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Rules of Evidence Amendments

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RULES OF EVIDENCE AMENDMENTS

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On July 1, 1991 five amendments to the Ohio Rules of Evidence became effective. Two of the amendments involved the adoption of new rules: Rule 616 (impeachment by bias) and Rule 807 (child abuse hearsay exception). The other three amendments changed existing rules: Rule 601 (competency of witnesses); Rule 609 (impeachment by prior conviction); and Rule 410 (guilty pleas). This article discusses these amendments.

SPOUSAL COMPETENCY

Ohio Rule 601(B) was amended to permit a spouse to testify against a defendant-spouse, if the spouse *elects* to do so. When Rule 601(B) was adopted in 1980, it codified the spousal competency rule as set forth in R.C. 2945.42. Under this rule, a witness was incompetent to testify against his or her spouse in a criminal case unless the charged offense involved a crime against the testifying spouse or the children of either spouse. Even if a spouse wanted to testify, the defendant could prevent the testimony. For example, if a husband killed his mother-in-law in the presence of his wife, he could keep her off the witness stand if she wanted to testify. *See* Locke v. State, 33 Ohio App. 445, 169 N.E. 833 (1929). The amendment changes this result by permitting the wife to elect to testify.

Criticism of the Former Rule

Rule 601(B) is based on the policy of protecting the marital relationship from "dissension" and the "natural repugnance" for convicting a defendant upon the testimony of his or her "intimate life partner." 8 J. Wigmore, Evidence 216-17 (McNaughton rev. 1961). Many commentators, however, criticized the rule. As McCormick has pointed out: "The privilege has sometimes been defended on the ground that it protects family harmony. But family harmony is nearly always past saving when the spouse is willing to aid the prosecution. The privilege is an archaic survival of a mystical religious dogma and of a way of thinking about the marital relation that is today outmoded." C. McCormick, Evidence 162 (3d ed. 1984). Wigmore agreed: "This marital privilege is the merest anachronism in legal theory and an indefensible obstruction to truth in practice." 8 J. Wigmore, Evidence 221 (McNaughton rev. 1961). *See also* Huhn, "Sacred Seal of Secrecy": The Rules of Spousal Incompetency and Marital Privilege in Criminal Cases, 20 Akron L. Rev. 433 (1987).

The amendment of Rule 601(B) is in accord with the federal common law rule as announced in Trammel v. U.S., 445 U.S. 40 (1980). In that case, the United States Supreme Court reasoned:

> When one spouse is willing to testify against the other in a criminal proceeding — whatever the motivation — their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve. In these circumstances, a rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace. *Id.* at 52.

Limitations on the New Rule

Two points should be noted. First, the amended rule does not abolish the spousal incompetency rule. A spouse cannot be compelled to testify if he or she does not want to testify. In January 1981, the Supreme Court proposed an amendment that would have deleted Evid. R. 601(B). 54 Ohio Bar 175 (1981). The 1981 amendment subsequently was withdrawn. 54 Ohio Bar 972 (1981). The current amendment differs from the 1981 proposal. The 1981 proposal would have abolished the spousal incompetency rule in its entirety, thereby permitting the prosecution to force the spouse to testify even when he or she did not wish to testify. The current proposal does not permit the prosecutor to compel testimony from an unwilling spouse.

Second, the amended rule still leaves the defendant with the protection of the confidential communication privilege, which is recognized in R.C. 2317.02(C) and R.C. 2945.42 and governed by Evid. R. 501. This privilege is not affected by Evid. R. 601(B).

IMPEACHMENT BY PRIOR CONVICTION

Rule 609, which governs the use of prior convictions offered to impeach, was amended in two respects. In a significant change, Rule 609(A) was amended to explicitly recognize a trial court's authority to exclude some "felony" convictions when offered as impeachment evidence. A second change concerns methods of proof.

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Amended Rule 609(A) reads:

(A) General rule. For the purpose of attacking the credibility of a witness:

(1) Subject to Evid. R. 403, evidence that a witness other than the accused has been convicted of a crime is admissible if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the witness was convicted.

(2) Notwithstanding Evid. R. 403(A), but subject to Evid R. 403(B), evidence that the accused has been convicted of a crime is admissible if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the accused was convicted and if the court determines that the probative value of the evidence outweighs the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

(3) Notwithstanding Evid. R. 403(A), but subject to Evid. R. 403(B), evidence that any witness, including an accused, has been convicted of a crime is admissible if the crime involved dishonesty or false statement, regardless of the punishment and whether based upon state or federal statute or local ordinance.

Former Rule 609(A)

Former Rule 609(A) contained only two subdivisions. The first concerned "felony" convictions — crimes punishable by death or imprisonment in excess of one year. The second concerned crimes of dishonesty and false statement. The second category has not been changed significantly, but it has been renumbered as Rule 609(A)(3). As under the former rule, prior convictions involving crimes of dishonesty and false statement are *automatically* admissible.

The problematic issue raised by the former rule concerned the trial court's discretion to exclude evidence of prior felony convictions. As adopted in 1980, the Ohio rule differed from its federal counterpart. A clause in Federal Rule 609(a)(1) explicitly authorized the trial court to exclude "felony" convictions; these convictions were admissible only if the "court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant." This clause was deleted from the Ohio rule.

It could have been argued that this deletion meant that Ohio courts did not have the authority to exclude prior felony convictions. In other words, any felony conviction was automatically admissible. Indeed, the rule specified that these convictions "shall be admitted." The Ohio Staff Note (1980), however, suggested otherwise. The Staff Note read:

> In limiting that discretionary grant, Rule 609(A) is directed to greater uniformity in application subject only to the provisions of Rule 403. The removal of the reference to the defendant insures that the application of the rule is not limited to criminal prosecutions.

This language indicated that admission of felony convictions was *not* automatic — that the trial court retained some discretion to exclude these convictions. This reading of the rule was buttressed by a subsequent case. In State v. Wright, 48 Ohio St.3d 5, 548 N.E.2d 923 (1990), the Supreme Court wrote: "Evid. R. 609 must be considered in conjunction with Evid. R. 403. The trial judge therefore has broad discretion in determining the extent to which testimony will be admitted under Evid. R. 609." *Id.* (syllabus).

Amended Rule 609

The amended rule explicitly recognizes this discretion. Former Rule 609(A)(1), which governed felony convictions, has been subdivided into what is now Rule 609(A)(1) and (A)(2). Rule 609(A)(1) governs the impeachment use of felony convictions where the witness is not the accused in a criminal case. Rule 609(A)(2) governs the impeachment use of felony convictions of the accused.

The accused is singled out for special treatment because the risk that a jury would misuse evidence of a prior conviction as evidence of propensity or general character, a use which is prohibited by Evid. R. 404, is far greater when a criminal accused is impeached. *See* C. McCormick, Evidence 99 (3d ed. 1984) ("The sharpest and most prejudicial impact of the practice of impeachment by conviction . . . is upon . . . the accused in a criminal case who elects to take the stand."). Moreover, if such convictions were automatically admissible in every case, an accused with a prior criminal record would confront what McCormick called a "grievous dilemma."

> The accused, who has a "record" but who thinks he has a defense to the present charge, is thus placed in a grievous dilemma. If he stays off the stand, his silence alone will prompt the jury to believe him guilty. If he elects to testify, his "record" becomes provable to impeach him, and this again is likely to doom his defense. *Id.*

The solution to this dilemma is to recognize the trial court's discretion to exclude evidence of prior convictions.

Impeachment of the Accused

Rule 609(A)(2) explicitly recognizes a trial court's authority to exclude evidence of an accused's prior convictions where the probative value of the evidence is outweighed by the danger of unfair prejudice. A number of factors should influence the trial court's admissibility determination.

First, the *nature of the offense*: A prior conviction that bears upon veracity has high probative value. In contrast, conviction of a crime of violence has little probative value. However, the most probative crimes — those involving dishonesty or false statement — are not governed by this provision. They are governed by Rule 609(A)(3) and are automatically admissible.

Second, the *remoteness* of the conviction: A one-year old conviction is more probative than an eight-year old conviction. Convictions more than ten years old, however, are subject to the special limitations of Rule 609(B), which generally excludes such convictions.

Third, the *similarity between the prior offense and the charged offense:* If a defendant is charged with a narcotics offense, evidence of a prior narcotics conviction is more prejudicial than evidence of a prior larceny conviction. The jury is more likely to use the prior narcotics conviction as evidence of character to commit narcotics offenses rather than as evidence of untruthful character.

Fourth, the *importance of and need for* the defendant's testimony: If the defendant is the only person who can provide defense evidence, the need for his testimony is

greater and thus the argument for exclusion of the prior conviction is stronger.

Fifth, the *importance or centrality of credibility in the case:* For example, if the case boils down to a "swearing contest," it is more important for the jury to know of any evidence affecting credibility and thus the argument for admission of the prior conviction is greater.

Impeachment of Other Witnesses

Rule 609(A)(1) provides that evidence of prior convictions involving crimes punishable by death or imprisonment in excess of one year may be admissible to impeach a witness other than an accused in a criminal case. As discussed above, subdivision (A)(2) governs impeachment of an accused. In contrast, Rule 609(A)(1) applies to witnesses in civil cases, prosecution witnesses in criminal cases, and defense witnesses in criminal cases.

The rule recognizes a trial court's authority to exclude evidence of a witness' prior convictions where the probative value of the evidence is *substantially* outweighed by the danger of unfair prejudice. This result is accomplished by making admissibility subject to Rule 403. In making this determination, the court should consider a number of factors, such as the nature of the crime resulting in conviction, the age of the prior conviction, and its prejudicial effect.

The treatment of an accused under subdivision (A)(2) and other witnesses under subdivision (A)(1) differs in one important respect. Both provisions recognize a trial court's discretion when balancing probative value against prejudicial effect. However, impeachment of a witness other than an accused is more readily permitted — exclusion of the prior conviction is required only when probative value is *substantially* outweighed by unfair prejudice. *See* Rule 403(A). The word "substantially" is not used when the accused is impeached under Rule 609(A)(2). Thus, exclusion is required even if the unfair prejudice does not *substantially* outweigh probative value.

Federal Rule 609

The issue raised by Ohio Evid. R. 609(A) also was raised by former Federal Rule 609(a), even though the federal provision explicitly recognized trial judge discretion to exclude evidence of prior convictions. Because the discretionary language in the federal rule referred to balancing the prejudicial effect to the *"defendant,"* the applicability of this clause to civil cases and prosecution witnesses had been questioned. The U.S. Supreme Court in Green v. Bock Laundry, 490 U.S. 504 (1989), ruled that the discretion to exclude convictions under Federal Rule 609(a) did not apply to civil cases or to prosecution witnesses. Moreover, the Court held that Rule 403 did not apply in this context. A 1990 amendment to the federal rule changed this result. This amendment is comparable to the new Ohio Rule 609.

Methods of Proof

New Rule 609(F) governs methods of proof. It reads:

> Methods of proof. When evidence of a witness's conviction of a crime is admissible under this rule, the fact of the conviction may be proved only by the testimony of the witness on direct or cross-examination, or by public record shown to the witness during his or her examination. If the witness denies that he or she is the person to whom the public record refers, the court may permit the introduction of additional evidence tending to establish that the witness is or is not the person to whom the public record refers.

There is no comparable federal rule. The 1980 version of Ohio Rule 609(A) contained a phrase on methods of proof; prior convictions could be "elicited from him [the witness] or established by public record during cross-examination." The 1991 amendment deleted this language from subdivision (A) and replaced it with subdivision (F).

The rule follows traditional practice; prior convictions can be proved by an acknowledgment by the witness during examination or by public record. The use of a public record, however, is also limited to the time when the witness is on the witness stand. This limitation ensures that the witness will have an opportunity to contest or explain the prior conviction.

A hearsay exception for judgments of previous convictions is recognized in Rule 803(21). A record of a prior conviction also would qualify as a public record under Rule 803(8), is often self-authenticating under Rule 902, and certified copies are admissible under Rule 1005 (best evidence rule). *See also* R.C. 2945.75(B) (certified copy of prior conviction).

IMPEACHMENT BY BIAS

A new rule, Rule 616, has been added to govern impeachment by means of bias. It provides:

> Bias, prejudice, interest, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by extrinsic evidence.

By promulgating a rule on bias impeachment, the Supreme Court has followed the lead of the Uniform Rules of Evidence (1974) and several other jurisdictions. *See* Unif. R. Evid. 616; Haw. R. Evid. 609.1; Utah R. Evid. 608(c); Mil. R. Evid. 608(c).

Even before the adoption of Rule 616, impeachment by bias was recognized in Ohio. R.C. 2945.42 provides: "No person is disqualified as a witness in a criminal prosecution by reason of his interest in the prosecution as a party or otherwise. . . . Such interest . . . may be shown for the purpose of affecting the credibility of such witness." In addition, the cases recognized this type of impeachment. *See* State v. Ferguson, 5 Ohio St.3d 160, 165, 450 N.E.2d 265 (1983) ("It is beyond question that a witness' bias and prejudice by virtue of pecuniary interest in the outcome of the proceeding is a matter affecting credibility under Evid. R. 611(B)."); Calderon v. Sharkey, 70 Ohio St.2d 218, 223-24, 436 N.E.2d 1008 (1982) ("Evidence of bias and pecuniary interest is a legitimate subject of inquiry of all expert witnesses . . . .").

Federal Rules

There is, however, no comparable federal rule. Nevertheless, impeachment by showing bias is permitted under the federal rules. In United States v. Abel, 469 U.S. 45 (1984), the U.S. Supreme Court held that impeachment of a witness for bias was proper. According to the Court, "the lesson to be drawn . . . is that it is permissible to impeach a witness by showing his bias under the Federal Rules of Evidence just as it was

permissible to do so before their adoption." *Id.* at 51. The Court went on to state that "[p]roof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." *Id.* at 52.

Types of Bias

There are two broad categories of bias. First, a relationship between a witness and one of the parties is evidence of bias. The relationship may be a favorable one, such as familial, employment, business, or sexual relationship, or it may be a hostile relationship, caused by prior fights and quarrels. *See* Taylor v. Schlichter, 118 Ohio St. 131, 136-37, 160 N.E. 610 (1928) (hatred and revenge); Gladman v. Carns, 9 Ohio App.2d 135, 137, 223 N.E.2d 378 (1964) (wife's interest affects credibility).

Second, a relationship between a witness and the litigation also is evidence of bias. *See* State v. Ferguson, 5 Ohio St.3d 160, 165, 450 N.E.2d 265 (1983) (interest in related civil case); Calderon v. Sharkey, 70 Ohio St.2d 218, 223, 436 N.E.2d 1008 (1982) (expert's interest in related cases).

One of the most common examples of interest in the litigation arises in cases in which a prosecution witness is offered immunity or a reduced charge in exchange for testifying against the defendant. Such arrangements, as well as the pendency of criminal charges, are always admissible to show bias. *See* State v. Wolery, 46 Ohio St.2d 316, 348 N.E.2d 351 (1976), *cert. denied,* 429 U.S. 932 (1976); State v. Hector, 19 Ohio St.2d 167, 249 N.E.2d 912 (1969).

In State v. Gavin, 51 Ohio App.2d 49, 365 N.E.2d 1263 (Cuyahoga 1977), the court commented:

> In a criminal case the spectre of bias materializes anytime the evidence indicates that the witness has potential trading assets to barter with the State. For instance, the potential is suggested whenever the witness is:
>
> (1) a co-defendant, an accomplice or a suspect susceptible to charge in the case on trial or (2) under pending indictment in another case or a suspect susceptible to charge in another case or (3) serving time subject to executive commutation, pardon or parole. *Id.* at 53.

Right of Confrontation

Substantial curtailment of a criminal defendant's efforts to establish bias on the part of prosecution witnesses is unconstitutional. In Davis v. Alaska, 415 U.S. 308 (1974), the defense attempted to show that a key prosecution witness was a juvenile probationer and therefore had a motive — retention of his probationary status — to testify in a way favorable to the prosecution. The trial court, based on a state statute, excluded this evidence. The U.S. Supreme Court reversed, finding a violation of the defendant's right of confrontation: "The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross examination for bias of an adverse witness." *Id.* at 320. *See also* Delaware v. Van Arsdall, 475 U.S. 673 (1986); Smith v. Illinois, 390 U.S. 129 (1968).

Extrinsic Evidence of Bias

Bias is not considered a "collateral matter," and thus extrinsic evidence of bias is admissible; the impeaching party is not limited to attempting to elicit the evidence during the examination of the witness. "[W]here the cross-examination is . . . with the view of showing the feeling, bias or interest of the witness with respect to the parties or either of them, the party cross-examining may, in a proper case, call witnesses to contradict the testimony so elicited on cross-examination." Kent v. State, 42 Ohio St. 426 (1884) (syllabus, para. 1). *See also* Harper v. State, 106 Ohio St. 481, 485, 140 N.E. 364, 365 (1922) ("Evidence relevant upon the question of credibility, especially of an interested witness, is in no sense collateral").

Rule 616 explicitly provides for the admission of extrinsic evidence.

Foundational Requirement

Most jurisdictions require that a foundation be laid for the introduction of extrinsic evidence of bias. Thus, the examiner must raise the question of bias during the cross-examination of the witness or be foreclosed from presenting the testimony of other witnesses on the issue. C. McCormick, Evidence § 40 (3d ed 1984).

Ohio, however, apparently followed the minority view; no foundation is required. In State v. Kehn, 50 Ohio St.2d 11, 361 N.E.2d 1330 (1977), *cert denied,* 434 U.S. 858 (1977), the Court stated: "[I]mpeachment of a witness by showing bias or prejudice does not require the foundation necessary for impeaching a prior inconsistent statement." *Id.* at 19. *Accord*, State v. Carlson, 31 Ohio App.3d 72, 508 N.E.2d 999 (Cuyahoga 1986).

Rule 616 follows this approach and does *not* require the laying of a foundation on cross-examination.

CHILD ABUSE HEARSAY EXCEPTION

Rule 807 is a new rule that recognizes a "child abuse" hearsay exception. The rule states:

> (A) An out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any sexual act performed by, with, or on the child or describing any act of physical violence directed against the child is not excluded as hearsay under Evid. R. 802 if all of the following apply:
>
> (1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid. R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement. In making its determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time

between the act and the statement. In making this determination, the court shall not consider whether there is independent proof of the sexual act or act of physical violence.

(2) The child's testimony is not reasonably obtainable by the proponent of the statement.

(3) There is independent proof of the sexual act or act of physical violence.

(4) At least ten days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness.

(B) The child's testimony is "not reasonably obtainable by the proponent of the statement" under division (A)(2) of this rule only if one or more of the following apply:

(1) The child refuses to testify concerning the subject matter of the statement or claims a lack of memory of the subject matter of the statement after a person trusted by the child, in the presence of the court, urges the child to both describe the acts described by the statement and to testify.

(2) The court finds all of the following:
(a) The child is absent from the trial or hearing;
(b) The proponent of the statement has been unable to procure the child's attendance or testimony by process or other reasonable means despite a good faith effort to do so;
(c) It is probable that the proponent would be unable to procure the child's testimony or attendance if the trial or hearing were delayed for a reasonable time.

(3) The court finds both of the following:
(a) The child is unable to testify at the trial or hearing because of death or then existing physical or mental illness or infirmity;
(b) The illness or infirmity would not improve sufficiently to permit the child to testify if the trial or hearing were delayed for a reasonable time.

The proponent of the statement has not established that the child's testimony or attendance is not reasonably obtainable if the child's refusal, claim or lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the child from attending or testifying.

(C) The court shall make the findings required by this rule on the basis of a hearing conducted outside the presence of the jury and shall make findings of fact, on the record, as to the bases for its ruling.

In recent years the legislatures in a number of states have enacted specialized hearsay exceptions for victims of child abuse. *See* Unif. R. Evid. 807; J. Myers, Child Witness Law and Practice § 5.38 (1987). The General Assembly followed this trend in enacting R.C. 2151.35(F), a provision that applies to abuse, neglect, and dependency cases in juvenile court. In State v. Boston, 46 Ohio St.3d 108, 545 N.E.2d 1220 (1989), the Supreme Court discussed the hearsay issues in child abuse cases and provided guidelines on admissibility. The Court, however, recognized that more was needed. The Court commented: "We establish these guidelines with the hope that the Ohio Supreme Court Rules Advisory Committee and the General Assembly of Ohio will review the entire problem and promulgate rules and statutes that will assist our courts in dealing with prosecutions in child abuse cases." *Id.* at 126. Rule 807 was promulgated in response.

The rule applies in all cases — criminal, juvenile, and civil. Admission of such statements against an accused in a criminal case, however, raises confrontation issues.

Rule 807 recognizes an *additional* hearsay exception. Thus, statements admissible under the hearsay exceptions recognized in Rules 803 and 804 are not affected by this rule. For example, statements by children under 12 that qualify as excited utterances are still admissible under Rule 803(2). It does not matter if the statement does or does not satisfy the requirements of Rule 807.

Statements admissible under Rule 807 must satisfy six conditions. First, the statement must have been made by a child who is under the age of 12 at the time of the trial or hearing. Second, the statement must describe a sexual act performed by, with, or on the child, or it must describe an act of violence directed at the child. Third, the statement must be trustworthy. Fourth, the child's in-court testimony must not be reasonably obtainable. Fifth, the statement must be corroborated by independent proof. Sixth, the proponent must give pretrial notice of its intention to introduce a statement under this rule ten days before the trial or hearing.

Age Requirement

Rule 807(A) requires that the statement be made by a child who is under 12 years of age at the time of the trial or hearing. An absolute physical age is used in the rule rather than a mental, emotional, or psychological age. The determinative time, however, is the time of trial and not the time of the abuse or the time of the statement.

Subject Matter Requirement

Rule 807(A) is limited to statements describing sexual abuse performed by, with, or on the child. Accordingly, out-of-court statements by one child about the sexual abuse of another child are not admissible under this rule. Statements describing acts of physical violence directed against the child are also admissible. Here, again, statements by one child about the physical abuse of another child are not covered by the rule. Statements about other crimes, such as a murder, which may have occurred in the child's presence are also not covered by Rule 807.

Trustworthiness Requirement

Rule 807(A)(1) codifies the confrontation requirements set forth in Idaho v. Wright, 110 S.Ct. 3139 (1990). *Wright* involved the admissibility of a child's statement under the Idaho residual hearsay exception. The U.S. Supreme Court found a Sixth Amendment violation because insufficient particularized guarantees of trustworthiness surrounded the making of the statement. In determining trustworthiness, the Court adopted a "totality of the circumstances approach."

Reliability Factors

The *Wright* opinion mentions a number of factors that might affect the trustworthiness of the statement: spontaneity and consistent repetition, the mental state of the

child, lack of motive to fabricate, and the use of terminology unexpected of a child of similar age.

Rule 807(A)(1) lists these factors and also specifies additional factors. The phrase "means by which the statement was elicited" concerns whether the statement was elicited by leading questions or after repeated promptings. The phrase "lapse of time between the act and the statement" identifies a traditional hearsay concern; the greater the time period, the more likely a memory lapse and the more likely external influences have affected the content of the statement.

The Staff Note mentions other factors: "Additional factors such as whether the statement was videotaped or whether the parents were involved in divorce or custody proceedings may be relevant." Divorce or custody battles raise the possibility that the child is being unduly influenced by one of the parents. Consideration of other relevant factors is not precluded by the rule; the enumerated factors are illustrative only.

Corroborating Circumstances

In *Wright* the Court also made clear that "corroborating circumstances" could *not* be considered in determining the trustworthiness of the statement: "the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief." *Id.* at 3148. In rejecting reliance on corroborating proof, the Court wrote:

> In short, the use of corroborating evidence to support a hearsay statement's "particularized guarantees of trustworthiness" would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility. *Id.* at 3150.

The last sentence of Rule 807(A)(1) codifies this rationale: "The court shall not consider whether there is independent proof of the sexual act or act of physical violence." Another subdivision, Rule 807(A)(3), sets forth an "independent proof" requirement but this requirement is *in addition to* the trustworthiness requirement of subdivision (A)(1).

Unavailability Requirement

Rule 807(A)(2) requires that the child-declarant be unavailable to testify at the trial or hearing: "The child's testimony is not reasonably obtainable by the proponent of the statement." Rule 807(B) specifies the circumstances that would satisfy the unavailability requirement. These circumstances are discussed below. None of these circumstances establishes unavailability, however, if the proponent of the statement has caused the unavailability "for the purpose of preventing the child from attending or testifying."

Refusal to Testify

A child is unavailable if the child refuses to testify after a person trusted by the child urges the child to testify. Rule 807(B)(1). The attempt to persuade the child to testify must occur in the presence of the trial judge. This requirement is intended to cover a situation where a parent or other person is resisting the effort to have the child testify. The preference underlying the rule is for live testimony, and the use of the hearsay statement is permitted only when there is an established need. A finding of unavailability based on a mere *pro forma* attempt to have the child testify would undercut this preference.

As the Staff Note indicates, some children who may refuse to testify in a courtroom may be willing to testify from another room via closed-circuit television. This procedure is authorized by R.C. 2907.41. The U.S. Supreme Court has upheld such a procedure, provided the trial court makes particularized findings of necessity in the specific case. Maryland v. Craig, 110 S.Ct. 3157 (1990). Testimony by closed-circuit TV is preferable to the admission of the hearsay statement; it allows for cross-examination and provides an opportunity for the jury to observe the demeanor of the child witness. Accordingly, the hearsay statement should not be admitted if the child is willing to testify via closed-circuit TV.

Lack of Memory

A child is unavailable if the child claims a lack of memory of the subject matter of the statement after a person trusted by the child urges the child to testify. Rule 807(B)(1). The attempt to persuade the child to testify must occur in the presence of the trial judge. Lack of memory makes the child's testimony unavailable and thus establishes a need for the admission of the hearsay statement. Nevertheless, a mere *pro forma* claim of lack of memory should not be accepted, and thus the rule requires a trusted person to urge the child to testify.

Inability to Procure Testimony or Attendance

A child is unavailable if the proponent cannot reasonably procure the attendance or testimony of the child. Rule 807(B)(2). The court must find, however, that the proponent has made a good faith effort to procure the attendance or testimony by process or otherwise. The court must also find that a reasonable delay would not make the testimony or attendance available. The reference to the child's "testimony" in addition to "attendance" indicates that the proponent would also have to show that it was not possible to take the child's deposition.

Death or Illness

A child is unavailable if the child is dead or seriously ill and unable to testify. Rule 807(B)(3). The serious illness, either physical or mental, must be such that it would not improve sufficiently if the trial were delayed for a reasonable time. In a criminal case, a delay may raise speedy trial concerns. This factor, as well as a defendant's willingness to agree to the delay, should be considered by the court in making this determination.

Right of Confrontation

The admission of hearsay evidence against an accused in a criminal case often raises confrontation issues. As discussed above, *Idaho v. Wright* addressed one aspect of this right, *i.e.,* determining the reliability of statements by a child which are admitted under a residual or child abuse hearsay exception. *Wright* specifically reserved consideration of a related confrontation issue, *i.e.,* whether the proponent of the statement also must

establish the declarant's unavailability. The U.S. Supreme Court has accepted certiorari in a case that raises this issue. White v. Illinois, 198 Ill. App.3d 641, 555 N.E.2d 1241 (1990), *review denied*, 133 Ill.2d 570, 561 N.E.2d 705 (1990), *cert. granted,* 111 S.Ct. 1681 (1991).

Independent Proof Requirement

Rule 807(A)(3) conditions admissibility of the statement on independent proof of the sexual act or act of physical violence. In effect, this is a corroboration requirement.

This provision does not conflict with the U.S. Supreme Court's opinion in *Wright v. Idaho* as discussed above in connection with the "trustworthiness" requirement of Rule 807(A)(1). The Court in *Wright* held that corroborating evidence could not be considered in determining the trustworthiness of the statement. Rule 807(A)(1) explicitly codifies this ruling; it provides that the "Court shall not consider whether there is independent proof of the sexual act or act of physical violence" when the trustworthiness of the statement is determined.

Rule 807(A)(3) does not permit "independent proof" or corroboration to be considered in assessing "trustworthiness." Instead, it requires independent proof (corroboration) *in addition to* the trustworthiness requirement. The *Wright* opinion explicitly recognized the permissibility of this approach:

> States are, of course, free, as a matter of state law, to demand corroboration of an unavailable child declarant's statements as well as other indicia of reliability before allowing the statements to be admitted into evidence. 111 S.Ct. at 3154.

Accordingly, the independent proof requirement is an added safeguard, making admissibility more restrictive. It does not water-down the constitutional requirement of trustworthiness.

Notice Requirement

Rule 807(A)(4) requires the proponent to notify the opposing party of an intention to offer statements under Rule 807. Other evidentiary rules contain similar notice requirements. *See* Rule 609(B) (ten-year old convictions for impeachment); R.C. 2907.02(E) (admissibility of evidence under the rape shield statute must be decided three days before trial); R.C. 2151.35(F) (child abuse hearsay exception in abuse, neglect, and dependency cases).

The purpose of notice is to provide the opposing party with a fair opportunity to challenge, respond to, or defend against the statement. In most cases, notice will result in a motion in limine for an out-of-court hearing as required under Rule 807(C).

The notice must be written and include the following information: the content of the statement, the time and place at which the statement was made, the identity of the witness who will testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness.

Hearing and Findings

Rule 807(C) requires the trial court to make findings on the record concerning the six requirements for admissibility set forth in the rule. The hearing is to be held outside the presence of the jury; similar provisions are found in Rules 103(C) and 104(C). This requirement is intended to ensure that the trial court makes the necessary findings and that a complete record is preserved for appellate review.

Federal Rules

There is no Federal Rule 807, and no other provision of the Federal Rules recognizes a special hearsay exception for child abuse cases. The Federal Rules, however, contain residual hearsay exceptions that were not adopted in Ohio, and these provisions could be used to admit comparable statements in federal trials. *See* Fed. R. Evid. 803(24); 804(b)(5).

PLEAS AND OFFERS OF PLEAS

Rule 410 makes certain types of pleas, offers of pleas, and related statements inadmissible. The amended rule reads:

> (A) Except as provided in division (B) of this rule, evidence of the following is not admissible in any civil or criminal proceeding against the defendant who made the plea or who was a participant personally or through counsel in the plea discussions:
>
> (1) A plea of guilty that later was withdrawn;
>
> (2) A plea of no contest or the equivalent plea from another jurisdiction;
>
> (3) A plea of guilty in a violations bureau;
>
> (4) Any statement made in the course of any proceeding under Rule 11 of the Rules of Criminal Procedure or equivalent procedure from another jurisdiction regarding the foregoing pleas;
>
> (5) Any statement made in the course of plea discussions in which counsel for the prosecuting authority or for the defendant was a participant and that do not result in a plea of guilty or that result in a plea of guilty later withdrawn.
>
> (B) A statement otherwise inadmissible under this rule is admissible in either of the following: (1) Any proceeding in which another statement made in the course of the same plea or plea discussions has been introduced and the statement should, in fairness, be considered contemporaneously with it; (2) A criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

At the time Evid. R. 410 became effective in July 1980, there was "no substantive variation between the Ohio rule and the Federal Rule." Ohio Staff Note (1980). The term "no contest" had replaced the phrase "nolo contendere" used in the federal rule and the phrases "or the equivalent plea from another jurisdiction" and "or a plea of guilty in a violations bureau" had been added to the Ohio rule.

Plea Bargaining Discussions

The federal rule, however, was thereafter amended because several federal cases had read the federal rule broadly to cover some statements made during "plea bargain" discussions between defendants and *law enforcement officers. See* United States v. Herman, 544 F.2d 791, 795-799 (5th Cir. 1977); United States v. Brooks, 536 F.2d 1137, 1138-39 (6th Cir. 1976); United States v.

Smith, 525 F.2d 1017, 1020-22 (10th Cir. 1975). Accordingly, the federal drafters became concerned "that an otherwise voluntary admission to law enforcement officials [might be] rendered inadmissible merely because it was made in the hope of obtaining leniency by a plea." Fed. R. Evid. 410, Advisory Committee Note (1980). Federal Rule 410 now specifies that only plea discussions with the *"attorney for the prosecuting authority"* are excluded by the rule.

Amended Ohio Rule 410 incorporates the same limitation. It is intended to clarify an area of ambiguity. The amended rule is designed to protect plea bargaining statements involving attorneys in order to promote the disposition of criminal cases by compromise. Statements made by an accused to the police are not covered by this rationale. Improper inducements by the police may be challenged under the constitutional standards governing the voluntariness of confessions, but they may not be excluded under Rule 410.

The amendment does not change Ohio law. The Supreme Court had interpreted former Rule 410 in a similar way; according to the Court, statements made by defendants to the police were not excluded under the prior rule. The Court wrote:

> [S]tatements made by Kidder relative to dropping the charges against him did not amount to plea negotiations, which would be rendered inadmissible by Evid. R. 410. (Footnote omitted). His statements do not contain an offer to plead guilty to any charge, nor do they indicate a serious effort at negotiating such a plea. Evid. R. 410 was not intended to be used to hamper police at such an early investigatory stage. State v. Kidder, 32 Ohio St.3d 279, 285, 513 N.E.2d 311 (1987).

Unlike the federal rule, the amendment specifically covers plea bargaining statements made by defense counsel. Such statements are excluded from evidence when made either to the prosecutor or the police.

Exception: Rule of Completeness

The amendment recognizes a new exception in addition to the exception for perjury and false statement prosecutions. This exception applies in "any proceeding in which another statement made in the course of the same plea or plea discussions has been introduced and the statement should, in fairness, be considered contemporaneously with it." This provision is comparable to Evid. R. 106, which codifies the "rule of completeness." The federal drafters provided the following commentary on this amendment:

> This change is necessary so that, when evidence of statements made in the course of or as a consequence of a certain plea or plea discussions are introduced under circumstances not prohibited by this rule (e.g., not "against" the person who made the plea), other statements relating to the same plea or plea discussions may also be admitted when relevant to the matter at issue. For example, if a defendant upon a motion to dismiss a prosecution on some ground were able to admit certain statements made in aborted plea discussions in his favor, then other relevant statements made in the same plea discussions should be admissible against the defendant in the interest of determining the truth of the matter at issue. The language of the amendment follows closely that in Fed. R. Evid. 106, as the considerations involved are very similar. Advisory Committee's Note, Fed. R. Crim. P. 11(e)(6) (1980).