Division 4
Courts, Lawyers & the Administration of Justice
Of The District of Columbia Bar

M E M O R A N D U M

TO WHOM IT MAY CONCERN:

FROM: Division 4, Courts, Lawyers and the Administration of Justice

RE: Rules of Evidence Applied in Superior Court

Currently, the District of Columbia Superior Court has not codified the rules of evidence that it applies in Superior Court proceedings. Division 4 and other members of the D. C. Bar have encouraged Superior Court adoption of the Federal Rules of Evidence. In encouraging the Superior Court to adopt the Federal Rules of Evidence, Division 4 undertook a comprehensive analysis of all of the rules of evidence currently applied by the Superior Court (under Superior Court common law or District of Columbia statutory law) and compared them to the Federal Rules of Evidence. The result is an extraordinarily useful guide on Superior Court evidentiary practice. The guide is keyed to Federal Rules of Evidence, and it provides Superior Court practitioners with the ruling law on all major evidentiary questions in Superior Court. We hope that you find the report as useful as hundreds of other Superior Court practitioners have found it.

REPORT OF THE COMMITTEE ON COURT RULES OF DIVISION IV OF THE DISTRICT OF COLUMBIA BAR PROPOSING RULES OF EVIDENCE FOR THE SUPERIOR COURT BASED ON THE FEDERAL RULES OF EVIDENCE

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Steering Committee,
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Committee on Court Rules,
Rules of Evidence Subcommittee

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February 2, 1984

STANDARD DISCLAIMER

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February [illegible], 198[illegible]

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The views expressed herein represent only those of Division IV: Courts, Lawyers and the Administration of Justice of the D.C. Bar and not those of the D.C. Bar or of its Board of Governors.

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INTRODUCTION

In the fall of 1982, the Committee on Court Rules of Division IV of the District of Columbia Bar, then chaired by David J. Hayes and John Townsend Rich, initiated a project to consider proposing rules of evidence for the Superior Court patterned after the Federal Rules of Evidence.

The Committee formed a subcommittee, chaired by Gerald P. Greiman, to carry on the project. Over the succeeding year, the Subcommittee thoroughly studied the Federal Rules as well as pertinent District of Columbia statutes, rules and case law.

The Subcommittee and full Committee concluded that rules of evidence for the Superior Court should be adopted, and that the rules should in large part be patterned after the Federal Rules of Evidence. It was felt that codification of evidence rules would facilitate the practice of law and administration of justice in the District of Columbia. The Federal Rules were deemed an appropriate model because they have gained a substantial degree of acceptance since their adoption and many lawyers who practice in both the United States District Court and the Superior Court are already familiar with them.

The work of the Subcommittee, and, ultimately, the full Committee, has culminated in the proposed rules and comments which are appended to this report.

Discussed below are: (1) a brief history of previous consideration accorded to adopting the Federal Rules of Evidence for the Superior Court; (2) a description of the methodology used by the Committee; and (3) certain significant aspects of the proposed rules.

1. History

Section 111 of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, 84 Stat. 473, enacted what is now D.C. Code § 11-946 (1981). That section provides:

> The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (except as otherwise provided in title 23 [Criminal Procedure]) unless it prescribes or adopts rules which modify those Rules. Rules which modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that court. The Superior Court may adopt and enforce other rules as it may deem necessary without the approval of the District of Columbia Court of Appeals if such rules do not modify the Federal Rules. * * *

At the same time, § 111 of the 1970 Act enacted what is now D.C. Code § 11-743 (1981), which provides:

> The District of Columbia Court of Appeals shall conduct its business according to the Federal Rules of Appellate Procedure unless the court prescribes or adopts modifications of those Rules.

The House Report concerning the Act stated:

> The rules of procedure for local courts are presently established by the respective courts. Provisions of this title (sections 11-743 and 11-946) require the use of the Federal Rules with authorization for modification, those of the Superior Court being subject to approval by the District of Columbia Court of Appeals except as to purely local situations such as small claims, domestic relations, traffic cases, and juvenile offense where the Federal rules are either silent or not practical for use by the local courts, and promulgation of which will not be derogatory to the intent of the Federal Rules.

H.R. Rep. 91-107, 91st Cong., 2d Sess. (Mar. 13, 1970), quoted in 1970 D.C. Code Legislative and Administrative Service 398, 441 (West).

Thus, the 1970 Act provided for application to the District of Columbia courts of all three sets of federal rules then in existence -- Civil, Criminal, and Appellate. It appears that the drafters of the Act intended that the practice in the local and federal courts of the District of Columbia be as similar as possible. Accordingly, it is reasonable to assume that had the Federal Rules of Evidence been in existence in 1970, the Act would have required the local courts to apply those rules as well, in the absence of specific modifications by the D.C. Court of Appeals.

The Federal Rules of Evidence were promulgated by the Supreme Court in November, 1972, and, as amended, adopted by Congress on January 2, 1975, Pub. L. 93-595, 88 Stat. 1926.

In 1973, an Ad Hoc Advisory Committee to the Superior Court Board of Judges was charged with making a recommendation to the Board of Judges as to whether or not the Superior Court should seek inclusion as one of the jurisdictions to which the forthcoming Federal Rules of Evidence would apply. The Committee recommended that the Superior Court not seek inclusion, and the Board of Judges followed that recommendation.

We understand that several factors contributed to this recommendation and decision: (1) it was felt by some that in certain areas where the Federal Rules and existing D.C. law differed, D.C. law was preferable; (2) the Federal Rules were, to

some degree, an unknown; (3) the Federal Rules appeared, at the time, to be subject to further revision in the near future; (4) the U.S. Attorney's Office opposed adoption of the Rules; (5) there was considerable uncertainty about the impact of the rules on local practitioners; and (6) it was felt by some that rules of evidence should evolve by judicial decision rather than be codified.

In October 1981, the Study Committee of the District of Columbia Bar (the Horsky Committee) published its Court Organization Report on the D.C. Court System. That Report recommended "that Rules of Evidence be adopted by the D.C. Court System, modeled on the Federal Rules of Evidence." (Report at 23.)

On August 1, 1983, the D.C. Court of Appeals issued a Notice stating that it "proposes to consider adoption of the Federal Rules of Evidence for this jurisdiction." The Court invited the submission of comments by February 15, 1984.

It might finally be noted that, as reflected by the respective actions of the Supreme Court and Congress regarding the adoption of the Federal Rules of Evidence, some question exists as to whether rules of evidence are procedural, and therefore may be judicially promulgated, or are substantive, and must therefore be enacted legislatively. Particularly in light of the Court of Appeals' Notice of August 1, 1983, which indicates that the Court has determined that it has authority to promulgate rules of evidence, the Committee has not addressed this question.

2. Methodology

Initially, the Subcommittee undertook a detailed comparison of each Federal Rule with existing District of Columbia law. As a starting point, substantial use was made of Judge Steffen W. Graae's treatise, District of Columbia Statutory and Case Law Annotated to the Federal Rules of Evidence (1976).

The Subcommittee then proceeded to draft proposed rules and explanatory comments. The comments principally focus on a comparison of each Federal Rule with current District of Columbia law. Although other matters are addressed where appropriate, the comments do not in all cases analyze the merits of each Federal Rule, or discuss in detail all law pertaining to the subject matter of each rule.

The drafts were reviewed extensively at both the Subcommittee and full Committee levels, and were revised as appropriate. Members of Divisions V and XVIII of the D.C. Bar were involved in this process.

Where present D.C. law appeared to be consistent with the corresponding Federal Rule, only one proposed rule is set forth, which is based on the Federal Rule.

Where a divergence appeared, a proposed rule based on the Federal Rule is set forth as Alternative A, and a further proposed rule reflecting current District of Columbia law is set forth as Alternative B.[1] In such cases, the alternative

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1 See Rules 405(a), 406, 409, 411, 412, 601, 603, 606, 607, 608, 609, 612, 613, 705, 801(d)(1), 803(6), 803(16), 804(a)(5), 804(b)(1), 804(b)(2), 804(b)(4), and 901(b)(8).

recommended by the Committee is indicated in the comment as well as denoted by an asterisk.

Where a rule is based on a Federal Rule, the language of the proposed rule is identical to the corresponding Federal Rule, unless otherwise noted, except that: (1) certain modifications were made to adapt the rules to the District of Columbia (e.g., substituting "applicable statutes" for "Acts of Congress"); and (2) certain other non-substantive modifications were made to make the language of the rules gender-neutral.

Where the subject matter of a particular rule is controlled by an applicable statute which diverges from the Federal Rule, the Committee has recommended the alternative based on the statute in order to obviate any conflict between applicable statutes and judicially prescribed rules of evidence.[2] Such recommendations, however, do not necessarily connote a view that, as a policy matter, the statutorily prescribed rule is superior to the Federal Rule. These issues are addressed in greater detail in the comments accompanying each proposed rule.

Finally, the Committee has generally striven for consistency with the Federal Rules except where there appeared good reason for doing otherwise.

3. Significant Aspects

In a great many respects, the Federal Rules of Evidence and present District of Columbia law are consistent. There are,

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2 See Rules 603, 607, 609 and 613.

however, a number of areas in which they diverge. Some examples of rules on which there is substantial divergence and as to which there appears a significant likelihood for controversy are Rules 405(a) (methods of proving character), 412 (rape cases; relevance of victim's past behavior), 607 (who may impeach), 613 (prior statements of witnesses), 705 (disclosure of facts or data underlying expert opinion), 801(d)(1)(A) (use of prior inconsistent statements) and 803(6) (records of regularly conducted activities).

In other instances, some question was raised as to whether, in fact, current D.C. law is consistent with the corresponding Federal Rule. See, e.g., Rules 405(b) (methods of proving character), 701 (opinion testimony by lay witnesses), 702 (testimony by experts), 703 (bases of opinion testimony by experts) and 803(18) (learned treatises)

In still other instances, while D.C. law and the corresponding Federal Rule appeared to be consistent, questions were raised as to whether the Federal Rule should be adopted verbatim. See, e.g., Rule 407 (subsequent remedial measures).

Finally, as to the subject of privileges, the proposed rules adopt the same approach set forth in Federal Rule 501 -- that questions of privilege shall continue to be governed by statutes and the common law. The Committee's approach in this regard, however, is not intended to foreclose consideration of the recommendation of specific rules regarding privileges at a later date.

MINORITY STATEMENT

This statement and the minority statements which appear at various points adjacent to the Committee's comments to the proposed rules constitute an effort to set forth the concerns of a minority of the Committee about the recommendations of the Committee and the language of the Committee's comments with respect to several of the proposed rules.

The minority vigorously opposes the verbatim adoption of each of the Federal Rules by the District of Columbia courts merely for the sake of uniformity. The years since the adoption of the Federal Rules have demonstrated that some of the rules have been more successful in their application than others. See, e.g., American Bar Association Section of Litigation, Emerging Problems Under the Federal Rules of Evidence (1983). Furthermore, in many instances the District of Columbia practice, as reflected by statute, rule, or judicial precedent, is often better reasoned than the federal rule. It should be recognized that in those state jurisdictions that have adopted the Federal Rules, many have adopted their own versions of particular rules when the federal version was not deemed appropriate for their practice. See Weinstein's Evidence (1982).

The purpose of the minority statements is to highlight those areas where a divergence exists between the Federal Rules and District of Columbia practice and a minority of the Committee

felt that the present practice is superior,[3] and to address certain other instances in which there was disagreement within the Committee on policy issues, interpretation of existing case law or other matters.[4]

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3 See Rules 405(b), 705, 803(6), 803(18), 803(24), 804(b)(1), 804(b)(2), and 804(b)(5).

4 See Rules 407, 607, 613, 701, 702, and 703.

VIEWS OF THE DIVISION IV STEERING COMMITTEE

The Division IV Steering Committee endorses the great majority of the recommendations made in the report of its Committee on Court Rules, proposing rules of evidence for the Superior Court of the District of Columbia. However, there are three particular proposals with which a majority of the Steering Committee disagrees. In each case, the Court Rules Committee has proposed the adoption of an alternative to the federal rule, but the Steering Committee is of the view that the federal rule ought to be adopted, not only because we believe conformity with the federal rules is desirable ipso facto, but because we believe the federal rule is a better rule.

1. Rule 409. Payment of Medical and Similar Expenses: Under the federal rule, evidence that a defendant paid or offered to pay the plaintiff's medical expenses is inadmissible to prove the defendant's liability for the injury. The Committee's alternative, following local case law, would permit the admission of such evidence if "the circumstances . . . indicate . . . some admission of fault." In our view, this exception contradicts the purpose of the rule, which is that the circumstances of such a payment or offer of payment should not be deemed to be an admission of guilt. (If there is any independent evidence of an admission of fault, it will be admissible in its own right.) The policy underlying the federal rule is the same as the policy

underlying Rules 407 and 408, barring the admission of evidence of subsequent remedial measures and of offers to compromise or settle claims -- namely, that if such evidence is known to be admissible, the result will simply be to prevent repairs or settlement offers from being made. Because it is desirable that repairs and settlement offers should be made, the evidence, although relevant, is excluded. The situation with respect to medical expenses is no different. If a potential defendant knows that an offer to pay medical expenses may be used against him, the offer simply will not be made. We believe it better serves the public interest, and the interest of the injured party in obtaining proper medical care or prompt reimbursement for medical expenses, to follow the same course here as is followed with respect to repairs and settlement offers.

2. Rule 412. Victim's Past Behavior in Rape Cases: Both the federal rule and the proposed alternative generally forbid the use of evidence of the rape victim's past sexual behavior, or her reputation for sexual behavior, with persons other than the defendant. But the federal rule is quite stringent and permits only a few well defined exceptions. The proposed alternative, by contrast, permits the introduction of such evidence under vague and undefined "unusual circumstances." The Court Rules Committee supports the alternative on grounds that it "vests the trial court with greater discretion and is less confusing." The Steering Commmittee believes, to the contrary, that the application of a rule premised on vague "unusual circumstances"

will be more rather than less confusing in practice, and that it is undesirable to grant trial judges greater discretion in this sensitive area in which concepts of pure evidentiary logic must be balanced against other policy considerations, including the encouragement of the reporting and prosecution of the crime of rape. We believe that the federal rule strikes the better balance.

3. Rule 804(b)(1). Hearsay Exception for Former Testimony: Here, both the federal rule and the Committee's proposed alternative permit the use of testimony taken at a prior hearing or deposition, if the witness is now unavailable and if the opposing party had an opportunity to examine the witness on the prior occasion. There are two differences. The federal rule requires the opposing party to have had a "similar motive" to challenge the testimony at the prior hearing as it has in the present proceeding; the committee's alternative has no such requirement. The federal rule also permits the testimony to be introduced if the opposing party's "predecessor in interest" had an opportunity and motive to examine the witness in the prior proceeding; the proposed alternative does not permit such testimony to come in. We believe the federal rule is preferable in both respects, and that the "similar motive" requirement -- which provides a useful protection even when the opposing party is the same -- also provides protection adequate to justify the extension of the rule to include testimony opposed by a predecessor in interest. Refusing to admit former testimony

because of the merely formal substitution of opposing parties (for example, successor corporations, or the heirs of a deceased party) could work a real injustice on the party with a need to introduce former testimony because of the unavailability of a witness.

The Court Rules Committee's recommendation of an alternative to the federal rule appears in this instance to be based not on its view that the alternative is preferable, but on the perceived constraint of an existing statute, D.C. Code, § 14-303. (See Report at 804-6: "since adoption of [the federal rule] could require a conforming statutory amendment . . . the adoption of Alternative B is recommended at this time.") In our view, D.C. Code § 14-303 does not compel this result. On its face, the statute is a permissive and not an exclusive provision for the admission of former testimony, and the Court of Appeals has confirmed that the statute did not displace other, common-law methods of introducing former testimony. See Warren v. United States, 436 A.2d 821 (D.C. 1981). Under these circumstances, we believe the court is free to adopt the broader federal rule.

COMMITTEE ON COURT RULES

OF

DIVISION IV OF THE DISTRICT OF COLUMBIA BAR

PROPOSED RULES OF EVIDENCE

FOR THE

SUPERIOR COURT

DIVISION IA OF THE DISTRICT OF COLUMBIA BAR

OF

CONVENTION ON CHOSEN DELEGATES

PROPOSED RULES OF RATIONALE

FOR THE

NOMINATION OF CLERKS

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RULE 101. Scope

These rules govern proceedings in the Superior Court of the District of Columbia, to the extent and with the exceptions stated in rule 1101.

Comment

This provision is substantially similar to Federal Rule 101, except that the Federal Rule refers to "courts of the United States and [proceedings] before United States magistrates," rather than to the "Superior Court of the District of Columbia."

A modified version of Federal Rule 101 has been adopted by nearly all of the states that have patterned their codes of evidence on the Federal Rules. See Weinstein's Evidence ¶ 101[02].

RULE 102. Purpose and Construction

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

Comment

This provision is identical to Federal Rule 102. Nearly all states that have adopted an evidence code patterned on the Federal Rules have adopted Rule 102 without change. See Weinstein's Evidence ¶ 102[03].

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.

(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. The court may direct the making of an offer in question and answer form.

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

(d) 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.

Comment

This provision is identical to Federal Rule 103. Rule 103 conforms fully with current practice in the District of Columbia. A large number of states have adopted this rule without change. See Weinstein's Evidence ¶ 103[9].

Subdivision (a)(1): Objection. District of Columbia courts have acknowledged that specific grounds for objections must be articulated unless the grounds are apparent from the context. See, e.g., Tirrell v. Osborn, 55 A.2d 725 (D.C. Mun. App. 1947) (failure to raise objection forecloses appeal); Wright v. United States, 53 U.S. App. D.C. 74, 288 F.2d 428 (1923) (general objection upheld on appeal because of obvious grounds for objection).

Subdivision (a)(2): Offer of proof. District of Columbia courts consistently have held that the failure to make an offer of proof may foreclose an appeal unless it is apparent from the context what the offer of proof would have included. See, e.g., Stafford v. American Security and Trust Co., 60 U.S. App. D.C. 380, 55 F.2d 542 (1931) (exclusion of evidence upheld on appeal for failure to make offer of proof below); Boorstein v. Douglas, 52 A.2d 492 (D.C. Mun. App. 1947) (where purpose of proffered evidence is apparent on its face, a proffer of what the evidence will prove need not be made).

Subdivision (b): Record of offer and ruling. The language of Rule 103(b) is virtually identical to the third sentence of Rule 43(c) of the Superior Court Rules of Civil Procedure. Rule 103(b) also is based, in part, on the final sentence of Rule 43(c). Thus, current District of Columbia practice is fully consistent with Rule 103(b).

It is recommended that Rule 43(c) of the Superior Court Civil Rules be withdrawn upon the adoption of Rule 103(b), in the same manner as Rule 43(c) of the Federal Rules of Civil Procedure was withdrawn upon the adoption of Rule 103(b) of the Federal Rules of Evidence.

Subdivision (c): Hearing of jury. Rule 103(c) is similar in intent to the second sentence of Superior Court Civil Rule 43(c). The rule is consistent with long-standing practice in the District of Columbia. See, e.g., Stafford v. American Security and Trust Co.,

supra (proceeding to evaluate admissibility of physician's evidence should be conducted out of the jury's hearing).

Subdivision (d): Plain error. Rule 103(d) is consistent with Rule 52(b) of the Superior Court Rules of Criminal Procedure. Ample case law demonstrates that District of Columbia courts have followed the "plain error" principle articulated in Rule 103(d). See, e.g., Richmond F. & P.R. Co. v. Brooks, 91 U.S. App. D.C. 24, 197 F.2d 404 (1952).

RULE 104. Preliminary Questions

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

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

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

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

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

Comment

This provision is nearly identical to Federal Rule 104, the only difference being that subsection (b) of the Federal Rule is mandatory. It states that the court "shall" (rather than "may") admit relevant evidence upon or subject to the fulfillment of a condition of fact. Several states have rejected the mandatory language of subsection (b). See generally Weinstein's Evidence

¶ 104[13]. Also, the mandatory language seems inconsistent with the overall spirit of the Federal Rules. See, e.g., Federal Rule 403. Accordingly, it is recommended that the District of Columbia also reject the mandatory language. The proposed rule conforms with present practice in this jurisdiction.

Subdivision (a): Questions of admissibility generally. It is a well-accepted principle in the District of Columbia that the court has the authority to rule on threshold questions of admissibility.

Subdivision (b): Relevancy conditioned on fact. D.C. courts have adopted the practice of admitting evidence pending the fulfillment of a condition of fact. See, e.g., Gerber v. Columbia Palace Corp., 183 A.2d 398 (D.C. Mun. App. 1962) (evidence of building code requirements properly excluded upon failure to satisfy condition of producing proper witness to testify respecting intent and meaning of regulations).

Rule 104(b) does not state whether an objecting party must move to strike evidence when the condition of its admissibility is not fulfilled. The general rule is that where evidence has been conditionally admitted over objection, the objecting party must renew the objection when, at a later point in the trial, it appears that the condition has not been satisfied. See Washington Railway & Electric Co. v. Cullember, 39 App. D.C. 316 (1912).

Subdivision (c): Hearing of jury. This rule is consistent with District of Columbia practice and with Supreme Court precedent. See, e.g., Jackson v. Denno, 378 U.S. 368 (1964) (the voluntariness of a confession is exclusively a matter for the court, to be determined outside the jury's hearing).

The second sentence of Rule 104(c) is consistent with the intent of Rule 103(c), discussed supra. See Stafford v. American Security & Trust Co., 60 U.S. App. D.C. 380, 55 F.2d 542 (1931).

Subdivision (d): Testimony by accused. This rule is consistent with the long-standing practice that the scope of cross-examination should be limited to matters raised on direct. See also Rule 611(b).

RULE 105. Limited Admissibility

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

Comment

This provision is identical to Federal Rule 105. It also is consistent with District of Columbia practice.

Nearly all states that have adopted evidence codes based on the Federal Rules have adopted Rule 105 without substantive change. See Weinstein's Evidence ¶ 105[06].

RULE 106. Remainder of or Related Writings or Recorded Statements

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

Comment

This rule is identical to Federal Rule 106, and is consistent with District of Columbia case law. See, e.g., Herfuth v. United States, 66 U.S. App. D.C. 220, 85 F.2d 719 (1936); Harrison v. District of Columbia, 95 A.2d 332 (D.C. Mun. App. 1953).

Sixteen states have adopted Rule 106 without change. Two states have adopted more elaborate (but substantially similar) versions of the rule. See Weinstein's Evidence ¶ 106[05].

RULE 201. Judicial Notice of Adjudicative Facts

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

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

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

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

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

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

(g) Instructing jury. 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.

Comment

This provision is identical to Federal Rule 201. Like Federal Rule 201, the provision applies only to "adjudicative" facts, that is, facts pertaining to the particular case. Neither the Federal Rules nor these proposed rules contains any provision governing "legislative" facts -- facts which have relevance to legal reasoning and the lawmaking process. See Notes of Advisory Committee on Proposed Federal Rules of Evidence, Rule 201. The provision appears to be consistent with existing practice in this jurisdiction, although District of Columbia courts have not squarely addressed whether judicial notice may be mandatory with respect to adjudicative facts. See Comment to Subsection (d), infra. Most states have adopted Rule 201 with few or no modifications. See Weinstein's Evidence ¶ 201[09].

Subdivision (b): Kinds of facts. Several District of Columbia cases illustrate the traditional rule that judicially noticed facts must not be subject to reasonable controversy. See, e.g., Sherman v. Commission on Licensure, 407 A.2d 595 (D.C. 1979) (can take judicial notice of prior guilty plea); Ball v. Flora, 26 App. D.C. 394 (1905) (judicial notice may be taken of weather conditions on a certain date if official records are produced).

Subdivision (c): When discretionary. District of Columbia law recognizes that courts may take judicial notice, whether requested or not. See, e.g., Barnett v. Bachrach, 34 A.2d 626 (D.C. Mun. App. 1943) (sua sponte judicial notice of physical impairment typically caused by pregnancy).

Subdivision (d): When mandatory. District of Columbia courts have made judicial notice of legislative facts mandatory under certain circumstances, but they have not squarely addressed whether judicial notice of adjudicative facts should be mandatory when requested by a party and supplied with the necessary information. See, e.g., Banks v. B. F. Saul Co., 212 A.2d 537 (D.C. Mun. App. 1965) (municipal court is required to take judicial notice of municipal ordinances and regulations); Williams v. Auerbach, 285 A.2d 701 (D.C. 1972) (D.C. housing regulations must be judicially noticed).

RULE 301. Presumptions in General in Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by applicable statutes 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.

Comment

This provision is identical to Federal Rule 301. It also conforms with District of Columbia practice. See Smith Transfer & Storage Co. v. Murphy, 115 A.2d 300 (D.C. Mun. App. 1955) ("when evidence in rebuttal is introduced by the bailee the presumption or inference disappears from the case as a rule of law but retains the probative weight of an inference of fact . . . the burden of proof on the issue of negligence is not shifted to the defendant but remains always with the plaintiff"); Harlem Taxi Cab Association v. Nemesh, 89 U.S. App. D.C. 123, 191 F.2d 459 (1951) ("when substantial evidence contrary to a presumption is introduced, the underlying facts that originally raised the presumption may or may not retain some degree of probative value as evidence but they no longer have any artificial or technical force").[1]

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[1] There may be some confusion on this point because the language in the Smith Transfer and Harlem Taxi cases appears, at first blush, to adopt the discredited "bursting bubble" rule that the evidentiary value of a presumption disappears entirely upon the introduction of evidence that tends to disprove the presumption. See Notes of Advisory Committee on Proposed Federal Rules of Evidence, Rule 301. In fact, however, the leading District of Columbia cases recognize that presumptions may deserve some evidentiary consideration by the fact finder even when evidence tending to disprove the presumption has been introduced.

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

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 federal law supplies the rule of decision is determined in accordance with federal law.

Comment

This provision is a state law analogue to Federal Rule 302. Several states have adopted the proposed rule. See Weinstein's Evidence ¶ 302[04]. As explained by the Commissioners' Comment to the 1974 Uniform Rules of Evidence, Rule 302:

> Parallel jurisdiction in state and federal courts exists in many instances. The modification of Rule 302 is made in recognition of this situation. The rule prescribes that when a federally created right is litigated in a state court, any prescribed federal presumption shall be applied.

RULE 401. Definition of "Relevant Evidence"

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

Comment

This provision is identical to Federal Rule 401. The rule is consistent with District of Columbia case law. See, e.g., Reavis v. United States, 395 A.2d 75, 78 (D.C. 1978). Rule 401 subsumes, under the single rubric of relevancy, traditional concepts of both relevancy and materiality. Relevancy may be defined as the requirement that the proffered evidence tends to make the existence of a fact more or less probable than would have been the case without the evidence. Materiality may be defined as the requirement that the fact sought to be proven by the evidence in question be one which is of consequence to the action. Id.

RULE 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, or applicable statutes or rules. Evidence which is not relevant is not admissible.

Comment

This provision is identical to Federal Rule 402, except that the wording regarding the exceptions has been modified to adapt the rule to the District of Columbia. In addition, as noted in the Comment to Rule 401, the term "relevant" used in this rule covers traditional notions of both relevancy and materiality. Rule 402 is consistent with District of Columbia case law. See, e.g., Reavis v. United States, 395 A.2d 75, 78 (D.C. 1978).

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

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Comment

This provision is identical to Federal Rule 403, and is consistent with District of Columbia practice. If evidence has probative value but possesses the potential for prejudicial misuse by the jury, confusion of the issues, or needless delay, the trial judge may exercise discretion to exclude the evidence. See, e.g., Brooks v. United States, 396 A.2d 200, 205-06 (D.C. 1978); Hawkins v. United States, 395 A.2d 45, 47 (D.C. 1978); Gregory v. United States, 393 A.2d 132, 138 (D.C. 1978); Douglas v. United States, 386 A.2d 289, 295 (D.C. 1978); Punch v. United States, 377 A.2d 1353, 1358 (D.C. 1977); Campbell v. District of Columbia, 64 U.S. App. D.C. 375, 379, 78 F.2d 725, 729 (1935).

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

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

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

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

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

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted 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.

Comment

This rule is identical to Federal Rule 404, and is consistent with District of Columbia practice.

Subdivision (a)(1): Character of accused. Evidence of the accused's character is not admissible to show that he or she acted in conformity therewith

unless such evidence is first offered by the accused. See, e.g., Willcher v. United States, 408 A.2d 67, 75 (D.C. 1979) ("evidence of criminal acts other than the charged offense is inadmissible where it tends to prove a criminal disposition, because of the risk that the jurors may infer guilt in the case before them.") The rule is based upon fundamental fairness. To permit the prosecution to introduce evidence of a defendant's bad character merely because the defendant testifies on his or her own behalf would "prejudge one with a bad general record and deny [the accused] a fair opportunity to defend against a particular charge." Johns v. United States, 434 A.2d 463, 468 (D.C. 1981). See Note, Evidence, 31 Cath. U. L. Rev. 799 (1982).

Although some jurisdictions hold that when the defendant puts a victim's character at issue to substantiate a self-defense claim, the defendant opens inquiry into his or her own character, the District of Columbia follows the rule that evidence of a defendant's character is never admissible until the defendant expressly places his or her own character in issue. See, e.g., Johns v. United States, supra at 471; 22 C. Wright & A. Miller, Federal Practice and Procedure § 5237 (1981).

Under Rule 404(a), a defendant is allowed to introduce character traits which are antithetical to the charged offense. For example, an accused may offer evidence of abstract qualities such as honesty, veracity, peacefulness and a law-abiding nature. But a defendant may not offer evidence of specific acts or courses of conduct to show that he or she did not commit the particular act charged. See Hack v. United States, 445 A.2d 634, 642 (D.C. 1982).

Subdivision (a)(2): Character of victim. Rule 404(a)(2) permits introduction of evidence of a character trait of the victim of a crime under certain circumstances. District of Columbia courts have long recognized the relevance of the victim's violent character to the accused's claim of self-defense. See Cooper v. United States, 353 A.2d 696 (D.C. 1975). Compare Preston v. United States, 65 U.S. App. D.C. 110, 80 F.2d 702 (1935). Once the defendant offers evidence of the victim's violent character, the prosecution may then offer evidence of the victim's peaceful character. See Johns v. United States, supra at 468-71.

Subdivision (a)(3): Character of witness. Rule 404(a)(3) permits evidence of the character of a witness as provided in Rules 607-609.

Subdivision (b): Other crimes, wrongs or acts. While evidence of other crimes is inadmissible to prove the bad character of the accused or a propensity to commit the crime charged, such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, etc. See, e.g., Lee v. United States, 454 A.2d 770, 775 (D.C. 1982); Rindgo v. United States, 411 A.2d 373, 376 (D.C. 1980); Calaway v. United States, 408 A.2d 1220, 1226 (D.C. 1979); Willcher v. United States, supra at 75; Day v. United States, 360 A.2d 483 (D.C. 1976). It is important to note that under present District of Columbia practice as well as Federal Rule 404(b), other crimes evidence directed to an issue other than propensity is only admissible if the issue to which it pertains is material and genuinely controverted. See Campbell v. United States, 450 A.2d 428, 430 (D.C. 1982); Weinstein's Evidence ¶ 404[09], at 50.

RULE 405. Methods of Proving Character

*Alt. A (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.

Alt. B (a) Reputation. 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. On cross-examination, inquiry is allowable into whether the witness has heard of relevant specific instances of 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 his conduct.

Comment

Subdivision (a): Reputation or opinion. Alternative A is identical to Federal Rule 405 (a), and represents a significant departure from present practice in the District of Columbia. Federal Rule 405 permits proof of character by reputation or opinion evidence. District of Columbia courts, following the traditional rule, have held that character may be proven only by testimony as to the reputation of the person in question for good or bad character traits, and not by the witness' opinion of the person's character or specific incidents of the person's conduct. See, e.g., Obregon v. United States, 423 A.2d 200, 209-10 (D.C. 1980); Hedgeman v. United States, 352 A.2d 926 (D.C. 1976); Lloyd v. United States, 333 A.2d 387 (D.C. 1975).

Federal Rule 405(a) and present District of Columbia law further differ in that while both permit inquiry into relevant specific instances of conduct on cross-examination, District of Columbia courts have held that the only permissible inquiry is "have you

heard" of such incidents, as opposed to "do you know" of such incidents. See, e.g., Morris v. United States, ___ A.2d ___, No. 82-63 (D.C. November 3, 1983);[1] Lloyd v. United States, supra; Coleman v. United States, 137 U.S. App. D.C. 48, 420 F.2d 616 (1969); Stewart v. United States, 70 U.S. App. D.C. 101, 104 F.2d 234 (1939). Alternative B reflects current District of Columbia law.

The departures from the traditional rule embodied in Federal Rule 405 were deliberate. The Advisory Committee felt that "the persistence of reputation evidence is due to its largely being opinion in disguise." The Advisory Committee also felt that since, according to the great majority of cases, a witness may on cross-examination be asked whether he or she has heard of particular instances of conduct pertinent to the trait in question, the witness should also be able to testify to what he or she knows. See Notes of Advisory Committee on Proposed Federal Rules of Evidence, Rule 405. Chief Judge Newman recently expressed similar views in his dissenting opinion in Morris v. United States, supra. For the foregoing reasons, adoption of Alternative A is recommended.

Subdivision (b): Specific instances of conduct. The most prevalent use of character evidence is to attempt to establish, by inference, that a person acted in conformity with his or her character on a particular occasion. These situations are covered by Federal Rules 404 and 405(a).

There are other situations, however, in both civil and criminal contexts, in which a person's character is more directly in issue. Examples of such instances are the competency of a driver in an action for negligent entrustment of a motor vehicle to an incompetent driver, and the character of the decedent in a wrongful death case as it pertains to the issue of damages. See Weinstein's Evidence ¶ 404[02].

Federal Rule 405(b) provides that in the latter instances, where character "is an essential element

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[1] As the Court noted in Morris v. United States, supra, the trial court enjoys broad discretion to limit or exclude cross-examination concerning a character witness' awareness of a criminal defendant's past arrests and convictions where their prejudicial impact outweighs their probative value.

of a charge, claim or defense," proof of character may also be made by specific instances of conduct.

The present state of District of Columbia law concerning the subject matter of Rule 405(b) is not entirely clear. While the cases cited under subdivision (a) express a broad proscription against proof of character by specific acts, they do not necessarily conflict with Rule 405(b) in that none of them involved circumstances in which character was directly at issue.

Certain criminal cases involving claims of self-defense may be read as being consistent with Rule 405(b). See Johns v. United States, 434 A.2d 463 (D.C. 1981) (in homicide case involving claim of self defense, defendant may present evidence of decedent's violent character, and such evidence may be testimony about specific acts); Griffin v. United States, 87 U.S. App. D.C. 172, 183 F.2d 990 (1950) (evidence of uncommunicated threat admissible in case involving claim of self defense). But cf. McBride v. United States, 441 A.2d 644 (D.C. 1982) (evidence of victim's uncommunicated threat against defendant goes to the issue of the victim's specific intent towards the defendant, not general propensity to violence); United States v. Akers, 374 A.2d 874 (D.C. 1977) (rule of admissibility of specific acts to show violent character of victim where self defense is in issue is limited to homicide cases, where exception to rule against propensity evidence is made in recognition of the decedent's absence from the trial).

Significantly, Federal Rule 405(b) reflects the rule at common law as well as the rule followed by most jurisdictions. See McCormick, Evidence § 187 (2d Ed. 1972); 1 J. Wigmore, Evidence § 202 (3d Ed. 1940).

Based on the foregoing, District of Columbia law does not appear to be inconsistent with Federal Rule 405(b), and adoption of Federal Rule 405(b) is recommended.

Minority Statement

The minority does not concur with the recommendation that subpart (b) of the rule should be adopted. Although it is not entirely clear whether District of Columbia case law would permit evidence of specific instances of conduct where a person's character is an essential element of the case, the minority would argue that such evidence would not be

permitted. Clearly, the case law has embraced the general principle that evidence of specific conduct as affirmative evidence of character is not admissible. Hedgeman v. United States, supra. One of the reasons for retaining this general prohibition against evidence of specific instances of conduct is to avoid separate trials on collateral issues (e.g., did the witness actually engage in the conduct alleged?). Neither this Committee's comment nor the Notes of the Advisory Committee on the Proposed Federal Rules gives any argument in favor of the change which rebuts this judicial interest in limiting the evidence at trial to those matters actually in issue. Thus, while the provision in subpart (a) of the rule allowing opinion as well as reputation testimony of charcter may be a rational improvement over the present practice, proposed subpart (b) does not have the same rational basis to support it. Subpart (b) is at best unnecessary and at worst it opens a Pandora's Box of collateral issues. It should not be adopted in the District of Columbia.

RULE 406. Habit; Routine Practice

*Alternative A

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.

Alternative B

Evidence of the habit of a person or of the routine practice of an organization is not admissible to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice unless there is no eyewitness to or other direct evidence of the conduct of the person or organization on the occasion in question.

Comment

Alternative A is identical to Federal Rule of Evidence 406. It represents a change in existing District of Columbia law, which, following an older view, allows admission of evidence of personal habit or business routine only if there is no eyewitness to or other direct evidence of the event in dispute. Compare Levin v. United States, 119 U.S. App. D.C. 156, 163-64, 338 F.2d 265, 272-73 (1964) (even if religious practice of remaining home on Sabbath could be considered "habit," eyewitness testimony regarding defendant's whereabouts on particular Sabbath in question made "habit" evidence cumulative), cert. denied, 379 U.S. 999 (1965) with Howard v. Capital Transit Co., 97 F. Supp. 578, 579 (D.D.C. 1951) (when no eyewitness was available, evidence of decedent's habit of taking bus was admissible to prove decedent had been passenger before bus ran over him), aff'd, 90 U.S. App. D.C. 359, 196 F.2d 593 (1952) and Lucas v. Auto City Parking Co., 62 A.2d 557, 559-60 (D.C. Mun. App. 1948) (when no other evidence of agreement was presented, customers' practice of leaving personal belongings in their cars in parking lot was admitted on issue of bailment). Alternative B codifies this "eyewitness rule."

Alternative A presents a preferable approach. The modern trend toward abandonment of the eyewitness rule rests on the sound theory that the admissibility of circumstantial evidence of habit or routine should not depend on the unavailability of direct evidence of conduct. Rather, the jury should have all evidence available to weigh in its deliberations. See Notes of Advisory Committee on Proposed Federal Rules of Evidence, Rule 406. See generally Weinstein's Evidence ¶ 406[02]-[03] (1982 & Supp. 1982).

Both alternatives leave two matters unspecified. First, unlike the Model Code of Evidence,[1] neither alternative defines the terms "habit" or "routine practice." Distinguishing evidence of habit from that of character, however, the Advisory Committee Note to Federal Rule 406 quotes a famous passage from McCormick:

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

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[1] The Model Code of Evidence states: "Habit means a course of behavior of a person regularly repeated in like circumstances. Custom means a course of behavior of a group of persons regularly repeated in like circumstances." Model Code of Evid. Rule 307(1).

(Quoting McCormick, Evidence § 162, at 340 (1954).) District of Columbia case law similarly has emphasized the "'invariable regularity'" of habit. Levin v. United States, 119 U.S. App. D.C. at 162-63, 338 F.2d at 271-72 (quoting 1 J. Wigmore, Evidence § 92, at 520 (3d ed. 1940)). See Lucas v. Auto City Parking Co., supra at 559-60. See also United States v. Sampol, 204 U.S. App. D.C. 349, 384 n.21, 636 F.2d 621, 656 n.21 (1980) ("to say that [witness] made a 'habit' of assassinating Chilean exiles is to stretch both the English language and the law"). See generally Weinstein's Evidence, supra ¶ 406[01].

Second, neither alternative specifies the methods of proof of habit and custom. Congress deleted a subdivision of proposed Federal Rule 406 that would have provided for proof by opinion or specific acts. The manner of proof accordingly lies within the sound discretion of the trial judge. See generally id. ¶ 404[04]. District of Columbia cases generally have involved proof by testimony concerning specific acts, rather than opinion or reputation. See Howard v. Capital Transit Co., supra at 579; Lucas v. Auto City Parking Co., supra at 558-59.

Thirteen states have adopted Federal Rule 406 substantially verbatim. Two have included a definitional section, and seven have added a provision specifying methods of proof. One state limits its rule to business routine. See Weinstein's Evidence, supra ¶ 406[05].

RULE 407. Subsequent Remedial Measures

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. 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.

Comment

This rule is identical to Federal Rule of Evidence 407 and accords with existing District of Columbia law.

District of Columbia courts long have followed the general rule that evidence of subsequent remedial measures is not admissible to prove negligence, for the widely accepted reason that public policy should not discourage repairs after injuries by treating the repairs as admissions of negligence. See Avery v. S. Kann Sons Co., 67 U.S. App. D.C. 217, 218-19, 91 F.2d 248, 249-50 (1937); Altemus v. Talmadge, 61 U.S. App. D.C. 148, 152, 58 F.2d 874, 878 (1932); Daly v. Toomey, 212 F. Supp. 475, 482 (D.D.C. 1963), aff'd sub nom. Muldrow v. Daly, 117 U.S. App. D.C. 318, 329 F.2d 886 (1964); Fine v. Giant Food Stores, Inc., 163 F. Supp. 231, 236-37 (D.D.C. 1958); rev'd on other grounds, 106 U.S. App. D.C. 95, 269 F.2d 542 (1959) (per curiam). See generally Weinstein's Evidence ¶¶ 407[01]-[02] (1982 & Supp. 1982).

District of Columbia courts, however, also have recognized the typical exceptions to this rule. Thus, within the discretion of the trial judge, such evidence may come in to impeach defense witnesses. Compare Avery v. S. Kann Sons Co., supra, 67 App. D.C. at 219, 91 F.2d at 250 with Fine v. Giant Food Stores, Inc., supra at 237. The plaintiff also may introduce evidence of subsequent repairs on substantive matters other than the defendant's negligence. See Fine v. Giant Food Stores, Inc., supra at 236-37; see also Daly v. Toomey, supra at 482. See generally Weinstein's Evidence, supra ¶ 407[04]-[06].

No reported decision of the District of Columbia courts appears to have addressed the issue of whether evidence of post-accident remedial measures is admissible in strict products liability cases. Courts in other jurisdictions which have addressed this question are divided. Some courts have concluded that evidence of subsequent remedial measures is admissible in strict liability actions for two principal reasons: (1) the issue in the case is not, in the words of Rule 407, "negligence or culpable conduct," but the existence of a defect in the product; and (2) because a failure to improve a product could result in extensive liability and loss of goodwill, a producer is likely to correct a defect even if evidence of such a change is admissible in a strict liability action for a pre-repair injury. See, e.g., Ault v. International Harvester Co., 13 Cal. 3d 113, 117 Cal. Rptr. 812, 528 P.2d 1148, 1150-53 (1975) (en banc) (Mosk, J.). Other courts have concluded that subsequent repairs should be excluded from strict liability cases on the grounds that (1) the policy of encouraging repairs applies equally in strict liability and negligence cases; and (2) such evidence is of questionable relevance and would be prejudicial to the defendant, particularly when a plaintiff bases his action on both strict liability and negligence. See, e.g., Cann v. Ford Motor Co., 658 F.2d 54, 59-60 (2d Cir. 1981), cert. denied 456 U.S. 960 (1982). The Model Uniform Product Liability Act and certain state statutes have taken the exclusionary approach. Weinstein's Evidence, supra ¶ 407[03], at 407-14 to -15 & nn. 9, 11. In the absence of such legislation, Weinstein favors testing the evidence against measures of relevancy and prejudice under Rule 403, rather than establishing a mechanical approach under Rule 407. See id. at 407-14.

Sixteen states have adopted Federal Rule 407 substantially verbatim. Three states have specified in their rules that evidence of post-accident repairs is admissible in strict liability cases, and two that it is not. One state permits admission of evidence of subsequent remedial measures even to prove negligence. See id. ¶ 407[08].

Minority Statement

There was no disagreement in the Committee that the rule accords with existing District of Columbia law. However, the statement in the comment that the District of Columbia courts have not addressed whether

the rule applies in products liability actions gives pause. While apparently no appellate decision has specifically dealt with this question, it certainly appears that the practice in trial courts has been to apply this rule to products liability situations. It is also worth noting that the decision in Avery v. S. Kann Sons, Co., 67 U.S. App. D.C. 207, 91 F.2d 248, 249 (1937), ruled that subsequent repairs were inadmissible as evidence of a defective condition. The Avery decision cited as support for the traditional rule a United States Supreme Court opinion dealing with a claim of a defect in a machine and requiring the exclusion of evidence of subsequent modifications to that machine. Columbia & P.S.R.R. Co. v. Hawthorne, 144 U.S. 202, 207 (1892). The application of the traditional rule to a claim of a defective condition indicates that the District of Columbia courts would not make any distinction between products liability and other cases in the application of this rule.

Certainly the public policy of encouraging such repairs or modifications would apply equally to negligence and product liability situations. This policy was set forth in the Advisory Committee Notes to the Federal Rule as the "most impressive" ground upon which the rule was based:

> The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. The courts have applied the principle to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees, and the language of the present rules is broad enough to encompass all of them.

Indeed, the use in the rule of the terms "negligence or culpable conduct" would further indicate that the rule was not to be restricted to actions based on negligence. Thus, any suggestion in the Committee comment that Rule 407 might modify the long-standing common law rule of the inadmissibility of evidence of subsequent repairs on the question of existence of a defective condition would appear to be ill-advised. Furthermore, the approach mentioned in the comment of dealing with this issue on the basis of relevancy and prejudice ignores

the "most impressive" reason for the rule, the public policy in favor of encouraging improvements in safety. A substantial number, perhaps a majority, of the Committee accepted the view expressed herein in the discussions on this rule and thus the comment should not be viewed as a Committee recommendation on this issue.

RULE 408. Compromise and Offers to Compromise

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

Comment

This rule is identical to Federal Rule 408, and is consistent with present practice in the District of Columbia.

Under the rule, offers to compromise disputed claims and statements or admissions of fact made in the course of compromise negotiations are not admissible to prove the validity or invalidity of claims or their amounts. See, e.g., Harrison v. District of Columbia, 95 A.2d 332 (D.C. Mun. App. 1953).

Note that for a settlement offer or statement to be inadmissible under the rule, it must have been made in the context of an effort to compromise a disputed claim. Thus, an offer to pay or resolve a matter made before a controversy has arisen is not excluded. See, e.g., Crain v. Allison, 443 A.2d 558 (D.C. 1982). Such an offer or statement made prior to a claim being disputed is considered admissible as an admission. See, e.g., Firestone Tire & Rubber Co. v. Hillow, 65 A.2d 338 (D.C. Mun. App. 1949).

The rule against admitting offers of compromise after a controversy has arisen is, of course, based on the policy of promoting out-of-court settlements. Based on the same policy, evidence of settlement agreements and completed settlements is similarly inadmissible to prove liability or damages in cases involving third parties or in subsequent litigation. See, e.g., Farnum v. Colbert, 293 A.2d 279 (D.C. Mun. App. 1972).

Finally, Rule 408 provides that offers or statements which are inadmissible to prove liability, invalidity of the claim or damages are, nevertheless, admissible for other purposes. See, e.g., United Securities Corp. v. Franklin, 180 A.2d 505 (D.C. Mun. App. 1962) (a consent decree was properly admitted into evidence to demonstrate that one corporation controlled, directed, and helped to formulate the acts of a second corporation rather than to demonstrate guilt for the specific acts and practices in question).

RULE 409. Payment of Medical and Similar Expenses

Alternative A

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.

* Alternative B

Evidence of furnishing or offering to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury, unless the circumstances thereof indicate not merely an act of benevolence but some admission of fault.

Comment

Alternative A is identical to Federal Rule 409. The policy considerations underlying the rule parallel those underlying Rules 407 and 408. In general, the rule is intended to encourage assistance to injured persons by obviating the risk that such assistance will be deemed to be an admission of liability. See Weinstein's Evidence ¶ 409[01].

Federal Rule 409 differs from current District of Columbia case law in that the Federal Rule renders evidence of furnishing or offering or promising to pay medical expenses inadmissible to prove liability for the injury in all cases. In contrast, District of Columbia case law permits such evidence to be admitted where the surrounding circumstances indicate that the offer, promise or payment was motivated not merely by an act of benevolence but by some admission of fault. See Crain v. Allison, 443 A.2d 558 (D.C. 1982); Stumpner v. Harrison, 136 A.2d 870 (D.C. Mun. App. 1957); Bateman v. Crim, 34 A.2d 257 (D.C. Mun. App. 1943). Alternative B reflects current District of Columbia law.

One rationale underlying Federal Rule 409 is that offers or payments of medical expenses usually stem from humanitarian impulses rather than from an admission of liability. This rationale, however, has been the subject of some criticism, it being argued

that, particularly where the injured person is a stranger, a person free from guilt is not likely to offer or furnish medical expenses or the like. See Weinstein's Evidence ¶ 409[01].

It appears that, under present District of Columbia case law, some affirmative showing is necessary to sustain a finding that an offer or payment was motivated by an admission of guilt. Accordingly, absent such a showing, it will be assumed that the offer or payment was motivated by something other than an admission of fault, e.g., an opinion of the law, benevolence, or the desire to effect a settlement, and evidence thereof will be inadmissible to prove liability. See Stumpner v. Harrison, supra; Bateman v. Crim, supra.

Several states have adopted Federal Rule 409 without change. See Weinstein's Evidence, ¶ 409[04].

The Committee recommends Alternative B.

RULE 410. Inadmissibility of 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:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under Rule 11 of the Superior Court Rules of Criminal Procedure regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with a prosecutor 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.

Comment

The proposed rule is virtually identical to Superior Court Criminal Rule 11(e)(4) and to Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6). There are only two technical differences from Superior Court Criminal Rule 11(e)(4): (1) In the opening proviso, the word "paragraph" has been changed to "rule"; and (2) in subsection (C), "this rule" has been changed to "Rule 11 of the Superior Court Rules of Criminal Procedure." The only other difference from the federal rules is minor: subsection (D) has been changed to refer to "a prosecutor" rather than to "an attorney for the prosecuting authority" or "an attorney for the government" in order to conform to Superior Court Criminal Rule 11(e)(4).

The rule is founded on a well-established, basic principle -- that a guilty plea, later withdrawn, is inadmissible in the subsequent prosecution of the defendant on the substituted plea of not guilty. See Kercheval v. United States, 274 U.S. 220, 223 (1927); Wood v. United States, 75 U.S. App. D.C. 274, 282-85, 128 F.2d 265, 273-76 (1942) (Rutledge, J.); Heim v. United States, 47 App. D.C. 485, 488-92 cert. denied, 247 U.S. 522 (1918). See generally Weinstein's Evidence ¶ 410[03] (1982 & Supp. 1982.)

The rule has expanded this fundamental doctrine to include other types of pleas and other types of proceedings. In addition, the D.C. Court of Appeals expressly has recognized that the government may not use such admissions to impeach a defendant. See Johnson v. United States, 420 A.2d 1214, 1215 & n.3 (D.C. 1980). See generally Weinstein's Evidence, supra ¶¶ 410[02]-[05], [08].

Before its amendment in 1980, Federal Rule 410 had a broader exclusionary effect. The 1980 amendments narrowed the types of statements that are inadmissible, in particular excluding statements made during plea discussions only with a government attorney, not with a law enforcement officer. The 1980 amendments also added the exception allowing presentation of an otherwise inadmissible statement to supplement a statement previously introduced. See generally Weinstein's Evidence supra, at 410-2 to -7.

Eighteen states have adopted rules similar in varying degrees to pre-1980 Federal Rule 410. Two states,

like the District of Columbia, follow the post-1980 approach. Two states have codified their own rules. See generally id. ¶ 410[09].[1]

[1] Federal Rule 410 is silent on several related but important matters concerning the use of guilty pleas not withdrawn. Criminal pleas that have not been withdrawn may have preclusive effects in later civil and criminal proceedings. Cf. Fed. R. Evid. 404(b), 405(b), 609. See generally Weinstein's Evidence ¶ 410[06]. In this jurisdiction it is an error, however, to inform the jury that a defendant's co-conspirator or co-indictee has pleaded guilty, although the error may be cured if the court gives a proper cautionary instruction and the admission of guilt does not implicate the defendant. Compare Carter v. United States, 108 U.S. App. D.C. 277, 277-79, 281 F.2d 640, 640-42 (per curiam), cert. denied, 364 U.S. 880 (1960) with Payton v. United States, 96 U.S. App. D.C. 1, 3, 222 F.2d 794, 796 (1955). But cf. Bruton v. United States, 391 U.S. 123, 126-37 (1968). See generally Weinstein's Evidence ¶ 410[07].

RULE 411. Liability Insurance

*Alternative A

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.

Alternative B

In civil cases, 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.

Comment

Alternative A is identical to Federal Rule 411. The rationale underlying the rule is that, at best, any inference with respect to fault from the fact or lack of insurance coverage is a tenuous one, and evidence as to insurance tends to be prejudicial. See Notes of Advisory Committee on Proposed Federal Rules of Evidence, Rule 411.

In the civil context, District of Columbia practice is generally consistent with Federal Rule 411, with respect to both the general rule of exclusion and the exceptions set forth in the second sentence of the rule. See, e.g., Knox v. Akowskey, 116 A.2d 406 (D.C. Mun. App. 1955); Radinsky v. Ellis, 83 U.S. App. D.C. 172, 167 F.2d 745 (1948); Paxson v. Davis, 62 U.S. App. D.C. 146, 65 F.2d 492 (1933).

One potential difference, however, between present District of Columbia practice and Federal Rule 411 is that the D.C. Court of Appeals has held that the rule

embodied in Federal Rule 411 applies only in civil cases. See Managó v. United States, 331 A.2d 335, 336 (D.C. 1975):

> The general rule of law is that a policy of liability insurance is not relevant as evidence of negligence in a civil action. McCormick, Evidence § 201 (2d Ed. 1972). However, there is no automatic rule as to exclusion of such evidence in a criminal proceeding. Instead, it must be judged, as is any other evidence, on the basis of its relevancy to the issues in question.***[1]

Federal Rule 411 is not expressly so limited in scope. Accordingly, while the circumstances to which the rule applies would most often arise in the civil context, it may have some application in the criminal area. See Weinstein's Evidence ¶ 411[13] (1982 Cum. Supp.).

Alternative B expressly limits the application of the rule to civil cases and, thus, squarely conforms to present District of Columbia law as articulated in Managó.

The Committee recommends Alternative A. It appears that the policies underlying Federal Rule 411 are as applicable in the criminal context as in the civil context. Also, in light of its facts and ultimate holding, Managó is not the strongest authority.

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[1] Managó involved a criminal prosecution for burglary of a jewelry store. Evidence was introduced at trial that the store owner did not have insurance. The trial court ruled that the evidence was not relevant, ordered it stricken and gave a cautionary instruction. The Court of Appeals held that permitting the jury to hear the question and answer did not constitute such plain error as to require reversal.

RULE 412. Rape Cases; Relevance of Victim's Past Behavior

Alternative A

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is --

(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or

(2) admitted in accordance with subdivision (c) and is evidence of --

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which rape or assault is alleged.

(c)(1) If the person accused of committing rape or assault with intent

to commit rape intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.

(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the

extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which rape or assault with intent to commit rape is alleged.

*Alternative B

(a) Notwithstanding the provisions of any other rule of evidence or procedure, this rule governs the admissibility of evidence of the past sexual behavior of the alleged victim in criminal prosecutions for rape or assault with intent to commit rape.

(b) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which rape or assault with intent to commit rape is alleged.

(c) For purposes of this rule, evidence of the alleged victim's past sexual behavior with persons other than the defendant is deemed not to be probative of whether or not the alleged victim consented to the sexual behavior with respect to which rape or assault with intent to commit rape is alleged, except under unusual circumstances.

(d) Reputation or opinion evidence of the alleged victim's past sexual behavior is not admissible except in unusual circumstances where its probative value is precisely demonstrated and outweighs its prejudicial effect.

(e) Evidence of specific acts of the alleged victim's past sexual behavior with the defendant is not admissible except (1) where there is an issue of identity at trial, or (2) to rebut evidence that the alleged victim did not consent

to the sexual behavior with respect to which rape or assault with intent to commit rape is alleged.

(f) Evidence of specific acts of the alleged victim's past sexual behavior with persons other than the defendant is not admissible except under unusual circumstances where its probative value is clearly demonstrated and outweighs its prejudicial effect.

(g) Evidence of the alleged victim's past sexual behavior is not admissible for purposes of impeaching the alleged victim's credibility as a witness.

(h) Notwithstanding the provisions of paragraphs (a) - (g), this rule shall not preclude the admission of any evidence which is constitutionally required to be admitted.

Comment

Alternative A is identical to Rule 412 of the Federal Rules of Evidence. Alternative B reflects current District of Columbia case law as set forth in McLean v. United States, 377 A.2d 74 (D.C. 1977). Federal Rule 412 and present District of Columbia case law both limit the admissibility of evidence of the alleged victim's past sexual behavior in criminal prosecutions for rape or assault with intent to commit rape. However, there are a number of significant differences between the two.

Federal Rule 412(a) absolutely prohibits the admission of reputation or opinion evidence of the alleged victim's past sexual behavior. District of Columbia case law generally prohibits the admission of such evidence, but permits it "in the most unusual cases where the probative value is precisely demonstrated and outweighs the prejudicial effect of the testimony." McLean, supra at 79.

Federal Rule 412(b) and District of Columbia case law differ slightly with respect to the admissibility of evidence of the alleged victim's specific acts of past sexual behavior with persons other than the accused. Federal Rule 412 permits such evidence only where there

is an issue of identity, while the District of Columbia test is couched more generally in terms of "unusual circumstances." McLean, supra at 78 n.6. (In either case, the probative value of the evidence must outweigh its prejudicial effect in order for it to be admissible.) Both Federal Rule 412 and District of Columbia case law preclude the admission of such evidence on the issue of consent.

Federal Rule 412(b) and District of Columbia case law also differ slightly with respect to the admissibility of evidence of the alleged victim's specific acts of past sexual behavior with the accused. Federal Rule 412 permits such evidence only on behalf of the accused on the issue of consent, while District of Columbia law also permits such evidence where there is an issue of identity at trial. See McLean, supra at 78 n.5.

Federal Rule 412(c) imposes various procedural requirements which have no parallel under current District of Columbia law, although it would seem that Superior Court judges, in their discretion, could impose analogous requirements in particular cases where appropriate.

Federal Rule 412 and Alternative B are both limited in application to criminal prosecutions for rape or assault with intent to commit rape. It appears, however, that there may be other analogous offenses under District of Columbia law to which the rule should apply, e.g., assault with intent to commit sodomy. See D.C. Code §§ 22-503 and 3502 (1981). Accordingly, consideration should be given to expanding the scope of the rule to cover such offenses.

Federal Rule 412(b)(1) provides that evidence of a victim's past sexual behavior (other than reputation or opinion evidence) which is not otherwise admissible under the provisions of Rule 412 is nonetheless admissible if it is constitutionally required to be admitted. It seems clear that a rule of evidence may not circumscribe a constitutional right. Accordingly, an analogous provision has been included in Alternative B as paragraph (h). In contrast to Federal Rule 412(b)(1), paragraph (h) of Alternative B covers reputation and opinion evidence as well as evidence of specific acts of past sexual behavior in order to obviate any question of unconstitutionality.

Several different approaches have been taken by various states concerning the subject matter of this rule. The modern trend appears to be towards prohibiting the admission of evidence of the past sexual behavior of the alleged victim of a rape or attempted rape, except in specified circumstances, which vary from state to state. See Weinstein's Evidence ¶ 412[01]; Annotation: "Modern Status of Admissibility, in Forcible Rape Prosecution, of Complainant's General Reputation for Unchastity," 95 A.L.R.3d 1181 (1979); Annotation: "Modern Status of Admissibility, in Forcible Rape Prosecution, of Complainant's Prior Sexual Acts," 94 A.L.R.3d 257 (1979).

The Committee recommends Alternative B in that, with respect to substantive matters, it vests the trial court with greater discretion and is less confusing. Also, the procedural aspects of Alternative A seem unduly cumbersome, and the Committee felt that such matters are best left to the trial court's discretion.

RULE 501. Privileges

Except as otherwise required by the Constitution of the United States, or applicable statute or rule, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by principles of common law as they may be interpreted by the courts of the District of Columbia in light of reason and experience.

Comment

This rule is a modified version of Rule 501 of the Federal Rules of Evidence, adapted to the District of Columbia. Like Federal Rule 501, the rule leaves the existing common law regarding privileges intact and free to evolve by judicial interpretation.

One aspect of Federal Rule 501 which is not reflected in the proposed rule is a provision that "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege * * * shall be determined in accordance with State law." Consideration was given to including a parallel provision in proposed Rule 501 -- that federal law would govern privilege questions where federal law supplies the rule of decision on the claim or defense at issue. However, none of the state rules patterned after Federal Rule 501 includes such a provision. See Weinstein's Evidence ¶ 501[07]. Also, under prevailing choice of law rules, it would seem that privilege questions would generally be determined in accordance with the law of forum. Finally, proposed Rule 501 would not prohibit the application of federal law or the law of another state to a privilege question where appropriate under choice of law rules.

Article V of the Federal Rules of Evidence as promulgated by the Supreme Court and submitted to Congress contained numerous rules, which codified various specific privileges and addressed collateral problems of waiver, comment upon or inference from a claim of privilege, and jury instructions. Congress, however, adopted only a single rule, which is now Federal Rule 501. See Weinstein's Evidence ¶ 501 et seq.

At least five states have adopted modified versions of Federal Rule 501 similar to the proposed rule. Several

other states have adopted rules codifying various privileges. See Weinstein's Evidence ¶ 501[07].

RULE 601. General Rule of Competency

Alternative A

Every person is competent to be a witness except as otherwise provided in these rules or by statute.

*Alternative B

Every person is competent to be a witness except as otherwise provided in these rules or by statute, unless the trial court determines that (1) the witness lacks the intellectual capacity to understand the difference between truth and falsehood or the appreciation of the duty to tell the truth, or (2) the witness is unable to recall the events about which he or she is to testify.

Comment

Alternative A is virtually identical to the first sentence of Federal Rule 601 except that a reference to statutory exceptions to competency has been added.

Federal Rule 601 contains a second sentence to the effect that in civil actions in which state substantive law governs, competency shall also be determined in accordance with state law. The committee considered including a federal law analogue to this provision in Alternative A but decided against doing so. It was felt that, at least outside of the diversity jurisdiction context, questions of competency should generally be determined in accordance with the law of the forum. Also, no state which has adopted Federal Rule 601 has adopted such a provision. See Weinstein's Evidence ¶ 601.

Alternative B, which reflects current District of Columbia law, recognizes a general assumption of competency. It differs from the Federal Rule, however, in that it contains no mandatory rule that a witness is competent no matter what the facts reveal. Rather it reflects the rule accepted both by the District of Columbia Court of Appeals and the United States Court of Appeals (D.C. Circuit) that competency is properly left to the discretion of the trial court, using the

following as the test, where the witness is a child or where the witness' mental capacity is in some way questioned:

> The proper legal standard encompasses (1) the child's intellectual capacity to understand the difference between truth and falsehood, coupled with the appreciation of the duty to tell the truth . . . , and (2) "the child's ability to recall the events about which she was to testify."

Smith v. United States, 414 A.2d 1189, 1197 (D.C. 1980) (citations omitted; testimony of eight-year-old child); accord, United States v. Schoefield, 150 U.S. App. D.C. 380, 465 F.2d 560, cert. denied, 409 U.S. 881 (1972) (testimony of twelve-year-old child); Johnson v. United States, 364 A.2d 1198 (D.C. 1976) (testimony of five-or six-year-old child); Hilton v. United States, 435 A.2d 383 (D.C. 1981) (testimony of witness whose mental competency was challenged).

Alternative B likewise adds a refer nce to statutory exceptions to the rule of competency of a witness in all cases, civil and criminal. As a practical matter, such an exception is generally limited to the District of Columbia Dead Man's Statute (D.C. Code § 14-302 (1981)), which applies generally to civil situations. However, this method of drafting the rule recognizes the right of the legislature to enact further limitations. It might be noted that D.C. Code § 14-305(a) (1981) provides: "No person is incompetent to testify, in either civil or criminal proceedings, by reason of having been convicted of a criminal offense."

According to Weinstein's Evidence ¶ 601[06], only two states, Arkansas and Delaware, have adopted the Federal Rule verbatim, while Arizona, Colorado and Florida have added the language "or by statute" or similar words to the end of the first sentence. Alaska has entirely revised the rule to provide specific criteria for determining competency similar to the criteria in Alternative B above.

Alternative B is preferable in that it maintains flexibility on the part of the trial judge, which circumstances sometimes require, subject, of course, to the specific guidelines set forth in the rule.

RULE 602. Lack of Personal Knowledge

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

Comment

This rule is identical to Federal Rule 602. It generally states the District of Columbia rule that a witness must have personal knowledge of the facts to which he or she is testifying. Chapman v. Capital Traction Co., 37 App. D.C. 479 (1911).

RULE 603. Oath or Affirmation

Alternative A

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

*Alternative B

(a) All evidence shall be given under oath according to the forms of the common law.

(b) A witness who has conscientious scruples against taking an oath, may, in lieu thereof, solemnly, sincerely, and truly declare and affirm. Where an application, statement, or declaration is required to be supported or verified by an oath, the affirmation is the equivalent of an oath.

Comment

Alternative A is identical to Federal Rule 603. While it is in no way inconsistent with District of Columbia law, it is not as specific as the statutory provision in D.C. Code § 14-101 (1981).

Alternative B is, verbatim, the provisions of D.C. Code § 14-101, subsections (a) and (b). (Subsection (c) of that statute is not applicable to a rule of evidence.)

Because of the existence of the controlling statute, the Committee recommends Alternative B.

RULE 604. Interpreters

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

Comment

This rule is identical to Federal Rule 604. Although there are no District of Columbia authorities directly dealing with the subject of this rule, the Federal Rule appears to comport with the practice in this jurisdiction.

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.

Comment

This rule is identical to Federal Rule 605, which states the rule as applied by District of Columbia courts. Downey v. United States, 67 App. D.C. 192, 91 F.2d 223 (1937).

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

*Alt. A (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 her or any other juror's mind or emotions as influencing him or her to assent to or dissent from the verdict or indictment or concerning his or her 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. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which he or she would be precluded from testifying be received for these purposes.

Alt. B (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 her or any other juror's mind or emotions as influencing him or her to assent to or dissent from the verdict or indictment or concerning his or her mental processes in connection therewith, except that a juror may testify on the question of whether there were any extraneous influences which may have affected the verdict; and a juror may also testify

as to the objective conduct of another juror when the mental competency of that other juror has been properly made an issue by the presentation of other clear and incontrovertible evidence of imcompetence shortly before or after jury service. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which he or she would be precluded from testifying be received for these purposes.

Comment

Subdivision (a): At the trial. This provision is identical to Federal Rule 606(a). No cases were found from this jurisdiction dealing with the subject matter of subdivision (a), but the provision appears to be in conformance with the principles set forth in Downey v. United States, 67 App. D.C. 192, 91 F.2d 223 (1937), relating to judges acting as both witnesses and triers of fact in the same proceeding.

Subdivision (b): Inquiry into validity of verdict or indictment. Alternative A is identical to Federal Rule 606(b). The Federal Rule is similar to current District of Columbia law, although, as discussed below, there may be certain differences.

In general, Federal Rule 606(b) and present District of Columbia law both prohibit a juror from impeaching his or her own verdict subject to limited exceptions. Khaalis v. United States, 408 A.2d 313 (D.C. 1979); Sellars v. United States, 401 A.2d 974 (D.C. 1979).

Generally, the District of Columbia courts have allowed the members of a jury to testify only as to "external influences" on their verdict. If "external influences" can be read to be the equivalent of "extraneous prejudicial information" and "outside influence . . . improperly brought to bear . . ." as those terms are used in Federal Rule 606(b), the Federal Rule would appear to substantially incorporate District of Columbia practice. A review of the authorities cited in Weinstein's Evidence ¶ 606[4] indicates that the meaning of the language of the Federal Rule as applied by the cases is identical to the meaning of the "external influences" language of the District of Columbia authorities.

It should be noted, however, that the Khaalis decision also recognized an additional narrow exception permitting testimony relating to the objective conduct of a juror when the mental competency of that juror is in issue. Such an inquiry will be undertaken only when there is clear and unquestionable evidence of incompetence shortly before or after jury service. This exception permitting testimony as to objectionable conduct appears to have been specifically rejected in the Conference Committee version of Federal Rule 606(b). (See Notes of Conference Committee, House Report No. 93-1597.) In any event, it is not included in the language of the rule.

Alternative B includes this narrow exception set forth in the Khaalis decision and traces the language of Khaalis more clearly.

The committee recommends Alternative A. In so doing it recognizes that, although the language of the rule is somewhat different from the language of the District of Columbia cases, the meaning of both is identical. It is also the opinion of the committee that the narrow "mental competency" exception mentioned in Khaalis should not be codified in the rule. As was noted in Khaalis, the exception was a narrow one and was not even applied in Khaalis because the facts did not warrant it. It is felt that to include such a minor and narrow exception in the rule would be to afford it undue emphasis.

RULE 607. Who May Impeach

Alternative A

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

*Alternative B

The credibility of any witness called by a party may be impeached by that party only upon a determination by the court that the witness is unwilling, adverse, or hostile or that the party offering the witness has been taken by surprise by the witness' testimony.

Comment

Alternative A is identical to Federal Rule 607 and represents a marked departure from current District of Columbia practice as prescribed by statute, Superior Court rule, and judicial decisions of this jurisdiction. In general, District of Columbia law permits a party to impeach his or her own witness only if counsel calling the witness is surprised by the witness' testimony, D.C. Code § 14-102 (1981),[1] or if the witness is adverse

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[1] D.C. Code § 14-102 (1981) provides:

> When the court is satisfied that the party producing a witness has been taken by surprise by the testimony of the witness, it may allow the party to prove, for the purpose only of affecting the credibility of the witness, that the witness has made to the party or to his attorney statements substantially variant from his sworn testimony about material facts in the cause. Before such proof is given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he made the statements and if so allowed to explain them.

or hostile, Superior Court Civil Rule 43(b),[2] cf. United States v. Gilliam, 157 U.S. App. D.C. 375, 484 F.2d 1093 (1973). See, e.g., Gordon v. United States, __ A.2d __, No. 82-900 (D.C. September 15, 1983); Reed v. United States, 452 A.2d 1173 (D.C. 1982); Scott v. United States, 412 A.2d 364 (D.C. 1980); Parker v. United States, 363 A.2d 975 (D.C. 1976).[3]

Alternative B attempts to incorporate the provisions of Superior Court Civil Rule 43(b) and D.C. Code § 14-102 (and cases applying them) into the language of the rule. One problem created by such an attempt is the lack of any clear judicial determination that the "adverse," "unwilling" and "hostile" exception to the prohibition against impeaching one's own witness, reflected in Civil Rule 43(b), applies to criminal cases. However, the decision in United States v. Gilliam, supra seems to imply that such an exception would be applicable in criminal cases as well as civil.

Alternative B is recommended by the Committee because Alternative A would be inconsistent with D.C.

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[2] Superior Court Civil Rule 43(b) provides:

> (b) SCOPE OF EXAMINATION AND CROSS-EXAMINATION. A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief.

[3] It should be noted that the D.C. rule against impeaching one's own witness does not prohibit a party from eliciting prior inconsistent statements or other damaging information on direct examination for purposes of attempting to "take the sting out" of anticipated impeachment of the witness by the opposing party. See, e.g., Reed v. United States, supra 452 A.2d at 1179.

Code § 14-102 as interpreted by case law.[4] No recommendation was made with respect to the policies behind each alternative because of the divergence in positions on this issue within the Committee. However, with respect to any consideration of which alternative is appropriate, reference should be made to Rule 801(d)(1) and the comment thereto, since the two rules are interrelated.

Minority Statement

The Committee has recommended the alternative to the rule that encompasses the present District of Columbia practice of only permitting a party to impeach her or his own witness if that party were surprised by that witness' testimony or if the witness were adverse or hostile. The comment notes that the Committee was unanimous in this recommendation, but only because the Federal Rule language conflicted with a District of Columbia statute. However, there were a number of Committee members who felt that, for policy reasons as well, the alternative encompassing the present D.C. practice was preferable.

The rationale expressed in the Advisory Committee Note to the Federal Rule for eliminating the traditional rule does not set forth a single reason why the rigid common law rule prohibiting any impeachment of one's own witness should be replaced by an equally absolute rule permitting such impeachment in all situations. The Advisory Committee justified the language of the Federal Rule by stating "A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right [to impeach] leaves the party at the mercy of the witness and the adversary." While these may be valid reasons for rejecting a rigid rule prohibiting impeachment of a party's witness under any circumstances, they fail to provide any support for extending the right to impeach a party's witness beyond the exceptions already incorporated in the District of Columbia practice. Alternative B, which incorporates that practice, satisfies

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[4] It is possible to construe the language of D.C. Code § 14-102 as being permissive rather than mandatory -- i.e., that the statute merely prescribes one set of circumstances, on a non-exclusive basis, in which a party may impeach his or her own witness. However, the D.C. Courts have generally construed the statute to be mandatory.

all of the concerns raised in the Federal Advisory Committee Note and further avoids the evils that the absolute language of the Federal Rule embraces. If the witness were hostile or adverse, or if his or her testimony suddenly changed, the party is protected under Alternative B and the present practice. To permit impeachment of a party's own witness beyond those exceptions would permit a party to consciously set up the witness as a straw man and then knock him down with, for example, prior inconsistent statements. Such a practice has no justification whatsoever. See, e.g., Reed v. United States, supra. It certainly does not weigh in favor of an extension of the exceptions to the rule against impeaching a party's own witness beyond the thoughtful and time tested exceptions already incorporated in District of Columbia law.

The relationship of this rule with Rule 801(d)(1) should be kept in mind in considering the practical results of following the language of the Federal Rule. Under the version of Rule 801(d)(1) which is recommended by this Committee, impeachment evidence under Rule 607 could in certain situations be "bootstrapped" into affirmative evidence. Thus, not only could a witness be impeached as a straw man, the impeachment evidence could be converted into affirmative evidence under Rule 801(d)(1). Such a result would make a mockery of the orderly system of presenting a lawsuit and should be rejected.

RULE 608. Evidence of Character and Conduct of Witness

*Alt. A (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.

Alt. B (a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of 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 reputation evidence or otherwise.

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

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his or

her privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Comment

Subdivision (a): Opinion and reputation evidence of character. Alternative A is identical to Federal Rule 608(a). Federal Rule 608(a) is in accord with District of Columbia practice to the extent that it permits evidence of the character of a witness only with respect to his or her character for truthfulness or untruthfulness. McLean v. United States, 377 A.2d 74 (D.C. 1977).

Although no District of Columbia decision was found concerning the subject matter of Federal Rule 608(a)(2), which permits evidence of truthful character only after the character of the witness for truthfulness has been attacked, this provision is in line with general principles of evidence. McCormick, Evidence § 49 (2d Ed. 1972). Accordingly, this provision would also appear to comport with present District of Columbia law.

However, Federal Rule 608(a) does not conform with District of Columbia practice in permitting character to be proved by opinion as well as reputation. Current District of Columbia law permits such evidence only by means of testimony as to reputation. See, e.g., Hedgeman v. United States, 352 A.2d 926 (D.C. 1976); Stewart v. United States, 70 App. D.C. 101, 104 F.2d 234 (1939). Alternative B attempts to conform the language of the rule to District of Columbia practice by eliminating the provision permitting opinion evidence of character.

Although some questions were raised about the advisability of permitting opinion testimony relating to character and thus possibly increasing the use of such testimony, the committee feels that Alternative A more accurately reflects the realities regarding such testimony and should be adopted. See also Comment to Rule 405.

Subdivision (b): Specific instances of conduct. Subdivision (b) is identical to Federal Rule 608(b) and appears to be substantially in line with District of Columbia law.

The rule prohibits the use of extrinsic evidence to prove specific instances of conduct of a witness to impeach or support that witness' credibility. See United States v. Robinson, 174 U.S. App. D.C. 224, 530 F.2d 1076 (1976). It limits such evidence of specific instances of conduct to testimony elicited on cross-examination of either the witness whose conduct is being inquired into, or the character witness testifying. Thus, although a party may cross-examine the witness as to specific acts bearing on his or her credibility or on the credibility of the person to whose character he or she has testified, the cross-examining party must take the answer as it is given and cannot put on extrinsic evidence to rebut or support it. This is consistent with District of Columbia law. See Sherer v. United States, __ A.2d __, No. 81-735 (D.C. September 30, 1983), Slip Op. at 12; Lee v. United States, 454 A.2d 770, 775 (D.C. 1982); United States v. Akers, 374 A.2d 874, 878 (D.C. 1977).

It may be that Federal Rule 608(b) permits greater latitude than does current D.C. law as to the specific instances of conduct which may be inquired about. See Sherer v. United States, supra. The test under Federal Rule 608(b) is whether the instance is "probative of truthfulness or untruthfulness," whereas the D.C. Courts have articulated the relevant inquiry as being whether "the bad act 'bears directly upon the veracity of the witness in respect to the issues involved in the trial.'" Id., Slip Op. at 12, quoting United States v. Akers, supra; see Reed v. United States, 452 A.2d 1173, 1178 (D.C. 1982). Any difference in this regard, however, does not seem sufficiently significant to warrant departure from the Federal Rules.

As is pointed out in Weinstein's Evidence ¶ 608[07], the last paragraph of Rule 608 is in line with the majority of decisions on the issue. The question presented by the last paragraph has never been directly addressed by a District of Columbia decision, although the District of Columbia courts follow the broad principle that ". . . a defendant who takes the stand on his own behalf may not utilize the Fifth Amendment privilege in order to bar cross-examination reasonably related to the scope of direct examination." Coleman v. United States, 379 A.2d 710, 712 (D.C. 1977). There is no authority indicating that District of Columbia law would be contrary to the last paragraph of Rule 608 when the only matter testified to was credibility.

RULE 609. Impeachment by Evidence of Conviction of Crime

Alternative A

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness 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 or she was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, 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, 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, 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, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

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

*Alternative B

(a)(1) Except as provided in paragraph (2), for the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a criminal offense shall be admitted if offered, either upon the cross-examination of the witness or by evidence aliunde, but only if the criminal offense (A) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, or (B) involved dishonesty or false statement (regardless of punishment). A party establishing conviction by means of cross-examination shall not be bound by the witness' answers as to matters relating to the conviction.

(2)(A) Evidence of a conviction of a witness is inadmissible under this rule if --

(i) the conviction has been the subject of a pardon, annulment, or other equivalent procedure granted or issued on the basis of innocence, or

(ii) the conviction has been the subject of a certificate of rehabilitation or its equivalent and such witness has not been convicted of a subsequent criminal offense.

(B) In addition, no evidence of any conviction of a witness is admissible under this section if a period of more than ten years has elapsed since the later of (i) the date of the release of the witness from confinement imposed for his or her most recent conviction of any criminal offense, or (ii) the expiration of the period of his or her parole, probation, or sentence granted or imposed with respect to his or her most recent conviction of any criminal offense.

(b) For purposes of this rule, to prove conviction of crime, it is not necessary to produce the whole record of the proceedings containing the conviction, but the certificate, under seal, of the clerk of the court wherein the proceedings were had, stating the fact of the conviction and for what cause, shall be sufficient.

(c) The pendency of an appeal from a conviction does not render evidence of that conviction inadmissible under this rule. Evidence of the pendency of such an appeal is admissible.

Comment

Alternative A follows Federal Rule of Evidence 609.

Alternative B tracks D.C. Code § 14-305 (1981).[1] Alternative B is the recommended alternative because of the controlling statute.

Section 14-305 differs from the later, more restrictive Federal Rule of Evidence 609 in several respects. First, under § 14-305, evidence of a prior conviction of any felony or of a crime involving dishonesty or false statement is admissible for purposes of impeachment. § 14-305(b)(1). Under Federal Rule 609, by contrast, a felony conviction is admissible only if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant"; crimen falsi, however, always can be used. Fed. R. Evid. 609(a); see S. Graae, District of Columbia Statutory and Case Law Annotated to the Federal Rules of Evidence 6.45-.46 (1976). See generally Weinstein's Evidence ¶¶ 609[01]-[06] (1982 & Supp. 1982).

Second, § 14-305 prohibits impeachment by prior conviction on the basis of staleness only if the witness has not been convicted of any crime within the previous ten years. See § 14-305(b)(2)(B). Federal Rule 609, by contrast, bars the introduction of any conviction more than ten years old, unless the court determines that the conviction is especially probative. Fed. R. Evid. 609(b); see S. Graae, supra at 6.46-.47. See generally Weinstein's Evidence, supra ¶ 609[07].

Third, § 14-305 provides that if a witness commits a crime after obtaining a certificate of rehabilitation for another crime, the earlier crime may be used for impeachment. § 14-305(b)(2)(A)(ii). Federal Rule 609 allows impeachment by the first conviction only if the second crime is a felony. Fed. R. Evid. 609(c)(1); see S. Graae, supra at 6.47. See generally Weinstein's Evidence, supra ¶ 609[08].

Section 14-305 contains no provision regarding impeachment by a juvenile adjudication. The D.C. Court of Appeals, however, has recognized that such adjudications may be used to impeach a witness for bias. Tabron v. United States, 410 A.2d 209, 211-13 (D.C.

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[1] Subpart (a) of D.C. Code § 14-305 has been deleted since it pertains to competency rather than to the subject matter of this rule, the remaining subparts of the statute have been re-lettered, and the word "Section" has been changed to "rule" in subparts (a), (b) and (c) of the proposed rule.

1979), appeal after remand, 444 A.2d 942 (1982); Lewis v. United States, 393 A.2d 109, 117-18 (D.C. 1978), aff'd on rehearing, 408 A.2d 303, 311-12 (1979); Smith v. United States, 392 A.2d 990, 992-93 (D.C. 1978); see Davis v. Alaska, 415 U.S. 308, 320 (1974); Fed. R. Evid. 609(d). See generally Weinstein's Evidence, supra ¶ 609[09].

Finally, both provisions permit admission of evidence of a conviction from which an appeal is pending -- as well as evidence of the filing of the appeal. See § 14-305(d); Fed. R. Evid. 609(e); S. Graae, supra at 6.48. See generally Weinstein's Evidence, supra ¶ 609[10].

Neither § 14-305 nor Federal Rule 609 addresses the question whether the government can use a constitutionally infirm conviction to impeach a witness. The Supreme Court has prohibited such use of a conviction at least when the defendant has lacked assistance of counsel. See Loper v. Beto, 405 U.S. 473, 483 (1972). See generally Weinstein's Evidence, supra ¶ 609[11].

Twenty-three states have adopted rules governing impeachment by prior conviction more or less along the lines of Federal Rule 609. See generally id. ¶ 609[12].

RULE 610. Religious Beliefs or Opinions

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

Comment

The proposed rule is identical to Federal Rule of Evidence 610.

Before adoption of the Federal Rule, no reported District of Columbia cases had dealt with the issue of impeachment on the basis of religious beliefs. The rule follows accepted modern views. "The purpose of the rule is to guard against the prejudice which may result from disclosure of a witness's faith." United States v. Sampol, 204 U.S. App. D.C. 349, 394, 636 F.2d 621, 666 (1980). The rule, however, does not prohibit admission of evidence of religious adherence that goes to a material issue other than veracity. See generally Weinstein's Evidence ¶ 610[01] (1982 & Supp. 1982).

Twenty-one states have adopted Federal Rule 610 substantially verbatim. See id. ¶ 610[02].

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 or her 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.

Comment

The proposed rule follows Federal Rule of Evidence 611 and is consistent with District of Columbia case law.

Subdivision (a): Control by court. District of Columbia courts repeatedly have recognized that the trial court has discretion to control the interrogation of witnesses in the interests of pertinence to the case, fairness to the witnesses, and orderliness of the trial. See, e.g., Tinker v. United States, 135 U.S. App. D.C. 125, 127-28, 417 F.2d 542 544-45, cert. denied, 396 U.S. 864 (1969); Springer v. United States, 388 A.2d 846, 854-57 (D.C. 1978); Rogers v. United States, 174 A.2d 356, 358-59 (D.C. Mun. App. 1961). The court's discretion is, of course, limited by a party's

constitutional right to a meaningful opportunity for cross-examination. See, e.g., Davis v. Alaska, 415 U.S. 308, 315-17 (1974); Alford v. United States, 282 U.S. 687, 691-94 (1931); Sherer v. United States, __ A.2d __, No. 81-735 (D.C. Sept. 30, 1983), Slip Op. at 8-9, 12-13. See generally S. Graae, District of Columbia Statutory and Case Law Annotated to the Federal Rules of Evidence, 6.69-.73 (1976); Weinstein's Evidence ¶ 611[01] (1982 & Supp. 1982).

Subdivision (b): Scope of cross-examination. This jurisdiction long has followed the view exposed in federal and most state courts that limits cross-examination to matters brought out on direct examination of the witness. See, e.g., Dixon v. United States, 112 U.S. App. D.C. 366, 367-68, 303 F.2d 226, 227-28 (1962) (per curiam); Washington Ry. & Electric Co. v. Dittman, 44 App. D.C. 89, 92-93 (1915); Hackett v. United States, 92 A.2d 766, 767-68 (D.C. Mun. App. 1952). Counsel, of course, must have an opportunity properly to explore credibility. See, e.g., District of Columbia v. Clawans, 300 U.S. 617, 630-32 (1937); United States v. Shumate, 139 U.S. App. D.C. 98, 99-100, 429 F.2d 777, 778-79 (1970) (per curiam); White v. United States, 297 A.2d 766, 767-68 (D.C. 1972); Solar v. United States, 94 A.2d 34, 36-38 (D.C. Mun. App. 1953). See generally S. Graae, supra at 6.73-.84; Weinstein's Evidence, supra ¶ 611[02]. Rule 611(b) does not address the extent to which the privilege against self-incrimination may restrict the scope of cross-examination of a party or other witnesses. See generally id. ¶¶ 611[03]-[04].

Subdivision (c): Leading questions. District of Columbia cases, of course, permit the use of leading questions on cross-examination. See, e.g., Ewing v. United States, 77 U.S. App. D.C. 14, 20, 135 F.2d 633, 639 (1942), cert. denied, 318 U.S. 776 (1943); Davenport v. District of Columbia, 65 A.2d 209, 210 (D.C. Mun. App.), appeal denied, 85 U.S. App. D.C. 430, 180 F.2d 909 (1949) (per curiam). In the Court's discretion, counsel also may use leading questions on direct examination to interrogate a reluctant, hostile, or adverse witness. See, e.g., Green v. United States, 121 U.S. App. D.C. 111, 112-13, 348 F.2d 340, 341-42, cert. denied, 382 U.S. 930 (1965); City-Wide Trucking Corp. v. Ford, 113 U.S. App. D.C. 198, 199-200, 306 F.2d 805, 806-07 (1962); Superior Court Civil Rule 43(6). See generally S. Graae, supra at 6.84-.85; Weinstein's Evidence, supra ¶ 611[05].

State adoption. Seventeen states have adopted Federal Rule 611 verbatim or with minor modifications. Four states, rejecting Rule 611(b), have adhered to the minority view permitting cross-examination, beyond the scope of direct examination, on any relevant matter. See generally id. ¶ 611[06].

RULE 612. Writing Used to Refresh Memory

* Alternative A

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, or by Superior Court Criminal Rule 26.2, if a witness uses a writing to refresh his or her 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 interest 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.

Alternative B

Except as otherwise provided in criminal proceedings by section 3500

of title 18, United States Code, or by Superior Court Criminal Rule 26.2, if a witness uses a writing while testifying to refresh his or her memory for the purpose of testifying, 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.

Comment

With the exception of the reference to Superior Court Criminal Rule 26.2, Alternative A tracks Federal Rule of Evidence 612; and Alternative A is the recommended rule. Alternative B reflects District of Columbia common law, which differs somewhat from Federal Rule 612.

Proposed Rule 612 in general. The common law in the District of Columbia and elsewhere long has given the trial court discretion to allow a witness to use a writing to refresh his or her memory for the purpose of testifying. See, e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 233 (1940); Robinson v. United States, 113 U.S. App. D.C. 372, 376-77, 308 F.2d 327, 331-32 (1962), cert. denied, 374 U.S. 836 (1963); Dobson v. United States, 426 A.2d 361, 365-66 (D.C. 1981); Parry-Hill v. Downs, 148 A.2d 715, 717 (D.C. Mun. App. 1959). Rule 612 presupposes but does not expressly state the permissibility of this practice.

See generally Weinstein's Evidence ¶ 612[01] (1982 & Supp. 1982).[1]

Rule 612 and the common law both differentiate between a witness who consults a writing before trial and one who does so while testifying. If the witness examines the document on the stand, the adverse party then has a right to use the document for cross-examination and to present it to the jury. United States v. Socony-Vacuum Oil Co., 150 U.S. at 233; Laas v. Scott, 26 App. D.C. 354, 360 (1905); Parry-Hill v. Downs, supra, 148 A.2d at 717. Proposed Rule 612 sets forth specific procedures to implement this right. See generally Weinstein's Evidence, supra ¶¶ 612[01], [04]-[05].[2]

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[1] Rule 612 does not address the proper method of using a writing to refresh the memory of one's witness; rather, it addresses the rights of the adverse party when a writing has been so employed. D.C. case law, however, has established certain rules for the use of a writing to refresh memory.

For example, the offering party cannot "refresh a witness' memory" by reading the document aloud in the presence of the jury. See, e.g., Young v. United States, 94 U.S. App. D.C. 62, 67-68, 214 F.2d 232, 237-38 (1954). The offering party can use the document to impeach the witness only if surprised by the testimony. See id. at 68, 214 F.2d at 238; D.C. Code § 14-102 (1981).

If the writing refreshes the witness' memory, the offering party may not introduce the writing in evidence to corroborate the witness' testimony. E.g., Gunning v. Cooley, 58 App. D.C. 304, 306, 30 F.2d 467, 469 (1929), aff'd, 281 U.S. 90 (1930); Killeen v. United States, 224 A.2d 302, 305 (D.C. 1966). If not, however, the offering party may have the writing (or the testimony based upon it) admitted as past recollection recorded. See, e.g., Tatum v. United States, 101 U.S. App. D.C. 373, 375-76, 249 F.2d 129, 131-32 (1957), cert. denied, 356 U.S. 943 (1958); Belcher v. Jenkins Engineering Co., 123 A.2d 215, 215-16 (D.C. Mun. App. 1956).

[2] Alternative A, which follows Federal Rule 612, states that the adverse party may "introduce in evidence those portions which relate to the testimony of the witness." On its face, this language seems quite broad. Weinstein is of the view, however, that the phrase should be limited by the other rules of evidence:

[Footnote continued on following page]

As to a witness who refreshed his or her recollection with a writing before trial, at common law the calling party was not required to produce the document at trial, although failure to do so could cause the testimony to be given little weight. See Lowrie v. Taylor, 27 App. D.C. 522, 525-26 (1906); McCormick v. Cleal, 12 App. D.C. 335, 338 (1898); see also McGill v. United States, 106 U.S. App. D.C. 136, 138, 270 F.2d 329, 331 (1959), cert. denied, 362 U.S. 905 (1960). Alternative A, following Federal Rule 612, permits compulsory production of a writing used to refresh memory before trial in limited circumstances -- "if the court in its discretion determines it is necessary in the interest of justice." Alternative B codifies the older D.C. practice. See generally Weinstein's Evidence, supra ¶¶ 612[01], [05]. In light of the breadth of modern civil discovery practices and the limited applicability of Rule 612 to criminal proceedings, the significance of the foregoing issue, and thus, the difference between D.C. law and Federal Rule 612, seems diminished. See generally id. ¶¶ 612[01]-[03].

Relationship to Criminal Rules. Coexisting with many other statutes, rules, and decisions governing disclosure between parties, see generally id. ¶¶ 612[02]-[03], Proposed Rule 612, like Federal Rule 612, specifically excludes from its coverage any statements governed by the Jencks Act, 18 U.S.C. § 3500.[3] Even

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[Footnote 2 continued from preceding page]

> [T]his provision must be understood as allowing the jury to examine the writing: (1) as a guide to assessing the credibility of the witness and (2), to the extent that it would otherwise have been admissible, for its normal evidential value. An instruction to that effect should be given upon request.

Weinstein's Evidence, supra, ¶ 612[05], at 612-43. With this understanding, in the interest of uniformity, Alternative B also has been drafted retaining this language from Federal Rule 612.

[3] 18 U.S.C. § 3500 (1982) provides in full:

[Footnote continued on following page]

before the adoption of the Federal Rules of Evidence, the Jencks Act was regarded as the exclusive avenue for production of statements of government witnesses in federal criminal cases. See McGill v. United States,

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[Footnote 3 continued from preceding page]

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified or direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be

[Footnote continued on following page]

supra, 106 U.S. App. D.C. at 138, 270 F.2d at 331. The Jencks Act applies in "any criminal prosecution brought by the United States" -- in U.S. District Court and D.C. Superior Court alike. Id. § 3500(a); see, e.g., United States v. Jackson, 430 A.2d 1380, 1382 (D.C. 1981). Unlike the states which have dropped the opening proviso of Rule 612, see generally Weinstein's Evidence, supra ¶ 612[06], it therefore appears that the District of Columbia should retain it.

Both Alternatives A and B modify Federal Rule 612 by adding a second proviso regarding Superior Court

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[Footnote 3 continued from preceding page]
reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement," as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means --

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Criminal Rule 26.2,[4] which tracks Federal Rule of Criminal

[4] Superior Court Criminal Rule 26.2 provides in full:

"PRODUCTION OF STATEMENTS OF WITNESSES

(a) MOTION FOR PRODUCTION. After a witness other than the defendant has testified on direct examination, the Court, on motion of a party who did not call the witness, shall order the prosecutor or the defendant and his attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.

(b) PRODUCTION OF ENTIRE STATEMENT. If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the Court shall order that the statement be delivered to the moving party.

(c) PRODUCTION OF EXCISED STATEMENT. If the other party claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the Court shall order that it be delivered to the Court in camera. Upon inspection, the Court shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over his objection shall be preserved by the prosecutor, and, in the event of a conviction and an appeal by the defendant, shall be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.

(d) RECESS FOR EXAMINATION OF STATEMENT. Upon delivery of the statement to the moving party, the Court, upon application of that party, may recess proceedings in the trial for the examination of such statement and for preparation for its use in the trial.

(e) SANCTION FOR FAILURE TO PRODUCE STATEMENT. If the other party elects not to comply with an order to deliver a statement to the moving party, the Court shall order that the testimony of the witness be stricken

[Footnote continued on following page]

Procedure 26.2.

The explanation for this addition lies in the history of Criminal Rule 26.2. In 1980, some years after the adoption of the Federal Rules of Evidence, Federal Rule of Criminal Procedure 26.2 became effective as promulgated by the Supreme Court. Rule 26.2 "place[s] in the criminal rules the substance of what is now 18 U.S.C. § 3500 (the Jencks Act)." Advisory Committee Note, Fed. R. Crim. P. 26.2. Rule 26.2, moreover, following United States v. Nobles, 422 U.S. 225 (1975), mandates, in certain circumstances, the production of statements of defense witnesses, as well as those of government witnesses.[5] Advisory Committee Note, Fed. R. Crim. P. 26.2.

As proposed by the Supreme Court, Rule 26.2 did not by its terms supersede the Jencks Act, and Congress has not repealed that Act. Nor has Federal Rule of

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[Footnote 4 continued from preceding page]
from the record and that the trial proceed, or, if it is the prosecutor who elects not to comply, shall declare a mistrial if required by the interest of justice.

(f) DEFINITION. As used in this rule, a "statement" of a witness means:

(1) a written statement made by the witness that is signed or otherwise adopted or approved by him;

(2) a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or

(3) a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.

[5] Effective August 1, 1983, new Federal Rule of Criminal Procedure 12(i) makes Rule 26.2 applicable in pretrial suppression hearings. The D.C. Superior Court is presently considering adoption of an analog to Fed. R. Crim. P. 12(i).

Evidence 612 been modified to reflect the advent of Criminal Rule 26.2. The state of federal law concerning the relationship among these rules, therefore, is unclear. See generally id. ¶ 612[02].

Weinstein is of the view that Criminal Rule 26.2 effectively repealed the Jencks Act, and the failure to conform Federal Rule of Evidence 612 should be interpreted as eliminating altogether the opening proviso concerning the Act. Id. ¶ 612[02], at 612-25. This interpretation, however, has two flaws, particularly as applied to proposed rules of evidence for the District of Columbia. First, it assumes that Federal Rule of Criminal Procedure 26.2 repealed the Jencks Act by implication. Even if Federal Rule 26.2 supersedes the Jencks Act in federal court, it is unlikely that Superior Court Criminal Rule 26.2 has superseded the Jencks Act as it applies in that court. Inasmuch as both the Jencks Act and Superior Court Criminal Rule 26.2 are on the books, it seems preferable to include both in the opening proviso to Rule 612.

Second, the elimination of such a proviso would create an unnecessary and potentially confusing overlap between the Jencks Act and Superior Court Criminal Rule 26.2, on the one hand, and Rule 612, on the other. Although similar in procedure, the substantive scope of these rules differs in important respects -- such as the witnesses and the types of statements to which each applies. In light of the particular concerns relating to the scope of criminal discovery, it seems appropriate that in any case of inconsistency, the criminal rules should prevail.

Accordingly, both Alternatives A and B of Proposed Rule 612 retain the proviso concerning the Jencks Act and add a second proviso concerning Superior Court Criminal Rule 26.2. Any conflict that may exist between the Jencks Act and Criminal Rule 26.2 is best resolved through channels other than the proposed rules of evidence.

State adoption. Fourteen states have followed Federal Rule 612, without the Jencks Act reference and seven the substantively similar Uniform Rule 612. See generally Weinstein's Evidence, supra ¶ 612[06].

RULE 613. Prior Statements of Witnesses

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

*Alt B (a) Examining witness concerning prior inconsistent statement. Before examining a witness concerning a prior inconsistent statement made by the witness, whether written or not, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and the witness must be asked whether or not he or she made the statement and if so be allowed to explain it.

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

Comment

Alternative A is identical to Federal Rule 613(a), except that the language "except as otherwise required by statute" has been added to avoid a conflict between the rule, if it is adopted, and D.C. Code § 14-102 (1981) (discussed infra).

Federal Rule 613(a) changed the traditional rule as to prior inconsistent statements and their use for impeachment purposes to the extent that counsel no longer is required to show a witness a prior inconsistent statement or disclose its contents before examining

the witness thereon. Thus, impeachment on cross-examination by contrary verbal or written statements elsewhere made can be undertaken without preliminarily directing the attention of the witness to the facts surrounding the statements. Under the Federal Rule, the witness must be given an opportunity to explain or deny the evidence and the opposing party given an opportunity to examine the witness only if counsel seeks to admit extrinsic evidence of a prior inconsistent statement.

The traditional practice prior to the Federal Rule, as reflected in Alternative B, still applies in the District of Columbia. The courts of this jurisdiction have required that a foundation be laid before a witness may be cross-examined about a prior inconsistent statement. See, e.g., Troublefield v. United States, 131 U.S. App. D.C. 153, 403 F.2d 176 (1968); Gordon v. Thomas, 63 U.S. App. D.C. 148, 70 F.2d 752 (1934); Mostyn v. United States, 62 U.S. App. D.C. 22, 64 F.2d 145 (1933). The required foundation consists of directing the attention of the witness to the time when, place where, and person to whom the alleged inconsistent statement was made, and asking the witness whether under those circumstances he or she made substantially the statement. See Arnstein v. United States, 54 U.S. App. D.C. 199, 296 F. 946 (1924). In the absence of this preliminary foundation, counsel cannot cross-examine on the statement for impeachment purposes; nor can extrinsic evidence to prove the prior statement be admitted. If the witness is confronted with the prior inconsistent statement and a proper foundation is otherwise laid, cross-examination on the statement or extrinsic evidence thereof is permissible. See Fireman's Insurance Co. of Washington, D.C. v. Henry Fuel, P.C., 245 A.2d 127 (D.C. 1968).

The current District of Columbia rule is also grounded in D.C. Code § 14-102 (1981),[1] which allows

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[1] D.C. Code § 14-102 (1981) provides:

> When the Court is satisfied that the party producing a witness has been taken by surprise by the testimony of the witness, it may allow the party to prove, for the purpose only of affecting the credibility of the witness, that the witness has made to the party or to his attorney statements substantially variant

[Footnote continued on following page]

evidence of prior inconsistent statements when a party's own witness "surprises" that party with his or her testimony, and requires that a foundation be laid prior to this proof being admitted.

In light of D.C. Code § 14-102 (1981), the Committee recommends Alternative B.

Minority Statement

Although the Notes of the Advisory Committee on the Proposed Federal Rules characterize the requirement that a foundation be laid before impeaching a witness with a prior inconsistent statement as "a useless impediment to cross-examination," a careful consideration of the practical applications of that requirement demonstrates its usefulness. To allow an attorney to cross-examine a witness with respect to a prior inconsistent statement without properly identifying such prior statement can only lead to confusion on the part of the witness and needless expenditure of court time to clarify such confusion. As a practical matter, laying a foundation for examination on a prior inconsistent statement involves only a minimum of time and effort by the court and counsel and avoids the clear danger of confusion on the part of the witness or the trier of fact. Alternative B is thus clearly preferable.

[Footnote 1 continued from preceding page]
from his sworn testimony about material facts in the cause. Before such proof is given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he made the statement and if so allowed to explain them.

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.

Comment

This provision is identical to Federal Rule 614, and is consistent with present District of Columbia practice.

Subdivision (a): Calling by Court. In both civil and criminal cases, a judge's authority to call witnesses is well established if the judge believes that their testimony is essential to a just and proper decision and the parties have failed to provide such testimony. See Bowman v. Roycel's Rental, Inc. and Tim Rich, No. SC14525-82 (D.C. Sup. Ct. October 28, 1982), 110 Wash. L. Rep. 2757 (December 22, 1982). Note that the rule states that the Court "may" call a witness on its own, and thus is permissive rather than mandatory. Concomitantly, the Court cannot dismiss an action because it insists that a party call a witness and the party fails to do so. See Fortune v. Fortune, 138 A.2d 390 (D.C. Mun. App. 1958).

Subdivision (b): Interrogation by Court. That the Court may examine a witness called by it or by a party is also well established, although the rule does not permit the Court to assume the role of an advocate, analyst or witness. See, e.g., United States v. Barbour, 137 U.S. App. D.C. 116, 420 F.2d 1319 (1969); Jackson v. United States, 117 U.S. App. D.C. 325, 329 F.2d 893 (1964); Blunt v. United States, 100 U.S. App. D.C. 266, 244 F.2d 355 (1957).

Subdivision (c): Objections. Like sections (a) and (b) of this Rule, the D.C. practice regarding section (c) comports with the Federal Rule. Objections to the calling of witnesses or interrogation by the Court should be made, and be permitted to be made, fully and accurately, but in a manner which does not cause embarrassment to counsel, the court or any party. See Billeci v. United States, 87 U.S. App. D.C. 274, 184 F.2d 394 (1950).

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 the party's cause.

Comment

Federal Rule 615 makes it mandatory for the Court to order witnesses excluded from the trial when requested by a party to the action unless one of the three exceptions applies. Bedrosian v. Wong Kok Chung, 33 A.2d 811 (D.C. Mun. App. 1943), can be read as differing from the Federal Rule in that it states that the question of exclusion is within the Court's discretion. However, prevailing practice in the District of Columbia seems to conform to Federal Rule 615. Accordingly, notwithstanding Bedrosian, Federal Rule 615 and present District of Columbia practice appear to be consistent.

RULE 701. Opinion Testimony by Lay Witness

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

Comment

The proposed rule is identical to Federal Rule 701. District of Columbia courts have applied the principles embodied in Federal Rule 701 in a number of contexts. See, e.g., Mark Keshishian & Sons, Inc. v. Washington Square, Inc. 414 A.2d 834 (D.C. 1980) (owner of property may testify to estimate of its value); Hartford Accident and Indemnity Co. v. Dikomey Mfg. Jewelers, Inc., 409 A.2d 1076 (D.C. 1979) (owner of property may testify to estimate of its value); Woolard v. District of Columbia, 62 A.2d 640 (D.C. Mun. App. 1948) (police officer may testify to whether person was intoxicated based on personal observation); Life Insurance Co. of Virginia v. Hermann, 35 A.2d 828 (D.C. Mun. App. 1944) (lay person may testify to mental capacity based on personal observation). Extrapolating from these cases, it appears that District of Columbia law is consistent with Federal Rule 701.

Minority Statement

The minority questions the statement in the comment that the proposed rule is consistent with the common law in the District of Columbia. The proposed rule attempts to express in simple and broad terms a test which will somehow encompass all the exceptions to the rule against lay opinion testimony that have evolved over many years of thoughtful judicial interpretation. As a result, it is in some ways broader and in some ways more restrictive than current District of Columbia practice.

The courts of this jurisdiction have consistently acknowledged the general prohibition against opinion testimony, see, e.g., Universal Airline v. Eastern Air

Lines, 88 U.S. App. D.C. 219, 188 F.2d 993, 1000 (1951). However, certain specific exceptions to that rule have been carved out over the years. These exceptions include the opinion of an owner as to the value of his property, and opinions regarding drunkenness, speed, mental competency and handwriting. The proposed rule is not limited to these time-tested and recognized exceptions, but is expanded into situations not contemplated by judicial decisions.

Perhaps more serious, however, is the possibility that the rule will exclude some of the common law exceptions. As an example, the admission of an owner's testimony as to value is not based on any actual knowledge or expertise the owner may have regarding the value of his property but on a judicially recognized exception to the rule. The owner's lack of any real knowledge merely goes to the weight of his or her testimony. Hartford Accident & Indemnity Co. v. Dikomey Mfg. Jewelers, Inc., supra. Thus, the requirement in the rule that the opinions be "rationally based" on the perceptions of the witness might, in some cases, be read to exclude the owner's testimony as to value. The minority would hope that if this rule is adopted, the judicial interpretations of this rule would indeed be consistent with present District of Columbia practice, and would recognize the specific common law exceptions now existing.

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.

Comment

This provision is identical to Federal Rule 702. District of Columbia courts have generally articulated the test for whether expert testimony is admissible as being that "the subject dealt with must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman . . . ." See, e.g., Washington Hospital Center v. Martin, 454 A.2d 306, 308 (D.C. 1982) (en banc), quoting Waggaman v. Forstmann, 217 A.2d 310, 311 (D.C. App. 1966). It is possible to construe the language of Federal Rule 702 as being more liberal in allowing expert testimony than the test formulated by the D.C. courts. However, the Notes of Advisory Committee on Proposed Federal Rules of Evidence, Rule 702 indicate that the test embodied in Federal Rule 702 is intended to be substantially similar to that utilized in the District of Columbia. Also, in District of Columbia v. Davis, 386 A.2d 1195 (D.C. 1978), the Court of Appeals, after articulating the traditional District of Columbia test, stated: "The test is whether such testimony would aid the trier of fact in the search for the truth." Id. at 1200. See also District of Columbia v. Barriteau, 399 A.2d 563, 569 (D.C. 1978). Douglas v. United States, 386 A.2d 289, 295 (D.C. 1978). Accordingly, Federal Rule 702 appears to be consistent with present District of Columbia law.

Minority Statement

The minority concurs in the Committee recommendation only if the court includes in the official comment to the rule the statement in the Committee comment that the language in the proposed rule that the expert testimony "will assist the trier of fact . . . ." is the functional equivalent of the language in the District of Columbia decisions requiring that the subject of

expert testimony be "beyond the ken of the average layman." On their face, the two phrases do not appear to be identical and if there is any question about their definitions, the minority would strongly suggest the adoption of an alternative Rule 702, stating:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue and if the subject dealt with is beyond the ken of the average layman, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In this day of "trial by experts" on even the most mundane issues, the approach set forth in the District of Columbia decisions limiting expert testimony to matters beyond the ken of the average layman is a salutory one and should not be abandoned.

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.

Comment

The proposed rule is identical to Federal Rule 703.

District of Columbia courts have applied the principles embodied in Federal Rule 703 in the context of expert medical testimony which is based on reports of others. See, e.g., Jenkins v. United States, 113 U.S. App. D.C. 300, 307 F.2d 637 (1962). See also, Smith v. United States, 318 A.2d 891 (D.C. 1974); Brown v. United States, 126, U.S. App. D.C. 134, 375 F.2d 310 (1966), cert. denied, 388 U.S. 915 (1967).

It has similarly been held that, subject to the discretion of the court, an expert testifying to the value of property taken in an eminent domain proceeding may rely on and testify to information about other sales, even though he did not have personal knowledge of the prices or other circumstances or details of them. District of Columbia Redevelopment Land Agency v. 61 Parcels of Land, 98 U.S. App. D.C. 367, 235 F.2d 864 (1956).

In Jenkins v. United States, supra, in a statement not expressly limited to medical testimony, the court stated:

> [W]e agree with the leading commentators that the better reasoned authorities admit opinion testimony based, in part, upon reports of others which are not in evidence but which the expert customarily relies upon in the practice of his profession. (Footnotes omitted.)

307 F.2d at 641.

Based on the foregoing, it appears that District of Columbia law is consistent with Federal Rule 703.

Minority Statement

The Committee comment states that the proposed rule is consistent with District of Columbia case law and practice. Indeed, no local decision exists specifically rejecting the approach of the rule. However, the District of Columbia decisions on this issue have not had to deal with many of the almost limitless possibilities the language of the proposed rule suggests. The District of Columbia cases on the subject have been limited to situations in which a physician relied on the opinions of other physicians in medical reports to reach a diagnosis or conclusion, and in which a real estate expert relied on the prices in real estate sales with which he was not involved to reach an opinion as to the value of a piece of property. See, e.g., Brown v. United States, supra; District of Columbia R.L.A. v. 61 Parcels of Land, supra. Thus the District of Columbia courts have not had the opportunity to evaluate the applicability of the principles of the proposed rule in terms of the myriad situations in which an expert might be offered beyond the subjects of medical or real estate valuation testimony. Nevertheless, the language of the earlier opinions indicates that the District of Columbia courts might not apply the overly broad approach of the proposed rule in all situations. The Brown decision held that medical expert testimony may be based on reports of others ". . . . which are not in evidence but which the expert customarily relies upon in the practice of his profession." Brown v. United States, supra, 375 F.2d at 318 (quoting from Jenkins v. United States, 113 U.S. App. D.C. 300, 304, 307 F.2d 637, 641 (1962) (emphasis supplied). The District of Columbia R.L.A. opinion permitted the real estate expert to testify based in part on his knowledge of other sales, but noted:

> The admission of such testimony will be subject to the discretion of the trial court, not only as to questions concerning comparability or remoteness, but also as to whether the expert's sources of information are reliable enough to warrant

> a relaxation of the rule against hearsay evidence.

235 F.2d at 866.

In contrast to the language of these decisions, the proposed rule provides that an expert may rely on facts not admissible in evidence "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. . . ." (emphasis supplied). This difference in language between the District of Columbia decisions and the proposed rule is significant. The Brown opinion allows the expert to rely on reports of others if such reports are customarily relied upon by the expert in the practice of his profession. That holding is limited to reports and is therefore more narrow than the proposed rule. More importantly, it makes clear that the facts relied upon must be those normally relied upon in the practice of the expert's profession. Thus, our courts have had no difficulty in permitting a physician to give a medical opinion based on the diagnoses of other physicians, since such diagnoses are precisely what the witness would rely on in making life and death decisions in his or her practice of medicine. Likewise, the District of Columbia courts recognize that a real estate agent would normally rely on hearsay evidence of other sales in making decisions critical to his trade.

The proposed rule does not make the distinction between facts relied upon by the expert in the actual practice of his profession and facts normally relied upon by those in the expert's field in reaching opinions or inferences for purposes of testimony only. For example, an economist does not, as a rule, prepare evaluations of expected lost income of individuals except in connection with testifying in judicial proceedings. In preparing such evaluations, economists often rely on sources of material that are clearly inadmissible and of questionable validity. Nevertheless, these economists can and sometimes do testify that their source materials are customarily relied upon by those in their profession, in preparing such evaluations relating to legal proceedings. This scenario can be applied to the myriad types of experts who now testify in our courts and whose reliance on inadmissible materials is not in connection with the daily practice of their professions, but, rather, merely for the purposes of reaching an opinion relating to litigation.

It is submitted that the writers of the District of Columbia opinions on this subject did not intend the principle to be expanded this far and, indeed, it appears that the drafters of the Federal Rule did not intend such a broad application. The Notes of the Advisory Committee on Proposed Rule 703 state:

> If it be feared that enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data "be of a type reasonably relied upon by experts in the particular field." The language would not warrant admitting in evidence the opinion of an "accidentologist" as to the point of impact in an automobile collision based on statements of bystanders, since this requirement is not satisfied.

The fact is, however, that the language of the rule does not exclude the testimony of such an "accidentologist" based on statements of eyewitnesses if the accidentologist could establish, as he probably could, that those in his field often rely on the statements of such witnesses in reaching opinions or inferences as to the cause of accidents. Thus, the safeguard supposedly built into the proposed rule just does not exist.

An alternative to the proposed rule which would incorporate both the policy set forth in the District of Columbia decisions and the safeguards missing from the Federal Rule would be the most sensible approach for this jurisdiction. Such an alternative is proposed as follows:

> 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 at or before the hearing. If of a type customarily relied upon by experts in the particular field in the practice of their profession and not relied upon solely in reaching opinions

or inferences in legal proceedings, the facts or data need not be admissible in evidence.

RULE 704. Opinion on Ultimate Issue

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

Comment

The proposed rule is identical to Federal Rule 704. The D.C. Court of Appeals has held that "although it is objectionable to pose questions to an expert which in effect submit the whole case to him, an expert may state his opinion concerning ultimate facts to the extent necessary to aid the jury." Beach v. United States, __ A.2d __, No. 82-1162 (D.C. September 19, 1983), Slip Op. at 4-5. See Lampkins v. United States, 401 A.2d 966, 970 (D.C. 1979). Accordingly, Federal Rule 704 seems consistent with current District of Columbia law.

RULE 705. Disclosure of Facts or Data Underlying Expert Opinion

Alternative A

The expert may testify in terms of opinion or inference and give his or her 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.

Alternative B

The expert may not testify in terms of an opinion or inference and give his or her reasons therefor until a foundation has been laid by specifying the facts or data on which the expert has relied.

Comment

Federal Rule 705, to which Alternative A is identical, changed orthodox American practice by eliminating the requirement of mandatory preliminary disclosure of the facts or data underlying an expert's opinion. Under Rule 705, the underlying facts and data may be preliminarily disclosed, but such disclosure is not required, unless the court orders otherwise. Of course, the expert may be required to disclose the underlying facts or data on cross-examination. See Weinstein's Evidence ¶ 705[01].

One of the principal purposes of Federal Rule 705 was to reduce the need for and use of hypothetical questions, which have been criticized by Wigmore and many others "as encouraging partisan bias, affording an opportunity for summing up in the middle of the case, and as complex and time consuming." Notes of Advisory Committee on Proposed Federal Rules of Evidence, Rule 705; Weinstein's Evidence, supra.

It appears that present District of Columbia law follows the orthodox rule of requiring preliminary disclosure of the facts and data underlying an expert's opinion, and is thus inconsistent with Rule 705. See Guaranty Development Co. v. Circle Paving Co., 83 A.2d 160 (D.C. Mun. App. 1951), in which the court held that

permitting an expert to testify that work was performed in accordance with the specifications of the D.C. Highway Department was erroneous; "plaintiff should first have shown what the specifications required and then develop by evidence the particulars in which the work conformed to such requirements." Id. at 163. Cf. United States v. Tyler, 376 A.2d 798 (D.C.), appeal after remand, 392 A.2d 511 (1977); Bethea v. United States, 365 A.2d 64 (D.C. 1976), cert. denied, 433 U.S. 911 (1977). But see W.B. Moses & Sons v. Lockwood, 54 App. D.C. 115, 295 F. 936, 939 (1924) ("The course usually pursued, after showing the competency of the witness to speak, is to ask for his opinion, and, having received it, to follow by an inquiry as to the facts on which he based it."). Also, as noted, a principal purpose of Federal Rule 705 was to reduce the need for hypothetical questions, while the courts of this jurisdiction have adhered to the required use of hypothetical questions were the expert witness is not testifying from personal knowledge. See, e.g., John McShain, Inc. v. L'Enfant Plaza Properties, 402 A.2d 1222, 1226 (D.C. 1979).

Alternative B reflects current District of Columbia law.

The Committee recommends the adoption of Alternative A for a number of reasons. First, the criticism of hypothetical questions by Wigmore (J. Wigmore, Evidence § 686 (3d Ed. 1940)) and others seems valid. Second, the liberal discovery of experts permitted under the discovery rules diminishes the need for mandatory preliminary disclosure of underlying facts and data. Third, as a practical matter, many lawyers will continue to preliminarily draw out the facts and data underlying the expert's opinions, as a matter of logical and persuasive presentation; and, in any event, Federal Rule 405 vests the court with the authority to require such an approach where it deems appropriate. Finally, where there is a question as to whether there exists a proper basis on which the expert may testify, it would seem that the witness' competency may be challenged under Rule 602 and/or 703.

At least seventeen states have adopted rules which are identical or similar to Federal Rule 705; and the approach embodied in the Federal Rule has also been incorporated into the Model Expert Testimony Act (§ 9), the Model Code of Evidence (Rule 409), and the Uniform Rules of Evidence (Rule 58). See Weinstein's Evidence ¶ 705[01] and [02].

Minority Statement

As the Committee comment recognizes, the proposed rule is inconsistent with current District of Columbia practice requiring that the basis of the expert's conclusions be set forth, either in the form of a hypothetical question or by disclosing in the record the facts within the knowledge of the witness. Giant Food Stores, Inc. v. Fine, 106 U.S. App. D.C. 95, 269 F.2d 542, 543 (1959); John McShain, Inc. v. L'Enfant Plaza Properties, Inc., supra.

Although the Committee recommends the federal version of the rule, it is difficult to see the rationale behind that recommendation other than a rather blind desire for uniformity with the Federal Rule. The Notes of the Advisory Committee on the Federal Rule provide no compelling reasons for favoring the federal version over the District of Columbia version. Those Notes attack the requirement that a hypothetical question be used in all instances, but the District of Columbia practice has long abandoned that rigid rule in cases in which the witness has obtained his or her own knowledge of the facts upon which the opinion is based. As a practical matter, either a hypothetical question or actual knowledge of the facts on the part of the expert would be necessary to form the basis of the expert's opinion under either proposed Rule 703 or the existing practice. Thus, the only issue is whether the expert should be required to outline the factual basis for his or her opinion before being permitted to render that opinion. As a matter of practice, such a factual foundation is almost universally laid in the federal courts of this and adjoining jurisdictions. This practice is a testament to the value of such a foundation both to the court in ruling on the competency of the evidence and to the trier of fact in clearly understanding the witness' testimony. Practice has demonstrated that laying such a factual foundation is almost invariably brief and straightforward.

It is worth noting that the Federal Advisory Committee Notes on this rule set forth no specific advantages to be gained in eliminating the requirement of a foundation for the expert's testimony, but merely attempt to rebut the objections to the change. The Notes point out that the basis for the expert's opinion

may be brought out in cross examination and that this basis will have been previously disclosed in discovery. This conclusion ignores the fact that in smaller cases, such as those faced by the District of Columbia Superior Court in great numbers, extensive discovery may not be economically practical. In such a case, where opposing counsel is hesitant to cross-examine on information he or she does not know, there is the very real possibility of incompetent testimony being received. The argument in the Notes further ignores the serious tactical dilemma facing opposing counsel in deciding whether or how to cross-examine an expert who has not disclosed the basis of his or her testimony. Although the Federal Advisory Committee Notes point out that counsel need only cross-examine on the helpful aspects of the basis of the witness' conclusions, in practice it is often impossible to carefully segregate such testimony without opening the door to all of the evidence counsel wished to avoid. There is the further problem that, under proposed Rule 703, much of the basis of the expert's testimony may be inadmissible evidence that opposing counsel may not want the trier of fact to consider. To place the burden on opposing counsel, rather than on counsel proferring the witness, to explore the basis of the expert's testimony has no advantages in terms of justice or judicial economy and is laden with the serious disadvantages explained abcve. The present practice has operated efficiently and fairly and, under the circumstances, ought to be retained.

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 or she consents to act. A witness so appointed shall be informed of his or her 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 or her findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling him or her 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.

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

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

Comment

The proposed rule is identical to Federal Rule 706.

The rule is similar to but more comprehensive than Superior Court Criminal Rule 28.[1] The Superior Court Civil Rules contain no counterpart to Criminal Rule 28 except Civil Rule 43(f), which pertains to

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[1] Superior Court Criminal Rule 28 provides:

> (a) Expert witnesses. The Court may order the defendant or the government or both 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 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, and may thereafter be called to testify by the Court or by any party. He shall be subject to cross-examination by each party. The Court may determine the reasonable compensation of such a witness and direct its payment out of such funds as may be provided by law. The parties also may call expert witnesses of their own selection.
>
> (b) Interpreters. The Court may appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the government, as the Court may direct.

interpreters.[2] However, as noted in the Notes of Advisory Committee on Proposed Federal Rules of Evidence, Rule 706: "the inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned."

One potentially controversial aspect of Federal Rule 706 is that it permits the compensation of court appointed experts in civil cases to be charged to the parties. No District of Columbia law on this point was found except Superior Court Civil Rule 43(f) which permits the compensation of interpreters to be charged against the parties.

The Committee recommends that Rule 706 be adopted in that it is more comprehensive than Superior Court Criminal Rule 28. If it is adopted, Criminal Rule 28(a) should be repealed.

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[2] Superior Court Civil Rule 43(f) provides:

> Interpreters. The Court may appoint an interpreter of its own section and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by 1 or more of the parties as the Court may direct, and may be taxed ultimately as costs, in the discretion of the Court.

RULE 801. Definitions

The following definitions apply under this article:

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

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

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

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

*Alt A (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

Alt B (1) Prior identification statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party

and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of his or her agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Comment

Alternative A is identical to Federal Rule of Evidence 801. As described below, Alternative B contains certain modifications to subsections (d)(1)(A) and (d)(1)(B) that would be necessary to conform the Federal Rule to current District of Columbia practice.

Subdivision 801(a): Statement. This is a standard, long-accepted definition in the hearsay area. See S. Graae, District of Columbia Statutory and Case Law Annotated to the Federal Rules of Evidence 8.4 (1976) [hereinafter cited as Graae].

Subdivision 801(b): Declarant. This is a standard, long-accepted definition in the hearsay area. See Graae at 8.4.

Subdivision 801(c): Hearsay. This is a standard, long-accepted definition in the hearsay area. See Graae at 8.4. If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. See Notes of Advisory Committee on Proposed Federal Rules of Evidence, Rule 801(c).

Subdivision 801(d)(1)(A): Prior inconsistent statements. The Federal Rule (as reflected in Alternative A) represents a significant change from existing District of Columbia practice. Contrary to the rule in the federal courts relating to prior inconsistent statements under oath, the rule in the District of Columbia is that prior inconsistent statements of a witness are hearsay and not admissible as proof of the matters contained therein.

See, e.g., Gordon v. United States, ___ A.2d ___, No. 82-900, (D.C. September 15, 1983), Slip Op. at 8-9; Brooks v. United States, 448 A.2d 253, 259 (D.C. 1982); Turner v. United States, 443 A.2d 542 (D.C. 1982); Matter of L.D.O., 400 A.2d 1055 (D.C. 1979); Webster v. M. Loeb Corp., 400 A.2d 319, 322 n.1 (D.C. 1979). In contrast, the Federal Rule permits the introduction of such statements as substantive evidence. Alternative B modifies the Federal Rule to conform to District of Columbia law by eliminating subdivision (d)(1)(A) so that no prior inconsistent statements are given substantive effect.

The District of Columbia approach -- rejecting all prior statements that are offered substantively -- constitutes the orthodox approach that is followed in the common law of a majority of jurisdictions. See Weinstein's Evidence ¶ 801(d)(1)[01]. Federal Rule 801(d)(1) adopts a compromise position, which attempts to take into account to some extent the suggestion of many scholars that the purpose of the hearsay rule is satisfied if the declarant is present under oath, subject to demeanor observation and amenable to cross-examination. Id. (Although it was once feared that the Supreme Court's decision in Bridges v. Wixon, 326 U.S. 135, 153-54 (1945) might mean that the substantive use of prior statements would be an unconstitutional violation of due process, this uncertainty was dispelled by the Court's later decision in California v. Green, 399 U.S. 149, 163 n.15 (1970).)

The phrase "trial, hearing, or other proceeding," as used in the Federal Rule, contemplates a proceeding in which a verbatim official record is kept. Thus, it clearly was intended to cover testimony before a grand jury. However, it does not generally cover less formal types of examination. For example, the Court of Appeals for the District of Columbia Circuit has held that a sworn written statement given to a postal inspector, after being interviewed by the inspector, did not constitute a "trial, hearing or other proceeding" within the meaning of the Rule. United States v. Livingston, 213 U.S. App. D.C. 18, 661 F.2d 239 (1981).

There has been some indication in the cases that the District of Columbia courts do not find the position expressed in the Federal Rule to be unreasonable. In Forbes v. United States, 390 A.2d 453 (D.C. 1978), for example, the Court of Appeals declined to find reversible error where the trial judge neglected to give a cautionary

instruction, sua sponte, regarding the limited purpose for which a prior inconsistent statement could be introduced. Noting that the Federal Rules of Evidence have eliminated the distinction entirely, the court stated:

> While not binding here, in federal court the failure to give a cautionary instruction as to the limited relevance of the prior statement would not have been error at all, let alone plain error. One would have to consider the federal judiciary has gone far afield in the reasoning underlying its rule in order to conclude . . . that there was plain error here.

Id. at 457.

See also Gordon v. United States, supra, Slip Op. at 11 n.2; Johnson v. United States, 387 A.2d 1084 (D.C. 1978). Likewise, in United States v. Hsu, 439 A.2d 469 (D.C. 1981), the District of Columbia Court of Appeals cited with apparent approval the decision of Judge Friendly in United States v. DeSisto, 329 F.2d 929 (2d Cir. 1964), which held that limiting the admissibility of prior inconsistent statements serves no rational purpose.

Several states have adopted Federal Rule 801(d)(1)(A) verbatim, although the rule has not been accepted without modification as readily as other sections of the Federal Rules. For example, Michigan adapted Rule 801(d) essentially as proposed in Alternative B, so that no prior inconsistent statements are given substantive effect. Weinstein's Evidence ¶ 801(d)(1)(A)[09].

On balance, however, Alternative A appears to reflect the trend of the more recent decisions and is the recommended alternative. Since the declarant is in court and may be cross-examined, a principal danger against which the hearsay rule is designed to protect is not present. Additionally, limiting instructions to the jury may be of questionable utility in any event.

It should be noted that, under Rule 607 of the Federal Rules, a witness may be attacked by any party, including the party calling the witness. As discussed in the comment with respect to proposed Rule 607, this

practice represents a departure from traditional practice in the District of Columbia and directly conflicts with D.C. Code § 14-102, which permits impeachment of one's own witness only after claim of surprise has been sustained by the court. A modified version of Rule 607 has been recommended, in view of the existing D.C. statute. Thus, if the recommended version of Rule 607 is adopted, the effect of permitting the introduction of prior statements as substantive evidence is likely to be more limited than under federal practice under Rule 801, since there will be fewer situations where prior statements can come in.

Finally, in light of D.C. Code § 14-102, it has been suggested that the prohibition against the use of prior inconsistent statements in the District of Columbia is a result of statutory, rather than judge-made law. See Gordon v. United States, supra, Slip Op. at 12 n.2 (D.C. Sept. 15, 1983). To the extent that this is so, the Committee would be constrained to recommend Alternative B, or at the very least, to preface Alternative A with the words "except as otherwise required by statute."

However, by its terms, D.C. Code § 14-102 addresses only prior inconsistent statements that a witness has made to the party producing the witness or to his attorney. It is such statements that the statute allows to be introduced "for the purpose only of affecting the credibility of the witness." D.C. Code § 14-102 does not address prior statements that possess the additional indicia of reliability demanded by subdivision 801(d)(1)(A): i.e., the requirement that the statement was "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." Thus, in the Committee's view, the prohibition under existing D.C. law against the substantive use of statements covered by subdivision 801(d)(1)(A) stems from judicial decisions, and may be changed without statutory revision.

Subdivision 801(d)(1)(B): Prior consistent statements. As with Rule 801(d)(1)(A), the Federal Rules version of the section changes the traditional rule by permitting the introduction of prior consistent statements as substantive evidence. District of Columbia courts have held that prior consistent statements are admissible only in exceptional circumstances, and then only to rehabilitate credibility. See, e.g., Reed v. United States, 452 A.2d 1173 (D.C. 1982); United States v.

Alexander, 139 U.S. App. D.C. 163, 430 F.2d 904 (1970); Coltrane v. United States, 135 U.S. App. D.C. 295, 418 F.2d 1131 (1969). Alternative B takes the District of Columbia position into account by deleting subsection (d)(1)(B).

Numerous states have adopted Rule 801(d)(1)(B) verbatim. See Weinstein's Evidence ¶ 801(d)(1)(B)[02]. Alternative A is again the recommended alternative, both for the reasons discussed in connection with subsection 801(d)(1)(A) and because it would appear that the limiting instruction to the jury would have to be especially confusing if the two types of prior statements were not treated the same: i.e., if a jury were to be instructed to consider prior inconsistent statements as substantive evidence but to limit prior consistent statements to the issue of the witness' credibility.

Subdivision 801(d)(1)(C): Prior identification. Although there are relatively few District of Columbia cases on point, they follow the more recent trend in other jurisdictions of admitting prior identifications, but primarily, it would appear, for the purpose of rehabilitating and corroborating the witness. The implication in the cases is that the prior identification has the force of substantive evidence. See, e.g., Mack v. United States, 150 A.2d 477 (D.C. Mun. App. 1959); Clemons v. United States, 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968).

The District of Columbia Court of Appeals has held that the rationale for the admission of prior identification testimony also applies with full force to the admission of prior description testimony. See Morris v. United States, 398 A.2d 333, 338 (D.C. 1978) ("where a witness who has provided pretrial description evidence is available for cross-examination, such pretrial description may be admitted as independent, substantive evidence").

Subdivision 801(d)(2)(A): Admission by party opponent. District of Columbia courts have generally allowed admissions by party-opponents in civil cases to be introduced as substantive evidence. See, e.g., Wines v. Wines, 291 A.2d 180 (D.C. 1972); Calloway v. Central Charge Service, 142 U.S. App. D.C. 259, 440 F.2d 287 (1971); Johns v. Cottom, 284 A.2d 50 (D.C. 1971). But see Keyser v. Pickrell, 4 App. D.C. 198 (1894).

It should be noted, however, that offers to compromise have generally been excluded as not falling within the admission exception to the hearsay rule, a position that is consistent with Rule 408 of the Federal Rules. See, e.g., Harrison v. District of Columbia, 95 A.2d 332 (D.C. Mun. App. 1953). Similarly, Superior Court Civil Rule 36(b) (which is identical to its counterpart in the Federal Rules of Civil Procedure) places certain limitations on the use of admissions made in discovery.

In contrast to civil practice, the admissibility of confessions and admissions in criminal cases is, of course, constrained by a variety of Constitutional, procedural, and policy considerations. Rule 801(d)(2)(A) does not deal explicitly with these matters. Thus, beyond the requirements of the Rule, such admissions may be introduced into evidence against an accused only so long as they were made voluntarily, without coercion, and in circumstances where the accused's fifth and sixth amendment rights were fully protected. See, e.g., Mallory v. United States, 354 U.S. 449 (1957); Miranda v. Arizona, 384 U.S. 436 (1966).

Beyond this, in criminal cases, certain policies require exclusion of admissions on grounds that are not expressly set forth in the Rule. Thus, admissions made by an accused in a suppression hearing cannot be used affirmatively against the accused at trial on the theory that the accused should not be forced to give up his or her fifth amendment rights against self-incrimination as the price for asserting his or her fourth amendment rights against illegal search and seizure. Similarly, protecting the integrity of the juvenile court system precludes the use in a criminal trial of a juvenile's confession obtained prior to waiver of juvenile court jurisdiction. See S. Graae at 8.18.

Subdivision 801(d)(2)(B): Adopted Statement. The Rule is generally consistent with District of Columbia practice. See, e.g., Lucas v. Hamilton Realty Corp., 70 App.D.C. 277, 105 F.2d 800 (1939); Wade v. Lane, 189 F.Supp. 661 (D.D.C. 1960).

However, the Rule does not spell out the circumstances under which silence may be construed as an admission in criminal cases. There has been a steady movement in criminal cases away from "silence as an admission," particularly in the custodial situation

where Miranda rights attach. See, e.g., United States v. Anderson, 162 U.S. App. D.C. 305, 498 F.2d 1038 (1974), aff'd sub nom. United States v. Hale, 422 U.S. 171 (1975). The drafters of the Federal Rule believed that the developing case law in this area afforded adequate protection, and that no special provisions concerning failure to deny in criminal cases were therefore required. See Notes of Advisory Committee on Proposed Federal Rules of Evidence, Rule 801(d)(2)(B).

Subdivision 801(d)(2)(C): Statements by authorized person. The Rule is consistent with District of Columbia law. See, e.g., Frank R. Jelleff, Inc. v. Braden, 98 U.S. App. D.C. 180, 233 F.2d 671 (1956); York Blouse Corp. v. Kaplowitz Brothers, 97 A.2d 465 (D.C. Mun. App. 1953).

Subdivision 801(d)(2)(D): Statement of agent. The rule is consistent with District of Columbia law. See, e.g., District of Columbia v. Washington, 332 A.2d 347 (D.C. 1975); Wabisky v. D.C. Transit System, Inc., 114 U.S. App. D.C. 22, 309 F.2d 317 (1962).

Subdivision 801(d)(2)(E): Statement of co-conspirator. The Rule is consistent with District of Columbia law. See, e.g., United States v. Peterson, 173 U.S. App. D.C. 49, 522 F.2d 661 (1975); Neal v. United States, 87 U.S. App. D.C. 377, 185 F.2d 441 (1950).

RULE 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules of this Court or by statute.

Comment

The proposed rule is similar to Federal Rule of Evidence 802, which contains a traditional statement of the hearsay rule. See S. Graae, District of Columbia Statutory and Case Law Annotated to the Federal Rules of Evidence 8.63 (1976). The proposed rule modifies the Federal Rule to reflect the supremacy of District of Columbia statutory law and of court rules which may address specific situations that are not adequately covered by evidence rules alone.

RULE 803. Hearsay Exceptions; Availability of Declarant Immaterial

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

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

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

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

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

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter

was fresh in his or her 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.

*Alt A (6) Records of regularly conducted 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.

Alt B (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, 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.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. 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 matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, 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.

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

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation,

in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

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

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

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

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

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

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

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

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

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

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among his or her 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 or her personal or family history.

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

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

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

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

(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 the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Comment

Alternative A is identical to Federal Rule of Evidence 803. As described below, Alternative B contains certain modifications to subsections (6) and (16) that would be necessary to conform the Federal Rule to current District of Columbia practice.

Subdivision 803(1): Present sense impression: Rule 803(1), which overlaps to some extent with Rule 803(2), is consistent with District of Columbia case law. See, e.g., Wabisky v. D.C. Transit System, Inc., 114 U.S. App. D.C. 22, 309 F.2d 317 (1962). Cf. Pratt v. District of Columbia, 407 A.2d 612, 616 n.6 (D.C. 1979).

Subdivision 803(2): Excited utterance. This exception to the hearsay rule has been accepted in the District of Columbia for many years. See, e.g., Lampe v. United Sates, 97 U.S. App. D.C. 160, 229 F.2d 43 (1956); United States v. Kearney, 136 U.S. App. D.C. 328, 420 F.2d 170 (1969).

Subdivision 803(3): Then existing mental, emotional, or physical condition. This rule is generally consistent with District of Columbia law and practice. See, e.g., United States v. Mack, 151 U.S. App. D.C. 162, 466 F.2d 333 (1972); Cooper v. United States, 353 A.2d 696 (D.C. 1975). In Clark v. United States, 412 A.2d 21 (D.C. 1980), the Court of Appeals expressly adopted the position in the House Report regarding Federal Rule 803(3), to the effect that the doctrine is limited to statements of intent by the declarant only to prove

his or her future conduct, and not the anticipated conduct of another person.

Subdivision 803(4): Statements for purposes of medical diagnosis or treatment. Although Rule 803(4) considerably liberalizes prior common law practice pertaining to the admissibility of statements made for purposes of medical diagnosis or treatment, it appears close to the traditional rule in the District of Columbia. See, e.g., Washington, A&M. V. R. Co. v. Fincham, 40 App. D.C. 412 (1913).

All jurisdictions previously admitted some statements made with a view to treatment as an exception to the hearsay rule, but considerable variation existed with regard to the scope of the exception. While some courts have admitted only statements of present symptoms, others have extended the rule to past symptoms, and a few have in addition admitted statements which describe the nature and cause of the injury insofar as they bear on treatment. This last and most expansive approach is expressed in Rule 803(4). It had some support in federal cases decided prior to the adoption of the Rule, was endorsed by McCormick and is in accord with the trend of recent decisions. See Weinstein's Evidence ¶ 803(4)[01].

Numerous states have adopted Federal Rule 803(4) verbatim. See Weinstein's Evidence ¶ 803(4)[02].

Subdivision 803(5): Recorded recollection. This rule is generally consistent with long-standing practice. See, e.g., Mitchell v. United States, 368 A.2d 514, 517 n.4 (D.C. 1977) (expressly citing Federal Rule 803(5) with apparent approval); Belcher v. Jenkins Engineering Co., 123 A.2d 215 (D.C. Mun. App. 1956); Washington v. W.V.M. Coach Co., 250 F. Supp. 888 (D.D.C. 1966).

It may be that the requirement of "freshness" in Federal Rule 803(5) is more liberal than the traditional formula, which required that the memorandum have been made or adopted reasonably contemporaneously with the event. See Weinstein's Evidence ¶ 803(5)[01]. The difference, however, does not appear to be of marked significance. Moreover, to the extent that the difference is felt to be significant, a majority of the Committee felt that the approach embodied in the federal rule is superior to the traditional formula.

Subdivision 803(6): Records of regularly conducted activity. Federal Rule 803(6) replaced 28 U.S.C. § 1732(a), which was subsequently deleted from Title 28 of the United States Code. Upon the repeal of Section 1732(a), the D.C. Superior Court, on June 30, 1975 promulgated Civil Rule 43-I which, in virtually all respects, tracks former Section 1732.[1] Civil Rule 43-I

[1] Superior Court Civil Rule 43-I provides:

> (a) Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility. The term "business", as used in this section, includes business, profession, occupation, and calling of every kind.
>
> (b) If any business, institution, member of a profession or calling or any department or agency of government, in the regular course of business or activity, has kept or recorded any memorandum, writing, entry, print, representation or combination thereof of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process which appears to accurately reproduce or form a durable medium for so reproducing the original, the reproduction, when

[Footnote continued on following page]

is also applicable to criminal cases pursuant to Superior Court Criminal Rule 57(a). See Sullivan v. United States, 404 A.2d 153 (D.C. 1979).

The Federal Rule (as reflected in Alternative A) departs from traditional practice to the extent that it permits the introduction of reports containing "opinions or diagnoses." In interpreting 28 U.S.C. § 1732, the District of Columbia courts have consistently held that opinions and diagnoses are inadmissible as hearsay, notwithstanding their inclusion in "official" reports and "business" records. See, e.g., New York Life Insurance Co. v. Taylor, 79 U.S. App. D.C. 66, 147 F.2d 297 (1944); Lyles v. United States, 103 U.S. App. D.C. 22, 254 F.2d 725 (1957). Alternative B reflects this approach.

Federal Rule 803(6) has been adopted verbatim in several states, although not in as many states as have adopted other portions of the Federal Rules without modifications. See Weinstein's Evidence ¶ 803(6)[08]. Adoption of Alternative A is recommended, on the ground that the Federal Rule affords the trial judge sufficient discretion to exclude on the basis of "lack of trustworthiness" those opinions or diagnoses that may be unfairly prejudicial or lacking in probative value. Additionally, counsel should be free to argue that such opinions or diagnoses, even if not excludable as hearsay, should be excluded from evidence if they fail to satisfy the standards for the admission of opinion testimony by lay witnesses or experts, including those explicitly set forth in Rules 701 and 702. Regardless of which alternative is adopted, the simultaneous deletion of Civil Rule 43-I(a) would be appropriate.

Subdivision 803(7): Absence of entry in records kept in accordance with the provisions of paragraph (6). There appear to be no District of Columbia cases

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[Footnote 1 continued from preceding page]

> satisfactorily identified, is as admissible in evidence as the original itself, whether the original is in existence or not, and an enlargement of such reproduction is likewise admissible in evidence. The introduction of a reproduced record or enlargement does not preclude admission of the original.

directly on point. However, the absence of entries in public records and reports (see Federal Rule 803(10)) has been held to be admissible probative evidence in the District of Columbia. See, e.g., Gaston v. United States, 34 A.2d 353 (D.C. Mun. App. 1943).

Federal Rule 803(7) has been adopted verbatim in numerous states. See Weinstein's Evidence ¶ 803(7)[02].

Subdivision 803(8): Public records and reports. The Federal Rule is basically consistent with District of Columbia cases. Authentication of official records is governed by Superior Court Criminal Rule 27 and its identical civil counterpart, Civil Rule 44; authentication of records generally is governed by D.C. Code §§ 14-501 and 14-507 (1981). See District Motor Co. v. Rodill, 88 A.2d 489 (D.C. Mun. App. 1952); Aben v. District of Columbia, 95 U.S. App. D.C. 237, 221 F.2d 110 (1955).

The legislative history to the Federal Rule clarifies that the admissibility of evaluative reports would be strictly limited to "factual findings" and, in criminal actions, only as against the Government. Read narrowly in this way, the Rule appears to be consistent with District of Columbia law. See, e.g., Emmet v. American Insurance Co., 265 A.2d 602 (D.C. 1970); Bowman v. Redding & Co., 145 U.S. App. D.C. 294, 449 F.2d 956 (1971).

For a variety of reasons, only two states appear to have adopted Federal Rule 803(8) verbatim, although several have adopted modified versions of the Rule. See Weinstein's Evidence ¶ 803(8)[05].

Subdivision 803(9): Records of vital statistics. The Federal Rule is consistent with District of Columbia case law. See, e.g., Doto v. United States, 96 U.S. App. D.C. 17, 223 F.2d 309 (1955).

Subdivision 803(10): Absence of public record or entry. As noted above, authentication of official records is dealt with in Superior Court Criminal Rule 27 and its identical civil counterpart, Civil Rule 44. In general, District of Columbia case law appears to support the Federal Rule. See, e.g., Gaston v. United States, 34 A.2d 353 (D.C. Mun. App. 1943).

Subdivision 803(11): Records of religious organizations. There appear to be no recent District of Columbia cases on this point.

In other jurisdictions, church records were often admitted as business records, but generally only to prove the occurrence of the church activity. Federal Rule 803(11) expands the scope of admissibility, and is based on the assumption that it is highly unlikely that a person would fabricate the information furnished on an occasion such as a baptism or other religious ceremony, and that such information therefore has a satisfactory degree of reliability. The requirement of personal knowledge on the part of the recorder is specifically eliminated. See Notes of Advisory Committee on Proposed Federal Rules of Evidence, Rule 803(11).

The Federal Rule does not appear to have generated particular controversy, notwithstanding the relatively small amount of case law on point in any jurisdiction. It has been adopted in numerous states. See Weinstein's Evidence ¶ 803(11)[02].

Subdivision 803(12): Marriage, baptismal and similar certificates. District of Columbia case law appears generally to support the Federal Rule. See, e.g., Lee v. District of Columbia, 117 A.2d 922 (D.C. Mun. App. 1955). However, as in the case of Rule 803(8) and 803(9), the admissibility of the certificate or record would appear to be limited to those facts contained therein of which the responsible person had direct personal knowledge.

Subdivision 803(13): Family records. There appear to be no recent District of Columbia cases on this point, but the Federal Rule has ancient authority behind it. See Notes of Advisory Committee on Proposed Federal Rules of Evidence, Rule 803(13).

Rule 803(13) has been adopted verbatim in numerous states. See Weinstein's Evidence ¶ 803(13)[02].

Subdivision 803(14): Records of documents affecting an interest in property. The position set forth in the Federal Rule has District of Columbia case support. See Wilson v. Snow, 35 App. D.C. 562 (1910).

Subdivision 803(15): Statements in documents affecting an interest in property. The Federal Rule position also has support in District of Columbia case law. See Wilson v. Snow, 35 App. D.C. 562 (1910).

Subdivision 803(16): Statements in ancient documents. The Federal Rule (as reflected in Alternative A) changes existing practice by qualifying documents more than 20 years old as "ancient," as opposed to the traditional 30 year rule. See, e.g., H.C. Cole & Co. v. William Lea & Sons Co., 35 App. D.C. 355 (1910). Alternative B reflects current District of Columbia law.

The usual common law age requirement of 30 years was intentionally reduced to 20 years in the Federal Rules, in accord with Rule 901(b)(8), in order to favor the admission of reliable, relevant evidence. See Weinstein's Evidence ¶ 803(16)[01].

The majority of states that have adopted the Rule have adopted it verbatim, although one state -- Nebraska -- changed the number of years a document must have been in existence from 20 years back to 30 years. See Weinstein's Evidence ¶ 803(16)[02]. There appears to be no strong argument against consistency with the Federal Rule position in this respect; Alternative A is therefore recommended.

Subdivision 803(17): Market reports, commercial publications. The Federal Rule appears to be consistent with District of Columbia practice. See, e.g., Reilly v. Cullinane, 53 App. D.C. 17, 287 F. 994 (1923). It should be noted that D.C. Code § 28:2-724 (UCC) (1981) expressly provides as follows:

> Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.

Subdivision 803(18): Learned treatises. It is unclear whether the Federal Rule is consistent with existing District of Columbia law and practice. Compare Monk v. Doctors Hospital, 131 U.S. App. D.C. 174, 403 F.2d 580 (1968) and Montana Power Co. v. Federal Power Commission, 87 U.S. App. D.C. 316, 185 F.2d 491 (1950

with Dolcin Corp. v. Federal Trade Commission, 94 U.S. App. D.C. 247, 219 F.2d 742 (1954), cert. denied, 348 U.S. 981 (1955). Although the Federal Rule goes beyond the traditional rule in most jurisdictions, see Weinstein's Evidence ¶ 803 (18)[01], the D.C. Court of Appeals has cited Federal Rule 803(18) with apparent approval. See Quin v. The George Washington University, 407 A.2d 580, 581 n.3 (D.C. 1979).

While a minority of the Committee feared that permitting the use of learned treatises as affirmative substantive evidence would raise the specter of trials becoming a "battle of the books," with the consequent dangers of lack of cross-examination and confusion of the jury, on balance the majority of the Committee did not believe that the perceived dangers outweighed the advantages of admitting such evidence in appropriate circumstances and of consistency with the Federal Rule in this respect.

Subdivision 803(19): Reputation concerning personal or family history. There appears to be only one recent District of Columbia case dealing with this point. Although that case discredited the probative weight to be given reputation evidence concerning personal or family history, it does not appear to be inconsistent with the position of the Federal Rules that such evidence will nevertheless be admissible. See United States Fidelity & Guaranty Co. v. Britton, 106 U.S. App. D.C. 58, 269 F.2d 249 (1959).

Numerous states have adopted Federal Rule 803(19) verbatim. See Weinstein's Evidence ¶ 803(19)[02].

Subdivision 803(20): Reputation concerning boundaries or general history. There appear to be no recent District of Columbia cases on this point, but the Federal Rule is of ancient origin. See Notes of Advisory Committee on Proposed Federal Rules of Evidence, Rule 803(20).

Federal Rule 803(20) has been adopted verbatim in numerous states. See Weinstein's Evidence ¶ 803(20)[02].

Subdivision 803(21): Reputation as to character. This rule is consistent with Federal Rules 404, 405 and 608 and District of Columbia cases. See, e.g., Morris v. United States, ___ A.2d ___, No. 82-63 (D.C. Nov. 3, 1983); Lomax v. United States 37 App. D.C. 414 (1911).

Subdivision 803(22): Judgment of previous conviction. Federal Rule 803(22) appears to be generally consistent with District of Columbia practice, insofar as the case law supports the view that, where the issue in a criminal case was clear, the defendant appeared, was represented by counsel, had an opportunity to testify, present witnesses and to cross-examine the adverse witnesses, and was duly convicted, the judgment of conviction may be admitted in a civil case based on the same facts as at least prima facie evidence of these facts. See Stagecrafters' Club, Inc. v. District of Columbia Division of American Legion, 111 F. Supp. 127 (D.D.C. 1953). But see Columbia Plaza Corp. v. Security National Bank, 676 F.2d 780 (D.C. Cir. 1982) (since only one of eighty-five overt acts was necessary to support a conspiracy conviction, the judgment of conspiracy was not admissible to prove any specific overt act that was charged).

For a variety of reasons, it appears that only three states have adopted Federal Rule 803(22) verbatim. See Weinstein's Evidence ¶ 803(22)[02].

Subdivision 803(23): Judgment as to personal, family or general history, or boundaries. There appear to be no recent District of Columbia cases on this point; however, the rule appears to have been based on well-established precedents in other jurisdictions. See Notes of Advisory Committee on Proposed Federal Rules of Evidence, Rule 803(23).

Subdivision 803(24): Other exceptions. This rule permits the continued development of hearsay exceptions, which do not necessarily fall within any of the recognized categories of exceptions, so long as the evidence in question meets the specified standards of reliability. See, e.g., United States v. AT&T, 516 F. Supp. 1237 (D.D.C. 1981) (use of Rule 803(24) to admit certain memoranda made by employees of the defendant's competitors, who were not parties to the litigation, in a complex antitrust case).

Minority Statement

Rule 803(6): The District of Columbia practice of excluding opinions and diagnoses from the business records exception to the hearsay rule is well reasoned

and ought to be retained. Both the Committee comment and the Federal Advisory Committee Notes appear to emphasize the question of the trustworthiness of such matters and ignore some of the most important objections to their admissibility. The seminal case on this issue in the District of Columbia, New York Life Insurance Co. v. Taylor, supra, contains a thoughtful discussion of the reasoning behind the traditional District of Columbia rule permitting facts but not opinions recorded in the ordinary course of business to be received in evidence. The New York Life opinion discussed the nature of opinion evidence and the distinctions between opinions and facts recorded in business records. The opinion went on to note the importance of the right of cross-examination in the case of opinion evidence. In discussing the practical difficulties of eliminating the right to cross-examine the witness who actually expressed the opinions, in particular with respect to psychiatric evidence at issue in that case, the New York Life court stated:

> It is true that after the party who introduced such opinions has closed his case the opposing party would have a chance to rebut them. But the disadvantageous position in which the denial of his right of cross-examination would place him is obvious to any trial lawyer. A period of time has gone by; an impression on the jury has been made. The expensive and sometimes impossible burden of hunting out and producing the psychiatrist who gave the opinion is unjustly shifted to the party against whom the opinion is used. And after he catches and produces the psychiatrist he must offer him as his own witness -- a disadvantage only slightly limited by the fact that the trial court may in its discretion allow him to impeach his own witness. Only a lawyer without trial experience would suggest that the limited right to impeach one's own witness is the equivalent of that right to immediate cross-examination which has always been regarded as the greatest safeguard of American trial procedure.

147 F.2d at 305.

Requiring that the author of opinion evidence be present for cross-examination not only serves the search for truth, it imposes no great burden either on the court or the parties. Under either alternative of Rule 703, an expert witness may rely on properly recorded opinions or diagnoses in reaching his or her conclusions, even though such records are not admissible. Requiring the author of an opinion to testify before that opinion is received in evidence may actually expedite trial proceedings. In the present practice, if a recorded opinion is not subject to dispute, the parties often stipulate to its being received into evidence notwithstanding its technical inadmissibility. On the other hand, if the opinion is subject to dispute, the proposed rule requires that the opposing party take the time and trouble of putting the witness on the stand for cross-examination or putting on time consuming rebuttal evidence. As the New York Life decision pointed out, the most fair and efficient method of handling such evidence is to place the author on the stand to be subject to immediate cross-examination after his direct testimony. The current practice as incorporated in Alternative B should be retained.

Rule 803(18): Contrary to the statement in the Committee comment, the proposed rule is at odds with current District of Columbia practice, Dolcin Corp. v. Federal Trade Commission, supra. Furthermore, it is contrary to the great weight of authority nationwide. Weinstein's Evidence ¶ 803(18)[01]. The decision in Quin v. The George Washington University, supra, cited by the Committee comment does not stand for a position contrary to the traditional rule and is actually consistent with that traditional rule. The only mention of Federal Rule 803(18) in Quin dealt with the court's approval of the trial court's refusal to receive medical articles into evidence and did not deal with the issue of whether such articles could be admitted as substantive evidence.

A review of Weinstein ¶ 803(18)[01] and of the Federal Advisory Committee Notes makes clear that the rule is intended to permit the use of learned treatises as affirmative substantive evidence. This goes well beyond the traditional use of such treatises in cross-examining opposing experts. It raises the very real specter of a party establishing his or her entire cause of action or defense based solely on such a writing

if that party can get any expert witness in the case to recognize such treatise.

Weinstein quotes the New Jersey Supreme Court, Committee on Evidence, which summarized the principal grounds for rejecting the proposed rule:

> (1) the writer is not available to be cross-examined; (2) concepts and "facts" in science, art and history change rapidly, tending to outmode books which nevertheless could be unfairly used to support undated theories; (3) the process of selection from a book could be abused to present material out of context or in distorted form; (4) the jury would be easily confused by technicalism without adequate explication; (5) the trial would become "a battle of the books."

Weinstein ¶ 803(18)[01] n.3. Although Weinstein does not agree with these objections, a careful consideration of each affirms its validity. The proposed rule should not be adopted.

Rule 803(24): The "catchall" exception to the hearsay rule set forth in subsection (24) of the rule has been the subject of a great deal of criticism and comment from legal scholars and it is not the desire of the minority to restate those points here. A few general comments should be made, however. First, the requirement in the rule that the proposed evidence have "circumstantial guarantees of trustworthiness" equivalent to those exceptions set forth in the first 23 exceptions is virtually meaningless. It is difficult to imagine that any evidence, not clearly false on its face, would have significantly less circumstantial guarantees of trustworthiness than records of some of the religious organizations in existence today (subsection (11)) or than evidence of reputation in the community concerning personal or family history (subsection (19)).

Second, it is difficult to justify the adoption of a set of rules whose purpose is to bring certainty and uniformity to the law of evidence while including in that set a rule that, as a practical matter, leaves the whole subject of hearsay evidence subject to the unbridled discretion of the trial court.

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 or her statement; or

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

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

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

Alt B (5) is absent from the hearing and the proponent of the statement has been unable to procure his or her attendance by process or other reasonable means.

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

(b) Hearsay exceptions. The following are not excluded by the hearsay

rule if the declarant is unavailable as a witness:

Alt A (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.

*Alt B (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 had an opportunity to develop the testimony by direct, cross, or redirect ex-mination.

*Alt A (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 or her death was imminent, concerning the cause or circumstances of what he or she believed to be his or her impending death.

Alt B (2) Statement under belief of impending death. In a prosecution for homicide, a statement made by a declarant while believing that his or her death was imminent, concerning the cause or circumstances of what he or she believed to be his or her impending death.

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

a reasonable person in his or her position would not have made the statement unless he or she 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.

*Alt A (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.

Alt B (4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, 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.

(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 effort; and (C) the

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

Comment

Alternative A is identical to Federal Rule of Evidence 804. As described below, Alternative B contains certain modifications to subsections (a)(5), (b)(1), (b)(2) and (b)(4) that would be necessary to conform the Federal Rule to current District of Columbia practice.

Subdivision 804(a): Definition of unavailability. The general definitions of unavailability in the Federal Rule are, on the whole, consistent with District of Columbia practice, except for the added proviso in (5) that a proponent of a witness' prior testimony must make an effort to depose the witness as a prerequisite to obtaining a rule on unavailability with respect to all of the types of prior statements covered by the rule other than the exception for prior testimony under oath. See S. Graae, District of Columbia Statutory and Case Law Annotated to the Federal Rules of Evidence 8,131 (1976).

Rule 804(a)(1) was cited with express approval in Alston v. United States, 383 A.2d 307, 315 (D.C. 1978). Consistent with Rule 803(a)(5), the Court of Appeals recently reaffirmed that, in a criminal case, the defendant has the responsibility to subpoena a witness. Failure to do so does not entitle a defendant to introduce grand jury testimony in place of the testimony of a live witness. Ready v. United States, 445 A.2d 982 (D.C. 1982).

Federal Rule 804(a) has been adopted without change in numerous states. See Weinstein's Evidence ¶ 804(a)[02]. Alternative A is recommended, primarily on the ground of a preference for consistency with the Federal Rules in the absence of strong arguments to

the contrary. However, it should be noted that Federal Rule 804(a)(5), as originally promulgated by the Supreme Court, was similar to Alternative B: that is, it contained "no requirement that an attempt be made to take the deposition of a declarant." Notes of Advisory Committee on Proposed Federal Rules of Evidence, Rule 804(a). Congress then subsequently amended the Rule to require an attempt to take the deposition, thereby expressing a policy in favor of depositions rather than use of the affected hearsay exceptions. See Weinstein's Evidence ¶ 804(a)[01]. Particularly in cases involving relatively small claims, the additional litigation costs that may result from such a policy are of legitimate concern.

Subdivision 804(b)(1): Former testimony. The Federal Rule permits the introduction of former testimony in cases where a predecessor in interest had the same motive for direct and cross-examination as the party against whom the testimony is now offered. In contrast, both statutory and case law in the District of Columbia limit the exception to those instances where either the party itself or its actual legal representative had such an opportunity. Specifically, D.C. Code § 14-303 (1981) states:

> When a party, after having testified at a time while he was competent to do so, dies or becomes incapable of testifying, his testimony may be given in evidence in any trial or hearing in relation to the same subject-matter between the same parties or their legal representatives, as the case may be; and in such a case the opposite party may testify in opposition thereto.

Although Section 14-303 applies only to parties, in Warren v. United States, 436 A.2d 821 (D.C. 1981), the Court of Appeals clarified that the section was not designed as the exclusive means of introducing former testimony and has not displaced the common law in the area. Rather, the prior testimony of non-party witnesses may be introduced in accordance with the common law standard for the introduction of such testimony, which requires:

> (1) That the direct testimony of the declarant is unavailable;

(2) That the former testimony was given under oath;

(3) That the issues in the two proceedings involved are substantially the same; and

(4) That the party against whom the testimony now is being offered had the opportunity to cross-examine the witness at the former proceeding.

Alternative B reflects current D.C. statutory and case law in this respect.

It should be noted that the admissibility at trial of prior deposition testimony is expressly governed by Superior Court Criminal Rule 15(e) and Civil Rule 32(a)(3), which are substantively identical to their counterparts in the Federal Rules of Criminal Procedure and Federal Rules of Civil Procedure. For a discussion of the notion of applicable Constitutional requirements in criminal cases, see Ohio v. Roberts, 448 U.S. 56 (1980).

Several states have adopted verbatim Federal Rule 804(b)(1), which appears to adopt a preferable approach in not requiring strict privity to admit prior testimony. See Weinstein's Evidence ¶ 804(b)(1)[06]. However, since adoption of Alternative A could require a conforming statutory amendment to D.C. Code § 14-303, the adoption of Alternative B is recommended at this time.[1]

Subdivision 804(b)(2): Statement under belief of impending death. The traditional rule as applied in the District of Columbia has limited the use of dying declarations to criminal homicide prosecutions (see, e.g., United States v. Kearney, 136 U.S. App. D.C. 328, 420 F.2d 170 (1969), while Federal Rule 804(b)(2) also permits their use in civil actions. Alternative B reflects District of Columbia practice.

The D.C. rule reflects the majority view under the common law. See Weinstein's Evidence ¶ 804(b)(2)[01].

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[1] It is possible to construe the language of § 14-303 as being permissive rather than mandatory. Were such a view adopted, Alternative A could be promulgated without doing violence to the statute.

Nevertheless, the limitation in the traditional rule has been uniformly criticized by virtually all of the commentators since Wigmore (on the ground that the theory of admissibility applies equally in civil cases), and the Federal Rule has now been adopted verbatim in several jurisdictions. Moreover, most such statements may be admissible in civil cases in any event under Rule 803(2). See Weinstein's Evidence 804(b)(2)[02]. Alternative A is therefore recommended.

Subdivision 804(b)(3): Statement against interest. The Federal Rule expanded the "against interest" exception to include statements exposing the declarant to criminal liability. District of Columbia cases formerly limited the exception to statements against "pecuniary or proprietary interest." See, e.g., Steadman v. United States, 358 A.2d 329 (D.C. 1976); Martin v. Savage Truck Line, 121 F. Supp. 417 (D.D.C. 1954). However, in Laumer v. United States, 409 A.2d 190 (D.C. 1979), the Court of Appeals expressly adopted the standard set forth in Federal Rule 804(b)(3) as the law of the District of Columbia.

Subdivision 804(b)(4): Statement of personal or family history. The Federal Rule is generally consistent with District of Columbia practice. See, e.g., Moy Jik v. United States, 47 App. D.C. 498 (1918); Liacakos v. Kennedy, 195 F. Supp. 630 (D.D.C. 1961). However, Federal Rule 804(b)(4)(B) departs from the common law insofar as it makes declarations of nonfamily members admissible, in specified circumstances. The traditional rule is limited to statements by family members. See, e.g., Jennings v. Webb, 8 App. D.C. 43 (1896). Alternative B reflects this difference.

Rule 804(b)(4) has been adopted verbatim in numerous states. See Weinstein's Evidence ¶ 804(b)(4)[02].

Alternative A is recommended, on the ground that it reflects a reasonable and appropriate extension of the traditional rule.

Subdivision 804(b)(5): Other exceptions. This rule permits the development of other exceptions, so long as basic requirements of reliability are met and the adverse party is alerted in advance that an opponent intends to use such evidence.

Minority Statement

Rule 804(b)(1): Alternative B, reflecting the current District of Columbia practice, is preferable. Not only is this area controlled by statute, but Alternative A, in requiring that a party or "a predecessor in interest" have had the opportunity to cross-examine the witness, opens the door to uncertainty as to who is actually a "predecessor in interest." The present law, as reflected in Alternative B, lends itself to a clearer and more predictable interpretation.

Rule 804(b)(2): As the Federal Advisory Committee Note indicates, at common law the dying declaration exception was applicable only in homicide cases and originated "as a result of the exceptional need for the evidence in homicide cases. . . ." While the Note states that the theory of admissibility applies equally in civil cases, it does not cite any similar "exceptional need" for such testimony in civil cases. It is also worth noting that the Advisory Committee Note states that "unavailability" as applied to a dying declaration ". . . is not limited to death." Such an application, which could only occur in a civil case, would result in confusion and uncertainty. The court would be forced to determine whether the statement by a person who did not die was truly made under a belief of impending death. In the absence of a compelling reason for expanding this exception this far, Alternative B should be adopted.

Rule 804(b)(5): This subsection sets forth virtually the same "catchall" exception to the hearsay rules as does Rule 803(24) and the minority comment to that rule applies to this provision as well.

RULE 805. Hearsay Within Hearsay

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

Comment

This provision is identical to the Federal Rule. It has been followed in the District of Columbia. Sellman v. United States, 386 A.2d 303 (D.C. 1978).

RULE 806. Attacking and Supporting Credibility of Declarant

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

Comment

This provision is identical to the Federal Rule. Research uncovered no decision in the District of Columbia applying the rule, but it has been adopted verbatim or nearly verbatim in numerous states. Weinstein's Evidence ¶ 806[02].

RULE 901. Requirement of Authentication or Identification

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

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

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

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

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

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

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

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company

to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

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

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

Alt B (8) Ancient documents or data compilations. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 30 years or more at the time it is offered.

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

(10) Methods provided by statute or rule. Any method of authentication or identification provided by an applicable statute or rule of this Court.

Comment

Subdivision 901(a): General provision. The proposed rule is identical to the Federal Rule and is consistent with practice in the District of Columbia. Banks v. United States, 359 A.2d 8 (D.C. 1976); Namerdy v. Generalcar, 217 A.2d 109 (D.C. 1966). It might be noted that in Montgomery v. Dennis, 411 A.2d 61, 62 (D.C. 1980), the Court held in a suit for assault and battery that the plaintiff's medical bills and records were "admissible at trial, without authentication, to corroborate his testimony that he had been assaulted by appellee receiving injuries requiring medical treatment." (Footnote omitted.) Accord, Reese v. Crosby, 280 A.2d 526 (D.C. 1971). The proposed rule, however, does not specify when the requirement of authentication is a condition precedent to admissibility, but merely indicates what evidence will satisfy that requirement. It thus does not conflict with these cases.

Subdivision 901(b)(1): Testimony of witness with knowledge. The proposed rule is identical to the Federal Rule and is in accord with District of Columbia law. Simms v. Dixon, 291 A.2d 184 (D.C. 1972) (any witness with knowledge of the "time or conditions of the taking" of a photograph can authenticate it). See also Rich v. District of Columbia, 410 A.2d 528, 531 (D.C. 1979).

Subdivision 901(b)(2): Nonexpert opinion on handwriting. The proposed rule is identical to the Federal Rule and is in accord with District of Columbia law. See Tyler v. Mutual District Messenger Co., 17 App. D.C. 85 (1900).

Subdivision 901(b)(3): Comparison by trier or expert witness. This rule is identical to the Federal Rule and is consistent with the standard for handwriting exemplars set forth in 28 U.S.C. § 1731:

> The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person.

That standard has been applied in the District of Columbia Courts. Banks v. United States, 359 A.2d 8 (D.C. 1976).

Subdivision 901(b)(4): Distinctive characteristics and the like. This rule is identical to the Federal Rule and is consistent with District of Columbia law. Banks v. United States, 359 A.2d 8, 10 (D.C. 1976).

Subdivision 901(b)(5): Voice identification. This rule is identical to the Federal Rule. The District of Columbia Court of Appeals has held in a criminal case that the authenticity and accuracy of tape recordings must be demonstrated by clear and convincing evidence. Springer v. United States, 388 A.2d 846 (D.C. 1978). The proposed rule merely specifies methods of authentication and does not address the appropriate standard of proof. It thus leaves intact existing District of Columbia law.

Subdivision 901(b)(6): Telephone conversations. The proposed Rule is identical to the Federal Rule and comports with District of Columbia law. See W.T. Cowan, Inc. v. Wagshal, 47 A.2d 94 (D.C. Mun. App. 1946).

Subdivision 901(b)(7): Public records or reports. This rule is identical to the Federal Rule and is consistent with District of Columbia law. District Motor Co. v. Rodill, 88 A.2d 489 (D.C. Mun. App. 1952). The District of Columbia has adopted verbatim Fed. R. Civ. P. 44 for both civil and criminal cases. See Superior Court Civil Rule; Superior Court Criminal Rule 27. These rules set forth the method of authenticating an official record. In addition, 14 D.C. Code § 14-501 (1981) provides:

> An exemplification of a record under the hand of the keeper of the record, and the seal of the court or office where the record is made, is good and sufficient evidence to prove a record made or entered in any State, territory, commonwealth or possession of the United States. The certificate of the person purporting to be the keeper of the record, accompanied by the seal, is prima facie evidence of that fact.

With respect to specific types of public records, D.C. Code § 14-502 (1981) provides:

> Under the hand of the keeper of a record and the seal of the court or office in which the record was made:

> (1) a copy of the record of a deed, or other written instrument not of a testamentary character, where the laws of the State, territory, commonwealth, possession or country where it was recorded require such a record, and that has been recorded agreeably to those laws; and
>
> (2) a copy of a will that the laws require to be admitted to probate and record by judicial decree, and of the decree of the court admitting the will to probate and record --
>
> are good and sufficient prima facie evidence to prove the existence and contents of the deed, will, or other written instrument, and that it was executed as it purports to have been executed.

But D.C. Code § 14-507 (1981) states:

> This chapter does not prevent the proof of records or other documents by any method authorized by other laws or rules of court.

In addition, proposed Rule 901(b)(10) provides that the methods of authentication specified in the Rule are not exclusive of other means specified by statute.

Subdivision 901(b)(8): Ancient documents or data compilation. The Federal Rule (as reflected in Alternative A) changes existing practice by qualifying documents more than 20 years old as "ancient," as opposed to the traditional 30 year rule. See, e.g., H.C. Cole & Co. v. William Lea & Sons Co., 35 App. D.C. 355 (1910). Alternative B reflects current District of Columbia law.

The usual common law age requirement of 30 years was intentionally reduced to 20 years in the Federal Rules, in order to favor the admission of reliable, relevant evidence. See Weinstein's Evidence ¶ 803 (16)[01].

The majority of states that have adopted the Rule have adopted it verbatim, although one state -- Nebraska -- changed the number of years a document must have been in existence from 20 years back to 30 years. See Weinstein's Evidence ¶ 803(16)[02]. There appears to be no strong argument against consistency with the Federal Rule position in this respect; Alternative A is therefore recommended.

Subdivision 901(b)(9): Process or system. The proposed rule is identical to the Federal Rule. Research uncovered no recent District of Columbia cases directly on point.

Subdivision 901(b)(10): Methods provided by statute or rule. The proposed Rule tracks the Federal Rule except that the language encompasses those methods of authenticating documents provided by District of Columbia law in addition to Acts of Congress, and D.C. court rules rather than rules promulgated by the U.S. Supreme Court.

District of Columbia statutes specify nonexclusive methods for authenticating official records, deeds, instruments and wills, and municipal ordinances and regulations. See D.C. Code §§ 14-501-07 (1981).

RULE 902. Self-Authentication

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

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

(2) Domestic public documents not under seal. A document purporting to bear the signature in his or her 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 or her official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country

assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

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

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

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

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

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

(9) Commercial paper and related documents. Commercial paper, signatures

thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions under Acts of Congress and statutes of the District of Columbia. Any signature, document, or other matter declared by Act of Congress or by a statute of the District of Columbia to be presumptively or prima facie genuine or authentic.

Comment

Subdivision 902(1): Domestic public documents under seal. The proposed Rule is identical to the Federal Rule and comports with District of Columbia statutes, see D.C. Code § 14-501 (1981); court rules, see Superior Court Civil Rule 44; Superior Court Criminal Rule 27, and case law, see Fowel v. Insurance Bldg., Inc., 32 A.2d 100 (D.C. Mun. App. 1943). See also D.C. Code § 14-507 (1981).[1]

Subdivision 902(2): Domestic public documents not under seal. The proposed Rule is identical to the Federal Rule and does not conflict with District of Columbia statutes, see D.C. Code § 14-507 (1981), or court rules, see Super. Ct. Civ. R. 44(c); Super. Ct. Crim. R. 27(c). Research uncovered no District of Columbia cases on point.

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[1] D.C. Code § 14-501 (1981) provides:

> An exemplification of a record under the hand of the keeper of the record, and the seal of the court or office where the record is made, is good and sufficient evidence to prove a record made or entered in any State, territory, commonwealth or possession of the United States. The certificate of the person purporting to be the keeper of the record, accompanied by the seal is prima facie evidence of that fact.

D.C. Code § 14-507 (1981) provides:

> This chapter does not prevent the proof of records or other documents by any method authorized by other laws or rules of court.

Subdivision 902(3): Foreign public documents. The proposed Rule is identical to the Federal Rule and consistent with District of Columbia court rules. Super. Ct. Civ. R. 44(a)(2); Super. Ct. Crim. R. 27(a)(2). Research uncovered no recent cases on point.

For documents of certain countries, the Convention Abolishing the Requirement of Legalization for Foreign Public Documents is controlling. See Weinstein's Evidence ¶ 902(3a)[01] (1982 Supp.). This Convention supersedes any local or federal rules. Therefore, no change in the Federal Rule is necessary to accommodate it.

Subdivision 902(4): Certified copies of public records. The proposed Rule is consistent with District of Columbia statutes, see D.C. Code §§ 14-501, 502, 507 (1981) and court rules, see Super. Ct. Civ. R. 44(a); Super. Ct. Crim. R. 27(a). It is identical to the Federal Rule except that it incorporates methods of authentication specified in D.C. statutes in addition to Acts of Congress, and D.C. court rules rather than Supreme Court rules.

Subdivision 902(5): Official publications. This rule is identical to the Federal Rule and is consistent with D.C. court rules. Super. Ct. Civ. R. 44(a); Super. Ct. Crim. R. 27(a). However, District of Columbia law is more specific with respect to authentication of publications containing statutes, ordinances and regulations. Super. Ct. Civ. R. 44-I provides:

> Printed books or pamphlets purporting on their face to be the statutes, ordinances, or regulations, of the United States, or of any state or territory thereof, or of any foreign jurisdiction, which are either published by the authority of any such state, territory, or foreign jurisdiction or are commonly recognized in its courts, shall be presumptively considered by the court to constitute such statute, ordinance, or regulation. The court's determination on such a matter shall be treated as a ruling on a question of law.

There is no conflict between this rule and subdivision 902(5), and no need to incorporate Super. Ct. Civ. R. 44-I into the subdivision by reference.

Subdivision 902(6): Newspapers and periodicals. The proposed Rule is identical to the Federal Rule. Research uncovered no recent cases on point in the District of Columbia. There is some support for the rule in older cases. See Montana Power Co. v. Federal Power Comm., 185 F.2d 491 (D.C. Cir. 1950), cert. denied, 340 U.S. 947 (1951).

Subdivision 902(7): Trade inscriptions and the like. The proposed Rule is identical to the Federal Rule. Research uncovered no recent cases on point in the District of Columbia.

Subdivision 902(8): Acknowledged documents. The proposed Rule is identical to the Federal Rule. Research uncovered no recent cases on point in the District of Columbia.

Subdivision 902(9): Commercial paper and related documents. The proposed Rule is identical to the Federal Rule. Research uncovered no recent cases on point in the District of Columbia.

Subdivision 902(10): Presumptions. The proposed Rule is identical to the Federal Rule except that the language has been changed to make documents presumptively authentic when so designated by D.C. statutes, in addition to Acts of Congress.

RULE 903. Subscribing Witness' Testimony Unnecessary

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

Comment

The proposed Rule is identical to the Federal Rule and is generally consistent with District of Columbia law. See Namerdy v. Generalcar, 217 A.2d 109, 111-12 (D.C. 1966) (authentication may be established by circumstantial evidence). Testimony of a subscribing witness is still required in some states to authenticate a will, see Notes of Advisory Committee on Proposed Federal Rules of Evidence, Rule 903, although such testimony is no longer required under District of Columbia law.

Rule 903 has been adopted verbatim in 19 states. Three states have adopted versions of the Rule that require subscribing witnesses only when a statute so specifies, and one state has eliminated the requirement altogether. Weinstein's Evidence ¶ 903[04] (1982 Supp.).

RULE 1001. Definitions

For purposes of this article the following definitions are applicable:

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

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

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

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

Comment

This rule is identical to Rule 1001 of the Federal Rules of Evidence. Research disclosed no District of Columbia law specifically addressing definitions of terms utilized in the rules governing proof of the contents of writings, recordings and photographs; however, as reflected in the comments under Rules 1002-08, D.C. law is substantially in accord with the provisions of Article X of the Federal Rules of Evidence.

RULE 1002. Requirement of Original

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

Comment

This rule is identical to Rule 1002 of the Federal Rules of Evidence, except that the term "statute" has been substituted for "Act of Congress" in order to adapt the rule to the District of Columbia. The rule is consistent with District of Columbia case law. See Walker v. United States, 402 A.2d 813 (D.C. 1979); Davenport v. Ourisman-Mandell Chevrolet, Inc., 195 A.2d 743 (D.C. 1963).

RULE 1003. Admissibility of Duplicates

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

Comment

This rule is identical to Rule 1003 of the Federal Rules of Evidence. The rule is consistent with District of Columbia case law. See Walker v. United States, 402 A.2d 813 (D.C. 1979); Fistere, Inc. v. Helz, 226 A.2d 578 (D.C. 1967).

RULE 1004. Admissibility of Other Evidence of Contents

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

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

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

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

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

Comment

Tnis rule is identical to Rule 1004 of the Federal Rules of Evidence. The rule is consistent with District of Columbia case law.

Subdivision (1): See Walker v. United States, 402 A.2d 813 (D.C. 1979); Edmunds v. Frank R. Jelleff, Inc., 127 A.2d 152 (D.C. Mun. App. 1956).

Subdivision (2): See Viereck v. United States, 78 U.S. App. D.C. 279, 139 F.2d 847 (1944).

Subdivision (3): See American Fire & Casualty Company v. Kaplan, 183 A.2d 914 (D.C. Mun. App. 1962).

Subdivision (4): Cf. Henson v. United States, 287 A.2d 106 (D.C. 1972). Some D.C. cases can be read to impose an additional requirement beyond that set forth in the Federal Rule -- that the terms of the writing not be in issue. See, e.g., Anderson v. District of

Columbia, 48 A.2d 710 (D.C. Mun. App. 1946). However, the "best evidence rule" only comes into play when the terms of the writing are in issue. See, e.g., Solway Decorating Company v. Merando, Inc., 264 A.2d 501 (D.C. 1970). Accordingly, for the District of Columbia rule to constitute an exception to the "best evidence rule," it must be read as being similar to the Federal Rule. See Weinstein's Evidence, ¶ 1004(4)[01].

RULE 1005. Public Records

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

(b) This rule does not prevent the proof of records or documents specified therein by any other method authorized by law.

Comment

Paragraph (a) of this rule is identical to Rule 1005 of the Federal Rules of Evidence. The rule is generally consistent with District of Columbia statutes, rules and case law, although there are certain differences with respect to scope of application and methodology of proof. See D.C. Code §§ 14-501 to 507 (1981); Superior Court Civil Rule 44; Superior Court Criminal Rule 27; Fowel v. Insurance Building, Inc., 32 A.2d 100 (D.C. Mun. App. 1943). It should also be noted that D.C. Code § 14-507 (1981) provides: "this chapter does not prevent the proof of records or other documents by any method authorized by other laws or rules of Court." Similar language appears in Superior Court Civil Rule 44(c) and Superior Court Criminal Rule 27(c).

Paragraph (b) has been added to make clear that the method of proof prescribed in Rule 1005 is non-exclusive and, thus, to obviate any conflict with existing District of Columbia law.

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 reasonable time and place. The court may order that they be produced in court.

Comment

This rule is identical to Rule 1006 of the Federal Rules of Evidence. The rule is consistent with District of Columbia case law. See R.S. Willard Company v. Columbia Van Lines Moving and Storage Company, Inc., 253 A.2d 454 (D.C. 1969).

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 the party's written admission, without accounting for the nonproduction of the original.

Comment

This rule is identical to Rule 1007 of the Federal Rules of Evidence. Research disclosed no District of Columbia law specifically addressing the subject matter of this rule. The rule, however, is consistent with the rule in effect in D.C. that an admission against interest is admissible as a hearsay exception. See Powell v. United States, 414 A.2d 530 (D.C. 1980); Johns v. Cottom, 284 A.2d 50 (D.C. 1971). Also, the rule is a restatement, albeit a narrow one, of the rule at common law. (In some jurisdictions, an oral admission will suffice; however, Federal Rule 1007 does not permit proof by an oral admission except where it is uttered as testimony). See Weinstein's Evidence, ¶ 1007[01].

RULE 1008. Functions of Court and Jury

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

Comment

This rule is identical to Rule 1008 of the Federal Rules of Evidence. Research disclosed no District of Columbia law specifically addressing the subject matter of the rule; however, the rule seems in accord with the traditional division of functions between judge and jury.

RULE 1101. Applicability of Rules

(a) Divisions. These rules apply in all divisions of the Superior Court of the District of Columbia except that the rules apply to cases in the Landlord and Tenant branch of the Civil Division only when they are certified for trial under Landlord and Tenant Rules 5(c) and 6, and the rules are not binding in the Small Claims branch of the Civil Division other than to cases certified to the Civil Division under Small Claims Rule 8.

(b) Proceedings generally. Except as otherwise stated in rule 1101(a), these rules apply generally to all proceedings, except those in which the court may act summarily.

(c) Rule of privilege. The rule with respect to privileges applies to all stages of all actions, cases, and proceedings.

(d) Statutory evidentiary provisions. To the extent that any of these rules conflict with any evidentiary provisions set forth in the District of Columbia Code, the statutory evidentiary provisions apply.

(e) Rules inapplicable. The rules generally do not apply in the following situations:

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

(2) Grand jury. Proceedings before grand juries.

(3) Miscellaneous proceedings. Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses,

and search warrants; and proceedings with respect to release on bail or otherwise.

Comment

This rule is analogous to the Federal Rule but it necessarily is tailored to the Superior Court's divisional structure.

The rules of evidence apply to matters in the Landlord and Tenant branch of the Civil Division only when the Superior Court Rules of Evidence pertain, namely, for cases certified for trial and involving a plea of title or jury issue. See Landlord & Tenant Rules 1, 5(c) and 6. The rules of evidence are not applied in the Small Claims branch pursuant to D.C. Code § 16-3906(b) (1981).

RULE 1102. Title

These rules may be known and cited as the Rules of Evidence for the Superior Court of the District of Columbia.

Comment

This provision is analogous to Federal Rule 1103.

These rules may be known and cited as the Rules of Evidence for the Superior Court of the District of Columbia.

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[illegible]

Opening Statement of Chairman, Chair

Presentation of Organizations, D.C.

[illegible] Avenue, N.W.

Washington, D.C. 20005

[illegible]

[illegible] P. Bennett

Bennett, Brown, Greenberg

[illegible]

[illegible] Street, N.W.

Washington, D.C. 20036

[illegible]

[illegible] Inc.

[illegible]

[illegible] Pennsylvania Avenue, N.W.

[illegible], D.C. 20006

[illegible]

[illegible]

Hogan & Hartson

[illegible] Connecticut Avenue, N.W.

Washington, D.C. 20006

[illegible]

[illegible] Reference

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