PROPOSED MONTANA

RULES OF EVIDENCE

SUBMITTED TO THE MONTANA SUPREME COURT BY ITS

COMMISSION ON RULES OF EVIDENCE

NOVEMBER 5, 1976

TABLE OF CONTENTS

	Page
Petition for Creation of the Commission	i
Order Creating the Commission	iv
Report of the Commission	vi
Proposed Montana Rules of Evidence:	

ARTICLE I. GENERAL PROVISIONS:

100.	Short title.....	1
101.	Scope	1
	(a) Proceedings generally	
	(b) Rules of privilege	
	(c) Rules inapplicable	
102.	Purpose and construction	5
103.	Rulings on evidence	5
	(a) Effect of erroneous ruling	
	(1) Objection	
	(2) Offer of proof	
	(b) Record of offer and ruling	
	(c) Hearing of the jury	
	(d) Plain error	
104.	Preliminary questions of admissibility	11
	(a) Questions of admissibility generally	
	(b) Admissibility subject to condition	
	(c) Hearing of jury	
	(d) Testimony by accused	
	(e) Weight and credibility	

ARTICLE I. GENERAL PROVISIONS - Continued

Page

105. Limited admissibility 16

106. Remainder of or related acts, writings, or statements, (a) and (b) 17

ARTICLE II. JUDICIAL NOTICE

201. Judicial notice of facts 20
(a) Scope of rule
(b) Kinds of facts
(c) When discretionary
(d) When mandatory
(e) Opportunity to be heard
(f) Time of taking notice
(g) Instructing the jury

202. Judicial notice of law 24
(a) Scope of rule
(b) Kinds of law
(c) When discretionary
(d) When mandatory
(e) Opportunity to be heard
(f) Time of taking notice
(g) Question for the court

ARTICLE III. PRESUMPTIONS

301. Presumptions in general 31
(a) Presumption defined
(b) Classification and effect
(c) Inconsistent presumptions

302. Applicability of federal law in civil cases. 35

ARTICLE IV. RELEVANCY AND ITS LIMITS

401 Definition of relevant evidence 39

402. Relevant evidence generally admissible; irrelevant evidence generally inadmissible 41

ARTICLE IV. RELEVANCY AND ITS LIMITS - Continued

Page

403. Exclusion of relevant evidence on grounds of prejudice, confusion or waste of time 43

404. Character evidence not admissible to prove conduct, exceptions; other crimes; character in issue 44
(a) Character evidence generally
(b) Other crimes
(c) Character in issue

405. Methods of proving character 49
(a) Reputation or opinion
(b) Specific instances of conduct

406. Habit; routine practice 51
(a) Habit and routine practice defined
(b) Admissibility
(c) Method of proof

407. Subsequent remedial measures 53

408. Compromise and offers to compromise 54

409. Payment of expenses 56

410. Offer to plead guilty; nolo contendere; withdrawn plea of guilty 57

411. Liability insurance 58

ARTICLE V. PRIVILEGES

Introductory Commission Comment 61

501. Privileges recognized only as provided 63

502. Identify of informer 64
(a) Rule of privilege
(b) Who may claim the privilege
(c) Exceptions and limitations

ARTIVLE V. PRIVILEGES - Continued

Page

503. Waiver of privilege by voluntary disclosure. 68
(a) General rule
(b) Joint holders

504. Privileged matter disclosed under compulsion or without opportunity to claim privilege 69

505. Comment upon or inference from claim of privilege 70

ARTICLE VI. WITNESSES:

601. General rule of competency 73
(a) General rule of competency
(b) Disqualification of witnesses

602. Lack of personal knowledge 79

603. Oath or affirmation 80

604. Interpreters 81

605. Competency of judge as witness 82

606. Competency of juror as witness 83
(a) At the trial
(b) Inquiry into validity of verdict or indictment

607. Who may impeach 87
(a) Attacking the credibility of a witness
(b) No party bound by testimony of any witness

608. Evidence of character and conduct of witness 91
(a) Reputation evidence of character
(b) Specific instances of conduct

609. Impeachment by evidence of conviction of crime 95

610. Religious beliefs or opinions 97

ARTICLE VI. WITNESSES - Continued

Page

611. Mode and order of interrogation and presentation 98
(a) Control by court
(b) Scope of cross-examination
(1) Cross examination
(2) Evidence developed from cross-examination by trier of fact as proof of any fact in issue
(c) Leading questions
(d) Re-examination and recall
(e) Confrontation

612. Writings used to refresh memory 107
(1) While testifying, or
(2) Before testifying

613. Prior statements of witnesses 109
(a) Examining witness concerning prior statement
(b) Extrinsic evidence of prior inconsistent statement of witness

614. Calling and interrogation of witnesses by court 112
(a) Calling by court
(b) Interrogation by court
(c) Objections

615. Exclusion of witnesses 114

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

701. Opinion testimony by lay witnesses 117

702. Testimony by experts 119

703. Bases of opinion testimony by experts 120

704. Opinions on ultimate issue 121

705. Disclosure of facts or data underlying expert opinion 122

ARTICLE VIII. HEARSAY

Page

801. Definitions 125
- (a) Statement
- (b) Declarant
- (c) Hearsay
- (d) Statements which are not hearsay
  - (1) Prior statement by witness
  - (2) Admission by party-opponent

802. Hearsay rule 135

803. Hearsay exceptions; availability of declarant immaterial 136
- (1) Present sense impression
- (2) Excited utterance
- (3) Then existing mental, emotional, or physical condition
- (4) Statements for purposes of medical diagnosis or treatment
- (5) Recorded recollection
- (6) Records of regularly conducted activity
- (7) Absence of entry in records kept in accordance with the provisions of paragraph (6)
- (8) Public records and reports
- (9) Records of vital statistics
- (10) Absence of public record or entry
- (11) Records of religious organizations
- (12) Marriage, baptismal, and similar certificates
- (13) Family records
- (14) Records of documents affecting an interest in property
- (15) Statements in documents affecting an interest in property
- (16) Statements in ancient documents
- (17) Market reports, commercial publications
- (18) Learned treatises
- (19) Reputation concerning personal or family history
- (20) Reputation concerning boundaries or general history
- (21) Reputation as to character

Page

ARTICLE VIII. HEARSAY - Continued

(22) Judgment of previous conviction
(23) Judgment as to personal, family, or general history, or boundaries
(24) Other exceptions

804. Hearsay exceptions; declarant unavailable... 152
(a) Definition of unavailability
(1) Exempted by court ruling by privilege from testifying concerning subject matter of his statement
(2) Persistence in refusing to testify despite order of the court
(3) Lack of memory
(4) Inability to be present or to testify at hearing because of death or physical or mental illness or infirmity
(5) Absence from hearing, with the proponent of his statement unable to procure his attendance by process or other reasonable means

(b) Hearsay exceptions:
(1) Former testimony
(2) Statement made under belief of impending death
(3) Statement against interest
(4) Statement of personal or family history
(5) Other exceptions

805. Hearsay within hearsay 162

806. Attacking and supporting credibility of declarant 162

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

901. Requirement of authentication or identification..... 164
(a) General provision
(b) Illustrations

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION - Continued

Page

901. (b) Illustrations - Continued
(1) Testimony of witness with knowledge
(2) Nonexpert opinion on handwriting
(3) Comparison by trier or expert witness
(4) Distinctive characteristics and the like
(5) Voice identification
(6) Telephone conversations
(7) Public records of reports
(8) Ancient documents or data compilation
(9) Process or system
(10) Methods provided by statute or rule

902. Self-authentication 174
(1) Domestic public documents under seal
(2) Domestic public documents not under seal
(3) Foreign public documents
(4) Certified copies of public records
(5) Official publications
(6) Newspapers and periodicals
(7) Trade inscriptions and the like
(8) Acknowledged documents
(9) Commercial paper and related documents
(10) Presumptions created by law

903. Subscribing witness' testimony unnecessary. 181

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

1001. Definitions 183
(1) Writings and recordings
(2) Photographs
(3) Original
(4) Duplicate

1002. Requirement of original 186

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS - Continued

Page

1003. Admissibility of duplicates, copies of certain entries 188

1004. Admissibility of other evidence of contents. 190
(1) Originals lost or destroyed
(2) Original not obtainable
(3) Original in possession of opponent
(4) Collateral matters

1005. Public records 192

1006. Summaries 193

1007. Testimony or written admission of party 194

1008. Functions of court and jury 194

TABLES

Table A. List of Proposed Rules of Evidence superseding R.C.M. 1947 Sections

Table B. List of R.C.M. 1947, Evidence Code Sections Affected by Proposed Rules of Evidence

Table C. Proposed Rules of Evidence Differing from Federal Rules of Evidence

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 12729

In the Matter of the Application of the
Montana Bar Association for Creation
of a Commission on Rules of Evidence

PETITION FOR CREATION OF COMMISSION
ON RULES OF EVIDENCE.

Henry Loble, Esq., President of the Montana Bar Association, of Helena, Montana, and Sam E. Haddon, Esq., of Missoula, Montana, respectfully petition and show the Court.

1. The Petitioners are members of the Bar of this State and duly licensed to practice law in the Courts of the State of Montana. Petitioner Henry Loble is the duly elected, qualified and acting President of the Montana Bar Association, a non-profit Corporation, organized and existing under the laws of the State of Montana.

2. The Montana Bar Association, in the interest of improving the quality of administration of justice in the Courts of the State of Montana, in the interest of furthering the fair and prompt disposition of matters before said Courts and in recognition of the continuing need for improvement of practice and procedure in the Courts of the State of Montana, has formed the Montana Bar Association Committee on Rules of Evidence to study the present Montana Code of Evidence and the practice thereunder, together with other developments and proposals in the field of evidenciary law and to make recommendations for appropriate revision of said Code of Evidence. The present members of the Committee are listed in Exhibit "A" attached to this Petition.

3. It is in the interest of the bench and bar of the State of Montana to appoint a Commission to carry on the work undertaken by the Montana Bar Association Committee on Rules of Evidence, and that said Commission make a complete study,

consider and finally prepare Rules of Evidence for the Courts of the State of Montana, comprehensive in scope, and to submit the same to this Court for its consideration and adoption.

4. Petitioners respectfully request this Court to appoint a Commission on Rules of Evidence from members of the bench and bar of this State, to designate a chairman thereof and to issue such further and other orders and directives in connection with the scope of responsibility and undertaking of said Commission as it deems appropriate in the premises.

Respectfully submitted,

/s/ Henry Loble
Henry Loble, Esq.

/s/ Sam E. Haddon
Sam E. Haddon, Esq.

EXHIBIT "A"

Honorable Frank I. Haswell
Associate Justice
Capitol Station
Helena, Montana 59601

Honorable Robert S. Keller
District Judge
Eleventh Judicial District
P. O. Box 263
Kalispell, Montana 59901

Honorable W. W. Lessley
District Judge
Eighteenth Judicial District
P. O. Box 1050
Bozeman, Montana 59712

Honorable Peter G. Meloy
District Judge
First Judicial District
Lewis & Clark County Courthouse
Helena, Montana 59601

Professor William F. Crowley
Law School
University of Montana
Missoula, Montana 59801

Douglas Allen, Esq.
Church, Harris, Johnson & Williams
Attorneys at Law
302 Great Falls National Bank Building
Great Falls, Montana 59401

Arthur W. Ayers, Jr., Esq.
Ayers & Alterowitz
Attorneys at Law
P. O. Box 67
Red Lodge, Montana 59068

John F. Blackwood, Esq.
McDonald & Blackwood
Attorneys at Law
P. O. Box 656
Livingston, Montana 59047

Stephen Foster, Esq.
Crowley, Kilbourne, Haughey, Hanson & Gallagher
Attorneys at Law
500 Electric Building
Billings, Montana 59101

Sam E. Haddon, Esq.
Boone, Karlberg & Haddon
Attorneys at Law
First National Bank Building
Missoula, Montana 59801

H. L. McChesney, Esq.
Goldman, McChesney & Eck
Attorneys at Law
P. O. Box 1347
Missoula, Montana 59801

Peter C. Pauly, Esq.
Loble, Picotte & Pauly
Attorneys at Law
833 North Main
Helena, Montana 59601

James J. Sinclair, Esq.
Berger, Anderson, Sinclair & Murphy
Attorneys at Law
2512 3rd Avenue North
Billings, Montana 59101

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 12729

In the Matter of the Application of the
Montana Bar Association for Creation
of a Commission on Rules of Evidence

O R D E R

A petition having been filed herein by Henry Loble, Esq., President of the Montana Bar Association and Sam E. Haddon, Esq., a member of the Montana Bar, requesting the creation of a commission on the rules of evidence and good cause appearing for granting the prayer of said petition,

IT IS ORDERED:

1. Said petition is granted.

2. Sam E. Haddon, Esq., of Missoula, Montana, is appointed chairman thereof.

3. The following are appointed as members of said commission:

Hon. Frank I. Haswell, Justice
Montana Supreme Court
Helena, Montana

Hon. Robert S. Keller, District Judge
Kalispell, Montana

Hon. W. W. Lessley, District Judge
Bozeman, Montana

Hon. Peter G. Meloy, District Judge
Helena, Montana

Professor William F. Crowley
University of Montana School of Law
Missoula, Montana

Douglas Allen, Esq.
Great Falls, Montana

Arthur W. Ayers, Jr., Esq.
Red Lodge, Montana

John F. Blackwood, Esq.
Livingston, Montana

Stephen Foster, Esq.
Billings, Montana

H. L. McChesney, Esq.
Missoula, Montana

Peter C. Pauly, Esq.
Helena, Montana

James J. Sinclair, Esq.
Billings, Montana

DATED this 4th day of April, 1974.

FOR THE COURT:

/s/ Gene B. Daly
Acting Chief Justice

MONTANA SUPREME COURT COMMISSION ON RULES OF EVIDENCE
UNIVERSITY OF MONTANA
SCHOOL OF LAW
MISSOULA, MONTANA 59801

November 3, 1976

ommission Members:

AM E. HADDON, Esq., Chairman
onorable FRANK I. HASWELL
onorable ROBERT S. KELLER
onorable W. W. LESSLEY
onorable PETER G. MELOY
ofessor WILLIAM F. CROWLEY
DUGLAS ALLEN, Esq.
RTHUR W. AYERS, JR., Esq.
OHN F. BLACKWOOD, Esq.
EPHEN FOSTER, Esq.
L. McCHESNEY, Esq.
TER C. PAULY, Esq.
AMES J. SINCLAIR, Esq.

DENNIS P. CLARKE,
Research Director

Re: In the matter of the report of the Montana Supreme Court Commission on Rules of Evidence

To: The Honorable Justices of the Supreme Court of Montana

The Montana Supreme Court Commission on Rules of Evidence presents herewith its final report.

The Commission was appointed by order of the Supreme Court on April 5, 1974. The Commission held its first meeting on July 12, 1974, and at that time undertook its responsibilities. Twenty meetings at approximately six week--two month intervals were held by the Commission in completing its work.

The Commission was drawn from active members of the bench and bar having a wealth of experience in all facets of trial practice. In spite of the members' busy work schedules, attendance and participation at the Commission meetings were excellent. Over one thousand hours of lawyer and judge time were devoted to the meetings exclusive of time in preparation for the meetings or to travel time to and from the meeting sites.

We are deeply indebted to Dennis P. Clarke, Research Director for the Commission, for his excellent research and drafting. His fine efforts provided the Commission with superior research materials and a sound and workable format for consideration of the Rules.

Much of the work of the Commission was made possible by grants from the Montana Board of Crime Control and from funds from the Montana Supreme Court. These monies enabled the Commission to hire Mr. Clarke as Research Director and to engage part-time clerical help and to help defray travel expenses

for Commission members. The Board of Crime Control generously donated use of its conference facilities for a majority of the Commission meetings without charge. We express our sincere thanks to the Board of Crime Control for its support and assistance in bringing the project to completion.

The Rules have been distributed to the bench and bar of Montana through the offices of the Montana State Bar. This distribution was intended to serve as official notice of the work of the Commission and to allow for comment by the bench and bar concerning the rules. All responses received from members of the bar have been considered and reviewed by the Commission and a number of changes from the originally published drafts were incorporated as a result.

The work product of the Commission presented herewith consists of the texts of the Rules, the official Commission comments, and a series of tables. It brings together for the first time in Montana practice a single source for reference and use by lawyers and judges in the litigation of matters in the courts of our state.

The official comments cover a comparison of the Montana Rules with their Federal counterparts, the reasons for the adoption of each Rule, the Rules' effect upon existing Montana law of evidence, and citations of leading Montana case law authorities. The Commission believes that the comments provide significant guidelines for interpretation and application of the Rules in practice.

Table "A" contains a compilation and listing of the Rules, the subject matter of the Rules, and the existing Montana statutes superseded by the Rules. Table "B" is a cross-index to existing evidence code sections and the effect of the Rules upon those sections. Table "C" is a comparison of the Montana Rules of Evidence with the Federal Rules of Evidence showing differences and similarities between the two. While the tables are not a part of the Rules themselves, they are essential to a thorough understanding of the relationship of the Rules to existing Montana law and to the Federal Rules of Evidence.

It is the recommendation of your Commission that the Rules be considered for adoption as rules of practice pursuant to Article VII, Section 2 (3) of the 1972 Montana Constitution. The members of the Commission are available to participate in any hearing the Supreme Court deems appropriate to a consideration and adoption of the Rules and to assist the Court in any way desired.

Respectfully submitted,

MONTANA SUPREME COURT COMMISSION
ON RULES OF EVIDENCE

By Sam E. Haddon
Chairman

SEH:df

ARTICLE I. GENERAL PROVISIONS

Rule 100. Short Title

These rules may be known and cited as the Montana Rules of Evidence.

Source: Based on Federal Rule 1103

Rule 101. Scope

(a) Proceedings generally. These rules govern all proceedings in all courts in the State of Montana with the exceptions stated in this rule.

Source: Based on Federal Rule 101

(b) Rules of privilege. The rules with respect to privileges found in Article V apply at all stages of all actions, cases and proceedings.

Source: Federal Rule 1101(c)

(c) Rules inapplicable. The rules (other than those with respect to privileges) 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(a).

(2) Grand jury. Proceedings before grand juries.

(3) Miscellaneous proceedings. Proceedings for extradition or rendition; preliminary examinations and proceedings on applications for leave to file informations in criminal cases; sentencing; dispositional hearings in youth court proceedings; granting or revoking probation or parole; issuance of warrants for arrest, criminal summonses and

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

(4) Summary proceedings. Proceedings, other than motions for summary judgment, where the court is authorized by law to act summarily.

(5) Other miscellaneous proceedings. Ex parte matters; and proceedings, when authorized by law, which are uncontested or nonadversary.

Source: Paragraphs (1) and (2) are Federal Rule 1101(d)(1) and (2); Paragraph (3) is based upon Federal Rule 1101(d)(3); Paragraph (4) is based upon Uniform Rules of Evidence (1974) Rule 1101(b)(4) adopted by the National Conference of Commissioners on Uniform State Laws; and Paragraph (5) is original.

Commission Comment

(a) Scope

This subdivision is identical to Federal and Uniform Rules (1974) Rule 101 with these exceptions: "all" is added to modify both proceedings and courts; "in the State of Montana" is substituted for the Federal phrase making the rules apply in Federal courts and before Federal magistrates and the Uniform Rule phrase "of this state"; "to the extent and" is deleted from both rules; and "exceptions stated in this rule" is substituted for the Federal and Uniform Rules phrase "exceptions stated in Rule 1101."

The first two changes are added to make it clear that the Proposed Montana Rules of Evidence will apply in all proceedings and in all courts in the State of Montana unless there is an exception stated in the rules. The third and fourth changes are made to conform to the different scheme employed in setting forth the exceptions. The Federal Rules contain a separate rule (Rule 1101) to provide for their application. Exceptions to the Proposed Montana Rules of Evidence are not nearly as complex as the Federal Rules and are placed in the first rule to provide clearer organization and easier understanding.

The Supreme Court's authority to promulgate these rules is Article VII, Section 2(3) of the 1972 Constitution of Montana,

allowing the court to make rules of practice and procedure for all courts. A similar provision establishing such authority is R.C.M. 1947, Section 93-2801-1. Existing Montana law covers the application of the law of evidence quite generally rather than applying it to specific proceedings. R.C.M. 1947, Section 93-2501-3 provides that the law of evidence applicable in jury trials is equally applicable where there is no jury. R.C.M. 1947, Section 95-3001 provides that rules of evidence applicable in civil cases is also applicable in criminal cases, except as otherwise provided in the Montana Code of Criminal Procedure. Therefore the Commission feels that the Supreme Court has the authority to make these rules consistent with existing Montana law or practice, or if there is neither, with what makes clear good sense.

(b) Privileges

This subdivision is identical to Federal Rule 1101(c) except that "found in Article V" is included as reference to the rules of privilege. Existing Montana law on privileges is contained in R.C.M. 1947, Section 93-701-4 which states in part: "There are particular relations in which it is the policy of the law to encourage confidence and <u>to preserve it inviolate</u>. . ." (emphasis added). Therefore the proposed rule is consistent with this statute and what the Commission believes to be the rule in Montana on privileges.

(c) Rules inapplicable

This subdivision is identical to Federal Rule 1101(d) in paragraphs (1) and (2). Paragraph (3) is identical to Federal Rule 1101(d)(3) except that the following additions are made to conform to Montana practice: "and proceedings on applications for leave to file informations" after "preliminary examinations"; "dispositional hearings in youth court proceedings" after "sentencing"; "or parole" after "probation"; and "notices to appear" after "criminal summonses." Paragraph (4) is based on Rule 1101 (b)(4) of the Uniform Rules of Evidence (1974). Paragraph (5) is original.

The reason for these changes is to extend the exceptions of the Federal Rules to follow the Montana practice of not applying rules of evidence in the following instances. Paragraph (1) is consistent with R.C.M. 1947, Section 93-2501-2

calling for the court to make determinations of this sort and with the view that it is impractical to require the court to observe rules of evidence when determining the admissibility of evidence under Rule 104(a).

Paragraph (2) is consistent with R.C.M. 1947, Section 95-1408(a) covering grand juries and with the view that it is impossible for rules of evidence to be applied in grand jury proceedings where there is no one to object and no one to rule on objections.

Paragraph (3) is consistent with Montana practice in criminal and youth court proceedings where application of rules of evidence would be impractical. The Commission does not intend that substantive due process be abrogated by suspension of the rules in the proceedings covered in paragraph (3); the rules may be applied when the court finds it necessary. An example of this problem can be found in R.C.M. 1947, Section 95-1506 where an increased sentence for prior conviction is not allowed unless the prosecution proves it at a separate hearing. In this situation, it is possible that the provision of this rule on sentencing would exclude the use of rules of evidence; however, as the Commission does not intend to abrogate due process by suspension of the rules, where the court feels that the rules should apply, they shall apply.

The statutes which the Commission believes cover most of the various criminal proceedings are as follows: extradition or rendition under R.C.M. 1947, Section 95-3101 et seq.; preliminary examination under Section 95-1202 and applications for leave to file informations under Section 95-1301 et seq.; sentencing under Section 95-2201 et seq.; granting or revoking probation or parole under Section 95-3201 et seq.; issuance of arrest warrants under Section 95-603, criminal summonses under Section 95-612 and notices to appear under 95-614; issuance of search warrants under Section 95-704; and proceedings with respect to bail or otherwise under Section 95-1101 et seq. Youth court dispositional hearings are covered under Section 10-1221.

Paragraph (4) is consistent with practical considerations and the Montana provision on direct contempt, R.C.M. 1947, Section 93-9803, allowing the court to act summarily in punishing such conduct. It is conceivable that other provisions of the law may allow the court to act in such a manner, and if the court points out where it is authorized by law to so act, the rules may be suspended. A specific instance where this rule does not apply is Rule 56, M.R.Civ.P., motions for summary judgment.

Paragraph (5) is consistent with practical considerations and the Montana practice that where the proceedings are such that no rules of evidence will be invoked, there is no need to have the rules apply.

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.

Source: Federal Rule 102

Commission Comment

This rule is identical to Federal and Uniform Rules (1974) Rule 102. The general philosophy followed in drafting the Federal Rules was to allow a court to ". . . admit the evidence unless some good reason exists to exclude it." Statement attributed to Albert Jenner, Chairman, Federal Rules Advisory Committee, in Schwartz, "The Proposed Federal Rules of Evidence: An Introduction and Critique," 38 U. Cinn. L. Rev. 449, 453 (1969). The Commission feels that this rule is a good statement of the purpose of the rules and how they should be construed; it also concurs in the statement of their philosophy. There is no existing law in Montana specifically on this point, however a statement of similar policy is found in R.C.M. 1947, Section 93-2801-1 granting the Supreme Court the authority to make rules: ". . . for the purpose of simplifying judicial proceedings. . . and for promoting the speedy determination of litigation upon its merits."

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. It may direct the making of an offer in question and answer form.

(c) Hearing of the 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 statement 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.

Source: Federal Rule 103

Commission Comment

(a) Effect of erroneous ruling

This subdivision is identical to Federal and Uniform Rules (1974) Rule 103(a). It was adopted because the Commission feels that it accurately states what is good about existing Montana law and overrules what is not.

The first clause of this rule states the harmless error provision of the rules. In allowing error to be predicated only where "a substantial right of the party is affected" the rule is consistent with the following Montana provisions:

1. R.C.M. 1947, Section 93-5603 (grounds for new trial): "The former verdict or other decision may be vacated and a new trial granted . . . for any of the following causes, materially affecting the substantial rights of the parties. . . ."

2. Rule 61, M.R.Civ.P. (harmless error): ". . . The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial

rights of the parties."

3. Rule 14, M.R.App.Civ.P. (following review of rulings against the respondent on appeal): ". . . any order, ruling, or proceeding of the trial court against the respondent, affecting his substantial rights on the appeal of said cause. . . ."

4. R.C.M. 1947, Section 95-2425 (appeals in criminal cases): "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Cases in Montana following these statutes have held that technical errors in rulings on evidence will not be grounds for reversal, and in order to allow reversal the ruling must affect substantial rights. White v. Chicago, M&PS Ry. Co. et. al, 49 Mont. 419, 429, 143 P. 561 (1914); Roper v. Caterpillar Tractor Co. et. al., 98 Mont. 76, 97, 37 P.2d 812 (1934); Lewis v. New York Life Ins. Co., 113 Mont. 151, 166, 124 P.2d 579 (1942); State v. Romero, 161 Mont. 333, 341, 505 P.2d 1207 (1973).

(1) Objection

This first paragraph presents the rule that an error may not be predicated unless the "substantial right of the party is affected" and, if the "ruling is one admitting evidence," an objection or motion to strike is made. The requirements for an objection or motion to strike are the same: it must be timely and it must state the specific ground of objection. This is consistent with Montana law: cases dealing with the proposition that an objection be specific is based on early cases: Herman v. Jeffries, 4 Mont. 513, 522, 1 P. 11 (1883) and City of Helena v. Albertose, 8 Mont. 499, 504, 20 P. 817 (1889). The requirement was also part of R.C.M. 1947, Section 93-5503 (superseded) stating: ". . . the grounds of the objection shall be particularly stated," and is part of Rule 46, M.R.Civ.P. which reads: ". . . his objection to the action of the court and his grounds therefor. . . ." A motion to strike must be preceded by a timely objection. Yoder v. Reynolds, 28 Mont. 183, 194, 72 P. 417 (1903) and Poindexter & Orr Livestock Co. v. Oregon Short Line Ry. Co., 33 Mont. 338, 341, 83 P. 886 (1905). It must also be specific as to what testimony should be excluded, for there is no error in denying a motion that is too broad. Dorias v. Doll, 33 Mont. 314, 319, 83 P. 884 (1905); Copenhaver et al. v. Northern Pacific Ry. Co., 42 Mont. 453, 469, 113 P. 467 (1911); and Baldwin v. Silver, 58 Mont. 495, 499, 193 P. 750 (1920).

An exception to the requirement that the objection be specific is the last phrase of paragraph (1) of this rule:

". . . if the specific ground was not apparent from the context . . . ." The Commission feels that this is a good rule; however it is not clear whether or not this exception is consistent with Montana law. Cases have referred to evidence which is determined to be inadmissible from the context of the transcript of the trial, and one in particular, Yoder v. Reynolds, supra at 193, indicates that a general objection can be properly made when it appears that the evidence is entirely inadmissible from the context of the case. In another circumstance, where grounds are apparent from the context, the court may sustain an objection before counsel is able to state his grounds. On appeal the proponent of the evidence may claim that the court improperly sustained the objection. Although the Supreme Court could presume the ruling of the trial court is correct (see appended Table C for cases), the objecting party could be penalized for not stating the grounds for his objection. The Commission feels that this is unfair, for the party is being penalized for an action of the trial court where there is good reason for the objection. This exception solves this problem.

An exception to the timeliness requirement not found in this rule is in Rule 46, M.R.Civ.P.: ". . . if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him." However rarely this exception would be invoked, it is unfair to require a timely objection or motion to strike when there appears to be no reason for either. Therefore application of this exception allows a party to make an objection and motion to strike when the grounds therefor only become apparent sometime after both should have been made.

Barring the application of any of these exceptions, the Commission intends the rule of this paragraph to mean that if an objection or motion to strike is not made, it is waived. Labbitt v. Bunston, 84 Mont. 597, 599, 277 P. 620 (1929) and Estate of Schueren v. Union Bank & Trust Co., 162 Mont. 417, 433, 512 P.2d 1283 (1973). The effect of this rule is to allow any inadmissible evidence, which is admitted without objection, to be treated the same as any admissible evidence.

(2) Offer of proof

The second paragraph of this subdivision presents the rule that an error may not be predicated unless the "substantial right of the party is affected" and if the "ruling is one excluding evidence" an offer of proof was made. The offer of proof is incorporated in Rule 43(c), M.R.Civ.P., but this rule is only codification of prior practice in Montana. The reason for the offer was succinctly stated in Milwaukee Gold Extraction Co. v. Gordon, 37 Mont. 209, 223, 95 P. 995 (1908): "It is impossible

for this court to say whether certain evidence was improperly excluded, unless the record discloses the offered evidence." The offer must be specific as to the facts that would be proved. Palmer v. McMaster, 10 Mont. 390, 396, 25 P. 1056 (1891).

Two exceptions to these rules are contained in Montana cases. The adoption of Rule 43(c) of the Montana Rules of Civil Procedure did not answer the problem raised by them, for it only states: "In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer. . ." (emphasis added).

The first exception deals with offers of proof on cross-examination: "The rule which requires that an offer of proof be made has no application to cross-examination." Herzig v. Sandberg, 54 Mont. 538, 542, 172 P. 132 (1918), citing other cases, and followed in Budd et al. v. Northern Pacific Railway Co., 59 Mont. 238, 242-3, 195 P. 1109 (1921) and Loncar v. National Union Fire Insurance Company, 84 Mont. 141, 151-52, 274 P. 844 (1929). The Commission specifically rejects this exception to the offer of proof rule by not including it in Rule 103(a)(2). The rationale of the exception is not stated in the cases, but according to McCormick, Handbook on the Law of Evidence (2d ed. 1972) 110-111 n. 9: "On cross-examination, the examining counsel is ordinarily assumed not to have had an advance opportunity to know what the witness will answer. . . ." This is no longer true because of the extensive discovery now allowed. The rationale for the exception fails when considering that the scope of cross-examination is usually limited to matters brought out on direct examination and matters of credibility: the likelihood of counsel not knowing what the answer to his question will be in this context is small. The purposes of an offer of proof are to show the trial court what error might be committed if the evidence is excluded, to give it a chance to change its mind, and to show the appellate court what evidence has been excluded so it can determine whether there has been error. These purposes are defeated by the exception. The Commission therefore rejects this exception to the requirement of an offer of proof because it is no longer valid, defeats the purpose of the offer of proof, and is not good law.

The second exception is contained in the Federal and proposed Montana rule. It allows the offer to be dispensed with where the substance of the offer is apparent from the context. This exception is recognized in Montana to the extent that the court was unwilling to rule on the propriety of excluding evidence because that evidence was not apparent from the context. First National Bank of Protland v. Carroll, 35 Mont. 302, 309, 88 P. 1012 (1907) and Trogden v. Hanson Sheep Co., 49 Mont. 1, 4, 139 P. 792 (1914). The exception is followed in Herzig v. Sandberg, supra at 541; Henderson v. Campbell, 95 Mont. 180, 184, 26 P.2d 351 (1933); and Koppang v. Sevier, 106 Mont. 79, 97, 75 P.2d 790 (1938).

(b) Record of offer and ruling

This subdivision is identical to Federal and Uniform Rules (1974) Rule 103(b). It was adopted to improve the practice of submitting offers of proof. The first sentence of the subdivision is the third sentence of Rule 43(c) M.R.Civ.P. The provision is meant to allow the trial court to clarify the record for the appellate court's review. The final sentence is derived from the final sentence of Rule 43(c) M.R.Civ.P. It allows the court to direct the offer of proof to be made in question and answer form.

(c) Hearing of jury

This subdivision is identical to Federal and Uniform Rules (1974) Rule 103(c). It clarifies Rule 43(c) M.R.Civ.P. which states: "The court may require the offer to be made out of the hearing of the jury" and expands the rule to include any mention of inadmissible evidence within the hearing of the jury. The Commission feels that this is the practice in Montana and therefore adopts the rule. It may also be noted that the rule conforms to Canons of Professional Ethics DR-7-106(c) (1) and (7) adopted by the Supreme Court of Montana, 160 Mont. xxiii, xlvi (1972), prohibiting an attorney from asking questions which are not supported by admissible evidence or intentionally or habitually violating established rules of evidence.

(d) Plain error

This subdivision is identical to Federal and Uniform Rules (1974) Rule 103(d). The Commission feels that although this

rule is not formally recognized in Montana, it is consistent with proposed Rule 102, Purpose and construction, particularly allowing "elimination of unjustifiable expense and delay" and providing "that the truth may be ascertained and proceedings justly determined." Having the rule formally recognized is not intended to negate subdivision (a) of this rule, which can be distinguished from this subdivision as follows: under subdivision (a) the party can, as a right, predicate error only when a substantial right is affected and an objection, motion to strike, or offer of proof is made; however, under subdivision (d), while a party may point out that an error affecting a substantial right has been made (for the first time on appeal), only the court has the power to invoke the rule. Therefore this rule will be used in exceptional cases and should not be relied upon by counsel. It should also be noted that while this rule is generally one of appellate review, it is not intended to preclude the trial court from allowing a new trial because of plain error.

Case law in Montana under subdivision (a) of this rule holds that the general rule is that unless a point is raised in the trial court, the Supreme Court will not hear the point on appeal, one of the latest examples is Spencer v. Robertson, 151 Mont. 507, 511, 445 P.2d 48 (1968). However, the Supreme Court has settled cases in accord with its view of substantial justice and ignored the general view. In one example, Tracy v. Harmon, 17 Mont. 465, 468, 43 P. 500 (1896), the court allowed counsel to raise the vagueness of the description of land in a judgment for the first time on appeal, and found the judgment void for this reason. In another example, State v. Duran, 127 Mont. 233, 235, 259 P.2d 1051 (1953), the Supreme Court reversed a conviction on a point raised at trial level, but not argued by either side on appeal, noted by the dissent at 240. The Supreme court will also consider jurisdictional questions (O'Donnell v. City of Butte, 72 Mont. 449, 457, 235 P. 707 (1925)) and constitutional questions (In re Clark's Estate, 105 Mont. 401, 410, 74 P.2d 401 (1937)) on its own motion. Therefore, rather than ignore such actions by the Supreme Court, the Commission adopts this rule.

Rule 104. Preliminary questions of admissibility

(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. In making its determination it is not bound by the rules of evidence except those with respect to privilege.

Source: Based on Federal Rule 104(a)

(b) Admissibility subject to a condition. Except as otherwise provided by law, when the admissibility of evidence depends upon proof of other connecting facts, the court may admit such evidence subject to the condition that further evidence be introduced sufficient to support a finding of those connecting facts. The order of proof may be regulated by the sound discretion of the court.

Source: The first sentence is original; the second is based on R.C.M. 1947, Section 93-1901-1.

(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 so requests.

Source: Federal Rule 104(c)

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

Source: Federal Rule 104(d)

(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.

Source: Federal Rule 104(e).

Commission Comment

(a) Questions of admissibility generally

This subdivision is identical to Federal and Uniform Rules (1974) Rule 104(a) except that "subject to the provisions of subdivision (b)" is deleted because of a change in that subdivision. The Commission adopted this provision because of its common-sense approach to the problem of whether the judge or jury should determine such preliminary questions, and because it is consistent with the practice in Montana. R.C.M. 1947, Section 93-2501-2 states:

> All questions of law, including the admissibility of testimony, the facts preliminary to such admission, . . . and other rules of evidence, are to be decided by the court. . . ."

Montana cases have followed this statute, and two in particular provide detailed procedure to be followed in using this provision. State v. Newman, 66 Mont. 180, 135, 213 P. 805 (1922) on the existence of a privilege; State v. Kacar, 74 Mont. 269, 280, 240 P. 365 (1925) on the admissibility of a dying declaration; and Union Interchange, Inc. v. Parker, 138 Mont. 348, 355, 357 P.2d 339 (1960) one of the latest cases.

The last sentence of this subdivision, providing for the suspension of the rules except for those with respect to privilege, is adopted for practical reasons: When the judge is determining these preliminary matters he must be able to view potentially inadmissible evidence in order to determine whether it can be admitted. It is not clear whether this part of the rule is consistent with existing Montana law. R.C.M. 1947, Section 93-2501-3 states that in the determination of facts in non-jury trials by the court, the law of evidence is applicable; however, it does not state whether the law of evidence is applicable when the court determines questions of law, such as those under this rule. The final phrase in this sentence, applying rules of privilege in preliminary questions, means that the substance of a privileged communication will be protected, but all other rules of evidence will not apply in the determination of the existence of that privilege. Holding the substance of a privilege inviolate is consistent with R.C.M. 1947, Section 93-701-4 and Proposed Montana Rule 101(b).

(b) Admissibility subject to a condition

This subdivision is original and therefore entirely different from either Federal or Uniform Rules (1974) Rule 104(b). The Commission rejected those rules on relevancy conditioned on fact because they were impractical and inconsistent with Montana law. The Federal and Uniform rule calls for a determination of the relevancy of an item <u>by the jury</u> when its relevance depends upon the existence of a preliminary fact. The impracticality of the rule arises when an attempt is made to apply it to various situations. The originator of the term, Morgan, in <u>Basic</u>

Problems in Evidence 45-46 (1962) gives examples of entirely different situations than are given by the Advisory Committee in its Note to Federal Rule 104(b) at 46 F.R.D. 161, 189. As shown by the Commission Comment to Proposed Montana Rule 104(a), Montana law clearly has no provision for the jury to determine any preliminary questions. The policy behind Federal and Uniform Rule 104(b) is to allow the jury to decide questions similar to other questions of fact which it is capable of making, especially where none of the exclusionary rules of competence apply. Advisory Committee Note to the Federal Rule, supra at 190. The Commission feels that current Montana law should not be rejected on such policy grounds, particularly where the result is potentially confusing and impractical.

The rule adopted is the common practice in Montana allowing evidence to be introduced subject to the condition that it be connected up. Montana has apparently always allowed this practice. State ex rel. Felker, 27 Mont. 451, 459, 71 P. 668 (1903); Risken v. N.P. Ry. Co., 137 Mont. 57, 70, 350 P.2d 831 (1960). The phrase "except as otherwise provided by law" is included to prevent a misinterpretation of the rule which could allow evidence to be introduced with a promise to connect but without sufficient foundation; this would be clearly contrary to existing Montana law. Examples of situations which require that foundation evidence be introduced first are: the best evidence rule under R.C.M. 1947, Section 93-1101-9; authentication of writings under R.C.M. 1947, Section 93-801-2 (business records), Section 93-901-1 (official reports), Section 93-1001-17, -18 and -30 (public writings) and Section 93-1101-12 and -19 (private writings); use of prior inconsistent statements under Section 93-1901-12; refreshing memory from notes under Section 93-1901-6; relevancy of material objects under Section 93-1201-1; and qualification of expert witnesses and of lay witnesses in certain situations under Section 93-401-27(9).

The final sentence is added to insure that the court retains its control over the parties' introduction of evidence under this rule. This is consistent with Montana statutes R.C.M. 1947, Sections 93-1901-1 and 95-1910 and case law. Exchange State Bank v. Occident Elevator Co., 95 Mont. 78, 91, 24 P.2d 126 (1933); State v. Jensen, 153 Mont. 233, 237, 455 P.2d 63 (1969); Sprugeon v. Imperial Elevator Co., 99 Mont. 432, 438, 43 P.2d 891 (1935) and cases cited therein. Especially important is that the evidence is capable of being connected up. State v.

Simanton, 100 Mont. 292, 309, 49 P.2d 981 (1935). It may also be noted that Montana follows the majority rule and requires that when evidence is not connected up, it is the duty of counsel to object and make a motion to strike as soon as it is apparent. State v. Simanton, supra at 305 and Pfau v. Stokke, 110 Mont. 471, 474, 103 P.2d 673 (1940).

(c) Hearing of jury

This subdivision is identical to Federal and Uniform Rules (1974) Rule 104(c). The rule was adopted because it expresses good policy and is generally consistent with Montana law. Having hearings on the admissibility of confessions outside the presence of the jury is consistent with the provisions of R.C.M. 1947, Section 95-1805. Hearings on other matters may or may not be conducted within the hearing of the jury, depending upon the nature of the matter; therefore, leaving this to the discretion of the court is the most practical solution to the problem and also current practice. The final part of this subdivision, allowing the accused in a criminal trial to request a hearing outside the presence of the jury when he is a witness, encourages testimony and prevents claims of prejudice.

(d) Testimony by accused

This subdivision is identical to Federal and Uniform Rules (1974) Rule 104(d). The rule was adopted because it expresses good policy, like that of subdivision (c), in encouraging the accused to testify in such preliminary matters, so that the admissibility of evidence is more easily determined. While there is no Montana law specifically dealing with this subdivision, the Commission does not intend to change the rule expressed in State v. Rogers, 31 Mont. 1, 7, 77 P. 293 (1904) and State v. Smith, 57 Mont. 349, 359, 188 P. 644 (1920) allowing a "wide latitude of cross-examination" when the accused testifies on his own behalf and "denies that he committed the crime for which he is on trial."

(e) Weight and credibility

This subdivision is identical to Federal and Uniform Rules (1974) Rule 104(e). It was adopted because it is consistent with Montana law and clarifies a potential misinterpretation of subdivision (a) of this rule. The misinterpretation could arise because of the similarity between evidence which may be preliminary to admissibility and that related to weight or credibility; the rule simply clarifies this situation. R.C.M. 1947, Sections 93-401-4 and 93-2001-1, respectively, have long

provided the rule in Montana that the jury is the sole judge of credibility and weight, and therefore the rule is consistent with Montana law in allowing a party to introduce such evidence.

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.

Source: Federal Rule 105.

Commission Comment

This rule is identical to Federal and Uniform Rules (1974) Rule 105. The Commission adopted the rule because it expresses longstanding practice and existing Montana law. The effect of the rule is to allow evidence to be admissible for a particular purpose even though that evidence may be inadmissible for another purpose. There is a danger that this evidence could be confusing or misleading to the jury or could prejudice a party. Therefore the court should exercise caution in admitting such evidence in light of the effectiveness of a limiting instruction. See Bruton v. United States, 391 U.S. 126, 137 (1968) holding that where a codefendant's confession inculpating Bruton was admitted, a limiting instruction was inadequate.

Montana cases have recognized this practice in situations unlike the one in Bruton, supra: Hester v. Western Life & Accident Co., 67 Mont. 286, 290, 215 P. 508 (1923) allowing hearsay; Outlook Farmer's Elevator Co. v. American Surety Co., 70 Mont. 8, 25, 223 P. 905 (1924) allowing declarations against interest against a surety; DeAtley et al. v. Streit et al., 81 Mont. 382, 390, 263 P. 967 (1928) allowing parol evidence; Edquest v. Tripp & Dragstedt Co. et al., 93 Mont. 446, 454, 19 P.2d 637 (1933) allowing exhibits that were potentially prejudicial; and Teesdale v. Anschutz Drilling Co., 138 Mont. 427, 439, 357 P.2d 4 (1960) allowing evidence showing remedial measures.

Rule 106. Remainder of or related acts, writings, or statements

(a) When part of an act, declaration, conversation, writing or recorded statement or series thereof is introduced by a party:

(1) an adverse party may require him at that time to introduce any other part of such item or series thereof which ought in fairness to be considered at that time; or

(2) an adverse party may inquire into or introduce any other part of such item of evidence or series thereof.

Source: Paragraph (1) is based on Federal Rule 106; Paragraph (2) and the items of evidence referred to in the first clause are based on R.C.M. 1947, Section 93-401-11.

(b) This rule does not limit the right of any party to cross-examine or further develop as part of his case matters covered by this rule.

Source: Original

Commission Comment

Subdivision (a)

This subdivision incorporates Federal Rule 106 with R.C.M. 1947, Section 93-401-11 and case law developed under it. The Commission intends that this combination will preserve Montana's completeness rule; adopt the Federal Rule allowing the whole of a writing or recorded statement to be admitted, if fairness requires it, when part of the writing or recorded statement are introduced; and, result in a rule of completeness that codifies all of Montana case law so that scattered fragments of the rule of completeness do not have to be searched for when the rule is to be applied. Therefore the Commission believes that this incorporation of the Federal Rule and Montana law is a more accurate statement of the rule of completeness.

The subdivision is identical to Federal and Uniform Rules (1974) Rule 106 with these exceptions: "When part of an act, declaration, conversation, writing or recorded statement or series thereof" is substituted for "When a writing or recorded statement or part thereof" in the first clause; "(1)" is added and "of such item or series thereof" is substituted for "any other writing or recorded state-

ment" and "at that time" is substituted for "contemporaneously with it" in Paragraph (1); and Paragraph (2) is added.

The subdivision begins with an expanded list of matters to be covered by the rule. R.C.M. 1947, Section 93-401-11 covers acts, declarations, conversations and writings; Federal Rule 106 covers only writings and recorded statements. Therefore the proposed rule adds the items from Montana law to the Federal Rule and the proposed rule adds recorded statements to Montana law. This addition is consistent with the policy of Section 93-401-11 whose title reads: "When part of the transaction proved, the whole is admissible," and with the items listed in that section; the addition is intended to be a modernization of that section. The list includes not only part of such items, but also a series of such items which is a codification of the Montana practice. Northwestern Electric Equipment Co. v. Leighton, 66 Mont. 529, 536, 213 P. 1094 (1923).

Paragraph (1) is a statement of the operational part of Federal Rule 106 which allows the adverse party the right to require the immediate introduction of all items of evidence which ought to be considered with part of the item of evidence being offered by the proponent of such evidence. The reason for this rule is that a mistaken impression gained by out of context evidence is hard to correct when the whole of the matter is not presented until later. Advisory Committee Note to Federal Rule 106, 46 F.R.D. 161, 194. A similar provision has already been adopted in Montana in Rule 26 (d)(4), M.R.Civ.P., allowing immediate introduction of all relevant parts of a deposition when a part is introduced, the same provision applies to interrogatories under Rule 33, M.R.Civ.P. and use of depositions in criminal trials under R.C.M. 1947, Section 95-1802(c).

Paragraph (2) is a statement of the operation of Montana law under Section 93-401-11 and case law construing it which allows the adverse party the right to inquire into other evidence necessary to make the proponent's evidence understood at any time. The evidence needed to make the part introduced understood is not normally admitted until the adverse party presents his case. McGonigle v. Prudential Life Ins. Co., 100 Mont. 203, 223, 46 P.2d 687 (1935) and Rasmussen v. Lee, 104 Mont. 278, 282, 66 P.2d 119 (1937). The Montana completeness rule allows evidence which would ordinarily be inadmissible on its own to be admitted. McConnell v. Combination M&M Co., 30 Mont. 239, 263, 76 P. 14 (1904) and Hulse v. Northern Pacific Ry. Co., 47 Mont. 59, 63, 130 P. 415 (1913).

The two paragraphs follow the normal sequence of trial in that Paragraph (1) allows the adverse party to immediately require that

the remainder of evidence to be admitted at the same time that the proponent's evidence is admitted when fairness requires. Paragraph (2) allows an inquiry by the adverse party at any time, but also gives him the right to introduce such evidence as part of his own case if Paragraph (1) were not used. Failure to demand introduction under Paragraph (1) would not waive the right to introduce this evidence later.

Therefore, this proposed rule expresses existing Montana law as well as expanding the completeness rule to include recorded statements, and allows immediate introduction of the remainder of evidence to gain a complete impression, which is an expansion of Rules 26(d)(4) and 33, M.R.Civ.P. and R.C.M. 1947, Section 95-1802(c).

It should be noted that the trial court makes the final determination of how much evidence is needed to make a fair impression under this rule, and to prevent abuses of the rule. The authority of the court to make such rulings is Rule 403, allowing exclusion of relevant evidence on the grounds of prejudice, confusion or misleading the jury, and waste of time or undue delay; and Rule 611 allowing the court the authority to conduct trial.

Subdivision (b)

This subdivision is original and therefore entirely different than Federal and Uniform Rules (1974) Rule 106. The Advisory Committee Note to Federal Rule 106, 46 F.R.D. 161, 194 states the same principle as this subdivision. The Commission feels that the guarantee of the right of any party to cross-examine or further develop as part of his case matters covered by this rule is important enough to be stated in the rule. Rule 26(d)(4) and Rule 33 (by reference) M.R.Civ.P. and R.C.M. 1947, Section 95-1802(c) state the same principle contained in Federal Rule 106 and proposed rule 106(a)(1) as applied to depositions and interrogatories and then concludes by giving any party the right to introduce any other part. There is no other Montana law specifically on this point, and therefore this would be new Montana law.

ARTICLE II. JUDICIAL NOTICE

Rule 201. Judicial notice of facts

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

Source: Based on Federal Rule 201(a)

(b) Kinds of facts. A fact to be judicially noticed 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 be reasonably questioned.

Source: Based on Federal Rule 201(b)

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

Source: Federal Rule 201(c)

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

Source: Federal Rule 201(d)

(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.

Source: Federal Rule 201(e)

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

Source: Federal Rule 201(f)

(g) Instructing the 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.

Source: Federal Rule 201(g)

Commission Comment

This rule governs judicial notice of facts. See Rule 202 for judicial notice of law.

(a) Scope of rule

This subdivision is identical to Federal and Uniform Rules (1974) Rule 201(a) except that it does not use the term "adjudicative facts." The Commission believes that use of the terms "adjudicative" and "legislative" facts as is done with Federal Rule 201 is confusing and that they cannot be readily or easily applied to all factual situations. The Commission rejects the approach under the Federal Rule 201 of limiting judicial notice to adjudicative facts because this is a basis which is totally new, not clearly defined, and contrary to existing Montana practice. The confusion and litigation bound to result are clearly contrary to a rule which is meant to save time and expense.

R.C.M. 1947, Section 93-501-1, is the primary statute on judicial notice in Montana. It lists eight categories of fact, most of which relate to judicial notice of law, covered in proposed Rule 202. However, the last of these categories gives the impression that this subdivision of the proposed rule is consistent with existing Montana Law: "the laws of nature, the measure of time, and the geographical divisions and political history of the world." In addition, R.C.M. 1947, Section 93-1101-8 has been construed as a judicial notice statute, Lynes v. Northern Pacific Ry. Co., 43 Mont. 317, 327, 117 P. 81 (1911), and is consistent with this subdivision in allowing "historical works, books of science or art, and published maps or charts" to be judicially noticed as items of "general notoriety and interest."

Therefore, the Commission intends to preserve existing law in Montana and hopefully encourage the expansion of the use of judicial notice to expedite the trial process.

(b) Kinds of facts

This subdivision is identical to Federal and Uniform Rules (1974) Rule 201(b) with the exception of the phrase "a fact to be judicially noticed" which is substituted for "a judicially noticed fact." This change is only to clarify the language of the section, as the Commission prefers the present tense of the proposed rule rather than the past tense of the Federal and Uniform Rule.

The Commission feels that the courts should take notice of facts only if they are not subject to reasonable dispute. If a fact is disputable, evidence should be introduced to support or deny it, and the trier of fact should then decide its existence. If a fact is not subject to a reasonable dispute, the court can save time and expense for all by judicially noticing it.

Existing Montana statute and case law on judicial notice is consistent with this subdivision. Facts to be judicially noticed under subdivision (b)(1) which are "generally known" have been judicially noticed in many cases in Montana using slightly different terminology that these facts are "common knowledge." See State ex rel. Shultz-Lindsey v. Board of Equalization, 145 Mont. 380, 401, 403 P.2d 635 (1965) and Clark v. Worral, 146 Mont. 374, 380, 406 P.2d 822 (1965) for recent examples. Facts to be judicially noticed under subdivision (b)(2) which are "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned" are now judicially noticed under R.C.M. 1947, Sections 93-501-1 and 93-1101-8, discussed in the Commission Comment to proposed Rule 201(a). See Holtz v. Babcock et al., 143 Mont. 341, 370, 372-7, 389 P.2d 869 (1964) for a strict statement by the Montana Supreme Court as to what matters should be judicially noticed.

(c) and (d) When discretionary and When mandatory

These subdivisions are identical to Federal and Uniform Rules (1974) Rule 201(c) and (d). As stated in the Advisory Committee's Note to the Federal Rules, 46 F.R.D. 161, 203, these rules are believed to reflect existing practice and are simple and workable.

The Montana statute on judicial notice (R.C.M. 1947, Section 93-501-1) does not indicate when a court may or when it must take judicial notice. Cases in Montana do not address themselves to the question; therefore the proposed rule is

apparently consistent with existing Montana law and practice. These subdivisions allow the court full discretion, within the limitations of Rule 201(b), to take judicial notice, except when a party requests notice be taken and supplies the necessary information, that is the information needed to satisfy the court that the fact fits within the limitations of Rule 201(b).

(e) Opportunity to be heard

This subdivision is identical to Federal and Uniform Rules (1974) Rule 201(e). No elaborate procedural safeguards are provided because it is contemplated that usual practices of notifying parties that judicial notice has been requested or taken will be followed. The rule provides the right to be heard as to the propriety of taking judicial notice, whether advance notification is given or not. Often notification is not given because of nonrecognition that judicial notice has been taken. This rule was adopted on the assumption that the discretion of the judge and parties will dictate how elaborate a hearing will be held. The issue at the hearing will be whether the fact to be judicially noticed falls within the limitations of subdivisions (a) and (b) of this rule. It should be noted that judicial notice by a trial court is reviewable by appellate courts, and for the sake of clarity and convenience the fact that judicial notice has been taken and the source of information should be a part of the record.

Existing Montana statutes and case law on judicial notice do not provide for any notification or opportunity to be heard. Therefore this section is new Montana law.

(f) Time of taking notice

This section is identical to Federal Rule 201(f). It is in accord with the usual view, accepted in Montana case law but not provided for by statute, that either a trial or appellate court can take judicial notice. Therefore there is no change in Montana law.

(g) Instructing the jury

This subdivision is identical to Federal Rule 201 (g). The first part of this subdivision, dealing with civil cases, is consistent with R.C.M. 1947, Section 93-2501-2

providing that the jury is bound to accept facts judicially noticed. The second part of the subdivision, dealing with criminal cases, is inconsistent with Montana case law. Criminal cases in Montana which have dealt with judicial notice have not mentioned any different means of instructing the jury than in civil cases, and so instructed the jury to accept facts judicially noticed: State v. Slothower, 56 Mont. 230, 236, 182 P. 270 (1919) that the moon was out on a certain night; State v. Williams, 122 Mont. 279, 282, 202 P.2d 245 (1949) that venue was established; State v. Wild, 130 Mont. 476, 491, 305 P.2d 325 (1956) that vodka is an intoxicating liquor; and, State v. Peters, 146 Mont. 188, 198, 405 P.2d 642 (1965) that venue was established. It is highly unlikely that any different result will be obtained under the proposed Rule 201 (g) since 201(b) allows judicial notice of indisputable facts such as those judicially noticed in the above cited cases: the jury would very probably find in accordance such indisputable facts. The Commission feels that there is no strong reason to ignore the civil-criminal distinction of the Federal Rule, while there are these reasons to adopt it: first, it will be uniform with the Federal Rule, and second, it insures that all facts necessary to prove each element of a crime will be proven beyond a reasonable doubt, not dictated to be found through judicial notice in instructing the jury. This view is consistent with the reason for Congressional changes in this subdivision to its present form because mandatory instructions in criminal cases are "contrary to the spirit of the Sixth Amendment right to a jury trial."

Rule 202. Judicial notice of law

(a) Scope of rule. This rule governs judicial notice of law.

Source: Based on Federal Rule 201(a)

(b) Kinds of law. Law includes but is not limited to the following:

(1) The common law, constitutions and statutes of the United States and of this and every other state, territory and jurisdiction of the United States;

(2) Duly enacted ordinances and regulations of governmental divisions of this state, including their charters;

(3) Regulations and legislative enactments issued by or under authority of the United States and of this and any state of the United States by or for their agencies or administrations;

(4) Official acts of the legislative, executive, and judicial departments of the United States and of this and any state of the United States;

(5) Private acts and resolutions of the Congress of the United States and of the legislature of this state;

(6) Records of any court of this state or of any court of record of the United States or any court of record of any state of the United States:

(7) Rules of practice and procedure of any court of this state or of any court of record of the United States of any court of record of any state of the United States;

(8) The law of foreign nations;

(9) International law;

(10) Maritime law.

(11) The seals of office of the officers of government in the legislative, executive and judicial departments of government of the United States and of this and every other state, territory and jurisdiction of the United States, of any foreign jurisdiction recognized by the executive power of the United States, and of notaries public.

Source: Paragraphs: (1) R.C.M. 1947, Section 93-501-2; (2) American Law Institute Model Code of Evidence (1942) Rule 802(a); (3) West's Annotated California Evidence Code, Section 452(b); (4) West's Annotated California Evidence Code, Section 452(c); (5) American Law Institute Model Code of Evidence (1942) Rule 802(a); (6) West's Annotated California Evidence Code, Section 452(d); (7) West's Annotated California Evidence Code, Section 451(c) and Section 452(e); (8) West's Annotated California Evidence Code, Section 452(f); (9) Original, and (10) Original; (11) based on R.C.M. 1947, Section 93-501-1(4), (5), (6), and (7).

(c) When discretionary. A court may take judicial notice of the law listed in parts 2-10 of Rule 202(b) or other law, whether requested or not. The court may inform itself of any law in such manner as it may deem proper and the court may call upon counsel to aid it in obtaining such information.

Source: Based on Federal Rule 201(c) and R.C.M. 1947, Section 93-501-3

(d) When mandatory. A court shall take judicial notice:

(1) of the common law, constitutions and statutes of the United States and of this and every other state, territory and jurisdiction of the United States; and

(2) of any other law when requested by a party and supplied with the necessary information.

Source: Paragraphs: (1) Based on R.C.M. 1947, Section 93-501-2; and (2) based on Federal Rule 201(d)

(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 law noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

Source: Based on Federal Rule 201(e).

(f) Time of taking notice.

(1) Judicial notice of the laws of this state and of the United States may be taken at any stage of the proceeding.

(2) Any party may present to the judge or court any admissible evidence of law. To enable a party to offer evidence of the law other than of this state and of the United States or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse party either in the pleadings or otherwise.

Source: Paragraphs: (1) Based upon Federal Rule 201(f); (2) R.C.M. 1947, Section 93-501-5.

(g) Question for the court. Except as otherwise provided by law, the determination of law shall be made by the court.

Source: Based on R.C.M. 1947, Section 93-501-4.

Commission Comment

(a) Scope of rule

This section is identical to Federal and Uniform Rules (1974) Rule 201(a) except that changes are made to indicate that the rule governs judicial notice of law rather than fact. There is no Federal rule equivalent to this proposed rule. The Advisory Committee Note to Federal Rule 201, 46 F.R.D. 161, 196, states that this area is a proper concern for rules of procedure; however, the Commission feels that rules facilitating proof of law are the proper concern of rules of evidence. Under Rule 9 (d) M.R.Civ.P. ordinances and statutes must be pl^d as special matters; the Commission Note to that rule states that it is "consistent with and complementary to" R.C.M. 1947 Sections 93-501-2 to 93-501-8, the Uniform Judicial Notice of Foreign Law Act, which is what much of this rule is based upon. The same

comment is applicable here. This rule is intended to expedite proving foreign law. For instance, procedures under R.C.M. 1947, Section 93-1001-1 et seq. on public writings could be facilitated under this rule.

The existing Montana law on judicial notice of law is covered by R.C.M. 1947, Sections 82-4208, judicial notice in the Administrative Procedures Act; 93-501-1(2) through (7), the general judicial notice statute; 93-501-2 through 93-501-8, the Uniform Judicial Notice of Foreign Law Act; and M.R.Civ.P. Rule 44.1, judicial notice of the law of foreign nations. These provisions do not adequately cover all law of all jurisdictions, nor do they cover all law in criminal cases. Rather than attempt to amend these provisions, the Commission adopts this rule in order to clarify and codify what it feels should be the rule on judicial notice of law. The rule serves to replace and is consistent with some of these provisions, but is inconsistent with some Montana case law detailed in the Commission Comment to Rule 202(b). (For a similar provision, see Nevada Revised Statutes, Section 47.140 and Wisconsin Rules of Evidence Sections 902.02 and 902.03.)

(b) Kinds of law

This subdivision is original and therefore entirely different than either the Federal or Uniform Rules of Evidence (1974) Rule 201(b). It was adopted because a series of Montana cases have limited judicial notice of law to a few areas. The Commission feels a broader approach is more in keeping with the goals of judicial notice: promoting convenience and expediting the administration of justice. To achieve these purposes, a broad list has been made, but it is not intended to be exclusive.

Paragraph (1) is taken from R.C.M. 1947, Section 93-501-2 and therefore no change occurs as a result of its adoption.

Paragraph (2) is taken from the A.L.I. Model Code 1942 and is a change in Montana law. Although the Montana Supreme Court has judicially noticed city charters (Drew v. City of Butte, 44 Mont. 124, 125, 119 P. 279 (1911)), it has refused to allow judicial notice of their ordinances. Carey v. Guest, 78 Mont. 415, 430, 258 P. 236 (1927); Dineen v. City of Butte, 83 Mont. 370, 374, 272 P. 243 (1928). Therefore this would be a change in the law, but, the Commission feels, a sensible and convenient one.

Paragraph (3) is from the California Evidence Code covering

judicial notice of acts of administrative agencies and is apparently not a change in Montana law. The court's first case on this subject allowed judicial notice of rules and regulations as acts of the executive department of the United States (U.S. v. Williams, 6 Mont. 379, 387, 12 P. 851 (1887)), as having the force and effect of Federal statutes (Johnson v. County of Lincoln, 50 Mont. 253, 256, 146 P. 471 (1915)), and of the public and private official acts of the legislative and executive department of the United States. Grosfield v. First National Bank of Miles City, 73 Mont. 219, 232, 236 P. 250 (1925). However, the court refused to recognize administrative rules of Montana's Industrial Accident Board on the grounds that the board was quasi-judicial and judicial notice of rules of court was not allowed. Williams v. Anaconda Copper Mining Co., 96 Mont. 204, 211, 29 P.2d 785 (1934). This decision was followed in other cases: State v. Andre, 101 Mont. 366, 368, 54 P.2d 566 (1936); State ex rel. Magelo v. Industrial Accident Board, 102 Mont. 455, 461, 59 P.2d 785 (1936). The court did, however, take judicial notice of the Montana Agriculture Commissioner's rules and regulations. Northern Montana Mustard Growers Co-op v. Britton, 128 Mont. 553, 567, 280 P.2d 1078 (1955). Under R.C.M. 1947, Section 82-4208, the Administrative Procedure Act, courts are to take judicial notice of rules and regulations.

Paragraph (4) is from the California Evidence Code. Montana law has a similar provision, R.C.M. 1947, Section 93-501-1(3), and the Montana Supreme Court has taken notice of these acts in several cases. Therefore there is no change from present Montana law.

Paragraph (5) is taken from the Model Code and is recognized in Montana by case law. State ex rel. Goodman v. Stewart, 57 Mont. 144, 169, 187 P. 641 (1920); Vaughn & Ragsdale v. State Board of Equalization, 109 Mont. 52, 56, 96 P.2d 420 (1939). It represents no change from Montana law.

Paragraph (6) is from the California Evidence Code, and in part may represent a change from Montana law. A long line of cases, the most recent being Sikora v. Sikora, 160 Mont. 27, 34, 499 P.2d 808, 812 (1972), has held that courts may take judicial notice of records of the same case and any other cases; however, proceedings in courts of another state have not been allowed to be judicially noticed. In re Estate of Bruhns, 58 Mont. 526, 529, 193 P. 1114 (1920). The Bruhns case is the only one that has followed this rule, and since the passage of the Uniform Judicial Notice of Foreign Law Act it would seem proper to change it. Therefore, to the extent that records of any court of record of any state or the United States can be judicially noticed, this is a change in the law.

Paragraph (7) is taken from the California Code of Evidence and represents a change in existing Montana law. A line of cases, the most recent being Coleman v. District Court, 120 Mont. 372, 377, 186 P.2d 91 (1947), has held that the local court rules will not be judicially noticed. However, the Commission feels that to adequately cover a rule on judicial notice of law this area should be included, there being little reason for not changing the rule as the Supreme Court is promulgating rules of court, and local court rules are available in any county courthouse.

Paragraph (8) is taken from the California Evidence Code and is in compliance with Rule 44.1 of the Montana Rules of Civil Procedure and represents no change in existing Montana law.

Paragraphs (9) and (10) are original and would be new Montana law.

Paragraph (11) is taken from R.C.M. 1947, Section 93-501-1(4), (5), (6) and (7). It retains existing Montana law allowing the Court to take judicial notice of a wide variety of seals of officials of government and seals of notaries public. This paragraph is intended to allow more expeditious use of proposed Rules 902(1), (2), (3) and (4) dealing with authentication of documents and seals.

(c) and (d) When discretionary and When mandatory

These subdivisions are based on Federal and Uniform Rules (1974) Rule 201(c) and (d) with changes and additions from existing Montana Sections 93-501-2 and 93-501-3, to make the rule compatible with a rule on judicial notice of law.

The first sentence of subdivision (c) allows the court complete discretion in taking judicial notice of all law such as those laws listed in paragraphs (2) through (10) of Rule 202(b). Subdivision (d) requires judicial notice to be taken of the law lsited in Rule 202(b)(1), as aslo requried by R.C.M. 1947 Section 93-501-2, and other law, when requested. Allowing the court to take judicial notice, whether requested or not, in subdivision (c), and making judicial notice mandatory when requested in subdivision (d) follows the Federal and Uniform Rules approach and is believed to be simple and workable, as well as current Montana practice.

Slight changes in language have been made from the present Section 93-501-2 which are only intended to make these statutes clearer, not to change their meaning. Therefore, there is no change from existing Montana law.

(e) Opportunity to be heard

This subdivision is identical to Federal Rule 201(e) except

for the substitution of the word "law" for "matter" in the phrase "tenor of the law noticed." As stated in the Commission Comment to Rule 201(e) no elaborate procedure is outlined, for it is felt that none is needed. The issue to be presented at the hearing would be whether the proper law was judicially noticed. This section is new and represents no change in existing Montana law.

(f) Time of taking notice

Paragraph (1) of this subdivision is based upon Federal Rule 201(f) in that it allows judicial notice to be taken at any stage of the proceeding but only judicial notice of the law of this state and the United States. Paragraph (2) is based upon R.C.M. 1947, Section 93-501-5 and requires that notice be given for judicial notice of other law. This notice requirement is also contained in Rule 44.1 M.R.Civ.P. H & J Gross, Inc. v. Fraser, 140 Mont. 95, 97, 368 P.2d 163 (1962) construed the statutory provision as putting the duty on the court to make an independent determination of the correct foreign law. In order that this may be done, paragraph (2) requires notification to be given; a reasonable amount of time can be allowed the court to properly examine and determine the foreign law. Both paragraphs are consistent with existing Montana law.

(g) Question for the court

This section is taken from R.C.M. 1947, Section 93-501-4 and is not similar to any Federal Rule of evidence. The phrase "except as otherwise provided by law" refers to unusual situations where the jury is directed by law to determine the law, as in the 1972 Constitution of the State of Montana, Article II, Section 7: ". . . In all suits and prosecutions for libel and slander the truth thereof may be given in evidence; and the jury, under the direction of the court, shall determine the law and facts." In all other situations it is anticipated that taking judicial notice of law will be a question for the court and not for the jury. This section is therefore consistent with existing Montana law.

ARTICLE III. PRESUMPTIONS

Rule 301. Presumptions in general

(a) Presumption defined. A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action or proceeding.

Source: West's Ann. Cal. Ev. Code, Section 600(a)

(b) Classification and effect of presumptions

(1) Conclusive presumptions are presumptions that are specifically declared conclusive by statute. Conclusive presumptions may not be controverted.

(2) All presumptions, other than conclusive presumptions, are disputable presumptions and may be controverted. A disputable presumption may be overcome by a preponderance of evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption.

Source: Original

(c) Inconsistent presumptions. If presumptions are inconsistent the court shall apply the presumption that is founded upon weightier considerations of public policy. If considerations of public policy are of equal weight the court shall disregard both presumptions.

Source: Based on Uniform Rule 301(b)

Commission Comment

This rule governs all presumptions generally. See Rule 302 for presumptions controlled by Federal law.

(a) Definition of presumption

This subdivision is entirely different from both the Federal and Uniform Rules (1974) Rule 301. The proposed rule is a complete departure from both of these rules which have the narrow objective of stating the effect of presumptions; therefore the proposed rule is not comparable or equivalent to either of these rules. The Commission feels that all the law of evidence should be put in one place as much as possible; therefore a definition is placed in this subdivision and other basic concepts are contained in following subdivisions of the proposed rule.

The definition in the proposed rule is taken from West's Ann. Cal. Ev. Code, Section 600(a). Previously California defined presumptions in the exact language of the existing statutory definition, R.C.M. 1947, Section 93-1301-3 which provides: "A presumption is a deduction which the law expressly directs to be made from particular facts." The Comment to California Section 600(a) states that the new California definition is substantially the same as the old definition; the change apparently is made to clarify the wording. The Commission also intends the definition in the proposed rule to be substantially the same as the existing statutory definition in Section 93-1301-3 and that the changes are only for clarification.

The existing statutory definition, Section 93-1301-3, points out one distinguishing feature of a presumption: that the law directs it to be made. That is, once the facts giving rise to the presumption are established, the presumption must be found. However, the statute uses the term "deduction" which implies that all presumptions result from some logical process. This is not true of all presumptions -- some are based on public policy rather than logical deduction.

To incorporate both distinguishing features, the proposed rule uses the terms "assumption of fact" rather than "deduction" and "that the law requires to be made" rather than "the law expressly directs to be made."

The present Montana rule that a presumption must be based on particular established facts and not on another presumption or inference is followed in this definition by the use of the phrase "from another fact or group of facts." See First National Bank of Glendive v. Sorenson, 65 Mont. 1, 13, 210 P. 900 (1922); Kern v. Payne, 65 Mont. 325, 337, 211 P. 767 (1922); Doran v. U.S. Bldg. and Loan Assoc., 94 Mont. 73, 76, 20 P.2d 835 (1933); and Cavitt v. Seirson, 119 Mont. 437, 440, 175 P.2d 67 (1946).

Finally, the phrase "found or otherwise established in the action or proceeding" makes clear that the facts giving rise to the presumption may be established by the pleadings, stipulation of the parties, or judicial notice, as well as by evidence.

(b) Classification and effect of presumptions

This subdivision is original and therefore entirely different from both Federal and Uniform Rules (1974) Rule 301; both state the effect, but neither contain a classification of presumptions. The effect given presumptions under the proposed rule differs from either approach followed by the Federal or Uniform rule. The Federal rule gives presumptions the sole effect of shifting the burden of producing evidence to rebut or meet the presumption, and does not shift the burden of persuasion. The Uniform rule gives presumptions the effect of shifting the burden of persuasion to rebut or meet the presumption.

The Commission rejects both of these rules because Montana has expressly rejected the approach contained in Federal Rule 301 (Lewis v. New York Life Insurance Co., 113 Mont. 151, 162, 124 P.2d 579 (1942)) and goes further than the approach contained in Uniform Rule (1974) 301. The Commission adopts this subdivision to retain, codify, and clarify existing Montana law on the effect of presumptions.

Paragraph (1) contains the rule found in R.C.M. 1947, Sections 93-1301-5 and 93-1301-6 that conclusive presumptions are set out by statute and may not be controverted; it is therefore consistent with Montana law. The Commission does not intend to alter in any way the enumeration or effect of conclusive presumptions as declared by statute. (See Appendix, Table D for these presumptions.)

Paragraph (2) contains the rules found in R.C.M. 1947, Section 93-1301-5, that all presumptions not declared conclusive are disputable and may be controverted; and that unless a presumption is overcome, the trier of fact is bound to find in accordance with it. The Montana Supreme Court has interpreted this section as well as Sections 93-1301-1 (classifying presumptions as indirect evidence) and 93-2001-1(2) (inferring that presumptions are to be weighed as evidence) to mean that presumptions have the effect of evidence.

The Commission believes the procedure and rule followed in Montana concerning presumptions is as follows: If evidence is introduced which gives rise to a presumption, and the presumption is not controverted or disputed, the trier of fact must find in accordance with the presumption. In order to avoid this and overcome a presumption, the rule necessarily requires that the burden of persuasion shift to the party against whom the presumption operates.

See Holen v. Phelps, 131 Mont. 146, 152, 308 P.2d 624 (1957) and cases cited therein. If evidence contrary to the presumption is introduced, the presumption is given the weight and effect of evidence and a question is raised for the trier of fact who may give the presumption such weight in the face of the contrary evidence as it thinks the presumption should have. See Lewis v. New York Life Insurance Co., supra; Williams v. Swords, 129 Mont. 165, 173, 284 P.2d 674 (1955); Rosenau Foods Inc. v. Kohlman, 140 Mont. 572, 577, 374 P.2d 87 (1962); Crissey v. State Highway Comm'n., 147 Mont. 374, 379, 413 P.2d 308 (1966). An exception occurs where the contrary evidence is so overwhelmingly against the presumption as to lead to only one reasonable conclusion; then the matter becomes a question of law for the judge, not a question for the trier of fact. Welch v. All Persons, 85 Mont. 114, 134, 278 P. 110 (1929); Nichols v. New York Life Ins. Co., 88 Mont. 132, 139, 292 P. 203 (1930); Renland v. First Nat'l Bank, 90 Mont. 424, 4 P.2d 488 (1931).

This proposed subdivision may change existing Montana law by providing that a preponderance of evidence is required to overcome all disputable presumptions. Previously different amounts of evidence were apparently required to overcome different presumptions. For example: "slight proof," Sommers v. Gould, 53 Mont. 538, 545, 165 P. 599 (1917); "substantial evidence," State ex rel. Rankin v. Martin, 68 Mont. 392, 404, 219 P. 632 (1923); "preponderance of evidence," In re Wray's Estate, 93 Mont. 525, 535, 19 P.2d 1051 (1933); "proof must be clear, satisfactory and convincing," In re Colbert's Estate, 31 Mont. 461, 468, 78 P. 971 (1904); "conclusive evidence," Gardiner v. Eclipse Grocery, 72 Mont. 540, 550, 234 P. 490 (1925); and "beyond a reasonable doubt," Spratt v. Helena Power Transmission Co., 37 Mont. 60, 79, 94 P. 631 (1908). However, the Commission feels that in the interest of obtaining a simple, practical rule one amount of evidence should be required and that amount should be preponderance of the evidence.

With one exception, the Commission does not intend to alter the enumeration or effect of the disputable presumptions declared by statute or common law. (See Appendix, Table D for these presumptions.) The exception arises with R.C.M. 1947, Section 93-1301-7 (34), which deals with ancient documents. This presumption is changed slightly by two proposed rules: Rule 803(16), dealing with the hearsay aspect of ancient documents, and Rule 901(b) (8), dealing with the authentication aspects of these documents. (See the Commission Comment to those rules for further explanation.)

(c) Inconsistent presumptions

This subdivision is not included in the Federal Rules of Evidence, but was adopted by the Uniform Rules of Evidence (1974) Rule 301(b). The simplest solution to the problem arising when two or more presumptions conflict or arise from the same group of facts is to have the judge decide whether one of the presumptions is based on weightier considerations of public policy, but if none of the presumptions is weightier, to disregard all of the inconsistent presumptions. The rule that presumptions of weightier public policy overcome those of lesser weight is recognized in Montana. Burgess v. Lasby, 91 Mont. 48], 491, 9 P.2d 164 (1932); McMahon v. Cooney, 95 Mont. 138, 144, 205 P. 2d 131 (1933); Platts v. Platts, 134 Mont. 474, 479, 344 P. 2d 722 (1959). The rule that if no presumption is of greater weight then all will be disregarded is not recognized, and is therefore new to Montana law.

Rule 302. Applicability of federal law in civil cases.

In civil actions and proceedings, the effect of a presumption respecting a fact whcih 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.

Source: Uniform Rule 302

Commission Comment

This rule is identical to the Uniform Rules of Evidence (1974) Rule 302 which in turn is identical to Federal Rule 302 with the exception of the word "federal" being substituted for "state." The comment to the Uniform Rule states the reasons this Commission adopted the rule:

> 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.

To this the Commission would add that not only should the prescribed federal presumption be applied but also given effect according to the Federal Rules.

Therefore it must first be determined whether there is a

prescribed "federal" presumption. If it has been determined that a "federal" presumption should be applied, the effect it is given is determined by the Federal Rule 301. If a presumption does not deal with a substantive element of a claim or defense it is not a "federal" presumption and the effect it is given is determined by proposed Montana Rule 301. This allows federal and state procedural effects to be applied to their respective substantive presumptions.

The current law in this area is generally uncertain. In Federal Employer's Liability Act cases it seems clear that state courts may not apply their own procedural rules. Brown v. Western Ry. of Alabama, 338 U.S. 294 (1949). Whether other types of federal litigation in state courts must follow the same rule is not certain; however, it is clear that Congress has the constitutional power to control the incidents of a state trial of a federal claim. Wright, The Law of Federal Courts, Section 45, 174 (2d ed. 1970).

(This page and page 38 are blank because the Commission reconsidered and deleted Rule 303.)

ARTICLE IV. RELEVANCY AND ITS LIMITS

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. Relevant evidence may include evidence bearing upon the credibility of a witness or hearsay declarant.

Source: The first sentence is Federal Rule 401; the second sentence is based upon West's Ann. Cal. Ev. Code, Section 210.

Commission Comment

The first sentence of this rule is identical to Federal and Uniform Rules (1974) Rule 401. The second sentence is based on a phrase from West's Ann. Cal. Ev. Code, Section 210, defining relevant evidence as "including evidence relevant to the credibility of a witness or hearsay declarant."

The definition of relevant evidence given in the first sentence keeps the Federal definition in tact. It has the effect of combining what has been labeled "materiality" with relevance. The ambiguous use of materiality in the past and the current trend in Montana to define relevance as including the concept associated with materiality (what is properly provable in the case as determined by pleadings, procedural rules and substantive law) makes abandoning the term simpler than having two distinct concepts. The inclusion of the phrase "fact that is of consequence to the determination of the action" makes materiality a part of relevance.

The test of relevance is whether an item of evidence will have any value, as determined by logic and experience, in proving the proposition for which it is offered. The standard used to

measure this acceptable probative value is "any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence." This standard rejects more stringent ones which call for evidence to make the fact or proposition for which it is offered more probable than any other. It is meant to allow wide admissibility of circumstantial evidence limited only by proposed Rule 403 or other special relevancy rules in Article IV.

Existing Montana law is consistent with this definition of relevant evidence. One of the latest statements by the Montana Supreme Court in the area of relevance is: "any fact which makes probable the existence of another fact in controversy is relevant to prove the disputed fact." Rhodes v. Weigland, 145 Mont. 542, 546, 404 P.2d 588 (1965). See also Brion v. Brown, 135 Mont. 356, 363, 340 P.2d 539 (1959) and State v. Sanders, 158 Mont. 113, 117, 489 P.2d 371 (1971). R.C.M. 1947, Section 93-401-25 requires that "evidence must correspond with the substance of the material allegations, and be relevant to the questions in dispute."

The second sentence of the proposed rule is included to insure that Montana law on credibility of witnesses is retained. The Commission feels that it is possible to interpret the Federal and proposed rule definition and that part of Federal Rule 402 providing "evidence which is not relevant is not admissible" to mean evidence used to attack or support credibility of witnesses may not be within the definition of relevant evidence and so would not be admissible. To avoid this problem the proposed rule therefore includes as its definition of relevant evidence all evidence properly admitted as it relates to matters of credibility under other rules of evidence and does not leave to implication the admissibility of such evidence.

The definition of relevant evidence is also meant to include real and demonstrative evidence admitted as an aid to understanding, but which could not always be considered to directly relate to, facts of consequence to the action. Montana has always allowed such evidence under R.C.M. 1947, Sections 93-5102 on jury views of property or premises and 93-1201-1 on material objects. These sections have been construed in Wolfe v. Northern Pacific Ry., 147 Mont. 29, 44, 409 P.2d 528 (1966) to allow the discretion of the trial court to admit such procedures and evidence if it is felt they are needed for the evidence as a whole "to be properly understood or that the jury would be aided thereby." There is

substantial case law in this area. Two leading cases express what is pertinent: Ferris et al. v. McNally et al., 45 Mont. 20, 31, 121 P. 889 (1912) held that Section 93-5102 "is to enable the jury to apply the testimony of the witnesses to the observed conditions about which they have spoken and also to determine the truth of the statements. . . ." Fulton v. Choteau County Farmer's Co., 98 Mont. 48, 61, 37 P.2d 1025 (1934) held that posed photographs were admissible "for the purpose of explaining and applying the evidence and assisting the court and jury in understanding the case."

Rule 402. Relevant evidence generally admissible; irrelevant evidence generally inadmissible

All relevant evidence is admissible, except as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state. Evidence which is not relevant is not admissible.

Source: Based on Federal Rule 402

Commission Comment

This rule is identical to Federal Rule 402 except that the clause beginning with "except as otherwise provided" is changed to apply Montana law, and is identical to Uniform Rules (1974) Rule 402 except that "constitution" is added.

This rule codifies a classic formulation and analysis of the admissibility of evidence. Advisory Committee Note to Federal Rule 402, 46 F.R.D. 161, 223. Under this analysis, the admissibility of evidence is determined first by testing relevance and then by determining whether the evidence is excluded by some provision of the law of evidence. Thayer, Preliminary Treatise on Evidence at Common Law 269 (1898). The codification of this formulation in Federal Rule 402 first declares the general principle that all relevant evidence is admissible with exceptions provided by law, and then declares the negative of the general principle that whatever is not relevant is not admissible but lists no exceptions. In other words, irrelevant evidence is

never admissible.

Existing Montana law, noted in the Commission Comment to proposed Rule 401, is certainly consistent with proposed Rule 402. The exceptions to the general rule that all relevant evidence is admissible contained in proposed Rule 402 refer to situations listed below. The list of exclusionary law and rules is only by way of example, because if a party wishes that relevant evidence be excluded he must object and give the specific reasons and authority therefor under proposed Rule 103.

Constitutional provisions excluding evidence relate primarily to the Fourth, Fifth, and Sixth Amendments to the United States Constitution and Sections 11, 24 and 25 of Article II, 1972 Constitution of Montana covering search and seizure, self-incrimination, and right to jury trial and case law under these provisions. Examples given by the Advisory Committee Note to Federal Rule 402, 46 F.R.D. 161, 225, are Weeks v. U.S., 232 U.S. 383 (1914) and Katz v. U.S., 389 U.S. 347 (1967) for unlawful search and seizure and Massiah v. U.S., 377 U.S. 201 (1964) for incriminating statements elicited in violation of right to counsel. Reference to these provisions and cases reflects the intent of the rule to recognize these limitations on the admissibility imposed by these constitutions but not to list each instance of limitation possible.

Statutory provisions which limit the admissibility of evidence in Montana must also be given by way of example because again the rule does not intend to list each limitation imposed: R.C.M. 1947, Section 32-1213(c) does not allow an accident report under the Uniform Accident Report Act to be used as evidence in any trial. This view was affirmed in Morrison v. City of Butte, 150 Mont. 106, 112, 431 P.2d 79 (1967). A similar provision is found in Section 53-428 under the Motor Vehicle Safety-Responsibility Act disallowing actions or findings by the supervisor under the act to be admitted as evidence as negligence in an action for damages. Under Section 93-401-12 and -13 parol evidence of writings is excluded except in certain circumstances. Under Sections 93-601-2 and 93-701-4 privileges are recognized which do not allow otherwise admissible evidence. Under the code of criminal procedure, two sections (95-1803(c) and 95-1804(c)) exclude evidence if it has not met discovery, inspection and notice requirements. Two other sections implement statutory guarantees under the Fourth and Fifth Amendments to the U.S. Constitution and Sections 11 and 25 of Article II of the 1972 Montana Constitution; section 95-1805

provides for suppression of involuntary confessions and 95-1806 of illegally seized evidence.

Other proposed rules which exclude evidence will be found following this proposed rule: Rules 403, 404, and 407 through 411 exclude otherwise relevant evidence; Article V excludes evidence through privileges; Article VI presents restrictions upon the examination of witnesses having the effect of excluding evidence; Article VII sets out requirements for expert testimony; Article VIII excludes hearsay evidence; Article IX excludes evidence not properly authenticated and identified, and Article X restricts proof of writings and recordings.

Montana Rules of Civil Procedure applicable in the courts of this state which provide procedures for excluding relevant evidence are Rule 16, allowing limitations upon evidence to be introduced at trial; Rule 30(b), allowing protection of parties or deponents and thereby excluding relevant evidence; and Rule 37, allowing the court to forbid introduction by a party of any evidence for failure to comply with the discovery rules.

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.

Source: Federal Rule 403

Commission Comment

This rule is identical to Federal and Uniform Rules (1974) Rule 403. The Commission intends, by adoption of this rule, to make no change in Montana law in this area. Terms used by this rule which may be new to Montana law are to be construed as synonomous with current practice; for example, "unfair prejudice" is synonomous with the usual use of the term prejudice.

A key element of this rule is the discretion of the judge

in deciding whether otherwise relevant evidence is to be excluded because of the factors listed in the rule. Montana law is consistent with this approach: R.C.M. 1947, § 93-401-25 allows "discretion of the court to permit inquiry into collateral facts. . ."; Section 93-1201-1 allows the admission of demonstrative or real evidence to be "regulated by the sound discretion of the court." Section 93-1901-3 contains a statement which is similar to the policy of the proposed rule: "The court, however, may stop the production of further evidence upon a particular point when the evidence upon it is already so full as to preclude reasonable doubt." Case law is also consistent with this proposed rule. In State v. Rollins, 149 Mont. 481, 484, 428 P.2d 962 (1967) the court allowed a photograph to be admitted and held that when admissibility of such evidence is being considered the court should "weigh its probative value against its prejudicial effect. . . . The trial judge should have latitude of discretion in passing upon the admissibility of such evidence." Other cases have dealt with similar questions that arise under the proposed rule and have been treated similarly: State v. Bischert, 131 Mont. 152, 159-60, 308 P.2d 969 (1957) on gruesome photographs; State v. Satterfield, 114 Mont. 122, 127, 132 P.2d 372 (1943) on remote evidence; and Wallin v. Kinyon Estate, 164 Mont. 160, 164 , 519 P.2d 1236 (1974) on exclusion of prejudicial evidence through the use of a motion in limine.

Rule 404. Character evidence not admissible to prove conduct, exceptions; other crimes; character in issue

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

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

(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 homocide case or in an assault case where the victim is incapable of testifying to rebut evidence that the victim was the first aggressor.

(3) Character of witness. Evidence of the character of a witness, as provided in Article VI.

Source: Based on Federal Rule 404(a)

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

Source: Based on Federal Rule 404(b)

(c) Character in issue. Evidence of a person's character or a trait of his character is admissible in cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense.

Source: Original

Commission Comment

This rule deals only with the admissibility of character evidence. Proposed Rule 405 deals with how such evidence may be proven.

(a) Character evidence generally

This subdivision is identical to Federal and Uniform Rules (1974) Rule 404(a) except that "or in an assault case where the victim is incapable of testifying" is added in (a)(2) to cover a situation to which the Commission believes the rule should logically extend; and "as provided in Article VI" is changed in (a)(3) to delete reference to specific rules.

The Commission intends, with one exception in (a)(2), this subdivision to express the generally accepted rules on the admissibility of character evidence when it is used as circumstantial evidence to infer conduct. The rule provides that such use of character evidence is not admissible unless it falls within one of the exceptions provided in paragraphs 1, 2, or 3, which generally limit such evidence to criminal cases.

Paragraph 1 expresses the rule that the accused may introduce evidence of his good character, and the prosecution may rebut the same to infer that he did not commit the crime. Paragraph 2 expresses the two usual rules on the character of the victim in the first clause, and an entirely new rule in the

second clause. The two usual rules in the first clause, "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," provide that the accused may introduce evidence of the violent character of the victim to show that the victim was the first aggressor or to show that the accused used a reasonable amount of force in defending himself, and the prosecution may rebut this evidence of violent character with evidence of peaceful character. The new rule in the second clause, "evidence of a character trait of peacefulness of the victim offered by the prosecution . . . to rebut evidence that the victim was the first aggressor," provides that the prosecution may rebut evidence offered by the accused to show that he acted in self-defence with evidence of the peaceful character of the victim to show who was the first aggressor. Paragraph 3 expresses the usual rule that character evidence may be used to attack or support the credibility of a witness, as provided in Article VI.

This subdivision is generally consistent with Montana law. R.C.M. 1947, §93-1901-13 provides that evidence of good character of a party or witness is not admissible until the character of the party or witness is attacked or unless an issue involves such character. Cases construing and using this statute have expressed this same meaning. In re Williams Estate, 52 Mont. 192, 203, 156 P. 1087 (1916); State v. Jackson, 71 Mont. 421, 433, 230 P. 370 (1924); Meinecke v. Skaggs, 123 Mont. 308, 311, 213 P.2d 237 (1949); and Goggans v. Winkley, 159 Mont. 85, 93, 495 P. 2d 549 (1972). One reason given for this statute excluding such evidence is that a person is presumed to have good character, and there is no need for such evidence until that good character is attacked. Fowlie v. Cruse, 52 Mont. 222, 237, 157 P. 958 (1916). A limitation upon this statute can be implied from other cases which do not allow an attack upon character, or character evidence in civil cases. Kornec v. Mike Horse Mining Co., 120 Mont. 1, 13, 180 P. 2d 252 (1947); Gunderson v. Brewster, 154 Mont. 405, 431 466 P. 2d 589 (1970); and Holland v. Biggs, ___ Mont. ___, 532 P. 2d 411, 32 St. Rep. 238, 240 (1975). While these cases are civil assault cases, it can be implied that the rule would hold true for all civil cases; the apparent reason for exclusion, as expressed in each of the cases, is that evidence of character is not relevant and therefore lacks probative value.

The rule contained in paragraph 1 that the accused may introduce evidence of his good character to show that he did not commit the crime is followed in Montana. State v. Moorman, 133 Mont. 148, 151, 321 P. 2d 236 (1957); State v. Popa, 56 Mont. 587, 590, 185 P. 1114 (1919); and State v. Jones, 48 Mont. 505, 516, 139 P. 441 (1914). These cases also stand for the proposition that the prosecution may cross-examine the witnesses for the accused concerning rumors or reports concerning the reputation of the accused

which would rebut their good character testimony and may cross-examine the witnesses to determine the sufficiency of grounds upon which they base their testimony. (See Proposed Rule 405(a) for further discussion.)

The rules contained in the first clause of paragraph 2, concerning evidence of character of the victim introduced by the accused, are also followed in Montana. Under Montana case law the accused must first lay a foundation that he acted in self-defense before he can introduce evidence of the violent character of the victim. State v. Logan, 156 Mont. 48, 64, 472 P.2d 833 (1970). Then evidence of the violent character of the victim may be introduced for two purposes: to show that the victim, not the accused, was the first aggressor, State v. Jones, supra at 519; and to show that the accused acted reasonably, or used a reasonable amount of force, in defending himself against a victim of violent character. State v. Shadwell, 22 Mont. 599, 572, 57 P. 281 (1899). There is a great deal of case law on these rules, much of it relating to methods of proof as applied to each of the two purposes. (See Proposed Rule 405 for further discussion.) This paragraph also contains the rule that the prosecution may introduce evidence of the peaceful character of the victim to rebut evidence offered by the accused showing that the victim was the first aggressor. This use of character evidence of the victim has not been recognized by Montana statutes or cases, and is therefore new to Montana law. The rule adds a phrase making it applicable to assault cases where the victim cannot testify, as well as to homocide cases where the same consideration applies. The Commission does not intend that this subdivision conflict with R.C.M. 1947, Section 94-5-503(5), which limits use of a rape victim's character to two instances.

The rule contained in paragraph 3 that evidence of the character of the witness may be used to attack or support the credibility of the witness is provided by R.C.M. 1947, Section 93-1901-13, among other statutes. Cases construing it are In re Williams Estate, supra, and State v. Jackson, supra. It should be noted that evidence of good character is not admissible until the character of the witness has been attacked. State v. Deidtman, 58 Mont. 13, 19, 190 P. 117 (1920). (See proposed rules in Article VI dealing with the character of witnesses for further discussion.)

(b) Other crimes, wrongs, acts

This subdivision is identical to Federal Rule 404(b). It states the general rule that evidence of another crime is not admissible to prove a criminal disposition or character trait and therefore that the accused committed the crime for which he is on trial. However, this narrow rule does have its exceptions, for evidence of other crimes is admissible for purposes other than as evidence of a criminal character trait. These purposes

are listed by way of example, as indicated by use of the phrase, "such as." The beginning of the second sentence of the Uniform Rule (1974) 404(b) retains language from an earlier Federal draft which reads: "This subdivision does not exclude evidence when offered for another purpose, such as ...." The Commission concurs in statements of intent concerning this amendment found in the Report of the Senate Judiciary Committee, 93d Cong., 2d Sess., October 18, 1974, pp. 24-25, that there is probably "...no necessity in amending the rule..."and that use of the word "may" in the amendment "...is not intended to confer any arbitrary discretion on the trial judge. Rather, it is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403...." The final draft of the Federal Rules was adopted for purposes of uniformity and the Commission intends that there be no change in the admissibility of such evidence under existing Montana law.

Present Montana Law is consistent with this subdivision, although this has not always been true. In State v. Sauter, 125 Mont. 109, 144, 232 p. 2d 731 (1951), evidence of other sex crimes was held inadmissible for any purpose; this was expanded in State v. Searle, 125 Mont. 467, 471, 239 p. 995 (1952) to disallow evidence of other crimes for any reason in a trial for any crime. This unorthodox rule reversed earlier cases in Montana (State v. Simpson, 109 Mont. 198, 208, 95 p.2d 761 (1939)) and eventually was overruled in a series of cases: State v. Merritt, 138 Mont. 546, 548, 357 p. 2d 683 (1960); State v. Teidmann, 139 Mont. 237, 242, 362 p. 2d 529 (1960; State v. Tully, 148 Mont. 166, 169, 418 p. 2d 549 (1960); and finally in State v.Jensen, 153 Mont. 233, 238, 455 p. 2d 63 (1969) where evidence of other sex crimes was held admissible because of similarity, nearness of time, and tendency to establish a common scheme or plan of the other crimes. The list of purposes allowing such evidence to be admitted, found in Tully, compares closely to those found in the proposed rule, but as Jensen indicates, purposes other than those contained in Tully are allowable; therefore, Montana law is consistent with the concept that purposes other than those listed in the rule may be found and used to admit evidence of other crimes. (See also State v. Frates, 160 Mont. 431, 436, 503 p. 2d 47 (1972); State v. Taylor, 163, Mont. 106, 120, 515 p. 2d 677 (1973).) It should be noted that State v. Skinner, 163 Mont. 58, 64, 505 p. 2d 81 (1973) indicates that courts are obliged to examine "the relative probative value of the evidence of other offenses... and weigh this against the prejudice inherent in this type of evidence in light of the actual need to introduce (it)," factors similar to those found in Proposed Rule 403.

(c) Character in issue

This subdivision is original and therefore not identical to any Federal or Uniform Rule (1974). The language, taken from proposed Rules 404(a) and 405 (b), is very close to phrases contained in the same Federal and Uniform Rules (1974).

The Federal drafters clearly intended to make character in issue admissible, because Federal Rule 405(b) has a provision for proving character in issue; however, the Commission believes that a rule which is meant to deal with the admissibility of character evidence should contain a provision for evidence which most obviously must be admitted, particularly in light of R.C.M. 1947, Section 93-1901-13 and cases construing it. It should be noted that character is not automatically placed in issue under Montana case law: good character of a party to the action is not in issue and thus far not admissible until it is questioned or attached by the other party. Fowlie v. Cruse, supra, and Meinecke v. Skaggs, supra.

Rule 405. Methods of proving character

(a) Reputation or opinion. In all cases in which evidence of character or 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.

Source: Federal Rule 405(a)

(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, or where the character of the victim relates to the reasonableness of force used by the accused in self defense, proof may also be made of specific instances of his conduct.

Source: Based on Federal Rule 405(b)

Commission Comment

This rule deals only with the methods which may be used to prove character evidence. Proposed Rule 404 deals with the admissibility of character evidence and is the only rule under which character evidence may be admitted. When character evidence is admissible, it is to be proven by methods specified by this rule.

(a) Reputation or opinion

This subdivision is identical to Federal and Uniform Rules (1974) Rule 405(a). The subdivision deals with two of the three allowable methods of proof of character evidence, reputation and

opinion. It should be noted that reputation is what the general community thinks a person's character is, while character is the trait the person actually possesses, and the two may not always coincide. The Commission believes that because of the potential inaccuracy of proof of character through reputation, and because a person may not actually have a "reputation" as such in today's society, and therefore testimony given by witnesses as to character may really only be an opinion, opinion evidence is allowed under this subdivision to prove character.

Existing Montana Law has generally allowed evidence of character to be proved by reputation. An example allowing evidence of the good character of the accused to rebut evidence that he committed a crime is State v. Moorman, 133 Mont. 148, 153, 321 p. 2d 236 (1957). In that case, the court stated the rule in these terms: "The rule is well settled that, when a defendant in a criminal case calls witnesses to testify that he possesses such a general reputation in the community...." It should also be noted that two older cases, State v. Shafer, 22 Mont. 17, 18, 55 p. 526 (1898) and Matusevitz v. Hughes, 26 Mont. 212, 217, 68 p. 467 (1902), have both held that where witnesses testify that they are in a position to know and hear what the reputation of a person is, but that they have never heard the character questioned or talked about, this is admissible because "if one lives such a life as not to excite adverse criticism of good or bad people, it cannot be said that this person has aught else than a reputation for good character." Matusevitz v. Hughes, supra.

Existing Montana law impliedly allows opinion evidence to prove character. Wilson v. Wilson, 128 Mont. 511, 517, 278 p. 2d 219 (1954) held admissible opinion testimony by a witness as to the fitness of one of the parties to have custody of her children. This subdivision expands the rule of this case to all character evidence.

The final sentence of this subdivision, in contrast to the first two methods of proof, provides that inquiry is allowable into relevent specific instances of conduct on cross-examination. This sentence codified the rule of Michelson v. United States, 335 U.S. 469 (1948), also followed in Montana in State v. Jones, 48 Mont. 505, 516, 139 p. 441 (1914); State v. Popa, 56 Mont. 587, 590, 185 p. 1114 (1919) and State v. Moorman, supra. These cases held the prosecution could rebut the accused's evidence of good character by cross-examining as to the witnesses' "knowledge of disparaging rumors or common reports affecting this reputation.... The prosecution has the right to cross-examine the witnesses to ascertain the sufficiency of grounds upon which they base their statements." State v. Moorman, supra. Therefore this last sentence is consistent with Montana case law.

(b) Specific instances of conduct

This subdivision is identical to Federal and Uniform Rules (1974) Rule 405(b) except that "or where the character of the

victim relates to the reasonableness of force used by the accused in self defense," is added to make the rule consistent with Montana law. This method of proof is the most persuasive of the three contained in the rule, and is also the most likely "to arouse undue prejudice, to confuse and distract, to engender time-consuming side issues and to create risk of unfair surprise." McCormick, Handbook of the Law of Evidence, 443 (2d ed. 1972). As a result of the effect of this method of proof, it is generally restricted to situations where character is in issue, when such proof is central to the outcome of the case.

Existing Montana law has dealt with this method of proof only in criminal cases involving the violent character of the victim offered by the accused to show that the amount of force used by the accused to defend himself was reasonable. State v. Shadwell, 22 Mont. 559, 572, 57 P. 281 (1899) and appeal after second trial, 26 Mont. 52, 55, 66 P. 508 (1901) both held that prior threats and conduct were admissible to establish the state of mind of the accused. In State v. Felker, 27 Mont. 451, 457, 71 P. 668 (1903) evidence of a prior assault by the victim upon another person, known by the accused, was held admissible to show the good faith motive of the accused. In State v. Hanlon, 38 Mont. 557, 570, 100 P. 1035 (1909) threats by the victim against the accused were held admissible to "show a disposition to violence, and, this disposition being known to the defendant, it may well be regarded as having aroused fears and as having impelled him to act upon them. . . ." As a final example, State v. Jennings, 96 Mont. 80, 89, 28 P.2d 448 (1934) held that the accused "ought to be allowed to prove every fact and circumstance known to him, and connected with the deceased, which was fairly calculated to create an apprehension for his own safety." It can be noted that while the character of the victim has been important to the outcome of these cases, it has not necessarily been "at issue" and therefore would not necessarily be included under the Federal Rule. The additional language making this subdivision apply to these cases is meant to solve this problem and make the subdivision entirely consistent with existing Montana law.

Rule 406. Habit; routine practice

(a) Habit and routine practice defined. A habit is a person's regular response to a repeated specific situation. A routine practice is a regular course of conduct of a group of persons or an organization.

Source: Original

(b) Admissibility. Evidence of habit or of routine practice, whether corroborated or not, and regardless of the presence of

eyewitnesses, is relevant to prove that conduct on a particular occasion was in conformity with the habit or routine practice.

Source: Based on Federal Rule 406

(c) Method of proof. Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

Source: Uniform Rule (1974) 406(b)

Commission Comment

(a) Habit and routine practice defined

This subdivision is original and therefore entirely different than either Federal or Uniform Rules (1974) Rule 406. The Commission feels that a definition of these terms is properly part of the rule for two reasons: First habit and character evidence are oppositely treated, that is, habit evidence is admissible while character evidence is generally not admissible. Second the importance because of the opposite treatment, is often not clear and has led to confusion. The Commission intends by this definition subdivision to clarify the terms necessary to apply correctly the rule allowing habit evidence to be admissible.

Existing Montana law does not define these terms, although similar terms are defined in R.C.M. 1947, §87A-1-205, course of dealing and usage of trade. Subdivision (b) of this rule allows habit and routine practice to be used to prove conduct, and so will not always relate to the construction of contracts associated with the terms in that statute, or associated with custom and usage under R.C.M. 1947, §93-401-27(12).

(b) Admissibility

This subdivision is based upon Federal and Uniform Rules (1974) Rule 406 except that certain words and phrases have been deleted as unnecessary becuase of the definition subdivision; other key phrases have been kept to allow uniform interpretation. The subdivision basically allows evidence of habit or routine practice to be admitted to prove conduct.

Existing Montana law is consistent with this subdivision. Prosser v. Montana Central Ry. Co., 17 Mont. 372, 382, 43 P. 81 (1895) allowed evidence of the habit of brakemen of mounting a moving train to show what an experienced and prudent brakeman would do under the same circumstances. Neary v. Northern Pac. Ry., 37 Mont. 461, 478, 97 P.2d 944 (1908) recognized the rule of Prosser, supra, but excluded evidence of how conductors

checked trains in a railroad yard because it was not relevant to the case. A later case dealing with habit evidence, Garrison v. Trowbridge, 119 Mont. 505, 510, 177 P.2d 464 (1947) held "where habits and customs are admissible the fact of such habits and customs and not the witnesses' conclusions as to the probably future consequences of such is all the court may allow in evidence." Hartse v. Korneychuk, 131 Mont. 530, 533, 312 P.2d 795 (1957) recognized that habit evidence can be admissible to prove conduct. The case of Mulville v. Pacific Mutual Life Insurance Co. of California, 19 Mont. 95, 100, 47 P. 651 (1897) held that "there was no error in excluding evidence as to the deceased having made a practice of jumping on the train while in motion," citing a Pennsylvania case finding this type of evidence insufficient to warrant an inference that the conduct had been the same as the alleged practice. If that case stands for the proposition that habit evidence is inadmissible to prove conduct, it is overruled by this subdivision; however, the case can also be interpreted as excluding habit evidence because other evidence failed to establish the existence of the habit.

It should be noted that R.C.M. 1947, §87A-1-205(6) requires that in order for evidence of usage of trade to be offered, notice is required to be given to the other party to prevent unfair surprise; this rule is not meant to supercede that provision, taken it applies under this rule.

(c) Method of Proof

This subdivision is identical to Uniform (1974) Rule 406(b) which is identical to a subdivision in the version of the Federal Rules submitted to Congress, but deleted by Congress. The Commission adopts this subdivision to provide guidance as to permissible methods of proof of habit or routine practice. A problem which may arise with specific instances of conduct is that in laying the foundation to prove habit by this method, the proponent may be able to infer all that is necessary for the jury to conclude a particular habit existed, even though the court subsequently rules an insufficient number of instances has been shown. This problem should be solved by having such foundation made in the absence of the jury under Rule 103. Note that use of opinion evidence is intended to be governed by Rule 701.

This subdivision is generally consistent with existing Montana law. Montana cases and statutes do not deal with opinions and proof of habit and routine practice and this represents an expansion. Cases dealing with habit have allowed proof by specific instances of conduct. Prosser v. Montana Central Ry. Co., supra, 17 Mont. at 382, and Garrison v. Trowbridge, supra, 119 Mont. at 510.

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.

Source: Federal Rule 407

Commission Comment

This rule is identical to Federal and Uniform Rules (1974) Rule 407. The rule disallows evidence of subsequent remedial measures because of the public policy of encouraging, or at least not discouraging, changes or repairs for added safety. The rule allows use of this type of evidence for other purposes, if those other purposes are controverted, or for impeachment.

Existing Montana law recognizes the rule excluding subsequent remedial measures, but all the case law on the subject allows this type of evidence under one of the other purposes for which it may be admitted. May v. City of Anaconda, 26 Mont. 140, 144, 66 P. 759 (1901) allowed evidence that a rock, which caused plaintiff's accident and injuries, had been removed from a certain street to prove that the city had assumed control of that street and was under the obligation to keep in it repair. Pullen v. City of Butte, 45 Mont. 46, 53, 121 P. 878 (1912) allowed evidence of repairs of a sidewalk to show conditions existing at the time of the accident. Titus v. Anaconda Copper Mining Co., 47 Mont. 583, 588, 133 P. 677 (1913) and Teesdale v. Anschutz Drilling Co., 138 Mont. 427, 440, 357 P. 2d 4 (1960) also allowed evidence of subsequent repairs to show conditions existing at the time of the accident. Other cases have recognized the rule but have not found it necessary to apply it. Hackley v. Waldorf-Hoerner Paper Co., 149 Mont. 286, 296, 425 P. 2d 716 (1967) and Morrison v. City of Butte, 150 Mont. 106, 115, 431 P. 2d 79 (1967).

It should be noted that under Teesdale, supra, Montana recognizes that admitting evidence for another purpose allows a limiting instruction under the limited admissibility rule also contained in proposed Rule 105. Further, admission of evidence of subsequent repairs for another purpose should be made under the considerations of proposed Rule 403, particularly its prejudicial effects.

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 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.

Source: Federal Rule 408

Commission Comment

This rule is identical to Federal Rule 408. Uniform Rules (1974) Rule 408 is the same except that it does not include the third sentence of the rule. Congress added this third sentence to insure that evidence will not be made inadmissible merely because it is disclosed during compromise negotiations if that evidence is otherwise discoverable, that is, a party should not be able to keep otherwise discoverable evidence from being admissible by presenting it during compromise negotiations. The broad purpose of the rule is to insure that frank and open negotiations will take place without fear that what is said during these negotiations will be used against the parties during the trial; the policy behind this purpose is that favoring compromises and settlements of disputes.

Existing Montana law is generally consistent with this rule. R.C.M. 1947, § 93-2201-5 states "[a]n offer of compromise is not an admission that anything is due." Case law using this statute has held that evidence of an offer of compromise is therefore inadmissible at trial of that dispute. Huffine v. Lincoln, 53 Mont. 474, 480, 164 P. 888 (1917) and Continental Oil Co. v. Bell, 94 Mont. 123, 135, 21 P.2d 65 (1933). The policy behind the rule was expressed in Black v. Martin, 88 Mont. 256, 269, 292 P. 577 (1930) and has been expressed in recent statutes, R.C.M. 1947, §§ 93-2201-7 through 93-2201-10. Section 93-2201-7 expresses the policy of the rule, and § 93-2201-9 states, among other things, that the fact of voluntary partial payment shall not be construed as an admission that anything is due, and that it is inadmissible as evidence.

Several cases have dealt with the question of what is an offer of compromise. Continental Oil Co. v. Bell, supra, held, contrary to the assertion that an offer was "merely a preliminary negotiation between parties," that "all offers are merely negotiations until accepted. The testimony disclosed an offer made in an attempt to effect a settlement and, therefore, was clearly inadmissible." However, Magelssen v. Atwell, 152 Mont. 409, 413, 451 P.2d 103 (1969) held that an offer to buy land made long before an action was brought to quiet title was admissible because there was no dispute at the time the letter was written. It would also seem logical that if there was no dispute because one of the parties had admitted liability and agreed to pay, that such an offer would also be admissible.

The final consideration under this rule concerns the second sentence of this rule providing that "evidence of conduct or statements made in compromise negotiation is likewise not admissible." This sentence overrules the common law doctrine of allowing admissions of liability made during negotiations to be admissible while still excluding evidence of any offers of compromise. The common law doctrine is followed in Montana in Lenahan v. Casey, 46 Mont. 367, 379, 128 P. 601 (1912). That case is expressly overruled by this rule because the Commission feels that it is contrary to the policy of the rule and can be unfairly applied to those who are unaware of it. It should be noted that the addition of the third sentence is meant to prevent the opposite abuse of this rule so that parties will not try to immunize their evidence from being admissible by presenting it during negotiations; the other party may otherwise discover this evidence and present it so long as no inference is made to compromise negotiations.

Rule 409. Payment of expenses

Evidence of payment of expenses occasioned by an injury or occurrence is not admissible to prove liability.

Source: Based on Federal Rule 409

Commission Comment

This rule is similar to Federal and Uniform Rules (1974) Rule 409 but changes have been made to avoid a potential problem under that rule, to provide a sounder policy basis for the proposed Montana rule, and to make the proposed Montana rule consistent with existing Montana law. The Federal and Uniform Rules (1974) Rule 409 states: "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." The potential problem under the Federal and Uniform rule is that an offer or promise to pay is often intertwined with an admission of liability, and since the Commission believes the latter should be admitted, having this as part of the rule is inappropriate. The policy basis of the Federal Rule, as shown by the Federal Advisory Committee Note to that rule (46 F.R.D. 161, 240 (1969)), is that such payments arise from humane impulses. The Commission believes that such offers or promises are seldom made from such impulses, and that such a policy is unrealistic. However, the statement of policy contained in R.C.M. 1947, Section 93-2201-7, and the policy implicit under proposed Rule 408, that

is the encouragement of settlement of claims, is a valid policy for this proposed Rule 409.

This rule was drafted to be consistent with existing Montana law contained in R.C.M. 1947, Section 93-2201-9. That section provides that payment of claims ". . . based on alleged liability of that person for injury to person, including death, or damage to property arising out of any occurrence. . ." are not to be construed ". . . as an admission of liability or fault. . ." nor are they to be admissible as evidence in a trial ". . . on the issue of liability, the extent of damages or otherwise." The Federal and Uniform Rule (1974) only included payments for injury, not for property damage. This rule is intended to cover all types of payment arising out of alleged liability from either an injury or occurrence. Therefore this rule is entirely consistent with existing Montana policy and law.

Rule 410. Offer to plead guilty; nolo contendere; withdrawn plea of guilty

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

Source: Based on Federal Rule 410.

Commission Comment

This rule is identical to a version of Federal Rule 410 conditionally adopted by Congress. The condition was that the rule would be superceded by any amendment to the Federal Rules of Criminal Procedure inconsistent with the rule. Such an amendment was made in Rule 611 (e) (6), Federal Rules of Criminal Procedure, which was later substituted for this version of the rule. The Commission prefers the superceded version of the rule because it allows use of statements whether or not made under oath, on the record, or in the presence of counsel, and most important, for impeachment purposes. The Uniform Rule 409 (1974) is similar to the first sentence of the proposed rule but does not include a provision provision similar to the second sentence of the proposed rule.

This rule allows an accused to offer to plead guilty or nolo contendere or to withdraw such pleas without either action being used against him in any subsequent trial. This is intended to aid the plea bargaining process, under similar policy considerations given to offers of compromise under Rule 408, and to allow highly prejudicial evidence to be excluded under considerations that the reasons for offering to plead or withdrawing pleas of guilty and nolo contendere would not be understood by a jury and would almost preclude a fair trial. The second sentence of this proposed rule is added to insure that the accused does not abuse this rule and contradict earlier statements. (See Harris v. New York, 401 U.S. 222 (1971).) The trial court is required to insure that the statements were "voluntary and reliable" and if contradicted, the statements may be introduced for the limited purposes of impeachment or prosecution for perjury.

Existing Montana law has not specifically dealt with the problem of offers to plead or withdrawn pleas, although a plea of guilty that is not withdrawn is admissible in subsequent proceedings. Sikora v. Sikora, 160 Mont. 27, 33, 499 P.2d 808 (1972). Therefore this rule is new to Montana law. It should be noted that Montana law does not allow pleas of nolo contendere; however, such a plea is included in the rule because it has been recognized by Montana courts in a case where such a plea was entered in Federal Court and was relevant to a state case. State ex rel. McElliot v. Fousek, 91 Mont. 457, 461, 8 P.2d 795 (1932).

Rule 411. Liability insurance

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

Source: Federal Rule 411

Commission Comment

This rule is identical to Federal and Uniform Rule (1974) Rule 411. The primary reasons for exclusion of evidence of insurance are its irrelevance, prejudicial effect, and potential misuse by the jury.

Existing Montana law is generally consistent with this rule. Evidence of a party's liability insurance is inadmissible. Wilson v. Blair, 65 Mont. 155, 1972, 211 p. 289 (1922) and D'Hoodge v. McCann, 151 Mont. 353, 359, 433 p. 2d 477 (1968). Evidence that a party does not have insurance is also apparently inadmissible. Doheny v. Cloverdale et al., 104 Mont. 534, 555, 68 p. 2d 142 (1937).

Although not strictly a rule of evidence, Montana also follows the rule that : "Ordinarily injection of the fact that the defendant is protected by liability insurance into such a case, directly or indirectly, by evidence, arguments, or remarks constitutes reversible error." D'Hoodge v. McCann, supra. It is apparent that there are exceptions to the rule. First, while it is reversible error for one party to mention the other's liability insurance during voir dire (Wilson v. Thurston Co. et al., 82 Mont. 492, 495, 267 p. 801 (1928)), if the insured party mentions that it has insurance during voir dire, it is harmless error and that party cannot complain. Francis v. Heidel, 104 Mont. 480, 488, 68 p. 2d 583 (1937). Second, where an admission of liability contains reference to insurance, the entire admission is still allowed in evidence. Tanner v. Smith, 97 Mont. 229, 238, 33 p. 2d 547 (1934). Third, where the existence of insurance is injected in the case by a witness for the insured party through a "voluntary, unresponsive, and incidental answer" there is no reversible error. Meinecke v. Intermountain Transporation Co., 101 Mont. 315, 324, 55 p. 2d 680 (1936). Finally, the reversible error rule has been viewed by the Montana Supreme Court as a problem where "each case ... must generally speaking, stand on its own particular facts and incidents and be determined by the manner and circumstances in which the question of insurance was brought into the case." Francis v. Heidel, supra.

This case-by-case examination of whether circumstances are such that the injection of insurance constituted reversible error or grounds for mistrial has been followed in several cases. The cases indicate that some of the circumstances to be considered are the rule that it is for the trial court to determine sufficiency of grounds for mistrial and this determination will not be disturbed except upon a showing of an abuse of discretion; whether the substantial rights of the insured party are affected; and whether the judgment is excessive, when considering reversible error on appeal. Doheny v. Cloverdale et al., supra; Adams v. Misener, 113 Mont. 559, 578, 131 p. 2d 472

(1942); Morehouse v. Ylvisaker, 152 Mont. 57, 63, 446 p. 2d 432 (1968); D'Hoodge v. McCann, supra at 360; and Klaus v. Hillberry, 157 Mont. 277, 283, 485 p. 2d 54 (1971).

The second sentence of this rule providing that insurance may be admissible for purposes other than to prove liability has not been dealt with in Montana. If admissibility is controlled by factors just mentioned above, the Commission believes that there is a legitimate use of evidence of insurance for purposes like those listed in the rule. Therefore, this second sentence would be new Montana law, but there is no intent to change the present Montana law on insurance in this rule.

ARTICLE V. PRIVILEGES

Introductory Commission Comment

The Commission has taken a different approach with Article V, Privileges, than used with other articles contained in the proposed Montana Rules of Evidence. In other articles the Commission has attempted to draft Montana rules that are identical to the Federal Rules (and the Uniform Rules of Evidence (1974) which are taken from them) as far as possible so that procedure in state and federal courts will be consistent. This is not possible in Article V because Congress, after reviewing the proposed Federal Rules on privileges, rejected the proposal and substituted a rule that applies the common law of privileges in federal civil and criminal cases and the state law of privileges in civil actions in which state law supplies the rule of decision. The Uniform Rules (1974) Article V adopted the federal draft which Congress rejected; it has the effect of modifying and deleting privileges currently recognized in Montana and of adding other privileges currently not recognized in Montana. Whether this draft will be widely adopted by states and become uniform remains to be seen; but, considering the widely different types of privileges recognized by the states, the outcome is not certain and will not be for many years.

In view of these developments, the Commission decided not to attempt to draft new rules of privilege but to continue the present Constitutional and statutory system with the recommendation that the legislature review all the privilege laws to determine whether they meet present day needs. It took this action for the following reasons:

First, there will probably not be a great deal of uniformity among the Federal courts and various states with respect to privileges. As previously pointed out, the Federal Rules do not recognize specific privileges but require that Federal courts either apply the common law or state law, depending upon the case. The Uniform Rules (1974) adopted specific rules of privilege but they have not been widely adopted and contain substantial changes in recognition of particular privileges. In view of the widely different types of privileges currently recognized by the states it does not appear that there will be much uniformity in this area, and so one of the goals of the Commission in drafting rules of evidence does not apply to privileges. Therefore, the Commission felt free to be more concerned with Montana law than uniformity when dealing with privileges.

Second, rules of privileges are not like other rules of evidence. Privileges have the effect of excluding relevant evidence because of the public policy of protecting confidential relationships, such as husband-wife, lawyer-cleint, and clergyman-penitent. R.C.M. 1947, Section 93-701-4. To uphold the protection of these policies, rules of privilege should apply not only in court proceedings, but also in any proceeding where testimony can be compelled by law. The proposed Montana Rules of Evidence only apply in court proceedings (see proposed Rule 101(a)), and would not necessarily apply in administrative hearings or legislative investigations. Further, drafting rules of evidence governing privileges which would only apply in court proceedings would create the confusing situation of having two sets of rules governing privileges, one for proceedings out of court and one for use in court. The proposed article on privileges meets these problems by not including those particular privileges created by statute as separate rules, but adopting them by reference to constitutions and statutes.

Finally, the effect of a privilege is to exclude relevant evidence which acts as a hinderance to ascertaining the truth, accurately adjudicating cases, and the constitutional right to a fair trial. In view of this, the Commission feels that it is inappropriate to change or expand privileges currently existing under Montana law; this type of decision, balancing the right to fair trial against the protection of certain relationships, is one more properly left to elected representatives of the people than a Commission drafting rules of evidence. Therefore, the Commission did not expand, change, or delete any particular privileges presently existing under Montana law.

The article on privileges drafted by the Commission has five rules. The first follows Uniform Rule (1974) 501, setting out the elements of a privilege, but most important, incorporating by reference all privileges found in the constitution, statutes and rules of practice and procedure. This has the effect of cutting off any further recognition.

of privileges by case law, which requires the second rule. It is based on Uniform Rule (1974) 509, and allows the government the privilege not to disclose the identity of an informer, which is currently recognized in Montana only through case law. The final three rules of this article generally apply to all privileges and are based on Uniform Rules (1974) 510 and 512. They relate to voluntary waiver, involuntary or erroneous disclosure, and comment and inference from a claim of privilege.

Rule 501. Privileges recognized only as provided

Except as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state, no person has a privilege to:

(1) refuse to be a witness;
(2) refuse to disclose any matter;
(3) refuse to produce any object or writing; or
(4) prevent another from being a witness or disclosing any matter or producing any object or writing.

Source: Based on Uniform Rule (1974) 501

Commission Comment

This rule is identical to Uniform Rule (1974) 501 except the opening clause is changed. The Uniform Rule read: "Except as otherwise provided by constitution or statute or by these or other rules promulgated by the Supreme Court of this state. . . ." The Commission chose to use language from the exception clause of proposed Rule 402 rather than that of the Uniform Rule because of its clarity, simplicity and because there appears to be no difference in general meaning between it and the phrase used.

The Commission intends the adoption of the first clause of this rule to incorporate by reference any privilege found in the Constitutions of the United States and the State of Montana, Montana statute, or rules of practice and procedure adopted by the Supreme Court. Certainly included among those privileges are the following listed by way of example: the constitutional privilege against self-incrimination and statutory privileges recognized under R.C.M. 1947, Sections 66-3212(1), 93-601-2, and 93-701-4.

The rule provides that only the privileges incorporated by reference shall be recognized, and so has the effect of cutting off any further case law recognition of privileges. The final four clauses in this rule represent a delineation of the elements of a testimonial privilege and are intended to clarify privileges generally. This rule represents a new approach to the use of privileges in Montana courts.

Rule 502. Identity of informer

(a) Rule of privilege. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law.

Source: Based on Uniform Rule (1974) 509(a)

(b) Who may claim the privilege. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished.

Source: Uniform Rule (1974) 509(b)

(c) Exceptions and limitations.

(1) Voluntary disclosure; informer a witness. No privilege exists under this rule if the identity of the informer or his interest in the subject matter of his communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the public entity.

(2) Testimony on relevant issue. If it appears in the case that an informer may be able to give testimony relevant to any issue in a criminal case or to a fair determination of a material issue on the merits in a civil case to which a public entity is a party, and the public entity invokes the privilege, the court shall give the public entity an opportunity to show facts relevant to determining whether the informer can, in fact, supply that testimony.

If the Court finds that the informer should be required to give the testimony, and the public entity elects not to disclose his identity, the court on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the court may do so on its own motion. In civil cases, the court may make any order that justice requires.

Source: Based on Uniform Rule (1974) 509(c)

Commission Comment

This is the only rule contained in Article V which relates to a particular privilege. The privilege for the identity of an informer could not be incorporated by reference in Rule 501 because it has only been recognized by case law in Montana. Since Rule 501 also has the effect of cutting off any further recognition of privileges by case law, it is necessary to recognize this privilege in these rules if it is to survive. The Commission believes that this privilege is a necessary part of effective law enforcement and therefore has adopted it.

(a) Rule of privilege.

This subdivision is identical to Uniform Rule (1974) 509(a) except that the phrase "to a law enforcement officer or member of a legislative committee or its staff conducting an investigation" has been deleted from the end of the subdivision. The Commission feels that listing specific governmental officers is unnecessary and unwise, since it is difficult to list all governmental officials to whom the privilege would apply and so avoids problems arising if any particular officer were omitted. The subdivision is phrased in general terms so that the rule not only applies to criminal actions, but violations of civil law and in civil cases as well.

This privilege is unique in that it belongs to the government, not to the communicating party, the informer; and that it covers only the identity of the informer, not the contents of his communications which are necessarily revealed as the basis for prosecution. Roviaro v. United States, 353 U.S. 53, 59 (1959). The privilege is limited

by its underlying purpose: ". . .the furtherance and protection of the public interest in effective law enforcement." Id. The protection given the informer by the privilege is therefore incidental, for it is only meant to encourage citizens to communicate information about the commission of crimes (Id.) and is not for the sole benefit of the well being of the informer.

The privilege has received recognition in Montana in State ex rel. Offerdahl v. District Court, 156 Mont. 432, 435, 481 p. 2d 338 (1971) and State v. Hull, 158 Mont. 6, 17, 47 p. 2d 314 (1971).

(b) Who may claim the privilege.

This subdivision is identical to Uniform Rule (1974) 509(b). The subdivision simply establishes the principle that the privilege granted in subdivision (a) to public entities may be claimed by "an appropriate representative" of those public entities to whom information was given. The Commission recognizes that in the majority of cases the privilege will be claimed by the prosecuting attorney on behalf of the public entity, but this does not foreclose any other "authorized representative" from claiming the privilege.

(c) Exceptions and limitations.

This subdivision is similar to Uniform Rule (1974) 509(c) except that in paragraph (1) "public entity" is substituted for "government" for the sake of consistency and in paragraph (2) substantial changes have been made which delete provisions for procedures for an in camera hearing, a sealed record of, and the presence of counsel at, the hearing. Also deleted were the test of determining when testimony of the informer would be required ("that there is a reasonable probability that the informer can give testimony"), and several alternatives the court could choose from if the testimony was found to be required by the court but the public entity chose not to reveal the identity of the informer. The Commission made these changes to provide a clearer, more practical, more flexible rule and allow the trial court to balance the interests of the public entity in keeping the identity secret against the interests of a party's right to prepare his case.

Paragraph (1) recognizes three means of waiving this privilege: first, if the public entity discloses the identity to "those who would have cause to resent the communication," a phrase from Roviaro, supra at 60; second, if the informer, by his own actions, reveals that he is the informer; and third, if the public entity has the informer testify in the case. It is obvious that if any of these three circumstances arise then attempts to invoke the privilege or demand the identity of the informer are meaningless. In State v. Hull, supra, the Montana Supreme Court held that a lower court could not be found in error for refusing demands by the defendant to reveal the identity of an informer where it was obvious that the defendant knew the identity of that informer. Therefore, this paragraph is generally consistent with Montana law.

Paragraph (2) governs situations where the informer can supply testimony which is needed in a case and the public entity does not want the informer's identity revealed. The test was stated in Roviaro, supra at 62:

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend upon the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

Paragraph (2) allows the public entity to make a showing of facts relevant to the question of whether the informer should testify; the Commission believes that it is within the sound discretion of the court to conduct such a showing in a manner consistent with the objective of the privilege of keeping this identity secret. However, if the court finds that the informer should testify and the public entity elects not to allow his identity to be disclosed, the court can dismiss the charges to which the testimony would relate in criminal cases or take appropriate action in civil cases. The Commission believes that this balances the interest of the public entity against a party's right to prepare his defense and confront and cross-examine his accuser.

This situation has arisen in Montana in State ex rel. Offerdahl v. District Court, supra, which quoted the balancing test from Roviaro, and required that the identity of the informer be revealed in a criminal case. Therefore, this paragraph is consistent with Montana law; however, to the extent that this rule expands Roviaro to civil cases, it is new Montana law.

Rule 503. Waiver of privilege by voluntary disclosure

(a) General rule. A person upon whom these rules confer a privilege against disclosure waives the privilege if he or his predecessor while the holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

Source: Uniform Rule (1974) 510

(b) Joint holders. Where two or more persons are joint holders of a privilege, a waiver of the right of a particular joint holder to claim the privilege does not affect the right of another joint holder to claim the privilege.

Source: Based on West's Ann. California Evidence Code, Section 912 (b)

Commission Comment

This rule and the two following, Rules 503-505, generally apply to all privileges, that is to the privileges incorporated in these rules by reference in Rule 501. The Commission has adopted them to clarify the use of privileges in Montana courts.

(a) General Rule. This subdivision is identical to Uniform Rule (1974) 510. It codifies the common law rule that where the holder of a privilege ceases to treat a matter as privileged, the privilege terminates. This subdivision is consistent with existing Montana law. Ludwig v. Montana Bank and Trust Company, 109 Mont 477, 500, 98 p. 2d 379 (1939). It should be noted that Montana law requires an objection to testimony that is privileged or the privilege is waived. Wilson v. Wilson, 64 Mont. 533, 544, 210 p. 896 (1922); Lewis v. Bowman et al., 113 Mont 68,

75, 121 p. 2d 162 (1942); and State v. Palen, 119 Mont 600, 603, 178 p. 2d 62 (1947).

It should be noted that in determining whether the holder of a privilege has in fact waived it, the intention of the holder is not the only factor to be considered. Once conduct reaches a certain point, fairness requires an objective finding of waiver, despite any subjective intentions of the holder; further, once the particular point is reached, consistency requires a finding that such conduct will constitute a waiver, also despite any intention of the waiver. 8 Wigmore, Evidence 636, Section 2327 (McNaughten Rev. 1961). This subdivision deviates from the common law in allowing part of a communication to be disclosed, up to a "substantial part." Another deviation from the common law that should be noted is that the holder of a privilege need not be aware that he is waiving a privilege when he does so; that is, knowledge is not a required element for waiver. These two departures from the common law are intended to provide more flexibility in determining whether there is waiver in accord with Wigmore's criteria of fairness and consistency. There is no Montana law specifically declaring what is a waiver of a privilege in terms which would indicate whether the two departures from the common law are inconsistent with Montana law; therefore, to this extent, this will be new Montana law.

(b) Joint holders. This subdivision is based on West's Annotated California Evidence Code, Section 912(b) except that references to specific privileges in that section have been deleted. This subdivision was adopted to govern a situation not covered by the Uniform Rules (1974); where two or more persons are holders of a privilege and one of them waives the privilege, the rule provides that the privilege is not waived by the other holders. The result under this subdivision is consistent with the policy underlying the next rule, Rule 504, in that the holder of a privilege is not made to suffer the consequences of a waiver over which he had no control. The joint holder situation has not arisen in any Montana cases and therefore would be new Montana law.

Rule 504. Privileged matter disclosed under compulsion or without opportunity to claim the privilege.

A claim of privilege is not defeated by a disclosure which was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

Source: Uniform Rule (1974) 511

Commission Comment

This rule is identical to Uniform Rule (1974) 511. The rule is intended to provide a remedy for the holder of a privilege when the subject matter of the privilege has been wrongfully disclosed. The remedy provided is that the privilege may be subsequently claimed and the disclosed subject matter made inadmissible.

The intent of "(a) compelled erroneously" is to allow a holder to disclose privileged matters where ordered to do so by a judge. The Commission rejects the common law rule that the holder of a privilege must exhaust all legal remedies and risk incarceration in order to not only uphold his claim of privilege but to prevent the privilege from being waived. Therefore, where the original order compelling the holder to disclose privileged matter is reversed, the rule allows the holder to reassert the privilege.

The intent of (b), a disclosure made without the opportunity to claim the privilege, is to allow the holder to assert the privilege where a person other than the holder has knowledge of privileged matter and discloses it under circumstances which do not allow the holder to assert the privilege. Examples of such persons would be an attorney's secretary, or an eavesdropper who, without the knowledge of the holder of the privilege, heard a privileged communication. The Commission intends the adoption of this rule to overrule the common law "eavesdropper" rule which allows such a person to disclose privileged communications even though a claim of privilege is asserted.

There are no Montana cases in either of these areas, but to the extent that this rule overrules common law, this would be a change in Montana law.

Rule 505. Comment upon or inference from claim of privilege.

The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by the court or counsel. No inference may be drawn therefrom.

Source: Uniform Rule (1974) 512(a)

Commission Comment

This rule is identical to Uniform Rule (1974) 512(a) except that "court" is substituted for "judge." The change is to keep the use of "court" consistent throughout the rules. Uniform Rule (1974) 512 also contained a subdivision (b) providing that proceedings shall be conducted to keep the making of claims of privilege from the knowledge of the jury and a subdivision (c) providing the parties a right to an instruction that no inference be drawn from any claim of privilege. The Commission did not adopt these subdivisions because it feels that they are not necessary. Enforcement of proposed Rule 505 and proper conduct of trial will obtain the same result. (Also see Rule 103(c))

A claim of privilege, made before a jury, often results in prejudicial feelings towards the holder of the privilege, and when the holder is one of the parties, the claim is prejudicial to his case. If comment can be made upon a claim or privilege or an inference be drawn therefrom, the holder of a privilege will either feel intimidated into waiving his privilege or be penalized for invoking it; either of these results destroy the effectiveness of privileges. This rule is intended to solve this problem, for the Commission intends this rule to maximize the effect of privileges by preventing comment or inference, and thereby keeping the jury unaware of claims of privilege.

It is not clear whether Montana law allows comment or inference from a claim of privilege. Certainly a judge cannot comment on the evidence (Suhr v. Sears Roebuck Company, 152 Mont. 344, 350, 450 p. 2d 87 (1969)) and comment by a judge as to privilege or a claim of privilege would also appear improper. Batchoff v. Craney, 119 Mont 157, 166, 172 p. 2d 308 (1946). Comment by counsel as to a claim of privilege appears to have arisen in only two Montana cases, neither of which is conclusive. In State v. Belland, 59 Mont 540, 549, 197 p. 841 (1921), the prosecution made repeated efforts to get a defendant's wife to testify as to illicit relations between her husband and a co-defendant; the court held these attempts "cannot be justified" and reversed the case for this and other prejudicial errors. In State v. Sloane, 22 Mont 293, 297, 56 p. 364 (1899), the defendant's wife was on a list of witnesses and the defendant's successful efforts to have her taken off the list were finally made in front of the jury; the court held there was no prejudicial error.

However, two statutes dealing with evidence generally could be inconsistent with this rule: R.C.M..1947, Section 93-1301-7 provides disputable presumption (5)"that evidence willfully suppressed would be adverse, if produced." and (6) provides "that higher evidence would be adverse from inferior, being produced." Section 93-2001-1(7) allows the court to instruct the jury "that if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust." It would appear that the provisions of Section 93-701-4, providing "...it is the policy of the law to encourage confidence and preserve it inviolate..." and then listing the various privileges, and of this rule should be read as exceptions to the general statutes. This rule would be new Montana law.

ARTICLE VI WITNESSES

RULE 601. Competency in general; disqualification.

(a) General rule of competency. Every person is competent to be a witness except as otherwise provided in these rules.

Source: Uniform Rule (1974) 601, first sentence of Federal Rule 601

(b) Disqualification of witnesses. A person is disqualified to be a witness if the court finds that (1) the witness is incapable of expressing himself concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand him or (2) the witness is incapable of understanding the duty of a witness to tell the truth.

Source: Based on Maine Rules of Evidence, Rule 601(b) and West's Ann. Cal. Ev. Code, Section 701

Commission Comment

(a) General Rule of competency.

This subdivision is identical to Uniform Rules of Evidence (1974), Rule 601 which in turn is identical to the first sentence of Federal Rule 601. The second sentence of the Federal Rule is inappropriate, for it concerns the law of competency to be applied in Federal courts in civil cases in which State law supplies the rule of decision.

The effect of this rule is to abolish all incompetencies of witnesses except as provided in rules which follow. This is consistent with the approach taken in R.C.M. 1947, Section 93-701-2:

> All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious beliefs . . .

The next two sections referred to in this statute are 93-701-3, concerned with incompetencies of witnesses, and 93-701-4, concerned with testimonial privileges. Privileges are covered in Article V, and, with one exception, the grounds of incompetency listed in Section 93-701-3 are covered in proposed Rule 601(b).

The ground of incompetency found in Section 93-701-3, not covered by these rules is commonly known as the Dead Man's Statute. Therefore, this rule has the effect of abolishing the Dead Man's Statute in Montana.

Montana Dead Man's Statutes provide that a claimant may not testify "to facts of direct transactions or oral communications" between himself and deceased, if the claim is against a deceased's estate under Section 93-701-3, subdivision 3, or between himself and a deceased officer of a corporation or a deceased agent if the claim is against either the deceased officer's corporation or the deceased agent's principal under Section 93-701-3, subdivision 4. The statute also provides that it does not apply where evidence of the claim is introduced by the estate or "when it appears to the court that without the testimony of the witness injustice will be done."

The purposes of the statute, as explained by Montana cases, are quite clear: First, the prevention of undue advantage by the living claimant, since he can testify where the deceased or personal representative cannot; and second, the removal of temptation for perjury by the claimant where there can be no denial by the deceased. Leffek v. Luedeman, 95 Mont. 457, 462, 27 P.2d 511 (1933); Johnson v. Mommoth Lode, 136 Mont. 420, 422, 348 P.ed 267 (1960); Novak v. Novak, 141 Mont. 312, 316, 377 P.ed 368 (1963); and Hansen v. Kierman, et al., 159 Mont. 448, 454, 499 P.ed 787 (1972).

However, the cases are not clear in applying the exception which allows the claimant to testify when the court determines the interest of justice requires it. Early cases considering the exception allowed the court to exercise its discretion and admit the testimony of the claimant with little or no corroboration if it appeared that to exclude it would deny a meritorious case. Roy v. King's Estate et al., 55 Mont

567, 573, 179 P. 821 (1919); Harwood v. Scott, 57 Mont. 83, 88, 186 P. 693 (1920); Anderson et al., v. Wirkman, 67 Mont. 176, 179, 215 P. 224 (1932); and Averill Machinery Co. v. Taylor et al., 70 Mont. 70, 80, 223 P. 918 (1924). A rule evolved from later cases requiring a foundation to be laid corroborating the claim before the testimony from the claimant could be heard. Wunderlich v. Holt, 86 Mont. 260, 269, and concurring opinion at 274, 283 P. 423 (1929); Langston et al., v. Currie et al., 95 Mont. 57, 70, P.2d 160 (1933) Phelps v. Union Central Life Insurance Co., 105 Mont. 195, 203, 71 P.2d 997 (1937); Rowe v. Eggum et al., 107 Mont. 378, 388, 87 P.2d 199 (1938); and Sharp v. Sharp, 115 Mont. 35, 38, 139 P.2d 235 (1943). The apparent reason for this rule is that the court cannot determine whether an injustice will occur unless it knows that the claim has merit, and so cannot admit testimony by the claimant under the exception until this is shown by the foundation. Johnson v. Mommoth Lode, supra at 423.

The uncertainty of application of this exception arises because the Montana Supreme Court "has never laid down a well defined line of demarcation between a sufficient and insufficient foundation. The application of the statute must vary with the circumstances presented to the district court." Sharp v. Sharp, supra at 38. The test proposed by that case was whether the record discloses testimony from "which it is reasonable to conclude that there is credibility in plaintiff's claim." Id. at 40. However, later cases have inconsistent results. In Ahlquist v. Pinski, 120 Mont. 355, 358, 185 P.2d 499 (1947) the court held that it was proper to admit the testimony of the claimant even where the foundation was "insufficient standing alone to establish plaintiff's claim but that it was sufficient to justify the court in concluding as it did that without plaintiff's testimony injustice would be done." In Novak v. Novak, supra, the court found the testimony of a claimant's wife to be sufficient foundation to admit his testimony. Yet, in Bauer v. Monroe, 117 Mont. 306, 320, 158 P.2d 485 (1945) error was found because the court did not find sufficient foundation from the testimony of the wife of the claimant and several other witnesses as to the existence of

an oral contract, even though (as pointed out in the dissent at 326) the deceased's actions were consistent with the allegation of the contract's existence. And, in Cox v. Williamson, 124 Mont, 512, 519, 227 P.2d 614 (1951), the court held that testimony by the claimant was erroneously admitted because the foundation consisted of the testimony of one witness, a friend of the claimant; but (as pointed out in the dissent at 527) the competency of the witness should not depend upon the strength of the corroborating evidence.

The Commission believes that the Dead Man's Statute in Montana should be abolished for several reasons. The first is uncertainty. When the inconsistent application of the statutory exception (just discussed) is combined with what the Commission believes is the practice of trial courts in admitting the claimant's testimony using this exception (despite inconsistent case law), the result is an unfair burden of uncertainty to parties involved in cases covered by the Dead Man's Statutes. All that is really left of the Statutes in Montana is an occasional arbitrary application. The Commission feels that this uncertainty cannot be reduced by any alternative to the Dead Man's Statute.

The second reason is the false premise upon which the statute and case law rests. As previously noted, Montana cases state one of the purposes of the Dead Man's Statutes is the removal of the temptation for perjury. Cases that demand a foundation before allowing a claimant to testify are really calling for corroboration because of a fear of possible perjury. Therefore, one premise supporting the Dead Man's Statute is that the interest of claimants winning their case makes it probable that they will commit perjury. This is also the basis of the common law incompetency that disqualified parties for interest which was rejected as a ground of incompetency long ago, for certainly all parties to a case have such an interest; yet the Dead Man's Statute is the only area which blocks a party's testimony. Also, the statute does not disqualify many persons having an interest in the outcome of the litigation, such as the spouse of the claimant, or other close relative.

Further, the statutes do not fulfill the purpose of preventing perjury. They only block testimony as to direct transactions or oral communications and not in other areas where perjury or false evidence is fabricated just as easily. The statute does not forbid the dishonest claimant, not concerned with committing perjury, from enlisting the aid of a third person to give false testimony in areas where the claimant is forbidden to do so by the statute.

Finally, the Commission feels that a fear of perjury is not properly handled by making a witness incompetent in certain areas; cross-examination and deliberations by the trier of fact are capable of exposing and dealing with false testimony in every other instance and there is no reason they are not capable of dealing with a claimant's false testimony. It should be noted that a declaration against a deceased's interests, even when given by the adversary party, have long been admissible as hearsay exceptions (R.C.M. 1947, Section 93-401-9 and 93-401-10) and that the practice is to regard such testimony as the weakest type and to accordingly give a cautionary instruction.

The third reason is that the public policies of the Dead Man's Statute are invalid and should be rejected. As previously noted, another reason supporting the existence of these statutes is that without the statute, claimants would have an unfair advantage over deceased persons or their personal representatives. While this advantage certainly does exist, it has not been a strong enough reason to apply a rule of incompetency where claims are made against persons' estates where the person is not able to testify because of physical or mental incapacity; nor has the incompetency of the Dead Man's Statutes been applied to the hearsay exceptions allowing the deceased's statements against interest because of this disadvantage.

Further, the result of the Dead Man's Statute is two very poor policies. The first allows a concern for the possible injustice of a dishonest claimant taking advantage of a deceased person and his estate to overcome the certain injustice when an honest claimant is prevented from proving his claim against an estate. The law should be more concerned with the satisfaction

of surviving claimants than of deceased persons. The second allows the concern over this advantage of claimants to suppress the truth in cases involving claims against estates. This is perhaps the greatest danger of the Dead Man's Statutes, and certainly contrary to the policy of proposed Rule 102 providing the purpose of the Montana Rules of Evidence "to secure fairness in administration, . . . and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Finally, it should be noted that with the abolition of the Dead Man's Statutes, the advantage of claimant can be lessened under provisions like proposed Rule 106 which provides that where part of an act, declaration, conversation, writing or recorded statement are introduced (in this case by the claimant) the adverse party (in this case the estate) can introduce any other part of the act, declaration, conversation, writing or recorded statement.

(b) Disqualification of witnesses.

This subdivision is based on Maine Rules of Evidence, Rule 601(b), which in turn is similar to California Evidence Code Section 701. The Federal Rules of Evidence do not include such a provision, apparently on several grounds: that standards ". . .have proved elusive in actual application. . ."; that ". . .few witnesses are disqualified on that ground . . ."; that "discretion is regularly exercised in favor of allowing testimony . . ."; that "a witness wholly without capacity is difficult to imagine. . ."; and that "the question is one particularly suited to the jury as one of weight and credibility." Advisory Committee's Note to Federal Rule 601, 46 F.R.D. 161, 285 (1969). The Commission feels that such a provision is necessary in Montana courts, that there is no other rule which explicitly gives the court the authority to exclude witnesses on this ground, and most important, that the rule expresses existing Montana law.

It should be noted that both Maine Rule 601(b) and California Evidence Code Section 701 refer to "proposed witness" while this rule only uses "witness". The Commission preferred to drop "proposed" to take into account the situation where a witness previously thought by all concerned to be mentally capable, is unable to testify coherently; in this situation the court would

be allowed to exclude witnesses. However, this rule is not intended to abrogate the universal rule observed in Montana that a party must object to a witness' incompetency before that witness testifies, or waive the right to so object. State v. Newman, 66 Mont. 180, 185, 213 P. 805 (1923); State v. Palen, 119 Mont. 600, 603, 178 P.2d 862 (1947) and cases cited therein; and State v. Cockrell, 131 Mont. 254, 262, 309 P.2d 316 (1947).

This subdivision is consistent with R.C.M. 1947, Section 93-701-3, subdivisions 1 and 2, and case law interpreting them. That statute provides "The following persons cannot be witnesses: 1. Those who are of unsound mind. . . 2. Children under ten years of age who appear incapable of receiving just impressions of the facts . . ., or of relating them truly." Cases interpreting the first subdivision have not prevented such persons from testifying but instead have imposed a standard that if the person is capable of giving a correct account of the event and appreciating the oath, he will be allowed to testify. State v. Berberick, 38 Mont. 423, 442, 100 P. 209 (1909); Martin v. Hoover, 60 Mont. 202, 207, 199 P. 694 (1921); State v. Cockrell, supra, and State v. Schleining, 146 Mont. 1, 8, 13, 403 P.2d 625 (1965). If a person meets this standard, the credibility of his testimony is left to the trier of fact. Martin v. Hoover, supra. Cases interpreting the second subdivision have been concerned with the child's understanding of his duty to tell the truth, and left this and the ability of the child to testify correctly to the discretion of the court. State v. Cadotte, 17 Mont. 315, 316, 42 P. 857 (1895) and State v. Shambo, 133 Mont. 305, 308, 322 P.2d 657 (1958).

RULE 602. Lack of personal knowledge.

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

Source: Federal Rule 602.

Commission Comment

This rule is identical to Federal and Uniform (1974) Rule 602. The Commission adopts it because it is universally recognized and a sensible requirement.

The rule is consistent with existing Montana statutory and case law. R.C.M. 1947, Section 93-401-2, provides: "A witness can testify to those facts only which he knows of his own personal knowledge; that is, which are derived from his own perceptions. . ." and goes on to list exceptions for opinion and hearsay evidence. Also, Section 93-701-2 provides, in part, much the same requirement: "All persons, without exception, . . . who, having organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses."

Cases interpreting Section 93-401-2 have followed its requirement for personal knowledge and generally not allowed testimony as to opinions, inferences, or conclusions (Watson v. Colusa-Parrot Mining and Smelting Co., 31 Mont. 513, 521, 79 P. 14 (1904); but, as long as the witness is so testifying, it does not matter "however clumsily he map express himself." State v. Vanella, 40 Mont. 326, 348, 106 P. 364 (1910). The foundation requirement of the rule, allowing the testimony of the witness himself or other evidence to establish that he is testifying from his own personal knowledge, can be inferred from these cases.

The exceptions stated in Section 93-401-2, opinions and hearsay, are intended to apply to this rule. The reference to Rule 703, contained in the rules as an exception, is therefore consistent with existing Montana law. The exception contained in the statute allowing a witness to testify to a hearsay statement is not a violation of the personal knowledge rule, for the witness does have personal knowledge of the making of the statement but not personal knowledge of its contents. See State v. Crean, 43 Mont. 47, 59, 114 P. 603 (1911) and Wilson v. Davis, 110 Mont. 356, 366, 103 P.2d 149 (1940).

RULE 603. Oath or affirmation.

Before testifying, every witness shall be required to declare

that he will testify truthfully, by oath or affirmation admininstered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

Source: Federal Rule 603

Commission Comment

This rule is identical to Federal and Uniform (1974) Rules 603 recognizes that an appeal to the witness' sense of accountability, or an attempt to impress a witness to tell the truth should be flexible to accomodate "religious adults, atheists, conscientious objectors, mental defectives, and children." Advisory Committee's Note to Federal Rule 603, 46 F.R.D. 161, 287 (1969). The rule is consistent with Montana law in that it also provides a flexible approach to oath or affirmation. R.C.M. 1947, Section 93-401-3 requires an oath or affirmation; Rule 43(d) M.R.Civ.P. allows a solemn affirmation in lieu of an oath; and Sections 93-2401-2 through 93-2401-5 provide various forms of oaths and affirmations.

RULE 604. Interpreters.

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

Source: Federal Rule 604

Commission Comment

This rule is identical to Federal and Uniform (1974) Rules 604. The rule is consistent with R.C.M. 1947, Section 93-701-6, requiring an interpreter when a witness does not understand or speak the English language and with Rule 43 (f), M.R.Civ.P. allowing the court to appoint an interpreter at its discretion. The requirement of the rule that the interpreter be sworn by oath or affirmation is also found in Section 93-701-6. It can be noted that the only case construing that provision found that the necessity for an interpreter is a matter for the discretion of

the court. State v. Inich, 55 Mont. 1, 10, 173 P. 230 (1918). However, the requirement of the rule that the interpreter be qualified as an expert is not found in existing Montana law and so the rule is new to Montana law to that extent.

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.

Source: Federal Rule 605

Commission Comment

This Rule is identical to Federal and Uniform (1974) Rules 605. The rule is consistent with the sensible policy that a judge should not be allowed to be a witness because it is inconsistent with his role as an impartial arbiter. From this policy it can be seen that if a judge were to testify, it might show a partisan attitude toward one party, it certainly limits the ability of counsel to cross-examine or impeach the judge as a witness, it is certain that there is no one to rule on objections, it is possible that the jury might be unduly impressed with his testimony, and finally, it is highly probable that the judge cannot weigh his own testimony in considering motions to dismiss or other motions concerned with the weight of the evidence.

This rule is inconsistent with R.C.M. 1947, Section 93-701-5, providing in part: "The judge himself, . . . may be called as a witness by either party, but in such cases it is in the discretion of the court or judge to order the trial to be postponed or suspended, and to take place before another judge. . ." This statute has been noted but not applied in State ex rel. Breen, v. District Court, 34 Mont. 107, 111, 85 P. 870 (1906) where the court indicated that a district judge could be called as a witness in regard to the regularity of drawing a jury panel and still preside, but did not discuss the issue. The statute has been applied in In re Nelson et al., 103 Mont. 43, 55, 60 P.2d 356 (1936), an unusual original proceeding in the Montana Supreme Court to hold a newspaper publisher in contempt. It was held

proper to allow two justices of the Supreme Court to testify at an evidenctiary hearing, particularly because testimony was undisputed. However, in State ex rel. Moser v. District Court, 116 Mont. 305, 316, 151 P.2d 1002 (1944) the Supreme Court held the trial court committed an abuse of discretion and reversible error in testifying in a contempt proceeding where he was presiding, rather than follow the procedure found in the statute. In re. Nelson, supra, is apparently the law when applied to the Supreme Court, State ex rel. Hall v. Niewoehner, 116 Mont. 437, 448, 155 P.2d 205 (1944).

The Commission believes that the proposed rule expresses the better policy and indicates the proper practice which is consistent with State ex rel. Moser v. District Court, supra, to this extent it is consistent with existing Montana law. The last sentence of the rule allowing an automatic objection is adopted as a practical feature; certainly if the judge did not disqualify himself if called as a witness, this rule would not preclude motions for mistrial.

RULE 606. Competency as juror as witness.

(a) At the trial. A member of the jury may not be called or testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called to testify, the opposing party shall be afforded an opportunity to object out ot he presence of the jury.

Source: Based on Federal and Uniform (1974) Rule 606(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 any other juror's mind or emotions as influencing him to assent or dissent from the verdict or indictment or concerning his mental processes in connection therewith. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

However, as an exception to this subdivision, a juror may testify and an affidavit or evidence of any kind be received as to any matter or statement concerning only the following questions, whether occurring during the course of the jury's deliberations or not: (1) whether extraneous prejudicial information was improperly brought to the jury's attention; or (2) whether any outside influence was brought to bear upon any juror; or (3) whether any juror has been induced to assent to any general or special verdict, or finding on any question submitted to them by the court, by a resort to the determination of chance.

Source: Based on Federal Rule 606(b), the third clause at the end of subdivision is based on R.C.M. 1947, Section 93-5603(2).

Commission Comment

(a) At the trial

This subdivision is identical to Federal and Uniform (1974) Rule 606(a) except that the phrase "be called or" is added to the first sentence. Federal and Uniform (1974) Rules 606(a) only provide that a juror may not testify in the case in which he is sitting. The Commission agrees that a juror should not be allowed to testify under these circumstances because of practical limitations on cross-examination and the inability of any juror to objectively determine the weight of his or another juror's testimony. The Commission believes that when a party calls a juror prejudice arises against the objecting party which cannot be obviated by the objection contained in the second sentence of this subdivision. The addition which prevents calling a juror is made to meet this problem. The Commission feels that the provision for objection like the one in Rule 607, is still necessary for instances when the rule is not followed and is not intended to preclude motions for mistrial.

The subdivision is inconsistent with R.C.M. 1947, Section 93-701-5 which allows a juror to be called as a witness by either party but allows, in the discretion of the judge, that the trial be postponed, suspended or take place before another jury. No case has considered the competency of a juror as a witness. Therefore, it is apparent that this subdivision is a change in Montana law to the extent that testimony by a juror is no longer a matter for the discretion of the court, but is absolutely prohibited.

(b) Inquiry into validity of verdict or indictment.

This subdivision is based on Federal and Uniform Rules 606(b). The Uniform Rule is drafted in a slightly different manner than the Federal Rule, for the exceptions are placed at the end of the subdivision. This format is used for the sake of clarity because another exception had to be added to make the subdivision consistent with Montana law. There is no intent to change the substantive content of the Federal Rule except for this addition.

The Advisory Committee Note to Federal Rule 606(b), 56 F.R.D. 183, 265 (1972), indicates the policies to be considered in this area:

> The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment. . . . On the other hand, simply putting verdicts beyond effective reach can only promote irregularity and injustice. The rule offers an accomodation between these competing considerations.

The Commission adopts this subdivision in the belief that it is consistent with existing Montana law and also meets these policy considerations.

R.C.M. 1947, Section 93-5603(2) provides that a new trial may be granted for misconduct of the jury and

> whenever any one or more of the jurors have been induced to assent to any general or special verdict or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors. . . .

Early Montana cases considering this section and the question of a juror impeaching his verdict indicated that the practice of allowing it ". . . should not be tolerated further than the statute permits." State v. Beeskove, 34 Mont. 41, 51, 85 P. 376 (1906). In other words, the statute provided the only exception to the common law rule forbidding a juror to impeach

his own verdict. This interpretation was followed in many cases, even where the jurors may have been bribed (Sutton v. Lowry et al., 39 Mont. 462, 470, 104 P. 545 (1909), or intoxicated (Snyder v. Town of Chinook, 48 Mont. 484, 489, 138 P. 1090 (1914), or a friend of the plaintiff, prejudiced for that party, and familiar with the facts of the case (Hough v. Schiskowsky, 95 Mont. 28, 30, 43 P.2d 247 (1935), or mistaken as to the evidence in the case and the instructions as to the law (Johnson v. Green, 153 Mont. 251, 255, 56 P.2d 290 (1969).

However, there are Montana cases which indicate that there is more than the statutory exception to the rule forbidding a juror to impeach his verdict. In Putro v. Baker and Mattox Electric, Inc., 147 Mont. 139, 143, 410 P.2d 717 (1965), the jury read and considered a newspaper article which contained highly prejudicial information, inadmissible as evidence, during deliberations. Jurors were allowed to testify to this fact, and the case was reversed and remanded for new trial on the basis of the testimony. In Goff v. Kinzle, 148 Mont. 61, 65, 417 P.2d 105 (1966) the court allowed testimony by jurors that the jury foreman had gone to the scene of the accident the night before deliberations began, conducted his own investigation, and reported the information to the jury during deliberations. In Schmoyer v. Bordeau, 148 Mont. 340, 342, 420 P.2d 316 (1966) the court spoke of the competing policies in this area, but in a slightly different light than considered by the Advisory Committee Note, supra:

> Two equally basic rights of jury trial collide here: the first is the right to have a fair and impartial trial, free from misconduct of the jury in material matters. . . the second is the right to have a jury deliberate in camera, free and secure from frivolous and recurrent invasions of that privacy by disappointed litigants.

The court concluded that the narrow interpretation of the statute not allowing jury misconduct to be the subject of testimony by other jurors would not be a fair construction. A summary of these and other cases is found in Charlie v. Foos, 160 Mont. 403, 407, 503 P.2d 733 (1972) which stated, "matters which are inherent in the jury process and not concerned with matters which relate to outside influence upon the jury. . ."

could not be the subject of testimony. It is implicit in this statement that outside influence can be testified to by jurors. Finally, this case indicated that Goff v. Kinzle, supra, (where the jury foreman conducted his own investigation) was not an outside influence case, but one concerned with a jury reaching its decision based on information other than evidence received in the case and arguments in open court; in other words, extraneous prejudicial information.

The Commission feels that this subdivision is entirely consistent with Montana law. The rule of competency expressed in the first paragraph is consistent with the rule expressed in the cases not allowing testimony on matters inherent in the verdict. The policy considerations made by the Advisory Committee, supra, have also been considered in a Montana case. The exceptions expressed in the first two categories are consistent with those found in Montana case law, and the final exception is based on a Montana statute. Therefore, the subdivision represents no change in Montana law.

Rule 607. Who may impeach; party not bound by testimony.

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

(b) No party is bound by the testimony of any witness.

Source: Subdivision (a) is Federal Rule 607; subdivision (b) is original.

Commission Comment

Subdivisions (a) and (b)

Subdivision (a) is identical to Federal and Uniform (1974) Rules 607. Its effect is to abolish the traditional common law rule, recognized in R.C.M. 1947, Section 93-1901-8, that a party may not impeach his own witness. A corollary to the traditional rule, that a party is bound by the testimony of his witnesses, is also necessarily and logically abolished in subdivision (b).

The Commission believes that the traditional rule is based on two invalid policies: first, that a party vouches for the credibility of his own witnesses, and second, a party could

coerce his witnesses if it were not for the traditional rule. Yet a party does not vouch for his witnesses because, except for expert and character witnesses, a party's witnesses are not chosen but those persons who happen to be present and see the event which is the basis of the case. The second policy is concerned with the situation where a party's witness decides to change his story, testify unfavorably, and is prevented from doing so by the party's threat of impeachment. Yet, the policy falsely assumes that whenever a witness changes his testimony, it will be from falsehood to truth, that the party coerces the witness by threatening impeachment, and that the truth is thereby suppressed. Certainly witnesses could be changing their testimony from truth to falsehood and so the coercion, if there is any, could be supporting, not suppressing, the truth. The second policy is also invalid because the exceptions to the common law allowing a party to impeach his own witness under certain circumstances, ignore the problem of coercion when its potential is just as great. Therefore, the Commission believes that the traditional common law rule that a party cannot impeach his own witness is based on invalid policies and should be abolished.

This rule is inconsistent with R.C.M. 1947, Section 93-1901-8 which provides:

> "The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in Section 93-1901-12."

All of the cases construing and using the statute have been concerned with its exceptions. The first exception contained in the statute allows a party to contradict his witness by other evidence; that is, where a witness testifies to a particular fact, other witnesses may later contradict it. The second exception allows a party to show that his witness has made prior inconsistent statements; that is, where a witness testifies to a particular fact, the party may ask the witness about contradictory statements and present evidence of them. A requirement exists, both at common law and under Montana cases, that before one's own witness could be impeached by prior inconsistent statement, the party had to show surprise at the change and that the change had caused prejudice to his case. State v. Bloor, 20 Mont. 574, 584, 52 P. 611 (1898); State v. Willette, 46 Mont. 326, 330, 127 P. 1013 (1912); and State v. Kinghorn, 109 Mont. 22, 36, 93 P.2d 964 (1939). These requirements have also been applied to impeachment by contradiction. Dick v. King, 73 Mont. 456, 459, 236 P. 1093 (1925). However, the requirements have been liberally construed so that the surprise does not have to take place while the witness is on the stand, but may occur before testimony is given. State v. Clark, 87 Mont. 416, 420, 288 P. 196 (1930) and State v. Kinghorn, supra.

Subdivision (a) is consistent with Rule 43(b), M.R. Civ.P., allowing a party to impeach and not be bound by the testimony of a hostile witness or adverse party. It is also consistent with Rule 26(d)(1), M.R.Civ.P., allowing impeachment of any witness with his deposition.

Therefore, under existing Montana law, a party can impeach his own witness by contradiction or prior inconsistent statement where he shows surprise and prejudice, or where the witness is hostile or the adverse party. As a practical consideration, it is likely that a party can impeach his own witness as the need arises under existing Montana law. The effect of this rule is simply to remove these artificial requirements by abolishing the traditional rule. This also somewhat broadens the methods of impeaching one's own witness.

The corollary to the traditional rule not allowing impeachment of one's own witness, that a party is bound by the testimony of his witness, is contained in Montana case law. Tebay Land and Livestock Co. v. Hastie, 64 Mont. 590, 517, 210 P. 605 (1922); Sommerville v. Greenhood, 65 Mont. 101, 120, 210 P. 1048 (1922); and Welch v. Nepstead, 135 Mont. 65, 75, 337 P.2d 14 (1959). The rule expressed by these cases is inconsistent with the idea that a party may impeach his own witness, for a party cannot be bound by testimony he has impeached. Therefore, to the extent that these cases are inconsistent with subdivision (b) of this rule, they are expressly superceded.

At this point it should be noted that the only means of impeachment covered by rules are character evidence under Rule 608, a prohibition of use of evidence of conviction of a crime under Rule 609, and a prohibition of use of religious beliefs under Rule 610. The Commission intends the broad language of Rule 607, allowing the credibility of a witness to be attacked, to mean that impeachment is only limited by the ingenuity of counsel to show any reason to disbelieve a witness' testimony and by considerations of relevancy under Rules 401 and 403.

The traditional methods of impeachment, not otherwise mentioned in these rules, are intended to be preserved by this rule. They may include, but are not limited to, evidence of the following:

(1) Bias for or against any party involved in the case. Frank v. Symons, 40 Mont. 56, 60, 88 P. 561 (1097); State v. Wakely, 43 Mont. 427, 436, 117 P. 95 (1911); State v. Whitworth, 47 Mont. 424, 430, 133 P. 364 (1913); State v. Ritz, 65 Mont. 180,

188, 211 P. 298 (1922); State v. London, 131 Mont. 410, 430, 310 P.2d 571 (1957); and State v. Carns, 136 Mont. 126, 137, 345 P.2d 735 (1959).

(2) Interest in the outcome of the litigation. Frank v. Symons, 35 Mont. 56, 61, 88 P. 561 (1907); State v. Mott, 72 Mont. 306, 314, 233 P. 602 (1925); and Currie v. Langston, 93 Mont. 570, 581, 16 P.2d 708 (1932).

(3) Motive to testify falsely, such as bribery (State v. London, supra at 432), or pending criminal charges (State v. Ritz, supra, and State v. Ponthier, 136 Mont. 198, 205, 346 P.2d 974 (1959).

(4) Lack of capacity of the witness to perceive, to recollect, or to communicate any matter about which he testifies. State v. Spotted Hawk, 22 Mont. 33, 64, 55 P. 1026 (1898); State v. Trueman, 34 Mont. 249, 252, 85 P. 1024 (1906); State v. Ritz, supra, at 187; Herzig v. Sandberg, et al., 54 Mont. 538, 540, 172 P.2d 132 (1918); State v. White, 146 Mont. 226, 237, 405 P.2d 761 (1965); and State Highway Commission v. Bennett, 162Mont. 386, 391, 513 P.2d 5 (1973).

(5) Contradiction of the existence or nonexistence of any fact about which the witness testifies. R.C.M. 1947, Section 93-1901-8 on one's own witness and cases cited in this Comment; Section 93-1901-11, "A witness may be impeached by the party against whom he was called, by contradictory evidence . . ."; Seder v. Peter Kiewit Sons'Co. 156 Mont. 322, 332, 479 P.2d 448 (1971); and State v. Deschner, 158 Mont. 188, 195, 489 P.2d 1290 (1971).

(6) Prior inconsistent statements. See Rule 613.

The limitation of impeachment by considerations of relevancy is a change in Montana law to the extent that it abolishes the collateral matters rule. This rule is concerned with the practice of cross-examining a witness as to matters not brought out on direct examination (which are irrelevant) for the purpose of contradicting the witness as to that matter. State v. McConville, 64 Mont. 302, 307, 209 P.987 (1922); and State v. Mott, 72 Mont. 306, 311, 233 P. 602 (1925). The rule is well settled that impeachment as to collateral matters is not allowed. Bullard v. Smith, 28 Mont. 387,

401, 72 P. 761 (1903); State v. Collett, 118 Mont. 473, 477, 167 P.2d 584 (1946); and State v. Deeds, 126 Mont. 38, 41, 243 P. 2d 314 (1952). The test relied on to determine what is a collateral matter, which has been construed as consistent with R.C.M. 1947, Section 93-401-25, is: "Could the fact, . . . have been shown in evidence for any purpose independently of the contradiction?" State ex. rel Bourquin v. Morris et al., 67 Mont. 40, 44, 214 P.2d 332 (1924). The latest statement of the test is very similar, requiring that the fact used for contradiction be provable as part of the cross-examining party's case in chief. Holland v. Biggs, -- Mont. -- , 532 P.2d 411, 32 St.Rep. 238, 240, (1975).

The many cases considering collateral matters indicate that it is a troublesome doctrine. The Commission believes that the limitation of impeachment by Rule 401, defining relevant evidence as including impeaching evidence, and Rule 403, allowing the court to exclude relevant evidence if its provative value is outweighed by prejudice, confusion or waste of time, will allow the same result to be reached through a more flexible means than than currently used with the collateral matters rule. Therefore, R.C.M. 1947, Section 93-401-25 (to the extent that it is concerned with collateral matters) and case law stating the collateral matters rule are abolished in favor of the relevancy approach.

Rule 608. Evidence of character and conduct of witness

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

Source: Federal Rule 608(a)

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility may not be proved by extrinsic evidence. They may, however, in the discretion of the court,

if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his 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 privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Source: Based on Federal Rule 608(b)

Commission Comment

(a) Opinion and reputation evidence of character.

This subdivision is identical to Federal and Uniform (1974) Rules 608(a). This subdivision is a continuation of Rules 404 and 405 on the admissibility and methods of proof of character evidence. Rule 404(a)(3) contains a cross reference to Article VI, and allows evidence of character to be admissible under this rule as an exception to the general rule that character evidence is inadmissible to prove conduct. Rule 405(a) provides, "in all cases in which evidence of character . . . is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion.

Montana law has long recognized that character evidence is admissible for the purpose of impeachment, but has generally restricted the method of proof to reputation evidence. R.C.M. 1947, Section 93-1901-11 provides in part, "A witness may be impeached by the party against whom he was called, . . . by evidence that his general reputation for truth, honesty, or integrity is bad . . ." Case law has also allowed reputation for truth and veracity to be admissible for impeachment purposes. Territory v. Paul, 2 Mont. 314, 316 (1875); State v. McMillan, 20 Mont. 407, 410, 51 P. 827 (1897); and Farleigh et al. v. Kelly, 28 Mont. 421, 431, 72 P. 756 (1903). Note that State v. Laverdure, 140 Mont. 236, 241, 370 P.2d 489 (1962) held that it was reversible error to deny the defendant an opportunity to impeach the prosecution's chief witness by evidence that his reputation for truth and honesty were bad.

This subdivision's use of character for truthfulness

or untruthfulness focuses the relevancy of character evidence. It does represent a change in the phrase contained in Section 93-1901-11, "general reputation for truth, honesty, or integrity . . ."

Proof of character evidence in the form of opinion testimony for impeachment purposes has never arisen under Montana case law, probably because of the language of the statute referring to reputation. The subdivision expands Montana law in this area by allowing character evidence for truthfulness or untruthfulness to be proved by opinion testimony. The Commission feels this is a sensible addition to Montana law for the reasons stated in the Commission Comment to Rule 405(a) allowing opinion evidence to prove character evidence generally.

The last clause of the subdivision incorporates the rule found in R.C.M. 1947, Section 93-1901-13, providing in part: Evidence of the good character of a party is not admissible in a civil action, nor a witness in any action, until the character of such party has been impeached . . . " Case law also supports this rule. In re William's Estate, 52 Mont. 192, 203, 156 P. 1087 (1916); State v. Diedtman, 58 Mont. 13, 19, 190 P. 117 (1920) (error to allow support of a witness' character before it was impeached); and State v. Jackson, 71 Mont. 421, 432, 230 P. 370 (1924) (reversible error for not allowing presentation of good character after the witness' character had been impeached.) A question can arise with this rule concerning whether or not an attack has been made upon the character of the witness so as to allow the introduction of good character evidence. The only Montana case on this point broadly construed what an attack constitutes; In re William's Estate, supra, found that the introduction of a deposition showing the witness was currently serving a sentence in prison was clearly an attack upon his character, and allowed supporting evidence.

(b) Specific Instances of conduct.

Start

This subdivision is identical to Federal and Uniform (1974) Rules 608(b) except that the phrase "other than conviction of crime as provided in Rule 609" was deleted because of a change in that rule making conviction of a crime inadmissible for purposes of impeachment.

This subdivision is inconsistent with R.C.M. 1947, Section 93-1901-11, providing that a witness may be impeached by evidence that his "general reputation for truth, honesty and integrity is bad, but not by evidence of particular wrongful acts." The cases following this section indicate that specific

wrongful acts were used for the cross-examination of witnesses that degraded their character, contrary to this section and sections 93-2101-2 and 93-2101-3. State v. Rogers, 31 Mont. 1, 6, 77 P. 293 (1904); State v. Crowe, 39 Mont. 174, 177, 102 P. 579 (1909); State v. Kanakaris, 54 Mont. 180, 184, 169 P. 42 (1917); State v. Shannon, 95 Mont. 280, 288, 26 P.2d 360 (1933). In Shannon, supra, the court indicated that asking questions on cross examination which were related to the same offense for which the defendant was on trial was particularly harmful because this places before the jury assumptions which may not or could not be proven. In State v. Rivers, 133 Mont. 129, 134, 320 P. 2d 1004 (1958) the court found that cross-examination as to specific instances of misconduct was not only a violation of the statutory prohibition, but an invasion of a substantial right of the defendant; the questions asked the defendant related tothe crime for which she was on trial.

There have been no Montana cases holding that a specific instance of conduct was improperly inquired into where the conduct was probative of truthfulness or untruthfulness. This is the standard imposed by the subdivision. The subdivision also contains the additional safeguard that the discretion of the court will determine whether a specific instance will be used at all. The court must consider the admissibility of this type of evidence, like any other impeaching evidence, under Rules 401 and 403. Also see Commission Comment to Rules 405(b) and 607. The Commission intends to change Montana law only to the extent that specific instances of conduct probative of truthfulness or untruthfulness and weighed by the trial court will be admissible. The Montana cases excluding specific instances of conduct would probably have the same result under this rule because they did not relate to these character traits.

There have been no Montana cases holding that a specific instance of conduct was improperly inquired into where the conduct was probative of truthfulness or untruthfulness. This is the standard imposed by this subdivision. The subdivision contains the additional safeguard that the discretion of the court will determine whether a specific instance of conduct will be used at all. The court must consider the admissibility of this type of evidence, like any other impeaching evidence, under Rules 401 and 403. Also see Commission Comment to Rules 405(b) and 607, and Rule 611(a). The Commission intends to change Montana law only to the extent that specific instances of conduct relative to truthfulness or untruthfulness, and weighed by the trial court will be admissible. The Montana cases excluding specific instances of conduct would probably have the same result under these rules.

There have been no Montana cases directly dealing with clause (2) of this subdivision, allowing impeachment of impeaching witnesses. However, in State v. Jackson, 71 Mont. 421, 433, 230 P. 370 (1924) the court indicated through dicta, "It should be noted that no question arises here as to the impeachment of an impeaching witness. . . . Of course there must be a limit to such collateral inquiry, for in most instances testimony for and against the reputation of a witness for truth and veracity could be recruited ad infinitum."

The final paragraph of this subdivision provides the final safeguard against abuse under this rule. It states that an accused or any other witness does not waive his "privilege against self-incrimination when examined with respect to matters which relate only to credibility." This is not inconsistent with the longstanding rule in Montana that when a defendant testifies on his own behalf, and denies he committed the crime, he waives his privilege against self-incrimination, and may be cross-examined as to the crime for which he is on trial. State v. Rogers, 1, 7, 77 P. 293 (1904); State v. Smith, 57 Mont. 349, 359, 188 P. 644 (1920); and State v. London, 131 Mont, 410, 436, 310 P.2d 571 (1957). Nor is it inconsistent with the rule that when a defendant testifies on his own behalf he is subject to the same rules of impeachment as any other witness. State v. Schnepel, 23 Mont. 523, 525, 59 P. 927 (1899); and State v. Inich, 55 Mont. 1, 13, 173 P. 230 (1918). As indicated in State v. Rogers, supra, any witness is granted the right to be protected from questions which have a tendency to subject him to punishment for a felony, unless it relates to the fact in issue. R.C.M. 1947, Section 93-2101-2. Therefore this paragraph is consistent with Montana law.

Rule 609. Impeachment by evidence of conviction of crime

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is not admissible.

Source; Original.

Commission Comment

This rule is unlike either the Federal or Uniform (1974) Rule 609 in that they provide that evidence of conviction

of a crime is admissible for the purpose of attacking credibility. Each of those rules provide substantial limitations upon the admissibility of this type of evidence: the discretion of the court; a time limit; and a pardon, annulment, or certificate of rehabilitation making such evidence inadmissible. Federal and Uniform Rule (1974) 609 (a), (b), and (c). The latter subdivision also provides an "other equivalent procedure" also makes conviction inadmissible; while Montana does not have a certificate of rehabilitation, Article II, Section 28, 1972 Constitution of Montana and R.C.M. 1947, Section 95-2227(3) both provide that when a person is no longer under state supervision, his full rights of citizenship are restored. Adoption of this provision would mean that only those persons serving a sentence in prison, suspended sentence or on parole could be impeached by this method, and would severly limit the usefulness of the rule.

However, the Commission rejects the rule allowing impeachment by evidence of conviction of a crime, not only because of this Constitutional and statutory provisions, but also, and most importantly because of its low probative value in relation to credibility. The Commission does not accept as valid the theory that a person's willingness to break the law can automatically be translated into willingness to give false testimony. Advisory Committee Note to Federal Rule 609, 46 F.R.D. 161, 297 (1969). The Commission does believe that conviction of certain crimes is probative of credibility; however, it is the specific act of misconduct underlying the conviction which is really relevant, not whether it has led to a conviction. Allowing conviction of crime to be proved for the purpose of impeachment merely because it is a convenient method of proving the act of misconduct (Advisory Committee Note, Id.) is not acceptable to the Commission, particularly in light of Rule 608(b) allowing acts of misconduct to be admissible, if they relate to credibility.

This rule is inconsistent with existing Montana law, R.C.M. 1947, Section 93-1901-11, provides the methods of impeachment and includes, ". . . it may be shown by the examination of the witness, or the record of the judgment, that he has been convicted of a felony." It is also admissible under Section 93-2101-2. Section 93-1901-11 was interpreted in State v. Coloff, 125 Mont. 31, 35, 231 P.2d 343 (1951) to mean that the cross-examiner may ask the question, "Have you ever been convicted of a felony?" If the witness answers "Yes"

then the inquiry is closed; if the witness answers "No" then proof may be made of conviction through the record of judgment. Montana also recognizes the rule that the witness may explain the felony conviction in an attempt to support his credibility. State v. McClellan, 23 Mont. 532, 538, 59 P. 924 (1899); Osnes Livestock Co. et al. v. Warren, 103 Mont. 284, 301, 62 P. 2d 206 (1936); and State v. Tully, 148 Mont. 166, 169, 418 P.2d 549 (1966.

The Commission feels that, in addition to the reasons for rejecting the rule stated above, the present Montana practice can lead to one of two undesirable results. First, the mere fact that a witness can be asked whether he has been convicted of a felony, can, in many instances, cause severe embarrassment on the part of the witness. This is particularly uncalled for where the conviction has no relation to credibility, such as manslaughter caused by an automobile accident. This could cause many witnesses to decide not to testify at all, or where the witness is a party, not to present or defend this side of the case at all. The fact that the witness can explain his conviction can simply add to the embarrassment and is no help. Second, when the witness answers that he has been convicted of a crime, no further inquiry is permitted. This can lead to confusion by jury members who see no connection between conviction of a crime and the case, or to undue prejudice, particularly where the witness is a defendant testifying in his own behalf.

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 their nature his credibility is impaired or enhanced.

Source: Federal Rule 610

Commission Comment

This rule is identical to Federal and Uniform (1974) Rule 610. As indicated in R.C.M. 1947, Section 93-701-2, persons were formerly not allowed to testify at common law if they did not profess a belief in God. This rule was grounded on the notion

that if the witness did not believe in punishment after death for testifying falsely, he was not considered trustworthy. The abandonment of this rule of disqualification has led to a rule, in some jurisdictions allowing impeachment on the grounds of religious beliefs. Although there is no Montana law on this subject, the Commission believes that the abandonment of the rule of disqualification should also mean abandonment of the rule of impeachment because there " . . . is no basis for believing that the lack of faith in God's avenging wrath is today an indication of greater than average untruthfulness." McCormick, Handbook on the Law of Evidence, 102 (2d ed. 1972).

The Advisory Committee's Note to the Federal Rule, 46 F.R.D. 161, 302 (1969), indicates that impeachment for religious beliefs should be allowed in "an inquiry for the purpose of showing interest or bias . . . ." The Commission agrees with this interpretation of the rule.

RULE 611. Mode and order of interrogation and presentation; re-examination and recall; confrontation.

(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.

Source: Federal Rule 611(a)

(b) Scope of cross-examination.

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

(2) Evidence developed on cross-examination may be considered by the trier of fact as proof of any fact in issue in the case.

Source: Paragraph (1) is Federal Rule 611(b); paragraph (2) is original.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. 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.

Source: Federal Rule 611(c)

(d) Re-examination and recall. A witness may be re-examined as to the same matters to which he testified only in the discretion of the court, but without exception he may be re-examined as to any new matter brought out during cross-examination. After the examination of the witness has been concluded by all the parties to the action, that witness may be recalled only in the discretion of the court. This rule shall not limit the right of any party to recall a witness in rebuttal.

Source: Based on R.C.M. 1947, Section 93-1901-10

(e) Confrontation. Except as otherwise provided by constitution, statute, these rules, or other rules applicable to the courts of their state, at the trial of an action, a witness can be heard only in the presence and subject to the examination of all the parties to the action, if they choose to attend and examine.

Source: Based on West's Ann. Cal. Ev. Code, Section 711 and R.C.M. 1947, Section 93-401-3

Commission Comment

(a) Control by Court.

This subdivision is identical to Federal and Uniform (1974) Rule 611(a). It expresses the common law rule which allowed the trial court to control the mode and order of presentation of evidence as well as restating goals found in proposed Rules 102, concerning the effective ascertainment of the truth; and 403, concerning undue delay, waste of time, or cumulative evidence. The rule states for the first time the goal that witnesses are to be protected from harassment or undue embarrassment. It should be noted that mode of interrogation refers to the allowable form of examination, that is, whether the discretion of the court will allow questions which ask for a general or specific answer; and order of presentation refers to the alteration of the normal order of presentation of evidence by the parties at the discretion of the court.

This rule is consistent with existing Montana law. R.C.M. 1947, Section 93-5101 provides the order of trial and as an exception states, "when the jury has been sworn, the trial shall proceed in the following order, unless the court, for good cause and special reason, otherwise directs . . . ." The fourth subdivision of that statute allows the court "for good reasons, in the furtherance of justice," to permit parties to offer evidence of their original case during rebutting evidence. Cases interpreting this subdivision of this statute indicate that allowing a variance from the normal order of proof is a matter of discretion with the trial court. First National Bank of Saco v. Vagg et al., 65 Mont. 34, 41, 212 P. 509 (1922); Puutio V. Roman, 76 Mont. 105, 116, 245 P. 523 (1926); Howe v. Messimer, 84 Mont. 304, 311, 295 P. 281 (1929).

R.C.M. 1947 Section 93-1901-1 provides: "The order of proof must be regulated by the sound discretion of the court . . . ." No cases have construed this particular provision. R.C.M. 1947, Section 93-1901-3 states:

> "The court must exercise a reasonable control over the mode of interrogation, so as to make it as rapid, as distinct, as little annoying to the witness, and as effective for the extraction of the truth as may be; . . . . The court, however, may stop the production of further evidence upon a particular point when the evidence upon it is already so full as to preclude reasonable doubt."

Of the four cases which have interpreted this statute, three were concerned with the exclusion of questions which have been asked and answered several times. State v. McConville, 64 Mont. 302, 306, 209 P. 987 (1922); State v. Cassill, 70 Mont. 433, 452, 227 P. 49 (1924); and State v. McSloy, 127 Mont. 265, 271, 261 P.2d 663 (1953). The final case citing this statute, State v. Keller, 126 Mont. 142, 146, 246, P.2d 817 (1952) indicates this statute as well as Section 93-401-24 represent the rule that cross-examination should be limited to pertinent questions.

Two sections of the criminal code also provide that the discretion of the court may control the order of trial: R.C.M. 1947, Section 95-1910 is a parallel provision to Section 93-5101 on order of trial, and Section 95-1911 allows this order to be varied from in the discretion of the court.

There is also a line of cases in Montana which establish the rule independent of any statute that the order of trial is within the sound discretion of the trial court. Griswold v. Boley, 1 Mont. 545m 558 (1872); Noyes v. Clifford, 37 Mont. 138, 142, 94 P. 842 (1908); Coleman v. Higgins, 137 Mont. 222, 236, 351 P.2d 901 (1960).

The first two goals stated in the subdivision are consistent with proposed rules 102 and 403, respectively. See the Commission Comments to those rules. The third goal is consistent with statutes and cases concerning the protection of witnesses from harassment or embarrassment. R.C.M. 1947, Section 93-2101-2 provides that while a witness is bound to answer all pertinent questions, ". . . he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need to give an answer which will have a direct tendency to degrade his character . . . ." Section 93-3101-3 provides, "it is the right of a witness to be protected from irrelevant, improper or insulting questions, and from harsh or insulting demeanor; . . . to be examined only as to matters legal and pertinent to the issue." Rules 26(c) and 30(b), M.R.Civ.P., similarly allow the court to limit discovery to protect parties and deponents from annoyance, embarrassment or oppression.

Cases which have interpreted Section 93-2101-2 and 93-2101-3 have indicated that witnesses should be protected and in some instances have found reversible error for allowing degrading questions. State v. Rogers, 31 Mont. 1, 7, 77 P. 293 (1904) (reversible error); State v. Trueman, 34 Mont. 249, 256, 85 P. 1024 (1906) (reversible error); State v. Crowe, 39 Mont. 174, 179, 102 P. 579 (1909) (improper questions); State v. Biggs, 45 Mont. 400, 404, 123 P. 410 (1912) (proper protection provided); Lukert v. Eldridge, 49 Mont. 46, 50, 139 P. 999 (1914); State ex rel Bacorn v. District Court, 73 Mont. 297, 302, 236 P. 533 (1925); and State ex rel Woodard v. District Court, 120 Mont. 585, 590, 189 P.2d 998 (1948).

(b) Scope of cross-examination.

The first paragraph of this subdivision is identical to Federal and Uniform (1974) Rules 611(b). The Commission added the second paragraph to ensure that if the court allows the scope of cross-examination to be exceeded, the evidence thereby brought out may be used as proof in the case and to overrule a line of older Montana cases which would not allow such evidence to be used in the cross-examiner's case.

The intent of the Commission in adopting the Federal Rule is to retain the traditional rule of scope of cross-examination for the purpose of maintaining the usual order of proof, but to allow the trial court to vary that order if good reasons occur during the trial. Two such reasons would be to save time for the court and witnesses by allowing complete questioning of a witness when he first testifies, rather than recalling by the cross-examining party, and to achieve a more orderly presentation of evidence where circumstances dictate.

It is important to note that the commission intends the adoption of proposed Rules 607 and 611 to abolish the doctrine of sponsorship of witnesses. In order to accomplish this end, five particular rules establishing the doctrine have been dealt with:

First, the rule that a party may not impeach his own witness has been abolished by proposed Rule 607(a). Second, the rule that a party is bound by the testimony of any witness has been abolished by proposed Rule 607(b). See Commission Comment to proposed Rule 607. Third, existing Montana law concerning the scope of cross-examination has been clarified by the adoption of proposed Rule 611(b)(1), noted above, which allows the court the discretion to permit parties to exceed the scope of normal cross-examination. Fourth, the rule not allowing a party to prove his case on cross-examination has been abolished by proposed Rule 611(b)(2). And fifth, an interpretation of R.C.M. (1947), Section 93-1901-7, that if a party exceeds the scope of cross-examination, he makes that witness his own, is bound by his testimony, and therefore cannot impeach him (State v. Smith, 57 Mont. 349, 363, 188 P. 644 (1920) and State v. Richardson, 63 Mont. 322, 329, 207 P. 124 (1922) is necessarily abolished by the combination of proposed Rules 607 and 611.

The first sentence of the first paragraph of this subdivision is consistent with existing Montana law. R.C.M. 1947, Section 93-1901-7, provides the scope of cross-examination: "the opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith . . . ." This section was enacted in 1895, and up to that point the leading case of scope cross-examination was territory the Rehberg, 6 Mont. 467, 470, 13 P. 132 (1887) which stated the rule that the scope cross-examination was to be limited to matters stated in the direct examination. The leading case interpreting the statute after its enactment is Kipp v. Silverman, 25 Mont. 296, 306, 64 P. 884 (1901), which stated:

> "We deem it sufficient in this connection to say that the statute . . . permits a wide range for cross-examination, and the courts should incline to extend, rather than to restrict the right. Properly understood, the right extends, not only to all facts stated by the witness in his original examination, but to all other facts connected with them, whether directly or indirectly, which tend to enlighten the jury on the question in controversy."

Another leading case construing Section 93-1901-7, Cobban v. Hecklan, 27 Mont. 245, 263, 78 P. 805 (1902), indicates that cross-examination should not be unduly restricted, for "the purpose of trial issues of fact is to bring out the whole truth, and to that end the right of cross-examination must be liberally interpreted and freely exercised." The court also indicated that this section ". . . radically changes the common law rule in respect of cross-examination . . . ." Many Montana cases have followed this particular interpretation of Section 93-1901-7. The latest case stating this rule is State Highway Commission v. Bennett, 162 Mont.

386, 391, 513 P.2d 5 (1973) where the courts stated that the statute:

> ". . . permits a wide range of cross-examination. The right of cross-examination may not be unduly restricted and may extend not only to facts stated by the witness in direct examination, but to all other facts connected with them which tends to enlighten the jury on the question in controversy."

In addition, there is a rule in criminal cases that where the defendant takes the stand and denies the commission of the crime for which he is on trial, ". . . a wide latitude of cross-examination is permissible, owing to the general nature of the defendant's statement." State v. Rogers, 31 Mont. 1, 7, 77, P. 293 (1904), and State v. Smith, 57 Mont. 349, 359, 188 P. 644 (1920).

The second sentence of the first paragraph of this subdivision allowed the court, in its discretion, to extend the scope of cross-examination beyond matters covered on direct. It is not clear if this particular provision is consistent with existing Montana law. There are cases which established the principle that " . . . it is the duty of the trial court to exercise a sound legal discretion in controlling the cross-examination of a witness . . . ." State v. Howard, 30 Mont. 518, 527, 77 P. 50 (1904); State v. Biggs, 45 Mont. 400, 404, 123 P. 410 (1912); and Conway v. Monidah Trust, 51 Mont. 113, 116, 149 P. 711 (1915). These cases are consistent with the existing Montana law which allows the trial court discretion in varying from the normal order of proof. See Commission Comment to proposed Rule 611(a). However, there are cases which hold that despite the liberal rule announced by the Kipp and Cobban cases, cross-examination should not be allowed as to any matter not connected with the subject matter of the direct examination. Borden v. Lynch, 34 Mont. 503, 509, 87 P. 609 (1906); State v. McConville, 64 Mont. 302, 305, 209 P. 987 (1922); Spurgeon v. Imperial Elevator Co., 91 Mont. 432, 436, 43 P.2d 891 (1935); and McCutcheon v. Larson, 134 Mont. 511, 514, 333 P.2d 1013 (1959). Therefore, to the extent that this particular provision allows the trial court discretion to permit the cross-examiner to exceed the scope of cross-examination, these and like cases are expressly overruled. The Commission feels that this matter is one for the discretion of the court in its capacity to determine the order of proof, and probably is consistent with the practice in many district courts of this state.

The second paragraph of this subdivision is inconsistent with existing Montana case law. This provision necessarily overrules many Montana cases, for if the cross-examiner is allowed to go beyond matters covered on direct examination, he should be allowed to use any evidence developed during such an examination.

Cases which have stated the rule that a party may not make out his case on cross-examination are as follows:

Fredericks v. Clark, 3 Mont. 258, 261 (1878) (defendant may not make out his defense on cross-examination of plaintiff's witnesses); Davis v. Morgan, 19 Mont. 141, 144, 47 P. 793 (1896) (same as previous case); Harrington v. Butte and Boston Mining Co., 19 Mont. 411, 417, 48 P. 758 (1897) (defendant may not make out his case on cross-examination); Brophy v. Downey, 26 Mont. 252, 255, 67 P. 312 (1901); Shandy v. McDonald 38 Mont. 393, 398, 100 P. 203 (1909); Allen v. Deer Creek Coal Co., 43 Mont. 269, 282, 115 P. 673 (1911) (holding it proper to deny an offer of proof on cross-examination which tended to show mitigation of damages); Pelican v. Mutual Life Insurance Co., 44 Mont. 277, 285, 119 P. 778 (1911) (defendant may not establish an affirmative defense on cross-examination); Hanson Sheep Co., v. Farmers and Traders State Bank, 53 Mont. 324, 340, 163 P. 1151 (1917); State v. Wyman, 56 Mont. 600, 612, 186 P. 1 (1919); State v. Smith, 57 Mont. 349, 361, 188 P. 644 (1920); Mutual Oil Co., v. Hamilton, 73 Mont. 385, 391, 236 P. 545 (1925); State v. Shannon, 95 Mont. 280, 288, 26 P.2d 360 (1933); Vonault v. O'Rourke, 97 Mont. 92, 110, 33 P.2d 535 (1934); and McGonigle v. Prudential Insurance Co., 100 Mont. 203, 219, 46 P. 2d 687 (1935) (stating, "this court has consistently adhered to the rule that a party under the guise of cross-examination make out his case by witnesses for the other side."). To the extent that these cases state rule contrary to paragraph 2 of this subdivision, they are expressly superseded.

(c) Leading questions.

This subdivision is identical to Federal Rule 611(c). It recognizes the traditional view that leading questions, that is, questions which suggest the desired answer, are generally undesirable on direct examination, for the witness ". . . may acquiesce in a false suggestion." McCormick, Handbook on the Law of Evidence, 8 (2d ed. 1972).

The exception found in the first sentence, allowing leading questions to develop a witness' testimony, is intended to recognize situations where leading questions can be used. Advisory Committee's Note to Federal Rule 611(c), 56 F.R.D. 183, 275 (1972). Among those recognized are "the witness who is hostile, unwilling, or biased; the child witness or an adult with communication problems; the witness whose recollection is exhausted; and undisputed preliminary matters." Id. citing 3 Wigmore Evidence, Sections 774-778 (Chadbourn Rev. 1970). The subdivision also recognizes that leading questions should ordinarily be allowed on cross-examination because the purpose of cross-examination is to discredit testimony and this is where leading questions are most effective. The use of the word "ordinarily" in the second sentence is intended to allow a court to deny use of leading questions where cross-examination is in form only, such as cross-examination of a party by his counsel after being called as an adverse witness or of a friendly witness. The use of leading questions is ultimately a question for the trial court under Rule 611(a).

Except for its final sentence, this subdivision is consistent with existing Montana law. R.C.M. 1947, Section 93-1901-5 provides:

> "A question which suggests to the witness by the answer which the examining party desires is denominated as leading or suggestive question. On a direct examination, leading questions are not allowed, except in the sound discretion of the court, under special circumstances making it appear that the interest of justice requires it."

Cases in Montana indicate that a trial court has the discretion to allow leading questions, in accordance with the statute. State v. Spotted Hawk, 22 Mont. 33, 64, 55 P. 1026 (1898); Hefferlin v. Karlman, 29 Mont. 139, 144, 174 P. 201 (1903); and State v. Collette, 118 Mont. 473, 477, 167 P.2d 584 (1946). The cases have also indicated that allowing leading questions where improper is a technical error and will only rarely be grounds for a new trial. Hefferlin v. Karlman, supra; State v. Kanakaris, 54 Mont. 180, 183, 169 P. 482 (1917); and State v. Collette, supra. The cases have also recognized some of the exceptions to the rule generally disallowing leading questions on direct examination. In State v. Spotted Hawk, supra, the Supreme Court found that where witnesses were illiterate or unable to speak English, examination should be allowed by leading questions, a view affirmed in State v. Collette, supra at 478. In Hefferlin v. Karlman, supra, the court held it was within the sound discretion of the trial court to permit leading questions to establish a foundation, for it was a preliminary matter. Finally, in State v. Karri, 84 Mont. 130, 136, 276 P. 247 (1929), the court held it was proper for the prosecution to ask a leading question which contained specific words which established an element of the crime.

The last sentence of this subdivision indicates that certain parties and witnesses may be "automatically regarded and treated as hostile." Advisory Committee's Note, 56 F.R.D. supra at 276. This is an expansion of Montana law. Rule 43(b), M.R.Civ.P., provides in its first sentence "a party may interrogate any unwilling or hostile witness by leading questions." The rule goes on to indicate that certain categories of witnesses may be treated as if they were the adverse party and so cross-examined and impeached; however, a foundation is usually required to show that the witness is in fact hostile. In Salvail v. Great Northern Railway Co., 156 Mont. 12, 22, 473 P.2d 549 (1970), the Supreme Court indicated that Montana Rule 43(b) is wider than the same Federal Rule because the adjective "managing", which modified agent in the Federal Rule, was deleted from the Montana Rule in accordance with the broader superseded Section 93-1901-9. Therefore, Montana has more broadly construed who is a hostile witness and the expansion under Rule 611(c) follows this previously established trend.

(d) Re-examination and Recall.

This subdivision is original and therefore entirely different from the Federal or Uniform (1974) Rule 611. It is based on R.C.M. 1947, Section 93-1901-10, the first two sentences simply rewording that statute. It should be noted that the word "concluded" in the second sentence is intended to mean that all the parties have had a chance to call and examine the witness. The final sentence is included to ensure that rebuttal, as defined by R.C.M. 1947, Section 93-5101 will be allowed as a matter of right and that witnesses may be called for this purpose even after their examination has been concluded.

Case law supports the rule that the scope of re-examination is a matter within the sound discretion of the trial court. State v. Simanton, 100 Mont. 292, 310, 49 P.2d 981 (1935), and State v. Heaston, 109 Mont. 303, 316, 97 P.2d 330 (1939). The rule has also been established that re-examination should be allowed as to new matters brought out during cross-examination. Croft v. Thurston, 84 Mont. 510, 514, 276 P. 950 (1929); State v. Board, 135 Mont. 139, 145, 337, P.2d 924 (1959); and State v. Crockett, 148 Mont. 402, 409, 421 P.2d 722 (1967). Case law also supports the rule that it is within the discretion of the trial court to allow a witness to be recalled after the examination of the witness has been concluded. State v. Mumford, 69 Mont. 424, 433, 222 P. 447 (1924); State v. Carns, 136 Mont. 126, 137, 345 P.2d 735 (1959) (finding an abuse of discretion); and Clark v. Wegner, 147 Mont. 521, 530, 415 P.2d 723 (1966) (also finding an abuse of discretion).

(e) Confrontation.

This subdivision is original and therefore not part of either the Federal or Uniform (1974) Rules. It is based on R.C.M. 1947, Section 93-401-3. The rule is adopted, not only to include this fundamental concept in the proposed rules, but also to ensure that it remains in effect because proposed Rule 603, Oath or affirmation, superseded Section 93-401-3, which provides: "A witness can be heard only upon oath or affirmation, and upon a trial he can be heard only in the presence and subject to the examination of all the parties, if they choose to attend and examine." What has not been superseded by Rule 603 is superseded by this subdivision.

The exception clause is included at the beginning of the subdivision to govern situations, for example, where a witness or deponent may give testimony out of the presence of a party, later joined in the action, or where reports are submitted in evidence as exception to the hearsay rule, but in apparent violation of the subdivision. The intent of the Commission in adopting this subdivision is to carry forward the effect of Section 93-401-3, subject to subsequently enacted exceptions.

RULE 612. Writings used to refresh memory

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

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce into 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 objection 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.

Source: Based on Federal Rule 612

Commission Comment

This rule is identical to Federal Rule 612 except that a qualifying clause making the rule subject to the Jenks Act, 18 U.S. Code Section 3500, is deleted, for the Jenks Act governs only Federal criminal proceedings and so has no application to Montana law.

At the outset, it is important to distinguish between writings used to refresh the memory of a witness, which are governed by this rule, and writings denominated as recorded recollection, which are governed as a hearsay exception under proposed Rule 803(5). A writing used to refresh memory is one that is meant to help a witness who has a memory of the subject of his testimony, but who needs a stimulus in order that his memory be revived. The witness can then testify independently of the writing, and it is his memory or recollection which is used as evidence and not the writing. A recorded recollection is a writing made by or for the witness about a subject of which the witness retains no independent recollection; the recorded recollection is allowed to be read to the trier of fact as an exception to the hearsay rule, but it does not have the effect of reviving the memory of the witness, and so it is the writing as a recorded recollection which constitutes the evidence. This distinction represents the common law approach to each of the doctrines.

The distinction is noted in Montana in Marron v. Great Northern Railway Company, 46 Mont. 593, 601, 129 P. 1055 (1913), but the case went on to construe R.C.M. 1947, Section 93-1901-6, as requiring a foundation to be supplied before either type of writing

can be used. That foundation required that the writing must have been made by the witness or under his direction, at a time when the event occurred or when the facts were fresh in the witness' memory, and that the witness must have known the writing to correctly state the facts. Marron v. Great Northern Railway Company, supra at 602. This is inconsistent with the common law doctrine of writing used to refresh memory. The common law doctrine has been revived by later Montana cases which are also consistent with the approach taken in proposed Rule 612. Therefore, to the extent that the statute and Marron v. Great Northern Railway Company, supra, are inconsistent with the common law and proposed Rule 612, they are superseded.

These later cases have held that witnesses may refresh their memory without the foundation, for this is a matter depending upon the circumstances of the case and the discretion of the court. State v. Gallagher, 151 Mont. 501, 504, 445 P.2d 45 (1968). The foundation is a matter addressed to the trial court and it is within his discretion to permit the witness to refresh his memory. State v. Watkins, 156 Mont. 456, 462, 481 P.2d, 689 (1971). The latest case dealing with this topic, State v. LaFreniere, 163 Mont. 21, 25, 515 P.2d 76 (1973) indicated that the writing used to refresh the witnesses' memory under the statute may include a copy of a police officer's report and therefore the writing used to refresh memory need not be admissible in evidence. The decision also cited and quoted United States v. Riccardi, 174 Fed. 2d 883, 889 (3d Cir. 1949) as "the best rationale in interpreting (the statute) in not requiring the introduction of the memorandum or report into evidence. . . ." Riccardi states that the witness testifying as to his present recollection is placing that in evidence, and not the writing; therefore, "it is pointless to require proof of the accuracy of the writing, for such proof can only amount to corroborative evidence." Ibid.

The purpose of proposed Rule 612 is "to promote the search of credibility and memory." Advisory Committee's Note to Federal Rule 612, 56 F.R.D. 183, 277 (1972). It accomplishes its purpose by allowing an adverse party the right to have a writing used to refresh the memory of a witness to be produced, whether the writing was used before testifying or while testifying. After the writing is produced, the adverse party may cross-examine the witness with the writing, and introduce portions which relate to the testimony of the witness. The rule also adopts provisions which are similar to those found in the Jenks Act: It allows the court to excise any portions not related to testimony, allows withheld writings to be made available to an appellate court, and provides sanctions for failure to produce the writing. The Commission intends that the term "writing" as used in this rule is the same as defined in Rule 1001(1).

This rule is consistent with existing Montana law which provides in Section 93-1901-6, ". . . but in such case the writing must be produced and may be seen by the adverse party, who may, if

he chooses, cross-examine the witness upon it, and may read it to the jury." There are no cases in Montana which have specifically dealt with the right of the adverse party to gain access or to use the writing used to refresh memory. The right is mentioned in State v. Watkins, supra 156 Mont. at 462, and State v. LaFreniere, supra 163 Mont. at 25. Allowing a party to demand the production of a writing used to refresh a witness' memory before testifying is consistent with Montana law to the extent that such a writing would be discoverable in civil cases under Rule 34(a)(1), M.R. Civ.P. and in criminal cases under R.C.M. 1947, Section 95-1803(c). The sanctions for non-production found in the last sentence of the rule allow in civil cases any order justice requires; this would be consistent with the sanctions found in Rule 37(b), M.R.Civ.P. In criminal cases, Section 95-1803(c) does not provide for mistrial for non-production of evidence, but it does allow testimony to be stricken. Other provisions of the rule are new to Montana law.

RULE 613. Prior statements of witnesses

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request, the same shall be shown or disclosed to opposing counsel.

Source: Federal Rule 613(a)

(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 him 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).

Source: Federal Rule 613(b)

Commission Comment

(a) Examining Witness Concerning Prior Statement.

This subdivision is identical to Federal and Uniform (1974) Rule 613(a). It has the effect of abolishing the rule of Queen Caroline's Case which required that before a witness could be cross-examined about his own written statement, he had to be shown that statement. The rule has been criticized as a misapplication of the best evidence rule, because first, the cross-examiner is not attempting to prove the contents of the document, but actually hopes that the witness will deny its existence; and second, the best

evidence rule is one requiring production of an original document "as proof of its contents to the judge and jury, not to the witness." McCormick, Handbook on the Law of Evidence, 56 (2d ed. 1972). The rule has been characterized as a "useless impediment to cross-examination." Advisory Committee's Note to Rule 613(a), 56 F.R.D. 183, 278 (1972). Allowing a witness to view his own written statement before an attempt to impeach him with it is certainly an obstacle to effective cross-examination. Therefore, the Commission intends the adoption of this rule to allow effective cross-examination of witnesses by their own prior statements, whether written or not.

This rule does not defeat the provisions of proposed Rule 1002, requiring the production of original to prove the contents of a document. The rule is also not inconsistent with Rule 26(b)(3), M.R.Civ.P., entitling a person to request the production of his own written statements, although its provisions must be temporarily suspended for effective cross-examination. Finally, the rule provides the safeguard that opposing counsel, upon request, shall be allowed to see the document "to protect against unwarranted insinuations that a statement has been made when the fact is to the contrary." Advisory Committee's Note, supra 56 F.R.D. at 278.

This subdivision is inconsistent with R.C.M. 1947, Section 93-1901-12. The section provides for impeachment by evidence of prior inconsistent statements, and indicates in part: "If the statements be in writing, it must be shown to the witness before any questions may be put to him concerning them." There are no cases in Montana which are directly in point with this part of the statute and what is covered in Rule 613(a). Cases concerned with impeachment by use of a writing a witness to impeach him, hold that the witness must be allowed to explain the writing. Kennelly v. Savage, 18 Mont. 119, 123, 44 P. 400 (1896); State v. Ritz, 65 Mont. 180, 188, 211 P. 298 (1922); State v. Keays, 97 Mont. 404, 417, 34 P. 855 (1934); and State v. Board, 135 Mont. 139, 143, 33 P.2d 924 (1959). These cases would certainly be consistent with the provisions of subdivision (b) of this rule. Therefore, the change in Montana law found in this subdivision affects only part of a statute which has never been construed by any cases.

(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness.

This subdivision is identical to Federal and Uniform (1974) Rule 613(b). It is implicit in the rule that the impeachment of a witness by use of a prior inconsistent statement will be allowed. The usual requirement for a foundation commonly required with this method of impeachment has been modified. This subdivision allows the witness to explain and the opposite party to examine concerning the prior inconsistent statement, but "with no specification of any particular time or sequence." Advisory Committee's Note, supra 56 F.R.D. at 279. This is in accord with two of the three objectives for requiring a foundation ; that is, that the witness in fairness to himself be allowed to explain or deny the apparent inconsistency,

and to avoid unfair surprise to the opposite party, by allowing him an opportunity to examine the witness concerning the inconsistent statement. Ibid. A third objective is to save time, for if the witness denies or forgets that he has made the statement, no contradiction exists and therefore no evidence of the inconsistent statement could be admitted. Yet, savings of time is a poor reason not to allow the trier of fact to consider and have the witness explain any prior inconsistent statements he may have made. Ibid. The Advisory Committee's Note gives an example of when this subdivision would be most effective: "under this procedure, several collusive witnesses can be examined before disclosure of a joint prior inconsistent statement." Ibid.

The final phrase in the first sentence allows the trial court the discretion to waive the foundational requirements, for instance when the witness is unavailable when the inconsistent statement is discovered. Ibid. The exclusion of admissions of a party opponent from the operation of this rule, as provided in the final sentence of the subdivision, is in accord with the traditional view that in this situation there is little danger of unfair surprise and usually the party will have an explanation ready. McCormick, supra at 74.

This subdivision is inconsistent with Montana law, to the extent that the foundation required for a prior inconsistent statement need not be laid before the witness may be impeached. R.C.M. 1947, Section 93-1901-12 provides:

> "A witness may also be impeached by evidence that he has made at other times, statements inconsistent with his present testimony; but before this can be done, the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he had made such statements, and if so, allowed to explain them . . . ."

A number of cases have held that it is improper to impeach a witness with a prior inconsistent statement unless the foundation is laid in accordance with the statute. State v. O'Brien, 18 Mont. 1, 9, 43 P. 1091 (1896); Melzner v. Chicago, Milwaukee and St. Paul Railway Co., 51 Mont. 487, 493, 153 P. 1019 (1915); and State v. McSloy, 127 Mont. 265, 273, 261 P.2d 663 (1953). In addition, there are many cases which cite this statute and indicate that the proper foundation had been laid; among the more recent cases are State v. Walker, 148 Mont. 216, 224, 419 P.2d 300 (1966); Tigh v. College Park Realty, 149 Mont. 358, 364, 427 P.2d 57 (1967); and State v. Smith, _____ Mont. _____ , 541, P.2d 351, 353, 32 St. Rep. 947, 949 (1975).

There are some cases which have liberally construed or not strictly followed the foundation requirements. State v. Hurst, 23 Mont. 484, 495, 59 P. 911 (1899); State v. Beeskove, 34 Mont. 41,

53, 85 P. 376 (1906); State v. McGowan, 36 Mont. 422, 431, 93 P. 552 (1908); Wise v. Stagg, 94 Mont. 321, 330, 22 P.2d 308 (1933); State v. Curtis, 114 Mont. 232, 242, 135 P.2d 361 (1943); and State v. Robinson, 109 Mont. 322, 328, 96 P.2d 265 (1939). However, it is apparent that statutory and case law in Montana require that a foundation be laid before impeachment by prior inconsistent statement is allowed; to the extent that this subdivision does not require that the foundation be laid before impeachment occurs, this subdivision supersedes the statute and cases.

Another rule associated with the foundational requirement is that where the witness denies having made the prior inconsistent statement, it may not be introduced. State v. Burrell, 27 Mont. 283, 285, 70 P. 982 (1902) cited what is now Section 93-1901-12 and held that if a witness denies or says that he does not remember making the inconsistent statement, that ends the matter because the foundation cannot be laid nor can he be impeached with a statement he says he did not make. However, in State v. McGowan, 36 Mont. 422, 531, 93 P. 552 (1908), a prior inconsistent statement was introduced after the witness had denied making it. Two other cases hold that the witness' assertion that he did not remember making a statement does not affect its admissibility. Wingate v. Davis, 77 Mont. 572, 579, 252 P. 307 (1926) and State v. Jolly, 112 Mont. 352, 355, 116 P.2d 686 (1941). State v. Burrell, supra, is effectively overruled by this subdivision. There is no Montana law allowing a judge in his discretion to waive the requirements of foundation; therefore, this part of the subdivision is new to Montana law. Finally, the last sentence of this subdivision is consistent with existing Montana law, excluding the requirements of a foundation where the statement is an admission by the party-opponent. State v. Allen, 34 Mont. 403, 410, 87 P. 177 (1906) and Howe v. Messimer, 84 Mont. 304, 311, 275 P. 281 (1929).

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.

Source: Federal Rule 614(a)

(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or a party; provided, however, that in trials before a jury, the court's questioning must be cautiously guarded so as not to constitute express or implied comment.

Source: Based on New Mexico Rule 614(b) and Federal Rule 614(b)

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

Source: Federal Rule 614(c)

Commission Comment

(a) Calling by the Court.

This subdivision is identical to Federal and Uniform (1974) Rule 614(a). It adopts the traditional view that the trial court has the inherent authority to call witnesses. The usual reason for this practice is the tendency of a jury to associate an undesirable witness with one party or the other, and this problem is met by having the court call such a witness to obtain his knowledge of relevant facts. The Commission intends the adoption of this rule to carry with it certain limitations, so that the court does not interfere with the jury's function as trier of fact or undermine either party's presentation of evidence. There is no Montana law specifically addressed to the question of whether a court may call witnesses; therefore, this subdivision is new to Montana law.

(b) Interrogation by Court.

This subdivision is based upon New Mexico Rule 614(b), which in turn is based upon Federal and Uniform (1974) Rule 614(b). The first clause of each of these rules is identical. However, the New Mexico rule adds the final clause to which the Commission has added "express or" before "implied comment." The Commission added the clause from the New Mexico Rule to ensure that trial courts would not lose their impartiality or become involved in a case as an adversary. This subdivision also expresses the traditional view, founded on the same reasons stated in the Commission Comment to subdivision (a).

There are Montana cases concerning the trial court's interrogation of witnesses. State v. McConville, 64 Mont. 302, 308, 209 P. 987 (1922); State v. Richardson, 69 Mont. 400, 403, 22 P. 418 (1924); and Roman v. Albert, et al, 81 Mont. 393, 403, 264 P. 115 (1928). None of these cases found that the trial court had abused its discretion in interrogating witnesses. In State v. Richardson, supra, the Supreme Court clarified this statement made in the McConville decision. "It is the right, even the duty of the judge to examine the witnesses for the purpose of eliciting the truth," by indicating:

> "But the right should be exercised with great care, and never unduly extended, and the questions put shall not betray bias or prejudice nor carry to the jury the impression that the judge has made up his mind as to fact inquired about or

> the merits of the case. The questions must be framed to make clear that which is not clear . . . . The judge should avoid officious interference."

There is no doubt that Montana follows the rule which does not allow the trial court to comment upon the evidence. State v. Fuller, 34 Mont. 12, 26, 85 P. 369 (1906). Therefore, this subdivision is entirely consistent with existing law.

(c) Objections.

This subdivision is identical to Federal and Uniform (1974) Rules 614(c). It is comparable to the objection provision of Rules 605 and 606(a). The subdivision gives counsel the option of objecting at the time an objection occurs or at the next available opportunity when the jury is not present, to allow avoidance of embarrassment which might arise where counsel is objecting to questions by the court in the presence of the jury. Advisory Committee's Note to Federal Rule 614, 56 F.R.D. 183, 280 (1972). Cases in Montana dealing with the objection to court imposed questions have held that the party must object at the time the question is made. State v. Richardson, supra; Roman v. Albert, et al., supra; and Batchoff v. Craney, 119 Mont. 157, 167, 172 P.2d 308 (1946). Therefore, to the extent that an objection is allowed out of the presence of the jury, this subdivision is a change in Montana law.

RULE 615. Exclusion of witnesses

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

Source: Federal Rule 615

Commission Comment

This rule is identical to Federal and Uniform (1974) Rule 615. It recognizes the time-honored view that excluding or sequestering witnesses is an effective "means of discouraging and exposing fabrication, inaccuracy, and collusion." Advisory Committee's Note to Federal Rule 615, 56 F.R.D. 183, 280 (1972). The rule allows witnesses to be excluded as a matter of right, rather than as a matter of discretion with the trial court. The

Commission believes that this is the better approach because it is simple, feasible, a powerful weapon against perjury, and it should not be left to the trial court to determine whether there is a need for exclusion where he may be unfamiliar with the witnesses or the case; and finally, no rule should ever be allowed which does not permit a party to expose inaccurate testimony or even perjury. 6 Wigmore, Evidence, Section 1838 (3d ed. 1940).

This rule provides three categories of witnesses who may be exempted from an order of exclusion: the first, the parties; the second, a representative of a party not a natural person; and third, a person necessary for the presentation of evidence. This latter category may allow the court some discretion in determining which witnesses will be excluded.

Montana law has allowed the exclusion of witnesses, but is inconsistent with the proposed rule in that it has been a matter of discretion with the court. R.C.M. 1947, Section 93-1901-2 provides: "If either party requires it, the judge may exclude from the courtroom any witness of the adverse party, not at the time under examination, so that he may not hear the testimony of other witnesses." Several cases have found that exclusion of witnesses is a matter of discretion with the trial court. Finlen v. Heinze, 32 Mont. 354, 383, 80 P. 918 (1905); State v. Walsh, 72 Mont. 110, 117, 232 P. 194 (1924); Smith v. Armstrong, 121 Mont. 377, 385, 198 P.2d 795 (1948); Thompson v. Yellowstone Livestock Commission, 133 Mont. 403, 419, 324 P.2d 412 (1958); and State v. Radi, —— Mont. —— , 542 P.2d 1206, 1210, 32 St. Rep. 1143, 1147 (1975). In State v. McLoed, 131 Mont. 478, 491, 211 P. 2d 400 (1957), the court also indicated that exclusion of witnesses was a question of discretion of the trial court; "however, this is the first time it has been brought to our notice that a judge has refused absolutely the exclusion rule, especially where . . . the county attorney informed the court that he had no objection to the exclusion of the witnesses." Supra at 492. The decision indicated that the Supreme Court examined the record to ensure that no witnesses were influenced and found no prejudice. The court went on to indicate ". . . the better practice especially in felony cases is to apply the customary and universal rule of exclusion when proper and timely request, supported by particular and well-founded reasons, is made." Id. Therefore, to the extent that the proposed rule provides exclusion as a right, it is inconsistent with Montana law, although the trend in Montana appears to be very close to providing a right.

There is no doubt that Section 93-1901-2 applies to criminal cases. State v. McDonald, 51 Mont. 1, 7, 149 P. 279 (1915) and State v. McLoed, supra. There is also a rule in criminal cases which has evolved since State v. Walsh, 72 Mont. 110, 117, 232 P. 194 (1924), where the trial court was upheld for refusing, as a matter of discretion, to exclude two members of the sheriff's office from the courtroom. State v. Fitzpatrick, 149 Mont. 400, 403, 427 P.2d 300 (1967), held that it was no error to exempt from an order of exclusion two members of the sheriff's office who were witnesses. In State v. Meidinger, 160 Mont. 310, 320, 502 P.2d 58 (1972), the

court indicated that "it has been a long and well-established rule in Montana . . ." that orders of exclusion do not apply to law enforcement personnel, citing State v. Walsh, supra, and State v. Fitzpatrick, supra. It indicated that the trial court, in exercising its discretion, was following the law. However, the latest case in this area, State v. Radi, supra, stated that police officers are exempted from an order of exclusion as a matter of discretion of the trial court. Therefore, to the extent that law enforcement personnel can be included in the second or third categories of the rule, they may be exempted from orders of exclusion; however, the rule does not establish that law enforcement personnel are always exempted from such an order.

Finally, Montana case law has considered an area not included as part of this rule, the sanctions to be imposed for disobedience of such an order. The general rule appears to be that unless the party is aware of a witness' disobedience, the witness should be cited for contempt, and the party should not be deprived of his testimony. See State v. McDonald, supra; State v. Johnson, 62 Mont. 503, 510, 205 P. 661 (1922); Bickford v. Bickford, 94 Mont. 314, 320, 22 P.2d 306 (1933); and State v. Love, 151 Mont. 190, 195, 440 P.2d 275 (1968).

Article VII

Opinions and Expert Testimony

RULE 701. Opinion testimony by lay witnesses

If the witness is not testifying as an expert, his 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 testimony or the determination of a fact in issue.

Source: Federal Rule 701

Commission Comment

This rule is identical to Federal and Uniform (1974) Rules 701. It has the effect of restating the lay opinion rule, not in terms of numerous exceptions, but safeguards which are easier to apply. It also allows limited expansion within these safeguards.

The traditional lay opinion rule, found in early American common law, prohibited lay witnesses from testifying as to his opinions. Yet the traditional rule has been criticized because of the difficulty of distinguishing "facts" which lay witnesses could testify to and "opinions" which they could not. See Territory v. Clayton, 8 Mont. 1, 12, 19 P. 293 (1888) and Watson v. Colusa-Parrot Mining and Smelting Co., 31 Mont. 513, 521, 79 P. 12 (1905). The impracticality of the traditional rule is obvious when the many sensible exceptions to it are considered. These exceptions are part of Montana case law, the most general of which allows a witness to give an opinion which is a "shorthand rendering of the facts." State v. Lucey, 24 Mont. 295, 302, 61 P. 994, (1900); State v. Tighe, 27 Mont. 327, 341, 71 P. 3 (1903); State v. Byrd, 41 Mont. 585, 592, 111 P. 407 (1910); and State v. Collins, 88 Mont. 514, 523, 294 P. 957 (1930).

Montana case law provided additional exceptions to the traditional rule, as the following statement indicates:

> . . . all concede the admissibility of the opinions of non-professional men upon a great variety of unscientific questions arising every day, and in every judicial inquiry. These are questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness, and health; questions also concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, <u>intoxication</u>, veracity, general character, and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention. State v. Trueman 34 Mont. 249, 253, 85 P. 1024 (1906).

Other cases have allowed opinions in the following specific areas: the general health of another person (Fearon v. Mullen, 38 Mont. 45, 52, 98 P. 650 (1908); nervousness (State v. Lucey, supra 24 Mont. at 303); fright (State v. Byrd, supra 41 Mont. at 592); the nature of alcohol and intoxication (State v. Trueman, supra 34 Mont. at 252; State v. Sedlacek, 74 Mont. 201, 211, 239 P. 1002 (1925), Meinecke v. Inter-Mountain Transportation Co., 101 Mont. 315, 322, 55 P. 2d 680 (1936), and State v. Strobel, 130 Mont. 442, 446, 304 P. 2d 606 (1956); the speed of an automobile (Herzig v. Sandberg, 54 Mont. 538, 540, 172 P. 132 (1918), State v. Souhrada, 122 Mont. 377, 381, 204 P. 2d 792 (1949), and Cross v. Tretheway, 155 Mont. 337, 340, 471 P. 2d 538 (1970); the fitness of a parent to have custody of children (Wilson v. Wilson, 128 Mont. 511, 517, 278 P. 2d 219 (1955); the value of property (Klind v. Valley County Bank of Hinsdale, 69 Mont. 386, 394, 222 P. 439 (1924), State v. Russell, 93 Mont. 334, 336, 18 P. 2d 611 (1933), Harding v. H.F. Johnson, Inc., 126 Mont. 70, 82, 244 P. 2d 111 (1952), and Futton v. Rocky Mountain Phosphates, 151 Mont. 54, 69, 438 P. 2d 674 (1968); and finally, the value of the witness' own services (Matoole v. Sullivan, 55 Mont. 363, 367, 177 P. 254 (1918).

Still other exceptions to the lay opinion rule can be found in R.C.M. 1947, Section 93-401-27(9), which allows the opinion of a witness respecting the identity or handwriting of a person "when he has knowledge of the person or handwriting . . ." and (10) which allows "the opinion of a subscribing witness to a writing, . . . respecting the mental sanity of the signer; and the opinion of the intimate acquaintanceship respecting the mental sanity of a person, the reason for the opinion being given." It is not clear whether these two statutory provisions come within the scope of the proposed rule.

The proposed rule is intended to be consistent with the holdings of Montana case law exceptions. However, the rule changes existing Montana law to the extent that it operates by allowing lay opinions to be admitted under a traditional rule riddled with necessary exceptions and without any such safeguards. The first safeguard, found in (a), requires the lay witness to base his opinion upon his personal knowledge, in accord with proposed Rule 602. In addition, the opinion must be "rationally based on the perception of the witness," ensuring an opinion or inference that would ordinarily be the result of a particular perception. The second safeguard, found in (b), requires the opinion to be "helpful to a clear understanding of his testimony or the determination of a fact in issue." This safeguard expresses a policy found throughout Article VII, and under this rule is intended to allow only those lay opinions which will assist the trier of fact in making its findings. It expresses the intention of the Federal drafters of ". . . putting the trier of fact in possession of an accurate reproduction of the event." Advisory Committee's Note to Federal Rule 701, 56 F.R.D. 183, 281 (1972). It also provides the court with a means of dealing with broad assertions which could conceivably be admitted under this rule, even though" . . . a detailed account carries more conviction . . ." and is subject to cross-examination and argument pointing up the weakness of such assertions. Ibid.

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.

Source: Federal Rule 702.

Commission Comment

This rule is identical to Federal and Uniform (1974) Rules 702. It states the two common law standards required before an expert is allowed to give his opinion, each of which is found in existing Montana law.

These two standards are set forth in R.C.M. 1947, Section 93-401-27(9): ". . . his opinion of a question or (sic, should be of) science, art, or trade, when he is skilled therein." The first standard is concerned with whether or not the subject matter is that requiring expert testimony. Case law has construed the phrase "science, art, or trade" to include any particular area ". . . not within the range of ordinary training or intelligence . . ." (Kelly v. John R. Daily Co., 56 Mont. 63, 79, 181 P. 326 (1919) or "the question must be one involving matters too complex to be readily grasped by the average mind . . . ." (Wibaux Realty Co. v. Northern Pacific Railway Co., 101 Mont. 126, 139, 54 P. 2d 1175 (1935). The proposed rule states this standard in slightly different terms of having the "scientific, technical, or other specialized knowledge . . . assist the trier of fact to understand the evidence or to determine the fact in issue . . . ." This is consistent with Forquer v. Slater Brick Co., 37 Mont. 426, 460, 97 P. 843 (1908) which indicated that expert testimony would not have aided the jury in its determination and so it should be excluded. Demarais v. Johnson, 90 Mont. 366, 370, 3 P. 2d 283 (1931) and cases cited therein indicate that expert testimony should be admitted so that the jury is able to understand the facts and draw correct conclusions. Other cases exclude expert testimony where the Supreme Court has found that the opinion testimony is not necessary for the jury to be capable of rendering a verdict. Hightower v. Alley, 132 Mont. 349, 354, 318 P. 2d 243 (1957) and Lamb v. Page, 153 Mont. 171, 178, 455 P. 2d 337 (1969). The Commission intends the proposed rule to be consistent with both statements of this standard.

The second standard is concerned with whether or not the particular witness is qualified as an expert to give an opinion in the particular area of his testimony. This is consistent with Section 93-401-27(9), quoted above (". . . when he is skilled therein."), and with case law which has allowed an expert to be qualified in the same terms of the proposed rule, that is ". . . qualified as an expert by knowledge, skill, experience, training, or education . . . ." De Sandro v. The Missoula Light and Water Co., 52 Mont. 333, 338, 157 P. 641 (1916); Graham v. Rolandson, 150 Mont. 270, 284, 435 P. 2d 263 (1968) and Haynes v. County of Missoula, 163 Mont. 270, 289, 517 P. 2d 370 (1973).

Finally, the proposed rule states that an expert properly qualified and testifying in an area requiring expert testimony, may not only testify in the form of opinion but "otherwise." This allows an expert to give testimony which need not be in the form of opinion, but which informs the jury so they may render the correct decision. This is consistent with State v. Cassill, 70 Mont. 433, 448, 227 P. 49 (1924) where prosecution witnesses qualified as experts in accounting and bookkeeping were allowed to explain the meaning of various bookkeeping entries because the court ". . . found the explanations illuminative and useful and have no doubt they served to enlighten the jury."

RULE 703. Bases of opinion testimony by experts

The facts of data in a 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 reasonably relied upon by experts in a particular field in forming opinions or inferences about the subject, the facts or data need not be admissible in evidence.

Source: Federal Rule 703

Commission Comment

This rule is identical to Federal and Uniform (1974) Rules 703. It is concerned with the sources of information upon which an expert may rely in forming an opinion. Proposed Rule 705 is concerned with when those particular sources of information should be placed before the trier of fact.

According to the Advisory Committee's Note to Federal Rule 703, 56 F.R.D. 183, 283 (1972), there are three possible sources upon which an expert may base his opinion. The first, as indicated in the rule, is facts or data perceived by the expert which he may testify to as part of his personal knowledge. The second, also indicated in the rule, is facts or data made known to the expert at the trial, either through listening to other testimony or a hypothetical question. Ibid. Therefore, the first sentence of this rule allows the traditional bases or foundation upon which an expert may rest his opinion.

The second sentence of Rule 703 provides the third source of information and allows information which ". . . consists of presentation of data to the expert outside of court and other than by his own perception." Advisory Committee's Note, supra, 56 F.R.D. at 283. As the rule indicates, this source of information need not be admissible evidence if it meets the test of a type of fact or data reasonably relied upon by experts in that particular field. The Advisory Committee's Note also indicates that this step was taken "to broaden the bases for expert opinion beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the

experts themselves when not in court." Ibid. The comment to a similar provision, California Evidence Code, Section 801(b), indicates that because of the wide variety of information upon which an expert may base his opinion, he must be able to rely on information that may not be admissible in evidence if he is going to give an opinion which will aid the jury. The comment also states". . . it is not practical to formulate a detailed statutory rule that lists all of the matters upon which an expert may properly base his opinion, for it would be necessary to prescribe specific rules applicable to each field of expertise. This is clearly impossible . . ." The solution to this problem is the general requirement found in the proposed rule and to allow the court to determine whether or not the sources of information are reliable.

The first sentence of this rule is consistent with existing Montana law. It has always been required that an expert have some basis for this opinion. Story v. Maclay, 3 Mont. 480, 483 (1880). An expert may base his opinion upon personal observation. Nesbitt v. City of Butte, 118 Mont. 84, 93, 163 P. 2d 251 (1945). Montana law also supports the rule that an expert may base his opinion upon hypothetical questions. (Pickett v. Kryger, 151 Mont. 87, 96, 439 P. 2d 57 (1968).) Also, case law supports the rule which allows an expert to base his opinion upon facts testified to by other witnesses. State v. Peel, 23 Mont. 358, 364, 59 P. 169 (1899).

Montana law has allowed some experts to base their opinion upon inadmissible evidence. Physicians have been allowed to give opinions based upon the statements of their patients (Kelly v. John R. Daily Co., 56 Mont. 63, 78, 181 P. 326 (1919) and Bingham v. National Bank of Montana, 105 Mont. 159, 173, 72 P. 2d 90 (1937) or upon the information given by nurses (in re Sales' Estate, 108 Mont. 202, 207, 89 P. 2d 1043 (1939) or upon the reports of other physicians. Klaus v. Hilberry, 157 Mont. 277, 285, 485 P. 2d 54 (1971); Pachaek v. Northern Concrete Co., 160 Mont. 16, 22, 499 P. 2d 766 (1972); and Bush v. Wardell, _____ Mont. _____, 528 P. 213, 31 St. Rep. 882, 887 (1974). Experts in land valuation have been allowed to base their opinion upon hearsay as to comparable sales. State Highway Commission v. Greenfield, 145 Mont. 164, 169, 399 P. 2d 989 (1965) and State v. Fish and Game Commission v. District Court, 163 Mont. 298, 301, 517 P. 2d 359 (1973). Further, it is apparent that highway patrolmen are allowed to reconstruct and give the cause of an accident based upon their investigation and interviews of persons involved in the accident. State v. Deshner, 158 Mont. 188, 193, 49 P. 2d 1290 (1971). Therefore, the second sentence of Proposed Rule 703 is consistent with existing Montana law but expands the rule of the cases just cited to allow any expert to base his opinion upon reliable, inadmissible information.

RULE 704. Opinions on ultimate issue

Testimony in the form of an opinion or inference otherwise

admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Source: Federal Rule 704

Commission Comment

This rule is identical to Federal and Uniform (1974) Rules 704. Its affect is to specifically abolish the rule against opinions on ultimate issues of fact, not currently followed in Montana. Therefore, this rule is consistent with existing Montana law. Kelly v. John R. Daily Co., 56 Mont. 63, 79, 181 P. 326 (1919); State v. Shannon, 95 Mont. 280, 286, 26 P. 2d 360 (1933) and State v. Campbell, 146 Mont. 251, 258, 405 P. 2d, 978 (1965); Rude v. Neal, _____ Mont. _____ 530 P. 2d, 428, 31 St. Rep. 1033, 1037 (1974); and McGuire v. Nelson, _____ Mont. _____, 536 P. 2d 768, 32 St. Rep. 600, 607 (1975).

The Advisory Committee's Note to this rule, 56 F.R.D. 183, 284 (1972), indicates that the "basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact." The language of the proposed rule allows lay witnesses to give their opinions on an ultimate issue if the requirements of Rule 701 are met. In any case, the proposed rule is not intended to allow all opinions and would exclude those "which would merely tell the jury what result to reach . . ." Advisory Committee's Note, supra, 56 F.R.D. at 285. In other words, the Commission intends this rule to follow the existing Montana practice of not allowing the witness to give a legal conclusion, or to apply the law to the facts in his answer. Daniels v. Andes Insurance Co., 2 Mont. 78, 88 (1874), Allen v. Bearcreek Coal Co., 43 Mont. 269, 281, 115 P. 673 (1911), Parsons v. Rice, 81 Mont. 509, 526, 264 P. 396 (1928), and McGonigle v. Prudential Insurance Co., 100 Mont. 203, 219, 46 P. 2d 687 (1935).

Finally, it should be noted that this rule is also consistent with case law which holds that either lay or expert opinion testimony may be rejected by the trier of fact. Reser v. Ziebarth, 59 Mont. 7, 9, 195 P. 98 (1928), Watts v. Billings Bench Water Association, 78 Mont. 199, 219, 253 P. 260 (1927); Putnam v. Pollei, 153 Mont. 406, 411, 457 P. 2d 776 (1969); and Richardson v. Ford Motor Company, 163 Mont. 347, 353, 516 P. 2d 1153 (1973). Therefore, if the jury properly performs its duty, there should be no fear that an opinion admissible under this rule constitutes an invasion of the province of the jury.

RULE 705. Disclosure of facts or data underlying expert opinion

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

Source: Federal Rule 705

Commission Comment

This rule is identical to Federal and Uniform (1974) Rules 705. Its effect is to abolish the traditional requirement for a hypothetical question. Hypothetical questions have ". . . been the target of a great deal of criticism as encouraging partisan bias, affording an opportunity for summing up in the middle of a case, and is complex and time consuming." Advisory Committee's Note to Federal Rule 705, 56 F.R.D. 183, 285 (1972). The Commission intends this rule to be consistent with the policy of Article VII, making expert testimony helpful to the trier of fact.

Disclosure of the facts or data underlying an expert's opinion through a hypothetical question or otherwise is initially a matter of discretion with counsel offering the expert witness. If the court believes that the expert's opinion is not helpful without the disclosure of the basis of that opinion, it then has the discretion to order such a disclosure. Under the second sentence of the rule, the adverse party has the burden to demonstrate an opinion faulty through cross-examination of the expert as to the basis of his opinion. The cross-examiner should be aware of the underlying facts or data of the opinion through discovery under Rule 26(b)(4) of M.R. Civ. P.

Therefore, the commission intends this rule to abolish the time-consuming practice of disclosing the basis of an expert's opinion where unnecessary and provide a clearer presentation of expert opinion to aid the trier of fact.

Existing Montana law is inconsistent with this rule to the extent that it no longer absolutely requires that an expert testify without prior disclosure of the basis of his opinion through a hypothetical question, his own observation, or testimony of other witnesses. The rationale for allowing an expert to testify through the use of hypothetical questions is found in Trogdon v. Hanson Sheep Co., 49 Mont. 1, 5, 149 P. 792 (1914): "An expert is not required to know the actual facts respecting the subject matter under consideration. He may base his opinion, not upon facts, but upon an assumed state of facts." The Montana practice in connection with hypothetical questions was concisely stated in De Sandro v. Missoula Light and Water Co., 52 Mont. 333, 338, 157 P. 641 (1916):

> In putting a hypothetical question to a witness, counsel has the right to assume as established, for the time being, all the facts in evidence tending, directly or by fair inference, to establish his theory of the case . . . . He need not embody all the evidence on the subject to which it relates. If opposing counsel does not think the question incorporates all the facts in evidence, he can include them in questions

> propounded by himself . . . . It is then for the jury to say whether the facts assumed by the question are really established and whether the opinion of the witness has any probative value.

A possible exception to this statement is that a hypothetical question may be asked based on evidence not in the record if counsel promises to later introduce that evidence. Riskin v. Northern Pacific Railway Company, 137 Mont. 57, 70, 350 P. 2d 831 (1960). Although there is no requirement for a hypothetical question where an expert gives an opinion based upon fact gained through his own personal knowledge or through testimony of other witnesses (State v. Shannon, 95 Mont. 280, 286, 26 P. 2d 360 (1933), if an expert is testifying from those sources, Montana law clearly requires that the expert testify as to those facts upon which he rests his opinion. Irion v. Hyde, 110 Mont. 570, 576, 105 P. 2d 666 (1940); Boehler v. Sanders, 146 Mont. 158, 164, 404 P. 2d 885 (1965); Jangula v. United States Rubber Co., 147 Mont. 98, 108, 410 P. 2d 462 (1966); and State Highway Commission v. Barnes, 151 Mont. 300, 307, 443 P. 2d 16 (1968). To the extent that these cases require an expert to testify as to the facts upon which he rests his opinion, they are superceded under the practice of the proposed rule.

Article VIII

Hearsay

Rule 801 Definitions

(a) Statement. A statement is (1) an oral or written assertion or (2) non-verbal conduct of person, if it is intended by him as an assertion.

Source: Federal Rule 801 (a)

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

Source: Federal Rule 801 (b)

(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.

Source: Federal Rule 801 (c)

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

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of subsequent fabrication, improper influence or motive, or (C) one of indentification of a person made after perceiving him; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of that relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Source: Based on Federal Rule 801(d)

Commission Comment

(a) Statement

This subdivision is identical to Federal and Uniform (1974) Rules 801(a). It is necessary because of the word statement in the

definition of hearsay in subdivision (c) of this rule. The first clause, defining statement as an oral or written assertion, speaks for itself. The second clause covers the situation where non-verbal conduct is a substitute for speech, and therefore, should be considered the equivalent of an oral or written assertion. The definiti distinguishes various forms of non-verbal conduct by the intention of the person performing the conduct. If the person intends the non-verbal conduct to be a statement or substitute for speech, this is a statement within the hearsay rule and so would not ordinarily be admissible as hearsay. Any non-verbal conduct not intended as an assertion is therefore admissible so far as the hearsay rule is concerned.

There are no Montana statutes or cases directly concerned with what is a statement in connection with the hearsay rule. Statutes providing exceptions to the hearsay rule refer to acts, declarations, or omissions. R.C.M. 1947, Sections 93-401-7, 93-401-9 and 93-401-10. A recent case defining hearsay, State v. Newman, 162 Mont. 450, 457, 513 P.2d 258 (1973), indicates, "Hearsay is testimony or evidence of someone's words or conduct outside the court, when offered in court to prove the truth of the thing being asserted, and thus resting for its value upon the credibility of the out-of-court asserter." (Emphasis added). This definition implies that in order for conduct to be within the hearsay rule, it must be assertive, and so is consistent with the definition in this subdivision.

(b) Declarant

This subdivision is identical to Federal and Uniform (1974) Rules 801(b). Like the definition in subdivision (a), this definition is necessary because of the use of declarant in the definition of hearsay in subdivision (c). The definition is self-explanatory. There is no Montana law concerning this subdivision.

(c) Hearsay

This subdivision is identical to Federal and Uniform (1974) Rules 801(c). The definition has the effect of placing three types of testimony outside the hearsay rule, making each type admissible as far as the hearsay rule is concerned. First, from the definition in subdivision (a) of statement carried to this subdivision, a statement is not hearsay if it is not intended to be an assertion. Second, from the phrase in the subdivision referring to statements ". . . made by the declarant while testifying at the trial or hearing. . .", all such testimony is not hearsay. This is almost never considered a hearsay problem. And third, from the phrase ". . . offered in evidence to prove the truth of the matter asserted," statements offered for purposes other than to prove the truth of their contents are not hearsay.

The third type of testimony is the major concern of this subdivision. It is theoretically correct to say that statements not offered to prove the truth of their contents are not hearsay because their reliability is not in issue, only

whether or not the statement was made. Hearsay statements are ordinarily not admitted because their reliability cannot be tested by oath, cross-examination, and the presence of the trier of fact, the three ideal conditions under which testimony is given by witnesses. Advisory Committee's Note, 56 F.R.D. 183, 288 (1972). Where a statement is introduced for purposes other than proving the truth of its content, the witness testifying as to the making of the statement by the hearsay declarant is doing so under the three ideal conditions. Therefore, statements which are offered for purposes other than to prove the truth of their content are not hearsay under the definition.

Montana law is consistent with this definition of hearsay, although it has not been concerned with the definition of statement or testimony by declarants at the trial or hearing. As previously noted in the Commission Comment, subdivision (a), State v. Newman, supra 152 Mont. at 457, defined hearsay as testimony: ". . . offered in court to prove the truth of the matter asserted, and thus resting for its value upon the credibility of the out-of-court asserter." The rule was followed in Brown v. Homestake Exploration Co., 98 Mont. 305, 3 9, 39 P.2d 168 (1934), where hearsay testimony was admitted for a purpose other than to prove the truth of its contents.

(d) Statements which are not hearsay

This subdivision is identical to Federal and Uniform (1974) Rules 801(d), except that changes have been made in (d)(1)(A) and (d)(1)(B), which will be explained in the discussion of those clauses. The effect of this rule is to place certain statements ". . . which would otherwise literally fall within . . ." the hearsay definition outside the hearsay rule. Advisory Committee's Note to Federal Rule 801(d), supra 56 F.R.D. at 295.

Subdivision (d)(1) deals with certain prior statements of the witness who is now testifying and subject to ideal conditions of oath, cross-examination, and presence of the trier of fact. The Commission feels that the application of the conditions at the trial or hearing is sufficient to take these statements out of the hearsay rule, for requiring their application at the time the statement was made would have the affect of excluding almost all prior statements. Therefore, these prior statements are admitted as substantive evidence. It should also be noted that the subdivision limits the types of prior statements placed outside the hearsay rule to three: This is a compromise between allowing "general use of prior prepared statements as substantive evidence" which could lead to an abuse of preferring prepared statements to actual testimony, and allowing no prior statements to be admitted which is not sensible, for ". . . particular circumstances call for a contrary result. The judgment is one more for experience than logic." Advisory Committee's Note, supra 56 F.R.D. at 295-6.

Proposed clause 801(d)(1)(A) is not the same as the Federal Rule. It provides ". . . inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial or hearing, or other proceeding, or in a deposition . . . ." The proposed clause deletes the oath requirement as unnecessary and harmful to the usefulness of the rule. The Commission believes that prior inconsistent statements should be admissible as substantive evidence. Although the rule does not specifically call for this result, the Advisory Committee Note to Federal Rule 801(d)(1)(A) states: "Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule, they are substantive evidence." Supra, 56 F.R.D. at 296. An argument in favor of this position, in addition to the consideration that the hearsay rule should not apply, is that the jury may consider this type of statement (when introduced for impeachment purposes) as substantive evidence because of a failure to regard the typical cautionary instruction. It can also be noted that this statement is always made closer in time to the event, free from any influences, and therefore has an assurance of trustworthiness like many hearsay exceptions.

The clause also indicates that the statement must be inconsistent with the declarant's testimony; this requires that an inconsistency does exist, and that practice under proposed rule 613(b), impeaching with prior inconsistent statements, will be used with this clause. It is the intent of the Commission that a witness' failure to recollect at a trial or hearing is an inconsistency under 801(d)(1)(A) when the witness has made a prior statement on the matter under inquiry. See Commission Comment to proposed Rule 613(b).

Montana law concerning this clause is uncertain. Older Montana cases follow the rule that a prior inconsistent statement cannot be used as substantive evidence, but only for impeachment purposes. State v. Willette, 46 Mont. 326, 330, 127 P. 1013 (1912); Wise v. Stagg, 94 Mont. 321, 330, 22 P. 2d 308 (1933) and State v. Kinghorn, 109 Mont. 22, 36, 93 P. 2d 964 (1939). However, in State v. Jolly, 112 Mont. 352, 355, 116 P. 2d 686 (1941), the court indicated that it preferred the rule that a prior inconsistent statement could be used as substantive evidence; it went on to hold that the prior inconsistent statements were not sufficient evidence to convict the defendant, and so did not apply the rule that it was announcing. Jolly has not been commented on since it was decided; however, later cases have cited Wise v. Stagg, supra, for the rule that prior inconsistent statements may be used for impeachment purposes, although this particular rule has not been properly applied in those cases. Batchoff v. Craney, 119 Mont. 157, 152, 172 P. 2d 308 (1946) and Seibel v. Yurick, 136 Mont. 39, 48, 344 P. 2d, 129 (1959). There are cases which demonstrate that prior inconsistent statements are given the affect of substantive evidence by the Montana Supreme Court. In State v. Mally, 139 Mont. 599, 608, 366 P. 2d 868 (1961),

the court stated that a witness' testimony concerning a prior inconsistent statement of the defendant's brother was sufficient evidence to convict the defendant. In State v. Borchert, 156 Mont. 315, 320, 479 P. 2d 454 (1970), the court used an inconsistent statement by the defendant's wife as part of the evidence which sustained the defendant's conviction. Finally, in State v. Longacre, ___ Mont. ___, 542 P. 2d 322, 32 St. Rep 1133, 1134 (1975), the court found that a prior inconsistent statement by the defendant's real daughter testified to by another witness was part of the evidence supporting the conviction. It should also be noted that the apparent practice in Montana is to give a cautionary instruction that prior inconsistent statements may be used only for impeachment purposes. Therefore, this clause has the affect of clarifying as well as changing existing Montana law.

Proposed clause 801(d)(1)(B) is not the same as the Federal Rule. It provides ". . . consistent with his testimony and his offer to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . . ." The proposed clause deletes "recent" and "or" following fabrication so that it reads ". . .consistent with his testimony and is offered to rebut an express or implied charge against him of subsequent fabrication, improper influence or motive . . . ." The Commission changed the language of the Federal Rule to make the proposed clause clearer. Under common law, a witness could not be supported by evidence of prior consistent statements because no amount of repetition makes the story more probable. 4 Wigmore Evidence, Section 1124 (3rd. ed. 1940). However, the common law does allow rehabilitation of a witness who has been impeached on the grounds mentioned in the proposed clause. Id, Sections 1128-29. The prior consistent statement is allowed to rehabilitate the witness because it was made prior to the existence of the impeaching evidence; that is, the consistent statement is made and subsequently the impeaching evidence comes into existence When a witness testifies consistently with these prior statements, it ". . . will effectively explain away the force of the impeaching evidence; because it is thus made to appear that the statement in the form now uttered was independent of discrediting influence." Id. Section 1128 at 268.

The clause changes traditional common law only to the extent that it allows this type of evidence to be admitted as substantive evidence. This is realistic because of the probability that juries do not understand or choose not to follow instructions limiting this type of evidence to rehabilitative purposes. Further, "The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally." Advisory Committee's Note, supra, 56 F.R.D. at 296.

Existing Montana law is consistent with and perhaps broader than the proposed clause. The clause does change Montana law to the extent that it allows prior consistent statements to be admitted as substantive evidence. The traditional common law rule was discussed in Kipp v. Silverman, 25 Mont. 296, 301, 64 P. 884 (1901), although

it was not applied. In Farleigh v. Kelly, 28 Mont. 421, 433, 72 P. 756 (1903), the court again declined to apply the traditional common law rule. However, in a recent case, Allen v. Moore, ___ Mont. ___, 538 P. 2d 1352, 32 St. Rep. 478, 484 (1975), the court did allow a prior consistent statement to be admitted. In that case, the defendant testified that the deceased had grabbed the steering wheel when the vehicle in which they were riding went out of control. He was impeached by evidence of three statements in which he did not mention the deceased's action. The defense introduced a deposition of the owner of the vehicle to show the defendant had mentioned the deceased's action; this statement was made prior to at least one of the statements when the defendant had not mentioned this occurrence. Therefore, this case is consistent with the language of the proposed clause, although it may also be interpreted as expressing concern over which story is the truth and not when the stories were told. Dicta in that case also indicates that the court should allow rehabilitation by prior consistent statements with any form of impeachment. On these two points it is apparent that this case is broader than the proposed clause.

Proposed clause 801(d)(1)(C) is the same as Federal Rule 801 (d)(1)(C), as amended in 1975. There is substantial authority for the admissibility of these statements, "often without recognition of the presence of a hearsay problem." McCormick, Handbook on the Law of Evidence, 603 (2d ed. 1972). The reasonsfor admitting these types of statements are first, "the generally unsatisfactory and inconclusive nature of courtroom identification . . ."; second, the higher reliability of prior identifications "made at an earlier time under less suggestive conditions "(Advisory Committee's Note, supra, 56 F.R.D at 296-7); and third, questions as to the reliability of identifications are really concerned with constitutional issues and not a hearsay problem. Ibid.

Montana law is apparently consistent with this clause, although of the two cases considering the problem, neither is on point. In State v. Fisher, 54 Mont. 211, 215, 169 P. 282 (1917), the court held that reception of evidence of an identification of the defendant by the victim of the crime was not error. The second case, State v. McSloy, 127 Mont. 265, 273, 261 P. 2d 263 (1953), dealt with the testimony of the prosecution witness' father as to the identification. The court treated this testimony as corroborating evidence "to show that the prosecuting witness identified the accused at a time when there had been no opportunity for the witness to be swayed by any suggestion of others." Id. at 275.

Proposed Rule 801(d)(2) contains five categories of statements which may be offered against a party-opponent as an admission. Each of the clauses is identical to Federal Rule 801(d)(2). It should be noted that proposed Rule 613(b) contains a cross-reference to this subdivision, in that admissions by a party-opponent are not treated as prior inconsistent statements. This subdivision changes existing Montana law to the extent that it defines admission outside the hearsay rule, rather than as an exception to it.

Subdivision (d)(2) deals with admissions of a party-opponent and settles the question of whether admissions are outside the hearsay rule or an exception to it. The subdivision places admissions outside the hearsay rule, but in any event, they have always been admitted as substantive evidence. It is important to remember that this subdivision only has the effect of placing these types of statements outside the hearsay rule; this does not mean that they are to be admitted automatically, for they still are subject to other rules of evidence and constitutional safeguards.

Proposed clause 801(d)(2)(A) refers to an individual's statement and "is the classic example of an admission." Advisory Committee's Note, supra, 56 F.R.D. at 297. "If he has a representative capacity and the statement is offered against him in that capacity, no inquiry whether he was acting in that representative capacity in making the statement is required; the statement need only be relevant to representative affairs." Ibid. R.C.M. 1947, Section 93-401-27 (2) provides the equivalent of the proposed clause as far as individuals are concerned: ". . . evidence may be given upon a trial of the following facts: . . . 2. the act, declaration, or omission of a party, as evidence against such party." Neither the statute nor the cases have specifically referred to admissions made by a person in his representative capacity. Cases construing this statute have followed its plain meaning. Sylvain v. Page, 84 Mont. 424, 438, 276 P. 16 (1929) and Edquest v. Tripp and Dragstedt Co., 93 Mont. 446, 458, 19 P. 2d 637 (1933).

Proposed clause 801(d)(2)(B) is concerned with adoptive admissions, or situations where the party-opponent adopts or acquiesces in the statement of another. "Adoption or acquiescence may be manifested in any appropriate manner. When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue." Advisory Committee's Note, supra, 56 F.R.D. at 297-8. Montana law has only been concerned with adoptive admissions where acquiescence or silence is the method of adoption. R.C.M. 1947, Section 93-401-27(3) states the equivalent of the proposed clause: ". . . evidence may be given upon a trial of the following facts: . . . . 3. an act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto." Case law in Montana has only been concerned with silence as conduct in relation to the statement, which is also denominated the tacit admission rule. The cases dealing with the tacit admission rule are all criminal cases in Montana. Territory v. Big Knot On Head, 6 Mont. 242, 11 P. 670 (1886); State v. Lucey, 24 Mont. 285, 302, 61 P. 994 (1900); State v. Fisher, 54 Mont. 211, 215, 169 P. 282 (1917); State v. Byrne, 60 Mont. 317, 326, 199 P. 262 (1921); State v. McLean, 76 Mont. 351, 355, 246 P. 956 (1926) and State v. Won, 76 Mont. 509, 518, 248 P. 201 (1926). The Advisory Committee's Note to the equivalent of the proposed clause, supra, 56 F.R.D. at 298, indicates:

> In criminal cases, however, troublesome questions have been raised by decisions holding that failure to deny is an admission: the inference is a fairly weak one, to begin with; silence may be motivated by advice of council or realization that 'anything you say may be used against you'; unusual opportunity is afforded to manufacture evidence; and encroachment upon the privilege against self-incrimina-

> tion seems inescapably to be involved. However, recent decisions of the Supreme Court relating to custodial interrogation and the right to counsel appear to resolve these difficulties. Hence the rule contains no special provisions concerning failure to deny in criminal cases.

Finally, in Whorley v. Patton - Kjose Company, 90 Mont. 461, 485, 5 P. 2d 210 (1931), the court held that failure to reply or to protest false statements in a letter ". . . has no probative value as tending to show an admission of the matter stated, especially when the party failing to reply has taken a final position in the matter of dispute, or for some other reason the correspondent on the subject has ended . . . ." It is apparent that the proposed clause is consistent with existing Montana law.

Proposed clauses 801(d)(2)(C) and (D) are concerned with admissions by an agent or employee against his principal or employer. Clause (C) states the traditional rule that a principal is not bound by statements of his agent unless he had the authority to make such statements. Clause (D) states a rule which changes by expanding the traditional common law view. The Advisory Committee's Note, supra, 56 F.R.D. at 298, indicates that the usual test of agency to determine the admissibility of statements by agents usually results in exclusion of the statement rather than its admissibility "since few principals employ agents for the purpose of making damaging statements . . . ." The proposed (D) changes the usual rule because "dissatisfaction with this loss of valuable and helpful evidence has been increasing. A substantial trend favors admitting statements related to a matter within the scope of the agency or employment." Ibid.

R.C.M. 1947, Section 93-401-27(5) states the rule concerning agent's admissions:

> . . . evidence may be given upon a trial of the following facts: . . . 5. after proof of a partnership or agency, the act or declaration of the partner or agent of the party, within the scope of the partnership or agency, and during its existence."

It should first be pointed out that the statute plainly requires a foundation to be laid showing the existence of a partnership or agency before an agent's admissions will be allowed in evidence. Ashley v. Safeway Stores, Inc., 100 Mont. 312, 324, 7 P. 2d 53 (1935) and Shillingstad v. Nelson, 141 Mont. 412, 419, 478 P. 2d 393 (1963). Although the proposed clauses (C) and (D) do not explicitly require a foundation, under (C) authorization must be shown before a statement would be admitted and under (D), the terminology agent or servant and scope of agency or employment indicates that this must be shown before this type of statement would be admitted.

The proposed clause (C) would represent no change to existing Montana law. Montana has always followed the rule that an agent's statements will bind the principal only if they were made with proper authorization. Ryan v. Gilmer, 2 Mont. 517, 520 (1877). It is also certain that unauthorized statements cannot be treated

as admissions. Fowlie v. Cruse, 52 Mont. 222, 234, 157 P. 958 (1916) and Raish v. Orchard Canal Co., 67 Mont. 140, 144, 218 P. 655 (1923). There are cases which have found an implied authority existed to allow an agent's admissions to bind his principal. Callahan v. Chicago, Burlington and Quincy Railroad Co., 47 Mont. 401, 411, 133 P. 687 (1913) (admissions by a conductor of a train admissible); exchange State Bank v. Occident Elevator Co., 95 Mont. 78, 87, 24 P. 2d 126 (1933) (grain elevator operator's statements admissible because they were within the scope of his employment); and Fox v. Fifth West, Inc., 153 Mont. 95, 99, 454 P. 2d 612 (1969) (defendant corporation's president's statement against the corporation's interest admissible). Finally, it should be noted that the Advisory Committee's Note to this clause, supra, 56 F.R.D. at 298, indicates that communications to the agent's principal as well as to third persons are admissible under this clause. To the extent that this question has not arisen in any Montana cases, this is new to Montana law.

Proposed clause (D) represents a change to existing Montana law. Not only may unauthorized admissions be admissible under this clause, and so contrary to the cases cited above, but admissions may be admitted regardless of whether or not they were part of the res gestae and regardless of the status of the agent or employee in relation to his principal or employer (as long as the relationship exists and the statement is concerned with the matter within the scope of the agent or employee's duties). Montana cases have always combined the rule that an agent's admissions must be within the scope of his authority with the res gestae rule. Hogan v. Kelly, 29 Mont. 485, 489, 75 P. 81 (1903) ("to bind the principal, the declarations of an agent must be made within the scope of his authority, at the time of the transaction, and be a part of the res gestae."); Poindexter and Orr Livestock Co., v. Oregon Short-line Railroad Company, 33 Mont. 338, 340, 83 P. 886 (1905); Callahan v. Chicago, Burlington and Quincy Railroad Co., supra, 47 Mont. at 411 ("Now, it is a well-settled rule that when an agent is vested with authority to perform any act for his principal, his words . . . while engaged in that business are part of the res gestae of that business."); Raish v. Orchard Canal Co., supra, 67 Mont. at 143 (statements by an agent will bind a corporation "only when made by the officer or agent acting within the scope of his authority and with reference to the transactions then pending . . . only because the declaration is a verbal act and part of the res gestae that it is admissible at all."); and Rossberg v. Montgomery Ward and Company, 110 Mont. 154, 161, 199 P. 2d 979 (1939) ("It is elemental that admissions or declarations of the officers or agents of private corporations are not admissible unless they are made while acting within the scope of their authority as part of the res gestae relating to the present transactions."); Therefore, to the extent that this clause separates the res gestae rule from the present rule regarding agent's admissions, it is a change to existing Montana law.

Montana law has also excluded statements by an agent on the ground that they were not made by a person with sufficient status in relation to his principal or employer to bind that principal or employer. In Callahan v. Chicago, Burlington and Quincy Railroad Co., supra, 47 Mont. at 412, the court admitted the statement of a

conductor of a freight train in part because he had sufficient authority to bind the railroad. That case distinguished Ryan v. Gilmer, supra, 2 Mont. at 520, where a sleigh driver had insufficient authority to bind his principal and Poindexter and Orr Livestock Co., v. Oregon Shortline Co., supra, 33 Mont. at 340, where a section foreman was held to have insufficient authority to bind the railroad. In Oscarson v. Grain Growers Association, Inc., 84 Mont. 521, 536, 277 P. 14 (1929), admissions by the defendant corporation's secretary-treasurer were held admissible because of the high position and extent of control he had over the corporation's affairs. In Rossberg v. Montgomery Ward Co., supra, 110 Mont. at 160, the court held that a store manager had insufficient authority to bind the Montgomery Ward Company. It is apparent from that opinion that the court felt that the store manager was a subordinate agent. The latest case dealing with this question is Fox v. Fifth West, Inc., supra, 153 Mont. at 99, where the court held that a president of a corporation had sufficient authority to make statements against the corporation's interest. Therefore, to the extent that this clause allows admissibility of statements by any agent or employee, it is a change to existing Montana law.

R.C.M. 1947, Section 93-401-27(5) also states that the rule to be applied to statements by agents ". . . applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party. The only two cases construing this part of this subsection are Monida Trust v. Kemper, 44 Mont. 1, 6, 118 P. 811 (1911) where the court held that this provision does not affect the limitation of actions against joint obligees; and Credit Counsellors v. Park, 163 Mont. 55, 57, 514 P. 2d 1330 (1973) where a letter and phone conversation admitting the existence of a debt by a joint debtor was held admissible against another joint debtor. Since proposed clauses (C) and (D) do not mention joint interests, the Commission intends that the existence of this relationship does not give rise to admissions, but should be treated as a declaration against interest under Federal Rule 804(b)(3).

Proposed clause 801(d)(2)(E) provides that statements by co-conspirators are admissible as admissions against other conspirators. The clause requires that the statement be made during the course of the conspiracy, which the Commission intends to mean that statements may be admitted only after a foundation establishing the conspiracy has been laid and that in order for statements to be admissible they must be made before the conspiracy terminates. The clause also requires that statements be made in furtherance of the conspiracy. The clause applies to both civil and criminal cases.

This clause is consistent with existing Montana law. R.C.M. 1947, Section 93-401-27(6) provides: "Evidence may be given upon a trial of the following facts: . . . 6. after proof of the conspiracy, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy." Montana case law requires that there be a foundation before a co-conspirator's statement will be admitted. State v. Dotson, 26 Mont. 305, 309, 67 P. 938 (1902) and Loncar v. Nation Union Fire Insurance Co., 84 Mont. 141, 153, 274 P. 844 (1929). They require

that statements must be made during the existence of the conspiracy and that statements made after the purpose of the conspiracy "has been accomplished and the joint enterprise completed, evidence of acts or declarations of one of the co-conspirators is not admissible against another." State v. Wells, 33 Mont. 291, 297, 83 P. 476 (1905). State v. Dotson, 26 Mont. 305, 309, 67 P. 938 (1902); State v. Allen, 34 Mont. 403, 409, 102 P. 988 (1906) and State v. Hopkins, 68 Mont. 504, 509, 219 P. 1106 (1923). Finally, they also require that statements must be made in furtherance of the conspiracy. State v. De Wolfe, 29 Mont. 415, 419, 74 P. 1048 (1904); State v. Allen, supra, 34 Mont. at 409; and State v. Collins, 88 Mont. 514, 526, 294 P. 957 (1930). Montana law applies the rule in the statute to civil and criminal cases. Examples of criminal cases are cited above, and civil cases include: Harrington v. Butte and Boston Mining Co., 19 Mont. 411, 419, 48 P. 758 (1897); Farleigh v. Kelly, 28 Mont. 421, 432, 72 P. 756 (1903) and Lane v. Bailey, 29 Mont. 548, 557, 75 P. 191 (1903).

RULE 802. Hearsay Rule

Hearsay is not admissible except as otherwise provided by statute, these rules, or other rules applicable in the courts of this state.

Source: Based on Federal Rule 802.

Commission Comment

This rule is identical to Federal and Uniform (1974) Rules 802, except the clause beginning "except as otherwise provided" has been changed so that the language is consistent with other exception clauses found in the proposed rules. The Advisory Committee's Note to Federal Rule 802, 56 F.R.D. 183, 299 (1972), indicates "the provision excepting from the operation of the rule hearsay which is made admissible by other rules adopted by the Supreme Court or by act of Congress continues the admissibility thereunder of hearsay which would not qualify under the evidence rules." The Advisory Committee's Note then goes on to list several examples of rules of procedure and acts of Congress which allow hearsay to be admitted. Ibid.

This rule is consistent with existing Montana law. Although a clear statement of the hearsay rule cannot be found in Montana statutes, R.C.M 1947, Section 93-401-2, has been interpreted as providing the hearsay rule. Patterson v. Halterman, 161 Mont. 278, 282, 505 P. 2d 905 (1973). That statute provides: "A witness can testify to those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions except in those few express cases in which his opinion or inferences, or the declarations of others, are admissible." In Wilson v. Davis, 110 Mont. 356, 366, 103 P. 2d 149 (1940), the court cited this statute and stated that the exceptions to it are found in Sections 93-401-6, 93-401-7,

93-401-10 and 93-401-27(4). These sections relate to various hearsay exceptions. However, the rule that hearsay is inadmissible has been followed in Montana without question since the early case of Davis v. Blume, 1 Mont. 463, 465 (1872).

Examples of hearsay exceptions are: proposed Rules 803 and 804 of the proposed Montana Rules of Evidence, stating the general hearsay exceptions; Rules 5(f), 43(e), and 56(e), of the Montana Rules of Civil Procedure relating to proof by affadavit; Rule 32(a) of the Montana Rules of Civil Procedure allowing depositions to be admitted as evidence; and R.C.M. 1947, Section 95-1802(e), allowing depositions to be admissible in criminal actions.

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.

(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 him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time of the acts, events, conditions, opinions or diagnoses, 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. To the extent not otherwise provided in this paragraph, 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. The following are not within this exception to the hearsay rule: (i) investigative reports by police and other law enforcement personnel; (ii) 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; (iii) factual findings offered by the government in criminal cases; (iv) factual findings resulting from special investigation of a particular complaint, case, or incident; and (v) any matter as to which 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. he 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.

(16) Statements in ancient documents. Statements in a document in existence twenty 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 him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

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

Source: Based on Federal Rule 803, with changes to Exceptions (3), (6), (8), (19), (22) and (24).

Commission Comment

This rule is identical to Federal Rule 803, except that changes have been made in several of the exceptions. Explanation of the changes appears in the Commission Comment to those exceptions. The Commission adopted the Federal scheme of setting out hearsay exceptions in Rules 803 and 804, which are differentiated by the requirement of availability of the hearsay declarant. Rule 803 contains exceptions which possess circumstantial guarantees of trustworthiness of such a high standard that the availability of the declarant is immaterial; that is, these statements may be admitted whether or not the declarant is available as a witness. Rule 804(b) contains exceptions which do not possess such a high circumstantial guarantee of trustworthiness and so require that the hearsay declarant be unavailable, as defined in Rule 804(a).

The Advisory Committee's Note to Federal Rule 803, 56 F.R.D. 183, 303 (1972), indicates that the rule is phrased so that statements are admissible only so far as the hearsay rule is concerned ". . . in order to repel any implication that other possible grounds for exclusion are eliminated from consideration." It also notes that it is intended that the firsthand knowledge rule applies to this rule and Rule 804. Ibid.

Finally, it should be mentioned that the Commission adopted, in Exception (24) of this rule, an exception which allows hearsay

statements to be admitted if they have ". . . comparable circumstantial guarantees of trustworthiness . . ." of the other exceptions. In light of this exception, the theory of admissibility of each exception is set out in its Commission Comment.

Exception (1). Present sense impression. This exception is identical to Federal and Uniform (1974) Rule 803(1). The guarantee of trustworthiness is provided by the spontaneity of the event and the reduced liklihood of deliberate misrepresentation; direct and cross-examination of either the declarant or witness who heard the hearsay statement adds to accuracy and aids in evaluation. Advisory Committee's Note, supra, 56 F.R.D. at 304. A slight time lapse is allowed because ". . . in most instances, precise contemporaneity is not possible . . . ." Ibid. The subject of the statement may only concern the event, because the trustworthiness attributed to spontaneity goes no further. Ibid at 305.

This exception is consistent with existing Montana law. There is one case which can be analyzed as coming within this rule, Sellers v. Montana-Dakota Power Co., 99 Mont. 39, 55, 41 P. 2d 44 (1935), and one case which has stated that present sense impression is an exception to the hearsay rule found within the res gestae rule. State v. Newman, 162 Mont. 450, 457, 513, P. 2d 258 (1973). However, the res gestae rule is broader than any of the first three exceptions to the hearsay rule considered under proposed Rule 803; first, because it goes beyond the time limits usually allowed (eleven years in Burns v. Smith, 21 Mont. 251, 275, 53 P. 742 (1898) and 25 years in Welch v. All Persons, 85 Mont. 114, 128, 278 P. 110 (1927), and second, because it applies to events or actions outside the hearsay rule as defined in Rule 801; that is, in Montana evidence of other crimes occurring within the criminal transaction which is the basis of the case, are admissible under the res gestae rule. State v. Howard, 30 Mont. 518, 524, 77 P. 50 (1904); State v. Russell, 93 Mont. 334, 336, 18 P. 2d 611 (1933) and State v. Meidinger, 160 Mont. 310, 321, 502 P. 2d 58 (1972). The statutory basis of the res gestae rule is R.C.M. 1947, Sections 93-401-7 and 93-401-27 (7).

Exception (2). Excited utterance. This exception is identical to Federal and Uniform (1974) Rule 803(2). The guarantee of trustworthiness is provided by the spontaneity of the statement, caused by the excitement ". . . which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." Advisory Committee's Note, supra, 56 F.R.D. at 304. The exception obviously requires an event which causes excitement, and that the declarant be under the stress of excitement when he makes the statement. Ibid. The subject matter of the statement is broader than allowed under Exception (1), in that it need only "relate" to the event.

This exception is also consistent with existing Montana law. As noted in the Comment for Exception (1), the res gestae rule is broader than any exception to the hearsay rule; however, excited utterances were included as hearsay exceptions within that rule in the analysis found in State v. Newman, supra, 162 Mont. at 457.

The Montana cases combine this hearsay exception with the res gestae rule, but provide the same requirement noted above. Callahan v. Chicago, Burlington and Quincy R.R. Co., 47 Mont. 401, 409, 133 P. 687 (1913); Sullivan v. Metropolitan Life Ins. Co., 96 Mont. 254, 266, 29 P. 2d 1046 (1934) and State v. Medicine Bull, 152 Mont. 34, 44, 455 P. 2d 916 (1968).

Exception (3). Then existing mental, emotional, or physical condition. This exception is identical to Federal and Uniform (1974) Rules 803(3) except the phrase "unless it relates to the execution, revocation, identification, or terms of declarant's will," found at the end of the exception in those rules, is deleted from the proposed rule. The Federal and Uniform (1974) Rule 803(3), state of mind exception, generally follows the rule of Mutual Life Ins. Co., v. Hillmon, 145 U.S. 285 (1892), which allows hearsay statements to prove state of mind from which future actions of the declarant may be inferred. Advisory Committee's Note, supra at 305. However, the state of mind exception is not allowed to be used to infer past actions of the declarant. Shepard v. United States, 290 U.S. 96 (1933). The Advisory Committee's Note, supra at 305, explains:

> The exclusion of "statements of memory to prove the fact remembered or believed" is necessary to avoid the virtual distruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind.

The deleted phrase is an exception to this limitation which allows declarations of the testator's state of mind to infer his past actions in connection with his will. The Commission rejects this phrase because it is inconsistent with existing Montana probate law which the Commission felt should not be changed by rules of evidence. Montana case law holds the declarations of the testator are not admissible as to the existence or revocation of the will (In re Colbert's Estate, 31 Mont. 461, 471, 78 P. 971 (1904) and the testator's attitude toward the contestee of the will. In re Miller's Estate, 71 Mont. 330, 341, 229 P. 851 (1924). It is also apparent that the deleted phrase is inconsistent with Montana statutes: R.C.M. 1947, Section 91A-2-603 provides that the "intention of the testator as expressed in his will controls the legal effect of his dispositions." R.C.M. 1947, Section 93-401-13 provides that no evidence other than the will itself is admissible concerning its terms, as part of the parol evidence rule.

The guarantee of trustworthiness of the state of mind exception is also the spontaneity of the statement, for this exception is really a "specialized application of Exception (1), presented separately to enhance its usefulness and accessibility." Advisory Committee's Note, supra at 305.

The exception, as adopted, is consistent with existing Montana

law. It is possible to interpret Burles v. Oregon Shortline Ry. Co., 49 Mont. 129, 134, 140 P. 513 (1914), as allowing hearsay statements relating to a physical condition. Statements of state of mind were held admissible in conjunction with the res gestae rule in Ross v. Industrial Accident Board, 106 Mont. 486, 495, 80 P. 2d 362 (1938) and Thompson v. Steinkamp, 120 Mont. 475, 481, 187 P. 2d 1018 (1947). Finally, this exception was recognized in the analysis of the res gestae rule in State v. Newman, supra 162 Mont. at 457. (See Comment to Exception (1) for discussion of res gestae rule).

Exception (4). Statements for purposes of medical diagnosis or treatment. This exception is identical to Federal and Uniform (1974) Rule 803(4). The guarantee of trustworthiness is provided by the patient's motivation for proper diagnosis and treatment. However, it is apparent that where the patient is obtaining the physician's diagnosis only, for purposes of litigation as under Rule 35 of the Montana Rules of Civil Procedure, this guarantee is not present. However, these types of statements would be admissible as the basis for an expert's opinion under proposed Rule 703, and the likelihood of the jury not distinguishing between the basis of an opinion and substantive evidence is strong enough that statements for purposes of diagnosis only are also admissible. Advisory Committee's Note, supra, 56 F.R.D. at 306. The exception allows statements made to any person and about any pertinent subject, so long as within the purpose of the exception. Ibid. The rule expands the law to allow statements of past medical history because the trustworthiness factor still applies (ibid) and because it is apparent that statements of this type could be admissible as the basis for an opinion or under Rule 803(6), which could admit hospital or physicians' records.

This exception is a change to existing Montana law to the extent that it allows statements dealing with medical diagnosis and treatment to be admitted as substantive evidence, rather than as the basis for an expert's opinion. Montana law allows physicians to base their opinion on statements of this kind (Kelly v. John R. Daily Co., 56 Mont. 63, 78, 181 P. 326 (1919) and Bingham v. National Bank of Montana, 105 Mont. 159, 173, 72 P. 2d 90 (1937)) and upon unsworn medical reports. Klaus v. Hilberry, 157 Mont. 277, 285, 485 P. 2d 766 (1972).

Exception (5). Recorded recollection. This exception is identical to Federal and Uniform (1974) Rule 803(5). The guarantee of trustworthiness "is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them." Advisory Committee's Note, supra, 56 F.R.D. at 306. It is important to distinguish this hearsay exception, recorded recollection, from proposed Rule 612, writings used to refresh memory. As noted in the Commission Comment to Rule 612, a writing used to refresh the witness' memory is used only for that purpose and not as evidence, for the witness is able to testify after referring to such a writing. A recorded recollection is used in the situation where the witness is unable to testify independently of the writing, because he has an insufficient memory of the subject.

This exception is consistent with existing Montana law as found

in R.C.M. 1947, Section 93-1901-6 and the leading case construing that statute, Marron v. Great Northern Ry. Co., 46 Mont. 593, 601, 129 P. 1055 (1913). That case construed the statute to require that the witness "not retain any recollection of the particular facts recorded in the memoranda after he examines the entries . . . ." This requirement was affirmed in O'Rourke v. Grand Opera House, 47 Mont. 459, 470, 133 P. 965 (1913). Exception (5) complies with that requirement by stating: "a witness . . . had knowledge but now has insufficient recollection to enable him to testify fully and accurately . . . ." Marron, supra at 602, construed the statute as requiring a three-part foundation:

> (a) The entries must have been written by the witness himself or under his direction; (b) they must have been written at the time the facts occurred or at a time when the facts were fresh in the witness' memory; and (c) the witness must have known at the time the entries were made that they correctly stated the facts.

Exception (5) complies with these foundational requirements by stating: ". . . shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly." It is also obviously required under existing Montana law and the exception that the witness have personal knowledge of the matter. Spurgeon v. Imperial Elevator Co., 99 Mont. 432, 436, 43 P. 2d 891 (1935).

However, the exception changes existing Montana law in its last sentence which provides that the memorandum may be read into evidence but not received as an exhibit unless offered by an adverse party. Existing Montana law provides in Section 93-1901-6 that the recorded recollection may be read to the jury and received with caution. In State v. Deidtman, 58 Mont. 13, 22, 190 P. 117 (1920), the court stated the reason for this provision in the statute: "Recognizing the possibility of error in the memorandum, and the fact that the opposite party is practically precluded from testing its accuracy, the statute has wisely declared the testimony of the witness . . . shall be received by the jury with caution." The Commission believes the exception states the better policy of not generally allowing the memorandum to be admitted into evidence because the jury may give written testimony undue emphasis. The same policy is found in R.C.M. 1947, Sections 93-5104, which provides that the jury may deliberate with all papers received as evidence "except depositions or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession . . ." and 93-5106, which provides the procedure for the jury's review of testimony.

Exception (6). Records of regularly conducted activity. This exception is identical to Federal and Uniform (1974) Rule 803(6) except the phrase "by or from information transmitted by, a person with knowledge," is deleted and the phrase "of the acts, events, conditions, opinions or diagnoses," is added. It is apparent that

the Federal drafters were following the Federal statute (28 U.S.C. Section 1732) in stating the personal knowledge requirement. However, the Commission made this change because existing Montana law had not specifically called for the personal knowledge rule to have the effect of excluding such records. It was felt that the admissibility of business records presently admitted under Montana law could be restricted by strict construction of the deleted phrase. The Commission also felt that the deleted phrase had the effect of requiring the proponent of the evidence and the custodian of the record to establish personal knowledge. If there is insufficien personal knowledge or lack of regularly conducted activity leading up to the entry in the record, the burden should be on the opponent of the evidence to show it and argue for exclusion under the authority of the phrase in the exception allowing the court to exclude records if the "source of information or method or circumstances of preparation indicate lack of trustworthiness."

The guarantee of trustworthiness is provided by the nature of the record and the circumstances of preparation, enhanced by "systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation." Advisory Committee's Note, supra, 56 F.R.D., supra at 308.

The exception, as amended, is consistent with existing Montana law. R.C.M. 1947, Sections 93-1101-17 and 93-1101-18, contains the common law exceptions for the shop book rule and regular business entry exceptions and Sections 93-801-1 through 801-6, contains the Uniform Business Records as Evidence Act. Section 93-801-1 contains a definition of business substantially the same as that contained in the last sentence of the exception. Section 93-801-2 contains a provision for the admissibility of business records like the first sentence of the exception. The Commission amended the Federal and Uniform (1974) Rule 803(6) to conform to what it believes to be the existing law and practice in Montana under the Uniform Act.

It should be noted that the exception allows opinions and diagnoses (contained in the record) to be admissible; this is consistent with Klaus v. Hilberry, 157 Mont. 277, 285, 485 P. 2d 54 (1921), which allowed medical reports containing opinions and diagnoses to be admitted and referred to Section 93-801-2. It should also be noted that the exception could be seen as an expansion of existing Montana law to the extent that records of regularly conducted activity in a wide variety of forms, including computer print outs, are admissible.

Exception (7). Absence of entry in records kept in accordance with the provisions of paragraph (6). This exception is identical to Federal and Uniform (1974) Rule 803(7). The guarantee of trustworthiness is found in the logical assumption that if records under Exception (6) are allowed to prove the existence of a fact or occurrence of an event because the records are systematically, regularly, and accurately kept and relied upon, then the absence of

an entry of a matter which would ordinarily appear should be allowed to prove the nonexistence or nonoccurence of that matter. This exception has never been dealt with under existing Montana law, although an analogous exception presently exists in Rule 44(b), M.R.Civ.P. See Comment to Exception (10).

Exception (8). Public records and reports. This exception is not the same as Federal Rule 803(8), but is identical to Uniform Rule (1974) 803(8). The Commission chose to adopt the Uniform provision because it was clearer than the Federal Rule and because it expressed better policy with certain reports in requiring the official to testify, rather than admitting his report as a hearsay exception.

The guarantee of trustworthiness of this exception can be found partly under the Exception (6), records of regularly conducted activity exception, partly under the assumption that official duty is regularly performed (R.C.M. 1947, Section 93-1301-7(15)), and "the unlikelihood that he will remember details independently of the record." Advisory Committee's Note, supra, 56 F.R.D. at 311.

This exception is consistent with existing Montana law except that it clarifies several areas where official reports are to be excluded. R.C.M. 1947, Section 93-1001-32, provides the entries in official books or records, made in the performance of official duty, are prima facie evidence of the facts stated therein. R.C.M. 1947, Section 93-901-1, et. seq., the Uniform Official Reports as Evidence Act, modernizes this exception to the hearsay rule. Section 93-901-1 provides: "Written reports or findings of fact made by the officers of this state, on a matter within the scope of their duty as defined by statute, shall, insofar as relevant, be admitted as evidence of the matter stated therein." The adoption of the exception is intended to remove the restriction of admitting only reports from state officials, found in the statute and applied in Richardson v. Farmers' Union Oil Co., 131 Mont. 535, 553, 312 P. 2d 134 (1957). Note that a police report was excluded in a civil case, but on grounds that it stated the cause of an injury, in Gagnier v. Zook. 141 Mont. 214, 377 P. 2d 101 (1962). This exception is inconsistent with State v. Snider, ___Mont.___, 541 P. 2d 1204, 32 St. Rep. 1056, 1062 (1975) which held that a state chemist's report admissible under §93-901-1, and so this case is overruled by this exception.

Exception (9). Records of vital statistics. This exception is identical to Federal and Uniform (1974) Rule 803(9). The circumstantial guarantee of trustworthiness is the same as found with Exception (8); the only distinction between the two is that the souce of information is not necessarily a public official, although a public official does make the record or entry. This guarantee of trustworthiness is enhanced the unlikelihood of a false entry being made where the report is of such an incident and is made pursuant to requirements of law.

This exception is consistent with existing Montana statutes. R.C.M. 1947, Section 93-1001-2 provides that records of this sort are public writings, Section 93-1001-32 provides that entries in official books are prima-facie evidence of their contents, Section 69-4412 provides that certificates concerning vital statistics are prima facie evidence of their contents, and Section 69-4435 provides the duty of any person with knowledge to furnish information concerning vital statistics.

Exception (10). Absence of public record or entry. This exception is identical to Federal and Uniform (1974) Rule 803(10). The circumstantial guarantee of trustworthiness is found in the same assumption made with Exception (7); that is, where a record is systematically, regularly, and accurately kept and relied upon, the absence of such a record or entry should be allowed to prove the nonoccurrence of the event.

This exception is consistent with Rule 44(b), Montana Rules of Civil Procedure, which provides, "A written statement that after diligent search no record or entry of a specific tenor is found to exist in the records designated by the statement . . . is admissible as evidence that the records contain no such record or entry." Note that Rule 44(a), as well as this exception, require proper authentication procedures. See Rule 902.

Exception (11). Records of religious organizations. This exception is identical to Federal and Uniform (1974) Rule 803(11). These records would be admitted under R.C.M. 1947, Section 93-901-1, et. seq., the business records exception, and therefore have the same guarantee of trustworthiness as the records admitted under Exception (6). This guarantee is enhanced by the unlikelihood of false information being provided to religious organizations. Advisory Committee's Note, supra, 56 F.R.D. at 314. There are possible restrictions under Exception (6), relating to the source of information being within the regular course of business, which should not apply here, and so a separate exception is provided. Ibid.

Exception (12). Marriage, baptismal, and similar certificates. This exception is identical to Federal and Uniform (1974) Rule 803 (12). This exception is similar to Exceptions (8) and (9), official records and records of vital statistics, and the guarantee of trustworthiness is found under these exceptions. It is consistent with Montana law as noted under those exceptions, but goes beyond those exceptions in the area of sacrament and so expands Montana law. Note the certification procedure requires authentication. See Rule 902.

Exception (13). Family records. This exception is identical to Federal and Uniform (1974) Rule 803(13). The guarantee of trustworthiness is provided by the unlikelihood that a false family record would exist. This represents the common law exception which has long received such records; the common law exception is found

in R.C.M. 1947, Section 93-401-27(13), which allows evidence of ". . . entries in family Bibles, or other family books or charts, engravings on rings, family portraits and the like . . . ." A family Bible was admitted into evidence, even though it appeared it had been altered, for whatever probative value it might have in the case of In re Colbert's Estate, 51 Mont. 455, 467, 153 P. 1022 (1916). Therefore, this exception is consistent with existing Montana law.

Exception (14). Records of documents affecting an interest in property. This exception is identical to Federal and Uniform (1974) Rule 803(14). The guarantee of trustworthiness is provided by Exception (8), official records, and is enhanced by the procedures associated with the recording process of this type of document. Advisory Committee's Note, supra, 56 F.R.D. at 315. This guarantee is strong enough to allow proof of execution and delivery of the document, even though the recorder probably does not have personal knowledge of those facts. Ibid. It should be noted that importance of documents of this nature lend credibility to their contents.

This exception is consistent with existing Montana law as pointed out in the Commission Comment to Exception (8); R.C.M. 1947, Section 93-401-12(4), which provides that evidence of contents of a writing are provable when the original has been recorded; and recording statutes such as R.C.M. 1947, Sections 16-2909, 39-129, 52-310 and 89-814.

Exception (15). Statements in documents affecting an interest in property. This exception is identical to Federal and Uniform (1974) Rule 803(15). The guarantee of trustworthiness is the same as that found in Exception (14), enhanced by "The circumstances under which dispositive documents are executed and the requirement that the recital be germaine to the purpose of the document. . . particularly in view of the nonapplicability of the rule if dealings with the property have been inconsistent with the document." Advisory Committee's Note, supra, 56 F.R.D. at 315.

The exception is consistent with existing Montana law to the extent set out in the Commission Comment to Exception (14). Note that the document itself and not the record of the document is admissible under this exception and some of those statutes allow the record to be prima facie evidence of the contents of the document.

Exception (16). Ancient documents. This exception is identical to Federal and Uniform (1974) Rule 803(16). There are two problems which arise in connection with ancient documents: authenticity and hearsay objection. The exception requires that the document be authenticated, and in so doing lends trustworthiness to the document. The trustworthiness is enhanced by the fact that the written document predated the controversy in which it is used as evidence. Advisory Committee's Note, supra, 56 F.R.D. at 315. It is also likely that the written document made 20 years before will be the most accurate evidence available.

Generally, existing Montana law is consistent with this exception. R.C.M. 1947, Section 93-1301-7(34), provides a rebuttable presumption that a document more than thirty years old which is authenticated and acted upon as genuine by persons having an interest is genuine. Cook v. Hudson, 110 Mont. 263, 284, 103 P. 2d 137 (1940), construed this statute as presuming the contents of documents are genuine and prima facie evidence of the facts stated therein. King v. Schultz, 141 Mont. 94, 98, 375 P. 2d 108 (1962), construed the statute and Cook v. Hudson, supra, by stating "the ancient document rule does not change the basis for admission of evidence other than as to genuineness of the document." This statement can be explained by later remarks that "ancient documents may be admitted in evidence as proof of the facts therein, provided the writers would have been competent to testify to such facts." This is apparently concerned with the firsthand knowledge rule which applies to this and all exceptions. The exception changes existing Montana law by allowing the age of the document to be twenty instead of thirty years and it need not be acted upon.

Exception (17). Market reports, commercial publications. This exception is identical to Federal and Uniform (1974) Rule 803(17). The guarantee of trustworthiness is provided by "general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate." Advisory Committee's Note, supra, 56 F.R.D. at 316.

The exception is consistent with existing Montana law. R.C.M. 1947, Section 87A-2-724, the Uniform Commercial Code, provides that prevailing price or value of goods regularly bought and sold may be proven by "reports in official publications or trade journals or in newspapers or periodicals of general circulation . . . ." R.C.M. 1947, Section 93-1101-8, provides that "historical works, books of science or art, and published maps or charts . . . are prima facie evidence . . ." of facts of general notoriety and interest." Cases construing this provision have allowed various commercial publications to be admitted: tables showing stopping distances of locomotives (Lynes v. Northern Pacific Railway Co., 32 Mont. 317, 326, 117 P. 81 (1911); and mortality and annuity tables (Ralph v. MacMarr Stores, 103 Mont. 421, 430, 52 P. 2d 1285 (1936). Safety reports and regulations may or may not be admissible. See Hackley v. Waldorf-Horner Paper Co., 149 Mont. 286, 294, 425 P. 2d 712 (1967).

Exception (18). Learned treatises. This exception is identical to Federal and Uniform (1974) Rule 803(18). Exception (17) is really a limited application of the learned treatises exception, and so the guarantees of trustworthiness mentioned there are applicable to this exception. The adoption of this exception represents a change in existing Montana law. (See below). Arguments against the admissibility of learned treatises deal with the lack of cross-examination, and potential misuse of treatises. Advisory Committee's Note, supra, 56 F.R.D. at 316. These arguments are met, first, by the trustworthiness of the exception, and second, by provisions in

the exception to prevent misuse. Ibid. The guarantees of trustworthiness of the exception, that experts in the area generally rely on the work, that the motivation of the writer is to be accurate in order to gain acceptance and that the treatise was written impartially and without concern for litigation, are strong enough to displace the argument of lack of cross-examination of the author. Ibid. The provisions in the exception which prevent misuse are: first, that the treatise be called to the attention of an expert or relied upon by him; second, the treatise must established as a reliable authority on the subject; and third, the learned treatise, if admitted, may only be read into evidence and not received as an exhibit.

This exception, as noted above, is contrary to Montana law. Although R.C.M. 1947, Section 93-1101-8, discussed in Exception (17), would seemingly provide that learned treatises are admissible, case law has provided otherwise. First, cases have held that it is proper to cross-examine an expert using a learned treatise. Emerson v. Butte Electric Ry. Co., 46 Mont. 454, 458, 129 P. 319 (1922) and State v. Bess, 60 Mont. 558, 569, 199 P. 426 (1921). However, it is not permissible to read or frame questions from treatises on direct examination of an expert. Schumacher v. Murray Hospital, 58 Mont. 447, 456, 193 P. 397 (1920) and State v. Bess, supra. The adoption of this exception overrules these cases which prohibit the use of learned treatises on direct examination. It should be noted that learned treatises concerned with legal topics are apparently admissible to prove the contents of the treatise. In re Nielsen's Estate, 118 Mont. 304, 307, 165 P. 2d 792 (1945).

Exception (19). Reputation concerning personal or family history. This rule is identical to Federal and Uniform (1974) Rule 803(19), except the phrase "or dissolution of marriage" is added to be consistent with the concepts contained in R.C.M. 1947, Section 48-316, the Uniform Marriage and Divorce Act. The guarantee of trustworthiness of this and other reputation exceptions that follow is found "when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusion, if any has been formed, is likely to be a trustworthy one." Advisory Committee's Note, 56 F.R.D. supra at 317, quoting 5 Wigmore, Evidence, Section 1580 at 444. This exception is somewhat broader than that found at common law in that the persons allowed to testify as to reputation is enlarged to include associates, a change consistent with conditions in today's society, and the matters about which reputation evidence may be used is broadened to include more than just marriage. Ibid.

This exception is consistent with existing Montana law, although it does represent an expansion as to persons who may testify and topics which may be proven. R.C.M. 1947, Section 93-401- 9, provides "the declaration, act, or omission of a member of a family, who is a decedent, or out of the jurisdiction, is also admissible in evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissible." Section 93-401-27(11),

provides that among the facts provable at trial are "common reputation existing previous to the controversy, respecting facts . . . in cases of pedigree. Two cases have held this sort of evidence admissible. In re Colbert's Estate, 51 Mont. 455, 468, 153 P. 1022 (1915) and In re Wehr's Estate, 96 Mont. 245, 251, 29 P. 856 (1934). This exception is a change to Montana law to the extent that the exception no longer requires the reputation to predate the controversy.

Exception (20). Reputation concerning boundaries or general history. This exception is identical to Federal and Uniform (1974) Rule 803(20). The guarantee of trustworthiness of reputation evidence is discussed in the Commission Comment to Exception (19). This exception is generally consistent with existing Montana law. R.C.M. 1947, Section 93-401-27(11), provides that among the facts provable at trial are "common reputation existing previous to the controversy respecting facts of a public or general interest more than 30 years old, and cases of . . . boundary." Section 93-1301-7(12) provides the rebuttable presumption "that a person is the owner of property. . . from common reputation of ownership." Cases recognize the exception in relation to boundaries. Kurth v. LaJeune, 83 Mont. 100, 109, 269 P. 408 (1928); Nemitz v. Reckards, 98 Mont. 229, 240, 38 P. 2d 930 (1934) and Brennan v. Mayo, 105 Mont. 276, 278, 72 P. 2d 463 (1937) and cases cited therein.

Exception (21). Reputation as to character. This exception is identical to Federal and Uniform (1947) Rule 803(21). The guarantee of trustworthiness for reputation evidence is discussed in the Commission Comment to Exception (19). This exception is adopted to allow character evidence to be proved by reputation under Rules 404, 405 and 608 without a hearsay problem. See Commission Comments under those rules for discussion of existing Montana law which is consistent with this provision.

Exception (22). Judgment of previous conviction. This exception is identical to Federal and Uniform (1974) Rule 802(22), except prosecution is substituted for Government and the phrase "for purposes other than impeachment" because of the Commission's action in relation to proposed Rule 609, not allowing impeachment by conviction of crime. The effect of this exception is to admit judgments of previous convictions for what they are worth and to prove any fact essential to sustain the judgment. Advisory Committee's Note, supra, 56 F.R.D. at 318.

This exception is inconsistent with existing Montana law. Doyle v. Gore, 15 Mont. 212, 213, 38 P. 939 (1895), held that evidence of conviction for assault was inadmissible in the civil action arising out of th e same incident. The rule was followed in State v. Vuckovich, 61 Mont. 480, 492, 203 P. 491 (1921). The Commission feels that the guarantee of trustworthiness of this exception, the high standard of proof in criminal cases and the result of a jury's deliberations or plea of guilty, is as trustworthy as any of the

other exceptions, and so changed the rule in Montana. It should be noted that the Montana Supreme Court sanctioned a trial court taking judicial notice of a criminal conviction in a civil action. Sikora v. Sikora, 160 Mont. 27, 34, 497 P. 2d 808 (1972).

Exception (23). Judgment as to personal, family, or general history, or boundaries. This exception is identical to Federal and Uniform (1974) Rule 803(23). The guarantee of trustworthiness is that a judgment based on reputation is at least as reliable as the reputation itself. Advisory's Committee's Note, supra, 56 F.R.D. at 319. Therefore, when evidence admissible under Exceptions (19) and (20) is the basis for a judgment, this exception allows that judgment to be admissible. It is probable that this exception will be used when other reputation evidence is not available. There is no Montana law specifically on this exception, but reputation evidence of this sort is currently admissible. See Commission Comment to Exceptions (19) and (20).

Exception (24). Other exceptions. This exception is identical to the Exception (24) contained in the version of the Federal Rules submitted to Congress. Congress amended that exception to require, in addition to circumstantial guarantees of trustworthiness, that the statement is offered as evidence of material fact, that it is more probative on the point for which it is offered than any other evidence, that the general purposes of the rules and interests of justice will be served, and that notice be served on the adversary.

The Commission believed this exception should allow "room for growth and development of the law of evidence in the area of hearsay" (Advisory Committee's Note, supra, 56 F.R.D. at 320), and that the amendments by Congress are too restrictive and contrary to the purpose of the provision. These amendments can be criticized as follows: The requirement that the statement be offered as evidence of a "material" fact is redundant in requiring relevance as defined in Rule 401, and uses outmoded language so indicated in the Commission Comment to that rule. The requirement that the evidence be more probative on the point for which it is offered restricts the use of these types of exceptions by imposing a requirement similar to that of unavailability under Rule 804; this restriction would have the effect of severely limiting the instances in which the exception would be used, and impractical in the sense that a party would generally offer the strongest evidence available regardless of the existence of this requirement. The requirement that the general purposes of these rules and interests of justice will be served in view of Rule 102. Finally, the notice requirement is unnecessary because of discovery procedures and the discretion of the court in allowing advance rulings on the admissibility of evidence.

The guarantee of trustworthiness set out in the Commission Comment to each of the other exceptions is the criteria to be used in determining whether to apply this open-ended exception and find a "comparable circumstantial guarantee of trustworthiness."

There is no equivalent Montana law to this exception. The adoption of this exception changes existing Montana law to the extent that it allows a court to admit hearsay because equivalent guarantee of trustworthiness exists, (even though there is no specific exception allowing it).

RULE 804. Hearsay exceptions: declarant unavailable

(a) Definition of unavailability. Unavailability as a witness includes situations in which the declarant -

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

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

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

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

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

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

Source: Based on Federal Rule 804 (a)

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

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

(2) Statement under belief of impending death. A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstance of what he believed to be his impending death.

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

(4) Statement of personal or family history. (A) a statement concerning the declarant's own birth, adoption, marriage, divorce or dissolution of marriage, legitimacy, relationship by blood, or family history, even though the declarant had no means of acquiring the 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.

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

Source: Based on Federal Rule 804 (b)

Commission Comment

(a) Definition of unavailability.

This subdivision is identical to Federal and Uniform (1974) Rules 804 (a) except that in (a) (5) the parenthetical phrase "(or in the case of a hearsay exception under subdivision (b) (2), (3), or (4), his attendance or testimony)" has been deleted. The Commission deleted this phrase because it imposes a requirement which not only does away with the concept of uniform application of the unavailability requirement to the exceptions in subdivision (b), but also changes existing Montana law to requrie a party to take the expensive and time-consuming step of deposing a witness who makes a statement that would fall within Rule 804(b), (2), (3), or (4). The Commission feels that depositions should only be taken by a party at its option for discovery purposes or

where the party feels there is a need for the preservation of the testimony. It also felt that it is unfair to make this a requirement of admissibility of a statement where the proponent has acted in good faith and, through no fault of his own, the witness is unavailable and was not deposed. Enacting this parenthetical clause would have the effect of depriving the trier of fact of valuable evidence, and would also change Montana law to add a further restriction to the admissibility of hearsay statements.

The Commission adopted this subdivision because it represents a practical and sensible solution to the problem of admitting a hearsay statement or receiving no evidence at all where the witness is unavailable. Whether the witness is unavailable because of an exemption for privilege, refusal to testify, claim of lack of memory, inability to testify or absence from the jurisdiction, the result will always be loss of his testimony and a need for reliance on his hearsay statement. Therefore this subdivision applies to each of the hearsay exceptions found in subdivision (b) a uniform definition of unavailability which considers whether the testimony of the witness will be received, and if not, then admits the hearsay statement insofar as unavailability is concerned.

This subdivision changes existing Montana law by uniformly applying the definition of unavailability to each of the hearsay exceptions in subdivision (b) and by expanding the unavailability requirement for all of those exceptions. The unavailability requirement under existing Montana law for each of the exceptions will be considered in the Commission Comment for those exceptions. It is sufficient to note here that Montana law does not recognize a claim of privilege, refusal to testify, despite a court order, or lack of memory as satisfying the requirement that the hearsay declarant be unavailable. Inability to testify and absence from the hearing meet the unavailability requirement for former testimony under existing Montana law, but the other three exceptions require that the declarant be dead in order that he be considered unavailable. Finally, note under subdivision (a) (5) that absence from the hearing is allowable only if a proponent is unable to procure attendance by "reasonable means", and that this is consistent with the Constitutional requirements set out in State v. LaCairo, 163 Mont., 511, 515, 518, P. 2d., 982 (1974).

(b) Hearsay exceptions.

(1) Former testimony. This exception is identical to

Federal and Uniform (1974) Rules 804 (b) (1) in its treatment of criminal actions and proceedings, and so the language of the introductory clause and clause (B) is the same as that exception. However, the Commission has adopted the more liberal rule contained in the Supreme Court draft of the Federal rule sent to Congress for civil actions and proceedings in clause (A). At common law, former testimony was admissible only where there was an identity of parties and interests; this is the approach taken by the Federal and Uniform (1974) Rules in that they admit former testimony only where the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony, the phrase "similar motive" approximating the requirement of identity of issues. The Supreme Court draft adopted a more liberal rule allowing former testimony to be offered against any party so long as the party who previously cross-examined had a similar motive and interest in examining the witness as the party against whom the testimony is being offered.

The Commission took this action for the following reasons. First, applying the liberalized Supreme Court draft found in clause (A) to criminal cases could easily pose constitutional problems concerned with the right to confrontation, in that former testimony could be admissible against the defendant even though he had never had the opportunity to cross-examine that witness. Therefore, the more conservative common law approach was applied to criminal cases in clause (B). Second, the Commission applied the more liberal Supreme Court version to civil actions and proceedings in clause (A) because it allows trustworthy evidence to be admitted where a stricter rule could exclude. It can be argued that it is unfair to impose the cross-examination of the party in the former action upon the party against whom the former testimony is offered, and that it is unfair to admit testimony against any party who has not cross-examined the witness. However, it is apparent that former testimony is like many other hearsay exceptions which do not allow the hearsay deponent to be cross-examined. Further, while it may be unfair to place a burden of another party's cross examination on the party against whom the testimony is now offered, the requirement that the parties have similar motivation and interest in the cross-examination will usually mean an effective cross-examination has occurred. Most important, where the choice is between no evidence at all and the former testimony, the former testimony should be admitted even though it may result in some unfairness. Third, differentiating between civil and criminal cases with former testimony is consistent with Montana case law, which has applied different rules to civil and criminal cases. (See below.)

Former testimony is admitted as a hearsay exception, like other hearsay exceptions, where the requirements of unavailability

and a circumstantial guarantee of trustworthiness are met. The unavailability requirement with its exception is set out in subdivision (a) of this rule. The circumstantial guarantee of trustworthiness can be found in the conditions under which this type of hearsay statement is made; that is, the witness is under oath and subject to cross-examination. The Advisory Committee's Note, 56 F.R.D. 183, 323, (1972), indicates that this exception is the strongest hearsay and perhaps could be included under Rule 803 (which does not require the deponent to be unavailable). However, it also notes that placing this exception under Rule 804 is consistent with tradition, the policy of producing the witness if he is available, and expresses a preference for testimony personally given by the witness, rather than his former testimony.

This exception is generally consistent with existing Montana law. R.C.M., 1948, Sec. 93-401-27(8) provides:

> "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts... 8. The testimony of a witness, deceased, or out of jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter."

Use of depositions in the same action or proceeding is governed in civil cases by Rule 32 (a) (3) of the Montana Rules of Civil Procedure (as amended, 1975). Use of depositions in criminal proceedings is governed by R.C.M. 1947, Sec. 95-1802 (e).

The unavailability requirement contained in Sec. 93-401-27 (8) is met in three instances, death, absence from the jurisdiction, or inability to testify. The unavailability requirement of the statute has been construed in Reynolds v. Fitzpatrick, 28 Mont. 170, 172, 72 P. 510 (1903) where the court held "the proponent of a former testimony must prove the ground of unavailability by positive testimony or by the existence of circumstances which warrant an inference that the ground of unavailability exists." The foundation showing unavailability in criminal cases is discussed in Petition of Tooker, 147 Mont., 207, 217, 410, P. 2d., 923 (1966) and the Constitutional requirements for unavailability in criminal cases can be found in State v. Zachmier, 153 Mont., 64, 72, 453 P. 2d., 783 (1969) and State v. LaCairo, supra, 163 Mont. at 515.

Section 93-401-27 (8) also states that former testimony is to be allowed "between the same parties, relating to the same matter." This is the requirement found at common law for identity of parties and issues. Early cases strictly construed

this requirement. Anaconda Copper Mining Company v. Heinze, 27 Mont., 161, 167, 69 P., 909 (1902) and Leggat v. Carroll, 30 Mont., 384, 389, 76 P., 805 (1904). However it appears that later Montana cases have applied a more liberalized rule in civil cases relating to the identity of parties. In O'Meara v. MacDermott, 40 Mont. 38, 57, 104 P. 1049 (1909), the Court held "precise nominal identity of all the parties is not necessary in order to make former testimony competent." In that case, there were co-parties on each side in the former action, but not in the action where the former testimony was offered. In Damm v. Damm, 82 Mont., 239, 245, 266 P. 410 (1948), a case where depositions were offered from a former action where the parties and issues were the same, the Court stated, "admissibility of such depositions is not dependent upon exact identity of parties and causes of action, but rather upon the identity of the question being investigated, and the opportunity of the party against whom the deposition is offered to cross-examine." Finally, in Arnold v. Genzberger, 96 Mont. 358, 372, 31 P. 2d., 396 (1934) the Court admitted the testimony of a deceased witness who was a party in the former action, citing O'Meara v. MacDermott, supra 40 Mont. at 57, and Damm v. Damm, supra 82 Mont. at 245. The reason for the rule requiring identity of parties and issues, as stated in Nelson v. Gough, 61 Mont. 301, 303, 202 P. 196 (1921), also appears to be the reason for liberalizing the rule:

> "If the issues presented on the former occasion were materially different, the cross-examination of the witness 'would not have been directed to the same material point of investigation,' and therefore could not have been an adequate test for exposing inaccuracies and falsehoods." (2 Wigmore on Evidence, Sec. 1386).
>
> "Conversely, it is sufficient if the issue was the same or substantially so with reference to the likelihood of adequate cross-examination, because the opponent has thus already had the full benefit of the security intended by the law." (Id., Sec. 1387).

In criminal cases, however, Montana law has not applied the same liberal standards. While State v. Byers, 16 Mont. 565, 568, 41 Pacific 708 (1895) held that there was no confrontation clause problem as to the admissibility of former testimony, the later case of State v. Storm, 127 Mont. 414, 417, 265 Pacific 2d., line 71 (1953) and State v. Piveral, 127 Mont. 427, 430, 265 Pacific 2d. 969 (1953) held that the confrontation clause did not allow the admissibility of former testimony in a criminal trial. Both of these cases were overruled in State

v. Bouldin, 153 Mont. 276, 281, 456 Pacific 2d. 830 (1969), where the trial court admitted former testimony where the defendant had the opportunity to cross examine the witness at the time the former testimony was given. Other criminal cases admitting former testimony, cited above in connection with the unavailability requirements, have all been instances where testimony was admitted against a defendant who had the opportunity to cross examine the witness.

(2) Statement made under belief of impending death. This exception is identical to Federal and Uniform (1974) Rule 804 (b) (2) except that an introductory clause reading "in a prosecution for homocide or in a civil action or proceeding," is deleted. The Commission deleted this clause because it felt that if statements of this sort were to be admissible in homocide prosecutions, they should also be admissible in any other criminal prosecutions. R.C.M. 1947. Sec. 93-401-27 (4) admits dying declarations in all criminal actions, and so the adoption of the Federal rule would have been a restriction on existing Montana law. None of the cases have expressed the rule that dying declarations are only admissible in prosecutions for homocide, although the cases considering admitting dying declarations have all been of this type of prosecution. Note that the Federal, Uniform, and proposed Montana rule all admit statements of this sort in civil actions; this is a major change from the common law. The Commission feels that if statements of this sort are reliable enough for use in criminal prosecutions then they should also be used in civil cases where the outcome does not involve personal freedom. It should also be noted that the unavailability requirement, as defined in subdivision (a), allows the hearsay declarant's statement to be admitted, even though he is not dead. However, the exception retains a circumstantial guarantee of trustworthiness required at common law, that the declarant make a statement under a belief of impending death.

This exception changes existing Montana law. First, it applies to criminal as well as civil cases, an expansion of Sec. 93-401-27 (4) which reads "... in criminal actions, the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death." And second, the unavailability requriement stated in the statute apparently requires the declarant to die in order for the statement to be admissible; this is changed by the unavailability requirement applied to this exception through Subdivision (a).

The other requirements contained in the statute, that the statement be made under a sense of impending death and that it concern the cause of the death, are additional circumstantial guarantees of trustworthiness found in this exception. There are many Montana cases dealing with whether or not a sufficient foundation has been laid to show a sense of impending death. In State v. Russell, 13 Mont. 164, 167, 32 P. 854 (1893) the Court held that it was not required that the declarant state he had no hope of recovery from his injury, for this may be shown by the facts and circumstances surrounding the declarant's making of the statement. In State v. Byrd, 41 Mont. 585, 600, 111 P. 407 (1910) the Court held that the sense of impending death foundation was satisfied when it was shown that the declarant died from the wounds from which he was suffering even though an operation was subsequently performed in an attempt to save his life. In State v. Martin, 76 Mont., 565, 568, 248 P. 176 (1926) the Court indicated the requirements for the admissibility of this type of hearsay statement, as found in the statute, and concluded "It is the state of mind of the declarant which determines the admissibility of the declaration..." The leading case considering this foundation is State v. Morran, 131 Mont. 17, 30, 306 2d., 679 (1956) where the Court reviewed most of the Montana cases in this area. The requirement that the declaration relate to the circumstances of the declarant's death has been construed liberally in State v. Crean, 43 Mont., 47, 56, 114 P. 603 (1911), "to comprise the facts and circumstances of the killing, and such other facts and circumstances, immediately surrounding and attending it, as properly form a part of the res gestae." In State v. Le Duc, 89 Mont. 545, 557, 300 P. 919 (1931) the Court held it was proper to allow a dying declaration which included the fact that the defendant had hit another person than the declarant.

(3) Statement Against Interest. This exception is identical to Federal and Uniform (1974) rules 804 (b) (3) except that the clause "or to make him an object of hatred, ridicule, or disgrace..." is added so that a statement against the declarant's social interests is included under this exception. This particular clause was deleted by Congress from the version of the Federal rules presented it by the Supreme Court. The Commission feels the clause should be included, for statements 'against social interest' are of sufficient importance to meet the circumstantial guarantee of trustworthiness under this hearsay exception. That guarantee of trustworthiness is that persons do not make statements against their interest unless true. Allowing

statements against penal interest to be admitted raises two problems. The first is concerned with statements which exculpate the accused in the criminal action in which he is being tried. This problem is solved by the last sentence in the exception which requires the statement to be corroborated so that false or trumped up confessions could not be used to exculpate. The second problem is concerned with statements against penal interests which inculpate the accused. The admissibility of these statements involves constitutional principles still under development, and so this type of statement is not governed by the rule.

This exception greatly expands existing Montana law concerning statements against interests. Statutes admitting these statements, R.C.M. 1947, Sec. 93-401-6, declarations of predecessor in title against interest, Sec. 93-401-10, declarations against pecuniary interest, Sec. 93-401-27 (4), declarations against proprietary interest, and Sec. 93-1101-17 (1) writings against interest, all require that the declarant be deceased. Also see MacDonald v. Protestant Episcopal Church, 150 Mont., 323, 335, 435 P., 2d., 369 (1967) holding that Montana only admits declarations against interest when the declarant is dead. Therefore, to the extent that Federal 804 (b) (3) and the definition of unavailability under 804 (a) allow declarations against interest where the declarant is not deceased, this is the change to existing Montana law. The statutes just cited (which deal with declarations against interest) only allow statement against the declarant's pecuniary or proprietary interests. This was affirmed in MacDonald v. Protestant Episcopal Church, supra 150 Mont. at 335. This exception changes existing Montana law by allowing statements against penal and social interest as well as those against proprietary and pecuniary interest to be admissible.

This exception as well as well as existing Montana law require that the statement be against the declarant's interests, and so the common law circumstantial guarantee of trustworthiness is retained. Cases which have specifically required that the declaration be against the interests of the declarant are Washoe Copper Company v. Juanila, 43 Mont. 178, 185, 115 P. 916 (1911); Wilson v. Davis, 110 Mont. 356, 366, 103 P. 2d., 149 (1940); McReynolds v. McReynolds 147 Mont. 476, 481, 414 P. 2d., 531 (1966) and MacDonald v. Protestant Episcopal Church, supra 15 Mont. at 335. It logically follows that where a declaration is self-serving, it is not against the interests of the declarant, the guarantee of trustworthiness fails, and the statement is not admissible under this exception. Welch v. Thomas, 102 Mont. 591, 601, 61 P. 2d., 404 (1936) and King v. Schultz, 141 Mont. 94, 99, 375 P. 2d., 108 (1962).

(4) Statement of Personal or Family History. This exception is identical to Federal and Uniform (1974) Rules 804 (b) (4) except the phrase "or dissolution of marriage" is added after divorce to be consistent with the concepts contained in R.C.M. 1947 Sec. 48-316, The Uniform Marriage and Divorce Act, as well as the language contained in proposed Rule 803 (19). The distinction between exception 803(19) and this exception is that Rule 803(19) allows the same subject matter to be proven by reputation evidence, while this exception relies upon the declaration of an unavailable witness to prove the same type of facts. The guarantee of trustworthiness for this exception is identical to that found for Rule 803(19). (See the Commission Comment to that rule.) In addition, it is quite natural for persons to discuss family history among members of the family or close friends, and it is highly unlikely that falsehood would be repeated in this context. Common law required that in order for these types of declarations to be admissible, the declaration be made before the controversy arose. This exception does not contain that requirement and it is apparent that existing Montana law was already in accord with the exception. The exception expands the common law by allowing the statements to concern more than geneology, and in allowing a person closely associated with the family to be the hearsay declarant. Advisory Committee's Note, supra 56 F.R.D. at 328.

This exception is consistent with existing Montana law, although it is somewhat broader. R.C.M. 1947 Sec. 93-401-9 provides "the declaration, acts, or ommission of a member of a family, who is a decedent, or out of a jurisdiction, is also admissible as evidence of common reputation, in cases where, on question of pedigree, such reputation is admissible." It is possible this statute could be construed to apply to declarations concerning reputation, and so would be consistent with proposed Rule 803(19). However, Sec. 93-401-27 (4) provides "the act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person..." This section plainly allows the declaration of a deceased person, but is changed to the extent that the unavailability requirement under Rule 804 (a) allow the declarant to be unavailable through means other than death. That section also uses language that is slightly narrower concerning the subject matter of the declaration. That section also restricts declarations to persons related by blood or marriage, while the exception expands this restriction by allowing the declarant to be a person intimately associated with the family. Welch v. All Persons 85 Mont. 114, 128, 278 P. 110 (1929) held that depositions taken on an issue as

to whether a marriage existed were admissible in a later trial, and so the court did not apply the common law restriction that the statements must be made before the controversy arose. This is consistent with the exception.

(5) Other Exceptions. This exception is identical to the version of Federal Rule 804 (b) (6) submitted to Congress but amended by renumbering and adding the exact conditions added to a similar exception found in Federal Rule 803(24). Since the conditions are identical in each exception and have been rejected in proposed Rule 803(24), the Commission Comment to that Rule applies here. Note that the circumstantial guarantees of trustworthiness found in the Commission Comment to each of the exceptions in proposed Rule 804(b) are to be applied with this exception in finding "comparable guarantees of trustworthiness."

RULE 805. Hearsay Within Hearsay

Hearsay within hearsay is not excluded under the hearsay rule if each part of a combined statement conform with an exception to the hearsay rule provided in these rules.

Source: Federal Rule 805.

Commission Comment

This Rule is identical to Federal and Uniform (1974) Rules 805. The Advisory Committee's note, 56 F.R.D. 183, 329 (1972) indicates "on principle it scarcely seems open to doubt that the hearsay rule should not call for exclusion of a hearsay statement which includes a further hearsay statement when both conform to the requirements of a hearsay exception." The Commission feels this is the only sensible solution to the problem of hearsay within hearsay, or multiple hearsay situations. There is no existing Montana law directly dealing with hearsay within hearsay, perhaps indicating that this rule will help courts properly analyze the problem and admit hearsay statements under this rule.

RULE 806. Attacking and Supporting the Credibility of Declarant.

When a hearsay statement, or a statement defined in Rule 801 (D) (2), (D), (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 the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded

an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

Source: Federal Rule 806.

Commission Comment

This Rule is identical to Federal and Uniform (1974) Rules 806. The Rule simply ensures that a hearsay declarant or the maker of a statement under Rule 801, (admissions by persons authorized, agents, employees, or co-conspirators), to have their credibility attacked as though the person had in fact testified. Advisory Committee's Note, 56 F.R.D. 183, 329 (1972). This is the effect of the first sentence of this rule. The second sentence of the Rule provides that the foundation requirements for impeachment by a prior inconsistent statement, as set out under Rule 613 (b), are not required under this Rule. Rule 613 (b) requires that a person so impeached be afforded an opportunity to explain or deny the statement. It is obvious that this requirement must be waived in the case of a person not present at trial or this method of impeachment would be effectively foreclosed. The final sentence of the rule is intended to ensure the cross-examination is not restricted.

Only two Montana cases have been concerned with attacking the credibility of a hearsay declarant, and each is consistent with this rule. The leading case is State v. Kacar, 74 Mont. 269, 281, 240 P., 365 (1925) where the Court held that the credibility of a declarant's dying declaration could be attacked like any other evidence. In Howe V. Messimer, 84 Mont., 304, 310, 275 P., 265 (1929) the Court held that an admission by a party may be impeached by a prior inconsistent statement without laying a foundation. Note that the provisions of R.C.M. 1947 Sec. 92-1901-12, relating to the foundation requirements for impeachment by a prior inconsistent statement, have been changed by proposed Rule 613 (b) and that the second sentence of this rule waiving foundation requirements can be construed as a further change to that statute. The final sentence of the Rule, allowing open cross-examination of the declarant, could be construed as consistent with Rule 43 (b) of the Montana Rules of Civil Procedure. (Also see proposed Rule 607 and Commission Comment concerning impeachment of one's own witness.)

ARTICLE IX

AUTHENTICATION AND IDENTIFICATION

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.

(8) Ancient documents or data compilation. 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 likly be, and (C) has been in existence 20 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) Method provided by statute or rule. Any method of authentication or identification provided by statute, these rules , or other rules applicable in the courts of this state.

Source: Based on Federal Rule 901, except for a change in (b) (10).

Commission Comment

(a) General Provision

This subdivision is identical to Federal and Uniform (1974) Rules 901 (a). The commission has adopted this general provision to simplify the process of authentication or identification. The Advisory Committee's Note, 56 F.R.D. 183, 323 (1972) indicates "authentication and identification represent a special aspect of relevancy... Thus a telephone conversation may be irrelevant because of an unrelated topic or because the speaker is not identified. The latter aspect is the one here involved." The standard contained in this subdivision is generally consistent with existing Montana law. In State v. Davis, 60 Mont. 426, 436, 199 P. 421 (1921) the Court held the standard for authenticity of a physical object is a prima facie showing of a connection between the object and "clear, certain, and positive proof is not required." This standard has been affirmed in State v. Wilroy, 150 Mont.

255, 258, 434 P., 2d., 138 (1967) and State v. Fitzpatrick, 163 Mont. 220, 230, 516 P. 2d., 605 (1973). In State v. Cooper, 161 Mont. 85, 91, 904 P., 2d., 978 (1972) the Court stated "authenticity for admissibility can be demonstrated by direct or circumstantial evidence and the consistency of evidence for a foundation is within the discretion of the trial judge." The Advisory Committee's Note, supra F.R.D. Ad. 333 indicates that the Federal drafters intend authenticity to be within the category of relevancy dependent upon fulfullment of a condition of fact under Federal Rule 104 (B). Montana Rule 104 (b) did not adopt the concept contained in the Federal Rule because it was felt it was impractical and inconsistent with Montana law. (See Commission Comment to Montana Rule 104 (b).) The Commission feels that the present practice under existing montana law of allowing the judge to admit evidence upon a proper authentica tion foundation should be continued, and the jury need not be allowed to exclude evidence conditionally admitted as under the Federal rule. Montana juries will still be allowed to reject evidence authenticated under this subdivision on grounds other than conditional admissibility. Whether the jury excludes evidence from its consideration because its conditional admissibility has failed or because of lack of credibility of authenticity, the result is the same: the evidence is disregarded. Therefore, the Federal rules concept of conditional relevance in Rule 901 (a) has little practical difference from existing Montana law.

This general standard of authentication will supersede many specific provisions in existing Montana law. Two examples of specific provisions not contained in the list of illustrations is subdivision (b) are R.C.M. 1947, Sections 93-1101-13 and 93-1101-16. Section 93-1101-13 provides that evidence of the execution of an instrument is not necessary where the party against whom it is offered has admitted its execution if the instrument is one mentioned in Section 93- 1101-16 or produced from the custody of the adverse party and acted upon by him as genuine. Section 93-1101-16 provides that writings more than thirty years old may be authenticated by comparison with specimens purported to be genuine when the specimen has been "generally respected and acted upon as such (genuine) by persons having an interest..." The general standard in this subdivision that the writing or object is what its proponent says it is certainly accomplishes the same end as these statutes, but without having to consider specific provisions relating to various types of writing or objects.

The authentication article does not distinguish the terms authentication and identification, nor does it distinguish

between the authentication or identification of writigns and other physical objects. Therefore the general standard will governthe introduction of any writing or physical object into evidence.

(b) Illustrations.

This subdivision is identical to Federal and Uniform (1974) Rules 901 (b) except for a change in illustration (10) which makes the subdivision consistent in language used in these rules. The change in illustration (10) is intended to allow application of authentication as it is provided by statute or rule in Montana, while Federal Rule 901 (b) (10) is intended to allow application under Federal law. Note that the introductory clause to this subdivision indicates that it is intended to list illustrations, and is not intended to be a limitation upon the application of the principle found in subdivision (a) of this rule.

(1) Testimony of Witness With Knowledge.

This illustration is identical to Federal and Uniform (1974) Rules 901 (b) (1). The simplest and most convenient form of authentication or identification is provided in this illustration, allowing a witness to simply testify the matter is what the proponent claims it to be. This illustration is consistent with existing Montana law. A good example of this illustration is the introduction of photographs. In Pilgeram v. Hass, 118 Mont. 431, 449, 167 P. 2d., 339 (1946) the Court stated the foundational requirement for authentication of a photograph:

> "Where the nature or condition of place is a matter of controversy in a civil action, photographs of the place shown to be true representations of the place at the time in question are generally admissible in evidence, and a photograph may be proved to be a correct representation of a place so as to be admissible by witnesses other than the person who took the photograph..."

It can be noted that a photograph may be admissible even where there has been a change in conditions appearing in the photograph, so long as they are explained. Cases following these rules are State v. Peters, 146 Mont. 188, 200, 405 P., 2d., 642 (1965); Pickett v. Kryger, 151 Mont. 87, 97, 439 P. 2d., 57, (1968); and Lamb v. Page, 153 Mont. 171, 176, 455 P. 2d., 337 (1969).

Several Statutes also are good examples of the principle of this illustration: R.C.M. 1947, §93-1001-14 allows a witness to testify as to the laws of a sister state or foreign country. §93-1001-19 allows proof of a copy of a foreign country's judicial records by a witness' testimony that the copy has been compared with the original, that the original was in the custody of the clerk of the court, and that the copy is attested by the clerk of the court to be the original. Section 93-1101-12 (1) allows a writing to be authenticated by any one who saw the writing executed and §93-1101-12 (3) allows a subscribing witness to authenticate the writing. Finally, §93-1101-14 allows a witness to authenticate his own handwriting by simply so testifying.

(2) Non-expert Opinion on Handwriting.

This illustration is identical to Federal and Uniform (1974) Rules 901 (b) (2). It expresses the rule observed at common law and in Montana that a non-expert may give his opinion on genuineness of handwriting if familiar with that handwriting. Note that familiarity acquired for the purposes of litigation is not within this illustration, but within illustration (3). This illustration is consistent with existing Montana law found in several Montana statutes: R.C.M. 1947, Sec. 93-401-27 (9) provides: "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: ..." the opinion of the witness respecting the identity or handwriting of the person, when he has knowledge of the person or handwriting..." Sec. 93-1101-12 provides:

"Any writing may be proved either:

1. By anyone who saw the writing executed; or

2. By evidence of genuineness of the handwriting of the maker; or,

3. By a subscribing witness."

Finally, Sec. 93-1101-14 provides: "The handwriting of a person may be proved by anyone who believes it to be his, and who has seen him write, or has seen writing purporting to be his, upon which he has acted or been charged, and thus acquired a knowledge of his handwriting." Montana cases have conformed to these statutes and have liberally allowed the foundation to be established. In State v. Mahoney, 24 Mont. 281, 286, 61 P. 647, (1900), the prosecutrix was allowed to authenticate the handwriting of a note to her from the defendant even when she was unable to swear

positively that the note was in his handwriting. In State v. Howard, 30 Mont., 518, 525, 77 P. 50 (1904) a letter was allowed to be authenticated by a witness testifying that he was familiar with the defendant's handwriting, and that the letter looked like it was in the defendant's writing. In Ingebrightsen v. Hatcher, 87 Mont., 482, 485, 288 P. 1023 (1930), a witness, though not personally acquainted with the writer, had seen and acted upon the signature a number of times in the ordinary course of business, and this testimony was held sufficient foundation for authentication. This rule was followed in Leffek v. Luedman, 95 Mont. 457, 464, 27 P. 2d., 511 (1933).

(3) Comparison by Trier or Expert Witness.

This illustration is identical to Federal and Uniform (1974) Rules 901 (b) (3). This illustration allows comparison by the trier of fact or by an expert witness of the item of evidence to be introduced with a specimen; it is not intended to be limited to writings, but may include any other authentication by comparison. This illustration is generally consistent with existing Montana law. Montana law allows the comparison by the trier of fact or by expert witness in authentication of a writing under Sec. 93-1101-15, R.C.M. 1947, which provides:

> Evidence respecting the handwriting may also be given by comparison, made by the witness or jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the judge.

The Advisory Committee's Note to this illustration, supra 56 F.R.D. at 334, indicates that this illustration is not intended to require the judge to be satisfied with the genuineness of the speciman, insofar as a high standard of genuineness is required. Therefore, this illustration could provide a slight change to existing Montana law, although certainly it is not intended that specimens be used which are not genuine. It can be noted that Sec. 93-1101-15 has been interpreted by In Re Miller's Estate, 71 Mont., 330, 338, 229 P. 851 (1924) so that "witness" means expert witness. The jury, as trier of fact, is free to accept or reject the opinion of an expert as to the genuineness of handwriting through comparison. Grosfield v. First National Bank, 73 Mont. 219, 239, 236 P., 250 (1925). Also, §93-1101-16 allows a comparison of handwriting using documents thirty years old and relied upon by persons having an interest as genuine.

Finally, note that evidence of ballistics is another means of authentication through comparison, and that this type of evidence is admissible under existing Montana law. State v. Simon, 126 Mont. 218, 223, 247 P. 2d., 481 (1952).

(4) Distinctive Characteristics and the like.

This illustration is identical to the Federal and Uniform (1974) Rules 901 (b) (4). This illustration allows a wide variety of circumstantial evidence to be introduced to show authenticity. This is consistent with existing Montana law. State v. Cooper, 161 Mont. 85, 91, 504 P. 2d., 987 (1972). A good example of authentication of a writing by its contents is the reply letter doctrine, observed in Olsen v. Spoya, 129 Mont. 83, 92, 282 P. 2d., 452 (1955), where the court stated:

> While ordinarily a letter is not admissible in evidence without proof of its authenticity, a well-recognized exception to this rule is where a letter is received in due course of mail in reply to another communication proved to have been sent to the purported author of the letter sought to be introduced to be in evidence.

(5) Voice Identification.

This illustration is identical to Federal and Uniform (1974) Rules 901 (b) (5). This illustration allows a witness to identify a voice based upon familiarity acquired at any time, whether before or after the speaker's voice is the subject of identification. Advisory Committee's Note, supra 56 F.R.D. at 334. Existing Montana law is consistent with the illustration. In State v. Vanella, 40 Mont. 326, 339, 106 P., 364 (1910) the court held that a witness may testify as to a person's identify from identification of his voice. Cases dealing with identification of person's voice on the telephone are covered in illustration (6). Although not dealing with the admissibility or authentication of tape recordings, State v. Warwick, 158 Mont. 531, 494 P., 2d., 627 (1972) established foundational requirements for Montana which were followed in State v. Smith, 164 Mont. 334, 340, 523 P., 2d., 395 (1974). Also, see Johnson v. Whitcombe, 149 Mont. 23, 27, 422 P. 2d., 642 (1967).

(6) Telephone Conversations.

This illustration is identical to Federal and Uniform (1974) Rules 901 (b) (6). The illustration contains two clauses, the

first dealing with identification of a person, and the second, identification of businesses. Both of the clauses within this illustration are consistent with existing Montana law. As to clause (A), in Wood v. Ferguson, 71 Montana 540, 547, 330 P., 592 (1944), the court allowed identification of a telephone call where the witness testified that a certain person's number was called and the person answering the telephone identified himself as that person. In Bingham v. National Bank of Montana, 105 Mont. 159, 175, 72 P., 2d., 90 (1937), the court held testimony by the plaintiff identifying two other parties in a telephone conversation to be admissible where the witness testified that she was familiar with the voices of the speakers. Clause (B) of this illustration concerned with business calls, is consistent with Ratliff v. the City of Great Falls, 132 Mont. 89, 94, 314 P., 2d., 880 (1957) where the court stated:

> The majority of the Court's indulge the presumption or inference that a party called over the telephone and responding, as here, as purporting to answer for teh office, is, in fact, the person called, and that he is authorized to answer the call in the basence of a mistaken connection... and in the absence of proof of an officious intermeddler.

The court went on to hold sufficient identification of the telephone call made under the circumstances set out in the illustration.

(7) Public Records or Reports.

This illustration is identical to Federal and Uniform (1974) Rule 901 (b) (7). The illustration provides the widely accepted method of authentication of public records and reports of certification that the writing was authorized by law to be recorded, and in fact was recorded, in a public office where where such writings are kept. The illustration is consistent with existing Montana law, expressed in several statutes. R.C.M. 1947, Secs.93-1001-16 and 93-1001-17 provide for the admissibility of judicial records, the latter section allowing proof by the production through certification procedures as to the correctness of the copy by the Clerk of Court. Sec. 93-1001-31 provides that any public record of a private writing may be proved either by the original or by a copy certified by the legal keeper of the record.

(8) Ancient Documents or Data Compilation.

This illustration is identical to Federal and Uniform (1974) Rules 901 (b) (8). The illustration provides safeguards for the authenticity of this type of document which are slightly different than existing Montana law. R.C.M. 1947 Sec. 93-1301-7(34) provides a rebuttable presumption that "a document more than thirty years old is genuine, when the same has been generally acted upon as genuine, by persons having an interest in the question, and its custody has been satisfactorily explained." Differences between this statute and the illustration are: first, the statute requires the document to be thirty years old, but the illustration only twenty; second, the statute requires the custody must be satisfactorily explained, but the illustration only in a place that is likely for a document to be kept if authentic; and third, the statute requires the document to be acted upon as genuine by persons having an interest, but the illustration only requires it to be of such a nature as to not create suspicion concerning authenticity. Therefore, this illustration represents a change in existing Montana law concerning the authentication of ancient documents.

(9) Process or System.

This illustration is identical to Federal and Uniform (1974) Rules 901 (b) (9). The Advisory Committee's Note, supra 56 F.R.D. at 335 indicates the illustration "is designed for situations in which the accuracy of a result is dependent upon a process or a system which produces it. X-rays afford a familiar instance. Among more recent developments is the computer..." Existing Montana law is generally consistent with the illustration. R.C.M. 1947 Sec. 32-2150.1 states "the speed of any motor vehicle may be measured by the use of radio micro-waves or other electrical device. Results of such measurement shall be accepted as evidence..." There are also Montana cases dealing with the admissibility of X-rays, requiring a foundation as to the qualifications of the person taking the X-ray, the capabilities of the machine, as well as establishing that the X-rays are a fair representation of what they are intended to show. West v. Wilson, 90 Mont., 522, 528, 4 P. 2d., 469 (1931) and Stokes v. Long, 52 Mont. 407, 485, 159 P. 28 (1916).

(10) Method Provided by Statute or Rule.

This illustration is similar to the Federal and Uniform (1974) Rules (901) (b) (10), except that language used through out the Rules for the applciation of statutes, these rules or other rules is used. The intent of this illustration is to

make clear that other statutory methods or methods provided in Rules of Procedure for authentication are to be allowed. This is consistent with the language of the opening clause of this subdivision, for this list is only intended to be an example of some of the methods of authentication allowable. Therefore, this illustration is consistent with existing Montana law, for if a proponent of the evidence can cite a statute allowing a different method of authentication, then it could be allowed under this illustration. Rule 44 (a), M.R. Civ. P., is an example of a Rule of Procedure providing a method of authentication.

Source: Based on Federal Rule 901, except for a change in (b) (10).

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 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. Except as otherwise provided by statute, a document purporting to bear the signature in his 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 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 to the execution of 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 a reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause show 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 otherf person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) or complying with any law of the United States or of this State.

(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 created by law. Any signature, document, or other matter declared by any law of the United States or of this State, to be presumptively or prima facie genuine or authentic.

Source: Based on Federal Rule 902 except for changes in (2), (4), and (10).

Commission Comment

This rule is identical to Federal and Uniform (1974) Rules 902 except for changes in paragraphs (2), (4), and (10) which are explained in the Commission Comment for those paragraphs. The Advisory Committee's Note to Federal Rule 902, 56 F.R.D. 183, 337, (1972), indicates that cases and statutes have established a substantial number of instances:

> In which authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence to that effect, sometimes for reasons of policy, perhaps more often because practical considerations reduce the possibility of unauthenticity to a very small dimension.

It also notes that while the rule collects the situation, in some instances expanding the visual rules, "in no instance is the opposite party foreclosed from disputing authenticity." Id. This rule changes existing Montana law to the extent that there is no provision which encompasses as much as Federal Rule 902.

Paragraph (1) Domestic Public Documents Under Seal

This paragraph is identical to Federal and Uniform (1974) Rules 902 (1). It is based on Rule 44 (a) (1) of the Federal and Montana Rules of Civil Procedure. However, that rule of Civil Procedure deals only with proof of official records, not documents under seal. Broad jurisdictional language is common to each provision. The paragraph is consistent with existing Montana law in that it is based upon Rule 44 (a) (1), M.R. Civ. P. There are also several statutes which deal with public documents under seal: R.C.M. 1947, Sec. 93-1001-17 provides for the admissibility of judicial records under the seal of the Clerk of Court. Sec. 93-1001- 17 provides for the admissibility of judicial records under the seal of the Clerk of Court. Sec. 93-1001-30 provides in four of its nine subdivisions for the admissibility of official documents as follows: Subdivision 1, acts of the executive office by the records of the state departments of the states and United States, certified by the Secretary of State; Subdivision 5, acts of a municipal corporation by a certified copy of the legal keeper; Subdivision 6, documents of any other class in this state certified by the legal keeper; and Subdivision 9, documents in the departments of the United States government certified by their legal keeper. Sec. 93-1001-33 and 93-1001-34 provide for the

admissibility of records of the Justices of the Peace of other states under certificate of authenticity. Sec. 93-1001-35 provides for other official documents to be admissible under certificate and official seal and Sec. 1001-36 applies the provisions of the preceding sections to public writings of sister states or public writings of the United States.

Paragraph (2) Domestic Public Documents Not Under Seal.

This paragraph is identical to Federal and Uniform (1974) Rule 902 (2), except that the phrase "except as otherwise provided by statute," is added so that the paragraph will be consistent with Montana law. This provision requires that in order for a domestic public document to be self-authenticating, if signed by an officer or employee of the entity included in Paragraph (1) having no seal, then a public officer having a seal with official duties in the same district or political subdivision as the signer must certify and place under seal the former's signature. There are Montana statutes which allow signatures or documents to be presumptive or prima facie genuine or authentic, without the necessity of an officer with a seal certifying its genuineness; for example, R.C.M. Sec. 4-218, which allows that an analyst's report and signature to be prima facie evidence of the contents of the report without proof of the appointment of the person or evidence as to the genuineness of his signature. Therefore, in order to be consistent with provisions like this, the paragraph was changed by the addition of the clause.

Paragraph (3) Foreign Public Documents.

This paragraph is identical to Federal and Uniform (1974) Rules 902 (3). It is based upon Rule 44 (a) (2) of the Federal and Montana Rules of Civil Procedure, but is broader in that it applies to public documents rather than to public records. The paragraph is therefore a slight expansion of existing Montana law. There are several statutes which also allow the admissibility of foreign public documents: R.C.M. 1947, Sec. 93-1001-13 allows evidence of foreign written laws or other public writings; Sec. 93-1001-18 and 93-1001-19 provide for the methods of authentication of a judicial record of a foreign country; Sec. 93-1001-30 (4) provides for the admissibility of the Acts of the Executive or Proceedings of the Legislature of a foreign country by records under seal; and Sec. 93-1001-30 (8) provides for the documents of any other class of a foreign country to be admissible under the seal of the country.

Paragraph (4) Certified Copies of Public Records.

This paragraph is identical to Uniform Rule (1974) 902 (4), which changes Federal Rule 902 (4) in the last clause of the paragraph in order to be appropriate for state jurisdictions. This paragraph intended to allow copies of official records or reports to be admissible if properly certified and authorized to be recorded or filed in a public office where any copy of a document complying with Paragraph (1), (2), or (3), or any law of the United States or of this State. This is consistent with existing Montana law which has several statutory provisions for the admissibility of certified copies. R.C.M. 1947 Sec. 93-1001-30 (5) provides for the admissibility of acts of a municipal corporation or a board or department by a certified copy of the legal keeper of a record thereof; Sec. 93-1001-30 (6) provides for documents of any class if certified by the legal keeper; Sec. 93-1001-30 (7) documents of any other class of a sister state if duly certified by the officer having legal custody of the original; Sec. 93-1001-30 (9) for documents in the department of the United States government by a certificate of the legal custodian. Sec. 93-1001-35 provides for proof of contents of a copy of the writing by a certificate of correctness by the legal keeper. Finally, Sec. 93-1101-21 provides that certified copies of records are admissible as evidence without further proof where certified to be filed and recorded in the county clerk's office.

(5) Official Publications.

This paragraph is identical to Federal and Uniform (1974) Rules 902 (5), which allow any book, pamphlet, or other publication issued by a public authority to be considered as self-authenticated. This is consistent with many Montana statutes on this subject. R.C.M. 1947 Sec. 93-1101-12 provides that books containing laws of a foreign country or a sister state are to be presumed correct. The provisions of Sec. 93-1001-30 (1), (2), and (3), provide that acts of the executives of this state or the United States, the proceedings of the legislative assembly of this state or congress, or of the executive or legislatures of sister states, may be proven by official publication of those acts or proceedings. Sec. 93-1301-7 (35) provides the rebuttal presumption "that a printed and published book, purporting to be printed or published by a public authority, was so printed and published."

(6) Newspapers and Periodicals.

This paragraph is identical to Federal and Uniform (1974) Rules 902 (6). The Advisory Committee's Note, supra 56 F.R.D.

at 338, indicates that the likelihood of forgery is slight enough that no danger is apparent in receiving this type of writing. However, they also indicate "establishing the authenticity of the publication, may, of course, leave still open questions of authority and responsibility for items therein contained." Id.

This paragraph changes existing Montana law. R.C.M. 1947 Sec. 63-605 provides that publication of the name of a partnership is resumptive evidence of the fact stated therein only if there is an affidavit from the printer or publisher of the newspaper. The same provision is found in Sec. 93-1701-2 concerning publication of notice as required by law. It can also be noted that in Harvey v. Townsend 57 Mont. 407, 412, 188 Pac. 897 (1920) the court held that a newspaper article was not sufficient evidence that a notice was published unless there was an affidavit of the publisher.

(7) Trade Inscriptions and the like.

This paragraph is identical to Federal and Uniform (1974) Rules 902 (7). The Advisory Committee note, supra F.R.D. at 339, indicates that there are several factors justifying self-authentication of this type of writing: "The risk of forgery is minimal. Trade mark infringement involves serious penalties. Great efforts are devoted to inducing the public to buy in reliance on brand names, and substantial protection is given them." It also cites R.C.M. 1947, Sec. 46-606 which provides that a copy of the recorded brand is prima facie evidence of the right to exclusive use of the brand. However, Montana cases are not consistent with this exception. In Ashley v. Safeway Stores, Inc., 100 Mont. 312, 323, 47 P. 2d., 53 (1935), on the issue of whether or not the driver of a truck was the agent of the Safeway Company, the Court held that the fact that the name of the Safeway Company appeared on the side of the truck did no more than to create an inference that Safeway was the owner of the truck. To the same effect is Monaghan v. Standard Motor Comapny, 96 Mont. 165, 173, 29 P., 2d., 378 (1934), except that the defendant's name appeared on the truck, taken with other circumstances, raised a presumption the driver was acting within the scope of his employment. To the extent that this paragraph allows a presumption of authenticity without further proof, these cases are superceded.

(8) Acknowledged documents.

This paragraph is identical to Federal and Uniform (1974) Rules 902 (8). This simply establishes that an acknowledged

document is self-authenticating, in accord with existing Montana law. R.C.M. 1947 Sec. 93-1101-19 provides that all private writings, except last wills and testaments, which are acknowledged in the manner provided for acknowledgment of proof of conveyances of real property are prima facie evidence of the execution of the writing. The section providing for acknowledgments of real property is 93-1101-21 which provides that those instruments when acknowledged may be read into evidence without further proof. It should be noted that Angell v. Lewistown State Bank, 72 Mont. 345, 353, 232 Pac. 90 (1925) have held that sections relating to proof of private writings, 93-1101-12 and the previously cited sections did not dispense with the requirement the attesting witness testify as to the execution of the document. However, the interpretation of those sections was dependent upon the existence of what was then Sec. 10589, R.C.M. 1921, which was subsequently repealed in order to overturn the decision. Finally, as to last wills and testaments, note that Sec. 91 A-2-504 provides for a self-proved will, and that the testator and subscribing witnesses execute the will before a notary public so that the will may be admitted to probate under Sec. 91-A-3-406 without proof of proper execution.

(9) Commercial Paper and Related Documents.

The Advisory Committee's Note, supra 56 F.R.D. at 339, indicates that despite use of the phrase "general commercial law", it intends certain provisions of the Uniform Commercial Code to be included under this paragraph. Those sections as enacted in Montana are R.C.M. 1947, Sec. 87A - 1 -202, concerned with the genuineness of documents required under an existing contract; Sec. 87A-3-307, concerned with the genuineness of signatures on negotiable instruments, Sec. 87A-3-510, concerned with the admissibility of formal certificates of protest and stamped by the drawee that payment was refused, or bank records as a presumption of dishonor, and Sec. 87A-8-105 (2) concerning a presumption as to the genuineness of signatures on negotiable instruments.

(10) Presumption Created by Law.

This paragraph is identical to Uniform Rule (1974) 902(10). It is an equivalent to Federal Rule 902 (10) except that it applies to Montana law, not just Federal law. The paragraph simply incorporates those statutes which allow a document, signature or other matter to be presumptively or prima facie genuine or authentic. Some examples of statutes allowing this are: R.C.M. 1947, Sec. 7-104, providing that evidence of the existence of a building and loan association may be proved prima facie by the certificate issued under state law;

Sec. 62-203(2), the minutes of a local board of park commissioners are prima facie evidenc e of the matters and things contained therein; Sec. 79-105, a report of the state auditor as to accounts of money or personal property belonging to the state is prima facie evidence of the things therein stated; Sec. 87A-1-202, documents required or authorized by contract listed in the section are prima facie evidence of their own authenticity and genuineness; Sec. 93-1001-12, books containing laws are presumed to be correct; Sec. 93-1001-32, entries in official books or records are prima facie evidence of their contents; Sec. 93-1101-17, entries in certain writings or other private writings of a decedent are prima facie evidence of the facts stated therein; and Sec. 93-1701-3, certified affidavits of publication are prima facie evidence of the facts stated therein. For other examples of these statutes, see Appendix, Table E.

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.

Source: Federal Rule 903.

Commission Comment

This rule is identical to Federal and Uniform (1974) Rules 903. The rule simply provides that the subscribing witness to a writing need not testify in order to authenticate the writing, unless specifically required by law in the jurisdiction governing the validity of the writing. This is consistent with existing Montana law. The Commission Comment to Rule 902 (8) indicates that R.C.M. 1947, Sec. 90-1101-12 (3) provides that a subscribing witness may authenticate a writing, but Sections 93-1101-19 and 93-1101-21 provide that acknowledged writings other than wills, are admissible without further proof. That Comment also indicates that Angell v. Lewistown State Bank, 72 Mont. 345, 353, 232 P. 90 (1925), holding the subscribing witness' testimony necessary because of these sections and Sec. 10589, R.C.M. 1921, has been overruled by the repeal of Seciton 10589. The necessity of subscribing witness' testimony concerning wills and last testaments is governed by the Montana

Uniform Probate Code, providing in Sec. 91A-3-303(3) that attesting witnesses need not testify in informal probate procedures and providing in Sec. 91A-3-406 that attesting witnesses need testify only where the will is not self-proved in formal probate procedures. The language of the rule allows this statutory requirement to be fulfilled by reference to such laws.

ARTICLE X

CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

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, photographing, 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 output 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.

(5) Copies of entries in the regular course of business. A copy of an entry in the regular course of business consists of an entry in a writing kept in the regular course of business copied from another such writing by manual or mechanical means at or near the time of the transaction.

Source: Federal Rule 1001, (5) is based on R.C.M. 1947, §93-1101-18.

Commission Comment

This rule is identical to Federal and Uniform (1974) Rules 1001 except that paragraph (5) has been added to retain existing Montana law. These definitions are used extensively throughout the rules that follow in Article X.

Paragraph (1) Writings and Recordings

Writings and recordings are defined broadly so as to include modern developments in storing and retrieving information. Advisory Committee's Note to Federal Rule 1001(1), 56 F.R.D. 183, 341 (1972). The law in Montana has required the original of a writing but has never defined the term writing. R.C.M. 1947, Section 93-1101-9. Therefore this definition is new to and an expansion of existing Montana law.

Paragraph (2) Photographs

Photographs are defined and included in this rule and Rule 1002, but it should be kept in mind that the rule requiring the production of the original applies to photographs in only a few special cases, and not in the usual instance where the witness incorporates a photograph as part of his testimony by identifying it as a correct and accurate representation of what it depicts. Advisory Committee's Note to Federal Rule 1002, supra at 56 F.R.D. at 342. Examples of when a photograph are to be included within this rule are: "copyright, defamation, and invasion of privacy by photograph or motion picture...Similarly as to situations in which the picture is offered as having independent probative value, e.g., automatic photograph of bank robber." Id. This definition is also new to and an expansion of existing Montana law.

Paragraph (3) Original

Original is defined to include not only the writing or recording itself, but also "any counterpart intended to have the same effect by a person executing or issuing it." The Advisory Committee's Note to Federal Rule 1001(3), supra, 56 F.R.D. at 341, states: "In most instances, what is an original will be self-evident...However, in some instances particularized definition is required." It goes on to give an example of a carbon copy of a contract executed in duplicate to show where the counterpart is to be treated as an original. The definition also refers to photographs and computer printouts in the second and third sentences; the intent of these sentences is to conform to "practicality and common usage." Id.

Existing Montana law has never precisely defined original. However, in Bond v. Hurd, 31 Mont. 314, 318, 78 P. 579 (1904), the court stated the common law rule of what is an original of a telegram, which is dependent upon whether the telegraph company is the agent of the sender or the receiver. Montana law has also recognized the "duplicate original rule," superceded by this definition, in Morris v. Langhausen, 155 Mont. 362, 365, 472 P. 2d 860 (1970), which admitted an executed carbon copy of a retail installment sales contract. Therefore, this definition is consistent with existing Montana law, as well as expanding the definition into new areas of photographs and computer printouts.

Paragraph (4) Duplicate

Duplicate is defined so that the copy is "produced by methods possessing an accuracy which virtually eliminates the possibility of error." Advisory Committee's Note, supra, 56 F.R.D. at 341. This means that copies produced manually are not within the definition. Id. This definition is used in Rule 1003 to allow duplicates to be admitted unless a question of authenticity is raised or it would be unfair to admit a duplicate. It should also be noted that"what is an original for some purposes is a duplciate for others. Thus, a bank's microfilm record of checks cleared is the original as a record. However, a print offered as a copy of a check whose contents are in controversy is a duplciate." Id.

This definition is an expansion of existing Montana law. First, under R.C.M. 1947, Section 93-801-5, the Uniform Photographic Copies of Business and Official Records as Evidence Act, photocopies are admissible, but only when the copy is made in the regular course of business and is of business or official records. This definition does not restrict the admissibility of copies to any type of document, and does not restrict the purpose for which the copy was made to the regular course of business. Second, insofar as the duplciate original rule, discussed in the Commission Comment to the preceding definition, allows copies to be admissible, it is also superceded by the definition as applied in Rule 1003.

Paragraph (5) Copies

This definition is based on R.C.M. 1947, Section 93-1101-18, which provided: "When an entry is repeated in the regular course of business, one being copied from another or [sic] at or near the time of the transaction, all the entries are equally

regarded as originals." It is included here so that it may be made admissible under proposed Rule 1003. The Commission feels that this type of evidence is not admissible under any of the other definitions in Federal Rule 1001. The entry cannot be considered an original because the person making the entry has no such intent, but is carrying on a normal business function of collecting information to be stored in a single record. The entry cannot be considered a duplicate because, as previously indicated, duplicates are defined to include only mechanical means of duplication and not manual means. Therefore, this definition is intended to continue existing Montana law contained in the statute.

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 by statute, these rules, or other rules applicable in the courts of this state.

Source: Based on Federal Rule 1002.

Commission Comment

This rule is identical to Federal and Uniform (1974) Rules 1002 except the exception clause found in those rules is deleted and an exceptions clause previously used in the proposed rules is substituted. It states the common law rule that to prove the contents of a writing, the original of that writing is required, unless otherwise provided. The exceptions to this rule of major concern are those found in the rules that follow, proposed Rules 1003 through 1007.

In applying this rule, the purposes of the rule requiring the production of the original should be kept in mind: first, the legal significance of particular words in a document requires the use of the original so that legal rights under those documents are not misinterpreted; second, use of the original prevents, to some degree, fraudulent use of copies; third, use of copies or other secondary evidence of the original is as prone to ignore mechanical or human errors in making the copy or part of the secondary evidence; and finally, the use of the original allows a complete view of all that is contained in that document. McCormick, Handbook on the Law of Evidence, 561 (2d Ed., 1972).

Further, application of this rule requires that the court determine whether the contents of the writing are being proved. The Advisory Committee's Note to Federal Rule 1002, supra, 56 F.R.D. at 342, offers the following guidelines:

> Thus an event may be proved by nondocumentary evidence, even though a written record of it was made. If, however, the event is sought to be proved by the written record, the rule applies. For example, payment may be proved without producing the written receipt which was given. Earnings may be proved without producing books of account in which they are entered. ... Nor does the rule apply to testimony that books or records have been examined and found not to contain any reference to a designated matter.

This rule is consistent with existing Montana law. R.C.M. 1947, Section 93-1101-9 provides: "The original writing must be produced and proved, except as provided in Sections 93-301-1 to 93-2501-3." Section 93-401-12 provides: "There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases..." Several cases have also stated this rule. Cohen v. Clark, 44 Mont. 151, 158, 119 P. 775 (1911); State v. Cates, 97 Mont. 173, 198, 33 P. 2d 578 (1934); and Morris v. Langhausen, 155 Mont. 362, 365, 472 P. 2d 860 (1970).

However, there has been some confusion in many cases on the issue of whether the original document or other evidence was required to prove certain facts. Examples of the confusion are: Whiteside v. Hoskins, 20 Mont. 361, 364, 51 P. 739 (1898) held that a party could testify that the judgment which was the basis of the present suit had not been satisfied without introducing court records to that effect. Yet, Spencer v. Spencer, 31 Mont. 631, 641, 79 P. 320 (1904), held that it was error to allow a witness to testify that another suit had been dropped without first introducing court records which would be the best evidence. In State ex rel. Rankin v. Madison State Bank, 77 Mont. 498, 503, 251 P. 548 (1926) the court held that oral evidence of the action of a state board was admissible even though a minute book was available and required to be kept by statute. Yet in State ex rel. Haley v. Dilworth, 80 Mont. 111, 116, 258 P. 250 (1927) the court held that where a statute requires a minute book to be kept, oral testimony regarding

those minutes is inadmissible. The Commission intends Rule 1002 to clarify these cases and that it be applied as in the former cases in each of the examples given; that is, the mere existence of a written record does not mean that it is the only source of evidence to prove the existence of facts or occurrence of events, but where the facts or events are sought to be proved by a writing, unless an exception applies, the original of that writing is required.

Finally, as noted in the Commission Comment to Rule 1001(2), defining photographs, the Commission intends Rule 1002 to apply to photographs in only a few special instances. The Commission does not intend to change the long standing rule in Montana allowing photographs to be made a part of the witness' testimony, or illustrative of his testimony to assist the jury in their determinations. Stokes v. Long, 52 Mont. 470, 485, 159 P. 28 (1916); Fulton v. Choteau County Farmers' Bank Co., 98 Mont. 48, 60, 37 P. 2d 1025 (1934). Under this rule, the trial court has the discretion to admit photographs. Gobel v. Rinio, 122 Mont. 235, 238, 200 P. 2d 235 (1948); Teesdale v. Anchutz Drilling Co., 138 Mont. 427, 357 P. 2d 4 (1960); and Hackley v. Waldorf-Hoerner Paper Co., 149 Mont. 286, 297, 425 P. 2d 712 (1967). For other cases on the admissibility of photographs, see Commission Comment to Rule 901(b)(1).

RULE 1003. Admissibility of Duplicates, Copies of Certain Entries.

A duplicate, or copy of an entry in the regular course of business as defined in Rule 1001(5), 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 or copy of an entry in the regular course of business in lieu of the original; or (3) otherwise provided by statute.

Source: Based on Federal Rule 1003.

Commission Comment

This rule is identical to Federal and Uniform (1974) Rules 1003 except for the addition of phrases referring to copies of entries made in the regular course of business, defined in Rule 1001(5), and the third clause, "otherwise provided by statute." These changes were made to retain existing Montana law. (See

below). The effect of this rule is to admit duplicates, as defined in Rule 1001(4), as though they were originals unless the conditions of the three clauses in this rule occur. The definition of duplicate in Rule 1001(4), as though they were originals unless the conditions of the three clauses in this rule occur. The definition of duplicate in Rule 1001(4) is such that duplicates admissible under this rule are those produced under "a method which insures accuracy and genuineness." Advisory Committee's Note to Federal Rule 1003, 56 F.R.D. 183, 343 (1972). (Also see Commission Comment to Rule 1001(4).) The first two clauses are those contained in the Federal Rule. Clause (1) refers to the situation where the original's authenticity is in question, which, of course, would make the admissibility of a duplciate as questionable as the admissibility of the original, and so in this instance the court may call for the original. Clause (2) refers to situations where it would be unfair to admit the duplciate, for example "when only a part of the original is reproduced and teh remainder is needed for cross-examination or may disclose matters qualifying the part offered or otherwise useful to the opposing party." Advisory Committee's Note, supra, 56 F.R.D. at 343. It is imprecisely worded to allow the court discretion to exclude duplicates.

The admissibility of duplicates under this rule represents an expansion of existing Montana law. As noted in the Commission Comment to Rule 1001(4), Montana law admits photocopies under the Uniform Photographic Copies of Business and Official Records as Evidence Act, R.C.M. 1947, Section 93-801-5, only where the photocopy is made in the regular course of business and is a copy of either a business or official record. Duplicates can also be seen as admissible under the duplicate original rule recognized in Morris v. Langhausen, 155 Mont. 314, 318, 78 P. 579 (1904).

The changes in this proposed rule from the Federal Rule are intended to retain existing Montana law contained in statutes. The first is concerned with R.C.M. 1947, Section 93-1101-18, discussed under the Commission Comment to Rule 1001(5), defining copies of entry in the regular course of business. Montana cases which have been concerned with that statute are: Silver v. Eakins, 55 Mont. 210, 218, 175 P. 876 (1918), which held that while a bank ledger was admissible under the statute, copies of that ledger was not; and Smith v. Sullivan, 58 Mont. 77, 87, 190 P. 288 (1920), which held that a ledger made from mechanic's time cards was admissible under the statute. It is not believed by the Commission that the imposition of the conditions in the first clauses in this rule is inconsistent with this statute.

Second, the third clause was added to take into account existing Montana probate law which requires the original of a will under either informal proceedings (R.C.M. 1947, Sections 91A-3-301 (2) (a) and 91A-3-303(1) (e)), or formal proceedings, R.C.M. 1947, Section 91A-3-402(1) (c). It should be noted that the Commission considers this Rule consistent with such sections as R.C.M. 1947 Section 87A-3-804, an action on allowing a lost instrument if proof of loss is first made.

Source: Based on Federal Rule 1003.

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, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he 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.

Source: Federal Rule 1004

Commission Comments

This rule is identical to Federal and Uniform (1974) Rules 1004. It sets out conditions under which the rule requiring the production of the original need not be followed. The Advisory Committee's Note to Federal Rule 1004, 56 F.R.D. 183, 344 (1972) explains:

> Basically the rule requiring the production of the original as proof of contents has developed as a rule of preference: if failure to produce the original is satisfactorily explained, secondary evidence is admissible. The instant rule specifies the circumstances under which production of the original is excused.

It should be noted that the rule does not require any type of secondary evidence to be produced once the absence of the original is explained; that is, "the rule recognizes not 'degrees' of secondary evidence." Id. Therefore, once absence of the original is explained, oral evidence, copies, or memoranda concerning the contents of the writing are all admissible. This is consistent with existing Montana law. R.C.M. 1947, Sections 93-401-12, 93-1101-9 and 93-1101-10 provide the exceptions contained in this rule, and do not specify types of secondary evidence which may then be used.

Paragraph (1) Originals lost or destroyed.

This paragraph is consistent with existing Montana law. Proof of loss or destruction is provided for in Sections 93-401-12(1) and 93-1101-9. Each of these statutes provide that proof of loss or destruction must first be made to excuse production of the original; case law has construed this to mean that a diligent search has been made for the original and it could not be found. Territory v. Stocker, 9 Mont. 6, 9, 22 P. 496 (1889) and Brooke v. Jordan, 14 Mont. 375, 378, 36 P. 450 (1894). The standard established is that proof of the loss should be clear and convincing. St. Martin State Bank v. Steffes, 88 Mont. 85, 88, 290 P. 259 (1930). The burden is upon the proponent of the secondary evidence to prove loss or destruction. Bond v. Hurd, 31 Mont. 314, 319, 78 P. 579 (1904). Language in this paragraph not applying it if the proponent lost or destroyed the original in bad faith is apparently consistent with State v. Welch, 22 Mont. 92, 96, 55 P. 927 (1899), which held that there was no error in admitting secondary evidence of letters destroyed by the proponent because a reasonable explanation was given for their destruction.

Paragraph (2) Original Not Obtainable

The fact that the original is not obtainable is consistent with existing Montana law. An interpretation given R.C.M. 1947, Section 93-401-12(1) by Nelson v. Gough, 61 Mont. 310, 304, 202 P. 196 (1921) held that when a document is beyond the jurisdiction

of the court, it is considered to be lost within the meaning of the statute. This case was followed in Dyle v. Kingsbury, 63 Mont. 145, 150, 206 P. 364 (1922). It can be noted that an earlier case allowed copies of documents where the original was not within the power or control of the proponent, without referring to the statute. Montana Mining Company, Ltd., v. St. Louis Mining and Milling Company, 20 Mont. 394, 406, 51 P. 824 (1898).

Paragraph (3) Original In Possession of Opponent

This paragraph is consistent with two statutory provisions, R.C.M. 1947, Sections 93-401-12(2) and 93-1101-10. Each of these provisions calls for notice to the adverse party. The paragraph relieves the proponent of producing the original, which is required to some degree for the protection of the adversary, when the adversary is in control of the document and needs no protection.

Paragraph (4) Collateral Matters

This paragraph is new to and an expansion of existing Montana law. No statute or case could be found which applied this rule. The Advisory Committee's Note to this paragraph, supra, 56 F.R.D. at 345, explains its intent:

> While difficult to define with precision, situations arise in which no good purpose is served by production of the original. Examples are the newspaper in an action for the price of publishing defendant's advertisement, (cite omitted)... and the streetcar transfer of plaintiff claiming status as a passenger... (cite omitted).

Also see McCormick, Handbook on the Law of Evidence, §234 at 565 (2d Ed. 1972).

RULE 1005. Public Records.

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.

Source: Federal Rule 1005.

Commission Comment

This rule is identical to Federal and Uniform (1974) Rules 1005. The Advisory Committee's Note to Federal Rule 1005, 56 F.R.D. 183, 345 (1972), gives the reasons for this exception to the rule requiring production of the original: "Public records call for somewhat different treatment. Removing them from their usual place of keeping would be attended by serious inconvenience to the public and to the custodian." This rule's allowance of certified or compared copies rather than the original is a recognition of degrees of secondary evidence which occurs only with this rule. Note that the second sentence of the rule allows any other evidence of contents if such copies cannot be obtained.

The rule is generally consistent with existing Montana law. R.C.M. 1947, Section 93-401-12 (3) and (4) provide that the original need not be produced when the original is a record or other document in the custody of a public officer, or when the original has been recorded and a certified copy is made admissible by other statutes. This statute also provides that with these subdivisions "a copy of the original, or of the record, must be produced...." This is inconsistent with the second sentence of the rule which allows any secondary evidence to be admitted if such copies cannot be obtained. Finally, a statement in Gazette Printing Company v. Carden, 163 Mont. 401, 406, 571 P. 2d 361 (1973) that "parol evidence of the contents of public records violates the best evidence rule and is inadmissible" is inconsistent with the second sentence and overruled by it.

RULE 1006. Summaries.

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

Source: Federal Rule 1006.

Commission Comment

This rule is identical to Federal and Uniform (1974) Rules 1006. It recognizes, as a matter of practicality and convenience, that summaries of admissible documents which are too lengthy to examine during trial may be admitted. This is consistent with R.C.M. 1947, Section 93-401-12(5). This practice has been commended in McCollum V. O'Neill, 128 Mont. 584, 591, 281 P. 2d 493 (1954). Note that the rule also contains safeguards whcih allow the adverse party reasonable time to inspect the summary and its original or duplicates to insure that it is accurate, and that in any event the judge may order production of the original or a duplicate in court.

RULE 1007. Testimony or Written Admission of Party.

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original.

Source: Federal Rule 1007.

Commission Comment

This rule is identical to Federal and Uniform (1974) Rules 1007. It is a limited version of the common law rule which allows proof of contents of a document by any admission of the opponent. Advisory Committee's Note to Federal Rule 1007, 56 F.R.D. 183, 346 (1972). Since there is a substantial risk of inaccuracy and the exception is not consistent with the purposes of the rule requiring the production of the original, limitations are imposed so that the admission by which contents may be proved includes only those made in writing or while testifying. Id. There is no Montana law equivalent to this rule, and so it is new Montana law.

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 for the court to determine in accordance with the provisions of Rule 104.

Source: Based on Federal Rule 1008.

Commission Comment

This rule is identical to Federal and Uniform (1974) Rules 1008 except the the word "ordinarily" and a second sentence contained in the Federal and Uniform Rules are deleted That sentence provides that the jury is to make determinations of admissibility, based on the concept of conditional admissibility found in Federal and Uniform (1974) Rules 104(b), for three areas concerned with the rule requiring the production of the original. The Commission deleted this language so that the rule would be consistent with existing Montana law, as expressed in proposed Rule 104(a), that the judge makes all determinations of admissibility of evidence. The concept of conditional admissibility was rejected in Rule 104(b) because it was confusing and inconsistent with existing Montana law, and has been rejected wherever it occurs in the Rules. Therefore, this rule is consistent with existing Montana law contained in R.C.M. 1947, Section 93-2501-2.

TABLE A.
LIST OF PROPOSED RULES OF EVIDENCE
SUPERSEDING R.C.M. 1947 SECTIONS

RULE	SUBJECT MATTER	STATUTE	SUBJECT MATTER
100	Short title	None	
101(a)	Rules of evidence apply to all proceedings in all courts in Montana	93-2501-3	Applies law of evidence to jury and non-jury trials
101(b)	Applies rules with respect to privileges at all times	None	
101(c)(1)	Rules of evidence do not apply to determinations under proposed Rule 104(a)	None	
101(c)(2)	Rules of evidence do not apply to grand jury proceedings	None	
101(c)(3)	Rules of evidence do not apply in certain criminal and youth court proceedings	None	
101(c)(4)	Rules of evidence do not apply to certain proceedings where court acts summarily	None	
101(c)(5)	Rules of evidence do not apply in certain civil proceedings	None	
102	Purpose and construction of rules	None	
103(a)	Requires objection, motion to strike, or offer of proof to predicate error for ruling on evidence	Rule 43(c), M.R.Civ. P.	Offers of proof

TABLE A.
LIST OF PROPOSED RULES OF EVIDENCE
SUPERSEDING R.C.M. 1947 SECTIONS

RULE	SUBJECT MATTER	STATUTE	SUBJECT MATTER
103(b)	Practice of making offers of proof	Rule 43(c), M.R.Civ.P.	Offers of proof
103(c)	Offers of proof to be made outside of hearing of jury	Rule 43(c), M.R.Civ.P.	Offers of proof
103(d)	Plain error.	None	
104(a)	Preliminary questions of admissibility of evidence, or qualification to be witness, or existence of privilege determined by court; rules of evidence do not apply	93-2501-2	Questions preliminary to admission of evidence decided by court
104(b)	Connecting-up rule; court controls order of proof	93-1901-1	Judge controls order of proof (See proposed Rule 611.)
104(c)	Preliminary questions of admissibility of confessions outside hearing of jury; other evidence in discretion of court unless accused requests jury not be present	None	
104(d)	Accused not subjected to cross-examination as to other issues in case when testifying on preliminary matter	None	
104(e)	Rule 104 does not limit right of party to introduce relevant evidence as to weight or credibility	None	
105	Limited admissibility	None	

TABLE A.
LIST OF PROPOSED RULES OF EVIDENCE
SUPERSEDING R.C.M. 1947 SECTIONS

RULE	SUBJECT MATTER	STATUTE	SUBJECT MATTER
106	Rule of completeness	93-401-11	Same
201(a)	Allows judicial notice of all facts	93-501-1	Allows courts to take judicial notice of listed facts:
201(b)	Facts judicially noticeable restricted to those (1) generally known or (2) capable of determination by resort to indisputably accurate sources.	93-501-1(1)	True significance of all English words
		93-501-1(5)	Accession to office of officers of governmen
		93-501-1(8)	Laws of nature, measure of time, geographical divisions and political history of the world
		93-501	Final phrase allows courts to resort to appropriate books or documents of reference.
		93-1101-8	Provides that books, maps, etc., are prima facie evidence of fact of general notoriety and interest
201(c)	Allows judge discretion in taking judicial notice of facts allowed to be noticed	None	
201(d)	Requires judge to take judicial notice when requested by party	None	
201(e)	Allows party, upon request, to be heard on propriety of taking judicial notice	None	Note: Rule 34 M.R.App.Civ. P. should be amended to allow rule of evidence after express statute as grounds for rehearing
201(f)	Allows any court to take notice at any stage of proceedings	None	
201(g)	Court instructs jury in civil cases to accept as conclusive facts	93-2501-2	Last sentence of this section provides

TABLE A.
LIST OF PROPOSED RULES OF EVIDENCE
SUPERSEDING R.C.M. 1947 SECTIONS

RULE	SUBJECT MATTER	STATUTE	SUBJECT MATTER
201(g) (cont'd.)	judicially noticed and in criminal cases that it may but is not required to accept facts judicially noticed		court to declare what is judicially noticed and jury bound to accept it
202(a)	Allows judicial notice of law	93-501-1(2)	Allows judicial notice of whatever is established by law
202(b)	Defines law that may be judicially noticed, not limited list.	93-501-1(2) through (7)	Lists matters related to law
202(b)(1)	Common law, constitution and statutes of U.S. and every state	93-501-2	Same as rule
202(b)(2)	Ordinances and regulations of local governmental divisions of this state.	None	
202(b)(3)	Administrative regulations of U.S. and every state	93-501-1(3)	Public and private acts of ... executive department of this state and U.S.
202(b)(4)	Official acts of executive, legislative and judicial departments of U.S. and every state	93-501-1(3)	Public and private acts of executive, legislative and judicial departments of this state and U.S.
202(b)(5)	Private acts of Congress of U.S. and legislature of this state	93-501-1(3)	Private acts of... legislative department of U.S. and this state
202(b)(6)	Records of court of this state or of any court of record of the U.S. and any state	93-501-1(4)	Seals of all courts of this state and the U.S.
202(b)(7)	Rules of practice and procedure of any court of this state or any court of record in the U.S. and any state	None	

TABLE A.
LIST OF PROPOSED RULES OF EVIDENCE
SUPERSEDING R.C.M. 1947 SECTIONS

RULE	SUBJECT MATTER	STATUTE	SUBJECT MATTER
202(b)(8)	The law of foreign nations	93-501-1(6)	The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the U.S.
202(b)(9)	International law	None	
202(b)(10)	Maritime law	93-501-1(7)	Seals of courts of admiralty and maritime jurisdictions
202(b)(11)	Seals	93-501-1(1) through (7)	Subdivisions allow judicial notice of various official seals
202(c)	Allows court discretion in noticing law except 202(b)(1)	None	
	Allows court to inform itself of law in manner it deems proper	93-501-3	Same as rule
	Allows court to call upon counsel to assist it	93-501-3	Same as rule
202(d)(1)	Court must take judicial notice of law listed in 202(b)(1)	93-501-2	Court shall take judicial notice of common law, constitution and statutes of every state and U.S.
202(d)(2)	Court must take notice when requested.	93-501-5	Allows party to present law of which court may take notice
202(e)	Allows party an opportunity to be heard as to propriety of taking notice		
202(f)(1)	Allows judicial notice of law of this state or U.S. to be taken at any stage of the proceeding	None	

TABLE A.
LIST OF PROPOSED RULES OF EVIDENCE
SUPERSEDING R.C.M. 1947 SECTIONS

RULE	SUBJECT MATTER	STATUTE	SUBJECT MATTER
202(f)(2)	Allows party to present evidence or ask notice to be taken of law of foreign jurisdiction if reasonable notice is given	93-501-5	Same as rule
202(g)	Calls for court to determine the law	93-501-4	Same as rule
301(a)	Presumption defined	93-1301-3	Same as rule
301(b)(1)	Conclusive presumptions must be declared by statute and may not be controverted	93-1301-5	States that a presumption may be declared conclusive
301(b)(2)	All other presumptions may be controverted by a preponderance of evidence and unless controverted must be found by trier of fact	93-1301-5	Allows presumption to be controverted unless conclusive and unless controverted must be found by trier of fact
301(c)	Inconsistent presumptions	None	
302	Effect of Federally created presumptions	None	
401	Definition of relevant evidence; includes evidence of credibility of witness	None	
402	Relevant evidence admissible; exceptions; irrelevant evidence not admissible	93-401-24 93-401-25	Only material need be proved. Evidence must be material and relevant; none

TABLE A.
LIST OF PROPOSED RULES OF EVIDENCE
SUPERSEDING R.C.M. 1947 SECTIONS

ULE	SUBJECT MATTER	STATUTE	SUBJECT MATTER
403	Court may exclude relevant evidence if prejudicial, confusing, misleading, causes delay, waste of time or cumulative	93-401-25	Discretion of court to permit inquiry into collateral facts
		93-1901-3	Court may stop production of evidence if cumulative
404(a)	Character evidence not generally admissible to prove conduct, exceptions	93-1901-13	Character evidence not admissible until attached or in issue
404(a)(1)	Evidence of a pertinent character trait offered by accused or by the prosecution to rebut same is admissible	None	
404(a)(2)	Evidence of pertinent character trait of victim offered by accused or by prosecution as rebuttal is admissible	None	
404(a)(3)	Evidence of character of witness admissible to attack or support credibility	93-1901-13	Evidence of character of witness not admissible until attacked (See Rule 608)
404(b)	Evidence of other crimes, wrongs, or acts not admissible to prove criminal character; exceptions, admissible for other purposes.	None	
404(c)	Evidence of character is admissible when it is in issue	93-1901-13	Evidence of character admissible if issue involves his character
405(a)	Reputation or opinion evidence admissible to prove character; specific instances conduct admissi-	None	

TABLE A.
LIST OF PROPOSED RULES OF EVIDENCE
SUPERSEDING R.C.M. 1947 SECTIONS

RULE	SUBJECT MATTER	STATUTE	SUBJECT MATTER
405(b)	Specific instances of conduct admissible when character is in issue, or reasonableness of force used by accused	None	
406(a)	Habit, routine practice defined	None	
406(b)	Habit, routine practice admissible to prove conduct	None	
407	Subsequent remedial repairs not admissible to prove negligence; admissible for other purposes	None	
408	Offers to compromise not admissible to prove liability.	93-2201-5	Offers of compromise of no avail
409	Evidence of payment of expenses not admissible to prove liability	None	
410	Evidence of offers to plea or withdrawn please of guilty or nolo contendere not admissible in any action; not apply to statements when used for impeachment or prosecution for perjury purposes	None	
411	Evidence of insurance inadmissible to prove liability;allowed for other purposes	None	

TABLE A.
LIST OF PROPOSED RULES OF EVIDENCE
SUPERSEDING R.C.M. 1947 SECTIONS

RULE	SUBJECT MATTER	STATUTE	SUBJECT MATTER
501	Recognized only privileges incorporated by reference; sets out elements of a privilege	None	
502(a)-(c)	Identity of informer	None	
503(a)	Waiver of privilege by voluntary disclosure	None	
503(b)	Joint holders of privilege waiver not affect other joint holders' privilege	None	
504	Privileged matter disclosed under compulsion or without opportunity to claim not a waiver	None	
505	Comment upon or inference from claim of privilege prohibited	None	
601(a)	All persons competent witnesses except as other wise provided	93-701-2	All persons competent witnesses except as provided in following sections
601(b)	Disqualifies witnesses who cannot express themselves or or are incapable of telling truth	92-701-2	Persons who can make known perceptions may testify
		93-701-3	Persons who cannot be witnesses: those of unsound mind; children under 10 years; Dead Man's statutes
602	Excludes witness from testifying as to matter if lacks personal knowledge of matter	93-401-2	Witness can testify only as to facts within his own personal knowledge

TABLE A.
LIST OF PROPOSED RULES OF EVIDENCE
SUPERSEDING R.C.M. 1947 SECTIONS

RULE	SUBJECT MATTER	STATUTE	SUBJECT MATTER
603	Witnesses required to testify under oath	93-401-3	Same
604	Interpreters required to be under oath and qualified as an expert	93-701-6	Allows interpreters and requires oath
605	Judge may not testify in case in which he is presiding	93-701-5	Allows judge to testify, may suspend trial and substitute judge
606(a)	Juror may not testify in case in which sitting	93-701-5	Allows juror to testify, may suspend trial and substitute
606(b)	Juror may not testify to impeach verdict, exceptions	None	
607(a)	Allows any party to impeach any witness	93-1901-8	Party may not impeach own witness, exceptions for contradiction and prior inconsistent statement
607(b)	No party is bound by testimony of any witness	None	
608(a)	Character evidence admissible for purposes of impeachment, conditioned on truthful or untruthful character trait only, provable by opinion or reputation	93-1901-11	Character evidence for truth, honesty, and integrity, provable by reputation
608(b)	Allows specific instances of conduct to be used on cross-examination to prove character of witness	93-1901-11	Does not allow specific instances of conduct to prove character evidence

TABLE A.
LIST OF PROPOSED RULES OF EVIDENCE
SUPERSEDING R.C.M. 1947 SECTIONS

RULE	SUBJECT MATTER	STATUTE	SUBJECT MATTER
609	Impeachment for conviction of crime	93-1901-11	Allows conviction of felony to be used for impeachment
610	Impeachment for religious beliefs not allowed	None	
611(a)	Court controls mode and order of interrogation	93-1901-1 93-1901-3	Court controls order of proof Court controls mode of interrogation
611(b)(1)	Scope of cross-examination	93-1901-7	Same
611(b)(2)	Evidence developed on cross-examination may be used as part of cross-examiner's case	None	
611(c)	Leading questions	93-1901-5	Same
611(d)	Re-examination and recall	93-1901-10	Same
611(e)	Requires parties be allowed to be present when witnesses are examined	93-401-3	Same
612	Production and use of writing used to refresh memory	93-1901-6	Same
		93-1901-14	Writing shown to witness may be inspected
613(a)	Examination of witness using prior statements	93-1901-12	Witness shown written prior inconsistent statement
		93-1901-14	Writing shown to witness may be inspected
613(b)	Foundation not required for impeachment by prior inconsistent statements	93-1901-12	Foundation required for impeachment by prior inconsistent statement

TABLE A.
LIST OF PROPOSED RULES OF EVIDENCE
SUPERSEDING R.C.M. 1947 SECTIONS

RULE	SUBJECT MATTER	STATUTE	SUBJECT MATTER
614(a)	Calling and interrogation of witnesses by court	None	
614(b)	Interrogation by court	None	
614(c)	Objections to court's questions	None	
615	Exclusion of witnesses from court room as matter of right of parties	93-1901-2	Exclusion of witnesses from court room as matter of discretion of judge
701	Lay opinion	93-401-27(9)	Allows lay opinion as to identity or handwriting
	(Note: whether these two sub-divisions superceded or not questionable)	93-401-27(10)	Allows lay opinion on questions of sanity o testator or any person if intimate acquaint anceship and reason for opinion shown
702	Expert opinion testimony	93-401-27(9)	Opinion by witness skilled in science, art, or trade.
703	Basis of expert opinion testimony	None	
704	Ultimate issue opinion allowed	None	
705	Disclosure of basis of expert opinion	None	
801(a)	Definition of statement	None	
801(b)	Definition of declarant	None	
801(c)	Definition of hearsay	None	

TABLE A.
LIST OF PROPOSED RULES OF EVIDENCE
SUPERSEDING R.C.M. 1947 SECTIONS

RULE	SUBJECT MATTER	STATUTE	SUBJECT MATTER
801(d)	Statements which are not hearsay:	None	
801(d)(1)	Prior statements by witness		
	(A) Prior inconsistent statement	None	
	(B) Prior consistent statements	None	
	(C) Statements of identification	None	
801(d)(2)	Admissions by		
	(A) Party as individual or representative	93-401-27(2)	Same
	(B) Adoptive admissionas	93-401-27(3)	
	(C) Authorized admissions	93-401-27(5)	
	(D) Agent's and employee's admissions	93-401-27(5)	
	(E) Coconspirator's admissions	93-401-27(6)	
802	Hearsay Rule	None	
803	Hearsay exceptions: declarant unavailable		
803(1)	Present sense impression	None	
803(2)	Excited utterance	None	
803(3)	Then existing mental, emotional, or physical conditions	None	
803(4)	Statements for purposes of medical diagnosis	None	
803(5)	Recorded Recollection	93-1901-6	recorded recollection
803(6)	Records regularly conducted activity,	93-801-1	Uniform Business Records as Evidence Act
	business defined		definition of business
		93-801-2	Business records admissible

TABLE A.
LIST OF PROPOSED RULES OF EVIDENCE
SUPERSEDING R.C.M. 1947 SECTIONS

ULE	SUBJECT MATTER	STATUTE	SUBJECT MATTER
803(7)	Absence of entry in record kept under 803(6)	None	
803(8)	Public Records and reports	93-901-1	Uniform Official Reports as Evidence Act
803(9)	Records of vital statistics	None	
803(10)	Absence of public record or entry	None	
803(11)	Records of religious organizations	None	
803(12)	Marriage, baptismal, similar certificates	None	
803(13)	Family records	93-401-27 (13)	Monuments, inscriptions, entries in family Bibles or other family books, charts, etc.
803(14)	Records of documents affecting an interest in property	93-401-12(4)	Recorded documents admissible(exception to rule requiring production of original)
803(15)	Statements in documents affecting an interest in property	93-401-12(4)	Recorded documents admissible
803(16)	Statements in ancient documents	93-1301-7(34)	Ancient documents presumed genuine
803(17)	Market reports, commercial publications	None	
803(18)	Learned treatises	93-1101-8	Certain books, charts, etc., prima facie evidence
803(19)	Reputation concerning family reputation	93-401-9	Reputation, evidence of family history admissible
		~~93-401-27(11)~~	~~Reputation evidence of pedigree admissible~~

TABLE A.

LIST OF PROPOSED RULES OF EVIDENCE
SUPERSEDING R.C.M. 1947 SECTIONS

RULE	SUBJECT MATTER	STATUTE	SUBJECT MATTER
803(20)	Reputation concerning boundaries or general history	93-401-27(11)	Reputation concerning boundary, facts of public interest admissible
803(21)	Reputation as to character	None	
803(22)	Judgment previous conviction	None	
803(24)	Judgment personal, family, or general history or boundaries	None	
804(a)	Definition of unavailability	None	
804(b)	Hearsay exceptions: declarant unavailable:		
804(b)(1)	Former testimony	93-401-27(8)	Former testimony
804(b)(2)	Statements under belief of impending death	93-401-27(4)	Dying declarations
804(b)(3)	Statements against interest	93-401-6 93-401-10 93-401-27(4)	Declarations of predecessor in title Declarations against pecuniary interest Declarations against interest in real property
804(b)(4)	Statement of personal or family history	93-401-9 93-401-27(4)	Declarations, acts, ommission concerning pedigree admissible Act or declarations of deceased person regarding relationship, birth, marriage, or death admissible
804(b)(5)	Other exceptions	None	

TABLE A.

LIST OF PROPOSED RULES OF EVIDENCE
SUPERSEDING R.C.M. 1947 SECTIONS

RULE	SUBJECT MATTER	STATUTE	SUBJECT MATTER
901(a)	General provision setting out requirement for authentication or identification	93-1101-13	Evidence of execution not necessary where admitted by party against whom offered
		93-1101-16	Writings more than 30 years old may be used for comparison
901(b)	Illustrations conforming with requirement of 901(a)		
901(b)(1)	Testimony by witness that matter is what it is claimed to be	93-1001-14	Witness may testify as to laws of sister state or foreign country
		93-1001-19	Witness may testify to authenticate foreign country's judicial records
		93-1101-12	Witness may testify to authenticate writing
901(b)(2)	Nonexpert opinion on handwriting	93-401-27(9)	Witness may give opinion respecting handwriting
		93-1101-12	Witness may authenticate writing by having seen it executed, other evidence of genuineness, or by the subscribing witness' testimony
901(b)(3)	Comparison of handwriting to authenticate by trier of fact or expert witness	93-1101-15	Evidence of handwriting by comparison
		93-1101-16	Evidence of handwriting by comparison with 30 year old document
901(b)(4)	Authentication by circumstantial evidence of distinctive characteristics and like	None	
901(b)(5)	Voice identification	None	
901(b)(6)	Telephone conversations	None	

TABLE A.

LIST OF PROPOSED RULES OF EVIDENCE
SUPERSEDING R.C.M. 1947 SECTIONS

RULE	SUBJECT MATTER	STATUTE	SUBJECT MATTER
901(b)(7)	Public records or reports authorized by law to be recorded or filed	93-1001-16, 17	Judicial records defined, admissible
		93-1001-31	Public records of private records admissibl
901(b)(8)	Ancient Documents	93-1301-7(34)	Ancient documents presumed authentic
901(b)(9)	Accurate process or system allows results to be authentic	None	
901(b)(10)	Authentication methods provided by statute	None	
902	Sets out matters which are self-authenticating:	None	
902(1)	Domestic public documents under seal	93-1001-16,17	Judicial records
		93-1001-30	Official documents
		93-1001-33,34	Records of justices of peace
		93-1001-35	Other official documents
		93-1001-36	Official documents of sister states
902(2)	Domestic public documents not under seal	None	
902(3)	Foreign public documents	93-1001-13	Foreign laws
		93-1001-18,19	Foreign judicial records
		93-1001-30(4)	Acts of legislatures and executives of foreign countries
		93-1001-30(8)	Other foreign documents
902(4)	Certified copies of public records	93-1001-30(5)	Copies of records, acts of municipal corporations

TABLE A.

LIST OF PROPOSED RULES OF EVIDENCE
SUPERSEDING R.C.M. 1947 SECTIONS

RULE	SUBJECT MATTER	STATUTE	SUBJECT MATTER
902(4)	Certified copies of public records	93-1001-30(6)	Documents of any class if certified by keeper
		93-1001-30(7)	Documents of any class of sister state or foreign country
		93-1001-30(9)	Documents of U.S. government departments
		93-1001-35	Other official certificates
		93-1101-21	Certified copies public records
902(5)	Official publication	93-1101-12	Books containing laws of foreign countries or sister states
		93-1001-30 (1), (2), (3)	Published acts of all branches of governmen
902(6)	Newspapers and periodicals	None	
902(7)	Trade inscriptions and like	None	
902(8)	Acknowledged documents	93-1101-19	Notarized instruments admissible like those dealing with real property
		93-1101-21	Notarized instruments dealing with real property admissible
902(9)	Commercial paper and related documents	None	
902(10)	Presumptions created by law	None	
903	Subscribing witness' testimony unnecessary.	93-1101-19 93-1101-21	Acknowledged documents admissible

TABLE A.

LIST OF PROPOSED RULES OF EVIDENCE
SUPERSEDING R.C.M. 1947 SECTIONS

RULE	SUBJECT MATTER	STATUTE	SUBJECT MATTER
1001	Definitions	None	
1001(1)	Writing	None	
1001(2)	Photograph	None	
1001(3)	Original	None	
1001(4)	Duplicate of entries	None	
1001(5)	Copies of entries in regular course of business	93-1101-18	Same as rule.
1002	Production of original required except as otherwise provided	93-401-12 93-1101-9	Original required, exceptions Original required, exceptions
1003	Admissibility of duplicates	93-801-5, 93-801-6	Uniform Photographic Copies of Business and Official Records as Evidence Act
	Admissibility of copies of entries in regular course of business	93-1101-18	Same as rule
1004	Original not required under certain conditions:		
1004(1)	Lost or destroyed	93-401-12(1) 93-1101-9	Same as rule Same as rule
1004(2)	Cannot be obtained by judicial process	None	
1004(3)	In possession of adverse party	93-401-12(2) 93-1101-10	Same as rule Same as rule

TABLE A.

LIST OF PROPOSED RULES OF EVIDENCE
SUPERSEDING R.C.M. 1947 SECTIONS

RULE	SUBJECT MATTER	STATUTE	SUBJECT MATTER
1004(4)	Not related to central issue	None	
1005	Requirement of original not apply to public records	93-401-12(3) 93-401-12(4)	Original not required where a record or document is in custody of public official Original not required where it has been recorded and certified copy introduced
1006	Original not required if summary more convenient	93-401-12(5)	Original not required when it consists of numerous documents and would be inconvenien to use
1007	Original not required where contents may be proven by testimony of written admission of adverse party.	None	
1008	Functions of court and jury under best evidence rule	93-2501-2	Questions of law for court generally

TABLE B.

LIST OF R.C.M. 1947, EVIDENCE CODE SECTIONS
AFFECTED BY PROPOSED RULES OF EVIDENCE

SECTION 93-	SUBJECT MATTER	RULE	REMARKS
301-1	Definition of evidence	None	
301-2	Definition of proof	None	
301-3	Definition of law of evidence	None	
301-4	Degree of proof required	None	
301-5	Specifies four kinds of evidence	None	
301-6	Specifies degrees of evidence	1004	Not directly superceded, Rules in Article do not recognize degrees of evidence
301-7	Primary evidence defined	None	
301-8	Secondary evidence defined	None	
301-9	Direct evidence defined	None	
301-10	Indirect evidence defined	None	
301-11	Prima-facie evidence defined	None	
301-12	Partial evidence defined	None	
301-13	Satisfactory evidence defined	None	
301-14	Indispensable evidence defined	None	
301-15	Conclusive evidence defined	None	

TABLE B.

LIST OF R.C.M. 1947, EVIDENCE CODE SECTIONS
AFFECTED BY PROPOSED RULES OF EVIDENCE

SECTION 93-	SUBJECT MATTER	RULE	REMARKS
301-16	Cumulative evidence defined	None	
301-17	Corroborative evidence defined	None	
401-1	One witness sufficient to prove fact	None	
401-2	Testimony confined to personal knowege, except when opinions or declarations of others admissible	602	Supercedes statute, same requirement
401-3	Testimony to be in presence of persons affected, under oath	611(e) 603	Supercedes statute, identical provision Requires oath, supercedes statute
401-4	Witness presumed to speak truth, may be rebutted, trier of fact judge of credibility	None	Rules 607-609 deal with impeachment and could be interpreted to supercede this statute
401-5	Rights of one party cannot be affected by another	None	
401-6	Declarations of predecessor in title	804(b)(3)	Declarations against interest Rule supercedes statute
401-7	Declarations part of transaction	None	Hearsay exceptions in 803(1)-(3) deal partially with the transaction rule, but case law has expanded it beyond these bounds. Statute <u>not</u> superceded
401-8	Evidence admissible against parties admissible against third persons because of obligation or duty	801(d)(2) 804(b)(3)	801(d)(2) abolishes admissions based on concept of privity, would be treated as declarations against interest, 804(b)(3) Supercedes statute

TABLE B.

LIST OF R.C.M. 1947, EVIDENCE CODE SECTIONS
AFFECTED BY PROPOSED RULES OF EVIDENCE

SECTION 93-	SUBJECT MATTER	RULE	REMARKS
401-9	Declarations of decedent as to pedigree evidence, also reputation	803(19) 804(b)	Supercedes statute. Hearsay evidence of reputation and declarations on matters relating to personal family history
401-10	Declarations of decedent against pecuniary interest admissible against successor	804(b)(3)	Declarations against interest supercedes statute
401-11	When part of transaction admissible, all admissible	106	Supercedes statute. Rule of completeness restated.
401-12	How prove contents of writings in certain cases where original not available	1004 1005 1006	Supercedes statute, similar provisions
401-13	Statute of frauds	None	
401-14	Construction of language	None	(Note many of following sections deal with substantive law of contracts and constructions of law and writings, and should be transferred.)
401-15	Construction of statutes	None	
401-16	Construction of statutes and instruments	None	
401-17	Construction of statutes and instruments	None	
401-18	Construction of statutes and instruments	None	
401-19	Construction of contracts control printed words in agreement	None	

TABLE B.

LIST OF R.C.M. 1947, EVIDENCE CODE SECTIONS
AFFECTED BY PROPOSED RULES OF EVIDENCE

SECTION 93-	SUBJECT MATTER	RULE	REMARKS
401-20	Expert witness may testify to illegible characters on document	None	Article VII would allow expert to testify in this area, statute not necessary, but not directly superceded.
401-21	Construction of agreements	None	
401-22	Construction of agreements	None	
401-23	Construction	None	
401-24	Material allegations only may be proved	401 402	Definition of relevant evidence supercede this concept. Relevant evidence admissible, irrelevant evidence inadmiss
401-25	Evidence must correspond with material allegations Collateral matters admissible in discretion of court	401 402 403	Definition of relevant evidence supercede this concept. Relevant evidence admissible, irrelevant evidence inadmissi Allows court to exclude evidence on basis of prejudice, waste of time, confusion, e
401-26	Affirmative only may be proved	None	
401-27	Allows certain facts to be proved		
401-27(1)	Precise fact in dispute	401 402	Defines relevance Admits relevant evidence, excludes irrelevant evidence. Subdivision not necessary although not directly superceded
401-27(2)	Admission of a party	801(d)(2)(A)	Admission of party or representative
401-27(3)	Adoptive and tacit admissions	801(d)(2)(B)	Adoptive and tacit admissions
401-27(4)	Declarations of deceased person con-	804(b)(4)	Declaration of family history, supercedes

TABLE B.

LIST OF R.C.M. 1947, EVIDENCE CODE SECTIONS
AFFECTED BY PROPOSED RULES OF EVIDENCE

SECTION 93-	SUBJECT MATTER	RULE	REMARKS
	(4) Continued)		
	Declarations against a deceased person's interest in real property	804(b)(3)	Statements against interest, supercedes statute
	Dying declarations in criminal cases	804(b)(2)	Statements made under belief of impending death, supercedes statute
401-27(5)	Declarations of partners, agents	801(d)(2)(C) 801(d)(2)(D)	Authorized admissions Admissions by agents, supercedes statute
401-27(6)	Declarations of coconspirators	801(d)(2)(E)	Admissions by coconspirators, supercedes statute
401-27(7)	Transaction or res gestae rule	803(1)-(3)	Hearsay exceptions do not supercede the statute which has been construed in a broader fashion by case law
401-27(8)	Former testimony	801(b)(1)	Supercedes statute
401-27(9)	Opinion testimony by lay witness as to identify of handwriting; expert witness in area of skill	701 702	Not clear whether rule supercedes the lay opinion statute Expert testimony admissible under rule, supercedes this part of statute
401-27(10)	Opinion testimony by subscribing witness as to sanity of signer; other lay opinion as to sanity with reason for opinion	701	Not clear whether this rule should supercede the statute.
401-27(11)	Reputation evidence of general matters of history, boundary and pedigree	803(19) 803(20)	Personal family history by reputation Reputation as to history and boundary
~~401-17(12)~~	~~Usage~~	None	No rule of evidence deals with usage.

TABLE B.

LIST OF R.C.M. 1947, EVIDENCE CODE SECTIONS
AFFECTED BY PROPOSED RULES OF EVIDENCE

SECTION 93-	SUBJECT MATTER	RULE	REMARKS
401-27(13)	Monuments, inscriptions, entries in family Bibles	803(13)	Family records, supercedes statute.
401-27(14)	Contents of writing when oral evidence is admissible	None	Statute is within relevancy concepts of Article IV, could supercede statute.
401-27(15)	Other facts which may be presumed or inferred from facts in issue	None	Statute admits evidence which would be relevant under Article IV, could be superceded.
401-27(16)	Facts relating to credibility of witness	607-610	Rules in Article VI supercedes this statute
501-1:	Allows courts to take judicial notice of listed facts:	201(a),(b)	Allows courts to take judicial notice of all facts, lists kinds of facts, supercedes statute
501-1(1)	True signification of English words, etc.	201(b)	Allows judicial notice of fact generally known or capable of determination by resort to accurate sources
501-1(2)	Whatever is established by law	202(a)	Allows judicial notice of law
501-1(3)	Public and private official acts of all branches of government	202(b)(3), (4), (5)	Same as statute
501-1(4)	Seal of all courts of this state and U.S.	202(b)(11)	Same as statute
501-1(5)	Accession to office, official signatures and seals of office of all branches of government	201(b) and 201(b)(11)	Facts generally known and seals
501-1(6)	Existence, flag, title and seal of states or sovereigns recognized by U.S.	202(b)(11)	Seals

TABLE B.

LIST OF R.C.M. 1947, EVIDENCE CODE SECTIONS
AFFECTED BY PROPOSED RULES OF EVIDENCE

SECTION 93-	SUBJECT MATTER	RULE	REMARKS
501-1(7)	Seals of courts of admiralty and maritime jurisdiction	202(b)(10) and (11)	Maritime law and seals
501-1(8)	Laws of nature, measure of time, geographical divisions and political history of world	201(b)	Allows judicial notice of facts generally known or capable of determination by resort to accurate sources
501-2	Courts may take judicial notice of laws of other states	202(b)(1)	Same as statute
501-3	Allows court to inform itself of laws	202(c)	Same as statute, supercedes it
501-4	Determination of law a question for court	202(g)	Same as statute, supercedes it
501-5	Provides for notice to adverse party	202(f)(2)	Same as statute, supercedes it
501-6	Allows for proof of foreign law not mentioned in §93-501-2	202(a)	Allows judicial notice of all law
501-7	Interpretation of Uniform Act	None	Since all other sections of act are superceded, could also be superceded
501-8	Citation to act	None	Since all other sections of act are superceded, could also be superceded
601-1	Citation to Reporters' Confidence Act	None	None
601-2	Reporter's Confidence Act	None	None
701-1	Witness defined	None	None

TABLE B.

LIST OF R.C.M. 1947, EVIDENCE CODE SECTIONS
AFFECTED BY PROPOSED RULES OF EVIDENCE

SECTION 93-	SUBJECT MATTER	RULE	REMARKS
701-2	All persons capable of perceiving and communicating may be witnesses, except as provided in following sections	601(a)	Same as statute, supercedes it
701-3	Certain persons cannot be witnesses		
701-3(1)	Persons of unsound mind	601(b)	Disqualifies witnesses who cannot express themselves or are incapable of telling the truth, supercedes statute
701-3(2)	Children under 10 years of age	601(b)	Disqualifies witnesses who cannot express themselves or are incapable of telling the truth, supercedes statute
701-3(3)	Deadman's statute	None	Deadman's statute superceded by this rule by not including it.
701-3(4)	Deadman's statute	None	Deadman's statute superceded by this rule by not including it.
701-4(1)-(9)	Sets out several privileges	None	Rules do not affect privilege sections, but Article V does have rule governing all privileges.
701-5	Judge or Juror may be witness, or trial may be postponed	605	Judge may not testify in case in which he presides
		606(a)	Juror may not testify in case in which sitting
701-6	Interpreter must be sworn	604	Interpreters to be sworn and qualified as expert

TABLE B.

LIST OF R.C.M. 1947, EVIDENCE CODE SECTIONS
AFFECTED BY PROPOSED RULES OF EVIDENCE

SECTION 93-	SUBJECT MATTER	RULE	REMARKS
801-1	Definition of business	803(6)	Same
801-2	Proof of business record	803(6)	Same
801-3	Interpretation of act	None	Since act is superceded, so should this section be superceded
801-4	Citation to Uniform Business as Records Act	None	Since act is superceded, so should this section be superceded
801-5	Allows introduction of copies of business and official records	None	Should be retained because of reference to administrative proceedings, although covered by Rules 1001(4) and 1003, admissibility of duplicates in courts
801-6	Interpretation of 93-801-5	None	
901-1	Official reports admissible as evidence	803(8)	Same
901-2	Copy to adverse party	None	Could be retained
901-3	Cross-examination with report	None	Could be retained
901-4	Interpretation of act	None	
901-5	Citation to act	None	
1001-1	Classifies writings	None	
1001-2	Defines public writings	None	(Note that each of these three sections could be superceded because they are unnecessary under the Rules.)
1001-3	All other writings than those in previous section private writings	None	

TABLE B.

LIST OF R.C.M. 1947, EVIDENCE CODE SECTIONS
AFFECTED BY PROPOSED RULES OF EVIDENCE

SECTION 93-	SUBJECT MATTER	RULE	REMARKS
1001-17	Proof of judicial records	901(b)(7) 902(1)	Authentication of public records Self-authentication of domestic public documents under seal, rules supercede statute
1001-18	Authentication of records of foreign country	902(3)	Self-authentication of foreign public documents, supercedes statute
1001-19	Authentication of records of foreign country-methods of proof	903(3)	Self-authentication of foreign public documents, supercedes statute
1001-20	Effect of judgment	None	(Note that sections 93-1001-20 through 93-1001-29 deal with judgments and not law of evidence.)
1001-21	Effect of other judicial orders	None	
1001-22	Parties deemed to be same	None	
1001-23	What deemed adjudged in judgment	None	
1001-24	Where sureties bound, so is principal	None	
1001-25	Record of another state-effect	None	
1001-26	Record of court of admiralty	None	
1001-27	Effect of foreign judgment	None	
1001-28	Manner of impeaching record	None	
1001-29	Jurisdiction necessary in judgment	None	

TABLE B.

LIST OF R.C.M. 1947, EVIDENCE CODE SECTIONS
AFFECTED BY PROPOSED RULES OF EVIDENCE

SECTION 93-	SUBJECT MATTER	RULE	REMARKS
1001-4	Citizen provided right to examine public writings	None	(Note that these two sections do not relate to law of evidence and writings.)
1005	Public officers' duties concerning public writings	None	
1001-6	Classifies public writings	None	(Note that this section could be supercede as unnecessary under the rules.)
1001-7	Written or unwritten laws	None	(Note that these sections, 93-1001-7 through 93-1001-11 are not concerned with laws of evidence and writings.)
1001-8	Written laws defined		
1001-9	Classifies written laws	None	
1001-10	Public and private statutes defined	None	
1001-11	Unwritten law defined	None	
1001-12	Books containing law presumed correct	None	This is a presumption which should be tra fered to the sections concerning presumptions
1001-13	Proof of foreign law or public writings	901(b) (3)	Rule deals with authentication of foreign public documents, supercedes statute
1001-14	Evidence of other law of other states	901(b)(1) 902(5)	Witness may testify to authenticate Official publications, supercedes statute
1001-15	Recitals in statutes conclusive evidence of facts stated	None	Presumption, and should be transferred
1001-16	Judicial record defined	None	Since next section superceded, this section would be unnecessary.

TABLE B.

LIST OF R.C.M. 1947, EVIDENCE CODE SECTIONS
AFFECTED BY PROPOSED RULES OF EVIDENCE

SECTION 93-	SUBJECT MATTER	RULE	REMARKS
1001-30	Manner of proving various official documents:		
1001-30(1)	Acts of executive by records and public documents	902(1) 902(5)	Domestic public documents under seal Official publications, supercedes statute
1001-30(2)	Proceedings of legislature	902(5)	Official publications, supercedes statute
1001-30(3)	Acts of executive or proceedings of legislature of sister state	902(1) 902(5)	Domestic public documents under seal official publications, supercede statute
1001-30(4)	Acts of executive or proceedings of legislature of foreign country	902(3) 902(5)	Foreign public documents Official publications, supercedes statute
1001-30(5)	Acts of municipal corporations of state or board or department thereof	902(1) 902(2) 902(4) 902(5)	Domestic public documents under seal Domestic public documents not under seal, supercedes statute Certified copies of public records Official publications, supercedes statute
1001-30(6)	Documents of any other class	902(1) 902(4)	Domestic public documents under seal Certified copies of public records, supercedes statute
1001-30(7)	Documents of any other class of sister state certified to be correct	902(4)	Certified copies of public records, supercedes statute
1001-30(8)	Documents of any other class of foreign country certified to be correct	902(4)	Certified copies of public records, supercedes statute
1001-30(9)	Documents in departments of United States government certified correct	902(4)	Certified copies of public records, supercedes statute

TABLE B.

LIST OF R.C.M. 1947, EVIDENCE CODE SECTIONS
AFFECTED BY PROPOSED RULES OF EVIDENCE

SECTION 93-	SUBJECT MATTER	RULE	REMARKS
1001-31	Public record of private writing-how proved	901(b)(7) 902(4)	Authentication of public records or report certified copies of public records, super-cedes statute
1001-32	Entries in official books prima-facie evidence of contents	None	(Note that this is a presumption of correc ness and should be transferred to presump-tion sections.)
1001-33	Proof of justice of peace records from other states	902(1) 902(2) 902(4)	Domestic public documents under seal Domestic public documents not under seal Certified copies of public records, super-cedes statute
1001-34	Certified copies of justice of peace records from other states	902(4)	Certified copies of public records, super cedes statute
1001-35	Contents of other official certifi-cates	902(4)	Certified copies of public records, super cedes statute
1001-36	Provisions of preceeding sections applicable to United States and territories	902(1) 902(2) 902(4)	Domestic public documents under seal Domestic public documents not under seal Certified copies of public records, super cedes statute
1001-37	Certificates of purchase prima-facie evidence of ownership	None	Statute should be transferred
1001-38	Entries made by officers or boards prima facie evidence	None	Statute should be transfered
1001-39 through 1001-42	Finding of death under Federal Miss-ing Persons Act presumed, official reports, prima facie evidence, pre-sumption of authenticity and sever-ability clause	None	Act should be transfered.

TABLE B.

LIST OF R.C.M. 1947, EVIDENCE CODE SECTIONS
AFFECTED BY PROPOSED RULES OF EVIDENCE

SECTION 93-	SUBJECT MATTER	RULE	REMARKS
1101-1	Private writings classified	None	(Note these statutes deal with classifica
1101-2	Seal defined	None	tion and execution of writings as well as
1101-3	Manner of making seal	None	seals, could be transfered.)
1101-4	Effect of seal	None	
1101-5	Execution of instrument defined	None	
1101-6	Compromise of debt without seal good	None	
1101-7	Subscribing witness defined	None	
1101-8	Certain books, maps, etc., admissible	201(b)	Judicial notice of certain facts
		803(18)	Learned treatises, supercede statutes
1101-9	Original of writing must be proved	1002	Original of writing must be proved
1101-10	Writing in possession of adverse party need not be proved by original if adverse party not produce it.	1004(3)	Same content as statute, supercedes it
1101-11	Writing called for need not be introduced in evidence	None	(Note statute is generally unnecessary.)
1101-12	Writing proved by one who saw it executed or evidence of genuineness of handwriting or by subscribing witness	901(b)(1)	Witness authenticates writing by saying i is what proponent says it is
		901(b)(2)	Nonexpert opinion on handwriting
		901(b)(3)	Comparison by trier or expert witness wit sample of handwriting, supercedes statute
1101-13	When evidence of execution not necessary	901(a)	Rule generally supercedes statute
1101-14	Evidence of handwriting by writer	901(b)(1)	Witness testifies matter is what proponen claims it is
		901(b)(2)	Non-expert testimony on handwriting, supe cedes statute
1101-15	~~Evidence of handwriting by comparison~~	~~901(b)(3)~~	~~Authentication of handwriting by compari~~ son by expert or trier, supercedes statut

TABLE B.

LIST OF R.C.M. 1947, EVIDENCE CODE SECTIONS
AFFECTED BY PROPOSED RULES OF EVIDENCE

SECTION 93-	SUBJECT MATTER	RULE	REMARKS
1101-16	Evidence of handwriting by comparison with sample 30 years old	901(b)(3)	Authentication of handwriting by compariso supercedes statute
1101-17	Certain writings prima-facie evidence	None	Statute should be transferred
1101-18	Copies of regular entries made irregular course of business	1001(5) 1003	Definition of such a writing Such a writing made admissible, supercedes statute
1101-19	Proof of private writings which are acknowledged	902(8)	Acknowledged documents self-authenticating supercedes statutes.
1101-20	Removal of public records from office prohibited except by court order	None	Statute should be transferred
1101-21	Certified copies of records admissible	902(4)	Certified copies of public records self-authenticating, supercedes statute
1201-1	Introduction of physical objects	104, 402 901(a)	Allows court discretion to admit evidence Admits relevant evidence Sets out authentication identification requirements. Rules do not directly deal with physical objects, but would be admissible.
1301-1	Classification of indirect evidence	None	
1301-2	Definition of inference	None	
1301-3	Definition of presumption	301(a)	Same substance as statute
~~1301-4~~	~~When inference arises~~	~~None~~	

TABLE B.

LIST OF R.C.M. 1947, EVIDENCE CODE SECTIONS
AFFECTED BY PROPOSED RULES OF EVIDENCE

SECTION 93-	SUBJECT MATTER	RULE	REMARKS
1301-5	Effect of presumptions	301(b)	Rule includes not only statutory but also case law.
1301-6	Lists conclusive presumptions	None	Rules do not contain substitute for these presumptions
1301-7	Lists disputable presumptions	None	Rule contains only one change in the thirt nine presumptions, (34) Ancient documents rule is changed by Rules 803(16) as a hearsay exception and 902(b)(8) as to authentication requirements
1401-1	Indispensable evidence defined	None	
1401-2	Requirement of more than one witness to prove perjury and treason	None	
1401-3	Requires a will to be in writing	None	
1401-4	Repealed		
1401-5	Transfers of property to be in writing	None	
1401-6	Last section not to extend to certain cases	None	
1401-7	Required certain agreements to be in writing or invalid	None	
1401-8	Representation of credit to be in writing	None	

TABLE B.

LIST OF R.C.M. 1947, EVIDENCE CODE SECTIONS
AFFECTED BY PROPOSED RULES OF EVIDENCE

SECTION 93-	SUBJECT MATTER	RULE	REMARKS
1401-9	No evidence is conclusive or unanswerable unless otherwise provided	None	
1501-1 through 1501-15	Production of evidence not affected by Rules	None	
1601-1 through 1601-5	Production of affidavits, depositions and definitions, not affected by rules	None	
1701-1 through 1701-7	Production of affidavits, not affected by rules	None	
1801-1 through 1801-16	Havebeen repealed by Rules of Civil Procedure		
1901-1	Order of proof may be regulated by the sound discretion of the court	611(a) 104(b)	Same as statute, superceded it Allows court to control order of proof in connection with connecting-up rule.
1901-2	Witnesses may be excluded in discretion of court	614	Witnesses may be excluded by parties request, supercedes statute
1901-3	Court controls mode of interrogation; may stop production of evidence on a point when cumulative	611(a) 403	Court controls mode of interrogation Court may exclude evidence when cumulative supercedes statute
1901-4	Direct and cross-examination defined	None	

TABLE B.

LIST OF R.C.M. 1947, EVIDENCE CODE SECTIONS
AFFECTED BY PROPOSED RULES OF EVIDENCE

ECTION 93-	SUBJECT MATTER	RULE	REMARKS
1901-5	Leading question defined; when allowed	611(c)	Use of leading questions, supercedes stat
1901-6	When witness may refresh memory; use writing as recorded recollection	612 803(5)	Writing used to refresh memory recorded recollection, supercedes statute
1901-7	Allowable cross-examination	611(b)	Same as statute, supercedes it
1901-8	To what extent party may impeach his own witness	607(a)	Party may impeach his own witness, supercedes statute.
1901-9	Repealed		
1901-10	Re-examination and recall of witnesses	611(d)	Same as statute, supercedes it
1901-11	How witnesses may be impeached	607-610, 613	Rules provide broad means of examination Rule 607; impeachment by use of character evidence in Rule 608; impeachment by conviction of crime not allowed in Rule 609 and impeachment for religious beliefs not allowed in Rule 610; impeachment prior inconsistent statement in 613, supercedes statute
1901-12	Impeachment by prior statement, foundation required	613	Impeachment by prior inconsistent statement; foundation changed, supercedes statute
1901-13	Evidence of good character, when	404(a)(1) 404(a)(3)	Allows accused in criminal action to use good character evidence. Allows use of character evidence with witnesses
		404(c)	Allows use of character evidence when it is in issue.

TABLE B.

LIST OF R.C.M. 1947, EVIDENCE CODE SECTIONS
AFFECTED BY PROPOSED RULES OF EVIDENCE

ECTION 93-	SUBJECT MATTER	RULE	REMARKS
1901-13	(Continued)	608	Impeachment by use of character evidence, supercedes statute
1901-14	When writing shown to witness, may be inspected by adverse party	612 613(a)	Production and use of writing used to refresh memory Examination of witnesses using prior statements, supercedes statute
2001-1	Jury instructions	None	
2101-1	Witness bound to attend when subpoenaed	None	
2101-2	Witness bound to answer lawful questions, not degrading questions	611(a) 609	Allows court to protect witnesses Rule does not allow impeachment for conviction of crime, does not necessarily supercede statute
2101-3	Right of witnesses to be protected from improper questions	611(a)	Court may protect witnesses, does not necessarily supercede statute
2101-4	Witnesses protected from arrest	None	
2101-5	Arrest of witness void	None	
2101-6	Procedure for affidavit if witness is arrested	None	
2101-7	Court to discharge witness who has been arrested	None	
2201-1 through 2201-10	Deals with evidence in particular cases; no rules affect, except 2201-5, Evidence of compromise of no avail	409	Same as statute, supercedes it

TABLE B.
LIST OF R.C.M. 1947, EVIDENCE CODE SECTIONS
AFFECTED BY PROPOSED RULES OF EVIDENCE

ECTION 93-	SUBJECT MATTER	RULE	REMARKS
2301-1 through 93-2301-7	Have been repealed		
2401-1 through 93-2401-5	Provide forms of oaths, and who may administer them, not affected by Rules	None	
2501-1	Questions of fact to be decided by jury	None	
2501-2	Questions of law to be decided by court;	104(a)	Questions preliminary to admissibility fo the court
	Whatever judicially noticed must be accepted by jury	201(g)	Provides in civil cases the jury is bound by judicially noticed facts; court may only request jury to do so in crimin cases.
2501-3	Rules of evidence applicable in jury trials applicable in non-jury trials	101(a)	Rules of evidence apply to all courts in a proceedings, except as otherwise provided supercedes statute

TABLE C.
PROPOSED RULES OF EVIDENCE DIFFERING
FROM FEDERAL RULES OF EVIDENCE (FRE)

RULE	SOURCE	REMARKS
100	Based on FRE 1103	Title of rules changed
101(a)	Based on FRE 101	Scope of rules changed to reflect Montana law and different scheme used in Rule 101 which eliminates need for Article XI of FRE
101(b)	Based on FRE 1101(c)	Change in phraseology in reference to Article V
101(c)	Based on FRE 1101(d)	Change Federal reference to area where rules are inapplicable to conform to Montana needs
104(a)	Based on FRE 104(a)	Delete reference to 104(b)
104(b)	Original	States connecting up rule rather than FRE's rule of conditional relevance
106(a)	Based on FRE 106 and §93-401-11	Change Rule of Completeness to incorporate FRE and Montana law
106(b)	Original	Addition based on same concept from Nebraska and Nevada Rules of Evidence not limiting rights of party to use evidence under Rule of Completeness
201(a)	Based on FRE 201(a)	Change FRE concept of legislative and adjudicative facts so court can take judicial notice of all facts
201(b)	Based on FRE 201(b)	Change in phraseology for clarity
202(a)-(e)	Original, patterned after FRE 201 (a)-(e)	Rule added to allow court to take judicial notice of law
301(a)	Based on Cal. Ev. Code §600(a)	Change Federal rule on presumptions by adding two subdivisions, including (a) giving a definition

TABLE C.
PROPOSED RULES OF EVIDENCE DIFFERING
FROM FEDERAL RULES OF EVIDENCE (FRE)

RULE	SOURCE	REMARKS
301(b)	Original	Retains Montana law on effect of presumptions
301(c)	URE(1974)301(b)	Adopted Uniform Rules of Evidence (1974) 301(b) on inconsisten presumptions
302	URE(1974)302	Changed FRE concerned with presumptions arising under state law to presumptions arising under Federal law
401	Based on FRE and Cal. Ev. Code §210	Definition of relevant evidence same as FRE, added from Cal. Ev. Code definition concerning credibility of witnesses and hearsay declarants
402	Based on FRE 402	Exceptions clause in FRE referring to Federal law changed for exceptions clause used throughout proposed Rules
044(a)(2)	Based on FRE 404	Added clause to allow the character of victim also where victim cannot testify
404(c)	Original	Added subdivision specifically allowing character evidence where character is in issue
405(b)	Based on FRE 405 (b)	Added phrase to be consistent with Montana law and allowing specific instances of conduct to show reasonableness of force based in self-defense
406(a)	Original	Added subdivision to provide definition
406(b)	Based on FRE 406	Reworded because of definition in (a)
406(c)	URE(1974) 406(b)	Added subdivision concerned with methods of proof
409	Based on FRE 409	Changed to avoid problems and be consistent with Montana statutes

TABLE C.
PROPOSED RULES OF EVIDENCE DIFFERING
FROM FEDERAL RULES OF EVIDENCE (FRE)

RULE	SOURCE	REMARKS
410	Based on FRE 410 as originally enacted	Retained original FRE enacted by Congress but later amended
501	Based on URE 501	Single general rule of privileges changed from FRE, used Uniform Rules (1974) for this and following rules
502(a)-(c)	Based on URE 509	Identity of informer privilege
503	URE 510	Waiver of privilege
504	URE 511	When disclosure not waiver of privilege
505	Based on URE 512	Comment upon or reference to claim of privilege
601(a)	Based on FRE 601	Second sentence of FRE 601 deleted, refers to Federal law
601(b)	Cal. Ev. Code §701	Allows court to prevent witness from testifying where witness not capable of expressing himself or of telling truth
606(a)	Based on FRE 606(a)	Changes in language for sake of clarity
606(b)	Based on URE 606(b)	Changes in language for sake of clarity, substantive content the same as FRE
607(b)	Original	Added to insure party not bound by testimony of any witness
608(b)	Based on FRE 608(b)	Change in language to conform to Rule 609
609	Original	Conviction of crime not allowed as ground of impeachment
611(b)(2)	Original	Added to insure evidence developed on cross-examination may be used for any purpose
~~611(d)~~	~~Based on R.C.M. 1947, §93-1901-~~	~~Added to retain existing Montana law in statute~~

TABLE C.
PROPOSED RULES OF EVIDENCE DIFFERING
FROM FEDERAL RULES OF EVIDENCE (FRE)

RULE	SOURCE	REMARKS
611(e)	Based on R.C.M. 1947, §93-401-3	Added to retain existing Montana law in statute
612	Based on FRE 612	Clause referring to Federal law deleted
614(b)	Based on New Mexico Rule 614(b)	Clause added to insure court's questions are not construed as a comment upon the evidence
706	None	Federal Rule allowing court to appoint expert deleted
801(d)(1)(A)	Based on FRE 801(d)(1)(A)	Allows prior inconsistent statements without necessity that they be made under oath
801(d)(1)(B)	Based on FRE 801(d)(1)(B)	Change to clarify language
802	Based on FRE 802	Exceptions clause in FRE referring to Federal law changed for exceptions clause used throughout Rules
803(3)	Based on FRE 803(3)	Clause inconsistent with Montana probate law deleted from state of mind exception
803(6)	Based on FRE 803(6)	Clause requiring strict personal knowledge deleted from business record exception
803(8)	Based on RUE 803(8)	Uniform Rule adopted, more restrictive as to admissibility of official reports than FRE
803(19)	Based on FRE 803(A)	Clause added to refer to dissolution of marriage
803(22)	Based on FRE 803(22)	Clause deleted to be consistent with Rule 609
803(24)	Based on Sp. Ct. version of FRE	Open-ended version of FRE hearsay exception without restrictions placed on it by Congress
804(a)(5)	Based on Sp. Ct. version of FRE	Definition of unavailability where absent from jurisdiction not require witness attempted to be deposed

TABLE C.
PROPOSED RULES OF EVIDENCE DIFFERING
FROM FEDERAL RULES OF EVIDENCE (FRE)

RULE	SOURCE	REMARKS
804(b)(1)	Based on FRE 804(b)(1)	Former testimony exception follows Sp. Ct. version for civil cases and FRE for criminal cases
804(b)(2)	Based on FRE 804(b)(2)	Clause restricting dying declarations to homocide prosecution and civil cases deleted
804(b)(3)	Based on FRE 804(b)(3)	Added clause contained in Supreme Court version allowing statements against social interest
804(b)(4)	Based on FRE 804(b)(4)	Clause added referring to dissolution of marriage
804(b)(5)	Based on Sp. Ct. version of FRE 804(b)(5)	Open-ended hearsay exception adopted without restrictions imposed by Congress
901(b)(10)	Based on FRE 901(b)(10)	Language changed to refer to Montana law rather than Federal law
902(2)	Based on FRE 902(2)	Clause added to conform to Montana statutes
902(4)	Based on URE 902(4)	Uniform Rule language used because of reference to Federal la
902(10)	Based on URE 902(10)	Uniform Rule language used because of reference to Federal la
1001(5)	Based on R.C.M. 1947, §93-1101-18	Definition added to retain existing Montana law
1003	Based on FRE 1003	Clauses added to retain existing Montana law and to be consistent with Montana probate law
1008	Based on FRE 1008	Sentence deleted allowing jury to make determination of admissibility of evidence