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05/18/2026

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: AF 07-0031

IN THE SUPREME COURT OF THE STATE OF MONTANA

AF 07-0031

FILED

MAY 18 2026

Bowen Greenwood
Clerk of Supreme Court
State of Montana

IN RE THE MONTANA RULES OF EVIDENCE

ORDER

The Commission on Rules of Evidence has petitioned this Court to adopt several proposed amendments to the Montana Rules of Evidence following an opportunity for public comment and consideration. The proposed amendments:

- a. clarify Rule 612 regarding refreshing a witness's recollection;
- b. amend Rule 803(6) concerning records of regularly conducted activity;
- c. adopt a forfeiture-by-wrongdoing hearsay exception in Rule 804(b)(6);
- d. add an authentication provision in Rule 901 addressing potentially fabricated evidence created by generative artificial intelligence; and
- e. revise Commission Comments relating to Rule 106.

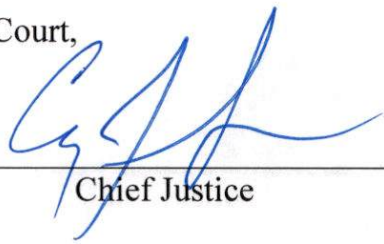
IT IS THEREFORE ORDERED that all members of the bench and bar of Montana and any other interested persons are granted 90 days from the date of this Order in which to file with the Clerk of this Court appropriate comments and/or suggestions to the attached Proposed Revisions to the Montana Rules of Evidence.

IT IS FURTHER ORDERED that this Order and attached petition shall be posted on the websites of the Montana Judicial Branch and the State Bar of Montana. The State Bar of Montana is requested to give notice of this Order and of its website posting of the petition to the membership by publication in the *Montana Lawyer* magazine and through other electronic and timely means.

IT IS FURTHER ORDERED that the Clerk of this Court shall provide copies of the Proposed Revisions to the State Bar of Montana and shall provide to each District Court Judge and each Clerk of the District Court a copy of this Order and attachments with a request that each Clerk of the District Court make the Order and proposed rule revisions

available for public review in the Office of the Clerk of the District Court. The additional documents referenced in this Order may be viewed on the Court's electronic public view docket: <https://supremecourtdocket.mt.gov/case-info/active/11483>.

DATED this 18th day of May, 2026.

For the Court,
By  _____
Chief Justice

EVIDENCE COMMISSION PROPOSED RULE CHANGES - 2026

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 the introduction at that time of 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.

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

Commission Comments

Subdivision (a). This subdivision incorporates the original Federal Rule 106 with Section 93-401-11, R.C.M. 1947 [superseded], and case law developed under it, in order to. ~~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 is 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 differs from the original is identical to Federal and Uniform Rules (1974) Rule 106 in the types of evidence covered by the rule. The original Federal Rule applied to "a writing or recorded statement or part thereof." Reflecting Montana law, Montana's rule was intentionally broader, applying to any 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 statement" and "at that time" is substituted for "contemporaneously with it" in paragraph (1); and paragraph (2) is added. See Section 93-401-11, R.C.M. 1947 [superseded]; Northwestern Electric Equipment Co. v. Leighton, 66 Mont. 529, 536, 213 P 1094 (1923).

The subdivision begins with an expanded list of matters to be covered by the rule. ~~Section 93-401-11, R.C.M. 1947 [superseded], covers acts, declarations, conversations, and writings; Federal Rule 106 covers only writings and recorded statements. Therefore the rule adds the items from Montana law to the Federal Rule and the rule adds recorded statements to Montana law. This addition is consistent with the policy of Section 93-401-11, R.C.M. 1947 [superseded], 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 [former] Rules 26(d)(4), M.R.Civ.P. [now superseded], allowing immediate introduction of all relevant parts of a deposition when a part is introduced; the same provision applies to interrogatories under [former] Rule 33, M.R.Civ.P. [now superseded] and use of depositions in criminal trials under Section 95-1802(c), R.C.M. 1947 [46-15-202].~~

Paragraph (2) is a statement of the operation of Montana law under Section 93-401-11, R.C.M. 1947 [superseded], 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 P2d 687 (1935) and *Rasmussen v. Lee*, 104 Mont. 278, 282, 66 P2d 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. N. Pac. Ry.*, 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 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~~ that party the right to introduce such evidence as part of ~~his~~ its own case if paragraph (1) was 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 [former] Rules 26(d)(4) and 33, M.R.Civ.P. [now superseded] and Section 95-1802(c), R.C.M. 1947 [46-15-202].

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 of issues, 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. [Former] Rule 26(d)(4) and Rule 33 (by reference) M.R.Civ.P. [now superseded] and Section 95-1802(c), R.C.M. 1947 [46-15-202], state the same principle contained in Federal Rule 106 and proposed rule 106(a)(1) as applied to depositions and interrogatories and then conclude 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.

~~The revision establishes gender-neutral format only. No substantive change.~~¹

Hearsay and the 2023 Amendments to the Federal Rule. Prior to 2023, Federal Rule 106 provided:

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.

In 2023, Federal Rule 106 was amended to provide:

If a party introduces all or part of a statement, an adverse party may require the introduction, at that time, of any other part — or any other statement — that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.

The amendment changed the rule in two significant ways: 1) it expanded the application of the rule to oral statements as well as written or recorded statements, a change Montana had already adopted; and 2) it explicitly allowed for hearsay to be admitted under the rule of completeness.

By expressly permitting completing evidence to be offered over a hearsay objection, the amended Rule 106 resolved a circuit split regarding the uses to which completing evidence may be put. The original Rule 106—and Montana's current Rule 106—focus on the timing of completing evidence; they make clear that completing evidence may be offered at the same time as the evidence it completes, rather than only during the opposing party's case in chief. Some federal courts interpreted the rule as only a rule of timing, holding that otherwise inadmissible hearsay is not made admissible because it fits within the rule of completeness. See Daniel J. Capra & Liesa L. Richter, *Evidentiary Irony and the Incomplete Rule of Completeness: A Proposal to Amend Federal Rule of Evidence 106*, 105 MINN. L. REV. 901, 917-19 (2020).

Other courts, however, read the rule to permit the introduction of otherwise inadmissible hearsay where necessary to avoid a mistaken impression. These cases have often

involved situations in which the government offers a statement by a criminal defendant under Rule 801(d)(2)(a) as a statement of a party opponent and the defendant contends that the statement is misleading without additional statements by the defendant. With no hearsay exception to invoke, the defendant cannot offer his own statements. Many courts have allowed defendants to offer such statements over a hearsay objection. See Capra & Richter, *supra*, at 915-17.

The 2023 amendment explicitly adopted the latter approach, framed by the Advisory Committee as a type of forfeiture: "A party that presents a distortion can fairly be said to have forfeited its right to object on hearsay grounds to a statement that would be necessary to correct the misimpression." Fed. R. Evid. 106 Advisory Committee Note.

The Montana Supreme Court has had few opportunities to address the scope of Montana Rule 106. In its decisions to date, it has suggested that Rule 106 does not open the door to the admission of otherwise inadmissible hearsay. In *State v. Campbell*, 178 Mont. 15, 582 P.2d 783 (1978), the government argued that the defendant opened the door to hearsay statements by informants simply by asking officers about the informants' names and participation (without actually offering their statements). The Court rejected that argument in language that suggested the rule of completeness does not trump the hearsay rule:

To say that here, defendant's line of inquiry "opened the door" to all hearsay communications between the officers and the informer under the completeness doctrine is to misapply the doctrine. The testimony of the officers regarding what Nix told them was a classic example of inadmissible hearsay.

Subsequently, in *State v. Castle*, 285 Mont. 363, 948 P.2d 688 (1997), the defendant offered an accomplice's self-incriminating statements as statements against interest under Rule 804(b)(3). The government then offered additional statements made by the accomplice that implicated the defendant. The trial court correctly held that the additional statements were not admissible under Rule 804(b)(3) because they were not against the accomplice's interests when made, but allowed the government to offer them under Rule 106. The Supreme Court held that this was error. Noting that Rule 106 is "separate and distinct" from the hearsay rule, the Court stated flatly that "Rule 106 does not make admissible statements that would otherwise be inadmissible."

The Montana Evidence Commission considered the new Federal rule in light of those decisions and decided not to propose a change to Montana Rule 106 at this time. While some members of the Commission favored adopting the Federal approach, others argued for the more restrictive approach indicated in *Castle*. Ultimately, the Commission concluded that the best course of action is to allow further case law development so that the Montana Supreme Court can clarify under what circumstances, if any, Rule 106 permits the introduction of otherwise inadmissible hearsay.

* * *

Rule 612. Writings Used to Refreshing a Witness's Memory.

(a) Requirements for using an item to refresh memory.

(1) A witness may use a writing, recording, or other item to refresh memory while testifying only if: if a witness uses a writing to refresh memory for the purpose of testifying, either

(A) while testifying, or the witness states that the witness does not recall the information sought;

(B) the writing, recording, or other item is shown to the witness and the witness states that reviewing it may assist in recalling the information; and

(C) after reviewing the writing, recording, or other item, the witness testifies from present recollection rather than from the item itself.

(2) The writing, recording, or other item used to refresh memory is not received in evidence unless offered by the adverse party.

(b2) Adverse party's rights.

(1) If a witness uses a writing, recording, or other item to refresh memory while testifying, or before testifying if the court in its discretion so orders, an adverse party is entitled to:

(A) have the writing, recording, or other item produced at the hearing;

(B) inspect it;

(C) cross-examine the witness about it; and

(D) offer in evidence any portion that relates to the witness's testimony.

(2) If the producing party claims that the writing, recording, or other item includes unrelated matter, the court must examine the writing, recording, or other item in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record 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.

(3) If the writing, recording, or other item is not otherwise admissible in evidence, any portion offered by an adverse party may be considered only for its effect on the credibility of the refreshed witness.

(c) Failure to Produce or Deliver the Writing. If a writing, recording, or other item is not produced or is not delivered as ordered, the court may issue any appropriate order.

Commission Comments

This rule governs the use of writings and other materials to refresh the recollection of a witness on the stand, while providing for certain rights of the adverse party to offer the refreshing materials in evidence. -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 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 N. Ry.*, 46 Mont. 593, 601, 129 P 1055 (1913), but the case went on to construe Section 93-1901-6, R.C.M. 1947 [superseded], 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 N. Ry.*, *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 Rule 612. Therefore, to the extent that the statute and *Marron v. Great N. Ry.*, *supra*, are inconsistent with the common law and 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 P2d 45 (1968). The foundation is a matter addressed to the trial court, and it is within the trial court's discretion to permit the witness to refresh his memory. *State v. Watkins*, 156 Mont. 456, 462, 481 P2d 680 (1971). The latest case dealing with this topic, *State v. LaFreniere*,~~

~~163 Mont. 21, 25, 515 P2d 76 (1973), indicated that the writing used to refresh the witness' 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 F. 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...". [Brackets in commission comments.] 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". Id.~~

As originally drafted, Rule 612 did not provide the foundation required to refresh a witness's recollection at trial and was limited to "writings" as defined in Rule 1001(1). This created uncertainty about how a refreshing item may be used at trial and about whether items other than writings can be used to refresh recollection. The proposed revision addresses both of those concerns.

The new section (a) spells out the process for refreshing recollection at trial. It makes clear, among other things, that the witness must testify from a current recollection and may not rely on the refreshing item after the recollection has been refreshed. Normally, the refreshing item should be recovered from the witness before the witness resumes testifying.

The revised rule also clarifies that a witness's recollection may be refreshed by items other than writings. This is consistent with long-standing practice in federal and state courts around the country. See United States v. Rappy, 157 F.2d 964 (2nd Cir. 1946) ("Anything may in fact revive a memory: a song, a scent, a photograph, an allusion, even a past statement known to be false."); see also Wright & Miller, 28 Fed. Prac. & Proc. Evid. § 6184 ("It is frequently stated that anything can be used to refresh the recollection of a witness."). Thus, to give one increasingly common example, body camera footage may be used to refresh the recollection of a witness on the stand even if the footage contains hearsay that would not otherwise be admissible. In such a case, steps should be taken to ensure the jury does not hear the refreshing item, such as by having the witness listen to the recording using earphones.

Sections (b) and (c) revise and clarify the previous section (2), addressing the rights of the adversary to obtain and offer the refreshing material. This revision tracks the current version of the federal rule. It makes clear that, if admitted, the refreshing item is admissible only for its value to the jury in assessing the credibility of the witness. The rule is not intended to create an independent hearsay exception allowing the refreshing item to be offered for its truth.

~~The purpose of 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 produced a writing used to refresh the memory of a witness 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 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, R.C.M. 1947 [superseded], "...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 [former] Rule 34(a)(1) M.R.Civ.P. [now superseded], and in criminal cases under Section 95-1803(c), R.C.M. 1947 [46-15-301]. The sanctions for nonproduction 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 [former] Rule 37(b), M.R.Civ.P. [now superseded]. In criminal cases, Section 95-1803(c), R.C.M. 1947 [46-15-301], does not provide for mistrial for nonproduction of evidence, but it does allow testimony to be stricken. Other provisions of the rule are new to Montana law.~~

~~The revision establishes gender neutral format only. No substantive change.~~

* * *

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:

...

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time of the acts, events, conditions, opinions, or diagnosis, 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. However, written reports from the Montana state crime laboratory are within this exception to the hearsay rule when the state has notified the court and opposing parties in writing of its intention to offer such report or reports in evidence at trial in sufficient time for the party not offering the report or reports (1) to obtain the depositions before trial of the person or persons responsible for compiling such reports, or (2) to subpoena the attendance of said persons at trial. 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.

COMMISSION COMMENTS TO 2026 AMENDMENT

Both Rule 803(6), the business records exception, and Rule 803(8), the public records exception, originally included language providing that written reports from the Montana state crime laboratory fit within those exceptions. In State v. Clark, 270 Mont. 479, 964 P.2d 766 (1998), the Montana Supreme Court held that that provision in Rule 803(8) violated a criminal defendant's right to face-to-face confrontation under Article II, Section 24, of the Montana Constitution. Subsequently, in Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court held that "testimonial" hearsay offered against a criminal defendant violates the United States Constitution unless the defendant has an opportunity to cross-examine the declarant. Relying on those decisions, the Montana Supreme Court in 2007 amended Rule 803(8) to remove the language permitting the introduction of reports from the Montana state crime laboratory. See In the Matter of the Petition for Amendment of the Montana Rules of Evidence, No. AF 07-0031 (Mont. June 20, 2007).

The parallel provision in Rule 803(6) raises the same constitutional concerns, but that provision was not addressed in the 2007 order. To harmonize the rules and clarify that Rule 803(6) does not permit the admission of state crime lab reports that are no longer admissible under Rule 803(8), the Commission recommends the removal of the language in Rule 803(6) purporting to include state crime lab reports within the business records exception. The Commission notes that, in civil cases, state crime lab reports will continue to fall within the business records exception as amended unless the source of the information or the method or circumstances of production indicate lack of trustworthiness.

* * *

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 the declarant's statement; or

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

(3) testifies to a lack of memory of the subject matter of the declarant's 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 the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.

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

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

(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 the declarant's death was imminent, concerning the cause or circumstance of what the declarant believed to be impending death.

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

(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.

(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

COMMISSION COMMENTS TO 2026 AMENDMENT

~~Paragraph Rule 804(b)(6) is an equivalent to Federal Rule 804(b)(6). This amendment provides that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement the party's deliberate wrongdoing or acquiescence procured the unavailability of the declarant as a witness. The wrongdoing need not consist of a criminal act.~~

~~The United States Supreme Court has held that where the hearsay exception in Rule 804(b)(6) applies to conduct of a criminal defendant, the defendant also forfeits the right to confrontation. This new rule extinguishes confrontation claims on equitable grounds. That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation. *Davis v. Washington*, 547 U.S. 813, 833 (2006) (citing *Crawford v. Washington*, 541 U.S. 36, 62 (2004)). To invoke forfeiture by wrongdoing, the proponent of the evidence must show that the defendant "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." *Giles v. California*, 554 U.S. 353, 367 (2008).~~

~~In 2007, the Montana Evidence Commission proposed adopting Federal Rule 804(b)(6). The Montana Supreme Court declined to adopt the rule, without explanation. Shortly thereafter, in *State v. Sanchez*, the Court recognized forfeiture by wrongdoing as an exception to the Confrontation Clause under the Montana Constitution and the United States Constitution. See *State v. Sanchez*, 2008-MT-27, 341 Mont. 240, 177 P.3d 444 (2008). But *Sanchez* did not recognize forfeiture by wrongdoing as a hearsay exception, and the Court has never subsequently addressed whether forfeiture by wrongdoing constitutes a hearsay exception. See *State v. Martinez*, 2023-MT-251, 414 Mont. 340, 545 P.3d 652 (2023) (Mcgrath, M., concurring) (addressing forfeiture of confrontation rights without discussing hearsay). The Commission believes that Montana should join the Federal courts and the overwhelming majority of states that recognize a hearsay exception for forfeiture by wrongdoing.~~

The amendment is consistent with *Giles v. California*, 554 U.S. 353, 367 (2008), which established that to invoke forfeiture by wrongdoing, a showing of some sort of intent is required.

Rule 104(a) is applicable given that forfeiture of wrongdoing would require the Court to determine a preliminary question of the admissibility of evidence.

~~The Commission recognizes that preponderance of the evidence standard should be employed and adopted considering the behavior this new rule seeks to discourage is wrongdoing intended to prevent a witness from testifying in a judicial proceeding.~~

* * *

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 likely 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.

(c) Potentially Fabricated Evidence Created by Generative Artificial Intelligence.

(1) If a party challenging the authenticity of an item of evidence demonstrates to the court that a jury reasonably could find that the item has been fabricated, in whole or in part, by generative artificial intelligence, the item is admissible only if the proponent demonstrates to the court that it is more likely than not authentic.

(2) "Generative artificial intelligence" means a type of artificial intelligence technology that, in response to user inputs or prompts, creates or materially alters content, including, without limitation, text, images, video, audio, or synthetic data.

(3) This rule governs authentication under both Rule 901 and Rule 902.

Commission Comments

(a) **General Provision.** This subdivision is identical to Federal and Uniform Rules (1974) Rule 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 the offense and that "clear, certain, and positive proof is not required". This standard has been affirmed in *State v. Wilroy*, 150 Mont. 255, 258, 434-P2d 138 (1967), and *State v. Fitzpatrick*, 163 Mont. 220, 230, 516 P2d 605 (1973). In *State v. Cooper*, 161 Mont. 85, 91, 904 P2d 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 56 F.R.D. at 333, indicates that the Federal drafters intend authenticity to be within the category of relevancy dependent upon fulfillment 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 Comments 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 authentication 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 any specific provisions in existing Montana law. Two examples of specific provisions not contained in the list of illustrations in subdivision (b) are Sections 93-1101-13, R.C.M. 1947 [26-1-107, now repealed], and 93-1101-16, R.C.M. 1947 [26-1-108, now repealed]. Section 93-1101-13,

R.C.M. 1947 [26-1-107, now repealed], provides that evidence of the execution of an instrument is not necessary when the party against whom it is offered has admitted its execution if the instrument is one mentioned in Section 93-1101-16, R.C.M. 1947 [26-1-108, now repealed], or produced from the custody of the adverse party and acted upon by him as genuine. Section 93-1101-16, R.C.M. 1947 [26-1-108, now repealed], 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 and identification of writings and other physical objects. Therefore the general standard will govern the introduction of any writing or physical object into evidence.

(b) Illustrations. This subdivision is identical to Federal and Uniform Rules (1974) Rule 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 Rules (1974) Rule 901(b)(1). The simplest and most convenient form of authentication or identification is provided in this illustration, allowing a witness to simply testify that 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 P2d 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 when 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 P2d 642 (1965); *Pickett v. Kryger*, 151 Mont. 87, 97, 439 P2d 57 (1968); and *Lamb v. Page*, 153 Mont. 171, 176, 455 P2d 337 (1969).

Several statutes also are good examples of the principle of this illustration: Section 93-1001-14, R.C.M. 1947 [superseded], allows a witness to testify as to the laws of a sister state or foreign country. Section 93-1001-19, R.C.M. 1947 [superseded], 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), R.C.M. 1947 [superseded], allows a writing to be authenticated by anyone who saw the writing executed, and Section 93-1101-12(3), R.C.M. 1947 [superseded], allows a subscribing witness to authenticate the writing. Finally, Section 93-1101-14, R.C.M. 1947 [superseded], allows a witness to authenticate his own handwriting by simply so testifying.

(2) Nonexpert opinion on handwriting.

This illustration is identical to Federal and Uniform Rules (1974) Rule 901 (b)(2). It expresses the rule observed at common law and in Montana that a nonexpert 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: Section 93-401-27(9), R.C.M. 1947 [superseded], provides existing Montana law found in several Montana statutes; Section 93-401-27(9), R.C.M. 1947 [superseded], 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...". Section 93-1101-12, R.C.M. 1947 [superseded], 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, Section 93-1101-14, R.C.M. 1947 [superseded], provides: "The handwriting of a person may be proved by anyone who believes it to be his, and who has seen him write, or had 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. Luedeman*, 95 Mont. 464, 27 P2d 511 (1933).

(3) Comparison by Trier or Expert Witness.

This illustration is identical to Federal and Uniform Rules (1974) Rule 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 Section 93-1101-15, R.C.M. 1947, [superseded], 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 specimen, 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 Section 93-1101-15, R.C.M. 1947 [superseded], 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 Nat'l Bank*, 73 Mont. 219, 239, 236 P 250 (1925). Also, Section 93-1101-16, R.C.M. 1947 [26-1-108, now repealed], 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 P2d 481 (1952).

(4) Distinctive Characteristics and the Like.

This illustration is identical to the Federal and Uniform Rules (1974) Rule 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 P2d 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 P2d 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 Rules (1974) Rule 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 identity 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*, 458 Mont. 531, 494 P2d 627 (1972), established foundational requirements for Montana which were followed in *State v. Smith*, 164 Mont. 334, 340, 523 P2d 395 (1974). Also, see *Johnson v. Whitcombe*, 149 Mont. 23, 27, 422 P2d 642 (1967).

(6) Telephone Conversations.

This illustration is identical to Federal and Uniform Rules (1974) Rule 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 Mont. 540, 547, 230 P 592 (1924), the court allowed identification of a telephone call when 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. Nat'l Bank of Montana*, 105 Mont. 159, 175, 72 P2d 90 (1937), the court held testimony by the plaintiff identifying two other parties in a telephone conversation to be admissible when 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 P2d 880 (1957) where the court stated:

The majority of the courts indulge the presumption or inference that a party called over the telephone who responds, as here, as purporting to answer for the office is, in fact, the person called, and that he is authorized to answer the call in the absence of a mistaken connection...and in the absence of proof of an officious intermeddler.

This 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 Rules (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 such writings are kept. The illustration is consistent with existing Montana law, expressed in several statutes. Sections 93-1001-16, R.C.M. 1947 [1-1-202], and 93-1001-17, R.C.M. 1947 [superseded], 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. Section 93-1001-31, R.C.M. 1947 [superseded], 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 Rules (1974) Rule 901(b)(8). The illustration provides safeguards for the authenticity of this type of document which are slightly different than existing Montana law. Section 93-1301-7(34), R.C.M. 1947 [26-1-602(34), deleted from section by amendment], 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 Rules (1974) Rule 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. Section 32-2150.1, R.C.M. 1947 [61-8-702], 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 P2d 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 Rules (1974) Rule 901 (b)(10), except that language used throughout these rules for the application of statutes, these rules, or other rules are 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 should be allowed under this illustration. [Former] Rule 44(a),

M.R.Civ.P. [now superseded], is an example of a Rule of Procedure providing a method of authentication.

(c) Potentially Fabricated Evidence Created by Generative Artificial Intelligence.

This subsection responds to the increasing ability of "generative artificial intelligence" to create or materially alter content, including text, images, video, audio, and synthetic data, in ways that may be difficult for jurors to detect and that may invite unfounded claims that authentic evidence is "fake." The definition in subsection (c)(2) is intended to describe this category of technology broadly, without tying the rule to any particular platform or medium.

Subsection (c)(1) establishes a two-step procedure that balances the need to screen out baseless "deepfake" accusations against the need for meaningful gatekeeping when there is a credible authenticity dispute. The opponent bears the initial burden of providing enough information to the court to show that a jury reasonably could find that the proffered item was fabricated, in whole or in part, by generative artificial intelligence. If the opponent meets that threshold, the item is admissible only if the proponent demonstrates to the court that it is more likely than not authentic.

This subsection is not intended to permit a party to argue, without evidentiary support, that "nothing can be trusted" because deepfakes exist. A conclusory assertion of "deepfake" does not suffice to trigger the heightened authentication showing. The heightened authentication standard should be applied only where the opponent has offered concrete, item-specific grounds to believe the item has in fact been fabricated.

The "more likely than not" requirement is a Rule 104(a)-type admissibility determination and is higher than the showing ordinarily required for authentication under Rule 901(a). The heightened standard is justified because: (i) the capacity to create convincing deepfakes is widely available at relatively little effort and expense, (ii) deepfakes may be increasingly difficult for jurors to detect, and (iii) determining whether a specific item is AI-fabricated may often require expert testimony, which lay jurors may not be well positioned to evaluate without judicial screening. The jury retains its power to assess the weight and credibility of the evidence and remains free to accept or reject the evidence as unpersuasive or unreliable.

Finally, this subsection applies to authentication under both Rule 901 and Rule 902. The risk of AI fabrication is not limited to traditionally "electronic" exhibits and may extend to items otherwise treated as self-authenticating (for example, publications). Accordingly, subsection (c)(3) clarifies that the same two-step process governs when a party makes the required showing that a proffered item may have been AI-fabricated.