, the Colorado Rule of Evidence as it now exists is set forth in Transamerica Insurance Co. v. Pueblo Gas & Fuel Co., 33 Colo. App. 92, 95, 519 P.2d 1201, 1203 (1973).

RULE 614. CALLING AND INTERROGATION OF WITNESSES BY COURT

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

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

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

RULE 615. EXCLUSION OF WITNESSES

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

RULE 701. OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Amended eff. July 1, 2002.

Committee Comment

This rule does not foreclose an owner from giving an opinion as to the value of his real property. Universal Insurance Company v. Arrigo, 96 Colo. 531, 44 P.2d 1020 (1935).

RULE 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

RULE 703. BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Amended eff. July 1, 2002.

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Committee Comment

The Committee believes this rule is a substantial deviation from former Colorado law, but there are former cases lending partial support to the rule. *See:* Hensel Phelps Construction Co. v. U.S., 413 F.2d 701 10th Cir. (1969); Houser v. Eckhardt, 168 Colo. 226, 450 P.2d 664 (1969); McNelley v. Smith, 149 Colo. 177, 368 P.2d 555 (1962); Ison v. Stewart, 105 Colo. 55, 94 P.2d 701 (1939); Enyart v. Orr, 78 Colo. 6, 238 P. 29 (1925); Rio Grande W. Ry. Co. v. Rubenstein, 5 Colo. App. 121, 38 P. 76 (1894). *See also,* Good v. A.B. Chance Co., 39 Colo. App. 70, 565 P.2d 217 (1977). Although not directly in point, we believe the case supports the last sentence of Rule 703. (Amended March 5, 1981, effective July 1, 1981.)

RULE 704. OPINION ON ULTIMATE ISSUE

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

Committee Comment

The present Federal and Colorado rules may conflict with preceding Colorado case law. (*Compare* Bridges v. Lintz, 140 Colo. 582, 346 P.2d 571 (1959) and McNelley v. Smith, 149 Colo. 177, 368 P.2d 555 (1962).) It is felt that the rule expresses the better alternative. The conflict arises in the area of lay witnesses testifying as to an ultimate issue of fact. In Colorado, case law says that he may testify concerning things which would "help" the jury to understand the facts, but he may not render an opinion on the ultimate fact in issue. Mogote-Northeastern Consolidated Ditch Co. v. Gallegos, 70 Colo. 550, 203 P. 668 (1922). There are exceptions to the rule, and the law in Colorado can best be stated by quoting the following language: "It is reversible error to allow an opinion as to ultimate facts unless the witness testifies as an expert or his testimony invokes a description or estimate of condition, value, etc. or when it is difficult or impossible to state with sufficient exactness the facts and their surroundings." Town of Meeker v. Fairfield, 25 Colo. App. 187, 136 P. 471 (1913).

RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

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

Amended eff. Nov. 16, 1995.

Committee Comment

Although the present rule is contrary to Colorado case law, the Committee believes it to be the better view. The reasons for the retention of the proposed Federal rule as it is presently written are as follows. First, the rule does not disturb the requirement for a proper foundation for expert opinions. City and County of Denver v. Lyttle, 106 Colo. 157, 103 P.2d 1 (1940). Secondly, the elimination of the requirement for preliminary disclosure of underlying facts or data has the effect of reducing the need for hypothetical questions, a goal which has been sought by a number of states. Thirdly: "If the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion. The answer assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination. This advance knowledge has been afforded, though imperfectly, by the traditional foundations requirement." Advisory Committee's Notes, Proposed Federal Rules. *See also,* Archina v. People, 135 Colo. 8, 307 P.2d 1083 (1957). Finally, it is clear that there is built-in safeguard in the discretionary power of the court to require prior disclosure.

RULE 706. COURT APPOINTED EXPERTS

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

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

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tained in a regularly kept record of a religious organization.

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

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

Committee Comment

The age of the record or regularity of keeping are immaterial to admissibility. The content of fact is not limited to pedigree or genealogy.

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

Committee Comment

The generic term "property" used in the Federal rule indicates an intent that the rule apply to documents relating to interests in both real property and personal property. The term "filed" has been added to render the rule applicable to personal property under Colorado law: the Uniform Commercial Code, the Colorado Rules of Civil Procedure, and § 30-10-103, C.R.S., all refer to "filing" documents affecting an interest in personal property.

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

Committee Comment

The rule extends admissibility beyond case law and statutes. *E.g.*, McClure v. Board of Commissioners of La Plata County, 19 Colo. 122, 34 P. 763 (1893); Wright v. People in the Interest of Rowe, 131 Colo. 92, 279 P.2d 676 (1955); Michael v. John Hancock Mutual Life Insurance Co., 138 Colo. 450, 334 P.2d 1090 (1959). Statutes more restrictive than the rule are §§ 38-35-102, 38-35-104, 38-35-105, 38-35-107, and 38-35-108, C.R.S.

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

Committee Comment

The rule liberalizes the hearsay exception for ancient documents by eliminating proof of execution (*see* general statement for this principle in 32A C.J.S., *Evidence*, Sec. 744, page 32) and, further, reduces the required age of such document to twenty years from thirty years. For Colorado authorities on the subject, *see* McGary v. Blakeley, 127 Colo. 495, 258 P.2d 770 (1953) and § 38-35-107, C.R.S.

(17) Market Reports, Commercial Publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

Committee Comment

Colorado authorities affecting this rule are: 4-2-724, C.R.S.; Continental Divide Mining Investment Company v. Bliley, 23 Colo. 160, 166, 46 P. 633, 635 (1896); Willard v. Mellor, 19 Colo. 534, 36 P. 148 (1894); Kansas Pacific R.R. Company v. Lundin, 3 Colo. 94 (1876); Rio Grande Southern R.R. Company v. Nichols, 52 Colo. 300, 123 P. 318 (1912); Johnson v. Cousins, 110 Colo. 540, 135 P.2d 1021 (1943).

(18) Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority, by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence and may be received as exhibits, as the court permits.

Committee Comment

Unlike the Federal Rule, the Colorado Rule allows the learned treaties to be admitted as exhibits in the discretion of the court. The former Colorado Rule seemed to be that only if such treatise had been relied upon by the witness in forming his opinion might it be admitted. Denver city Tramway v. Gawley, 23 Colo. App. 332, 129 P. 258 (1912); Wall v. Weaver, 145 Colo. 337, 358 P.2d 1009 (1961); Ross v. Colo. Nat'l Bank, 170 Colo. 436, 463 P.2d 882 (1970).

(19) Reputation Concerning Personal or Family History. Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth,

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

August 12, 2009

TO THE BENCH, BAR, AND PUBLIC:

Proposed Style Amendments to the Federal Rules of Evidence

The Judicial Conference Advisory Committee on the Federal Rules of Evidence has completed its style revision of the Evidence Rules in accordance with uniform drafting guidelines. The restyling of the Evidence Rules is the fourth in a series of comprehensive style revisions to simplify, clarify, and make more uniform all of the federal rules of practice, procedure, and evidence. The proposed restyled Evidence Rules are now circulated to the bench, bar, and public for comment. The proposed restyled rules, along with a report from the Advisory Committee, are posted on the Judiciary's Federal Rulemaking web site at <www.uscourts.gov/rules>. Proposed amendments to the Federal Rules of Bankruptcy Procedure and Federal Rules of Criminal Procedure are published separately.

Opportunity for Public Comment

Please provide any comments and suggestions on the proposed amendments, whether favorable, adverse, or otherwise, as soon as possible. **The comment deadline is February 16, 2010**. Comments, suggestions, or other correspondence may be submitted electronically to <Rules_Comments@ao.uscourts.gov> or in hard copy to the Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544. The Advisory Committee will review all timely comments. All comments are made part of the official record and are available to the public.

The Advisory Committee welcomes comment on all aspects of the proposed style amendments. The Advisory Committee also specifically invites comment on the following proposed style changes: (1) the definition of "record" in restyled Evidence Rule 101(b)(4), including the bracketed language; (2) the use of "admitted to prove" in restyled Evidence Rules 803(7)(A), 803(10), 803(14)(A), 803(22)(C), and 803(23); (3) the use of bullet points in restyled Evidence Rules 402, 407, 501, 802, and 1101; and (4) the restyling of Evidence Rule 801(d)(2)(B).

The Advisory Committee will hold public hearings on the proposed style amendments on the following dates:

- January 5, 2010 Phoenix, Arizona
- January 29, 2010 San Francisco, California
- February 4, 2010 New York, New York

If you wish to testify, you must contact the Committee Secretary at the above address **at least 30 days before the hearing.**

After the public comment period, the Advisory Committee will decide whether to submit the proposed amendments to the Standing Committee on Rules of Practice and Procedure. At present, the Standing Committee has not approved these proposed amendments, except to authorize their publication for comment. The proposed amendments have not been submitted to nor considered by the Judicial Conference or the Supreme Court.

Lee H. Rosenthal
Chair

Peter G. McCabe
Secretary

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

TO: **Honorable Lee H. Rosenthal, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Robert L. Hinkle, Chair**
Advisory Committee on Evidence Rules

DATE: **May 6, 2009**

RE: **Report of the Advisory Committee on Evidence Rules**

Introduction

The Advisory Committee on Evidence Rules met on April 23-24 in Washington, D.C. The meeting produced two action items for Standing Committee consideration at the June 2009 meeting.

First, as the Standing Committee knows, the Advisory Committee has been restyling the Evidence Rules. The Advisory Committee divided the rules into three groups for this purpose. At its last two meetings, the Standing Committee approved the first two groups but delayed publication until after all three groups had been approved. The Standing Committee did this with the understanding that at the end of the process there would be a top-to-bottom review of all the restyled rules for consistency and to address "global" issues that had been deferred during the initial restyling.

At the April 2009 meeting, the Advisory Committee completed its work on the restyling project. First, the Committee restyled the third (and last) group of rules, consisting of Rules 801 to 1103. Second, the Committee undertook the promised top-to-bottom review of all the restyled rules. This resulted in limited changes to the first two groups of restyled rules. Third, the Committee approved a set of proposed committee notes to the restyled rules. The entire set of restyled rules is attached to this Report as Appendix A. The Committee now asks the Standing Committee to approve the entire set for release at this time for public comment.

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I. Action Item — Restyled Evidence Rules 101–1103

Beginning in the early 1990s, Judge Robert Keeton, who was chair of the Standing Committee, and a committee member, University of Texas Professor Charles Alan Wright, led an effort to adopt clear and consistent style conventions for all of the rules. Without consistent style conventions, there were differences from one set of rules to another, and even from one rule to another within the same set. Style varied because a committee seeking to amend a rule did not always consider how another rule expressed the same concept. Style varied based on the membership of a particular advisory committee. Style varied as the membership of a particular advisory committee changed over time. And style varied as the membership of the Standing Committee changed over time. Different rules expressed the same thought in different ways, leading to a risk that they would be interpreted differently. Different rules sometimes used the same word or phrase to mean different things, again leading to a risk of misinterpretation. And in other respects, too, rules drafters who were experts in the relevant substantive and procedural areas sometimes did not express themselves as clearly as they might have.

Judge Keeton appointed Professor Wright to chair a newly formed Style Subcommittee of the Standing Committee. At Professor Wright's suggestion, the Standing Committee retained a legal-writing authority, Bryan Garner, as its style consultant. Mr. Garner is the author of such books as The Elements of Legal Style and A Dictionary of Modern Legal Usage. These are generally regarded as the leading authorities on these subjects. Mr. Garner also is the current editor of Black's Law Dictionary and the co-author, with Justice Scalia, of Making Your Case: The Art of Persuading Judges.

In conjunction with his work for the Standing Committee, Mr. Garner wrote Guidelines for Drafting and Editing Court Rules. First published in 1996, the Guidelines manual is now in its fifth printing. It has guided all rules amendments since it was written—whether or not they related to a restyling project. And the Guidelines manual has guided successful restylings of the Federal Rules of Appellate, Criminal, and Civil Rules, which took effect in 1998, 2002, and 2007. For matters not addressed in the Guidelines, the restylings have followed Garner's A Dictionary of Modern Legal Usage. Professor Daniel R. Coquillette has been the Standing Committee's reporter through all of these projects.

Mr. Garner was himself the style consultant for the restyled Appellate and Criminal Rules. Professor Joseph Kimble took over near the end of the Criminal Rules restyling project and was the style consultant as the Civil Rules project went forward. Professor Kimble is the editor in chief of The Scribes Journal of Legal Writing and the author of Lifting the Fog of Legalese, a book that compiles some of his many essays. He and Mr. Garner are co-authors of a forthcoming book, The Elements of Legal Drafting, which West Publishing Company will publish. Professor Kimble has taught legal writing at Thomas Cooley Law School for 25 years.

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Despite some initial opposition, each of the restyling projects has proved enormously successful. Indeed, in recognition of their work in restyling the Civil Rules, Professor Kimble, the Standing Committee, and the Civil Rules Advisory Committee each received a Burton Award for Reform in Law. The Burton is probably the nation's most prestigious legal-writing award. Judge Rosenthal, Judge Thrash (of the Style Subcommittee), and Professor Kimble accepted the awards at a black-tie dinner at the Library of Congress on June 4, 2007.

The division of responsibility on the restyling projects has conformed generally to the protocol the Standing Committee has adopted for addressing style issues for a proposed amendment to a rule outside the restyling process. For an amendment outside a restyling project, the relevant Advisory Committee must submit its proposed language to the Style Subcommittee. On style issues, the Style Subcommittee, not the Advisory Committee, has the last word. Thus when an Advisory Committee submits a proposed amendment to any rule to the full Standing Committee, the amendment already has gone through a style review, and style issues have been determined by the Style Subcommittee. The Standing Committee chairs have kept the Style Subcommittee small in order to promote consistency. Although the Standing Committee retains the ultimate authority, through the years it has followed the style decisions of the Style Subcommittee, thus ensuring a high level of consistency across all sets of rules.

With this background, the Advisory Committee on Evidence Rules undertook its restyling project beginning in the Fall of 2007. The Committee established a step-by-step process for restyling that is substantially the same as that employed in the earlier restyling projects. Those steps are: 1) draft by Professor Kimble; 2) comments by the Reporter; 3) response by Professor Kimble and changes to the draft where necessary; 4) expedited review by Advisory Committee members and redraft by Professor Kimble if necessary; 5) review by the Style Subcommittee of the Standing Committee; 6) review by the Advisory Committee; and 7) review by the Standing Committee to determine whether to release the restyled rules for public comment.

The Advisory Committee divided the Evidence Rules into three parts. The process described above thus was conducted in three stages. The Committee also agreed that the entire package of restyled rules should be submitted for public comment at one time.

The Advisory Committee established a working principle for whether a proposed change is one of "style" (in which event the decision is made by the Style Subcommittee) or one of "substance" (in which event the decision is for the Advisory Committee). A proposed change is "substantive" if:

1. Under the existing practice in any circuit, it could lead to a different result on a question of admissibility; or

2. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made; or

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3. It changes the structure of a rule or method of analysis in a manner that fundamentally changes how courts and litigants have thought about, or argued about, the rule; or

4. It changes what Professor Kimble has referred to as a "sacred phrase"—"phrases that have become so familiar as to be fixed in cement."

At its Spring 2008 meeting the Advisory Committee approved the restyling of the first third of the rules (Rules 101–415). The Standing Committee, at its June 2008 meeting, approved these rules for release for public comment, with the understanding that there could be further changes and that publication would occur after the Standing Committee approved all of the rules.

At its Fall 2008 meeting, the Advisory Committee approved the restyling of the second third of the rules (Rules 501–706). The Standing Committee, at its January 2009 meeting, approved these rules for release for public comment, again with the understanding that there could be further changes and that publication would occur after the Standing Committee approved all of the rules.

At its April 2009 meeting, the Advisory Committee approved the restyling of the final third of the rules (Rules 801–1103). The rules came to the Advisory Committee after the full process outlined above. The Committee addressed each rule separately. The Committee then doubled back to all of the prior rules to ensure consistency throughout the entire set and to address global issues such as how to refer to a writing in a manner that would include its electronic form and how to refer to a public office or agency. These and similar matters were handled through a new set of definitions in proposed Rule 101(b). Finally, the Committee approved proposed Committee Notes conforming to the template and general approach of the Committee Notes to the restyled Civil Rules. The Committee delegated to the Reporter, the Style Consultant, and the Chair the authority to compile and implement the Committee's many decisions and to ensure that no new inconsistencies were introduced. Two of the Style Committee's three members attended and participated fully in the Advisory Committee meeting.

The April 2009 minutes—which summarize but are by no means a transcript of the two-day meeting—run to 85 pages and are attached to this report. I have not attempted to summarize in this report the extensive discussions and many drafting decisions detailed in the minutes.

The entire set of proposed restyled Evidence Rules—consisting of Rules 101 to 1103—are attached to this Report as Appendix A, with Committee Notes at the end. The rules are presented in a "side-by-side" version, with the existing rule in the left column and the restyled rule in the right.

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Recommendation: The Advisory Committee on Evidence Rules recommends that the Standing Committee approve proposed restyled Evidence Rules 101–1103 for release for public comment.

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ARTICLE I. GENERAL PROVISIONS[1] Rule 101. Scope	ARTICLE I. GENERAL PROVISIONS Rule 101. Scope; Definitions
These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.	**(a) Scope.** These rules apply to proceedings before United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101. **(b) Definitions.** In these rules: **(1)** "civil case" means a civil action or proceeding; **(2)** "criminal case" includes a criminal proceeding; **(3)** "public office" includes a public agency; **(4)** "record" [in Rules 803, 901, 902, and 1005] includes a memorandum, report, or data compilation; **(5)** a "rule prescribed by the Supreme Court" means a rule adopted by the Supreme Court under statutory authority; and **(6)** a reference to any kind of written material includes electronically stored information.

Committee Note

The language of Rule 101 has been amended, and definitions have been added, as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Style Project

The Evidence Rules are the fourth set of national procedural rules to be restyled. The restyled Rules of Appellate Procedure took effect in 1998. The restyled Rules of Criminal Procedure took effect in 2002. The restyled Rules of Civil Procedure took effect in 2007. The restyled Rules of Evidence apply the same general drafting guidelines and principles used in restyling the Appellate, Criminal, and Civil Rules.

1. General Guidelines

Guidance in drafting, usage, and style was provided by Bryan Garner, *Guidelines for Drafting and Editing Court Rules,* Administrative Office of the United States Courts (1969) and Bryan Garner,

[1] Rules in effect on December 1, 2008.

A Dictionary of Modern Legal Usage (2d ed. 1995). *See also* Joseph Kimble, *Guiding Principles for Restyling the Civil Rules,* in *Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure,* at page x (Feb. 2005) (available at http://www.uscourts.gov/rules/Prelim_draft_proposed_pt1.pdf); Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 Scribes J. Legal Writing __ (2008-2009).

2. Formatting Changes

Many of the changes in the restyled Evidence Rules result from using format to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are used throughout. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words are not changed. Rules 103, 404(b), 606(b), and 612 illustrate the benefits of formatting changes.

3. Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. For example, consistent expression is achieved by not switching between "accused" and "defendant" or between "party opponent" and "opposing party" or between the various formulations of civil and criminal action/case/proceeding.

The restyled rules minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or something else, depending on context. The potential for confusion is exacerbated by the fact the word "shall" is no longer generally used in spoken or clearly written English. The restyled rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule.

The restyled rules minimize the use of redundant "intensifiers." These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. The absence of intensifiers in the restyled rules does not change their substantive meaning. *See, e.g.,* Rule 104(c) (omitting "in all cases"); Rule 602 (omitting "but need not"); Rule 611(b) (omitting "in the exercise of discretion").

The restyled rules also remove words and concepts that are outdated or redundant.

4. Rule Numbers

The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity.

5. No Substantive Change

The Committee made special efforts to reject any purported style improvement that might result in a substantive change in the application of a rule. The Committee considered a change to be "substantive" if any of the following conditions were met:

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a. Under the existing practice in any circuit, the change could lead to a different result on a question of admissibility (e.g., a change that requires a court to provide either a less or more stringent standard in evaluating the admissibility of particular evidence);

b. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made (e.g., a change in the time in which an objection must be made, or a change in whether a court must hold a hearing on an admissibility question);

c. It alters the structure of a rule in a way that may alter the approach that courts and litigants have used to think about, and argue about, questions of admissibility (e.g., merging Rules 104(a) and 104(b) into a single subdivision); or

d. It changes a "sacred phrase" — phrases that have become so familiar in practice that to alter them would be unduly disruptive. Examples in the Evidence Rules include "unfair prejudice" and "truth of the matter asserted."

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Rule 102. Purpose and Construction	Rule 102. Purpose
These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.	These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

Committee Note

The language of Rule 102 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Rule 103. Rulings on Evidence	Rule 103. Rulings on Evidence
(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and **(1) Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or **(2) Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.	(a) **Preserving a Claim of Error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and: (1) if the ruling admits evidence, the party, on the record: (A) timely objects or moves to strike; and (B) states the specific ground, unless it was apparent from the context; or (2) if the ruling excludes evidence, the party informs the court of its substance by an offer of proof, unless the substance was apparent from the context. (b) **Not Needing to Renew an Objection or Offer of Proof.** Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.
(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.	(c) **Court's Statement About the Ruling; Directing an Offer of Proof.** The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.
(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.	(d) **Preventing the Jury from Hearing Inadmissible Evidence.** To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.
(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.	(e) **Taking Notice of Plain Error.** A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

Committee Note

The language of Rule 103 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 104. Preliminary Questions	Rule 104. Preliminary Questions
(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.	(a) **In General.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.
(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.	(b) **Relevancy That Depends on a Fact.** When the relevancy of evidence depends on fulfilling a factual condition, the court may admit it on, or subject to, the introduction of evidence sufficient to support a finding that the condition is fulfilled.
(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.	(c) **Matters That the Jury Must Not Hear.** A hearing on a preliminary question must be conducted outside the jury's hearing if: (1) the hearing involves the admissibility of a confession; (2) a defendant in a criminal case is a witness and requests that the jury not be present; or (3) justice so requires.
(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.	(d) **Testimony by a Defendant in a Criminal Case.** By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.
(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.	(e) **Evidence Relevant to Weight and Credibility.** This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

Committee Note

The language of Rule 104 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Rule 105. Limited Admissibility	Rule 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes
When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.	If the court admits evidence that is admissible against a party or for a purpose — but not against another party or for another purpose — the court, on request, must restrict the evidence to its proper scope and instruct the jury accordingly.

Committee Note

The language of Rule 105 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Rule 106. Remainder of or Related Writings or Recorded Statements	Rule 106. Rest of or Related Writings or Recorded Statements
When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.	If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.

Committee Note

The language of Rule 106 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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ARTICLE II. JUDICIAL NOTICE **Rule 201. Judicial Notice of Adjudicative Facts**	ARTICLE II. JUDICIAL NOTICE **Rule 201. Judicial Notice of Adjudicative Facts**
(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.	**(a) Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.	**(b) Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it: **(1)** is generally known within the court's territorial jurisdiction; or **(2)** can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
(c) When discretionary. A court may take judicial notice, whether requested or not. **(d) When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.	**(c) Taking Notice.** At any stage of the proceeding, the court: **(1)** may take judicial notice on its own; or **(2)** must take judicial notice if a party requests it and the court is supplied with the necessary information.
(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.	**(d) Opportunity to Be Heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the noticed fact. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.
(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.	
(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.	**(e) Instructing the Jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

Committee Note

The language of Rule 201 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules.

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These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS **Rule 301. Presumptions in General in Civil Actions and Proceedings**	ARTICLE III. PRESUMPTIONS IN CIVIL CASES **Rule 301. Presumptions in a Civil Case Generally**
In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.	In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of going forward with evidence to rebut the presumption. But this rule does not shift the burden of proof in the sense of the risk of nonpersuasion; the burden of proof remains on the party who had it originally.

Committee Note

The language of Rule 301 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Rule 302. Applicability of State Law in Civil Actions and Proceedings	Rule 302. Effect of State Law on Presumptions in a Civil Case
In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.	In a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision.

Committee Note

The language of Rule 302 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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ARTICLE IV. RELEVANCY AND ITS LIMITS **Rule 401. Definition of "Relevant Evidence"**	ARTICLE IV. RELEVANCY AND ITS LIMITS **Rule 401. Test for Relevant Evidence**
"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.	Evidence is relevant if it has any tendency to make more or less probable the existence of a fact that is of consequence in determining the action.

Committee Note

The language of Rule 401 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible	Rule 402. General Admissibility of Relevant Evidence
All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.	Relevant evidence is admissible unless any of the following provides otherwise: • the United States Constitution; • a federal statute; • these rules; or • other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible.

Committee Note

The language of Rule 402 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time	Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons
Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.	The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Committee Note

The language of Rule 403 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes	Rule 404. Character Evidence; Crimes or Other Acts
(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: **(1) Character of accused.** In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution; **(2) Character of alleged victim.** In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor; **(3) Character of witness.** Evidence of the character of a witness, as provided in Rules 607, 608, and 609.	**(a) Character Evidence.** **(1)** ***Prohibited Uses.*** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait. **(2)** ***Exceptions in a Criminal Case.*** The following exceptions apply in a criminal case: **(A)** a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it; **(B)** subject to the limitations in Rule 412, a defendant may offer evidence of an alleged crime victim's pertinent trait, and if the evidence is admitted, the prosecutor may: **(i)** offer evidence to rebut it; and **(ii)** offer evidence of the defendant's same trait; and **(C)** in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor. **(3)** ***Exceptions for a Witness.*** Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

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(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.	**(b) Crimes or Other Acts.** **(1)** ***Prohibited Uses.*** Evidence of a crime or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. **(2)** ***Permitted Uses; Notice.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must: **(A)** provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and **(B)** do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

Committee Note

The language of Rule 404 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Rule 405. Methods of Proving Character	Rule 405. Methods of Proving Character
(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.	(a) **By Reputation or Opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination, the court may allow an inquiry into relevant specific instances of the person's conduct.
(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.	(b) **By Specific Instances of Conduct.** When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

Committee Note

The language of Rule 405 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Rule 406. Habit; Routine Practice	Rule 406. Habit; Routine Practice
Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.	Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

Committee Note

The language of Rule 406 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Rule 407. Subsequent Remedial Measures	Rule 407. Subsequent Remedial Measures
When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.	When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove: • negligence; • culpable conduct; • a defect in a product or its design; or • a need for a warning or instruction. But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

Committee Note

The language of Rule 407 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 407 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

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Rule 408. Compromise and Offers to Compromise	Rule 408. Compromise Offers and Negotiations
(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: **(1)** furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and **(2)** conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.	**(a) Prohibited Uses.** Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: **(1)** furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in order to compromise the claim; and **(2)** conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
(b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.	**(b) Exceptions.** The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Committee Note

The language of Rule 408 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 408 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

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Rule 409. Payment of Medical and Similar Expenses	Rule 409. Offers to Pay Medical and Similar Expenses
Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.	Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

Committee Note

The language of Rule 409 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements	Rule 410. Pleas, Plea Discussions, and Related Statements
Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: (1) a plea of guilty which was later withdrawn; (2) a plea of nolo contendere; (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) 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.	(a) **Prohibited Uses.** In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions: (1) a guilty plea that was later withdrawn; (2) a nolo contendere plea; (3) a statement about either of those pleas made during a proceeding under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or (4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea. (b) **Exceptions.** The court may admit a statement described in Rule 410(a)(3) or (4): (1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness both statements ought to be considered together; or (2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and in the presence of counsel.

Committee Note

The language of Rule 410 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Rule 411. Liability Insurance	Rule 411. Liability Insurance
Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.	Evidence that a person did or did not have liability insurance is not admissible to prove that the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or — if disputed — proving agency, ownership, or control.

Committee Note

The language of Rule 411 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 411 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

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