Evidence Rules Advisory Committee
Minutes of Meeting on May 8, 2015

Present: Judge Karen Lansing, Chair; Jessica Lorello, Michelle Points, Wyatt Johnson, Tim Gresback, John Rumel, Cathy Derden. Joining by phone: Judge John Stegner, Judge Steve Verby, Steve Smith.

The purpose of the meeting was to review 2014 amendments to the federal hearsay rules and a 2006 amendment to F.R.E. 609 to determine if corresponding amendments to the Idaho Rules should be recommended. When the Idaho Rules were adopted they largely mirrored the Federal Rules. Over the years, as the federal rules were amended, similar amendments have often been made to the Idaho rules. This is a help to practitioners and judges who can use the federal case law. For each potential amendment, the rationale that was given for the amendment to the corresponding federal rule is set out.

Rule 609. The proposed amendment to 609 (a) is as follows

> (a) **General rule.** For the purposes of attacking ~~the credibility of a witness~~ a witness's character for truthfulness**,** evidence of the fact that the witness has been convicted of a felony and the nature of the felony shall be admitted if elicited from the witness or established by public record, but only if the court determines in a hearing outside the presence of the jury that the fact of the prior conviction or the nature of the prior conviction, or both, are relevant to the ~~credibility of the witness~~ witness's character for truthfulness and that the probative value of admitting this evidence outweighs its prejudicial effect to the party offering the witness. If the evidence of the fact of a prior felony conviction, but not the nature of the conviction, is admitted for the purpose of impeachment of a party to the action or proceeding, the party shall have the option to present evidence of the nature of the conviction, but evidence of the circumstances of the conviction shall not be admissible.

The amendment clarifies that the restrictions in Rule 609 apply only where the conviction is offered to attack a witness's general character for truthfulness and not for some other purpose, such as contradicting the witness's specific testimony.

The Committee voted to recommend adopting the amendment as well as the official comment below:

> The amendment substitutes the term "character for truthfulness" for the term "credibility" in the first sentence of the Rule. The limitations of Rule 609 are not applicable if a conviction is admitted for a purpose other than to prove the witness's character for untruthfulness.

Rule 801(d)(1)(B). The proposed amendment is as follows:

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

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

The official comment to this amendment in the federal rules explains that though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not, for example, provide for substantive admissibility of consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it cover consistent statements that would be probative to rebut a charge of faulty memory. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility but not for the truth of the matter asserted. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

The amendment retains the requirement set forth in *Tome v. United States*, 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication or improper influence or motive must have been made before the alleged fabrication or improper inference or motive arose. The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness--such as the charges of inconsistency or faulty memory.

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. The amendment does not make any consistent statement admissible that was not admissible previously--the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

The Committee voted to recommend this amendment to the Idaho Rules.

Rule 803(6)-(8). The proposed amendments are as follows:

> **Hearsay exceptions; availability of declarant immaterial.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness.
>
> . . . .
>
> (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, or by certification that complies with Rule 902(11), unless the opponent shows 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 opponent shows the sources of information or other circumstances indicate lack of trustworthiness.
>
> (8) **Public records and reports.** ~~Unless the sources of information or other circumstances indicate lack of trustworthiness, R~~records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law, unless the opponent shows the sources of information or other circumstances indicate lack of trustworthiness. The following are not within this exception to the hearsay rule: (A) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case; (B) investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party; (C) factual findings offered by the government in criminal cases; (D) factual findings resulting from special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case.

The amendment clarifies the burden of proving circumstances indicating the evidence was not trustworthy. If the proponent has established the stated requirements of the exception--regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification--then the burden is on the opponent to show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to

impose this burden on opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable.

The Committee voted to recommend this amendment to the Idaho Rules.

Rule 803(10). The proposed amendment is as follows:

> **Hearsay exceptions; availability of declarant immaterial.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness.
>
> . . . .
>
> (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. In a criminal case, such a certification shall be admissible only if a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice--unless the court sets a different time for the notice or the objection.

Rule 803(10) allows a party to prove that certain public records cannot be found using a certification in lieu of live testimony. The federal rules advisory committee believed that the rule did not conform to post-*Crawford v. Washington* Confrontation Clause jurisprudence, which generally prohibits the admission of testimonial hearsay, even when the statement falls within a hearsay exception. The committee explained:

> Rule 803(10) has been amended in response to *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). The *Melendez-Diaz* Court declared that a testimonial certificate could be admitted if the accused is given advance notice and does not timely demand the presence of the official who prepared the certificate. The amendment incorporates, with minor variations, a "notice-and-demand" procedure that was approved by the *Melendez-Diaz* Court.

In essence, the amendment creates a procedure by which a defendant may waive the Sixth Amendment right to confront a witness and permit the admission of the certification. The bench and bar may be aided by adding the constitutionally required process to the text of the rule.

The Committee voted to recommend this amendment to the Idaho Rules.

Rule 804(b)(3). The proposed amendment is as follows:

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

Rule 804(b)(3) generally allows the admission of a statement against interest, over a hearsay objection. But, there is an additional requirement in some circumstances. Under the former federal rule, and the current Idaho Rule, statements tending (1) to expose the declarant to criminal liability and (2) to *exculpate* a criminal defendant must meet an additional requirement before the statement may be admitted: there must be corroborating circumstances indicating that the evidence is trustworthy. The amendment broadens the rule to apply whether the evidence exculpated or inculpated the defendant.

The Committee voted to recommend this amendment to the Idaho Rules, with one vote against.

Rules formatting update. In 2011 a vast number of nonsubstantive changes were made to the federal rules, including breaking rules into subparts and other format and style changes which make the current federal rules much easier to read. The Idaho Rules of Civil Procedure are currently being updated in a similar manner. The Committee recommended that the Supreme Court authorize this committee or a specially constituted committee to develop recommendations for reformatting and updating the Idaho Rules of Evidence along the same lines as the federal rules.