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

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TO: **Honorable Anthony J. Scirica, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Honorable Jerry E. Smith, Chair**
Advisory Committee on Evidence Rules

DATE: **May 5, 2003**

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

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 25, 2003, in Washington, D.C. At the meeting the Committee approved a proposed amendment to Evidence Rule 804(b)(3), with the unanimous recommendation that the Standing Committee approve the proposed amendment and forward it to the Judicial Conference. Part II of this Report summarizes the discussion of this proposed amendment. An attachment to this Report includes the text, Committee Note, statement of changes made after public comment, and summary of public comment for the proposed amendment to Rule 804(b)(3).

Part III of this Report provides a summary of the Committee's long-term projects. A complete discussion of these matters can be found in the draft minutes of the Spring 2003 meeting, attached to this Report.

II. Action Item

Recommendation To Forward the Proposed Amendment to Evidence Rule 804(b)(3) to the Judicial Conference

The Evidence Rules Committee has voted unanimously to propose an amendment to Rule 804(b)(3) in order to correct the potential unconstitutionality of that Rule in cases where declarations against penal interest are offered against a criminal defendant. The amendment is made necessary by Supreme Court decisions analyzing the relationship between the Confrontation Clause and hearsay admitted against an accused under a hearsay exception. Specifically, in *Lilly v. Virginia*, 527 U.S. 116 (1999), the Supreme Court declared that the hearsay exception for declarations against penal interest is not "firmly rooted" and therefore the Confrontation Clause is not satisfied simply because a hearsay statement fits within that exception. Furthermore, under *Lilly* and *Idaho v. Wright*, 497 U.S. 805 (1990), a statement offered under a hearsay exception that is not firmly-rooted will satisfy the Confrontation Clause only when it bears "particularized guarantees of trustworthiness." And the *Lilly* Court held that this standard of "particularized guarantees" would not be satisfied simply because the statement was disserving to the declarant's penal interest. To satisfy the Confrontation Clause, the government must show particularized guarantees of trustworthiness beyond the fact that the statement is disserving. Yet Rule 804(b)(3) as written requires only that the prosecution show that the statement is disserving to the declarant's penal interest. It does not impose any additional evidentiary requirement.

Thus, after *Lilly*, Rule 804(b)(3) as written is not consistent with constitutional standards. To the Committee's knowledge, no other categorical hearsay exception has the potential of being applied to admit evidence that would violate the accused's right to confrontation. Other categorical hearsay exceptions, such as those for dying declarations, excited utterances and business records, have been found firmly-rooted.

The Evidence Rules Committee has determined that codifying constitutional doctrine provides a protection for defendants against an inadvertent waiver of the reliability requirements imposed by the Confrontation Clause. A defense counsel might be under the impression that the hearsay exceptions as written comport with the Constitution. Indeed, this is a justifiable assumption for all the other categorical hearsay exceptions in the Federal Rules of Evidence, which have been found "firmly rooted"–the exception being Rule 804(b)(3). A minimally competent defense lawyer might object to a hearsay statement as inadmissible under Rule 804(b)(3), thinking that an additional, more specific objection on constitutional grounds would be unnecessary. If the hearsay exception and the Confrontation Clause are congruent, then the risk of inadvertent waiver of the constitutional reliability requirements would be eliminated. See, e.g., *United States v. Shukri,* 207 F.3d 412 (7th Cir. 2000) (court considers only admissibility under Rule 804(b)(3) because defense counsel never objected to the hearsay on constitutional grounds).

The language added to the amendment concerning "particularized guarantees of trustworthiness" is carefully chosen to track the language used by the Supreme Court in its

Confrontation Clause jurisprudence. The addition of this language would guarantee that the Rule would comport with the Constitution in criminal cases, without imposing on the government any evidentiary requirement that it is not already required to bear.

The Evidence Rules Committee carefully considered the public comment on the proposed amendment and held a public hearing on the amendment as part of its Spring 2003 meeting. While the comments received generally were favorable, the Committee agreed with two important suggestions for improvement to the proposed amendment:

1. The proposal released for public comment would have extended the corroborating circumstances requirement to declarations against penal interest offered in civil cases. The Committee has deleted this language in response to public comment indicating that it would make it unreasonably difficult to present some important evidence in certain civil cases, and reasoning that the extension was not supported by the original intent of Rule 804(b)(3).

2. The proposal released for public comment did not attempt to provide guidance on the difference between the two evidentiary standards set forth in the Rule, i.e., "corroborating circumstances" (applicable to statements against penal interest offered by the accused) and "particularized guarantees of trustworthiness" (applicable to statements against penal interest offered by the prosecution). The Committee has added a paragraph to the Committee Note that distinguishes the two standards, in response to public comment suggesting the need for more guidance to courts and litigants.

The proposed amendment to Rule 804(b)(3) is set forth as an attachment to this Report.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 804(b)(3), as modified following publication, be approved and forwarded to the Judicial Conference.

III. Information Items

A. Long-Term Project on Possible Changes to Evidence Rules

Two years ago the Evidence Rules Committee, as part of its long-range planning, directed its Reporter to review scholarship, caselaw, and other sources of evidence law to determine whether there are any evidence rules that might be in need of amendment. At its April 2002 meeting, the Committee reviewed a number of potential changes and directed the Reporter to prepare a report on a number of different rules, so the Committee could take an in-depth look at whether those rules require amendment. The Committee's decision to investigate those rules is not intended to indicate that the Committee has agreed at this time to propose any amendments. Rather, the Committee determined that with respect to those rules, a more extensive investigation and consideration are warranted.

At its October 2002 meeting, the Committee began to consider the Reporter's memoranda on some of the rules that have been found worthy of in-depth consideration. The Committee agreed that the problematic rules should be considered over the course of four Committee meetings and that if any Rules are found in need of amendment, the amendment proposals would be delayed in order to package them as a single set of amendments to the Evidence Rules. This would mean that the package of amendments, if any, would go to the Standing Committee at its June 2004 meeting, with a recommendation that the proposals (again, if any) be released for public comment.

The Committee continued its consideration of reports on a number of possibly problematic evidence rules at its Spring 2003 meeting. The goal of the Committee was not to vote definitively on whether to propose an amendment to any of those rules, but rather to determine whether to proceed further with the rules as part of a possible package of amendments. Thus, a "no" vote from the Committee meant rejection of any proposed amendment. A "yes" vote meant only that the Committee was interested in further inquiry into a possible amendment and might consider and approve possible language for an amendment at its Spring 2004 meeting.

In addition, the Committee considered and rejected a proposal by a member of the public to amend Evidence Rule 404(a)(1), as discussed below.

The Committee voted to reject the following proposals:

1. *Rule 106:* Commentators have suggested that Rule 106, the rule of completeness, should be expanded to cover oral as well as written statements. But the Committee determined that such a change would be unnecessarily disruptive to the order of proof at a trial. The Committee also investigated an apparent split of authority in the federal courts as to whether Rule 106 operates to

admit completing evidence that would otherwise be excluded as hearsay. After investigating this federal caselaw in detail, the Committee concluded that it was unnecessary to amend Rule 106 to specify whether the Rule is to operate as an independent hearsay exception. The costs of an amendment were found not justified, because the apparent conceptual disagreement among the courts has not made a difference in the results of any of the reported cases.

2. Rule 404(a)(1): The Committee received a request from a member of the public to propose an amendment to Rule 404(a)(1) "to explicitly authorize admission of character evidence to prove a trait of character when it is essential to a claim or defense." The Committee carefully considered the proposal and unanimously concluded that the proposed amendment did not meet the high threshold of necessity that the Committee imposes on amendments to the Evidence Rules. Rule 404(a) in its current form prohibits character evidence only when it is offered for a certain specific purpose: to prove "action in conformity" with the character trait. If the character evidence is offered to prove an element of a claim or defense, i.e., where character is "in issue", the evidence by definition is not being offered to prove conduct. Thus, character evidence offered to prove an element of a claim or defense is already admissible under the existing Rules. All federal courts have recognized this point and have uniformly admitted character evidence when character is "in issue."

3. Rule 803(6): At a previous meeting the Committee directed the consultant to the Committee, Professor Ken Broun, to prepare a report on the advisability of amending Evidence Rule 803(6) to codify the "business duty" requirement. The "business duty" requirement addresses a problem that arises when information recorded in a business record comes from outside the recording entity. If the person reporting from outside the entity has no "business duty" to report the information reliably, then there is a concern that the business record will contain a reliable recording of unreliable information.

After considering Professor Broun's report, the Committee concluded unanimously not to proceed with an amendment to Rule 803(6). Committee members agreed with Professor Broun that the courts have approached the question of "business duty" in a flexible and reasonable manner, with few if any conflicts in the caselaw. The Committee found it advisable to give this common law development an opportunity to continue without amendment of the Rule.

The Evidence Rules Committee voted to give further consideration to the following proposals:

1. *Rule 404(a)*: The Committee has agreed on tentative language for a possible amendment to Rule 404(a)(1) to clarify that character evidence is never admissible to prove conduct in a civil case. The text of Rule 404(a) seems to prohibit the circumstantial use of character evidence in a civil case, and yet two circuits have held that such evidence is admissible when a defendant is charged by the plaintiff with what amounts to criminal activity. The Committee will revisit this proposal at its meeting in Spring 2004.

2. *Rule 408:* The Committee is continuing to work on a possible amendment to Rule 408, the Rule that limits the admissibility of evidence of settlement and compromise. Currently there is substantial dispute in the courts over three important questions: a) whether evidence of a civil compromise is admissible in subsequent criminal litigation; b) whether statements made during settlement negotiations can be admitted to impeach a party for prior inconsistent statement; and c) whether an offer to settle can be admitted in favor of the party who made the offer. The Committee will give further consideration to possible language for a proposed amendment at its Fall 2003 meeting.

3. *Rule 410:* The Committee has agreed in principle that Evidence Rule 410—the rule that excludes most statements and offers made during guilty plea negotiations—should protect the statements and offers of prosecutors as well as defendants and defense counsel. Currently the Rule does not protect statements and offers of prosecutors from admissibility at trial. The Committee has determined that the policy of encouraging plea bargaining would be furthered by providing protection for the statements of all of the parties to a plea negotiation. The Committee will give further consideration to possible language for a proposed amendment at its Fall 2003 meeting.

4. *Rule 606(b):* Evidence Rule 606(b) generally excludes juror affidavits or testimony concerning jury deliberations. The rule is silent, however, on whether juror statements are admissible to prove that the verdict reported by the jury was different from that actually agreed upon by the jurors. Courts have generally allowed juror statements to prove errors in the reporting of the verdict, but there is dispute among the courts as to the scope of this court-created exception to the Rule.

At its Spring 2003 meeting the Committee discussed whether Rule 606(b) should be amended to account for errors in the reporting of the verdict, and if so, what the breadth of the exception should be. The Committee tentatively determined that an amendment to Rule 606(b) is justified because the courts have found an exception permitting proof of jury error even though no such exception is set forth in the Rule, and moreover because the courts are in dispute over the

breadth of that exception. Thus, an amendment would not only rectify a divergence between the text of the Rule and the case law (eliminating a trap for the unwary and the unpredictability that results from such divergence), but it would also eliminate a circuit split on an important question of evidence law.

The Committee also determined that if an amendment to Rule 606(b) is to be proposed, it should codify a narrow exception that would permit juror statements only to prove a clerical error in the reporting of the verdict. A broader exception that would permit proof of juror statements whenever the jury misunderstood or ignored the court's instruction was thought to have the potential of intruding into juror deliberations and upsetting the finality of verdicts in a large and undefined number of cases. In contrast, an exception permitting proof only if the verdict reported is different from that actually reached by the jury does not intrude on the privacy of jury deliberations, as the inquiry only concerns what the jury decided, not why it decided as it did.

The Committee tentatively decided to place a narrow amendment to Rule 606(b) on its list of a possible package of amendments that could be proposed in 2004. The Committee tentatively approved language providing that a juror may testify about whether "the verdict reported is the verdict that was decided upon by the jury." This language, and the advisability of an amendment to Rule 606(b), will be reconsidered by the Committee at its Spring 2004 meeting.

In addition, and as set forth in the Report to the Standing Committee in June 2002, the Committee has directed the Reporter to prepare memoranda on the following rules, to determine whether any changes to these rules are necessary:

Rule 607 (to consider whether the rule should be amended to prohibit a party from calling a witness solely to impeach that witness with otherwise inadmissible information).

Rule 609 (to consider whether to adopt the Uniform Rules definition of a conviction involving dishonesty or false statement).

Rule 613(b) (to consider whether to require a party to confront a witness with a prior inconsistent statement before it can be admitted for impeachment).

Rule 704(b) (to consider whether the rule should be amended to exclude only opinions of mental health experts).

Rule 706 (to consider certain stylistic suggestions and to determine whether to incorporate civil trial practice standards developed by the ABA).

Rule 801(d)(1)(B) (to consider whether the rule should be amended to provide that a prior consistent statement is admissible for its truth whenever it is admissible to rehabilitate the witness).

Rule 803(3) (to consider whether the rule should be amended to cover statements of the declarant's state of mind where offered to prove the conduct of someone other than the declarant).

Rule 803(5) (to consider whether the hearsay exception should cover records prepared by someone other than the party with personal knowledge of the event).

Rule 803(8) (to consider whether the language excluding law enforcement reports in criminal cases should be replaced by general language requiring that public reports are to be excluded if they are untrustworthy under the circumstances).

Rule 803(18) (to consider whether the "learned treatise" exception should be amended to provide for admissibility of "treatises" in electronic form).

Rule 806 (to consider whether the Rule should permit impeachment of hearsay declarants with prior bad acts that could be used for impeachment were the declarant to testify at trial).

Rule 901 (to consider whether the Rule must be amended to cover the admissibility of digital photographs and other evidence that can be altered electronically).

I wish to emphasize that in regard to any rules or other items as to which the Committee has indicated possible interest, this should by no means be read as an indication that the Committee ultimately will propose, or has a substantial likelihood of proposing, an amendment. The Committee merely wishes to be thorough in its consideration of any potential problems in the existing rules, but the Committee continues to be wary of recommending changes that are not considered absolutely necessary to the proper administration of justice.

B. Privileges

The Committee's Subcommittee on Privileges has been working on a long-term project to prepare a "survey" of the existing federal common law of privileges. The end-product is intended to be a descriptive, non-evaluative presentation of the existing federal law, and not a proposal for any amendment to the Evidence Rules. The survey is intended to help courts and lawyers in working

through the existing federal common law of privileges, and if completed it will be published as a work of the Consultant to the Committee and the Reporter.

C. "De Bene Esse" Depositions

At the request of the Civil Rules Committee, the Evidence Rules Committee considered a proposal by Judge Irenas to amend the Civil Rules to permit more general use of "de bene esse" depositions, i.e., depositions prepared as a substitute for trial testimony. The question for the Evidence Rules Committee was whether a rule supporting more general use of a "de bene esse" deposition would conflict with the Federal Rules of Evidence.

The Evidence Rules Committee determined that a rule permitting use of "de bene esse" depositions would create a conflict with the hearsay rule. The current exception that might apply–the Rule 804(b)(1) exception for prior testimony–is premised on the unavailability of the declarant, and with respect to "de bene esse" depositions, the deponent is often not unavailable for trial in the sense required by the Evidence Rules. Committee members also noted a possible conflict with the general preference for live testimony and the trial court's discretion under Evidence Rule 611(a) to control the mode and presentation of testimony. The Committee noted, however, that if the "de bene esse" deposition was given only after stipulation as to its admissibility, there would be no conflict with the Evidence Rules.

Committee members further expressed disapproval of the proposal on the merits. In their view, a rules-based distinction between discovery depositions and "de bene esse" depositions was unjustified. One problem would arise if a discovery deposition were taken and then the deponent becomes unavailable for trial under the terms of Evidence Rule 804(a). When the proponent moves to admit the deposition at trial, the opponent would have an argument that the proponent gave no "de bene esse" notice at the time the deposition was taken. This would change the existing law that discovery depositions are admissible when they comply with the terms of a hearsay exception. Committee members strongly expressed the opinion that no distinction should be made in the rules between discovery and "de bene esse" depositions.

Finally, Committee members discussed a related problem concerning the relationship between the Civil Rules and the Evidence Rules. Civil Rule 32 contains what amounts to a freestanding exception to the hearsay rule for depositions, creating a problematic overlap with the different (and sometimes more rigorous) exception for prior testimony in Evidence Rule 804(b)(1). The Committee determined that the placement of a hearsay exception in the Civil rather than the Evidence Rules could create confusion and a trap for the unwary.

The Committee resolved unanimously to report the following conclusions to the Civil Rules Committee: 1) Adoption of a rule permitting broad use of "de bene esse" depositions would create a conflict with the Evidence Rules, unless the rule were premised on stipulation among the parties;

2) On the merits, the Evidence Rules Committee is opposed to any attempt to distinguish "de bene esse" depositions from discovery depositions: and 3) The Evidence Rules Committee would be happy to work with the Civil Rules Committee in addressing the problem created by the existence of a freestanding hearsay exception in Civil Rule 32.

IV. Minutes of the October 2003 Meeting

The Reporter's draft of the minutes of the Committee's October 2003 meeting is attached to this report. These minutes have not yet been approved by the Committee.

Attachments:

Proposed amendment to Evidence Rule 804(b)(3)
Draft minutes of October 2003 Evidence Rules Committee meeting

PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE

Rule 804. Hearsay Exceptions; Declarant Unavailable*

* * * * *

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

* * * * *

(3) Statement against interest. – A statement ~~which~~ that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. But

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*New material is underlined; matter to be omitted is lined through.

in a criminal case a ~~A~~ statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is ~~not~~ admissible ~~unless~~ under this subdivision in the following circumstances only:

(A) if offered to exculpate an accused, it is supported by corroborating circumstances that clearly indicate ~~the~~ its trustworthiness, or ~~of the statement~~

(B) if offered to inculpate an accused, it is supported by particularized guarantees of trustworthiness.

* * * * *

COMMITTEE NOTE

The Rule has been amended to confirm the requirement that the prosecution must provide a showing of "particularized guarantees of trustworthiness" when a declaration against penal interest is offered against an accused in a criminal case. This standard is intended to assure that the exception meets constitutional

requirements, and to guard against the inadvertent waiver of constitutional protections. *See Lilly v. Virginia,* 527 U.S. 116, 134-138 (1999) (holding that the hearsay exception for declarations against penal interest is not "firmly-rooted"and requiring a finding that hearsay admitted under a non-firmly-rooted exception must bear "particularized guarantees of trustworthiness" to be admissible under the Confrontation Clause).

The amendment distinguishes "corroborating circumstances that clearly indicate" trustworthiness (the standard applicable to statements offered by the accused) from "particularized guarantees of trustworthiness" (the standard applicable to statements offered by the government). The reason for this differentiation lies in the guarantees of the Confrontation Clause that are applicable to statements against penal interest offered against the accused. The "particularized guarantees" requirement cannot be met by a showing that independent corroborating evidence indicates that the declarant's statement might be true. This is because under current Supreme Court Confrontation Clause jurisprudence, the hearsay exception for declarations against penal interest is not considered a "firmly rooted" exception (*see Lilly v. Virginia, supra*) and a hearsay statement admitted under an exception that is not "firmly rooted" must "possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Idaho v. Wright,* 497 U.S. 805, 822 (1990). In contrast, "corroborating circumstances" can be found, at least in part, by a reference to independent corroborating evidence that indicates the statement is true.

The "particularized guarantees" requirement assumes that the court has already found that the hearsay statement is genuinely

disserving of the declarant's penal interest. *See Williamson v. United States*, 512 U.S. 594, 603 (1994) (statement must be "squarely self-inculpatory" to be admissible under Rule 804(b)(3)). "Particularized guarantees" therefore must be independent from the fact that the statement tends to subject the declarant to criminal liability. The "against penal interest" factor should not be double-counted as a particularized guarantee. *See Lilly v. Virginia, supra,* 527 U.S. at 138 (the fact that the hearsay statement may have been disserving to the declarant's interest does not establish particularized guarantees of trustworthiness because it "merely restates the fact that portions of his statements were technically against penal interest").

The amendment does not affect the existing requirement that the accused provide corroborating circumstances for exculpatory statements. The case law identifies some factors that may be useful to consider in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors include (*see, e.g., United States v. Hall,* 165 F.3d 1095 (7th Cir. 1999)):

> (1) the timing and circumstances under which the statement was made;
>
> (2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie;
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> (3) whether the declarant repeated the statement and did so consistently, even under different circumstances;
>
> (4) the party or parties to whom the statement was made;

(5) the relationship between the declarant and the opponent of the evidence; and

(6) the nature and strength of independent evidence relevant to the conduct in question.

Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses.

Changes Made After Publication and Comments. The proposed amendment as issued for public comment would have extended the corroborating circumstances requirement to statements against penal interest offered in civil cases. The Committee withdrew this language in response to public comment, thus retaining the existing rule that corroborating circumstances are not required for declarations against interest offered in civil cases.

A paragraph was added to the Committee Note to clarify the distinction between "corroborating circumstances" (the standard applicable to statements against penal interest offered by the accused) and "particularized guarantees of trustworthiness" (the standard applicable to statements against penal interest offered against the accused).

SUMMARY OF PUBLIC COMMENTS

Robert E. Leake, Jr., Esq. (02-EV-001) would apply the "particularized guarantees of trustworthiness" requirement to "exculpatory as well as incriminating matter."

G. Daniel Carney, Esq. (02-EV-002) approves of the proposed amendment.

Jack E. Horsley, Esq. (02-EV-003) endorses the proposed change to Rule 804(b)(3).

The General Accounting Office (02-EV-004) has no comments to offer with respect to the proposed amendment.

The Commercial and Federal Litigation Section of the New York State Bar Association (02-EV-005) supports the proposed changes to Rule 804(b)(3) and advocates further analysis of other possible changes to the Rule. The Section notes that the text of the Rule is "misleading" in two respects. First, "in civil cases recent federal cases have held that an out-of-court statement against penal interest must be supported by corroborating circumstances to be admissible" – even though that requirement is not imposed by the text of the Rule. Second, where such statements are offered in a criminal case to inculpate the accused, the Confrontation Clause requires a showing of "particularized guarantees of trustworthiness" – a requirement that does not exist in the current text of the Rule. The Section notes that the proposed amendment would incorporate these two "judicial glosses" into the text of the Rule. The section supports the proposed amendment "as a useful codification of current law." But it urges the Advisory Committee to address two further questions: 1) whether the standard of "particularized guarantees of trustworthiness" should be applied to statements against penal interest offered in civil cases; and 2) whether the "particularized guarantees of trustworthiness" requirement should be applied to declarations against penal interest offered by an accused.

Professor Richard Friedman (02-EV-006), appreciates and applauds "at least much of the impetus" behind the proposed amendment. But he fears that the proposed amendment may cause confusion and that it "foregoes the opportunity to make more significant improvements in the operation of Rule 804(b)(3)." He advocates the elimination of the corroborating circumstances requirement as applied to hearsay statements offered by an accused. Professor Friedman also opposes an extension of the corroborating circumstances requirement to statement against penal interest offered in civil cases. He concludes that the Rule should provide that a statement made to law enforcement personnel "shall not be admissible against the accused." He also suggests that the proposed amendment should be changed to add language that would reject the Supreme Court's analysis in *Williamson v. United States,* 512 U.S. 594 (1994), by providing that a non-adverse

statement that is part of a broader inculpatory statement would be admissible if "it appears likely that the declarant would make the statement in question only if believing it to be true." Finally, Professor Friedman suggests that the text of the Rule include language (currently in the proposed Committee Note) providing that the credibility of the in-court witness is irrelevant to the reliability of the hearsay statement.

David Romine, Esq. (02-EV-007), opposes the extension of the corroborating circumstances requirement to civil cases. He contends that the extra evidentiary requirement will have a deleterious effect on the prosecution of civil antitrust cases. He states that the "relatively easy ways in which the corroborating circumstance requirement is satisfied by defendants in criminal cases will usually not be available to antitrust plaintiffs." Mr. Romine concludes that the "Committee should not endorse a revision that will have the perverse effect of making it harder to introduce such evidence in a private antitrust case than to exculpate the accused in a criminal case."

The Federal Magistrate Judges Association (02-EV-008) supports the proposed amendment to Rule 804(b)(3), as an appropriate revision in light of the Supreme Court's decision in *Lilly v. Virginia,* 527 U.S. 116 (1999).

Professor Roger Kirst (02-EV-009) opposes the amendment on the ground that it is "not possible to anticipate the evolving contours of confrontation doctrine for the hearsay exception in this Rule." He recommends that if the Rule is to be amended on other topics, "a caution about the right to confrontation should be included only in an Advisory Committee Note without attempting to define what the Sixth Amendment requires."

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (02-EV-010) agrees with the proposed amendment "insofar as it articulates the constitutional requirement that a declaration against penal interest, offered to inculpate a defendant in a criminal case, be supported by particularized guarantees of trustworthiness." The Committee states that "[i]ncorporating the 'particularized guarantees' language into the rule does not change the law; it simply carries on the mission of the Rules of Evidence of codifying court-made evidentiary law and making it more accessible." However, the Committee disagrees with the proposal "insofar as it would import into the law of civil evidence the 'corroborating circumstances' requirement that traditionally has been thought to apply only to declarations against penal interest offered in criminal cases." Extension of the corroborating circumstances requirement to civil cases would, in the Committee's view, "move a difficult aspect of the criminal procedural law into the civil procedural law, without any compelling reason to do so."

Professor Clifford Fishman (02-EV-011), complains that "the proposal's language provides no explanation as to why different standards are imposed in the first place and offers no guidance as to what the different standards mean." Professor Fishman suggests that the text of the Rule be expanded to clarify that "corroborating circumstances" requires the court to consider the nature or strength of independent evidence that tends to corroborate the hearsay statement, while "particularized guarantees of trustworthiness" prohibits consideration of corroborating evidence.

The Federal Bar Association (02-EV-012), "supports the substance of the proposed amendment" but "recommends a change in format to provide additional clarity." The Association's proposal would place statements against penal interest offered by the prosecution into a separate subdivision. The Association "also agrees with the Committee's recommendation that the specific factors to be considered in assessing whether a proffered statement meets the applicable requirement be left to the Committee Note and to case law rather than being specified in the text of the Rule."

The Committee on Federal Courts of the California State Bar (02-EV-013), supports the proposed amendment to Rule 804(b)(3).

The National Association of Criminal Defense Lawyers (02-EV-014), opposes the amendment and argues that "'corroborating circumstances' should be required, and not merely 'particularized guarantees of trustworthiness', before the prosecution is allowed to obtain admission of hearsay statements on the basis of their having been made against the declarant's penal interest."