STATE OF MINNESOTA

IN SUPREME COURT

C3-84-2138

PROMULGATION OF AMENDMENTS TO THE RULES OF EVIDENCE

ORDER

WHEREAS, the Supreme Court Advisory Committee on Rules of Evidence has recommended certain amendments to the Rules of Evidence, and

WHEREAS, the Supreme Court held a hearing on these amendments on October 11, 1989, and

WHEREAS, the Supreme Court extended the time for written comments on the proposed amendments until November 15, 1989, and is fully advised in the premises,

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. The attached amendments to the Rules of Evidence be, and the same hereby are, prescribed and promulgated for the regulation of the practice and procedure of law in the courts of the State of Minnesota.

2. The inclusion of Advisory Committee comments is made for convenience and does not reflect court approval of the comments made therein.

3. These amendments to the Rules of Evidence shall be effective January 1, 1990.

Dated: December 28, 1989

BY THE COURT

Peter S. Popovich

Peter S. Popovich, Chief Justice

AMENDMENTS

RULES OF EVIDENCE

C3-84-2138

ARTICLE 1. GENERAL PROVISIONS

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Rule 103. Rulings on Evidence

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

* * *

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

Committee Comment--~~1977~~89

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

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

* * *

Rule 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 ~~his~~ determination it ~~he~~ is not bound by the rules of evidence except those with respect to privileges.

* * *

(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 ~~if he~~ so requests.

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

* * *

Rule 106. Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require ~~him~~ the introduction at that time of ~~to introduce~~ any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

ARTICLE 2. JUDICIAL NOTICE

Rule 201. Judicial Notice of Adjudicative Facts

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

* * *

(g) Instructing jury. ~~In a civil action or proceeding~~ Tthe court shall instruct the jury to accept as conclusive any fact judicially noticed. ~~In a criminal case, the court shall instruct a jury that it may, but is not required to, accept as conclusive any fact judicially noticed.~~

Committee Comment-1977~~89~~

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

* * *

The conclusive nature of judicially noticed facts in civil cases is consistent with the restrictions which the rule places upon the kinds of facts which can be judicially noticed. ~~This subdivision contains the only distinction which the rule creates between civil and criminal cases. The prohibition against the judge instructing the jury to accept judicially noticed adjudicative facts as conclusively established is based on the same considerations which prohibit the court from directing a verdict against the defendant in a criminal case.~~

ARTICLE 4. RELEVANCY AND ITS LIMITS

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

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

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

* * *

(b) Other crimes, wrongs or acts. Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show ~~that he acted~~ action in conformity therewith. It may however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In a criminal prosecution, such evidence shall not be admitted unless the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence. Evidence of past sexual conduct of the victim in prosecutions under Minn.Stats. § 609.342 to 609.346 is governed by Minn.R.Evid. 412.

~~**(c) Past conduct of victim of certain sex offenses.**~~**[Now Rule 412]**

Committee Comment--~~1977~~89

* * *

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

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

The Committee renumbered the rules in Article 4, moving the rule addressing evidence of the victim's past sexual conduct to a new Rule 412 to conform to the numbering in the Federal Rules of Evidence and Uniform Rules of Evidence. **[Comments to Rule 404 (c) have been moved to the Comments for Rule 412]**

Rule 405. Methods of Proving Character

* * *

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

* * *

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.

Committee Comment-~~1977~~89

The change in the title of the rule conforms the title to the text of the rule and to the title of the corresponding Federal Rule and Uniform Rule 406. Habit is not defined in the rule, but the definition as set forth in McCormick is generally accepted and should be used in conjunction with this rule. Whereas character evidence is considered to be a "generalized description of one's disposition, or of one's disposition in

respect to a generalized trait," habit describes "one's regular response to a repeated specific situation." C. McCormick, Evidence § 195 (2d ed. 1972). Whether the response is sufficiently regular and whether the specific situation has been repeated enough to constitute habit are questions for the trial court. See Lewan, Rationale of Habit Evidence, 16 Syracuse L. Rev. 39 (1964). The Court should make a searching inquiry to assure that a true habit exists. Once it is established that a habit does exists testimony as to that habit is highly probative. Such testimony has been received in Minnesota Courts. See Department of Employment Security v. Minnesota Drug Products, Inc., 258 Minn. 133, 138, 104 N.W.2d 540, 644 (1960); Evison v. Chicago St. Paul, Minneapolis & Omaha Ry., 45 Minn. 370, 372, 373, 48 N.W. 6, 7, 11 (1891).

Rule 407. Subsequent Remedial Measures

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Committee Comment--~~1977~~89

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

Under the rule subsequent remedial measures can be admissible to establish feasibility of precautionary measures in any case where such feasibility is in issue. ~~However, the Committee takes no position on other uses of subsequent remedial measure in strict liability or breach of warranty action. See Ault v. International Harvester Co., 13 Cal.3d 113, 117 Cal.Rptr. 812, 528, P.2d 1148 (1975), and Justice Clark's dissent.~~ Subsequent remedial measures are not admissible to prove defect in design defect cases. See Kallio v. Ford Motor Co., 407 N.W.2d 92 (Minn. 1987), rejecting Ault v. International Harvester Co., 13 Cal.3d 113, 117 Cal.Rptr. 812, 528 P.2d 1148 (1975). The Committee is of the view that such measures are also inadmissible in failure to warn cases in view of Bilotta v. Kelly Co. Inc., 346 N.W.2d 616 (Minn. 1984), which held that design defect and failure to warn cases can be submitted to the jury on a single theory of products liability. See DeLuryea v. Winthrop Laboratories, 697 F.2d 222 (8th Cir. 1983).

* * *

Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible upon the issue whether ~~he~~ 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.

* * *

Rule 412. Past Conduct of Victim of Certain Sex Offenses

(1) In a prosecution under Minn.Stats. 609.342 to 609.346, evidence of the victim's previous sexual conduct shall not be admitted nor shall any reference to such conduct be made in the presence of the jury, except by court order under the procedure provided in rule ~~404 (c)~~ 412. Such evidence can be admissible only if the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature and only in the following circumstances:

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

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

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

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

(2) The accused may not offer evidence described in rule ~~404 (c) (1)~~ 412 (1) except pursuant to the following procedure:

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

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

(C) At the conclusion of the hearing, if the court finds that the evidence proposed to be offered by the accused regarding the previous sexual conduct of the victim is admissible under the provisions of rule ~~404 (c) (1)~~ 412 (1) and that its probative value is not substantially outweighed by its inflammatory or prejudicial nature, the court shall make an order stating the extent to which such evidence is admissible. The accused may then offer evidence pursuant to the order of the court.

(D) If new information is discovered after the date of the hearing or during the course of trial, which may make evidence described in rule ~~404 (c) (1)~~ 412 (1) admissible, the accused may make an offer of proof pursuant to rule ~~404 (c) (2)~~ 412 (2), and the court shall hold an in camera hearing to determine whether the proposed evidence is admissible by the standards herein.

Committee Comment--~~1977~~89

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

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

Subdivision 3 of the statue relates to admissibility, and subdivision 4 relates to

the procedure for determining admissibility. Both of these subjects are properly within the scope of evidentiary rules, and the Committee incorporated their substance into the revised rule ~~404(c)~~ 412. The revised rule contains the substance of the statute's provision that evidence of the victim's previous sexual conduct can only be admitted in limited circumstances and the provision for mandatory notice and hearing before such evidence can be admitted.

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

Although the Committee agreed in substance with the thrust of the statue, because of the many questions that were created by the language in the statue, the Committee could not recommend the entire statute as drafted. For example, although it appears that the purpose of the statute was to eliminate the unwarranted attack on the victim's character when such evidence does not relate to the issues at trial, the effect of the statue could be the opposite. Subdivision (3)(a) suggests that the victim's past sexual conduct would be admissible to prove "fabrication." This could have the effect of expanding the use of past sexual conduct to all contested trials, an unwise result that seems inconsistent with sound policy and the purposes of the legislation. The evidentiary rule does not make past conduct admissible to prove fabrication.

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

The statue recognized three situations in which previous sexual conduct of the victim would be relevant and admissible. The first of these occurs when consent is in issue. Prior sexual conduct is offered in order to give rise to an inference that the victim acted in conformity with that past conduct on a particular occasion. In the case of a victim of a sex offense, this is only relevant to prove that the victim consented to the act. If consent is not a defense, as, for example, the accused denies he was involved in the incident, evidence of the victim's past conduct is not relevant. This type of evidence is treated in rule ~~404(c)(1)~~ 412 (1). The rule recognizes the same two categories of such evidence recognized by the statute: evidence tending to show a common scheme or plan [subsection (A)(i)]; and evidence of conduct involving both the accused and the victim [subsection (A)(ii)]. As in the statute, the rule allows only these two categories of past sexual conduct to be admitted to prove consent.

The second situation in which evidence of the victim's previous sexual conduct can be admitted under both the statue and the rule occurs when the prosecution has offered evidence concerning semen, pregnancy or disease, to show either that the offense occurred or that the accused committed it. In this case the accused may offer evidence of the victim's specific sexual activity to rebut the inferences raised by the prosecution's evidence. Rule ~~404(c)(1)(B)~~ 412 (1) (B). In this situation consent is not material, and the rule admits such evidence without requiring consent to be a defense.

The third situation in which the statute admitted evidence of previous sexual conduct occurs when the victim testifies specifically concerning such sexual conduct--or more probably, lack of sexual conduct--on direct examination. The statute allowed evidence of previous sexual conduct to impeach the victim's testimony. Minn.Stat. §

609.347, Subd. 3(d) (Supp.1975). This provision was not incorporated in the rule because the Committee is of the opinion that the accused might not know whether the victim was going to testify about lack of sexual conduct until the victim had actually completed direct examination. To impose the notice and hearing requirement does not seem to be fair in such a case. Moreover, the prosecution and victim can obviate such impeaching testimony by avoiding general statements about the victim's sexual activity on direct examination. For these reasons subdivision 3(d) of the statute is not incorporated in the rule. ~~The deletion of this provision is intended to allow the accused the traditional right to impeach the victim, without the notice and hearing requirement, if the victim's direct testimony specifically concerns the victim's previous sexual activity or lack of it.~~ The Committee has not attempted to codify rules about circumstances under which prosecution evidence of this nature opens the door to rebuttal evidence by the defense.

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

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

The Committee deleted the language "and prescribing the nature of the questions to be permitted at trial," also from subdivision 4(c) of the statute. A court order stating the extent to which the evidence is admissible is a sufficient safeguard, especially when considered with the restrictive language, "nor shall any reference to such conduct be made in the presence of the jury," taken from the statute and incorporated in rule ~~404(c)(1)~~ 412 (1). Prescribing the nature of the questions to be asked by counsel is a marked and unnecessary departure from the adversary system and may be unconstitutional.

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

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ARTICLE 6. WITNESSES

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Rule 6.02. Lack of Personal Knowledge

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

Rule 6.03. Oath or Affirmation

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

Rule 6.04 Interpreters

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

* * *

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 ~~he~~ the juror is sitting ~~as a juror~~. If ~~he~~ the juror is called to so testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

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

Committee Comment--~~1977~~89

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The rule makes the juror's statements by way of affidavit or testimony incompetent. The rule does not purport to set out standards for when a new trial should be granted on the grounds of juror misconduct. Nor does the rule set the proper procedure for procuring admissible information from jurors. In Minnesota it is generally considered improper to question jurors after a trial for the purpose of obtaining evidence for a motion for a new trial. If ~~the losing litigant suspects~~ possible misconduct on behalf of a juror is suspected, it should be reported to the Court, and if necessary the jurors will be interrogated on the record and under oath in court.

Schwartz v. Minneapolis Gas Co., 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960); Olberg v. Minneapolis Gas Co., 291 Minn. 334, 343, 191 N.W.2d 418, 424 (1971); Minn.R.Crim.P. 26.03, subd. 19(6). See also Rule 3.5 of the Rules of Professional Conduct in regard to communications with jurors. The amended rule allows jurors to testify about overt threats of violence or violent acts brought to bear on jurors by anyone, including by other jurors. Threats of violence and use of violence is clearly outside of the scope of the acceptable decisionmaking process of a jury. The pressures and dynamics of juror deliberations will frequently be stressful and jurors will, of course, become agitated from time to time. The trial court must distinguish between testimony about "psychological" intimidation, coercion, and persuasion, which would be inadmissible, as opposed to express acts or threats of violence. See State v. Scheerle, 285 N.W.2d 686 (Minn. 1979); State v. Hoskins, 292 Minn. 111, 193 N.W.2d 802 (1972).

Rule 607. Who May Impeach

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

Rule 608. Evidence of Character and Conduct of Witness

* * *

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting ~~his~~ the witness' credibility, other than conviction of crime as provided in ~~r~~Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning ~~his~~ 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 ~~his~~ the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Rule 609. Impeachment by Evidence of Conviction of Crime

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

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, vacation or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, vacation or certificate of

rehabilitation or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, vacation or other equivalent procedure based on a finding of innocence.

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

Committee Comment 1977~~89~~

Subdivision (a)

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

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

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

Subdivision (b)

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

~~The rule should end the confusion in Minnesota as to the admissibility of prior convictions. Compare State v. West, 285 Minn. 188, 173 N.W.2d 468 (1969) with State v. Stewart, 297 Minn. 57, 209 N.W.2d 913 (1973).~~ The rule will supersede Minn. Stat. § 595.07 (1974).

* * *

Subdivision (d)

The amendment is a change in style not substance. Minn.Stats. § 260.211, subd. 2 (1988) does permit the disclosure of juvenile records in limited circumstances. Pursuant to Minn. Stats. § 260.211, subd. 1 (1988~~74~~) a juvenile adjudication is not to be considered a conviction nor is it to impose civil liabilities that accompany the conviction of a crime. Rule 609(d) reflects this policy by precluding impeachment by evidence of a prior juvenile adjudication. It is conceivable that the state policy protecting juveniles as embodied in the statute and the evidentiary rule might conflict with certain constitutional provisions, e.g., the sixth amendment confrontation clause. Under these circumstances the evidentiary rule becomes inoperative. See Davis v. Alaska, 94 S.Ct. 1105, 415 U.S. 308, 39 L.Ed.2d 347 (1974),construed in State v. Schilling, 270 N.W.2d 769 (Minn. 1978).

Rule 610. Religious Beliefs or Opinions

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

Rule 611. Mode and Order of Interrogation and Presentation

* * *

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

Rule 612. Writing Used to Refresh Memory

Except as otherwise provided in criminal proceedings by the rules of criminal procedure, if a witness uses a writing to refresh ~~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 if otherwise admissible to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires.

Rule 613. Prior Statements of Witnesses

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by ~~him~~ the witness, whether written or not, the statement need not be shown nor its contents disclosed to ~~him~~ the witness at that

time, but on request the same shall be shown or disclosed to opposing counsel.

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

* * *

Rule 615. Exclusion of Witnesses

* * *

Committee Comment--1977~~89~~

The rule conforms to existing law in Minnesota and is consistent with Minn.R.Crim.P. 26.03 subd. 7. The rule, unlike the federal rule, leaves the issue subject to the discretion of the trial court. A request for sequestration in criminal cases rarely should be denied. State v. Jones, 347 N.W.2d 796 (Minn. 1984); State v. Garden, 267 Minn. 97, 125 N.W.2d 591 (1963). The committee agrees, however, with the Advisory Committee Note to Fed.R.Evid. 615 that investigating officers, agents who were involved in the transaction being litigated, or experts essential to advise counsel in the litigation can be essential to the trial process and should not be excluded.

Rule 616. Bias of Witness

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

Committee Comment-1989

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

Rule 617. Conversation with Deceased or Insane Person

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

Committee Comment--1977~~89~~

This rule, former Minn.R.Evid. 616, was renumbered to permit the inclusion of Rule 616, Bias of Witness, in a manner consistent with the organization of the Uniform Rules of Evidence. This rule supersedes Minn.Stats. § 594.04 (1974), which is known to the bench and bar of Minnesota as the "Dead Man's Statute." The purpose of this statute was to reduce the possibility of perjury in cases of this type. However, the statute was subject to all the problems and potential for injustice which are inherent in a rule which excludes otherwise admissible evidence.

* * *

ARTICLE 7. OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witness.

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

* * *

Rule 703. Bases of Opinion Testimony by Experts

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

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

Committee Comment-~~1977~~89

* * *

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

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

In civil cases, upon a showing of good cause, the inadmissible foundation, if trustworthy, can be admitted on direct examination for the limited purpose of establishing the basis for the opinion. See generally Carlson, Policing the Bases of Modern Expert Testimony, 39 Vand. L. Rev. 577 (1986); Federal Rules of Evidence: A Fresh Review and Evaluation, ABA Criminal Justice Section, Rule 703 and accompanying comment, 120 F.R.D. 299, at 369 (1987).

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

* * *

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

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

Committee Comment ~~1977~~89

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

Rule 706. Court Appointed Experts

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

* * *

ARTICLE 8. HEARSAY

Rule 801. Definitions

The following definitions apply under this article:

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

* * *

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

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with ~~his~~ the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with ~~his~~ the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility as a witness ~~is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive~~, or (C) one of identification of a person made after perceiving ~~him~~ the person, if the court is satisfied that the circumstances of the prior identification demonstrate the reliability of the prior identification, or (D) a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

(2) Admission by party-opponent. The statement is offered against a party and is (A) ~~his~~ the party's own statement, in either ~~his~~ an individual or a representative capacity, or (B) a statement of which ~~he~~ the party has manifested ~~his~~ an adoption or

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

Committee Comment--~~1977~~89

* * *

~~Prior consistent statements are not excluded under the hearsay rule when offered to rebut express or implied charges of recent fabrication, improper influence or motive. The rule is generally consistent with the common law. In ruling on the admissibility of evidence described in this rule the Court must balance probative value against the dangers of undue waste of time resulting from the presentation of cumulative evidence. See Rule 403.~~

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

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

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

Even when a prior consistent statement deals with events described in the witness' trial testimony, amended Rule 801(d)(1)(B) does not make the prior statement

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

* * *

~~Although this evidentiary rule has come under some criticism, see generally Levie, Hearsay and Conspiracy, 52 Mich.L.Rev. 1159 (1954); Comment, The Hearsay Exception for Co-conspirator's Declarations, 25 U.Chi.L.Rev. 530 (1958), it states the generally accepted rule in current practice. See generally State v. Thompson, 273 Minn. 1, 16, 139 N.W.2d 490, 502 (1966).~~

~~The evidentiary rule is not limited to conspiracy prosecutions. See State v. Thompson, supra. Agency principles and the provisions of r~~Rule 801(d)(2) ~~would require the same result in the case of joint venturers.~~ In Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), the United States Supreme Court construed Fed.R.Evid. 801(d)(2)(E) so that the federal coconspirator rule differed from the Minnesota rule in two important particulars. First, Minnesota law required a prima facie showing of a conspiracy, and second, the showing had to be made without considering the coconspirator's statements. State v. Thompson, 273 Minn. 1, 139 N.W.2d 490 (1966). In Bourjaily the Court continued the prior federal rule that the showing had to be made by a preponderance of the evidence, which is a higher standard than the Minnesota standard of a prima facie showing. However, the Court held that the trial judge could consider the statements in determining whether a conspiracy had been shown, overruling a line of federal cases which held that the statements could not be considered. The amended rule adopts the Bourjaily holdings in the following respects: The quantum of proof required is a preponderance of the evidence, and under most circumstances the rule allows the judge to consider the statements in determining whether the showing has been made. The proviso in the amended rule precludes the declarant's statement by itself from establishing the conspiracy and is included to prevent the hearsay statement from becoming admissible solely on the basis of the content of the statement.

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

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

* * *

Rule 803. Hearsay Exceptions: Availability of Declarant Immaterial

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

* * *

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to ~~enable him to~~ testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in ~~his~~ the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

* * *

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

* * *

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

* * *

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

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

* * *

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

* * *

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the

general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, ~~his~~ the proponent's intention to offer the statement and the particulars of it, including the name, address, and present whereabouts of the declarant.

Committee Comments--~~197~~789

* * *

Subdivision (6)

The rule should be read broadly to accomplish the purposes set out in rRule 102 as well as to ensure that only trustworthy evidence is admitted. The application of the rule should not cause a substantive change in existing practice. Past decisions of the Minnesota Supreme Court should serve as guidelines for the proper interpretation of this rule. See gen. Brown v. St. Paul Ry., 241 Minn. 15, 62 N.W.2d 688, 44 A.L.R.2d 535 (1954); City of Fairmont v. Sjostrom, 289Q Minn. 87, 157 N.W.2d 849 (1968).

Documents prepared solely for litigation purposes do not qualify under this exception. If the document is prepared in part for business purposes but with an eye toward litigation the court must decide if the interest in litigation sufficiently detracted from the trustworthiness of the report to preclude its admission. See Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645, 144 A.L.R. 719 (1943), cited with approval in Brown v. St. Paul Ry. Co., 241 Minn. 15, 36, 62 N.W.2d 688, 702 (dictum).

* * *

Subdivision (8)

The rationale for this exception rests in:

1. a belief in the trustworthiness of the work product of government agents operating pursuant to official duty;
2. the necessity for introducing the full reports as opposed to testimony of government agents whose memory may be faulty; and
3. a concern for the disruption that would result in government agencies if its employees were continually required to testify in trials. See United States Supreme Court advisory Committee Note. See also C. McCormick, Evidence § 315 (2d ed. 1972). Subdivisions (A) and (B) are consistent with existing practice.

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

Subdivision (C) permits introduction of factual findings resulting from investigations made pursuant to authority granted by law except when offered against the accused in criminal cases. ~~At present~~ Prior to the Minnesota Rules of Evidence, Minnesota courts did ~~do~~ not admit reports ~~of this nature~~ which included discretionary conclusions and opinions Barnes v. Northwest Airlines, Inc. 233 Minn. 410, 433, 47 N.W.2d 180, 193 (1951); Clancy v. Daily News Corp., 202 Minn. 1, 7, 277 N.W. 264, 268 (1938). The rule makes no distinction among findings of historical fact, factual conclusions, or opinions. Beech Aircraft Corp. v. Rainey, 488 U.S. , 109 S.Ct. 439, 102 L.Ed.2d 445 (1988)(investigator's report on cause of airplane crash was not excludable because it included investigator's opinion or conclusion). See also Pipestone v.

Halbersma, 294 N.W.2d 271 (Minn. 1980). The primary concern of the rule is a determination of whether the factual finding, conclusion, or opinion is trustworthy and helpful to the resolution of the issues. Considerations of whether the document contains historical facts as opposed to conclusions or discretionary factual findings is subordinate to this primary consideration. ~~The court has the discretion to exclude public records offered under any of the categories in this rule if the sources of information or other circumstances indicate a lack of trustworthiness.~~

* * *

Subdivision (24)

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

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

Rule 804 Hearsay Exceptions; Declarant Unavailable

(a) Definitions 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~~ the declarant's statement; or

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

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

* * *

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

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

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

* * *

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

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject ~~him~~ the declarant to civil or criminal liability, or to render invalid a

claim by ~~him~~ the declarant against another, that a reasonable ~~man~~ person in ~~his~~ the declarant's position would not have made the statement unless ~~he believed~~ believing 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.

* * *

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

Committee Comment--~~1977~~89

* * *

Subdivision (b)(5)

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

* * *

Rule 806. Attacking and Supporting Credibility of Declarant

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

* * *

ARTICLE 9. AUTHENTICATION AND IDENTIFICATION

* * *

Rule 9.02 Self-Authentication.

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

* * *

(2) Domestic public documents not under seal. A document purporting to bear the signature in ~~his~~ the official capacity of an officer or employee of any entity

included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

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

* * *

Committee Comment--~~1977~~89

* * *

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

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

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

* * *

ARTICLE 10. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

* * *

Rule 1004. Admissibility of Other Evidence of Contents

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

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

* * *

Rule 1006. Summaries

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

* * *

Rule 1007. Testimony or Written Admission of Party

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

* * *