ADVISORY COMMITTEE
ON
EVIDENCE RULES

Washington, DC
April 23-24, 2009

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

Washington, D.C.

April 23-24, 2009

I. Opening Business

Opening business includes approval of the minutes of the Spring 2008 meeting; a report on the January 2009 meeting of the Standing Committee; and announcement of Rules Subcommittee on Privacy.

II. Restyling Evidence Rules 801-1104

The Style Subcommittee of the Standing Committee has reviewed and approved a draft of restyled Rules 801-1104. At this meeting, the Evidence Rules Committee will review and finalize the draft so that it can be referred to the Standing Committee with the recommendation that it be released for public comment.

The agenda book contains the following pertinent materials:

1. A memorandum from the Reporter setting forth background information, restyled Rules 801-1104 (blacklined from the existing rules to show changes proposed to date), and commentary on the changes by the Reporter, Committee Members, and Professor Kimble, the style consultant.

2. A side-by-side version of Rules 801-1104, with the left side being the existing rules and the right side a clean copy of the rules incorporating the changes proposed to date. The side-by-side version also contains a few footnotes on issues and questions raised by the Style Subcommittee.

3. Supplementary materials from Professor Kimble.

III. Restyling Evidence Rules 101-415

These rules have already been approved for release for public comment. But Committee review is necessary to ensure that style changes are consistent throughout the entire body of rules, and also to determine whether there are any remaining issues of style or substance that need to be resolved before the rules are issued for public comment. The agenda book contains a short introductory memo from the Reporter and a side-by-side of Rules 101-415.

IV. Restyling Evidence Rules 501-706

These rules have already been approved for release for public comment. But, as with Rules 101-415, Committee review is necessary to ensure that style changes are consistent throughout the entire body of rules, and also to determine whether there are any remaining issues of style or substance that need to be resolved before the rules are issued for public comment. The agenda book contains a short introductory memo from the Reporter and a side-by-side of Rules 501-706.

V. Committee Notes for Restyled Evidence Rules

The Committee must approve Committee Notes to the restyled Evidence Rules . The agenda book contains a memorandum from the Reporter on possible Committee Notes to the restyled rules.

VI. Possible Amendment to Evidence Rule 804(b)(3)

The comment period on the proposed amendment to Rule 804(b)(3) has ended. The proposed amendment would requiring the government to prove corroborating circumstances clearly indicating trustworthiness before a declaration against penal interest can be admitted against the accused At this meeting, the Committee will consider whether to recommend that the proposed amendment be approved by the Standing Committee and referred to the Judicial Conference

The agenda book contains a memorandum from the Reporter on the public comments received on the proposed amendment. The amendment reviews some possible changes to the proposed amendment in light of the public comment.

VII. Next Meeting

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
CHAIRS and REPORTERS

March 25, 2009

Honorable Lee H. Rosenthal United States District Judge United States District Court 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600	Prof. Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459
Honorable Carl E. Stewart United States Circuit Judge United States Court of Appeals 2299 United States Court House 300 Fannin Street Shreveport, LA 71101-3074	Prof. Catherine T. Struve University of Pennsylvania Law School 3400 Chestnut Street Philadelphia, PA 19104
Honorable Laura Taylor Swain United States District Judge United States District Court Daniel Patrick Moynihan U. S. Courthouse 500 Pearl Street - Suite 755 New York, NY 10007	Professor S. Elizabeth Gibson Burton Craige Professor of Law 5073 Van Hecke-Wettach Hall University of North Carolina at Chapel Hill C.B. #3380 Chapel Hill, NC 27599-3380
Honorable Mark R. Kravitz United States District Judge United States District Court Richard C. Lee United States Courthouse 141 Church Street New Haven, CT 06510	Prof. Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215
Honorable Richard C. Tallman United States Circuit Judge United States Court of Appeals Park Place Building, 21st Floor 1200 Sixth Avenue Seattle, WA 98101	Professor Sara Sun Beale Duke University School of Law Science Drive & Towerview Road Box 90360 Durham, NC 27708-0360
Honorable Robert L. Hinkle Chief Judge, United States District Court United States Courthouse 111 North Adams Street Tallahassee, FL 32301-7717	Prof. Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023

ADVISORY COMMITTEE ON EVIDENCE RULES

Chair:	**Reporter:**
Honorable Robert L. Hinkle Chief Judge, United States District Court United States Courthouse 111 North Adams Street Tallahassee, FL 32301-7717	Professor Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023
Members:	
Honorable Joseph F. Anderson, Jr. Chief Judge, United States District Court Matthew J. Perry, Jr. U. S. Courthouse 901 Richland Street Columbia, SC 29201	Honorable Anita B. Brody United States District Court 7613 James A. Byrne United States Courthouse 601 Market Street Philadelphia, PA 19106-1797
Honorable Joan N. Ericksen United States District Judge United States District Court 12W United States Courthouse 300 South Fourth Street Minneapolis, MN 55415	William T. Hangley, Esquire Hangley, Aronchick, Segal & Pudin, P.C. One Logan Square, 27th Floor Philadelphia, PA 19103-6933
Honorable Andrew D. Hurwitz Justice Supreme Court of Arizona Suite 431 1501 West Washington Phoenix, AZ 85007	Marjorie A. Meyers Federal Public Defender 310 The Lyric Center 440 Louisiana Street Houston, TX 77002-1634
Elizabeth J. Shapiro Assistant Director, Federal Programs Branch Civil Division U.S. Department of Justice 20 Massachusetts Avenue, N.W., Room 7152 Washington, DC 20530	William W. Taylor, III, Esquire Zuckerman Spaeder LLP 1800 M Street, N.W. Washington, DC 20036-5802

ADVISORY COMMITTEE ON EVIDENCE RULES (CONT'D.)

John Cruden Acting Assistant Attorney General Environment and Natural Resources Division Department of Justice, Room 2139 950 Pennsylvania Avenue, N.W. Washington, DC 20530	
Liaison Members: Honorable Michael M. Baylson United States District Judge United States District Court 4001 James A. Byrne U. S. Courthouse 601 Market Street Philadelphia, PA 19106	Honorable Judith H. Wizmur Chief Judge United States Bankruptcy Court Mitchell H. Cohen U. S. Courthouse 2nd Floor – 400 Cooper Street Camden, NJ 08102-1570
Honorable Marilyn L. Huff United States District Court Edward J. Schwartz U. S. Courthouse Suite 5135 940 Front Street San Diego, CA 92101	Honorable John F. Keenan United States District Court 1930 Daniel Patrick Moynihan United States Courthouse 500 Pearl Street New York, NY 10007-1312
Consultants: Professor Kenneth S. Broun University of North Carolina School of Law CB #3380, Van Hecke-Wettach Hall Chapel Hill, NC 27599 --- Professor R. Joseph Kimble Thomas M. Cooley Law School 300 South Capitol Avenue Lansing, MI 48933	**Secretary:** Peter G. McCabe Secretary, Committee on Rules of Practice and Procedure Washington, DC 20544

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

John K. Rabiej Chief Rules Committee Support Office Administrative Office of the United States Courts Washington, DC 20544	James N. Ishida Attorney-Advisor Office of Judges Programs Administrative Office of the United States Courts Washington, DC 20544
Jeffrey N. Barr Attorney-Advisor Office of Judges Programs Administrative Office of the United States Courts Washington, DC 20544	Ms. Gale Mitchell Administrative Specialist Rules Committee Support Office Administrative Office of the United States Courts Washington, DC 20544
Ms. Amaya Hain Administrative Specialist Rules Committee Support Office Administrative Office of the United States Courts Washington, DC 20544	Adriane Reed Program Assistant Rules Committee Support Office Administrative Office of the United States Courts Washington, DC 20544
James H. Wannamaker III Senior Attorney Bankruptcy Judges Division Administrative Office of the United States Court Washington, DC 20544	Scott Myers Attorney Advisor Bankruptcy Judges Division Administrative Office of the United States Courts Washington, DC 20544

FEDERAL JUDICIAL CENTER

Joe Cecil (Committee on Rules of Practice and Procedure) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Marie Leary (Appellate Rules Committee) Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Robert J. Niemic (Bankruptcy Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Thomas E. Willging (Civil Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Laural L. Hooper (Criminal Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Tim Reagan (Evidence Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003

Advisory Committee on Evidence Rules

Members	Position	District/Circuit	Start Date	End Date
Robert L Hinkle Chair	D	Florida (Northern)	Member 2002 Chair 2007	---- 2010
Joseph F Anderson, Jr	D	South Carolina	2005	2011
Michael M Baylson**	D	Pennsylvania (Eastern)	2006	2010
Anita Brody	D	Pennsylvania (Eastern)	2007	2010
Joan N Ericksen	D	Minnesota	2005	2011
William T Hangley	ESQ	Pennsylvania	2006	2009
Andrew D Hurwitz	JUST	Arizona	2004	2010
John F Keenan**	D	New York (Southern)	2007	2010
Marjorie A Meyers	FPD	Texas (Southern)	2006	2009
William W Taylor III	ESQ	Washington, DC	2004	2010
Ronald J Tenpas*	DOJ	Washington, DC	----	Open
Daniel J Capra Reporter	ACAD	New York	1996	Open

Principal Staff John K Rabiej 202-502-1820

* Ex-officio

** Ex-officio non-voting members' terms coincide with terms on Civil & Criminal Rules

TAB-1

Advisory Committee on Evidence Rules

Minutes of the Meeting of October 23-24, 2008

Santa Fe, New Mexico

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 23rd and 24th in Santa Fe.

The following members of the Committee were present:

Hon. Robert L. Hinkle, Chair
Hon. Joseph F. Anderson, Jr.
Hon. Anita B. Brody
Hon. Joan N. Ericksen.
Hon. Andrew D. Hurwitz
William T. Hangley, Esq.
Marjorie A Meyers, Esq.,
William W. Taylor, III, Esq.
Ronald J. Tenpas, Esq , Department of Justice

Also present were.

Hon. Lee H. Rosenthal, Chair of the Committee on Rules of Practice and Procedure ("Standing Committee")
Hon. Marilyn L. Huff, Liaison from the Committee on Rules of Practice and Procedure and member of the Standing Committee's Style Subcommittee
Hon. James A. Teilborg, Chair of the Standing Committee's Style Subcommittee
Hon. Michael M. Baylson, Liaison from the Civil Rules Committee
Hon. Richard A. Schell, Liaison from the Bankruptcy Rules Committee
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Peter McCabe, Esq., Secretary to the Standing Committee on Rules of Practice and Procedure.
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Professor R. Joseph Kimble, Consultant to the Standing Committee's Style Subcommittee
Timothy Reagan, Esq., Federal Judicial Center
Jeffrey Barr, Esq., Rules Committee Support Office
Alan Rudlin, Esq., ABA representative

Opening Business

Judge Hinkle welcomed the members and other participants to the meeting and noted that Ronald Tenpas, the Department of Justice representative, would be going off the Committee after this meeting. Judge Hinkle, Committee members, and the Reporter thanked Mr. Tenpas for his stellar efforts on behalf of the Committee and the rulemaking process.

The Committee approved the minutes of the Spring 2008 meeting.

Judge Hinkle reported on developments since the last meeting. At its June 2008 meeting, the Standing Committee approved for publication the proposed amendment to Rule 804(b)(3) as well as the proposed restyled Rules 101-415 (both proposals discussed below).

Judge Hinkle also reported that Evidence Rule 502, which provides important protections against waiver of privilege, was signed by the President on September 19, 2008. The Committee expressed its gratitude to Judge Rosenthal for her amazing dedication and brilliant leadership in getting Rule 502 passed by Congress. Judge Rosenthal noted that thanks were owed to John Rabiej, Dan Coquillette, and the Reporter for their work in the effort to enact Rule 502. Judge Rosenthal and the Committee also expressed thanks and appreciation to all those members of Congress, and the staff of both Judiciary Committees, who worked through the issues raised by Rule 502 and helped to move the rule through the process.

I. Restyling Project

At the Spring 2007 meeting, the Committee voted unanimously to begin a project to restyle the Evidence Rules. At the Fall 2007 meeting, the Committee agreed upon a protocol and a timetable for the restyling project. At the Spring 2008 meeting the Committee approved the restyled Rules 101-415; the Standing Committee authorized those rules to be released for public comment, but publication will be delayed until all the Evidence Rules are restyled.

At the Fall 2008 meeting the Committee reviewed a draft of restyled Rules 501-706. The draft had been prepared in the following steps: 1) Professor Kimble prepared a first draft, which was reviewed by the Reporter; 2) Professor Kimble made some changes in response to the Reporter's comment; 3) the revised draft was reviewed by the Evidence Rules Committee, and Professor Kimble made some further revisions in light of Committee comments; 4) the Style Subcommittee reviewed the draft and implemented changes, resolving most of the open questions left in the draft. The Advisory Committee reviewed the Style Subcommittee's approved version at the Fall 2008 meeting.

At the meeting, the Committee reviewed each rule to determine whether any change was one of substance rather than style (with "substance" defined as changing an evidentiary result or method of analysis, or changing language that is so heavily engrained in the practice as to constitute a

"sacred phrase"). Under the protocol for the restyling project, if a significant minority of Evidence Rules Committee members agree that the proposed change is substantive, then that change is not implemented.

The Committee also reviewed each rule to determine whether to recommend that a change, even though one of style, might be considered by the Style Subcommittee of the Standing Committee. After considering possible changes of both substance and style, the Committee unanimously voted to refer the restyled rules to the Standing Committee, with the recommendation that they be released for public comment. If the Standing Committee accepts the Evidence Rules Committee's recommendations, then all of the proposed restyled rules would be released for public comment as one complete package, in approximately two years.

What follows is a description of the Committee's determinations, rule by rule. It should be noted that a number of the rules required no discussion because any drafting questions in those rules had already been resolved in the extensive vetting process described above.

Rule 501

Rule 501 currently provides as follows:

General Rule

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

The restyled version of Rule 501, reviewed by the Committee at the meeting, provides as follows:

Privilege in General

The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provide otherwise:

- the United States Constitution;
- a federal statute; or
- other rules prescribed by the Supreme Court under statutory authority.

But in a civil case, state law governs if the privilege relates to a claim or defense for which state law supplies the rule of decision.

Committee Discussion:

1. Before discussion of the particulars of the restyled draft, the Committee considered whether a restyled rule would have to be directly enacted by Congress. 28 U.S.C. § 2074(b) provides that "any rule creating, abolishing or modifying a privilege shall have no force or effect unless approved by Congress." It is clear that any restyling would not create or abolish a privilege. The Committee also found it unlikely that any style changes could be thought to modify the privilege — it would modify the language of the rule, but not the privilege itself.

The Committee therefore decided to proceed with restyling Rule 501. Judge Rosenthal noted that she has been keeping Congress apprised of the work of the Rules Committee, and would notify the House and Senate Judiciary Committees of the restyling of Rule 501 as well as the other Evidence Rules.

2. The Committee considered whether the phrase "under statutory authority" was necessary. But the Reporter argued that the language was necessary given the Enabling Act provision requiring rules of privilege to be directly enacted by Congress. The reference to statutory authority provides emphasis that the Supreme Court cannot establish rules of privilege on its own rulemaking power — nor through its supervisory power over federal courts. The Committee agreed that the reference to statutory authority should be maintained. Professor Kimble noted that the phrase "under statutory authority" was used in other rules, such as Rules 402 and 801. The Committee agreed that it would need to be consistent in the use of the phrase.

3. The Committee agreed that there was no need to refer to the parties who would be holding the privilege, i.e., "witness, person, government, State, or political subdivision thereof." The rule is not about who holds the privilege — rather it is about which law governs the existence and scope of a privilege. So the Committee agreed with the proposal to strike that language from the rule.

4. The restyled rule refers to a "civil case" while the existing rule refers to "civil actions and proceedings." The Committee recognized that the description of the cases or proceedings to which an Evidence Rule applies raises a "global" issue that must be treated consistently throughout the Rules. It determined that it would revisit all global terminology questions after it had completed restyling the final third of the Evidence Rules.

Committee Vote:

The Committee voted unanimously to recommend that the restyled Rule 501 be released for public comment.

Rule 601

Rule 601 currently provides as follows:

General Rule of Competency

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

The restyled version of Rule 601, reviewed by the Committee at the meeting, provides as follows:

Competency to Testify in General

Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law on witness competency governs when the witness's testimony relates to a claim or defense for which state law supplies the rule of decision.

Committee Discussion:

1. The Reporter noted that the draft had been changed to clarify that state law applies when the witness's testimony, as opposed to competency, relates to a state law claim or defense. The Committee agreed that this change was necessary.

2. A Committee member asked what would happen in a case involving both federal and state claims, in which the competency rules of federal and state laws were in conflict. Both the original rule and the draft would seem to provide that state law on competency would apply to both federal and state claims. The Reporter noted that under the similar language of Rule 501, federal courts generally apply federal law to mixed claims. The Reporter was unaware of any case law involving

mixed claims under Rule 601. In any case, the style change would not change the result that a court would reach under the current Rule 601.

Committee Vote:

The Committee voted unanimously to recommend that the restyled Rule 601 be released for public comment.

Rule 602

Rule 602 currently provides as follows:

Lack of Personal Knowledge

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

The restyled version of Rule 602, reviewed by the Committee at the meeting, provided as follows:

Need for Personal Knowledge

A witness may testify on a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to testimony by an expert witness under Rule 703.

Committee Discussion:

1. Committee members expressed concern about the change from "testifying to a matter"

to "testifying *on* a matter " Members thought that courts and litigants more commonly use the term "testifying to a matter." The Committee recognized that the change was one of style, it voted unanimously to recommend to the Style Subcommittee that the draft be amended to return to the original iteration — "testify to a matter."

2. One Committee member wondered whether the exceptional sentence at the end of the rule should be made an exceptional clause at the beginning, e.g., "Except as provided in Rule 703, a witness may testify on a matter . . . " Professor Kimble responded that there is no uniform rule on how to treat exceptional clauses, and that moving the last sentence to the beginning of the rule would complicate the first sentence The Committee made no recommendation to change the location of the last sentence.

Committee Vote:

The Committee voted unanimously to recommend that the restyled Rule 602 be released for public comment, with the suggestion that the Style Subcommittee substitute "on the matter" for "to the matter" in the first sentence of the Rule.

Rule 603

Rule 603 currently provides as follows:

Oath or Affirmation

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

The restyled version of Rule 603, reviewed by the Committee at the meeting, provides as follows:

Oath or Affirmation to Testify Truthfully

Before testifying, a witness must give an oath or affirmation to testify truthfully. The oath or affirmation must be in a form designed to impress that duty on the witness's conscience.

Committee discussion:

None.

Committee Vote:

The Committee voted unanimously to recommend that the restyled Rule 603 be released for public comment.

Rule 604

Rule 604 currently provides as follows:

Interpreters

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

The restyled version of Rule 604, reviewed by the Committee at the meeting, provided as follows:

Interpreters

An interpreter is subject to Rule 603 on giving an oath or affirmation to make a true translation and to Rule 702 on qualifying as an expert.

Committee Discussion:

Committee members expressed concern about the reference to Rule 702 in the restyled draft. Rule 702 covers testifying witnesses, and interpreters do not testify in the same sense as experts

under Rule 702. Moreover, some interpreters are not experts within the meaning of Rule 702 — an example is a person who interprets the signals of an impaired witness, based on having taken care of the witness for years. While interpreters must be qualified, the Committee thought a reference to Rule 702 would raise confusion and argument about how to qualify interpreters — that is, the reference could raise problems not currently experienced by courts and litigants in the current practice. **Consequently, the Committee unanimously determined that the reference to Rule 702 constituted a substantive change.**

Committee Vote:

The Committee voted unanimously that the reference to Rule 702 in the restyled draft constituted a substantive change. It also voted unanimously to recommend that the following restyled version of Rule 604 be released for public comment:

> "An interpreter must be qualified and must give an oath or affirmation to make a true translation."

Rule 605

Rule 605 currently provides as follows:

Competency of Judge as a Witness

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

The restyled version of Rule 605, reviewed by the Committee at the meeting, provided as follows:

Judge as a Witness

The presiding judge may not testify as a witness at the trial. A party need not object

to preserve a claim that the judge did so

Committee Discussion:

1. Committee members discussed whether the rule is intended to apply to judges commenting on the evidence. The Reporter stated that the Rule is not intended to regulate the judge in commenting on the evidence, nor in asking questions of witnesses (a topic covered by Rule 614). Committee members stated that taking the term "competency" out of the heading could send an incorrect signal that the rule should be construed more broadly to cover such matters as judges commenting on the evidence.

2. Committee members expressed concern that the restyled language "need not preserve a claim that the judge did so" might be a bit indistinct. The Committee found it stylistically preferable to state that a party "need not object to preserve the issue."

Committee Vote:

The Committee voted unanimously to recommend the following restyled Rule 605 for release for public comment:

Judge's Competency as a Witness

The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

Rule 606

Rule 606 currently provides as follows:

Competency of Juror as a Witness

(a) At the trial. A member of the jury may not testify as a witness before that jury in

the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

The restyled version of Rule 606, reviewed by the Committee at the meeting, provided as follows:

Juror as a Witness

(a) At the Trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give an adverse party an opportunity to object outside the jury's presence.

(b) During an Inquiry into the Validity of a Verdict or Indictment.

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; anything that may have affected the juror or another juror and thus influenced that person's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) Exceptions. A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) any outside influence was improperly brought to bear on a juror; or

(C) a mistake was made in entering the verdict on the verdict form.

Committee Discussion:

1. Professor Kimble noted that if the reference to competency is to be restored in the heading to Rule 605, it should also be restored (for purposes of consistency) to the heading of Rule 606. The Committee unanimously agreed.

2. Committee members expressed concern over the change from "the effect of anything upon that or any other juror's mind" to " anything that may have affected the juror or another juror." Under the case law of Rule 606(b), juror testimony is allowed about such things as extraneous information or outside influence, but juror testimony is *never* allowed on the *effect* of such information on jury deliberations or on any juror's vote. The change from "the effect of anything" to "anything that may have affected" changes the rule from one prohibiting testimony about *effect* on the jury to one that focuses on the things that may affect the jury. Moreover, the restyled draft, in prohibiting testimony about anything that affected the jury in (b)(1) creates a tension with (b)(2), which permits testimony about things that may have affected the jury. **Accordingly, Committee members unanimously determined that the change to "anything that may have affected the juror" constituted a substantive change.**

Committee Vote:

The Committee voted unanimously to recommend the following restyled Rule 606 for release for public comment:

Juror's Competency as a Witness

(a) At the Trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give an adverse party an opportunity to object outside the jury's presence.

(b) During an Inquiry into the Validity of a Verdict or Indictment.

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on the juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) Exceptions. A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) any outside influence was improperly brought to bear on a juror; or

(C) a mistake was made in entering the verdict on the verdict form.

Rule 607

Rule 607 currently reads as follows:

Who May Impeach

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

The restyled version of Rule 607, reviewed by the Committee at the meeting, provides as follows:

Who May Impeach a Witness

Any party, including the party that called the witness, may attack the witness's credibility.

Committee Discussion:

None.

Committee Vote:

The Committee voted unanimously to recommend that the restyled Rule 607 be released for public comment.

Rule 608

Rule 608 currently provides as follows:

Evidence of Character and Conduct of Witness

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

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

The restyled version of Rule 608, reviewed by the Committee at the meeting, provided as follows:

A Witness's Character for Truthfulness or Untruthfulness

(a) Opinion or Reputation Evidence. A witness's credibility may be attacked or

supported by evidence in the form of an opinion about — or a reputation for — having a character for truthfulness or untruthfulness. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct, in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about

(c) Privilege Against Self-Incrimination. By testifying about a matter that relates only to a character for truthfulness, a witness does not waive the privilege against self-incrimination.

Committee Discussion:

1. The restyled version retains the original rule's reference allowing bad acts impeachment only on cross-examination. In fact bad acts impeachment can occur on direct examination as well. This is because Rule 607 allows a party to call an adverse witness, in which case direct examination is functionally cross-examination — in which bad acts may be introduced to impeach the witness's character for untruthfulness. The Committee considered whether it would be a stylistic improvement to delete the references to cross-examination in Rule 608(b), on the ground that it would be a useful clarification and it would not change any case law. After discussion, the Committee decided against deleting the references to cross-examination. The Committee noted that courts are having no problem under the existing rule in allowing bad acts impeachment on direct examination where appropriate. They also observed that the cross-examination limitation may be useful to prohibit an attempt to *support* a witness's credibility through evidence of *good* acts on direct examination. Thus, deleting the references to cross-examination may lead to unintended consequences, well outside the scope of restyling.

2. Some Committee members suggested that the language in restyled Rule 608(a) — "may be attacked or supported by evidence in the form of an opinion about — or a reputation for — having a character for truthfulness or untruthfulness" — might be sharpened stylistically. After discussion, the Committee unanimously voted to suggest to the Style Subcommittee that the language to restyled Rule 608(a) should be changed as follows:

A witness's credibility may be attacked or supported by opinion or reputation evidence ~~in the form of an opinion about — or a reputation for — having~~ a of the witness's character for truthfulness or untruthfulness.

Committee Vote:

The Committee voted unanimously to recommend that restyled Rule 608 be released for public comment, with the suggestion that the Style Subcommittee consider the proposed change to the first sentence of Rule 608(a).

Rule 609

Rule 609 currently provides as follows:

Impeachment by Evidence of Conviction of Crime

(a) General rule. For the purpose of attacking the character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

The restyled version of Rule 609, reviewed by the Committee at the meeting, provided as follows:

Impeachment by Evidence of a Criminal Conviction

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, if the witness is not a defendant in a criminal case; and

(B) must be admitted if the witness is a defendant in a criminal case and the court determines that the probative value of the evidence

outweighs its prejudicial effect; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the conviction or the witness's release from confinement for the conviction, whichever is later. Evidence of the conviction is admissible only if the court determines that its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect But before offering the evidence, the proponent must give an adverse party reasonable written notice, in any form, of the intent to use it so that the party has a fair opportunity to contest its use.

(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible if:

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications Evidence of a juvenile adjudication is admissible only if:

(1) the case is a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) a conviction for that offense would be admissible to attack an adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.

(e) Pendency of an Appeal. A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

Committee Discussion:

1. Committee members expressed concern about the deletion of the proviso "under the law under which the witness was convicted" in Rule 609(a)(1). That language provides a choice of law rule — the court must treat the conviction as the convicting jurisdiction would treat it For example, it could occur that the witness was convicted of a crime that is treated as a misdemeanor in the convicting jurisdiction but that would be treated as a felony in the court in which the witness is testifying. Without the deleted language, a court could well decide to treat the conviction as a felony and find it admissible for impeachment under Rule 609(a)(1) — and that would be a substantive change from the existing rule. **The Committee voted unanimously that the choice of law provision in Rule 609(a)(1) must be restored to avoid a substantive change**— though the Committee recognized that the language could be improved stylistically, given that the existing iteration uses the word "under" twice within the same phrase.

Professor Kimble suggested using the phrase "in the convicting jurisdiction" instead of "under the law under which the witness was convicted." The Committee agreed that this was a significant stylistic improvement. The Committee voted unanimously to change the restyled Rule 609(a)(1) accordingly:

> 1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

2. The restyled draft deleted the language "under this rule" in the first sentence of Rule 609(d), the provision on juvenile adjudications. The Reporter noted that courts and commentators have relied on the limiting phrase "under this rule" to hold that the Rule's substantial limitations on admissibility of juvenile adjudications are applicable only if the witness is being attacked for having an untruthful character. So for example, if impeachment is for bias, the chances for admissibility are much higher, as the Supreme Court indicated in *Davis v. Alaska*. Deleting the limiting phrase "under this rule" may lead to an argument that Rule 609(d) has been extended to other forms of impeachment. **The Committee therefore determined, unanimously, that deletion of the term "under this rule" was a substantive change, and voted unanimously to restore that language to the restyled draft.** The Committee therefore approved the preamble of Rule 609(d) to be restyled as follows:

> "Evidence of a juvenile adjudication is admissible under this rule only if:"

3. The restyled Rule 609(d)(1) provided, as a condition of admissibility of a juvenile adjudication, that "the case is a criminal case." The Committee determined that this language was inaccurate because it was vague as to which case was being described — the one in which the adjudication was obtained or the one in which the evidence is offered as impeachment. **The Committee therefore voted unanimously that a substantive change was required to the**

language of restyled Rule 609(d)(1). After discussion, the Committee unanimously agreed on the following language:

"Evidence of a juvenile adjudication is admissible under this rule only if:

(1) ~~the case is~~ it is offered in a criminal case;

4. The restyled Rule 609(d)(3) provides, as a condition of admissibility of a juvenile adjudication, that "a conviction for that offense would be admissible to attack an adult's credibility." A Committee member suggested a style change would be useful in clarifying that the juvenile was never "convicted" for the offense. After discussion, the Committee unanimously agreed to suggest to the Style Subcommittee a style change to Rule 609(d)(3), as follows:

"Evidence of a juvenile adjudication is admissible under this rule only if:

* * *

(3) a conviction of an adult for that offense would be admissible to attack ~~an~~ the adult's credibility;"

5. Rule 609(e), on the pendency of an appeal, refers only to convictions and not juvenile adjudications (the subject of Rule 609(d)). The Style Subcommittee asked the Evidence Rules Committee to consider whether adjudications should be included in subdivision (e). After discussion, the Committee determined that no reference to juvenile adjudications should be made in Rule 609(e). The original Advisory Committee could have included adjudications within the general rule that the pendency of appeal did not affect admissibility. But given the extremely narrow grounds for admissibility of juvenile adjudications in Rule 609(d), it is plausible that the Advisory Committee may have decided to allow trial courts to have discretion to exclude such adjudications if they were on appeal. Therefore, including adjudications under Rule 609(e) would be a substantive change. Looked at another way, the current Rule 609(e) contains no reference to juvenile adjudications, so continuing the omission in the restyling results in no substantive change.

Committee Vote:

The Committee voted unanimously to recommend that restyled Rule 609 be released for public comment, with the following changes to the existing draft: 1) addition of "in the convicting jurisdiction" to Rule 609(a)(1); 2) restoring "under this rule" to the preamble to Rule 609(d); 3) substituting "it is offered in a criminal case" for "the case is a criminal case" in Rule 609(d)(1); and 4) a style suggestion for changing Rule 609(d)(3) to clarify that the juvenile was not "convicted" of

an offense.

Rule 610

Rule 610 currently provides as follows:

Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

The restyled version of Rule 610, reviewed by the Committee at the meeting, provides as follows:

Religious Beliefs or Opinions

Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

Committee Discussion:

None.

Committee Vote:

The Committee voted unanimously to recommend that restyled Rule 610 be released for public comment.

Rule 611

Rule 611 currently provides as follows:

Mode and Order of Interrogation and Presentation

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

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

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

The restyled version of Rule 611, reviewed by the Committee at the meeting, provided as follows:

Mode and Order of Questioning Witnesses and Presenting Evidence

(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of questioning witnesses and presenting evidence so as to:

(1) make those procedures effective for determining the truth;

(2) avoid wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

b) Scope of Cross-Examination. The court should limit cross-examination to the subject matter of the direct examination and matters affecting a witness's credibility. The court may permit inquiry into additional matters as if on direct examination.

(c) Leading Questions. The court should permit leading questions on direct examination only if necessary to develop the witness's testimony. Ordinarily, the court

should permit leading questions on cross-examination. And the court must permit leading questions when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Committee Discussion:

1. The current Rule 611(a) states that the court "shall" exercise reasonable control over the mode and order of interrogating witnesses. One of the goals of the restyling project is to delete the word "shall" because it is subject to different interpretations — it could mean that a rule is mandatory, but it could also mean that a rule is permissive. In Rule 611(a), the restyling substitutes "should" for "shall." Other possibilities are "must" and "may." Committee members determined that "must" could not be used in Rule 611(a), as that Rule is designed to give courts the discretion to handle various issues that might arise in the presentation of testimony and other evidence at trial. It would be inconsistent with the discretionary grant to impose a mandatory obligation on the trial court. After discussion, Committee members agreed with the restyled version's use of "should" rather than "may" because it implies more authority on the part of the court to control the proceedings.

2. The current Rule 611(b) provides that cross-examination "should be limited" to the subject matter of the direct examination. The restyled draft changed this language to the active voice by providing that "[t]he court should limit cross-examination to the subject matter of the direct examination . . ." Committee members contended that this change of focus, from what the parties should not do to what the court should do, was a substantive change. The changed language could be read to invite more court intervention, when in fact the rule is intended to instruct the parties to adhere to the American Rule in framing questions on cross-examination. Moreover, the focus on what the court should do in the first sentence of Rule 611(b) creates tension with the second sentence of the Rule, which provides that the court may in its discretion permit inquiry beyond the scope of direct. There is tension if the first sentence provides that the court should control the scope of cross-examination and the next sentence provides that it may expand the scope of cross. The Committee determined that the existing Rule's approach had much to recommend it, given its focus in the first instance on limiting the parties, and then allowing them to seek relief from the court. **The Committee unanimously agreed that the language "the court should limit" in the first sentence of the restyled Rule 611(b) effected a substantive change.** It unanimously approved a restyling that retained the focus of the existing Rule 611(b), changing the restyled version as follows:

"~~The court should limit cross-examination to~~ Cross-examination should not exceed the subject matter of the direct examination and matters affecting the witness's credibility.

3. As in Rule 611(b), the restyling attempted to avoid the passive voice that is in the current Rule 611(c) by changing the focus of the rule to court involvement in regulating leading questions. The result is to imply that courts are to be more active in regulating leading questions than is implied in the current rule. As with Rule 611(b), **the Committee unanimously agreed that the change of focus in the first sentence of Rule 611(c) effected a substantive change to the Rule.** The Committee voted unanimously to return to the original focus of the rule (with a slight stylistic variation) and approved the following changes from the restyled version of the first sentence to Rule 611(c):

> "~~The court should permit leading questions~~ Leading questions should not be used on direct examination ~~only if~~ except as necessary to develop the witness's testimony."

4. The restyled version of the last sentence of Rule 611(c) provided that the court "must" permit leading questions when a party calls a hostile witness. Committee members noted, however, that under the case law the court is not absolutely required to permit leading questions of a hostile witness. *See, e g., Rodriguez v. Banco Cent* 990 F.2d 7 (1st Cir. 1993) (finding no error in the trial court's refusal to permit leading questions of hostile witnesses). **The Committee therefore determined unanimously that the use of the word "must" effected a substantive change of the last sentence of Rule 611(c).** The Committee unanimously approved the following restyled version of Rule 611(c):

> "And the court ~~must~~ should permit leading questions when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party."

Committee Vote:

The Committee voted unanimously to recommend that restyled Rule 611 be released for public comment, with the following changes to the restyled version: 1) Changing the first sentence of Rule 611(b) to "Cross-examination should not exceed the subject matter of the direct examination . . ."; 2) Changing the first sentence of Rule 611(c) to "Leading questions should not be used on direct examination . . ." 3) Changing "must" to "should" in the last sentence of Rule 611(c).

Rule 612

Rule 612 currently provides as follows:

Writing Used to Refresh Memory

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either—

(1) while testifying, or

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

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

The restyled version of Rule 612, reviewed by the Committee at the meeting, provides as follows:

Writing Used to Refresh a Witness's Memory

(a) General Application. This rule gives an adverse party certain options when a witness uses any form of a writing to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires a party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter. Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing 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.

(c) Failure to Produce or Deliver. If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial.

Committee Discussion:

The Committee determined that the few issues it had previously raised about the restyling of Rule 612 had all been addressed very effectively by Professor Kimble in the latest draft.

Committee Vote:

The Committee voted unanimously to recommend that the restyled Rule 612 be released for public comment.

Rule 613

Rule 613 currently provides as follows:

Prior Statements of Witnesses

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

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

The restyled version of Rule 613, reviewed by the Committee at the meeting, provided as follows:

Witness's Prior Statements

(a) Showing or Disclosing the Statement During Questioning. When questioning a witness about the witness's prior statement, the party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party.

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if justice so requires or if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to question the witness about it. This subdivision (b) does not apply to a party opponent's admission under Rule 801(d)(2).

Committee Discussion:

1. Rule 613(a) currently provides that a prior inconsistent statement need not be shown to the witness at the time of questioning, but that it must be shown or disclosed to "opposing counsel." This was restyled to provide that the statement must be shown "to an adverse party." Committee members pointed out that the change would mean that if it was the adverse party being examined, the examiner would have to disclose the statement to the witness on the stand. This would be contrary to the first sentence of the Rule, under which witnesses are not entitled to inspect their inconsistent statements. **Thus, taking out the reference to "opposing counsel" effected a substantive change in situations in which the adverse party is being questioned.** The Committee unanimously determined that the reference to "an adverse party" in the second sentence of Rule 613(a) had to be changed to "an adverse party's attorney."

2. The existing version of Rule 613(b) provides that extrinsic evidence of a prior inconsistent statement is not admissible unless the witness is afforded an opportunity to explain or deny the statement, "or the interests of justice so require." This interests of justice exception to the general rule of presentment is intended to be a narrow exception, and has been applied narrowly as well (usually to situations in which the statement was discovered after the witness has been excused and can no longer be produced). The restyled version places the interest of justice language as the first factor for the court to consider in determining whether to admit extrinsic evidence of a prior inconsistent statement. Committee members argued that this new placement raised "interest of justice" to a more prominent place than intended by the drafters of the rule. The drafters intended that the major focus of admissibility is to be whether the witness is afforded an opportunity to explain or deny the statement. **The Committee unanimously determined that the change in**

placement of the "interest of justice" factor effected a substantive change The Committee voted unanimously to return the interest of justice factor to the end of the first sentence of Rule 613(b).

Committee Vote:

The Committee voted unanimously to recommend that the following restyled version of Rule 613 be released for public comment (with changes shown from the restyled version reviewed at the Committee meeting:

Witness's Prior Statements

(a) Showing or Disclosing the Statement During Questioning. When questioning a witness about the witness's prior statement, the party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if ~~justice so requires or if~~ the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to question the witness about it, or if justice so requires. This subdivision (b) does not apply to a party opponent's admission under Rule 801(d)(2).

Rule 614

Rule 614 currently provides as follows:

Calling and Interrogation of Witnesses by the Court

(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.

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

The restyled version of Rule 614, reviewed by the Committee at the meeting, provides as follows:

Court's Calling or Questioning a Witness

(a) Calling. The court may call a witness on its own or at a party's suggestion Each party is entitled to cross-examine the witness.

(b) Questioning. The court may question a witness regardless of who calls the witness.

(c) Objections A party may object to the court's calling or questioning a witness either at that time or at the next opportunity when the jury is not present.

Committee Discussion:

None.

Committee Vote:

The Committee voted unanimously to recommend that the restyled version of Rule 614 be released for public comment.

Rule 615

Rule 615 currently provides as follows:

Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

The restyled version of Rule 615, reviewed by the Committee at the meeting, provides as follows:

Excluding Witnesses

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony Or the court may do so on its own. But this rule does not authorize excluding·

(a) a party who is a natural person;

(b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;

(c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or

(d) a person authorized by statute to be present.

Committee Discussion:

None.

Committee Vote:

The Committee voted unanimously to recommend that the restyled version of Rule 615 be released for public comment.

Rule 701

Rule 701 currently provides as follows:

Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

The restyled version of Rule 701, reviewed by the Committee at the meeting, provides as follows:

Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702

Committee Discussion:

1. In the drafting process leading up to the meeting, the major question on Rule 701 was whether the reference to "inferences" could be deleted as superfluous — leading to similar deletions of the references to "inferences" throughout Article VII. Professor Broun researched whether the term "inference" had any meaning in the case law different from "opinion" and found no case that had made any such distinction. The Reporter consulted scholars in Evidence and determined that a separate reference to "inferences" was unnecessary because in the final analysis, an inference (as used in Article VII) is a type of opinion.

At the meeting, the Committee unanimously agreed with the deletion of "inference" from Rule 701 as well as the other rules in Article VII.

Committee Vote:

The Committee voted unanimously to recommend that the restyled Rule 701 be released for public comment.

Rule 702

Rule 702 currently provides as follows:

Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The restyled version of Rule 702, reviewed by the Committee at the meeting, provides as follows:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Committee Discussion:

In discussions of previous drafts, Professor Kimble, Committee members and the Style Subcommittee worked to make sure that the preamble to the rule accurately set forth the existing qualification requirements. At the meeting, there was no further discussion on restyled Rule 702.

Committee Vote:

The Committee voted unanimously to recommend that restyled Rule 702 be released for public comment.

Rule 703

Rule 703 currently provides as follows:

Basis of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect

The restyled version of Rule 703, reviewed by the Committee at the meeting, provided as follows:

Basis of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in that same field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if the court determines that their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Committee Discussion:

1. The existing rule provides that experts can rely on inadmissible information if other experts "in the particular field" would rely on such information in forming an opinion. The restyled version referred to experts "in that same field." Committee members noted that the case law on Rule 703 often relied on the language "the particular field" in order to determine which experts' whose reasonable reliance would be relevant. Members expressed concern that any change of that language could lead to unanticipated results. Committee members described the change to "that same field"

as substantive, but the members of the Style Subcommittee at the meeting agreed in any case to restore the term "the particular field." The Committee unanimously approved that change, finding it unnecessary under the circumstances to vote on whether the proposed change in the restyled draft to "that same field" was substantive.

2. The Style Subcommittee asked the Committee to consider whether the reference in the last sentence of Rule 703 to "the jury" could have "any negative or unintended implications in a bench trial without a jury." Committee members addressed this question and determined that the reference to "the jury" was an essential part of the Rule. The last sentence of Rule 703 addresses whether an expert who relies on otherwise inadmissible information can disclose it at trial. The danger in the disclosure is that the jury will use the information not just to assess the basis of the expert's opinion, but also for some purpose not permitted under the Evidence Rules (e.g., using hearsay information for the truth of the matter asserted). At a bench trial, there is no comparable risk of misuse. Moreover, in a bench trial, it would make no sense to try to regulate disclosure of the otherwise inadmissible information at trial, because the judge likely would already have heard about the information at a *Daubert* hearing. Consequently, the reference to "the jury" in Rule 703 was appropriate and should be retained.

Committee Vote:

The Committee voted unanimously to recommend that the restyled version of Rule 703 be released for public comment, with the phrase "that same field" replaced by "the particular field" in the second sentence of the Rule.

Rule 704

Rule 704 currently provides as follows:

Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

The restyled version of Rule 704, reviewed by the Committee at the meeting, provided as follows:

Opinion on an Ultimate Issue

(a) Admissibility in General. An opinion is not objectionable just because it embraces an ultimate issue.

(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense.

Committee Discussion:

1. Committee members suggested that the heading to subdivision (a) might be improved because Rule 704(a) does not provide a grant of admissibility — rather it emphasizes that an opinion that is otherwise admissible (because it is helpful) is not excluded merely because it embraces an ultimate issue. The Committee unanimously agreed to request the Style Subcommittee to consider a change to the heading of subdivision (a) that would delete the term "Admissibility."

2. One Committee member suggested that the phrase "just because" in Rule 704(a) should be changed to "solely because" in order to sound less colloquial. The motion to make that style choice was defeated by a vote of two in favor and five against.

Committee Vote:

The Committee voted unanimously to recommend that restyled Rule 704 be released for public comment, with a suggestion to the Style Subcommittee to delete the word "Admissibility" from the heading to Rule 704(a).

Rule 705

Rule 705 currently provides as follows:

Disclosure of Facts or Data Underlying Expert Opinion

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

The restyled version of Rule 705, reviewed by the Committee at the meeting, provided as follows:

Disclosing the Facts or Data Underlying an Expert's Opinion

Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the court may require the expert to disclose those facts or data on cross-examination.

Committee Discussion:

The Style Subcommittee avoided the passive voice in the second sentence of the existing rule by providing that "the court may require the expert to disclose" facts or data on cross-examination. But Committee members noted that a focus on the court's role oversimplified what occurs at the trial when an expert does not disclose facts or data on direct. At that point, the cross-examiner can demand disclosure of the facts or data on cross, and the expert would be expected to comply. If not, the court would then have the authority to require the disclosure. The Committee unanimously determined that **the change of focus to solely what the court will do effected a substantive change in how Rule 705 actually applies in a litigation.** The Committee voted unanimously to restore the language of the existing rule: "the expert may be required."

Committee Vote:

The Committee voted unanimously to recommend that the following restyled version of Rule 705 be approved for public comment (blacklined from the restyled version reviewed by the Committee at the meeting):

Disclosing the Facts or Data Underlying an Expert's Opinion

Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But ~~the court may require~~ the expert may be required to disclose those facts or data on cross-examination

Rule 706

Rule 706 currently provides as follows:

Court Appointed Experts

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling

expert witnesses of their own selection.

The restyled version of Rule 706, reviewed by the Committee at the meeting, provides as follows:

Court-Appointed Experts

(a) Appointment Process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert witness that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) Expert's Role. The court must inform the expert in writing, in any form, of the expert's duties and have a copy filed with the clerk. Or the court may so inform the expert at a conference in which the parties have an opportunity to participate. The expert:

(1) must advise the parties of any findings the expert makes;

(2) may be deposed by any party;

(3) may be called to testify by the court or any party; and

(4) may be cross-examined by any party, including the party that called the expert.

(c) Compensation. The expert is entitled to whatever reasonable compensation the court allows. The compensation is payable as follows:

(1) in a criminal case and in a civil action or proceeding involving just compensation under the Fifth Amendment, from any funds that are provided by law; and

(2) in any other civil action or proceeding, by the parties in the proportion and at the time that the court directs — and the compensation is then charged like other costs.

(d) Disclosing the Appointment. The court may authorize disclosure to the jury that the court appointed the expert.

(e) Parties' Choice of Their Own Experts. This rule does not limit a party in calling

its own experts

Committee Discussion:

Committee members suggested that it would be useful to change the heading to the Rule to clarify that the Rule covered only court-appointed experts who testify as witnesses The Rule does not cover, for example, experts appointed by the court to be technical advisors. The Committee voted unanimously to suggest to the Style Subcommittee that the heading be amended to refer to "Court-Appointed Expert Witnesses."

Committee Vote:

The Committee voted unanimously to recommend that the restyled Rule 706 be released for public comment, with the suggestion to the Style Subcommittee that it consider changing the title of the rule to "Court-Appointed Expert Witnesses."

Rules 101-415

The restyled Rules 101-415 were approved for release for public comment at the June 2008 Standing Committee meeting (though the release will be delayed until all the rules have been restyled). The Style Subcommittee raised two issues on which it sought reconsideration by the Evidence Rules Committee. Both of these issues concerned restyled Rule 404(b)(2). The first was the heading to restyled Rule 404(b)(2) — which currently is "Permitted Uses". The Style Subcommittee requested reconsideration of a proposal to change the heading to "Exceptions." The second and related issue was requested reconsideration of a proposal to provide that "the court may admit" evidence of uncharged misconduct when offered for a non-character purpose. Restyled Rule 404(b) currently states that such evidence "may be admissible" if offered for a non-character purpose — which is the same language as is used in the existing Rule 404(b).

Both proposals for reconsideration were an attempt to use terminology that is consistent with Rules 407, 408 and other similar rules. Those rules, as restyled, are structured as providing "exceptions" to exclusionary principles, in which "the court may admit" the evidence if offered for a proper purpose.

The Committee considered the changes to Rule 404(b) proposed by the Style Subcommittee and unanimously rejected them on the ground that they would effect substantive changes to the Rule. The DOJ representative noted that hundreds of cases had established that Rule 404(b) was a rule of inclusion — not an "exception." It was also noted that Congress explicitly changed the original Advisory Committee draft of Rule 404(b) — which used more exclusionary language — to "may be admissible," thus indicating a legislative intent that Rule 404(b) is to be treated as an inclusionary rule. Under the Style protocol, language in a rule that is a "sacred phrase" is considered substantive and is not to be changed. The Committee unanimously determined that changing the heading to "Exceptions" and changing the text of the Rule to "the court may admit" was substantive both because 1) it made the rule potentially less permissive and 2) it would alter a "sacred phrase." Many members noted that the cost of stylistic uniformity would be high, given the Justice Department's strong objections to any attempt to change Rule 404(b) in a way that might be considered less permissive.

II. Proposed Amendment to Rule 804(b)(3)

At its last meeting the Evidence Rules Committee approved, for release for public comment, an amendment to Evidence Rule 804(b)(3). The proposal was approved by the Standing Committee. The comment period ends in March, 2009. The amendment would require the government to provide corroborating circumstances indicating trustworthiness before a declaration against penal interest could be admitted in a criminal case. In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest for the hearsay to be admissible; but by its terms the Rule imposes no similar requirement on the prosecution. The need for the amendment arose after the Supreme Court's decision in *Whorton v. Bockting*, which held that the Confrontation Clause provides no protection against unreliable hearsay if that hearsay is nontestimonial. If the prosecution has to show only that a declarant made a statement that tended to disserve his interest — i.e., all that is required under the terms of the existing rule — then it might well be that unreliable hearsay could be admitted against an accused.

The Reporter noted that no public comment had yet been received on the proposed amendment to Rule 804(b)(3). The Committee will consider all public comments at its next meeting.

III. Report on Subcommittees

The Judicial Conference has requested the Standing Committee (as well as other Conference committees) to prepare a report on the use of subcommittees. Judge Rosenthal in turn asked the Advisory Committees to report on use of subcommittees — the goal is to prepare a "best practices"

report on the use of subcommittees Judge Hinkle reported on this development and informed the Committee that he had reported to Judge Rosenthal that, as the Evidence Rules Committee has no subcommittees, it had no relevant information about best practices — but that it would support the suggestions of Judge Rosenthal and the other Advisory Committees that do use subcommittees. The members of the Evidence Rules Committee agreed with this approach.

IV. Report on Proposed Amendment to Civil Rule 26

Judge Hinkle reported on a proposed amendment to Civil Rule 26. The amendment would provide protection against discovery of work product when counsel consults with testifying experts One sentence in the Committee Note to the proposed amendment provides an opinion that if work product is to be protected in the discovery process, it should also result in the information being excluded at trial. Judge Hinkle observed that this sentence of the Committee Note carried possible implications for the rules of evidence. Judge Kravitz, chair of the Civil Rules Committee, has agreed that the amendment to Rule 26 deals only with discovery, not trial evidence. Judge Hinkle and the Evidence Committee Reporter have suggested removal of the Committee Note's reference to admissibility at trial. The Evidence Committee was not asked to address this issue and took no action.

V. Report on *Crawford v. Washington* and Subsequent Case Law

The Reporter prepared a report for the Committee on case law developments after *Crawford v. Washington*. The Court in *Crawford* held that if hearsay is "testimonial," its admission against an accused violates the right to confrontation unless the declarant is available and subject to cross-examination. The Court in *Crawford* declined to define the term "testimonial," but the later case of *Davis v. Washington* provides some guidance on the proper definition of that term: a hearsay statement will be testimonial only if the primary purpose for making the statement is to have it used in a criminal prosecution. Thereafter the Court in *Whorton v Bockting* held that if hearsay is not testimonial, then its admissibility is governed solely by rules of evidence, and not by the Confrontation Clause. This Supreme Court case law has been reviewed and developed in a large body of lower court case law. In the 2008-9 term, the Supreme Court will once again address a question under the Confrontation Clause — whether a report of a chemical test for drugs is testimonial.

Committee members resolved to continue to monitor case law developments after *Crawford*, and to propose amendments should they become necessary to bring the Federal Rules into compliance with the *Crawford* standards as developed in the federal case law.

VI. Next Meeting

The Spring 2009 meeting of the Committee is scheduled for March 30th and 31st in Washington, D. C.

Respectfully submitted,

Daniel J. Capra
Reporter

42

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 12-13, 2009
San Antonio, Texas
Draft Minutes

TABLE OF CONTENTS

ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held at St. Mary's Law School in San Antonio, Texas, on Monday and Tuesday, January 12 and 13, 2009. The following members were present:

Judge Lee H. Rosenthal, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Chief Justice Ronald N. George
Judge Harris L Hartz
Judge Marilyn L. Huff
John G. Kester, Esquire
William J. Maledon, Esquire
Judge Reena Raggi
Judge James A. Teilborg
Judge Diane P. Wood

Ronald J. Tenpas, Assistant Attorney General for the Environment and Natural Resources Division, represented the Department of Justice Professor Daniel J. Meltzer was unable to attend the meeting.

Also participating in the meeting were: Judge Anthony J. Scirica, former chair of the committee; Professor Geoffrey C. Hazard, Jr., consultant to the committee; Judge Patrick E. Higginbotham, former chair of the Advisory Committee on Civil Rules; Judge Vaughn R. Walker, Professor Steven S. Gensler, and Daniel C. Girard, Esquire, current members of the Advisory Committee on Civil Rules; and Professor David A. Schlueter, former reporter to the Advisory Committee on Criminal Rules.

In addition, the committee conducted a panel discussion in which the following distinguished members of the bench and bar participated: Judge Rebecca Love Kourlis; Gregory P. Joseph, Esquire; Joseph D. Garrison, Esquire; Douglas Richards, Esquire; and Paul C. Saunders, Esquire. Dean Charles E. Cantu of St. Mary's Law School greeted the participants and welcomed them to the school.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
John K. Rabiej	Chief, Rules Committee Support Office
James N. Ishida	Senior attorney, Administrative Office
Jeffrey N. Barr	Senior attorney, Administrative Office
Emery Lee	Research Division, Federal Judicial Center
Andrea Kuperman	Judge Rosenthal's rules law clerk

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Carl E. Stewart, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Laura Taylor Swain, Chair
Professor S. Elizabeth Gibson, Reporter
Advisory Committee on Civil Rules —
Judge Mark R. Kravitz, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Robert L. Hinkle, Chair

INTRODUCTORY REMARKS

Judge Rosenthal thanked Dean Cantu and St. Mary's Law School for hosting the committee meeting and Becky Adams, Coordinator to the Dean, for her help in planning the meeting, managing transportation, and providing meals and refreshments. She suggested that the committee consider holding more meetings at law schools in the future. She also recognized the outstanding contributions to the rules committees made by Judge Higginbotham and Professor Schlueter, both of whom currently teach at St. Mary's.

Judge Rosenthal thanked Mr. Tenpas for his active and productive involvement in the rules process over the last several years in representing the Department of Justice. She asked him to convey the committee's appreciation back to the many Department executives and career attorneys who have contributed professionally to the work of the committees. In particular, she asked the committee to recognize the important contributions in the last couple of years of James B. Comey, Paul J. McNulty, Robert D. McCallum. Jr., Paul D. Clement, John S. Davis, Alice S. Fisher, Greg Katsas, Benton J. Campbell, Deborah J. Rhodes, Douglas Letter, Ted Hirt, J. Christopher Kohn, Jonathan J Wroblewski, Elizabeth Shapiro, Stefan Cassella, and Michael J. Elston.

Mr. Tenpas announced that the Department had arranged to have career attorneys support the work of the committees during the transition from the Bush Administration to the Obama Administration.

Judge Rosenthal welcomed Judge Scirica and thanked him for his distinguished leadership as the committee's chair. She also recognized Professor Gibson, professor of law at the University of North Carolina, as the new reporter of the Advisory Committee on Bankruptcy Rules. She noted that the advisory committee will have to move quickly to draft additional changes in the bankruptcy rules if pending legislation is enacted providing bankruptcy judges with authority to modify home mortgages.

Judge Rosenthal reported that all the rules amendments sent by the committee to the Judicial Conference at its September 2008 session had been approved on the consent calendar and are currently pending before the Supreme Court. The majority of the changes, she said, were part of the comprehensive package of time-computation amendments. She pointed to the draft cover letter that will be sent to Congress conveying proposed legislation to amend 29 statutory provisions affecting court proceedings and deadlines. She noted that the Department of Justice and a number of bar associations had also written Congress to support the changes.

She added that the new Congress is largely preoccupied at this point in getting organized, but she and others planned to visit members and their staff in February to

discuss the proposed legislation. She noted that a good deal of background work for the proposal had already been initiated in the last Congress.

Judge Rosenthal explained that the purpose of the proposed legislation is to coordinate the time-computation rules changes with appropriate statutory changes and make them all effective on December 1, 2009. She reported, too, that the committee will initiate efforts to have the courts amend their local rules to take account of the changes in the national rules and statutes. To that end, it will send materials to the chief judges. She suggested that it should not be difficult for the courts to comply, but it will take coordinated efforts to make sure that the task is completed on a timely basis in each court. She added that the chief judges should also be advised of the matter at various judge workshops and meetings and in articles in the judiciary's publications.

Judge Scirica reported that Chief Justice Roberts had complimented Judge Rosenthal at the September 2008 Judicial Conference meeting for her extraordinary efforts in securing legislative approval of the new FED. R. EVID. 502. Unfortunately, he said, Judge Rosenthal had not been able to attend the Conference in person because of the hurricane in Houston. But, he noted, the honor from the Chief Justice was greatly deserved and remarked upon by many members of the Conference. Judge Scirica then presented Judge Rosenthal with a framed copy of the legislation enacting Rule 502 signed by the President and a personal card from the President.

Judge Rosenthal noted that the 75th anniversary of the Rules Enabling Act of 1934 will occur on June 19, 2009. She said that she planned to speak with the Chief Justice about holding an appropriate program later in the year to mark the event. One possibility, she said, would be to combine a celebration at the Supreme Court with education programs on the federal rules process featuring prominent law professors.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on June 9-10, 2008.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr. Rabiej reported that the 111th Congress was just getting organized. The first legislative task for the rules office staff, he said, had been to prepare the cover letters to be sent to Congressional leadership in support of legislation to amend the time deadlines

in 29 statutes. The judiciary hopes that the legislation will take effect on December 1, 2009.

Mr. Rabiej reported that proposed legislation on gang crime would amend FED. R. EVID. 804(b)(6) (the hearsay exception for unavailable witnesses) to codify a decision of the Tenth Circuit and make it explicit that a statement made by a witness who is unavailable because of the party's wrongdoing may be introduced against the party if the party should have reasonably foreseen that its wrongdoing would make the witness unavailable. One version of the legislation would amend the rule directly by statute. But another would only direct the Standing and Evidence Committees to consider the necessity and desirability of amending the rule.

Mr. Rabiej noted that legislation was anticipated in the new Congress to authorize bankruptcy judges to alter certain provisions of a debtor's personal-residence mortgage. If enacted, he said, the legislation would likely require amendments to the bankruptcy rules and forms.

As for legislation that would affect the criminal rules, Mr. Rabiej reported that a bill likely would be introduced once again on behalf of the bail bond industry to prohibit a judge from forfeiting a bond for any condition other than the defendant's failure to appear in court as ordered. In addition, legislation may be introduced in the new Congress to add more provisions to the rules to protect victims' rights.

On the civil side, Mr. Rabiej reported that the main legislative focus will be on Senator Kohl's bill to amend FED. R. CIV. P. 26 by imposing certain limitations on protective orders. He said that the legislation had been introduced in the last several Congresses and had been opposed consistently by the Judicial Conference on the grounds that it is unnecessary, impractical, and overly burdensome for both courts and litigants. He noted that Judge Kravitz had testified against the legislation in the 110th Congress, and his written statement had been included in the committee's agenda materials. He added that Senator Kohl was expected to introduce the bill again in the 111th Congress.

Judge Kravitz explained that the legislation had two primary provisions. First, it would prevent judges from entering sealed settlement orders. He pointed out, though, that empirical research conducted for the committee by the Federal Judicial Center had demonstrated that these orders are relatively rare in the federal courts. Thus, the provision would have little practical impact.

The second provision of the legislation, though, would be very troublesome. It would prevent a judge from entering a discovery protective order unless personally assured that the information to be protected by the order does not implicate public health or safety. He pointed out that a judge would have to make particularized findings

attesting to that effect at an early stage in a case – when the judge knows very little about the case, the documents have not been identified, and little help can be expected from the parties.

He pointed out that he had been the only witness invited by the House Judiciary Committee to speak against the legislation. His testimony explained that the judiciary opposed the bill because empirical data demonstrates that protective orders typically allow parties to come back to the court to challenge the information produced or ask the judge to lift the order. In addition, protective orders have the beneficial effect of allowing lawyers to exchange information more readily and at much less expense to the parties. Many of the problems targeted by the legislation, he said, appear to have arisen in the state courts, rather than the federal courts. He also reported that he had emphasized at the hearing that Congress had established the Rules Enabling Act process explicitly to allow for an orderly and objective review of the rules. Accordingly, Congress should normally give substantial deference to that thoughtful process.

Judge Kravitz observed that the supporters of the proposed legislation clearly do not fully understand the rules process. Several members of Congress, he said, seemed surprised to discover that the Advisory Committee on Civil Rules had actually held hearings on the proposal, commissioned sound research from the Federal Judicial Center, and reached out to all interest groups. He suggested that the rules committees increase their outreach efforts to Congress. A participant added that the regular turnover of members and staff on Congressional committees results in little institutional memory. He said that several prominent law professors would be willing to help educate staff about the rules process by conducting special seminars for them. Judge Rosenthal added that the 75th anniversary celebration of the Rules Enabling Act would be a good time to have some prestigious academics conduct seminars to educate Congressional staff on the rules process. The programs, she said, should emphasize that the work of the rules committees is transparent, thorough, and careful.

Administrative Report

Mr. Ishida reported that the rules staff has continued to improve and expand the federal rules page on www.uscourts.gov The digital recordings of the public hearings have now been posted on the site and are available as a podcast. He noted that the website had been attracting favorable attention among bloggers. Mr. McCabe added that the staff has continued to search for historical records of the rules committees. They traveled recently to Hofstra and Michigan law schools to obtain copies of missing records of the Advisory Committee on Bankruptcy Rules from the 1970s and 1980s.

Judge Rosenthal thanked both the advisory committees and the members of the Standing Committee for their helpful comments on the use of subcommittees. She said

that they will be incorporated in the committee's response to the Executive Committee of the Judicial Conference. Judge Scirica explained that the Executive Committee's request had been directed to concerns about the supervision by some committees over their subcommittees. He emphasized that the rules committees' use of subcommittees has always been appropriate and productive.

Judge Rosenthal reported that the newly re-established E-Government Subcommittee, which includes representatives from the Court Administration and Case Management Committee, will address a number of issues that have arisen since the new privacy rules took effect.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Struve presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachments of December 11, 2008 (Agenda Item 6).

Informational Items

FED. R. APP. P. 40(a)(1)

Judge Stewart reported that the advisory committee had voted to give final approval to proposed amendments to Rule 40(a)(1) (time to file a petition for panel rehearing). The proposed amendments would clarify the applicability of the extended deadline for seeking panel rehearing to cases in which federal officers or employees are parties. At this time Judge Stewart presented the proposed amendments to the Standing Committee for discussion rather than for final approval.

He explained that the proposal was one of two recommended by the Department of Justice and published for comment in 2007. The other would have amended Fed. R. App. P. 4(a)(1) to clarify the applicability of the 30-day and 60-day appeal time limits in cases in which federal officers or employees are parties. The Department, however, later withdrew the second proposal because the Supreme Court's decision in Bowles v. Russell, 551 U.S. 205 (2007), indicated that statutory appeal time limits are jurisdictional. Amending Rule 4's time periods for filing a notice of appeal might raise questions under Bowles because those time periods also appear in 28 U.S.C. § 2107.

Judge Stewart reported that the advisory committee at its November 2008 meeting had voted to proceed with the proposed amendment to Rule 40 because it involves a purely rules-based deadline. But he noted that there was no need to proceed at the January 2009 Standing Committee meeting because the matter could be taken up more

effectively at the June 2009 meeting. This would give the Department of Justice additional time to decide whether to pursue a legislative change of Rule 4's deadlines, rather than a rules amendment. He pointed out that there is no disadvantage in waiting another meeting because the matter will not be presented to the Judicial Conference until its September 2009 session. The advisory committee, he said, hoped to receive additional input from the Department at its April 2009 meeting.

BOWLES V. RUSSELL

Judge Stewart noted that a number of issues are unresolved regarding the impact of *Bowles v. Russell* on appeal deadlines set by statute versus those set by rules. The Supreme Court, he said, has had other pertinent cases on its docket since *Bowles*, but has not provided additional guidance. Accordingly, the advisory committee decided to explore, in coordination with the civil, criminal, and bankruptcy advisory committees, whether a statutory change, rather than a rules amendment, might be appropriate to resolve these issues.

Professor Struve explained that although *Bowles* holds that appeal deadlines set by statute are jurisdictional, the implications of the decision for other types of deadlines are unclear. A consensus has developed, she said, that purely non-statutory deadlines are not jurisdictional. But there are also "hybrid deadlines," such as those involving motions that toll the deadline for taking an appeal. A split in the case law already exists among the circuits on this matter, and there may even be instances in which one party in a case has a statutory deadline and the other does not.

Professor Struve reported that the advisory committee was considering developing a propose statutory fix to rationalize the whole situation, and it had asked her to try drafting it. Obviously, she said, the advisory committee will consult with the other advisory committees and reporters, and it will appreciate any insights or guidance that members of the Standing Committee may have. She added that the Advisory Committee on Civil Rules has been particularly helpful in working with her on the matter.

COMPLIANCE WITH THE SEPARATE-DOCUMENT REQUIREMENT OF FED. R.CIV. P. 58

Judge Stewart reported that the advisory committee had voted to ask the Standing Committee to take appropriate steps to improve district-court awareness of, and compliance with, the separate-document requirement of FED. R. CIV. P. 58 (entering judgments), rather than seek rules changes. In particular, jurisdictional problems arise between the district court and the court of appeals in cases where: (1) a separate judgment document is required but not provided by the court; (2) an appeal is filed; and (3) a party later files a tolling motion – which is timely because the court did not enter a separate judgment document – and the motion suspends the effect of the notice of appeal.

Judge Stewart emphasized that it is important for the bar to have the district courts comply with the rule. He reported that the advisory committee had asked the Federal Judicial Center to make informal inquiries. In addition, the advisory committee had asked its appellate clerk liaison, Charles Fulbruge, to canvass his clerk colleagues regarding the level of compliance that they have experienced in their respective circuits with the separate-document rule. Some clerks, he reported, had noted a fair degree of noncompliance, but others had not.

A member reported that a serious problem had existed in his circuit with district courts not entering separate documents, especially in prisoner cases. After judgment, prisoners who have already filed a notice of appeal file a document that can be construed as a Rule 59 motion for a new trial that tolls the deadline for filing a notice of appeal. The court of appeals then loses jurisdiction because a timely post-judgment motion has been filed in the district court, but the district court fails to act because it believes that the court of appeals has the case. He said that representatives of his circuit had spoken directly with the district court clerks in the circuit about the Rule 58 requirements, and compliance has now been much improved. He suggested that it would be productive for the rules committees also to work informally with the district courts on the matter. In addition, it would be advisable to place an automated prompt or other device in the CM/ECF electronic docket system to help ensure compliance with the separate-document requirement. Judge Rosenthal added that the committee should coordinate on the matter with the Committee on Court Administration and Case Management.

MANUFACTURED FINALITY

Judge Stewart reported that the advisory committee was collaborating with the other advisory committees on the issue of "manufactured finality" – a mechanism used in various circuits for parties to get a case to the court of appeals when a district court dismisses a plaintiff's most important claims but other, peripheral, claims survive. To obtain the necessary finality for an appeal, he said, the plaintiff may seek to dismiss the peripheral claims to let the case proceed to the court of appeals on the central claims.

Whether or not these tactics work to create an appealable final judgment generally depends on the conditions of the voluntary dismissal. The circuits are split on whether there is a final judgment when the plaintiff has reserved the right to resume and revive its dismissed peripheral claims if it wins its appeal on its central claims. A member added that her circuit does not allow dismissals without prejudice to create an appealable final judgment. The circuit will permit the appellant to wait until oral argument to stipulate to a dismissal with prejudice, but the appellant must do so by that time. Another member pointed out that manufactured finality may arise in several ways. In his circuit, some parties simply take no action after an interlocutory decision, and the district court ultimately dismisses the peripheral claims for failure to prosecute. A participant suggested that the case law on finality and the application of 28 U.S.C. § 1292(b) varies

considerably among the circuits, and many district judges use a variety of devices to get cases to the courts of appeal.

Judge Stewart pointed out that there are cases in which everybody – the parties and the trial judge – wants to send a case up to the court of appeals quickly. He suggested that manufactured finality is a real problem, and the circuits have taken very different approaches to dealing with it. Therefore, it may well be appropriate to have national uniformity. To that end, he said, the advisory committee will consider whether the federal rules should provide appropriate avenues for an appeal other than through the certification procedure of FED. R. CIV. P. 54(b) and the interlocutory appeal provisions of 28 U.S.C. § 1292(b).

OTHER MATTERS

Judge Stewart reported that the advisory committee had decided to remove from its active agenda a proposal to amend FED. R. APP. P. 7 (bond for costs on appeal in a civil case) to clarify the scope of the "costs" for which an appeal bond may be required. Professor Struve added that the advisory committee would collaborate with the Advisory Committee on Civil Rules on whether to amend FED. R. APP. P. 4(a)(4) (effect of a motion on a notice of appeal in a civil case) to refine the time and scope of notices of appeal with respect to challenges to the disposition of post-trial motions.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Swain and Professor Gibson presented the report of the advisory committee, as set out in Judge Swain's memorandum and attachments of December 12, 2008 (Agenda Item 9).

Amendments for Publication

FED. R. BANKR. P. 6003

Professor Gibson reported that FED. R. BANKR. P. 6003 (relief immediately after commencement of a case) was adopted in 2007 to address problems typically arising in large chapter 11 cases when a bankruptcy judge is presented with a large stack of motions on the day of filing. The rule imposes a 21-day breathing period before the judge may actually rule on these first-day motions – largely applications to approve the employment of attorneys or other professionals and to sell property of the estate. The delay provides time for a creditors committee to be formed and for the U.S. trustee and the judge to get up to speed on the case.

Some judges and lawyers, she said, have read the rule to prohibit a debtor-in-possession from hiring an attorney during the first 21 days of the case. The current rule permits an exception on a showing of irreparable harm, but some parties resort to claiming irreparable harm in every case. The proposed amendment, she said, would make it clear that although the judge may not issue the order before the 21-day period is over, the judge may issue it later and make it effective retroactively, thereby ratifying the appointment of counsel sought in the motion.

Another, minor change to the rule, she said, would make it clear that even though a judge may not grant the specific kinds of relief enumerated in the rule – such as approving the sale of property – the judge may enter orders relating to that relief, such as establishing the bidding procedures to be used for selling the property.

The committee without objection by voice vote approved the proposed amendments for publication.

Informational Items

Professor Gibson reported that several of the bankruptcy rules amendments published in August 2008 would implement chapter 15 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, dealing with cross-border cases. She noted that only two comments had been received, and the advisory committee had canceled the scheduled public hearings.

OFFICIAL FORMS 22A and 22C

Professor Gibson explained that Forms 22A and 22C implement the "means test" provisions of the 2005 Act. The statute, she said, defines "current monthly income" and establishes the means test to determine whether relief for the debtor under chapter 7 should be presumed abusive. Chapter 13 debtors must complete the means test to determine the applicable commitment period during which their projected disposable income must be paid to unsecured creditors.

Under the Act, debtors may subtract from their monthly income certain expenses for themselves and their dependents. In determining these allowances, the forms currently use the terms "household" and "household size." The advisory committee believes, though, that "household" is not correct in light of the statute because it is both over-inclusive and under-inclusive. The Act allows deductions for food, clothing, and certain other items in amounts specified in IRS National Standards and deductions for housing and utilities in the amounts specified in IRS Local Standards. Both the national and local IRS standards are based on "numbers of persons" and "family," rather than "household." Moreover, the IRS bases these numbers on the number of dependents that

the debtor claims for federal income tax purposes. A person in the "household" may not be a "dependent."

Judge Swain explained that the policy of the advisory committee, whenever there are possible conflicting interpretations of the Act, is to allow filers to present their claims as they interpret the statute – and not have them precluded from doing so by restrictive language in the forms. She added that the revised forms focus on dependency without specifically adopting the IRS standard. Thus, Form 22C refers to "exemptions . . . plus the number of any additional dependents." This provides room for a litigant to argue that a member of the debtor's household could be a "dependent" for bankruptcy purposes even without entitling the debtor to an exemption under IRS standards.

Judge Swain stated that the advisory committee had planned to present the revisions to the Standing Committee at the current meeting as an action item. But another technical problem had just been discovered with the forms, and the advisory committee would like to consider making another change and return with the forms for final approval in June 2009. Accordingly, she said, the matter should be considered as an informational item, rather than an action item.

National Guard and Reservists Relief Act

Professor Gibson explained that after the advisory committee meeting, Congress passed the National Guard and Reservists Relief Act, creating a temporary exemption from the means test for reservists and members of the Guard. The statute took effect on December 19, 2008, but it will expire in 2011. Thus, a permanent change to the rules is not advisable. But an amendment to Form 22A (the chapter 7 means test form) and a new Interim Rule 1007-I were approved on an emergency basis by email votes of the advisory committee, the Standing Committee, and the Executive Committee of the Judicial Conference. Thus, they were in place when the Act took effect in December 2008. She added that the interim rule has now been adopted as a local rule by all the courts.

She pointed out that the amendment to Form 22A had been particularly challenging to craft because the statute gives a reservist or member of the Guard a temporary exclusion from the means test only while on active duty or during the first 540 days after release from active duty. Thus, a temporarily excluded debtor may still have to file the means test form later in the case.

Part VIII of the Bankruptcy Rules

Professor Gibson said that the advisory committee was considering revising Part VIII of the bankruptcy rules governing appeals. Part VIII, she said, had been modeled on the Federal Rules of Appellate Procedure as they existed many years ago. The appellate rules, though, have been revised several times since, and they have also been restyled as a

body. Accordingly, the advisory committee concluded that it was time to take a fresh look at Part VIII and consider: (1) making it more consistent with the current appellate rules; (2) adopting restyling changes; and (3) reorganizing the chapter. She reported that the advisory committee at its October 2008 meeting had considered a comprehensive revision of Part VIII prepared by Eric Brunstad, a very knowledgeable appellate attorney whose term on the advisory committee had just expired.

She added that the committee decided that it would be very helpful to conduct open subcommittee meetings on Part VIII with members of the bench and bar at its next two advisory committee meetings, in March and October 2009. The committee, she said, will invite practitioners, court personnel, and others to address any problems they have encountered with the existing rules and to discuss their practical experience with two sets of appellate rules in cases that are appealed from the district court or bankruptcy appellate panel to the court of appeals. She said that the dialog at the open subcommittee meetings will help inform the advisory committee as to the worth of proceeding with the project.

ZEDAN V. HABASH

Judge Swain reported that Judge Rosenthal had referred to the advisory committee the concurring opinion of Chief Judge Frank Easterbrook in *Zedan v. Habash,* 529 F.3rd 398 (7th Cir. 2008), a case that raised two bankruptcy rules issues. In particular, he questioned whether FED. R. BANKR. P. 7001 (list of adversary proceedings covered by Part VII of the rules) should continue to classify proceedings to object to or revoke a discharge as adversary proceedings, termination of which constitutes a final decision that permits appellate review.

Zedan, she said, was a very unusual case involving a potential objection to discharge brought after the objection to discharge deadline had lapsed, but before a discharge had been entered by the court. Zedan, a creditor, claimed fraud with respect to an asset sale, and he tried to object to or revoke the debtor's discharge. Under the literal language of the Bankruptcy Code and Rules, however, he was barred from either type of relief. An objection to discharge was untimely because the deadline had passed, and an attempt to revoke the discharge was premature because no discharge had been entered. Moreover, even if Zedan had waited until the discharge was entered, an attempt to seek revocation would not have been possible because § 727(d)(1) of the Code requires that the party seeking revocation "not know of such fraud until *after* the granting of such discharge."

Judge Swain said that the advisory committee was considering the matter thoroughly and would consider a potential rules fix. It was also weighing whether the need for relief in this unusual situation outweighs the importance of finality in bankruptcy

cases. One possible amendment, she said, would be to permit an extension of the time for the creditor to file an objection based on newly discovered evidence.

Judge Swain explained that Judge Easterbrook in his concurring opinion had also asked whether objections to discharge should be treated as adversary proceedings or reclassified as contested matters because they are "core proceedings" under the Bankruptcy Code. She noted that the advisory committee had always considered objections to discharge as adversary proceedings, requiring application of the full panoply of the Federal Rules of Civil Procedure. She reported that the committee had conducted a lengthy discussion on the matter at its October 2008 meeting and concluded that it is appropriate to consider certain core proceedings as adversary proceedings, rather than contested matters. Moreover, a judge may deal with unusual problems, such as those arising in *Zedan,* by a variety of devices.

BANKRUPTCY FORMS MODERNIZATION

Judge Swain reported on the advisory committee's project to analyze and modernize all the bankruptcy forms. She said that the committee was undertaking a holistic review of the forms both for substance and for practical usage in today's electronic environment. Among other things, she said, courts and other participants in the bankruptcy system have requested an expanded capacity to manipulate electronically the individual data elements contained on the forms.

She pointed out that the advisory committee had established two subgroups to tackle the project. An analytical group is analyzing for substance all the information contained on all the forms, *i.e.,* what pieces of information are truly needed by each participant, whether any of it is duplicative, and whether the information could be solicited in a more effective manner. At the same time, a technical group is looking at various ways to gather and distribute the information contained on the forms. It is working closely with the special group of judges, clerks of court, and AO staff just convened to design the next generation electronic system to replace CM/ECF.

HOME-MORTGAGE LEGISLATION

Professor Gibson reported that legislation had been introduced in Congress to authorize a bankruptcy judge to modify the terms of a debtor's home mortgage. (Since 1979, the Bankruptcy Code has prohibited modification.) As currently drafted, the legislation would allow a home mortgage to be treated in the same manner as other secured claims, and a bankruptcy judge would be able to "cram down" the mortgage to the current value of the house and allow repayment for up to 40 years. It would also let the judge reset the interest rate at the current market rate for conventional mortgages plus a premium for risk. Other provisions include dispensing with the credit counseling requirements, changing the calculation for chapter 13 eligibility, and requiring that home

owners be given notice of additional bank fees and charges. The legislation would be effective on enactment and would apply to mortgages originated before its effective date. The legislation would also require a number of changes to the bankruptcy rules and forms.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set out in Judge Kravitz's memorandum and attachments of December 9, 2008 (Agenda Item 5).

Discussion Items

Judge Kravitz reported that a great deal of interest had been expressed by the bench and bar in the published amendments to FED. R. CIV. P. 26 (expert witness disclosures and discovery) and FED. R. CIV. P. 56 (summary judgment). He noted that the public comments had been heavy, and many witnesses had signed up to testify at the three scheduled public hearings. He pointed out that the publication distributed to the bench and bar had asked for comments directed to the specific concerns voiced by Standing Committee members at the June 2008 meeting.

FED. R. CIV. P. 26

Judge Kravitz said that the proposed amendments to Rule 26 had been very well received on the whole, principally because they offer a practical solution to serious discovery problems regarding discovery of expert witness draft reports and attorney-expert communications. The great majority of comments from practicing lawyers, he said, had stated that the amendments will help reduce the costs of discovery without sacrificing any information that litigants truly need. On that point, he emphasized, extending work-product protection to drafts prepared by experts and to certain communications between experts and attorneys will not deprive adversaries of critical information bearing on the merits of their case.

Judge Kravitz noted, though, that opposition to the proposed amendments had been voiced by a group of more than 30 law professors. He suggested that their principal concern is that the amendments would further ratify the role of experts as paid, partisan advocates, rather than independent, learned observers. By way of contrast, experts in other countries are often appointed by the court or selected jointly by the parties.

He noted that the professors argue that by limiting inquiry into discussions between lawyers and their experts, the rule will lead to concealment of huge amounts of relevant information contained in draft reports and communications with experts. But, he said, the practicing bar has told the committee repeatedly that it will not in fact do so

because the information they seek presently does not exist. Practitioners report that lawyers today avoid communications with their testifying experts and discourage draft reports. Therefore, the proposed amendments will not make unavailable information that is currently available. Experience in the New Jersey state courts, moreover, shows that few problems arise in the state systems that prohibit discovery of expert drafts and communications. The practicing lawyers say consistently that juries clearly understand that experts are paid by the parties, and they are not misled at trial.

Judge Kravitz said that the professors are concerned that the amendments would take the rules in a direction inconsistent with *Daubert* and the gate-keeping role that it imposes on the courts to protect the integrity of expert evidence. But, he said, the advisory committee has consulted regularly with judges and lawyers and has been informed that decisions applying *Daubert* really turn on the actual testimony of expert witnesses, not on their communications with attorneys

Finally, Judge Kravitz noted that the professors claim that the amendments would create an evidentiary privilege that under the Rules Enabling Act must be affirmatively enacted by Congress. He pointed to an excellent memorandum in the agenda book by Andrea Kuperman on work-product protection. The advisory committee, he reported, is convinced that the amendments deal only with work-product protection and do not create a privilege. Essentially, he said, they really only modify a change made by the 1993 amendments to Rule 26. He recommended, though, that it may be advisable to dispel any notion that a privilege is being created by eliminating any reference in the proposed committee note regarding the expectation that the work-product protections provided during pretrial discovery will ordinarily be honored at trial. He suggested that the current language of the note may allow opponents to argue, incorrectly, that a privilege is being created at trial.

Judge Kravitz said that the advisory committee very much appreciated the comments from the law professors, and it had taken all their concerns very seriously. But it concluded that it is vital to the legal process for lawyers to be able to interact freely with their experts without fear of having to disclose all their conversations and drafts to their adversaries. He noted, for example, that a law professor had informed the committee that the amendments will be very beneficial to him as an expert witness because he will now be able to take notes and have candid conversations with attorneys regarding the strengths and weakness of their cases.

A participant suggested that there is a wide gulf between practitioners and the professors on these issues. He attributed the difference to a lack of practical experience on the part of the latter and their focus on theory. He suggested that the professors tend to view experts under the current system as "hired guns." The nub of their opposition is their policy preference for a "truth-seeking" model versus the current "adversary" model. He conceded, though, that there are some cases in the state courts where there is

insufficient monitoring of experts, but there are few problems in practice in the federal courts and in most state courts. Several other participants endorsed these observations.

One member, however, expressed sympathy with the views of the law professors and argued that the proposed amendments are unwise. She suggested that the committee think carefully about whether the amendments in fact would create a privilege, or at least a hybrid between a privilege and a protection. In particular, she objected to the language in the committee note stating that the limitations on discovery of experts' drafts and communications will ordinarily be honored at trial. She suggested that the note should state explicitly that judges have discretion in individual cases to require more disclosure, especially when they suspect sharp practices. She noted, too, that in addition to the law professors, opposition had been expressed to the proposed amendments by the bar of the Eastern District of New York, which had argued for more discovery of communications between experts and attorneys.

Judge Kravitz responded that proposed Rule 26(b)(4)(C) explicitly allows discovery of communications between experts and attorneys if they: (1) relate to the expert's compensation; (2) identify facts or data that the attorney provided and the expert considered; and (3) identify assumptions that the attorney provided and the expert relied upon. He said that the advisory committee had concluded that these three exceptions to the work-product protection of the rule were sufficient.

A lawyer-member added that it is difficult for him to ask an expert to assess the weaknesses of his case because the expert's responses will be discoverable by the other side. For that reason, lawyers often hire two experts – one to testify and one to assess candidly. Other practitioners said that the rule will reduce costs and delays in many ways. Several participants added that juries know well that experts are advocates for the parties, but they believe an expert only if the expert is convincing on the stand.

Another lawyer pointed out that good lawyers regularly enter into stipulations to protect communications with their experts. He explained that experts are often unfamiliar with a case when they are hired. Therefore, they need a lawyer to give them information and directions. In fact, it is not unusual for experts to prepare reports that are not at all helpful – simply because they do not understand the case. This often leads to a sideshow during the discovery process, and potentially at trial. He said that it is important for the rules to specify that these preliminary communications between attorneys and experts are protected in order to allow experts to be educated at the outset of a case without having to risk sideshows from adversaries.

A judge-member stated that it is important for the rules to provide advice and direction to trial judges in this difficult area of discovery law. But, she suggested, the committee note should be amended to eliminate the controversial language on protecting information at trial. Another judge added that removing the note language would also be

advisable because issues at trial are much broader and also involve the rules of relevance. In short, she recommended, the committee should make it clear that discovery is discovery and trial is trial.

A member strongly supported the rule but suggested that the committee be very careful about the scope of its authority. It has clear authority, he said, to decide what information may be discovered, but no authority to create an evidentiary privilege governing what may be introduced at trial. He asked whether the states that have a similar rule, such as New Jersey and Massachusetts, have actually created an evidentiary privilege. Judge Kravitz responded that the advisory committee was convinced that the proposal was a discovery rule only, and it does not create a privilege.

A participant recommended that the committee note be revised to eliminate all language regarding information at trial. He also rejected the charge that experts are merely hired guns, noting that an expert's reputation and credibility are very important. Good experts, he said, value their reputation and are more than just advocates. Of course, they would not be called unless their testimony is helpful to the party calling them.

Another participant concurred and suggested that the concerns of the law professors appear to be less with the Rules Enabling Act than with their vision of experts as independent, learned truth-seekers, rather than paid advocates. He suggested that their opposition is based on theory and not real experience. He said that the best way for lawyers to challenge experts is by good cross-examination.

A member pointed out that there is a genuine risk for lawyers that the work-product protection that governs discovery will not continue to protect them at trial. As a result, he suggested, the amendments may not actually work in practice. Judge Kravitz responded, though, that his understanding is that practitioners believe that if the work-product information is protected during discovery, the remaining risk of disclosure at trial will not be significant enough for them to incur the costs of hiring two sets of experts or to resort to all the other artificial practices that the proposed amendments are designed to avoid. Several members agreed.

Another member suggested a parallel situation between the proposed amendments to Rule 26 and the recent development of FED. R. EVID. 502 (waiver of attorney-client privilege and work-product protection). The evidence rule, too, was devised specifically to allay the fear of lawyers that protection given to documents during discovery in a given case will not carry over to future cases. With Rule 502, the bar argued forcefully that if the protection against waiver does not carry over to future proceedings in the state courts, the rule would be useless as a practical matter in achieving its goal of reducing discovery costs. With the Rule 26 amendments, however, the bar has not suggested that confining the work-product protection to the discovery phase of litigation will undermine the practical value of the rule.

Judge Kravitz suggested that these problems should not occur very often at trial, and it may simply be necessary to let the rule play out in practice. He added that the rule cannot provide 100% protection, but the bar has been telling the committee that the amendments offer a practical solution to difficult and costly problems. Professor Cooper pointed out that the New Jersey state rule deals only with discovery, and the bar in that state has informed the advisory committee that it has caused no problems at trial. The rule's most important effect, they said unequivocally, has been to change the behavior and the very culture of the lawyers in dealing with experts' drafts and communications.

FED. R. CIV. P. 56

Judge Kravitz reported that public reaction to the proposed revision of Rule 56 (summary judgment) had been mixed. The great majority of comments, even those from judges and lawyers criticizing particular aspects of the rule, acknowledge that the revised rule is clearly organized and effectively addresses a number of problems arising in current practice. The objections to the rule, he said, fall into three categories.

First, many – but not all – plaintiff's lawyers and law professors criticizing the proposed rule appear to oppose summary judgment in general and are concerned that the revised rule may lead to additional grants of summary judgment. But, he said, research conducted by the Federal Judicial Center demonstrates that the amendments will not produce that result. Opponents also object to the rule's point-counterpoint procedure, claiming that it focuses exclusively on individual facts and obscures inferences, thereby preventing plaintiffs from telling their full story. Judge Kravitz suggested, though, that he – as a judge – looks first to the parties' briefs for a gestalt view of a case and to discover the lawyers' theory of the case. Later, he said, he consults the point-counterpoint to hone in on and confirm specific facts in the record.

Second, many – but not all – members of the defense bar support the point-counterpoint approach. They strongly urge, though, that proposed Rule 56(a) be revised to specify that a judge "must" – rather than "should" – grant summary judgment if there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law. The great majority of comments from the defense bar support using "must." In addition, the defense bar would like to have the rule provide sanctions for frivolous opposition to summary judgment.

A member said that the proposed rule will send an important reminder to the courts that they need to grant summary judgment when it is appropriate. Many cases have no material facts in dispute and should not go to a jury. Nevertheless, some judges announce that they will not decide summary-judgment motions until the moment of trial. So the lawyers have to prepare for trial, and their clients bear unnecessary and

unreasonable additional costs. A revised Rule 56 is needed, he said, if only to prod judges into acting on summary-judgment motions.

Third, many judges and some federal practitioners say that the point-counterpoint approach is not an effective procedural device. They recommend that the rule permit local discretion, rather than impose a national procedure. More importantly, many judges informed the committee that they have actually used the point-counterpoint procedure and have found it unsatisfactory for a variety of reasons. First, they say, it is not user-friendly and increases the cost of litigation. Second, they believe that it distracts from the merits of a case and encourages disputes over the statement of facts and motions to strike. Third, they say that the point-counterpoint process results in evasion of the page limitations on the briefs. Fourth, it lets moving parties dictate the facts, and it ignores inferences. Fifth, districts that have adopted the point-counterpoint procedure tend to have generated more paperwork, and the motions take longer to resolve.

Judge Kravitz noted that one lawyer had told the committee that the summary judgment papers in point-counterpoint districts are simply too long and require a good deal of unnecessary work by lawyers in dealing with immaterial facts and responses. Judge Kravitz explained that the advisory committee had struggled to confine the point-counterpoint procedure to essential, material facts and had heard from members of the bar that a numerical limitation should be imposed on the number of facts that a party may include in its statement.

Judge Kravitz said that these are substantial criticisms, especially because they come from people who have used point-counterpoint and have abandoned it. In defense of the proposal, though, he said that the rule allows a judge to opt out of it on a case-by-case basis. Nevertheless, he said, some judges do not want to use the point-counterpoint process in any cases.

Judge Kravitz reported that the advisory committee had initiated the project to revise Rule 56 for two reasons. First, summary-judgment practice around the country varies enormously, even within the same district. The committee concluded that there was substantial value in encouraging more national uniformity in the federal court system for a procedure as vital as summary judgment. Second, he said, summary judgment practice in the federal courts has deviated greatly from the text of the rule, and it is appropriate to update the rule to reflect the actual practice.

Judge Kravitz stated that the advisory committee would like to have the Standing Committee's input on the importance of national uniformity in summary judgment practice. He reported that several members of the bench and bar have told the committee that summary judgment today lies at the very heart of federal civil practice and should be relatively uniform across the federal system. Others, though, have said that local courts should be able to shape the procedure the way they want, in coordination with their local

bars. Moreover, they say, it is relatively easy for lawyers to ascertain what the practice is in each court and adapt to it. Therefore, procedural uniformity may not be very important.

Judge Kravitz said that some commentators have urged that Rule 56 not specify a particular procedural method for pinpointing material, undisputed facts. Judges or courts should be free to adopt the point-counterpoint procedure, but only if they wish. On the other hand, if national uniformity is deemed an important, overriding value, the advisory committee must decide what the national default procedure should be. On that point, the advisory committee believes that the point-counterpoint procedure specified in the published rule is the best approach to take. The local rules of some 20 districts require both parties to prepare summary-judgment motions in a point-counterpoint format, while roughly another third only require the movant to list all undisputed facts in individual paragraphs. Thus, if the advisory committee were to choose another approach, there would still be opposition to the rule from courts that have a point-counterpoint system. Therefore, the threshold question is whether national uniformity is truly needed in Rule 56.

One member argued that uniformity is important, and the advisory committee should continue trying to draft a national rule. But, she said, allowing an opt-out from the national procedure by local rule of court would be a good idea and would make the rule much more acceptable to the courts. Even allowing a broad opt-out would still be a marked improvement over the current rule.

A lawyer-member said that national uniformity is indeed important, but the fact that there is such strong dissent from the proposal by many judges argues for including a broad opt-out provision. He suggested that it would be helpful to have a national procedure specified in the rule, but courts should be allowed to deviate from it broadly.

A judge-member agreed that uniformity is the key question to focus on. She said that the point-counterpoint system works well in her experience, but the committee needs to respect the view of judges and lawyers who claim that it increases costs and disputes. It is hard in the end to be optimistic about achieving national uniformity because each court has developed its own system over time and is comfortable with it.

Another member agreed that uniformity is the critical question, but argued that it simply may not be achievable. The comments and testimony have indicated that the proposed rule will not be as successful as expected. In reality, imposed uniformity is likely to be ephemeral because judges will add their own requirements to whatever any national rule specifies.

Professor Coquillette pointed out that Congress over the years has urged more national uniformity and has expressed concern over the proliferation of local court rules.

The committee's local rules project, he said, had been successful in getting the courts to eliminate local rules that are inconsistent with the national rules. Nevertheless, the project avoided treading in two areas where enormous differences persist among the courts – attorney conduct and summary judgment. Many local rules, he said, are clearly better than the current FED. R. CIV. P. 56, but the differences of opinion among the courts are so deep that it is extremely difficult to achieve national uniformity.

He noted that the 1993 amendments to FED. R. CIV. P. 26 allowed individual district courts to opt out of the national disclosure requirements by local rule. Many districts opted out, in whole or in part. There was no uniformity even within many districts. The only way to restore uniformity was to dilute the national rule, a change that itself required considerable effort. He suggested that it would be better to have the national rule not specify any particular procedures than to have one that sets forth national procedures but authorizes wholesale opt-outs. Allowing a broad opt-out by local rule, he said, will not promote uniformity.

Judge Kravitz explained that the problem with summary judgment variations among the courts is not only that courts have a fondness for their own local rules and resist change, but it is also that many judges genuinely believe that the proposed national rule will add costs without making meaningful improvements.

Two members recommended that the committee proceed with the point-counterpoint proposal, but another suggested that the rule require that only the moving party state the material, undisputed facts in numbered paragraphs without burdening the opponent with having to respond to each fact in numbered paragraphs. Another member expressed support for the point-counterpoint process, but suggested that the committee impose a limit on the number of facts that may be stated and consider a different system for certain categories of cases.

A participant pointed out that his district had used the point-counterpoint system for more than a decade, but had abandoned it because it was not helpful to judges in resolving summary-judgment motions. They discovered that in reality there are not many disputed facts after discovery. Rather, cases turn largely on inferences drawn from the facts, rather than the facts themselves.

A member related that the point-counterpoint procedure is currently used in his district, and all the judges follow it. But a visiting judge from a district without the procedure has criticized it strongly, and the district court is taking a fresh look at the matter.

Several participants said that they liked the point-counterpoint process because it adds structure to the rule and forces attorneys to focus on the facts, but they recognized that it may add costs. They emphasized that the briefs or memoranda of law, which argue

the inferences drawn from the facts, are more important than the statements of facts themselves. One lawyer-member said that he had practiced in both courts that have the process and those that do not have it, and he has no problem in adapting to the requirements of each court or allowing courts considerable latitude to structure their own process.

Judge Scirica pointed out that the proposed changes in Rule 56 will have to be approved by the Judicial Conference. It is a virtual certainty, he said, that they will be placed on the discussion calendar for a full debate.

Two other members suggested that the key problems are not so much with the mechanics of the procedure, but the fact that some district judges are simply not deciding summary-judgment motions. Judge Kravitz noted that the advisory committee had learned from the Federal Judicial Center's research that summary judgment motions remain undecided until trial in many districts. But that problem will not likely be cured by any rule.

Professor Cooper pointed out that the Federal Judicial Center's research had shown that there is more likelihood that summary-judgment motions will be decided in the point-counterpoint districts. The figures show that more motions are granted in these districts, but largely because a higher percentage of motions are actually ruled on. There simply are more rulings in the point-counterpoint districts. On the other hand, the courts' time to disposition is longer in these districts, in part because it may take more judicial time to resolve summary judgment motions presented in this detailed format. The numbers may not be not reliable, though, because there may be other reasons for delays in some districts, such as heavy caseloads.

Judge Kravitz mentioned that some sentiment had been expressed that the point-counterpoint system may favor defendants and the well-heeled. The advisory committee, he said, had tried to address that perception by allowing an opponent of a summary-judgment motion to concede a particular fact for purposes of the motion only. This provision would save the opponent the expense of having to respond in detail to each and every fact asserted to be undisputed.

Judge Kravitz emphasized that a fundamental principle for the advisory committee has been to produce a rule that does not favor either side. The committee, he said, had succeeded in that objective, despite certain criticisms from both sides He suggested that the opposition from some plaintiffs' lawyers is really a proxy for their opposition to summary judgment per se. He pointed out that other plaintiffs' lawyers support the proposal, though they favor a cap on the number of facts that may be stated.

A member added that the perception that the point-counterpoint process is favored by defendants and opposed by plaintiffs makes no sense. He suggested that defense

counsel normally want to have as few disputed facts as possible when seeking summary judgment. Plaintiffs, on the other hand, want to raise as many facts as they can.

One participant pointed out that summary judgment is the key event in many federal civil cases, either because it disposes of a case or, if denied, leads to settlement. He emphasized that summary judgment must be seen as interconnected with several other procedural devices specified in the Federal Rules of Civil Procedure – such as Rule 8 (pleading), Rule 12 (defenses), Rule 16 (pretrial management), and Rules 26-37 (disclosures and discovery). The numbering and organization of the rules imply that these are separate stages of litigation, rather than essential components of an interconnected process. He suggested that the committee consider bringing those rules physically closer together, instead of having them spread out as they are now. He also suggested that the committee consider looking at all the rules as a whole and examining how all the parts work together.

He added that faux uniformity may not be a bad idea. There are clear differences among regions, judges, and types of cases. There are also great differences among the bar, both as to the culture of the bar and the quality of individual lawyers. There are differences, too, in the abilities and preferences of individual judges. And it must be recognized that judges have to work hard to grant a motion for summary judgment.

Judge Kravitz reported that the advisory committee had decided to conduct a two-day conference in 2010 at a law school to conduct a holistic review of all these interrelated provisions and how well they work in practice.

FED. R. CIV. P 45

Judge Kravitz reported that the advisory committee was considering potential revisions to FED. R. CIV. P. 45 (subpoenas). The rule, he said, is long, complicated, and troubling to practitioners. Practical issues have been raised, for example, regarding: whether Rule 45 issues should be decided by the court where the action is pending or the court where a deposition is to be taken or production made; the use of the rule to conduct discovery outside the normal discovery process; the adequacy of the modes of service; use of the rule to force corporate officers to come to trial; and the continuing relevance of the territorial limits of subpoenas, such as the 100-mile radius that dates from 1789. He noted that Judge David G. Campbell's subcommittee will take the lead on this issue, and Professor Richard L. Marcus will serve as the principal Reporter.

Professor Cooper added that the Federal Rules of Appellate Procedure intersect with the Federal Rules of Civil Procedure in several ways, and the advisory committee is working on joint projects with the appellate advisory committee. He noted, for example, the suggestion that FED. R. APP. P. 7 (bond for costs on a civil appeal) include statutory attorney fees as costs on appeal The civil advisory committee, he said, has been

considering changes to FED. R. CIV. P. 23 (class actions) for several years, and the problem of objectors to class settlements is a long-standing and difficult one. The civil advisory committee would be interested, for example, in whether it is appropriate to require a cost bond for objectors who appeal from approval of a class-action settlement, especially in fee-shifting cases. He added that some appeals by objectors are on solid grounds, but some clearly are not.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman presented the report of the advisory committee, as set forth in his memorandum and attachments of December 15, 2008 (Agenda Item 8).

Informational Items

FED. R. CRIM. P. 32

Judge Tallman reported that the advisory committee is considering a possible revision to FED. R. CRIM. P. 32(h) (notice of possible departure from sentencing guidelines). Under the current rule, a sentencing court must notify the parties if it intends to depart from the sentencing guidelines range on a ground not identified in the pre-sentence report or the parties' submissions. There has been litigation, he said, over whether the rule also applies to variances from the guidelines under *United States v Booker*, 543 U.S. 220 (2005). Recently, the Supreme Court held in *Irizarry v. United States*, 553 U.S. ___ (2008), that the rule does not apply to variances. So the committee may wish to amend the rule to cover both. Alternatively, though, it may also consider eliminating Rule 32(h) altogether.

Judge Tallman reported that the American Bar Association had approved a resolution to mandate disclosure to the parties of all information used by probation officers in preparing their pre-sentence reports. The proposal is designed to increase transparency, and both the defense and the government argue for greater openness in the sentencing process.

The advisory committee, he said, had discussed the proposal and was concerned that it could compromise sources who give confidential information to probation officers, including victims and cooperating witnesses. It would also impose additional burdens on probation offices and make the process of preparing reports more adversarial than it is now. He explained that the committee was relying heavily on the Federal Judicial Center and the Administrative Office to canvass those district courts currently following a regime similar to the ABA model to ascertain what their practical experience has been. In particular, the staff will explore with the courts whether there is merit to the concerns that

sources will be compromised if all communications to probation officers must be disclosed.

Professor Beale added that there is a relationship between FED. R. CRIM. P. 32(h) and the ABA proposal to require disclosure of all materials presented to the probation officer. If more information were disclosed to the parties earlier, more would be on the record at the time of sentencing, and notice of planned departures or variances would not be needed. A member suggested that many judges are concerned that the ABA proposal will add another layer of litigation. Another pointed out that defendants in her district have asked for access to information given to probation officers regarding earlier cases in a defendant's criminal history. That information, though, may reveal information about victims, cooperating witnesses, and other sensitive matters.

FED. R. CRIM. P. 12(b)

Judge Tallman reported that the Supreme Court held in *United States v. Cotton,* 535 U.S. 625 (2002), that omission of an essential element in the indictment does not deprive the court of jurisdiction. Under the current rule, a motion alleging a failure to state an offense can be made at any time. In light of *Cotton,* the advisory committee is exploring an amendment to FED. R. CRIM. P. 12(b) (motions that must be made before trial) to require that a challenge for failure to state an offense, like other defects in an indictment or information, be made before trial. Under FED. R. CRIM. P. 12(e), a party waives the defense or objection if not made on time, but the court may grant relief from the waiver for "good cause shown."

He explained that the proposal raises a number of difficult issues, particularly relating to the breadth of the "good cause" that the defendant must show to obtain relief. Some courts, for example, interpret the rule to require both "good cause" and "prejudice." The requirement to show "good cause" may result in a defendant forfeiting substantial rights merely because of an error of counsel in failing to raise the defect earlier. In addition, the committee is concerned about the relationship between the proposed amendment and cases holding that the Fifth Amendment precludes a court from constructively amending an indictment. He said that the advisory committee had voted 7 to 5 to continue working on the proposed amendment and will consider the issue again at its April 2009 meeting.

TECHNOLOGY

Judge Tallman reported that the advisory committee had formed a technology subcommittee, chaired by Judge Anthony J. Battaglia, to conduct a comprehensive review of all the criminal rules to assess whether amendments are desirable to sanction the use of new technologies. He pointed out that several rules already permit the use of technology, such as the use of video teleconferencing to conduct certain proceedings. But more

amendments may be needed to let judges, lawyers, and law enforcement agents take full advantage of technology in performing their jobs The subcommittee, he said, was expected to complete its report in time for the advisory committee's April 2009 meeting.

AUTHORITY OF PROBATION OFFICERS TO SEEK AND EXECUTE SEARCH WARRANTS

Judge Tallman reported that the advisory committee was considering a preliminary proposal referred by the Criminal Law Committee that would authorize probation officers (and pretrial services officers) to seek and execute search warrants. The proposal, he said, was controversial and would represent a major change of policy for the federal courts. Among other things, it raises questions of separation of powers because probation officers are part of the judiciary. In effect, judiciary employees could be asking a court for a search warrant to obtain evidence that might lead to criminal charges, a decision entrusted to the executive branch. Professor Beale added that the Department of Justice had expressed concern about the proposal because of the possibility of probation officers, who are not law enforcement officers, interfering with investigations and other prosecution efforts.

Judge Tallman pointed out that committee members had expressed concern that seeking and executing search warrants could interfere with the relationship between probation officers and their clients and impede the effectiveness of the officers. They were also concerned about the training and safety of probation officers if they will be placed in dangerous situations that may arise when conducting a search.

Judge Tallman reported that he had sent a letter to Judge Julie E. Carnes, chair of the Criminal Law Committee, advising her of the advisory committee's initial concerns and inviting her to participate in the April 2009 meeting. In response, he said, she advised that members of the Criminal Law Committee share some of the same concerns.

VICTIMS' RIGHTS

Judge Tallman reported that the advisory committee was continuing to monitor a number of issues arising under the Crime Victims' Rights Act. He noted that the General Accountability Office had just published a comprehensive report on implementation of the Act, which gave the judiciary a clean bill of health for its efforts. The report also noted that the Act's 72-hour limit on the time for a court of appeals to act on mandamus review appeared to be too short. Professor Beale added that the advisory committee did not pursue amending that particular statutory deadline as part of the judiciary's time-computation legislation because it raised significant policy issues, which were not appropriate for the package of proposed technical changes to accommodate the new time computation rule.

Judge Tallman reported that the advisory committee has been receiving written reports of the regular meetings that the Department of Justice holds with victims' rights

organizations. In addition, he said, the advisory committee anticipates that additional legislative proposals on victims' rights might be introduced in the new Congress.

FED. R. CRIM. P. 12.4

Finally, Judge Tallman reported that the advisory committee had received a request from the Codes of Conduct Committee to consider an amendment to FED. R. CRIM. P. 12.4 (disclosure statement) to require additional disclosures that could help courts screen for potential conflicts of interest. The proposal would assist courts in ascertaining whether an organization, including its subsidiary units or affiliates, that was a victim of a crime is one in which a judge holds an interest.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Hinkle presented the report of the advisory committee, as set forth in his memorandum and attachments of December 1, 2008 (Agenda Item 7).

Amendments for Publication

RESTYLED FED. R. EVID. 501-706

Judge Hinkle reported that the advisory committee had now completed restyling two-thirds of the Federal Rules of Evidence. The final third of the rules, he said, will be more difficult to restyle because it includes the hearsay rules. He pointed out that, for the first time, the committee's reporter, Professor Daniel J. Capra, could not attend a Standing Committee meeting due to a conflict with essential teaching duties. He also regretted that Professor R. Joseph Kimble, the committee's style consultant, could not attend the meeting because of winter snows and transportation difficulties. He said that both will participate in the June 2009 meeting.

Judge Hinkle pointed out that Judge Hartz had discovered a glitch in the restyled draft of FED. R. EVID. 501 (privilege). It could be read to suggest that if testimony relates to both a federal and state claim, only state law will apply. Case law, however, suggests that federal law applies.

The advisory committee, he said, intends no change in the law. Accordingly, it recommends substituting the following language for the last sentence of FED. R. EVID. 501: "But in a civil case, with respect to a claim or defense for which state law supplies the rule of decision, state law governs the claim of privilege." A corresponding change will also be made in FED. R. EVID. 601 (competency to testify).

A member praised the work of the advisory committee, but expressed concern over some of the style conventions, including the use of bullets rather than numbers in some lists, the use of dashes rather than commas, and beginning sentences with "but," "and," or "or." A member pointed out, however, that these conventions are fully consistent with widely accepted contemporary style. Judge Hinkle promised to bring these concerns back to the advisory committee for consideration at its next meeting.

The committee by a vote of 10 to 2 approved the restyled FED. R. EVID. 501-706 for publication, including the substitute language for FED. R. EVID. 501 and 601. The dissenting members explained that their negative votes were motivated solely by what they regard as some inelegant and inappropriate English usage in the restyled rules. Judge Rosenthal added that the committee's action will be subject to an additional, final review of the entire body of restyled evidence rules at the June 2009 committee meeting.

Informational Items

Judge Hinkle reported that only one public comment had been received in response to the proposed amendment to FED. R. EVID. 804(b)(3) (hearsay exception for a statement against interest), and the scheduled public hearing had been cancelled because there had been no requests to testify.

He added that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's holding in *Crawford v. Washington,* 541 U.S. 36 (2004), that admission of "testimonial" hearsay violates an accused's right to confrontation unless given an opportunity to cross-examine the declarant. He said that case law developments to date suggest that amendments to the hearsay exceptions in the rules may not be necessary.

GUIDELINES ON STANDING ORDERS

Judge Rosenthal reported that Professor Capra had prepared an excellent report on the use of standing orders and general orders in the district courts and bankruptcy courts. In addition, a survey of the courts had been conducted asking judges for their advice in identifying matters that belong in local rules versus those that may be addressed appropriately in standing orders. The survey results, she said, had shown that the courts do not want federal rules to regulate standing order practices, but they do favor the committee distributing guidelines to help them decide what matters should be included in their local rules and standing orders.

To that end, she said, Professor Capra had prepared draft Guidelines For Distinguishing Between Matters Appropriate For Standing Orders and Matters Appropriate for Local Rules and For Posting Standing Orders on a Court's Website.

Judge Rosenthal emphasized that the proposed guidelines were not an attempt by the Standing Committee or the Judicial Conference to dictate particular binding rules that the courts must follow

Several members endorsed the guidelines and said that they were very well-written and helpful. But one expressed reservations about the specific language of Guideline 4 on the grounds that it appears to give too much encouragement to individual judges to deviate from court-wide standing orders. He suggested that it may also be internally inconsistent with Guideline 8, specifying that individual-judge orders may not contravene a court's local rules.

Another member suggested, though, that Guideline 4 had an inappropriately negative tone because it appeared to fault district judges for having orders different from their own district court rules and standing orders. She said that it is perfectly appropriate to accommodate some individual-judge preferences, such as those dealing with courtesy copies of papers and courtroom etiquette. In fact, the committee may not have authority to address the orders of individual judges. She recommended that the guidelines focus on court-wide orders and say nothing about the orders of individual judges.

Judge Rosenthal agreed that the guidelines will be more successful if they are not openly negative as to the preferences of individual judges. But some members cautioned that individual-judge orders can be a serious problem. Some are very beneficial, they said, but others are not. Some, in fact, are contrary to the national rules and may contain matters that should be addressed in local rules, rather than orders. Moreover, the orders of individual judges are not readily accessible, may not be posted on a court's website, and can create a trap for litigants. The point of the proposed guidelines, she said, was not to make judges change their procedures, but to make them aware of the effects of their actions.

Professor Coquillette pointed out that the current standing orders project should be viewed in the context of the local rules project and the 1995 amendments to FED. R. CIV. P. 83. As revised, the rule specifies that no sanction or other disadvantage may be imposed on a party for noncompliance with a procedural requirement unless the requirement has been set forth in a national or local rule or the party has received actual notice of it in the particular case.

Judge Rosenthal explained that there are two kinds of standing orders – court-wide standing orders and the standing orders of individual judges. The committee, she said, can address court-wide standing orders, but an individual judge's ability to include the judge's own preferences, particularly on such matters as courtroom practices, is a much more delicate matter. She said that she agreed with Professor Capra's view that it would be a more successful approach if the committee were to focus on court-wide standing orders.

Judge Rosenthal added that if an order affects lawyers and litigants on a district-wide basis, it should be set forth in a local rule of court. But it is appropriate to let individual judges continue to include variations and innovations in their own standing orders. In addition, she said, judges normally send specific orders and detailed written instructions to the parties at the outset of each case. The parties, thus, receive actual notice of what the judge expects from them. The committee, she said, should not attempt to police the orders of individual judges. Its goal should be simply to provide helpful advice to the courts and urge them to make all orders readily accessible and easily searchable.

Members suggested some specific edits for the guidelines. Judge Rosenthal said that the document would be amended to take account of these concerns and re-circulated to the members after the meeting.

Judge Swain asked whether the committee would like comments from the Advisory Committee on Bankruptcy Rules. Judge Rosenthal responded that comments would be very welcome, and the advisory committee should explore whether any changes in the guidelines would be appropriate for the bankruptcy courts. At this point, though, the focus should be on sending the guidelines to the district courts.

SEALED CASES

Judge Hartz, chair of the Ad Hoc Subcommittee on Sealed Cases, reported that the Federal Judicial Center has been examining all cases filed in the federal courts since 2006 to ascertain for the subcommittee what types of cases are sealed. The Center's initial review has now been largely completed. The results show that many of the sealed cases on the civil docket are filed under the False Claims Act. By statute, they must be sealed until the government decides whether or not to proceed. It often takes a long time for the government to make its decision. Moreover, some of these cases are later dismissed, but not unsealed.

The largest number of sealed cases are on the districts' magistrate-judge dockets, and many of them involve the issuance of warrants. It appears that many were never formally unsealed after the warrants were executed, an indictment filed, and a district-court criminal case opened. Only one bankruptcy case has been identified among the sealed cases. The subcommittee learned later that the courts' CM/ECF case management system now provides an electronic reminder to unseal a filing after a certain period of time has elapsed.

Judge Hartz said that the initial research by the Center for the subcommittee seems to reveal that there are few, if any, systemic problems with sealed cases in the courts. He noted that the procedure in his circuit has been for the court of appeals to carry over the status of a case from the district court. Thus, if a case has been sealed by a district court, it

will remain sealed in the court of appeals, and sometimes the circuit judges are unaware of the sealing. Another judge reported that the court of appeals in her circuit effectively orders that all cases be unsealed at filing but asks the parties to petition the court if they wish to have the cases remain sealed.

PANEL DISCUSSION ON PROBLEMS IN CIVIL LITIGATION

Mr. Joseph chaired the panel discussion and announced that it would focus on the ideas set forth in the draft report on the civil justice system prepared by the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System. He pointed out that the report is not yet final, but would likely be endorsed by the College. It sets forth a series of broad principles and recommendations to improve civil litigation in the federal and state courts, addressing such areas as pleading, discovery, experts, dispositive motions, and judicial management.

Professor Cooper opened the discussion by referring to recent reform efforts by the Advisory Committee on Civil Rules. He noted that the committee had been looking at pleading for years. It has explored fact pleading or substance-specific pleading rules, but it has not been prepared to pursue that path. Recently, the committee has considered reinvigorating motions for a more definite statement under FED. R. CIV. P. 12(e) to support the disposition of motions to dismiss, for judgment on the pleadings, and to strike under FED. R. CIV. P. 12(b), (c), and (f). More ambitiously, a more definite statement might promote more effective pretrial management. The concept was endorsed by the lawyer members of the advisory committee, but all the judges cautioned that it would result in the lawyers filing motions for a more definite statement in every case.

The advisory committee has also made some progress in drafting a set of simplified procedures that include fact pleading and much reduced discovery, but that project has been placed on indefinite hold. The committee's next effort will be to solicit ideas for improving the civil process at a major conference next year with members of the bench and bar.

Professor Cooper said that hope springs eternal for rulemakers in their efforts to make procedural rules "just, speedy, and inexpensive," in the words of FED. R. CIV. P. 1. He noted, for example, a new rule in New South Wales specifies that resolution of cases should be "just, quick, and cheap," parallel to FED. R. CIV. P. 1. The 1848 Field Code had a standard that a complaint should be a statement of the facts constituting a cause of action in ordinary and concise language, without repetition, in such a manner as to enable a person of common understanding to know what is intended. In 1916, Senator Root proclaimed that procedure ought to be based on common intelligence of the farmer, the merchant, and the laborer. There is no reason why a plain, honest man should not be permitted to go into court to tell his story and have the judge be permitted to do justice in that particular case. In 1922, Chief Justice Taft addressed the American Bar Association

and argued that the plan should be to make procedure so simple that it requires no special knowledge to master it. Indeed, a plaintiff should be able to write a letter to the court to make his case.

Professor Cooper pointed out that good rules often do not work in practice, even though they may be sound in principle and expertly crafted. The 1970 amendments to the Federal Rules of Civil Procedure, for example, were good rules, but they do not function as anticipated. There may be a variety of reasons to explain the phenomenon. It may be because the rules are trans-substantive or govern the litigation of topics that are just not well suited to resolution through our adversary dispute system. They may be focused too much on ordinary, traditional litigation. Or perhaps the system is no longer effective for the general run of claims.

The problem, in part, may lie with the lawyers. We may have developed a world of litigators and associates who understand discovery well, but few actual trial lawyers. The fault may be attributable in part to adversary zeal run amok, the structure of law firms, and the realities of hourly billings and law practice as a business. Judicial overload and the lack of judicial resources, too, may be part of the problem. Sound pretrial management is needed, and some pretrial and discovery problems need to be addressed quickly. But the judges may not be available or willing to oversee cases or resolve problems in a timely manner.

Professor Cooper suggested that inertia is a major obstacle to reform, as lawyers generally do not like change. He noted, by way of example, that a bar committee had objected recently to the proposed revision of FED. R. CIV. P. 56 (summary judgment) because the current Rule 56 has a long history of interpretation, and it would be impossible to predict the unintended consequences if the rule were changed. The fear of doing something different, he said, is prevalent.

In addition, the rules committees have been told to make no changes in the rules without first having sound empirical support behind them. As a result, the committees turn regularly to the Federal Judicial Center to provide them with excellent research support. The Center's resources, though, are limited. Its research can identify associations in the data between specific procedures and specific outcomes, but it cannot often prove actual causation. Therefore, it is difficult to predict with certainty the impact that proposed amendments will have.

Finally, Professor Cooper noted that a critical issue for reform of the civil justice system is which body should initiate it. The rules committee process, he said, unlike the legislative process, provides balance and careful discussion and deliberation. But sometimes there is political resistance to certain rules changes based on partisan or financial interests. Note, for example, the opposition to proposed changes in FED. R. CIV. P. 11 (sanctions) and FED. R. CIV. P. 68 (offer of judgment) in the past, and to certain

aspects of proposed FED. R. CIV. P. 56 (summary judgment) now. Getting even modest changes through the system can be difficult if certain segments of the bar and their clients oppose them strongly. As a result, the advisory committee treads carefully and strives for consensus, when feasible.

Discovery, for example, has been on its agenda for over 30 years, and there appears to be no end in sight. Notice pleading, for example, has been brought back to the table by the Supreme Court's decision in *Bell Atlantic v. Twombly,* 550 U.S. 554 (2007). The package of notice pleading, discovery, and summary judgment, though, lies at the very heart of the revolutionary 1938 Federal Rules of Civil Procedure. They represent the very soul of the current civil justice system. Therefore, making significant changes in these basic components of the rules – as the proposals of the College and Institute appear to recommend – may have consequences that are profoundly political. As a result, it is natural to ask whether a change of this sort should be made through the Rules Enabling Act process.

Judge Kourlis suggested that the ideas and recommendations embodied in the report are not new. They respond to a pervasive belief that the civil justice system is just too costly and laden with procedures. In many ways, she said, the report's recommendations mirror the proposed Transnational Principles and Rules of Civil Procedure drafted, in part, by the American Law Institute, the new civil rules of the Arizona state courts, and the simplified rules developed a few years ago by the advisory committee.

For some time, she said, there has been a variety of opinions about whether the rules should be substantially revised, merely tweaked, or left untouched. But a great many observers, including legislators, have come to the conclusion that substantial changes in the civil justice system are needed.

She pointed out that the Federal Rules of Civil Procedure cast a long shadow over the civil justice system and set the standard for litigation throughout the nation. The federal rules committees occupy a unique leadership position. Among the states, 23 follow the federal rules closely, and 10 more apply them relatively closely. Eleven states rely on factual pleading, and 4 have hybrid systems.

Judge Kourlis said that lawyers and judges tend to cleave to consensus. But the search to achieve consensus can impede the sort of innovation that is needed. Therefore, the report declares that it is time to answer the growing voice for change. To that end, it is time for the federal system to lead the way. The federal rules committees can take advantage of the expertise of the Federal Judicial Center and the Administrative Office, and they enjoy a great electronic case management and data collection system that can provide the sorts of empirical data that the reform effort requires. State courts, unfortunately, just do not have those resources.

Judge Kourlis emphasized that the report does not advocate wholesale revision of the rules. Rather, it recommends carefully designed pilot projects that can provide critical empirical information on how to reduce costs, increase customer satisfaction, and perhaps increase the number of trials. She said that innovative pilot programs are easier to establish in the state courts than in the federal courts, but the states are not good at collecting data from them.

She recognized that federal law does not readily accommodate pilot programs. Nevertheless, the committee might wish to reexamine FED. R. CIV. P. 83 (local rules) or seek legislation to establish appropriate pilot projects. Clearly, she said, the language and intent of the Rules Enabling Act would support the suggested reform efforts.

She recommended, though, that the courts proceed carefully. The civil justice system is tarnished in the eyes of the public, lawyers, and litigants alike. Some of the criticisms may be unjustified, but some are clearly justified. The plea to rulemakers is that they remember whom they are serving and that their charge is to provide a civil justice system that is as good as they can make it.

Mr. Saunders reported that the drafters of the American College-Institute report had not been constrained by the Rules Enabling Act or by precedent. The group, he said, was composed of trial lawyers and two judges, but no scholars. They were liberated to write on a blank slate. They started by considering the existing civil discovery system and examined a number of proposals for reform made since the federal rules were adopted. But the group was not looking just at the federal system. Its proposals are meant to apply across the board to all systems, federal and state.

Mr. Saunders reported that the participants had read many articles and examined a great deal of data. After doing so, they reached the conclusion that much of the available data are simply counter-intuitive. The 1990 Rand study, for example, showed that there are few problems with civil discovery. But that conclusion clearly did not seem correct to the members of the group. So they asked for more data and administered a survey to all 3,000 fellows of the College and received a good response. One of the first conclusions they drew from the responses was that discovery cannot be considered in a vacuum. Several other parts of the civil rules, such as pleading, intersect with it.

The survey encompassed 13 different areas of civil litigation. In 12, there was widespread agreement among all segments of the bar. Only one area – summary judgment – produced any differences between the responses from lawyers representing plaintiffs and those representing defendants. For that reason, the group refrained from making recommendations regarding summary judgment.

The goal of the group, he said, was only to identify principles – not to write actual rules. It attempted to reach agreement on a set of basic principles that could be applied

across the board to civil litigation. The principles set forth in the report were then adopted unanimously by all 20 members of the task force.

The first principle, he said, is that there should be different sets of rules for different kinds of cases. In essence, "one size does not fit all" in civil litigation. Judge Kourlis added that both the task force and the Institute agree that one set of rules cannot handle all kinds of civil cases effectively. Instead, there should be either be separate rules for different kinds of cases or separate protocols within the same set of rules for different kinds of cases.

Mr. Joseph pointed out that the federal rules already sanction deviations from the trans-substantive provisions of the rules. For example, FED. R. CIV. P. 26 exempts certain categories of civil cases from its mandatory disclosure requirements. FED. R. CIV. P. 9 (pleading special matters) imposes separate requirements of particularity for pleading fraud or mistake, and there is a separate set of supplemental rules for admiralty cases. In addition, certain kinds of civil cases, such as social security appeals, are handled very differently by the courts from other cases, even though they are governed by the same civil rules. The report recognizes these differences and recommends that rulemakers create different sets of rules for certain types of cases.

Mr. Richards agreed that it would be constructive to consider adopting specific procedures for different types of cases. He noted that he had argued *Twombly,* and he emphasized that antitrust cases are truly different from other kinds of cases. Nevertheless, the lawyers in that case cited securities cases and other types of cases to the Supreme Court as precedent, assuming – incorrectly – that the concerns and principles discussed in those cases must be applicable in antitrust cases.

Judge Kravitz pointed out that patent lawyers come to him in every case and suggest how they want to handle the case. He works together with them to craft specific procedures for each case. But they are the only category of lawyers to do so. He pointed out that mechanisms currently exist in the Federal Rules of Civil Procedure to have a court fashion special rules, at least on an individual-case basis.

Mr. Saunders reported that the study group agreed that if discovery is to be tailored in different kinds of cases, the specialty bars – such as the patent, admiralty, and employment discrimination bars – should be called upon to fashion the special discovery rules for those types of cases. In a patent case, for example, discovery should focus on the history of the patent and the patent holder's notebooks. Other specialty bars could do the same for their cases. Mr. Garrison added that this concept would include standard document requests and standard interrogatories for the special categories of cases. He said, though, that it is very difficult to get judges to do this under the current rules.

Mr. Joseph pointed out that a defense lawyer's focus is normally on two matters – dismissal and summary judgment. There is a fear of juries that causes many cases to settle if summary judgment is denied. Consideration might be given, he said, to conducting a small mini-trial in appropriate cases to see whether it is worth going forward with the case

A member suggested that the central concern being expressed by the panel appeared to be that judges are not taking sufficient charge of their cases, and lawyers are not working together with the court to fashion the direction of each case. Mr. Joseph responded that law firms are conservative by nature. No lawyer wants to try an alternative procedure and be second-guessed after the fact. Lawyers need to be assured that certain procedural alternatives are fully authorized and encouraged. Accordingly, it would be much easier for lawyers to get together and agree if there were specific alternatives set forth in the rules, or recognized protocols that they can rely on. Mr. Saunders added that the task force was unanimous in its conclusion that judges need to be more involved at the outset of each case – much earlier and much more directly than most judges are today.

A member suggested that model procedures could be devised by each specialty bar. Lawyers could then tell the court that they wish to follow the appropriate model in their case. Mr. Joseph agreed that the model procedures could well be developed by the bar itself, rather than through the rules. Mr. Richards added that the key point is that the specialized procedures need to be enshrined somewhere, either in the rules or in authorized models that can be considered by the lawyers and the judges. In either case, it would provide legitimacy for procedural options that should be considered in specific areas of the law.

Mr. Joseph concurred with a member that the task force was in effect asking the rules committees to formalize rules that would sanction different tracks for different kinds of cases. Judge Kourlis pointed out that recent reforms in the United Kingdom have led to protocols that govern disclosure requirements. Each segment of the bar was asked to develop a set of protocols, and if there are no protocols in a given area, the lawyers must follow the standard protocols.

Mr. Richards addressed the second principle in the draft report, which calls for fact-based pleading. He pointed out that there is now some sort of fact pleading in the federal courts as a result of *Bell Atlantic v. Twombly,* holding that a complaint must provide "enough facts to state a claim to relief that is plausible on its face." He said that discovery clearly imposes excessive costs in certain cases, and some cases settle because of the high costs of discovery. The Federal Rules of Civil Procedure, he said, do not deal adequately with the problems of discovery.

But, he said, there is no showing that a systemic problem of that sort exists in antitrust cases. Nevertheless, the Supreme Court in *Twombly* threw out the traditional foundations of the civil rules system in an antitrust case on the theory that the cost of

discovery forces settlement. He said that the underlying debate in *Twombly* was indeed over the costs of discovery, but the Court had no data to support its view. He suggested that a whole myth has been developed by industry and the defense bar that defendants are forced to settle cases that have no merits just because it costs too much to defend them. Antitrust cases, he said, are inherently expensive, but there is no indication at all that frivolous antitrust cases are settled because of attorney fees.

Mr. Saunders reported that some Canadian provinces have developed a procedure in which the bar may ask a court for an "application" and obtain relief very quickly based on affidavits and without full discovery. Accordingly, he said, rather than apply the full panoply of the federal or state procedural rules to each case, exceptions to the federal rules could be carved out for certain types of cases to provide relief quickly.

Mr. Saunders reported that 80% of the respondents in the American College survey agreed that the civil justice system is too expensive, 68% said that civil cases take too long to decide, and 67% said that costs inhibit parties from filing cases. He added that the report states that pleadings should "set forth with particularity all of the material facts that are known to the pleading party to establish the pleading party's claims or affirmative defenses." Discovery would be limited to what is pleaded.

Mr. Garrison replied, however, that employment lawyers would take issue with the College's recommendations. Mr. Richards added that in both antitrust and employment discrimination cases, the plaintiff simply does not know all the facts at the time of filing.

Mr. Saunders explained that the task force had spent a great deal of time discussing discovery, including electronic discovery, and it has two fundamental suggestions to offer to the rules committee. First, the federal rules should retain and slightly modify the existing initial disclosures by eliminating the option for a party merely to identify categories of documents. Rather, a party should be required to turn over all the actual documents reasonably available that support its case.

Second, he said, after the initial disclosures, only limited discovery should be allowed. The existing system of wide-open, unlimited discovery should be ended. Instead, the rules should provide an initial set of discovery limited to producing documents or information that enables a party to prove or disprove a claim or defense. After that, a party should not be entitled to additional discovery unless the parties agree to it or the court approves it on a showing of good cause and proportionality.

This fundamental recommendation of the report, he said, represents a major change from current civil practice. In essence, the task force wants to fundamentally change the current mind set of litigants, under which they seek as much discovery as possible and keep asking for documents and depositions until somebody stops them. The task force, he said, had concluded that the current default in favor of unlimited discovery increases

discovery costs and delays without producing corresponding benefits. Instead, parties should be entitled as a matter of right only to specified, limited disclosures. Additional discovery should be permitted only if there is an agreement among the parties or a court order authorizing it.

One way to achieve this result, he said, would be for the specialty bars, such as the patent and employment discrimination bars, to specify the kinds of discovery and documents that they need and typically receive in a typical case. In addition, the task force identified – without comment and for further consideration – several other ways in which discovery might be limited, such as by changing the definition of "relevance," limiting the persons from whom discovery may be sought, and imposing discovery budgets approved by clients and the court.

Mr. Saunders added that he knew of no case in which a district judge has been reversed for allowing too much discovery. But judges may be reversed for allowing too little. Therefore, the safest course for a judge under the current regime is to allow discovery. That reality has created the mind set of entitlement that has led to the excessive costs and delays caused by discovery.

He reported that the College survey shows that electronic discovery is an extremely costly morass, and some fellows responded that it is killing the civil justice system. He said that it is essential for lawyers and litigants to work together with the court early in a case to decide how much discovery is truly needed and what the appropriate costs of it should be. To that end, perhaps the most important recommendation in the report, he said, is to change the default on discovery.

A member reported that the rules that limit discovery in the Arizona state courts have worked very well. The required disclosures in Arizona are much more elaborate than those in the federal system. But additional discovery is much more limited. Third-party depositions, for example, are not allowed without court approval. Moreover, the state court system has an evaluation committee, and there are empirical data demonstrating the effectiveness of the Arizona regime. In general, cases move through the Arizona state court system quickly and at less cost. The state has also established a complex-case division that has its own discovery rules under which all discovery is stayed until the judge holds an initial conference and determines how much discovery to allow.

Mr. Saunders said that the data from the survey of College fellows show that the costs of litigation must be addressed. Those costs are causing cases to settle that should not be settled on the merits. He said that 83% of the respondents to the survey agreed with this observation, and 55% said that the primary cause of delay in civil cases is the time to complete discovery.

Mr. Garrison said that certain discovery costs can be reduced, but he argued that the College's recommendations are too broad. He offered a range of other, alternative suggestions to improve efficiency and reduce costs. Most importantly, he said, there is a need to improve early judicial case management under FED. R. CIV. P. 16(a) because lawyers simply will not take the initiative on their own. In employment cases, for example, the court should enter a standard protective order at the Rule 16 conference. There could also be model protective orders that would work for most civil cases. The courts could require the plaintiff and defendant bars, or a special task force appointed by the court, to craft standard interrogatories that, once adopted, would not be subject to objections. The process of developing the standards could follow that used by the bar to draft pattern jury instructions.

The court and the bar could also adopt standard discovery requests to produce documents early in the case. They, too, would not be subject to objection. He added that the initial disclosures currently required by FED. R. CIV. P. 26(a) do not work because plaintiffs simply do not obtain the disclosures they need from defendants, and they have to proceed straight to discovery. He suggested that the proposed standard documents should be an alternative to initial disclosure.

He also suggested that a court should conduct a second conference at the end of the initial round of discovery. At that point, no more discovery will be needed in many cases. But if more is required, the judge could refer the case to a magistrate judge to handle the second stage of discovery. Judges could also get rid of the voluminous and duplicative paper produced in discovery by just requiring final documents. Courts could also consider alternate ways to deal with discovery disputes, such as by asking for letters, rather than motions, and holding telephone conferences to resolve disputes.

Mr. Garrison said that electronic discovery is really not that much of an issue for him, as he obtains the electronic information that he needs without difficulty. He cautioned against drafting procedural rules based on experience in heavy commercial litigation. Discovery problems in those cases, he said, are completely different from what occurs in most other cases.

Mr. Richards said, though, that there are indeed major problems with electronic discovery in antitrust cases and other big cases. The participants run search terms against electronic databases and come up with many hits. Then, it takes enormous attorney and paralegal time just to review all the hits. Nevertheless, he said, the College's proposal is not the right way to go. Courts, rather, should focus on the costs in each individual case and manage the discovery in reference to the anticipated costs of the discovery and the benefits it will produce in the case. That goal, he said, could be accomplished in three ways.

First, courts could require that discovery requests be more focused, directed, and limited to key areas. The broad requests seen today are very harmful. Discovery demands should be limited and based on specific details and events.

Second, courts should apply a triage system. Nothing, he said, focuses the mind of a plaintiff's lawyer more than costs. For example, the 7-hour limit on depositions has worked very well. Other kinds of limits, such as on interrogatories and discovery demands, would also work very well. Judges could ask lawyers at the outset of a case how many hits they expect to get on electronic discovery searches and then tailor the request to the anticipated results.

Third, courts could require phased discovery in many cases. At the outset of a case, the lawyers normally know that there really are only a handful of key issues. Resolution of those issues will determine the case as a whole. In antitrust cases, for example, it may be whether there was or was not a conspiracy.

The plaintiffs should be made to focus on the issues they really care about. Unfortunately, though, there now is simultaneous, unlimited discovery on all issues. Plaintiffs want to receive all the key information as quickly and as cheaply as possible, and they should be made to cut to the chase. To that end, phased discovery is the preferred way to go to narrow the scope of discovery. On the other hand, throwing a case out because of defects in the pleadings makes no sense at all.

A participant stated that one problem with phased discovery is that parties are not willing to move quickly to do it. Instead of allowing nine months or so for all discovery in a case, they want nine months for just the first phase of discovery. In addition, with phased discovery, key witnesses may get deposed three separate times, instead of only once. In reality, he said, one side often wants discovery, and the other does not. Mr. Richards agreed as to depositions, but said that it is the documents that are the main causes of unnecessary costs and delays.

Mr. Saunders pointed out that the obligation to preserve electronic information begins on the first day of a case. The parties, however, do not see a judge for some time after that. During the hiatus between filing and issuance of a pretrial order, parties incur large costs just to preserve electronic information before they are relieved of that responsibility by the court. Therefore, judges should take immediate action at the outset of a case to address preservation obligations, and no sanctions should be imposed on the parties other than for bad faith. The current rules, he said, do not adequately address this point.

A member recommended that the advisory committee obtain more information from the state courts in Arizona and Massachusetts to see how well they are controlling discovery. Judge Kravitz agreed to pursue the matter.

NEXT MEETING

The committee agreed to hold the next meeting in Washington, D.C., in June 2009, with the exact date to be set after the members have had a chance to consult their calendars. By e-mail, the committee later decided to hold the meeting on Monday and Tuesday, June 1 and 2, 2009

Respectfully submitted,

Peter G. McCabe
Secretary

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

This report is submitted for the record, and includes the following items for the information of the Conference:

Agenda E-19
Rules
March 2009

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure met on January 12-13, 2009 All members attended, with the exception of Professor Daniel J Meltzer Ronald J. Tenpas, Assistant Attorney General, Environment and Natural Resources Division, attended on behalf of the Department of Justice

Representing the advisory rules committees were: Judge Carl E. Stewart, chair, and Professor Catherine T. Struve, reporter, of the Advisory Committee on Appellate Rules, Judge Laura Taylor Swain, chair, and Professor S. Elizabeth Gibson, reporter, of the Advisory Committee on Bankruptcy Rules; Judge Mark R. Kravitz, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge Richard C. Tallman, chair, and Professor Sara Sun Beale, reporter, of the Advisory Committee on Criminal Rules; and Judge Robert L. Hinkle, chair of the Advisory Committee on Evidence Rules.

Participating in the meeting were Peter G McCabe, the Committee's Secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief of the Administrative Office's Rules Committee Support Office; James N. Ishida and Jeffrey N. Barr, attorneys in the Office of Judges Programs in the Administrative Office; Emery G. Lee of the Federal Judicial Center; and Professor Geoffrey C. Hazard, consultant to the Committee.

FEDERAL RULES OF APPELLATE PROCEDURE

The Advisory Committee on Appellate Rules presented no items for the Committee's action

Informational Items

Proposed amendments to Rules 1 and 29 and Form 4 were published for comment in August 2008. Scheduled public hearings on the amendments were canceled because no one asked to testify The advisory committee will consider written comments submitted on the proposed amendments at its April 2009 meeting.

The advisory committee is considering a proposed amendment to Rule 40, which would clarify the applicability of the 45-day period for filing a petition for rehearing in a case that involves a federal officer or employee. The advisory committee initially proposed but decided not to pursue a similar change to Rule 4, because the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), raised questions about amending a rule to change a time period set by statute (28 U.S.C. § 2107)

The advisory committee is studying problems that arise when an appeal taken before entry of a judgment that requires a separate document under Civil Rule 58 is followed by a post-judgment motion that is timely only because the court failed to enter the judgment in a separate document. The effectiveness of the appeal is suspended until the post-judgment motion is disposed of The advisory committee concluded that rather than pursuing a rule change, the better way to address these problems is to improve awareness by clerks of court and district judges' chambers of the separate-document requirement. The advisory committee will also explore whether CM/ECF could include a prompt to judges and clerks to have the judgment set out in a separate document.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rule 6003 with a request that they be published for comment The proposed amendments make clear that a judge may enter certain orders that are effective retroactively notwithstanding the rule's requirement that the relief specified in the rule cannot be entered within 21 days after a petition has been filed The Committee approved the advisory committee's recommendation to publish the proposed amendments for public comment.

Informational Items

Proposed amendments to Bankruptcy Rules 1007, 1014, 1015, 1018, 1019, 4004, 5009, 7001, and 9001, and new Rules 1004 2 and 5012 were published for comment in August 2008 Scheduled public hearings on the amendments were canceled because no one asked to testify. The advisory committee will consider written comments submitted on the proposed amendments at its March 2009 meeting

On behalf of the Judicial Conference, the Executive Committee in November 2008 approved the recommendation of the Committee to revise Official Form 22A and distribute to the courts Interim Rule 1007-I with a recommendation that it be adopted through a local rule or standing order. The changes implement the National Guard and Reservists Debt Relief Act of 2008, which amends the Bankruptcy Code to exempt from means testing for a three-year period certain members of the National Guard and Reservists (Pub. L. No. 110-438). The Act was enacted on October 20, 2008. Interim Rule 1007-I and the revision to Form 22A took effect on December 19, 2008.

The advisory committee is considering amendments to Official Forms 22A and 22C to clarify certain deductions under the means test for chapter 7 and chapter 11 cases. The

amendments substitute "number of persons" and "family size" for "household" and "household size" to reflect more accurately the manner in which the deductions are to be applied and to be consistent with related IRS standards

The advisory committee has embarked on a project to revise and modernize bankruptcy forms As part of this project, the advisory committee is studying the forms' content, ways to make the forms easier to use and more effective to meet the needs of the judiciary and all those involved in resolving bankruptcy matters, and possible approaches to take advantage of technology advances. The advisory committee is also reviewing Part VIII of the Bankruptcy Rules, which addresses appeals to district courts and bankruptcy appellate panels, to consider whether the rules should be revised to align them more closely with the Federal Rules of Appellate Procedure. A miniconference of judges, lawyers, and academics is scheduled for March 2009 in conjunction with the advisory committee's spring meeting to explore the benefits of, and concerns raised by, such a revision.

FEDERAL RULES OF CIVIL PROCEDURE

The Advisory Committee on Civil Rules presented no items for the Committee's action

Informational Items

Proposed amendments to Civil Rules 26 and 56 were published for comment in August 2008. Two public hearings on the amendments have been held and another public hearing is scheduled in February. The hearings were well attended, and the discussions were robust. The advisory committee will consider the testimony and written comments submitted on the proposed amendments at its April 2009 meeting.

The advisory committee is examining the Rule 26 provisions on experts retained to testify. The American Bar Association has recommended that federal and state discovery rules be amended to prohibit the discovery of draft expert reports and to limit discovery of attorney-

expert communications, without hindering discovery into the expert's opinions and the facts or data used to derive or support them These recommendations are based on experience since Rule 26 was amended in 1993 That experience has shown that discovery of attorney-expert communications and draft expert reports impedes efficient use of experts and results in artificial discovery-avoidance practices and expensive litigation procedures that do not meaningfully contribute to determining the strengths or weaknesses of the expert's opinions Instead, such practices and procedures significantly and unnecessarily increase the costs and delays in civil discovery.

The proposed amendments to Rule 56 are not intended to change the summary-judgment standard or burdens Instead, they are intended to improve the procedures for presenting and deciding summary-judgment motions, to make the procedures more consistent across the districts, and to close the gap that has developed between the rule text and actual practice The rule text has not been significantly changed for over 40 years. The district courts have developed local rules with practices and procedures that are inconsistent with the national rule text and with each other. The local rule variations, though, do not appear to correspond to different conditions in the districts The fact that there are so many local rules governing summary-judgment motion practice demonstrates the inadequacy of the national rule

Although there is wide variation in the local rules and individual-judge rules, there are similarities in many of the approaches. The advisory committee is considering proposed amendments that draw from many of the current local rules. Under one part of the proposed amendments, unless a judge orders otherwise in the case, a movant would have to include with the motion and brief a "point-counterpoint" statement of facts that are asserted to be undisputed and entitle the movant to summary judgment. The respondent, in addition to submitting a brief, would have to address each fact by accepting it, disputing it, or accepting it in part and disputing

it in part (which could be done for purposes of the motion only). The statements are intended to require the parties to identify and focus on the essential issues and provide a more efficient and reliable process for the judge to rule on the motion The point-counterpoint statement has been used by many courts and judges. It also has been used by courts that have subsequently abandoned it Testimony and comments have provided support for a point-counterpoint procedure, but also have pointed to practical difficulties encountered by its use

The proposed point-counterpoint procedure also presents a more fundamental issue. The proposed rule authorizes a judge to use a different procedure than point-counterpoint by entering an order in an individual case, but does not authorize different procedures by local rule or standing order. Some of the arguments against the point-counterpoint proposal are framed in terms of local autonomy at the cost of national uniformity The choice to be made will depend in part on the importance of national uniformity, subject to the case-by-case departures authorized by the published proposal.

The advisory committee also is considering concerns raised by some members of the bar about a word change to Rule 56 that took effect in December 2007 as part of the Style Project. That project replaced the inherently ambiguous word "shall" throughout the rules with "must," "may," or "should," deriving the meaning for each rule from both context and court opinions interpreting and applying the rule. Before restyling, Rule 56 had used the word "shall" in stating the standard governing a court's decision to grant summary judgment. The Style Project changed the word to "should," based on case law applying the rule ("The judgment sought *should* be rendered if [the record shows] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law ") Although "should" could simply be carried forward from Rule 56 as amended in 2007, many vigorous comments express a strong preference for "must," based in part on a concern that adopting "should" in rule text will lead to

undesirable failures to grant appropriate summary judgments These comments will be the basis for careful reexamination in light of the case law that supports "should "

The advisory committee is planning to hold a major conference in 2010 to investigate growing concerns raised by the bar about pretrial costs, burdens, and delays The conference will examine possible rule and other changes

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no items for the Committee's action

Informational Items

Proposed amendments to Criminal Rules 5, 12.3, 15, 21, and 32.1 were published for comment in August 2008 Scheduled public hearings on the amendments were canceled The two individuals requesting to testify on the proposed amendments agreed to present their testimony in conjunction with the advisory committee's April 2009 meeting The advisory committee will consider the testimony and written comments submitted on the proposed amendments at the meeting.

The advisory committee is considering proposed amendments to: (1) Rule 12(b)(3), requiring the defendant to raise before trial "a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense"; (2) Rule 32(c), requiring disclosure to the parties of information on which the probation officer relies in preparing the presentence report; (3) Rule 32(h), requiring the court to notify the parties of *Booker* variances, as well as departures, for reasons not identified in the presentence report or the parties' submissions; and (4) Rule 41, in consultation with the Committee on Criminal Law, authorizing probation and pretrial service officers to apply for and execute searches as part of their efforts to enforce court-ordered supervision conditions. The advisory committee is also reviewing all the criminal rules

to identify any that should be updated in light of new technologies and the nearly universal use of electronic case filing Additionally, the advisory committee is continuing to study rule changes to conform with case law implementing the Crime Victims' Rights Act and whether further rule changes may be needed in light of possible new legislation

FEDERAL RULES OF EVIDENCE

Rules Approved for Publication and Comment

The Advisory Committee on Evidence Rules submitted proposed amendments to Rules 501-706 with a request that they be published for comment The proposed amendments are the second part of the project to "restyle" the Evidence Rules to make them clearer and easier to read, without changing substantive meaning. The Evidence Rules "restyling" project follows the successful restyling of the Federal Rules of Appellate, Criminal, and Civil Procedure The Committee approved the advisory committee's recommendation to publish the proposed amendments to Rules 501-706 and to delay publishing them until all the Evidence Rules have been restyled, which should occur by June 2009.

Informational Items

The advisory committee continues to monitor cases applying the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 34 (2004), which held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to cross-examine the declarant.

GUIDELINES FOR DISTINGUISHING BETWEEN LOCAL RULES AND STANDING ORDERS

The Committee considered the results of a study submitted by Professor Daniel R. Capra, reporter to the Advisory Committee on Evidence Rules, on local rules and standing orders. The report describes the inconsistent uses of local rules, standing orders, administrative orders, and

general orders, as well as problems in providing lawyers and litigants with adequate notice of standing, administrative, and general orders and making them accessible The report proposes voluntary guidelines to assist courts in determining whether a particular subject matter should be addressed in a local rule or whether it is appropriate for treatment in a standing order A revised report taking into account suggestions made by several Committee members will be presented for the Committee's consideration at its next meeting

PANEL DISCUSSION ON PROBLEMS IN CIVIL LITIGATION AND POSSIBLE REFORM

Gregory Joseph, Esq., led a discussion on studies and reports from a joint project of the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System on the growing costs and burdens of civil litigation. The panel, which included Paul B Saunders, Esq (chair of the American College of Trial Lawyers Task Force on Discovery), Judge Rebecca Love Kourlis, Executive Director of the Institute, Joseph Garrison, Esq., and J. Douglas Richards, Esq., focused on the rising costs of electronic discovery, the public's deepening disenchantment with federal trial practices and procedures, and the flight of litigants from federal court to state court and alternative dispute organizations. The results substantiated the Civil Rules Committee's plan to hold a major conference in 2010 with judges, lawyers, and law professors addressing these issues.

JUDICIAL CONFERENCE-APPROVED LEGISLATION

At its September 2008 meeting, the Judicial Conference approved the Committee's recommendation to seek legislation adjusting the time periods in 29 statutory provisions that affect court proceedings to account for the proposed changes in the new time-computation provisions in the federal rules that will take effect on December 1, 2009, assuming that the last stages of the Rules Enabling Act process are successfully completed. The Committee is actively

pursuing the legislation and believes that it can be enacted so that its effective date is coordinated with the time-computation rules amendments

LONG-RANGE PLANNING

The Committee was provided a report of the September 2008 meeting of the Judicial Conference's committee chairs involved in long-range planning The Committee is reviewing its long-range goals to determine whether any changes are appropriate

Respectfully submitted,

Lee H. Rosenthal

David J. Beck	John G. Kester
Douglas R. Cox	William J Maledon
Mark Filip	Daniel J Meltzer
Ronald M. George	Reena Raggi
Marilyn L. Huff	James A. Teilborg
Harris L Hartz	Diane P. Wood

TAB-2A

FORDHAM
University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J Capra
Philip Reed Professor of Law

Phone. 212-636-6855
e-mail:dcapra@law.fordham.edu
Fax: 212-636-6899

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Restyled Evidence Rules 801-1104, to be submitted for public comment
Date: March 23, 2009

The Style Subcommittee of the Standing Committee has reviewed and approved a draft of restyled Evidence Rules 801-1104. The Advisory Committee reviewed and provided suggestions on an earlier draft. At this meeting, the Advisory Committee will review the draft from the Style Subcommittee to determine whether any of the proposed changes are substantive, and also to provide any necessary style suggestions for the Style Subcommittee's consideration. The Advisory Committee will also vote on whether to refer the restyled Rules 801-1104 to the Standing Committee with the recommendation that those rules — together with Rules 101-801, previously approved and to be reviewed again at this meeting — be released for public comment this summer.

This memorandum sets forth the restyled Rules 801-1104, and supporting information to assist the Advisory Committee in its review. The memorandum is in four parts. Part One provides a recap of the restyling protocol and the timeline for the restyling project. Part Two sets forth the draft of Rules 801-1104 as approved by the Style Subcommittee. This part is blacklined to show changes from the existing rules. Comments and suggestions from the Reporter and others are at the bottom of each rule. Part Three sets forth the proposed language for the Committee Note to each of the restyled rules.

Also in this agenda book, immediately behind this memo, is a side-by-side version of Rules 801-1104, with a few footnotes indicating comments from the Style Subcommittee. For those who want to have the side-by-side next to the blackline for ease of reference — you have my authorization to tear the agenda book apart to implement that juxtaposition.

This agenda book also contains the following materials pertinent to the restyling project: 1) Supplementary materials provided by Professor Kimble on restyling questions arising in Rules 801-1104; 2) a memo on proposed Committee Notes for the restyled rules; 3) a side by side presentation of Rules 101-415, with a short memo addressing any remaining questions that might be considered before release for public comment; and 4) a side by side presentation of Rules 501-706, with a short memo addressing any remaining questions that might be considered before release for public comment.

I. Styling Protocol and Timeline

A. Approved Steps for Restyling

What follows is the agreed-upon procedure for restyling the Evidence Rules:

1. Professor Kimble prepares a draft of a restyled rule.

2. The Reporter reviews the draft and provides suggestions, specifically with an eye to whether any proposed change is substantive rather than procedural. But the suggestions can go further than just the substantive/procedural distinction.

3. Professor Kimble considers the Reporter's comments and revises the draft if he finds it necessary.

4. The Advisory Committee reviews the draft and provides suggestions of both style and substance.

5. Professor Kimble considers the comments of the Advisory Committee and revises the draft if he finds it necessary.

6. The draft as revised to this point is sent to the Standing Committee's Subcommittee on Style. The Subcommittee reviews the draft with a focus on the areas of disagreement between Professor Kimble and the Advisory Committee and Reporter The Subcommittee may also make style changes that have not been previously proposed or considered.

5. The Style Subcommittee draft is referred to the Advisory Committee. The draft may contain footnotes providing comments on the issues unresolved up to this point in the process. At the Advisory Committee meeting, Committee members, liaisons and consultants review the draft to determine whether a proposed change is "substantive." If a "significant minority" of the Evidence Rules Committee believes that a change is substantive, then the wording is not approved.

6. The draft approved by the Advisory Committee is reviewed once again by the Style Subcommittee of the Standing Committee in order to consider the comments and votes by the Advisory Committee.

7. The proposed restyled rules are submitted to the Standing Committee and, if approved, released for public comment.

B. Ground Rules for Restyling:

The Evidence Rules Committee has approved the following ground rules for restyling

1. The Committee will follow Garner's Guidelines. [A copy of Garner's style guidelines has been distributed to each committee member.]

2. On matters not covered by the Guidelines, the Committee will follow Garner's reference books. [The reporter will keep those books on file.]

3. The basic rule for the restyling project is that the final word on questions of "style" are for Professor Kimble and the Style Subcommittee of the Standing Committee, while the Evidence Rules Committee can veto a proposed change if it would be "substantive."

4. A change is "substantive" if:

a. Under the existing practice in any circuit, it could lead to a different result on a question of admissibility (e.g., a change that requires a court to provide either a less or more stringent standard in evaluating the admissibility of a certain piece of evidence); or

b. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made (e.g., a change in the time in which an objection must be made, or a change in whether a court must hold a hearing on an admissibility question), or

c. It changes the structure of a rule so as to alter the way in which courts and litigants have thought about, and argued about, questions of admissibility (e.g., merging Rules 104(a) and 104(b) into a single subdivision); or

d. It changes what Professor Kimble has referred to as a "sacred phrase" — "phrases that have become so familiar as to be fixed in cement." Examples in the Evidence Rules include "unfair prejudice" and "truth of the matter asserted."

C. Timeline for the Restyling Project

The Committee has agreed to the following timeline for the restyling project:

December 2007 –	Professors Capra and Kimble draft and comment on Group A Rules
January 2008 –	Advisory Committee does an initial review of Group A Rules
February 2008 –	Standing Style Subcommittee reviews **Group A — Rules 101-415.**
May 1-2, 2008 –	Advisory Committee reviews Group A
June 2008 –	Standing Committee reviews Group A for publication for comment (but the package is held until the whole is completed).
June 2008 –	Professor Kimble completes restyling **Group B — Rules 501-706.**
July 2008 –	Professor Capra edits Group B
July 2008 –	Advisory Committee does an initial review of Group B Rules
August 2008 –	Standing Style Subcommittee reviews Group B
October 2008 –	Advisory Committee reviews Group B
December 2008 –	Professor Kimble completes editing **Group C — Rules 801-1103**
January 2009 –	Standing Committee reviews Group B for publication (but the package is held until the whole is completed).
January 2009 –	Professor Capra edits Group C
January 2009 –	Advisory Committee does an initial review of Group C rules
February 2009 –	Standing Style Subcommittee reviews Group C
April 2009 –	Advisory Committee reviews Group C
June 2009 –	Standing Committee reviews Group C for publication
August 2009 –	Publication of entire set of restyled rules
January 2010 –	Hearings

April 2010 –	Advisory Committee approves restyled rules
June 2010 –	Standing Committee approves rules
September 2010 –	Judicial Conference approves rules
April 2011 –	Supreme Court approves rules
December 1, 2011 –	Rules take effect

II. Restyled Rules 801-1104

What follows is the draft of restyled Rules 801-1104, after review and changes by the Style Subcommittee of the Standing Committee. Comments by the Reporter, Professor Kimble, and certain Committee members are included at the bottom of the blacklined version. As stated above, a side-by-side version of the restyled Rules 801-1104 is in this agenda book, right after this memorandum.

Note that it might be possible that there are one or two discrepancies between the blacklined version and the side-by-side. *If any such discrepancy is found, the side-by-side controls.*

Rule 801

Rule 801. Definitions That Apply To this Article

~~The following definitions apply under this article:~~

(a) Statement. ~~A "statement" is~~ "Statement" means:

(1) an oral or written assertion; or

(2) a person's nonverbal conduct ~~of a person~~, if ~~it is~~ the person intended ~~by the person~~ it as an assertion.

(b) Declarant. ~~A "declarant" is a~~ "Declarant" means the person who ~~makes a~~ made the statement.

(c) Hearsay. "Hearsay" ~~is~~ means a prior statement~~, other than one made by the declarant~~ — one not made by someone while testifying at the current trial or hearing — ~~, offered~~ that a party offers in evidence to prove the truth of the matter asserted by the declarant.

Reporter's comments:

1. I previously raised the question about the need to add the word "current" in line 14. The Style Subcommittee voted to add the word "current."

Professor Kimble's Response re "current".

> Note that we are using the past tense in 801 — *the person intended, the person who made the statement, the declarant did not make.* I think *current* would serve as a clarifying contrast. And it does not appear to be a substantive change.

Judge Keenan: I see no need for the word "current."

Meyers and Broun and Judges Ericksen and Huff agree with Judge Keenan — "current" is not necessary.

Saltzburg: I think the word "current" is not the right word, but that's because I think the drafting could be improved if it read: "Hearsay" is any statement offered but not made at a trial or hearing offered to prove the truth of the matter asserted.

Justice Hurwitz *I would not include "current. Why not just define hearsay as a "statement, not made in testimony at . ."?*

2. Committee members previously raised concern about the multiple use of the term "declarant" in subdivision (c). Professor Kimble changed it to "one not made by someone" and this was approved by the Style Subcommittee.

Return to the text — 801(d)

(d) Statements ~~Which~~ That Are Not Hearsay. A statement that meets the following conditions is not hearsay ~~if~~ :

(1) A Witness's Prior Statement ~~By Witness~~. The declarant testifies ~~at the trial or hearing~~ and is subject to cross-examination ~~concerning~~ about the statement, and the statement ~~is~~:

(A) is inconsistent with the declarant's testimony~~;~~ and was given under ~~oath subject to the~~ penalty of perjury at a trial, hearing, or other proceeding~~, or in a deposition;~~ ~~or~~ ;

Reporter's comment re retention of "trial, hearing or other proceeding":

That language was added by Congress to make sure that the statement was made under sufficient formality. So, for example, a statement made under oath but not at a proceeding would not qualify for admissibility. See *United States v. Day,* 789 F.2d 1217 (6th Cir. 1986) (statement made under oath to an IRS was not admissible under 801(d)(1)(A) because it was not made at a "proceeding"; Congress added this language in order to limit the admissibility to statements made in formal circumstances); *United States v Perez,* 870 F.2d 1222 (7th Cir. 1989) (pretrial interview under oath does not qualify as a statement made at a proceeding). Accordingly, the Style Subcommittee voted to retain the language (which had been bracketed for a possible deletion).

Reporter's comment re retention of "penalty of perjury" in line 27.

The Style Subcommittee voted to retain this language, which had been proposed for deletion. The language was added to the Rule by Congress; it has been given substantive effect in the cases; and a number of Committee members suggested that it be retained.

Back to the text — 801(d)(1)(B):

> (B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge ~~against~~ that the declarant ~~of recent fabrication~~ recently fabricated it or acted from improper influence or motive in so testifying; ;or

Reporter's comment: The phrase "recent fabrication or improper influence or motive" has approached, if not met, "sacred phrase" status. As the Supreme Court noted in *Tome*, the Advisory Committee took the language straight out of the common law. The phrase has been used, in precisely the way set out in the existing rule, for more than 200 years. It's true that the phrase begins in the rule with the dreaded word "of" but that should not be enough to condemn it.

Because the "of" has been taken out and the phrasing changed, the rule now reads that the witness "*acted from* an improper influence or motive." This makes the language quite awkward — does a person "act from" an improper influence? Does a person "act from" a motive? It would be more accurate to say that the person "acted under an improper influence" and "had an improper motive." But then the change, in the name of style, makes the rule more complicated than the original.

All in all, it appears to makes sense substantively and stylistically to return to the original: "offered to rebut an express or implied charge of recent fabrication or improper influence or motive."

Professor Kimble's response·

> The problem is not *of*. The problem is the abstract quality of the current rule. Recent fabrication of what? OK, the testimony. But I think that the restyled version makes that clearer — by replacing the abstract noun *fabrication* with a verb (not to mention eliminating two unnecessary prepositional phrases). And to call the phrase in question a sacred phrase seems a stretch, as suggested by Dan's comment that it has "approached, if not met, sacred-phrase status." It would be much different if we were changing the word *fabrication* to an entirely different word. We are only changing the form of the word.

Meyers. *I agree with the reporter that we should be hesitant about changing language, i e recent fabrication and improper motive, that has a 200 year history*

Justice Hurwitz *Perhaps "sacred phrase" overstates the case, but when a phrase is derived from the common law and routinely used verbatim by the courts, why risk confusion just for the sake of restyling?*

Broun: *I'd keep the phrase "recent fabrication or improper influence or motive." I agree with Joe that it's vague – but it's always been vague. The courts, including the Supreme Court, have interpreted the rule in light of this phrase and I wouldn't mess with it simply because it could be said better. My comment doesn't mean that we should never adjust a phrase that has been the subject of Supreme Court decision, but rather that we ought to have a very good reason to do so*

Saltzburg: *I agree with Dan that the original should be kept These are words "of art" in the case law.*

Judge Ericksen: *801(d)(1)(B) I object to* ***it*** *as in "recently fabricated it." Too awkward to find the antecedent, which is, I admit, pretty clearly the "that" testimony.*

In addition, I agree with the Reporter's comments on this and would retain the original

Professor Kimble, 2/10/09.

Two of our guidelines are involved here: uncover buried verbs (*fabricate*, not *fabrication*) and eliminate unnecessary prepositional phrases. If the change is not substantive, we should try to follow our guidelines.

Return to the text — 801(d)(1)(C)---

(C) ~~one of identification of a person made after perceiving the person; or~~ identifies a person as someone the declarant perceived earlier.

(2) ~~Admission by party-opponent.~~ An Opposing Party's Statement. The statement is offered against ~~a~~ an opposing party and ~~is~~ :

Reporter's comment on changing the title from "admission" to "statement":

An "admission" is a term of art. It doesn't require admitting anything, indeed the statement could be intended as self-serving at the time it is made. Changing "admission" to "statement" not only intrudes on a sacred phrase, but also makes the heading less accurate — the exception does not cover all of an opposing party's statements. Only those that are offered *against* the opposing party are admissible. In sum, the heading should refer to "admissions", not "statements".

Professor Kimble's response:

> Dan says *Statement* is too broad because the rule does not cover all of an opposing party's statements. But neither does (d)(1) cover all of a witness's prior statements. *Statement* can't be wrong, can it, since the rule refers to *statement* throughout? If *Admission* is a sacred phrase, though, so be it.

Meyers: I agree with the Reporter that "admission" is a term of art.

Justice Hurwitz: *I tend to agree with Joe Kimble here "Admission" may be a term of art, but it is a very misleading term, because it suggests that the statement somehow is against the party-declarant's interests Hence, litigants often refer to a party's "statement against interest," and bad judges (none that we know) sometimes confuse this rule with 804(b)(3)*

Broun. *Although "admission" may be a term of art, I am less wedded to it than with other commonly used labels. Maybe it's a sacred word but it's a problematic one. The problem is that the word itself is confusing -- it seems to imply some declaration against interest (a mistake not infrequently made by law students, lawyers and some judges). The point is that the hearsay exemption covers all party statements if offered by the opposing party and if otherwise admissible*

Saltzburg: *If you don't leave the word "admission" alone, people will think this is the stupidest group ever assembled The original drafters were wrong to include admissions in this rule, and we are stuck with that mistake Let's not make things worse. If you do change "admission" to "statement" I hope the Advisory Committee Note says that this is intended to assure confusion.*

Return to the text of 801(d)(2)

(A) was made by the party ~~the party's own statement,~~ in ~~either~~ an individual or a representative capacity, ~~or~~

Judge Ericksen: *This is odd The way it now reads, the party could be the representative How else would you make a statement in a representative capacity?*

Reporter comment: The language is intended to cover an agent who is sued individually, when he's made statements in a representative capacity that can also be used against him individually. The famous 8th circuit case of *Mahlandt* is an example: Mr. Poos was an agent, and made a statement as an agent "Sophie the wolf bit the kid." He was sued individually and the statement was admitted under 801(d)(2)(A).

Return to the text — 801(d)(2)(B)

(B) is one that the party adopted or the party accepted as true ~~a statement of which the party has manifested an adoption or belief in its truth, or~~ ;

Reporter's comment:

1. Style comment: why do you need to say "party" twice? Shouldn't it be "is one that the party adopted or accepted as true?"

2. I wonder if "accepted as true" is the same as "manifested a belief in its truth"? There are many cases in which adoption is found when the party hears a statement and stands silent — but only if the circumstances are such that a reasonable person would deny the statement if it were untrue. Under those circumstances silence is deemed a "manifestation" of agreement with the statement. Is "accepted" the same? One could argue that "acceptance" is more passive than "manifestation" — you can "accept" your fate by sitting around, whereas "manifestation" sounds like you are doing something more affirmative. This could mean that under the proposed change, the courts might be encouraged to find *more* cases of adoption by silence than under the existing rule; that is, the active word "manifestation" cautions courts that they should find adoption by silence only in clear cases in which a person should object to the statement — whereas "acceptance" means something less. The Committee may therefore wish to consider whether the change from "manifested" to "accepted" is a substantive change.

Return to the text — 801(d)(2)(C)

(C) ~~a statement~~ was made by a person whom the party authorized ~~by the party~~ to make a statement ~~concerning~~ on the subject~~, or~~ ;

Saltzburg: *I'd always prefer "authorized by the party" to "whom the party authorized."*

(D) ~~a statement~~ was made by the party's agent or ~~servant~~ employee ~~concerning~~ on a matter within the scope of ~~the agency or employment, made during the existence of the relationship,~~ that relationship and while it existed; or

(E) was made ~~a statement~~ by a the party's coconspirator ~~of a party~~ during the ~~course and in furtherance of the~~ conspiracy and to further it.

Reporter's comment: I hate to go to the "sacred phrase" well too often, but the language "during the course and in furtherance of the conspiracy" is one that has been used hundreds of times for many years. Is it worth it to change it just to get rid of the dreaded "of"?

Professor Kimble's response.

How many sacred phrases are there? The problem is not *of*, as I have been trying to suggest. Rather, *of* — along with other unnecessary prepositional phrases — is a prime indicator of wordiness and abstraction. (You might look at the first sentence of 609(b) as an example. The current rule has nine prepositional phrases, four of them using *of*. The revised rule has three.) The restyled version of (E) has the advantage, again, of replacing the abstract noun *furtherance* with a verb — an important goal of good writing and drafting. The restyled version also has a nice parallelism with the last clause in (D).

Moreover, the Committee may wish to consider whether "during the course of" the conspiracy is the same as "during the conspiracy." For example, statements made before the defendant joins the conspiracy are admissible against him, because they are made during the course of the conspiracy. Does the same rule apply if the requirement is that the statements must be made "during the conspiracy?" Referring to "the course of" the conspiracy sounds broader. So there is much to be said for returning to the original language: "during the course and in furtherance of" the conspiracy. Once again, there seems to be a lot of risk and effort to get rid of the "of."

Professor Kimble's response

There is no semantic difference between *during* and *during the course of*. They are dead synonyms. Is there a difference between *during the game* and *during the course of the game*? *During the course of* is a classic multiword preposition, which one writer has called the "compost" of legal writing and every expert inveighs against. We have replaced it everywhere in all the restyled rules, and keeping it here makes us look bad. I respectfully ask the Advisory Committee, on questions like this, to consider whether there is a realistic possibility that readers will conjure up a substantive change.

Judge Ericksen: *"To further it" implies a more active purpose than is supported by the case law under the current rule Statements that are pretty benign and are in context can be said to be "in furtherance" of a conspiracy, whereas they might not be said to have been made specifically TO further it.*

As to whether the statement has to be during or during the course of, an advantage of including "course of" is that it is marginally clearer that it must relate to the conspiracy and not just be temporally correct in the sense of being said at the same time the conspiracy is going on Yes, yes, there's the in furtherance requirement, but I still like course of better

Judge Keenan: *I still like the old language, "during the course and in furtherance of the conspiracy "*

Meyers: *As the reporter indicates, this is one of the most oft cited rules in criminal cases and has a long history. I would not change the "in furtherance" part but I am not sure that "the course of" adds anything to "during " In other words, I would say "during and in furtherance of the conspiracy," but in an abundance of caution would support not changing this phrase at all.*

Broun: *I don't feel particularly strongly about the "sacred" phrase "during the course of and in furtherance of the conspiracy" I rather like Joe's phrasing "during the conspiracy and to further it." I find it hard to imagine a court seeing this as a substantive change.*

Justice Hurwitz *Although the phrase is now part of our DNA, I tend to agree with Ken that no rational court would interpret "during the conspiracy" as different from "during the course." The real issue for me is whether restyling makes this so much clearer that we should run the risk, however minor, that someone will reach a different conclusion. When we only have two extra words, I am not sure that the restyling helps much.*

Saltzburg: *The "sacred phrase" applies here but I don't really see a problem if we use the following language "during and in furtherance of" The words "the course of" can be abandoned as long as the phrasing is as I've indicated As for how many "sacred phrases" there are, the answer is "not enough."*

Return to the text – last paragraph of Rule 801(d)(2)

The ~~contents of the~~ statement ~~shall~~ must be considered but ~~are not alone sufficient to~~ does not by itself establish the declarant's authority under ~~subdivision~~ (C)~~;~~ ; the existence or scope of the relationship ~~agency or employment relationship and scope thereof~~ under ~~subdivision~~ (D)~~;~~ ; or the existence of the conspiracy ~~and the participation therein of the declarant and the party against whom the statement is offered~~ or participation in it under ~~subdivision~~ (E).

[*Special note from Professor Kimble*:

801(d) and the rules that follow adopt a format that we generally don't use. They create a hybrid of a list and independent subparts. When we set up a list, often signaled by words like *the following* and a colon, we normally don't use a heading for each item in the list, and we don't start a new sentence in the list, as in current 803(5).]

Reporter's Comment: This bracketed comment should be deleted before the rules are sent to the Standing Committee. It's an observation, and its not directed toward any point of remaining disagreement.

Rule 802

Rule 802. ~~Hearsay Rule~~ General Inadmissibility of Hearsay

Hearsay is not admissible ~~except as provided by~~ unless any of the following provides otherwise:

- a federal statute;
- these rules; or ~~by~~
- other rules prescribed by the Supreme Court ~~pursuant to statutory authority or by Act of Congress~~ [under statutory authority?].

Reporter's comment: "under statutory authority" raises a recurring question that should be answered the same in every case. The language is intended to allow the Supreme Court to promulgate rules of evidence in other national rules (as is the case, for example, in the civil rules on admissibility of depositions). It's notable that the Advisory Committee's proposed language was to permit hearsay as provided by "other rules adopted by the Supreme Court." Congress changed that language to "other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." So Congress made a point of distinguishing Supreme Court rulemaking under the Enabling Act from other rules generated by the Supreme Court in the exercise of its supervisory authority over the federal courts. The latter authority could not be used to create hearsay exceptions. Accordingly, cutting out any reference to statutory authority would be a substantive change. And, for consistency purposes, it would make sense to use identical language in Rules 402, 501, etc.

Moreover, there is an especially strong reason to keep the language in Rule 501 — anything that even *looks* like a substantive change creates tension with the Enabling Act provision requiring that rules of privilege be directly enacted by Congress.

Note that Joe proposes a definitional fix in the new Rule 1102, supra.

Justice Hurwitz and Professor Saltzburg. *Dan is correct that reference must be made to statutory authority*

Broun *I am agnostic on this point. But I can't think of a situation in which the Supreme Court would adopt a rule dealing with hearsay other than by statutory authority. I feel the same way about the need for the term in other Evidence Rules*

Rule 803

Rule 803. ~~Hearsay Exceptions; Availability of Declarant Immaterial~~ Exceptions to the Hearsay Rule — Regardless of Whether the Declarant Is Available as a Witness

(a) The Exceptions. The following are not excluded by the rule against hearsay ~~rule~~, ~~even though~~ regardless of whether the declarant is available as a witness:

Saltzburg *There is no "rule against hearsay." There is now a "rule on the "general inadmissibility of hearsay" (802). Perhaps it should say "is not excluded by Rule 802"*

Reporter response to Saltzburg: I agree that the "rule against hearsay" is not an accurate description, given all the exceptions. As part of the restyling effort is designed to lead the reader to other applicable rules, it makes great sense to simply refer to Rule 802, as Professor Saltzburg suggests.

Professor Kimble·

The current rule says, "The following are not excluded by the hearsay rule." Of course, that means "are not excluded by the rule against hearsay." The trouble with *the hearsay rule* is that you don't get any sense of direction from it — whether hearsay is good or bad, admissible or inadmissible. I think it's hypercorrect to say that there is no such thing as a rule against hearsay. There is a general rule against hearsay, in 802. Note that the first time we say *the rule against hearsay*, it follows immediately after 802; it's in the first sentence of 803. And wherever we use the phrase, we follow it with exceptions. In context, then, there can't be any confusion about what the rule against hearsay refers to — the general rule against hearsay. And if we're going to refer back to Rule 802, we have to do it in 803(a), 804(b), 805, and 807(a). I'd hate to add four cross-references. In 807(a), we'd be using three cross-references in the same sentence Shade of the Internal Revenue Code.

Reporter response: In other places, Professor Kimble emphasized the need for and value in cross-referencing other rules (e.g., the rule on interpreters). Why is it different here?

Return to the Rules — 803(1)

> ***(1) Present Sense Impression.*** A statement describing or explaining an event or condition, made while the declarant was perceiving ~~the event or condition,~~ it or immediately ~~thereafter~~ after perceiving it.
>
> ***(2) Excited Utterance.*** A statement ~~relating~~ related to a startling event or condition, made while the declarant was under the stress of excitement that it caused ~~by the event or condition~~.

Reporter's comment:

There may be a difference between a statement "relating to" a startling event and one "related to" it. "Relating to" is a reference to the subject matter of the statement – the subject matter must have some relationship with the excited utterance — as in the *David* case in which a shopper's statement that she had warned the supermarket about the spilled ketchup was found to be "relating to" the startling event of seeing another person slip in the ketchup. "Related to" sounds like it means spurred by or circumstantially tied to the startling event — but the requirement of connection to the startling event is already covered by the "under the influence" admissibility requirement. In order to avoid an inadvertent substantive change in a complicated area, the language of the original rule should probably be retained.

Professor Kimble's response.

> Dan's distinction seems rather attenuated. Wouldn't a court find that the warning statement in his example was "related to" seeing the other person slip? They are connected; that's all. *Related to* does have the advantage of avoiding two *-ing*s in the same clause. And we use *related to* six other times in our restyled rules. Do we mean something different here? The point may seem small, but it presents another consistency issue.

Judge Ericksen: *This should be relating rather than related. Relating must be about the event. Related might not be Imagine Bob rams Mary with a supermarket basket. She says "Ouch, you hurt me;" that's relating and related What if she says "That's it I've had it I want a divorce" It's related (in her mind) but not exactly relating to*

Meyers I share Dan's concern about changing "relating to" to "related to."

Broun I don't think this is a big deal, but I am not bothered by the substitution of "related" for "relating."

Return to the text — Rule 803(3)

(3) Then - Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or ~~emotion, sensation~~ emotional, sensory, or physical condition (such as ~~intent, plan, motive, design~~, mental feeling, pain, ~~and~~ or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the ~~execution, revocation, identification,~~ validity or terms of the declarant's will.

(4) Statements Made for ~~Purposes of~~ Medical Diagnosis or Treatment. ~~Statements~~ A statement that:

(A) is made for ~~purposes of~~ — and is reasonably pertinent to — medical diagnosis or treatment; and

(B) ~~describing~~ describes medical history~~, or~~ ; past or present symptoms, ~~pain, or~~ sensations~~;~~, or the inception or general character of ~~the~~ their cause ~~or external source thereof insofar as reasonably pertinent to diagnosis or treatment.~~

Reporter's Comments:

1. Deletion of "pain" — I raised the question whether deletion of the term "pain" might operate as a substantive change. Ken Broun filed this report:

> There is no discussion of the difference between "symptoms," "pain," or "sensations" in either the Advisory Committee's Note or the Congressional review of the rules. I could find no state or federal case that distinguishes among the terms. Most commonly, the language of the rule with all three terms is simply quoted. *See, e g , Petrocelli v. Gallison,* 679 F.2d 286 (1st Cir. 1982).
>
> Going to the dictionaries, Black's does not contain a separate definition of "pain," but defines pain and suffering as: *"physical discomfort or emotional distress* compensable as an element of damages in torts." (emphasis added). There are no definitions of "symptoms" or "sensations."
>
> Webster's New Collegiate Dictionary defines pain as: Localized physical suffering associated with bodily disorder (as a disease or an injury) *also*: a basic bodily sensation induced by a noxious stimulus, received by naked nerve endings, characterized by physical discomfort (as pricking, throbbing, or aching) and typically leading to evasive action.
>
> Symptom is defined as "subjective evidence of disease or physical disturbance, *broadly* something that indicates the presence of bodily disorder."
>
> Sensation is defined with several meanings. But most significantly, for our purposes it is "awareness (as of heat or pain) due to stimulation of a sense organ.

I conclude that statements of "pain" would necessarily be included in statements of "symptoms" or "sensations." A "mental pain" – the emotional distress referred to in the Black's definition of pain and suffering would strike me as a sensation or a symptom within the dictionary meaning of those terms. I would delete the term.

Judge Ericksen: *Pain is such a vivid word. Plus, it is probably the most commonly used avenue to this exception The word deserves to be left in.*

2. Deletion of "external source" — I raised the question whether deletion of the phrase "external source" — leaving only "cause" — might operate as a substantive change. Ken Broun filed this report:

Rule 803(4) provides that statements made for purposes of medical diagnosis or treatment are exceptions to the hearsay rule, including statements of the "general character of the cause or external source" of the symptoms, pain or sensations. The question is whether the restyled rule should continue to use both the terms "cause" and "external source" or whether "external source" can safely be eliminated without changing the meaning or likely interpretation of the rule. In short, my answer is yes.

The Advisory Committee note refers only to statement of causation, without commenting separately on "external source." The Committee stated:

> [The rule] also extends to statements as to causation, reasonably pertinent to the same purposes, in accord with the current trend, Shell Oil Co. v. Industrial Commission, 2 Ill. 2d 590, 119 N.E 2d 224 (1954); McCormick § 266, p. 564; New Jersey Evidence Rule 63 (12)(c). Statements as to fault would not ordinarily qualify under this latter language. Thus a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light. . . .

Leading examples of federal cases decided under Rule 803(4) dealing with cause are *United States v Pollard,* 790 F.2d 1309, 1313-14 (7th Cir. 1986), where the court admitted a statement of a patient describing how his arm was twisted, and *Cook v. Hoppin,* 783 F.2d 684 (7th Cir. 1986), where the court held that a patient's statement that he was wrestling when he fell from a third-story stairway was not admissible because it was not relevant to diagnosis or treatment. *See generally,* Saltzburg, Martin & Capra, Federal Rules of Evidence Manual, ¶ 803.02[5][b].

In no case that I could find, does the court's ruling seem to depend upon whether the reference to the statement is to a "cause" or an "external source."

The most controversial question dealing with the admissibility of statements of "causation" arises in sexual abuse cases where the victim's statements naming the abuser have been admitted. Typical is *United States v. George,* 960 F.2d 97, 99 (9th Cir. 1992). In *George*, the defendant argued that the statement of the 12-year-old victim, naming her father as her abuser, should not have been admitted under Rule 803(4). The court upheld the

admission of the statement noting that the physician's diagnosis and treatment of the child may depend upon the identity of the abuser. It noted specifically that the physician may have an obligation under state law to prevent the child from being returned to an abusive environment. In *George* and other similar cases, the court simply cites the language of the rule, without emphasizing either cause or "external source." *See also, United States v. Yazzie*, 59 F.3d 807, 812 (9th Cir. 1995); *United States v. Provost*, 875 F.2d 172, 177 (8th Cir. 1989). The analysis does not depend upon whether the court is dealing with an adult or a child or whether the injuries are physical or psychological or both. *See, e.g , United States v Joe*, 8 F.3d 1488, 1494-95 (10th Cir. 1993). It is difficult to imagine that the result of these cases would be different if the term "external source" had been absent from the rule and the statement was held only to relate to the "cause" of the symptoms.

Black's defines "cause" as "something that produces an effect or result " There is no definition given for "external source."

If the court is dealing with either physical or mental symptoms or sensations, it would seem that it would have the same concern for either the "cause" or "external source" of those symptoms or sensations. The "external source" of a physical or mental reaction to trauma would seem to be the same thing as the "cause" of that trauma.

Might there be a difference if the event related in the statement is likely to have been only a contributing factor to the declarant's mental or physical state rather than the sole cause? For example, the post traumatic stress caused by being hit by a truck exacerbated an already unstable mental condition resulting from combat. Could it be said that the accident was the "external source" of the condition rather than the "cause?" It is still difficult to see the difference in use of the terms. If "only" is to be implied from the use of the word "cause," it should also be applied to the term "external source " The cases have simply not required that the statement refer to the "only" cause

Saltzburg style suggestion: *Why not just eliminate (A)? The last clause of (B) makes clear that it must be pertinent to diagnosis and treatment*

Return to the Rule, 803(5) —

(5) Recorded Recollection. ~~A memorandum or record concerning~~ A record that:

(A) is on a matter ~~about which a~~ the witness once ~~had knowledge~~ knew about but now ~~has insufficient recollection to enable the witness~~ cannot recall well enough to testify fully and accurately~~,~~ ;

(B) ~~shown to have been~~ was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) ~~to~~ accurately reflects that knowledge ~~correctly~~.

If admitted, the ~~memorandum or~~ record may be read into evidence but may ~~not itself~~ be received as an exhibit ~~unless~~ only if offered by an adverse party

Reporter's comment:

1. Record, memorandum — electronic information needs to be covered. Joe has proposed a fix by adding a rule on definitions. See new Rule 1102.

2. Change from "correctly" to "accurately" in 5(C) — I raised the question whether there might be a substantive difference between reflecting knowledge "correctly" and reflecting knowledge "accurately." Ken Broun researched this question and responded as follows:

> Current Rule 803(5) requires that the record be on a matter that the witness . . . cannot recollect well enough to testify fully and "accurately." In a later clause, the Rule says that the statement must reflect knowledge "correctly." Is there a difference between "accurately" – used to describe the state of the witness's memory – and "correctly" – used to describe the requirements for the record itself – or can the second use safely be changed to "accurately?"
>
> My short answer is that the term "accurately" can safely be substituted for "correctly" in describing the requirements for the record.
>
> The Advisory Committee Note, in discussing the method for establishing that the record meets the requirements of the Rule, states: "No attempt is made in the exception to spell out the method of establishing the initial knowledge or the contemporaneity and *accuracy* of the record . . ." (Emphasis added). Thus, the Committee used the term "accuracy" in its description of the requirement, apparently believing it to be synonymous with the term "correctly" used in the Rule itself.
>
> The reports of the Congressional Committees dealing with this Rule are unenlightening with regard to the use of the different terms. The main concern contained in those reports was that the language "or adopted" by the witness be added to the rule. The rule as drafted by the Committee, containing the different terms, is simply cited in the reports. See Report of the House Committee on the Judiciary, Fed. Rules of Evidence, H.R. Rep. No. 650, 93d Cong., 1st Sess., p. 14 (1973); Report of the Senate Committee on the Judiciary, Fed. Rules of Evidence, S. Rep. No. 1277, 93d Cong., 2d Sess., p. 27 (1974).
>
> The Courts have consistently used the word "accurate" or other forms of the word to describe the requirements that the record must meet to come within the exception. Perhaps the most significant issue in the federal courts with regard to Rule 803(5) is the foundation necessary where one person perceives an event and repeats it to another who records the statement. The courts have held that both persons must ordinarily testify to establish that the statement is a past recollection recorded under rule 803(5). The cases dealing with the issue have consistently used the term "accurately" or other forms of the word rather than

"correctly" or other forms of that word For example, in *United States v. Williams,* 951 F.2d 853, 858 (7th Cir. 1992), the court stated:

> The person who witnessed the event must testify to the *accuracy* of his oral report to the person who recorded the statement The record must also testify to the *accuracy* of his transcription. Weinstein's Evidence § 803(5)[1]; Louisell & Mueller, Federal Evidence § 445. (Emphasis added)

Louisell, in § 445, cited in *Williams,* also uses the word "accurately" rather than "correctly." Interestingly, Weinstein uses both in commenting on another aspect of the rule: "[I]t is sufficient if the witness testifies that he knows that a record of this type is *correct* because it was his habit or practice to record such matters *accurately.*" (Emphasis added). Weinstein & Berger, § 803(5) [01] 803-181. The language from Weinstein is quoted favorably in *Parker v. Reda,* 327 F.3d 211, 214 (2d Cir. 2003)

In *United States v. Lewis,* 954 F.2d 1386, 1395 (7th Cir. 1992), the court approved admission of an FBI agent's recording of a witnesses statement under Rule 803(5). The court noted that the agent "testified he *accurately* transcribed his notes of the interview when he prepared the report." (Emphasis added). The court stated that there were no indications that the report was "*inaccurate*" but that the "better practice, however, would be for the government to have witnesses examine the interview reports shortly after they are prepared to ensure that the reports are *accurate* " (Emphasis added)

See also, United States v Hernandez, 333 F.3d 1168, 1179 (10th Cir. 2003) where the court noted that recollection recorded through the efforts of more than one person under Rule 803(5) possess circumstantial guarantees of trustworthiness. It added·

> Such recollections have sufficient indicia of *accuracy* to be admitted in evidence when the parties who jointly contributed the record testify that, on the one hand, the facts contained in the record were observed and reported *accurately,* and on the other hand, that the report was *accurately* transcribed. (Emphasis added).

In all of these instances, the courts are referring to the requirement of the rule that the record reflect the witness's knowledge "correctly." Yet, in each instance, the term "accurately" or another form of the same word is used. I did not come across a case that uses the term "correctly" in this context. The language used by the courts indicates that the term "accurately" is at least synonymous, if not preferable, to the term "correctly" used in the rule.

As a further indication, the Webster's definition of "accuracy" uses "correctness" as a synonym I suppose an etymologist could give us some differences in the two terms, but for our purposes I believe them to be synonymous.

Judge Ericksen *I don't disagree with anything in Prof Broun's research Nevertheless, with the accuracy/correctness of the witness's prior recordation being separated out, we need to be especially careful that we do not cause a substantive requirement that the prior information be "correct" After all, a witness can be wrong about something then as well as now The question for 803(5) is whether the record reflects what the witness knew or thought he knew back then In my sense of things, the old language clearly requires that the reflection be correct, but the rule takes no position on the correctness (or accuracy) of the knowledge.*

Meyers: I am satisfied that "accurately" can safely be substituted for "correctly"

Return to the Rule — 803(6)

(6) Records of a Regularly Conducted Activity. A ~~memorandum, report~~, record~~, or data compilation, in any form,~~ of an acts, events, conditions, opinions, or diagnoseis~~;~~ if:

(A) the record was made at or near the time by~~;~~ ~~–~~ or from information transmitted by~~;~~ ~~–~~ a ~~person~~ someone with knowledge~~;~~ ;

(B) the record was ~~if~~ kept in the course of a regularly conducted business activity~~;~~ ~~and~~ ;

(C) making the record ~~if it~~ was ~~the~~ a regular practice of that business activity ~~to make the memorandum, report, record or data compilation,~~ ;

(D) all ~~as~~ these conditions are shown by the testimony of the custodian or ~~other~~ another qualified witness, or by a certification that complies with Rule 902(b)(11)~~, Rule 902~~ or (12)~~;~~ or with a statute permitting certification~~;~~ ; and

(E) ~~unless~~ the opponent [note: a good contrast with *proponent?* We'd have to check for consistency] does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

~~The term "business" as used~~ "Business" in this paragraph (6) includes any kind of ~~business, institution, association, profession,~~ organization, occupation, or calling, ~~and calling of every kind,~~ whether or not conducted for profit

Reporter Comment:

1. Trustworthiness clause: bracket "a good contrast with proponent?" — Opponent seems proper here. It's a common reference and it is a good contrast with "propenent".

2. Trustworthiness clause, changing "unless" to "the opponent does not show" — the existing rule is unclear on who has the burden when a trustworthiness question is raised. Of course the proponent has the burden of showing that the admissibility requirements of a hearsay exception are met. But the trustworthiness clause is essentially an *exception* that applies to exclude a business record when the other admissibility requirements are met. This has led every reported case I know to hold that the burden of showing untrustworthiness is on the opponent of the evidence. [The leading case being Judge Becker's comprehensive opinion in the Japanese Products litigation.] Therefore, it would appear that the shift implemented by the restyling does not constitute a substantive change — unless making a substantive point more clear when it might have been purposely left vague is a substantive change.

Meyers comment on trustworthiness clause

> *I would keep the trustworthiness component vague While I have not canvassed the cases, the explicit reference to the opponent having the burden of proof would appear to be a difference in tone that may have a substantive effect. For example, the court itself could presumably raise concerns about trustworthiness As another example, suppose notebooks are found in an apartment containing names and numbers and the DEA agent claims these are drug ledgers, i.e. records regularly maintained in the course of the drug business. Must the defendant put on evidence challenging reliability? How much could be accomplished through cross-examination? These types of records have been admitted pursuant to Fed. R. Evid. 803(6), but there may be cases where there are trustworthiness questions not readily provable by the defendant. Compare United States v. Lizotte, 856 F 2d 341, 344 (1st Cir. 1988)(admitting drug ledgers pursuant to Fed R. Evid 803(6)) with United States v. Wells, 262 F 3d 455, 459-62 (5th Cir. 2001)(oral testimony about destroyed drug ledgers without sufficient indica of trustworthiness not admissible).*

Reporter's comment: Margy doesn't cite cases that put the burden anywhere other than on the opponent. The *Wells* case was not about the trustworthiness clause but about the fact that there was no offering of any record at all — the government sought to establish a record on the basis of oral testimony that there was a record sometime in the past. Obviously this is not permitted by Rule 803(6).

Judge Ericksen agrees with all the Reporter's comments on Rule 803(6)

Return to the Rule — 803(7)

(7) Absence of an Entry in ~~Records Kept in Accordance With the Provisions of Paragraph (6)~~ a Record of Regularly Conducted Activity. Evidence that a matter is not included in ~~the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of~~ a record described in paragraph (6), if:

(A) the evidence is offered to prove ~~the nonoccurrence or nonexistence of~~ that the matter did not occur or exist; ;

(B) ~~if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved,~~ a record was regularly kept for a matter of that kind; and

(C) ~~unless the sources~~ the opponent does not show that the possible source [why is the current rule plural? cf. (6)(E)] of information or other circumstances indicate a lack of trustworthiness.

Reporter's Comment: The bracketed comment on lines 12-13 should be cut before the rules are sent to the Standing Committee. It's not on a point of contention.

(8) Public Records ~~and Reports.~~ ~~Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth~~ A record of a public office or agency [check for consistency] setting out:

(A) the office's or agency's activities ~~of the office or agency, or~~ ;

(B) ~~matters observed pursuant to duty imposed by law as to which matters~~ a matter observed while under ~~there was~~ a legal duty to report, ~~excluding, however,~~ but not including, in a criminal cases ~~a~~ matters observed by ~~police officers and other~~ someone officially engaged in law- enforcement ~~personnel~~ [the current plural suggests that two persons have to observe]; ;or

(C) in a civil ~~actions and proceedings and~~ case or against the government in a criminal cases, factual findings resulting from ~~an~~ a legally authorized investigation ~~made pursuant to authority granted by law;~~ .

But the record is not admissible if the opponent shows that ~~unless~~ the sources of information or other circumstances indicate lack of trustworthiness

Reporter comments:

1. Bracket, check forconsistency on office or agency – we have used "office or agency" throughout — see.,e.g., 408. The Justice Department checked this and found it was necessary to include both terms to be comprehensive. Joe proposes a definitional fix in Rule 1102, supra. If that definitional fix is implemented, then "public office or agency" should be changed to "public office" in this rule.

2. Bracketed comment, line 31— This bracketed comment should be deleted before the rules are sent to the standing committee. It's an observation, not about any remaining point of contention.

3. Trustworthiness clause — Placing the trustworthiness clause in a separate paragraph clears up an ambiguity in the original rule — whether the trustworthiness clause applies only to (C) reports or to all reports. Commentators, such as Mueller and Kirkpatrick, indicate that it should apply — and was intended to apply — to all public reports (and so would be parallel with business records, as the trustworthiness clause in that exception applies to all records proffered under it). I have not found a case in which a court held that the trustworthiness inquiry is completely inapplicable to a report offered under A or B. Indeed the case law that exists applies the trustworthiness requirement to all such reports. So, assuming that clarifying vague language is not itself a substantive change, this is a good clarification.

Likewise, the restyling clarifies that the burden of proving untrustworthiness is on the opponent. As with the business records exception, the case law appears to be uniform in placing that burden on the opponent. So, again, if clarification is itself not substantive, then this is a good change.

Broun: *I too like placing the trustworthiness clause in a separate paragraph.*

Judge Ericksen.

An informant might be "engaged in law-enforcement" and not be law enforcement personnel as this rule means it

Meyers on (B) and (C).

I know that Professor Kimble will disagree but I thinking "excluding" is different (at least in tone) from "not including". The law enforcement exclusion in criminal cases subject to the discussion below is a prohibition. It is more than a statement that Rule 803(8) does not cover these documents. For example, courts have held that the government cannot get around the exclusion by using another rule, such as Rule 803(6) See e.g. United States v. Oates, 560 F.2d 45 (2d Cir 1977), see also United States v. Cain, 615 F 2d 380 (5th Cir 1980).

Professor Kimble, 2/10/09:

On *not including*: I'd like this to be consistent with 803(a)(3). I look for this kind of parallelism.

Reporter comment on excluding/not including: *Oates* has been repudiated by a number of courts, including in its own circuit, for its proposition that public reports can never be admissible under another exception if they are excluded by 803(8). A law enforcement report can be admitted, for example, as a past recollection recorded if the admissibility requirements of that exception are satisfied. The reason that you can't end-run 803(8) with 803(6) is that the law enforcement reports excluded under 803(8) are only those that are prepared for litigation against a specific individual after a crime occurs. That disqualifying factor means that those same reports are excluded under the trustworthiness clause of 803(6). See Federal Rules of Evidence Manual 803-57 through 60. In sum, I think not including is a stylistic rather than a substantive change.

Return to the Rules — 803(9)

(9) Public Records of Vital Statistics. ~~Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made~~ A record of a birth, death, or marriage, if reported to a public office or agency ~~pursuant to requirements of law~~ in accordance with a legal duty.

(10) Absence of a Public Record or an Entry in a Public Record. Testimony — or a certification under Rule 902 — ~~To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony,~~ that a diligent search failed to disclose a ~~the~~ public record~~, report, statement, or data compilation,~~ or an entry in one if the testimony or certification is offered to prove that:

(A) the record or entry does not exist; or

(B) a matter did not occur or exist, even though a public office or agency regularly kept a record for a matter of that kind

Judge Hinkle, style suggestion–

"even though" seems awkward Would a dash followed by "if" be better?

Professor Kimble, 2/10/09.

On *even though*: you're trying to prove that something did not occur or exist. So you offer testimony that a search didn't disclose a record *even though* a record of the matter was regularly kept. Isn't that the logic? Not *if* a record was regularly kept.

(11) Records of Religious Organizations Concerning Personal or Family History. ~~Statements~~ A statement of births, ~~marriages, divorces, deaths,~~ legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or ~~other~~ similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Certificates of Marriage, Baptismal, and Similar ~~Certificates~~ Ceremonies. ~~Statements~~ A statement of fact contained in a certificate:

(A) made by a ~~clergyman, public official, or other~~ person who is authorized by ~~the rules or practices of~~ a religious organization or by law to perform the act certified; ;

(B) attesting that the ~~maker~~ person performed a marriage or ~~other~~ similar ceremony or administered a sacrament; ; and

(C) purporting to have been issued at the time of the act or within a reasonable time ~~thereafter~~ after it.

(13) Family Records. ~~Statements~~ A statement of fact ~~concerning~~ about personal or family history contained in a family record, such as a Bibles, genealogiesy, charts, engravings on a rings, inscriptions on ~~family~~ a portraits, ~~engravings on urns, crypts, or tombstones, or the like~~ or an engraving on an urn or burial marker.

(14) Records of Documents That Affect ~~Affecting~~ an Interest in Property. The record of a document ~~purporting~~ that purports to establish or affect an interest in property; if:

(A) the record is offered to prove ~~as proof of~~ the content of the original recorded document, along with its signing and its ~~execution and~~ delivery by each person ~~by whom it purports to have been executed,~~ who purports to have signed it;

(B) the record is kept in ~~if the record is a record of~~ a public office; and

(C) ~~an applicable~~ a statute authorizes ~~the~~ recording ~~of~~ documents of that kind in that office.

(15) Statements in Documents ~~Affecting~~ That Affect an Interest in Property. A statement contained in a document ~~purporting~~ that purports to establish or affect an interest in property if:

(A) the matter stated was relevant to ~~the purpose of~~ the document's purpose; and

(B) ~~unless~~ the opponent does not show that later dealings with the property ~~since the document was made have been inconsistent~~ are inconsistent with the truth of the statement or the purport of the document.

(16) Statements in Ancient Documents. ~~Statements~~ A statement in a document ~~in existence twenty years or more the~~ that is at least 20 years old and whose authenticity ~~of which~~ is established.

Judge Hinkle:

Does "document" here have a restricted meaning, and if so, should we say so? On its face, if "document" just means "writing," this would authorize admission of evidence in violation of Crawford --- as, for example, a witness statement in a retrial for a crime that occurred more than 20 years ago This presumably isn't what the rule contemplates, but unless "document" has a restricted meaning, that is what it says. This is the same language as in the existing rule, so perhaps for restyling purposes, we should just leave it as it is. But this at least relates to the global issue of how to describe a writing.

(17) Market Reports; and Similar Commercial Publications. Market quotations, tabulations, lists, directories, or other ~~published~~ compilations; — published in any form — generally ~~used and~~ relied ~~upon~~ by the public or by persons in particular occupations.

Reporter comment: I raised the question whether deleting the words "used and" — leaving only the words "relied upon" — might constitute a substantive change. Ken Broun researched the question and filed this report:

Rule 803(17) provides a hearsay exception for market quotations, etc., "used and relied upon" by the public or by persons in particular occupations. The question is whether the "used and" can be eliminated from the rule without changing its meaning. My short answer is yes – the words serve no substantive purpose.

The Advisory Committee note cites common law authority, including Wigmore, as well as existing rules. The language of the rule closely follows the California Evidence Code provision § 1340, which uses the phrase "used and relied upon." The Committee also cites Uniform Rule 63 (30), which contains the same phrase.

The justification for the exception set out in Rule 803(17) is stated as follows: "The basis of trustworthiness is general *reliance* by the public or by a particular segment of it, and the motivation of the compiler to foster *reliance* by being accurate." (Emphasis added). Note that the term"reliance" is used without the addition of "use and."

The case law applying rule 803(17) also talks in terms of "relied" rather than "used." Typical is *United States v Masferrer*, 514 F.3d 1158, 1163 (11th Cir. 2008) ("The government presented evidence at trial establishing that Bloomberg financial information is universally *relied upon* by individuals and institutions involved in financial markets" [emphasis added]). *See also United States v Mount*, 896 F.2d 612, 625 (1st Cir. 1990) ("[Witness] testified that manuscript dealers like himself *rely* on Basler's work to locate original Lincoln documents so the foundation requirements of Rule 803(17) were met." [emphasis added].

"Use" and "rely" are clearly different terms. One can use something without relying on it. Thus, if the rule had said "used *or* relied upon," both terms would be necessary. But the language of the rule is "and." You can't rely on something without "using" it. The language in the Advisory Committee Note and used in the cases demonstrates that "relied upon" is the operable term.

We can eliminate "used and" without risking a substantive change.

(18) Statements in Learned Treatises, Periodicals, or Pamphlets. ~~To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination,~~ A statements contained in ~~published~~ a treatises, periodicals, or pamphlets ~~on a subject of history, medicine, or other science or art,~~ — published in any form — if the publication is:

(A) called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination ; and

(B) established as a reliable authority by the expert's admission or testimony, ~~or admission of the witness or~~ by ~~other~~ another expert's testimony, or by judicial notice.

If admitted, the statements may be read into evidence but ~~may~~ not ~~be~~ received as an exhibits.

Reporter comment:

1. Deleting "history, medicine, or other science or art" — that description is intended to be comprehensive, and Joe's point, I think, is that if it covers all subject matter, then there is no need for a reference at all. The Committee may wish to think about whether the list is so completely comprehensive that it can be deleted — the risk is that there is subject matter not covered on the list, so that a publication might be admitted under the restyled version that would not be admitted under the existing rule.

Ken Broun did some research on deleting the listed subject matters, and files this report:

There is nothing in the Advisory Committee Note that would limit the subject matter of the treatises or other publications used The Advisory Committee Note cites Uniform Rule 63(31), which contains the phrase "on a subject of history, science or art." The concerns expressed in the Note were for the use of the publications apart from an expert's testimony. The Note states: "The rule avoids the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which an expert is on the stand and available to explain and assist in the application of the treatise if desired." The exception applies so long as an expert is confronted with the treatise on direct or cross-examination and the treatise is established as authoritative

The tie-in of the exception to the testimony of a witness qualified as an expert would seem to eliminate disputes as to the subject matter of the publication. In McCormick on Evidence § 321, 393 (6th ed. 2006), the author states: "The rule is broadly worded as to

subjects – "history, medicine or other science or art" – and is sufficient to include standards and manuals published by government agencies and industry or professional organizations." Examples of the expansion of the rule to cover things outside of what one would ordinarily consider science or art include: Alexander v. Conveyers & Dumpers, Inc., 731 F 2d 1221 (5th Cir. 1984) (American Safety Code for Conveyers); Dawson v. Chrysler Corp., 630 F.2d 950, 961 (3d Cir. 1980) (automobile crashworthiness reported prepared for U.S. Department of Transportation); Johnson v. William C., Ellis & Sons Iron Works, Inc. 609 F. 2d 820, 823 (5th Cir. 1980) (American Standard Safety Code for Power Presses).

As seems clear from the Advisory Committee note, the key is not the subject matter of the publication but the establishment of its authoritativeness. See Schneider v Revici, 817 F. 2d 987, 991 (2d Cir. 1987) (report properly excluded where there was a failure to lay foundation regarding authoritativeness). In addition, courts have held that the material must be published in a form that subjects it to widespread scrutiny. SeeUnited States v. Jones, 712 F.2d 115, 121 (5th Cir., 1983) (prior testimony by a witness did not qualify under Rule 803(18); exception confined to "published works").

The words "history, medicine, or other science or art" are unnecessary to the substantive meaning of the exception. So long as an expert is confronted with a publication established as reliable authority, there would seem to be no limitation on subject matter. It is hard to imagine a publication that would be excluded so long as an expert is confronted with it and someone testifies that it is a reliable authority.

2. Treatise "in any form" — Judge Hinkle asks the Reporter whether the cases uniformly treat electronic publication as sufficient. My response is that there are very few federal cases, but the reported cases do treat electronic publication as sufficient. The leading case is *Costantino v. Herzog*, 203 F.3d 164 (2d Cir. 2000).

Return to the text — 803(19)

(19) Reputation ~~Concerning~~ About Personal or Family History. A reputation ~~Reputation~~ among ~~members of~~ a person's family by blood, adoption, or marriage~~;~~ — or among a person's associates~~,~~ or in the community; — ~~concerning~~ a about the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, ~~legitimacy;~~ relationship by blood, adoption, or marriage, ~~ancestry,~~ or other similar facts of personal or family history.

Reporter's Comment:

The Style Committee considered whether to change "reputation" to "understanding" and it opted to retain the language of the current rule — as well as in the other "reputation" exceptions in (20) and (21).

Return to the text — Rule 803(20)

(20) Reputation ~~Concerning~~ About Boundaries or General History. A reputation ~~Reputation~~ in a community, ~~—~~ arising before the controversy, ~~—~~ ~~as to~~ about boundaries of ~~or customs affecting~~ lands in the community or customs that affect the land, ~~and reputation as to events of general history~~ or about general historical events important to ~~the~~ that community, ~~or State~~ state, or nation ~~in which located~~.

(21) Reputation ~~as to~~ About Character. A reputation ~~Reputation of a person's character~~ among a person's associates or in the community about the person's character.

[*Note on (19)-(21) from Professor Kimble*: is there a better word than *reputation*? The whole idea seems fuzzy here. There's a hearsay exception for "reputation" — an abstract idea, as opposed to a record, etc. I can't see what is being offered or who is testifying.]

Reporter's comment: Response to bracketed comment on a better word than reputation, what is being offered, etc. — These hearsay exceptions are not used frequently, but when they are, they allow the jury to consider reputation for its truth, i.e., that the reputation is accurate. So for example, if you want to prove that someone is adopted, one way to do so is by proving reputation within the family that the person was adopted. The witness would be anyone with sufficient knowledge of the reputation. Under the circumstances, there is no other word to use. It's reputation. It would be confusing to the bar to change it.

Accordingly, Professor Kimble's bracketed comment should be deleted from the side by side before the rules are submitted to the Standing Committee. The Style Subcommittee has voted in agreement with the Advisory Committee that the word "reputation" should be retained, so there is no remaining point of disagreement.

(22) Judgment of a Previous Conviction. Evidence of a final judgment of conviction — even one on appeal —; if:

(A) the judgment was entered after a trial or ~~upon a plea of~~ guilty plea, ~~(~~ but not ~~upon~~ a ~~plea of~~ nolo contendere plea; ~~)~~;

(B) the judgment was for a ~~adjudging a person guilty of a~~ crime punishable by death or by imprisonment ~~in excess of one~~ for more than a year; ;

(C) the evidence is offered to prove any fact essential to ~~sustain~~ the judgment; ; and

(D) ~~but not including,~~ when offered by the government in a criminal prosecution [case?] for a purposes other than impeachment, ~~judgments against persons other than the accused~~ the judgment was against the defendant

~~The pendency of an appeal may be shown but does not affect admissibility.~~ The opponent may show that an appeal is pending. [really needed?]

Reporter comment:

1. Criminal prosecution, line 28 — we have used "criminal case" previously. Perhaps "criminal prosecution" is the best term to use. It provides a more obvious distinction from a "civil case."

Meyers: *I am not sure that "criminal prosecution" is the best term Prosecution suggests that the government is seeking punishment but there are quasi-criminal proceedings that are not punishment per se, e g criminal forfeiture. I think this needs to be researched before we make the change.*

Judge Hinkle on last sentence and in response to Professor Kimble's question whether it is "really needed."

I think we need this sentence

Reporter's comment:

The Style Subcommittee left the bracketed question, but did not implement the suggestion. So the bracketed comment should be deleted before the Rules go to the Standing Committee.

(23) Judgments ~~as to~~ Involving Personal, Family, or General History, or a Boundary ~~Boundaries~~. A judgment that is offered to prove ~~Judgments as proof of~~ a matters of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; ; and

(B) could be proved ~~if the same would be provable~~ by evidence of reputation.

~~(24) [Other exceptions.] [Transferred to Rule 807]~~

Reporter comment:

It makes some sense to delete the reference to the transferred Rule 803(24). That transfer was more than a decade ago. On the other hand, it could be argued that it is doing no harm, and may help with electronic searches.

Broun *I agree with eliminating the transferred section.*

Back to the rule — a proposed new subdivision, 803(b):

(b) Definition of "Record." In paragraphs (a)(5)-(10), "record" includes a memorandum, report, or data compilation in any form. [This omits *statement* from (8) & (10). I think it may be swallowed up by *report.* I assume that we're not talking about "statements" to the newspaper, for instance.]

[*Special note from Professor Kimble*: current 803 changes the numbering scheme; for the first time, a number follows a number — e.g., 803(6). Nothing like that in any of the restyled rules. Surely, we don't want to leave that anomaly. And the definition in (b) saves gobs of repetition.]

Reporter's comment: Everyone knows that renumeration imposes transaction costs and makes electronic searches more difficult. Sometimes the benefits outweigh these dislocation costs. Not here. There is not enough bang for the buck. It "electrifies" only five hearsay exceptions, not any of the others, and not any of the other rules that require electrification, e.g., 412, 106, 902 and on and on. Two years ago the Committee reviewed a proposed Rule 107 that would provide an electronic fix for all the rules. Perhaps that should be reconsidered. But the proposed subdivision is an incomplete fix. To be fair, it also has the benefit of not having to refer to "memorandum, report, etc. in Rules 803(5) and 803(6) — but even that is not enough of a benefit given the serious dislocation for all of the 803 exceptions, as they now all would have a lettered subdivision.

Moreover, the purported fix is not even located near the exceptions that it is modifying. When you read the business records exception, you will be asking, "what happened to data compilations?" You don't find out until you read all the way past 17 more exceptions. It's like a treasure map — contrary to the point of the restyling, which is to make the rules more user-friendly.

Nor is the benefit of rectifying the "anomaly" of a number after a number sufficient to justify a half-or-less solution to the problems of electronic evidence and repetition in Rules 803(5) and (6). As it is now, it looks like a new subdivision was thought up just for the sake of rectifying the number-after-number anomaly. I know that this is not the case, but that is what it might look like to the practicing bar.

This is a fundamental restructuring of a rule that is used every day in the federal courts. That should only be done if truly necessary. The fix proposed is not effective or comprehensive enough to justify this major change.

Professor Kimble's response

I strongly disagree with Dan's comments. First, the whole point of restyling is not only to improve clarity and consistency in the evidence rules but also to make the rules consistent across the board. The numbering in 803 is inconsistent with the rest of the evidence rules and also with all the other sets of restyled rules (not to mention violating our guidelines). Second, the rules will be published for at least a year, right? So people will have plenty of notice and time to adjust. Third, the adjustment is not difficult. It would be different if we were changing the last number — for instance, changing 803(6) to 803(a)(7). But we are simply asking people to realize that there is now an inserted (a). So the fix works across the entire rule. Fourth, we should take the long view. This chance to set the numbering right — as part of our overall effort to improve the rules — will not come along again for many years. Fifth, Dan misses the point of the definition. It's not to "electrify" the five hearsay exceptions. That is, the definition is not about *in any form* (in fact, I'll omit *in any form* from this definition when I prepare the overall definitional rule). The point of the definition is to avoid nine repetitions of *memorandum or record* and *memorandum, report, record or data compilation*. Just look at those five paragraphs and see how much cleaner they are. I visited two evidence classes at Thomas Cooley Law School and showed students the two versions of (a)(6). Students were rolling their eyes and shaking their heads. Finally, how have I made a substantive change? How does inserting an (a) change the words? I think numbering is presumptively a matter of style. And even then, we've been quite conservative about changing the current numbers.

Justice Hurwitz *I don't think that the change is substantive, but it is in a strange place I still prefer the universal definition route.*

Broun *I would not add a definition section to Rule 803 for the reasons Dan articulates*

Saltzburg *My preference, like Dan's is not to put (a) before the exceptions simply to add a (b) We have 34 years of cases without an (a), and this is sure to cause some research*

problems On the other hand, I don't think this is as large a problem as renumbering would be.

Reporter's closing comment: At the very least, the Committee may wish to consider whether the omission of "statements", as indicated by Joe's bracketed comment, is problematic. Can't there be an electronic statement that would need to be covered?

Rule 804

Rule 804. ~~Hearsay~~ Exceptions; — When the Declarant Is Unavailable as a Witness

(a) Definition of Unavailability. ~~"Unavailability as a witness" includes situations in which~~ A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted by a court ruling ~~of the court~~ on the ground of having a privilege to not testify about ~~from testifying concerning~~ the subject matter of the declarant's statement; ~~or~~

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

(3) testifies to ~~a lack of memory of~~ not remembering the subject matter ~~of the declarant's statement~~; ~~or~~

(4) ~~is unable to be present or to~~ cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness ~~or infirmity~~; or

(5) is absent from the trial or hearing and the statement's proponent ~~of a statement~~ has not been ~~unable~~, by process or other means, to procure:

(A) the declarant's attendance; ~~(~~ or

(B) in the case of a hearsay exception under subdivision (b)(2), (3), or (4) below, the declarant's attendance or testimony~~) 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.~~ But this Rule 804 does not apply if the statement's proponent wrongfully caused the declarant to be unavailable in order to preven the declarant from attending or testifying.

Saltzburg comment re (a)(1). *The wording is awkward. Why not say "is exempted by a court sustaining a privilege claim"?*

Reporter's comment:

1. Trial or hearing — this is a universal question that must be handled in a top to bottom review.

2. Last paragraph — the existing rule states that conduct constituting "procurement or wrongdoing" disentitles the party from relying on hearsay. The restyling deletes "procurement". This may be a substantive change because deleting "procurement" takes away the emphasis that there must be an affirmative act.

The word "procurement" is emphasized in cases such as *United States v. Dolah,* in which the defendant argued that the government could not use a hearsay statement against him because the declarant's unavailability— based on his declaration of a privilege — could have been alleviated by the government's grant of immunity. The *Dolah* court held that the hearsay was admissible, because the *failure* to grant immunity did not constitute "procurement" under Rule 804(a) — that is, procurement implies affirmative conduct.

So, "procurement" or some other word implying affirmative conduct should be retained in the rule. "Caused" doesn't do the trick, because the government did in a sense "cause" unavailability in *Dolah* by refusing to immunize the witness.

Return to the Rule — 804(b):

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

Reporter comment:

1. "Rule against hearsay" — As Professor Saltzburg has suggested, this terminology is inaccurate. We suggest that it be replaced with a reference to Rule 802: "The following are not excluded by Rule 802 if the declarant is available as a witness:"

(1) Former Testimony. Testimony that:

(A) was given as a witness at ~~another~~ a trial, 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~~, whether given during the current proceeding or a different one, and

(B) is now offered against a party ~~if the party against whom the testimony is now offered,~~ — or, in a civil ~~action or proceeding~~ case, a predecessor in interest; — who had an opportunity and similar motive to develop ~~the testimony~~ it by direct, cross-, or redirect examination.

Reporter comments:

1. Change from civil action and proceeding to civil case — this is a universal question. Joe proposes a fix in the new rule on definitions. See Rule 1102.

2. Hearing/trial — this is another universal question. Ken Broun filed this report on the varying uses of "hearing" and "trial" in the evidence rules:

> Could the word "trial" be substituted for "hearing" in these rules without a substantive change? Could the word "trial" be added to "hearing" in these rules?
>
> My short answer is that the word "trial" could not be substituted for "hearing" without a change in meaning. There would seem to be no reason not to add "trial" to hearing if there was some other reason to do so.
>
> First, Rule 804(a)(4) and 804(a)(5) apply in all proceedings in which the Federal Rules of Evidence apply. The rules apply to all kinds of proceedings that are not technically trials. *See* Rule 1101(b). Rule 804(b)(1) has been held to apply to testimony given at hearings that are not trials, *e g*, *United States v. Poland,* 659 F.2d 884 (9th Cir. 1981) (testimony at motion to suppress hearing admissible). To substitute the word "trial" for "hearing" would change the law
>
> Second, there would seem to be no harm in changing the reference from "hearing" to "hearing or trial." Rule 804(a)(4) and 804(a)(5) clearly apply to all federal trials. Rule 804(b)(1) clearly applies to testimony given at former trial, *e.g., United States v Reed, 227 F 3d 763* (7th Cir. 2000) (testimony at former trial admissible).
>
> The Advisory Committee Notes refer to old Uniform Rule 62(7) in the case of the requirements for unavailability. That rule uses the term "hearing," as does Calif. Evid Code § 240 (a) (4) and (5), also cited in the note. My guess is that the drafters simply borrowed the language from these earlier rules without giving the issue much thought.
>
> The only problem with the addition of the words "or trial" is the possibility that there is something other than a "hearing" or a "trial" as to which the rule might apply. The word "proceeding" is used throughout the rules, including in Rule 804(b)(1) and in Rule 1101(b), describing the "proceedings" to which the Rules of Evidence apply. Although it seems unlikely that a court would find that there is some "proceeding" which is neither a "hearing" or a "trial," to be absolutely safe, we could substitute "proceeding" for "hearing" in Rules 804(a)(4) and (5) and in Rule 804(b)(1) and feel secure that there would be no change in the law.

Professor Kimble's response

> *Civil action or proceeding* and *trial/hearing/proceeding* are trickier than I had hoped. The first one is easier, using a definition: "civil case" means a civil action or proceeding. On the second one, as Ken Broun points out, *proceeding* is the

broadest word. It might work here, but I don't think it works as a generic solution. For instance, I don't think it would replace the word *trial* in the rules that require notice before trial: 404(b)(2)(B), 412(c)(1)(B), 413(b), 414(b). I trust that we don't need to add *or hearing* to those rules. Ultimately, I think the question is how many times we'd have to *trial or hearing*. I hope it's not dozens, because I've not yet come up with a definition that seems to work. For now, I'd add *or trial* in 804(a)(4), (a)(5), and (b)(1)(A). Make it *trial or hearing*.

Judge Hinkle: *This is a global issue related to "proceeding." If, in any other rule, we use both hearing and trial, we should also do so here*

Return to Rule— 804(b)(2):

(2) Statement Under the Belief of ~~Impending~~ Imminent Death. In a prosecution for homicide or in a civil ~~action or proceeding~~ case, a statement ~~made by a~~ that the declarant, while believing ~~that~~ the declarant's death ~~was~~ to be imminent, ~~concerning the~~ made about its cause or circumstances ~~of what the declarant believed to be impending death~~.

Saltzburg style suggestion: *The "declarant" is used too much. What about "a statement that the declarant makes in the belief that death is imminent about its causes or circumstances"?*

Reporter comment

Changing "impending" to "imminent" — Ken Broun filed the following report:

Current Rule 804(b)(2) is entitled **Statement under belief of *impending* death.** The body of the rule refers to a "a statement made by a declarant while believing that the declarant's death was *imminent*, concerning the cause or circumstances of what the declarant believed to be *impending* death." The question is whether the word *imminent* can be used in all places in the rule in lieu of *impending*.

The short answer is that I think that the change to a consistent use of *imminent* would not work a substantive change.

The Advisory Committee Note and the Congressional history give no assistance with regard to the use of these words. The Note cites California Evid. Code § 1242, which uses the phrase "immediately impending death." It also cites old Uniform Rule 63(5) which simply refers to *impending* death.

The leading case at the time of the adoption of the Rule was *Shepard v United States,* 290 U.S. 96, 54 S.Ct. 22 (1933). The Court in Shepard states that, in order for the exception to apply, the declarant "must have spoken without hope of recovery and in the shadow of *impending* death."(emphasis added) However, later in the opinion, the Court notes with regard to the statement in question: "death was not *imminent* and that hope was still alive." (emphasis added)

Cases decided under Rule 804(b)(2) also use the terms interchangeably, although *imminent* seems to be a somewhat more frequent usage.. *See, e.g , Webb v Lane*, 922 F.2d 390 (7th Cir. 1991) (at one point in the opinion the court refer's to declarant's consciousness of *impending* death; at another point it refers to Seventh Circuit cases concerning whether a declarant's sense of *impending* death may be inferred), *United States v Lawrence,* 349 F.3d 109, 116 (3d Cir. 2003) ("A declarant's statement identifying his/her assailant can be admitted as an exception to the hearsay rule if the declarant believes that he/she is facing *imminent* death" emphasis added); *United States v Two Shields,* 497 F.3d 789 (8th Cir. 2007) (inquiry as to whether death was *imminent*).

The issue with regard to the exception is not between the meanings of "imminent" and "impending," but rather the extent to which the declarant has actually abandoned hope *See* McCormick, Evidence, § 310. The author of that section also uses the terms *imminent* and *impending* interchangeably

The Random House Dictionary of the English Language defines *imminent* as "likely to occur at any moment; impending.

impending is defined as "about to happen' imminent."

Merriam-Websters does not define the terms quite so identically, but the definitions are still very close: *imminent:* "ready to take place;" *impending:* "to hover threateningly; to be about to occur."

In light of both the case authority and the dictionary definitions, I believe it is safe to restyle Rule 804(b)(2) using the word *imminent* throughout.

Meyers: *Reading the words, I am not sure that "impending" is the same as "imminent," but Professor Broun's research suggests I am wrong. I just don't think the question should be off the table.*

Return to the rules — 804(b)(3):

(3) Statement Against Interest. A statement ~~which~~ that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; ~~was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.~~ ; and

(B) ~~A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless~~ is supported by corroborating circumstances that clearly indicate ~~the~~ its trustworthiness ~~of the statement~~, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

Reporter comment:

1. Changing "so far" to "so" before "contrary" and "tended" in subdivision (A) — the existing rule requires a contextual analysis. The question is not whether the statement was in fact disserving but whether it so far tended to be disserving that a person wouldn't have said it if untrue. The style subcommittee added back the word "so" — which had been deleted in a previous iteration. It would appear that this is a sufficient fix for maintaining the contextual analysis of the existing rule.

2. Corroborating circumstances requirement: The restyling incorporates the proposed amendment that is currently out for public comment — the corroborating circumstances requirement applies to *all* declarations against penal interest, whether offered by the accused or the government. Given the timing, this strategy appears to make sense. It also avoids a problem in the existing rule that has been raised in the public comment to the amendment. The existing rule says that a statement *is not admissible* unless corroborating circumstances are provided. What it really means is that a statement is not admissible *under this exception* unless corroborating circumstances are provided. The restyling solves this requirement by limiting the corroborating circumstances requirement to this specific exception.

Return to the Rule — 804(b)(4)

(4) Statement of Personal or Family History. A statement about:

(A) ~~A statement concerning~~ the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, ~~legitimacy;~~ relationship by blood; ~~adoption;~~ or marriage, ~~ancestry;~~ or ~~other~~ similar facts of personal or family history, even though the declarant had no ~~means~~ way of acquiring personal knowledge of ~~the matter stated~~ that fact; or

(B) ~~a statement~~ another person concerning ~~the foregoing matters~~ any of these facts, ~~and~~ as well as death ~~also, of another person~~, if the declarant was related to the ~~other~~ person by blood, adoption, or marriage or was so intimately associated with the ~~other's~~ person's family ~~as to be likely to have accurate information concerning the matter declared~~ that the declarant's information is probably accurate.

Reporter's comment:

Change from "likely to have accurate information" to "probably accurate" — "probably accurate" seems more strenuous than "likely to have accurate information." As it appears to set a higher standard for admissibility, it appears to be a substantive change.

Return to the Rule — transferred 804(b)(5)

~~**(5) [Other exceptions.]** [Transferred to Rule 807]~~

Reporter comment:

As with Rule 803(24), there is an argument that there is no need to keep the deletion, because the transfer occurred more than a decade ago. But unlike 803(24), this deletion will cause a disruption in electronic searches, because it will operate to move the forfeiture provision up to Rule 804(b)(5). Again the benefit, in this case of consecutive numbering, does not obviously outweigh the transaction costs imposed by the numbering change.

Saltzburg: *I think it is important to leave in the rule and indicate that it was abrogated. This makes it clear for those who grow up knowing about Rule 807 that previously there were two rules*

(6) (5) ~~Forfeiture By Wrongdoing~~ Statement Offered Against a Party Who Wrongfully Caused the Declarant's Unavailability. A statement offered against ~~a~~ the party that ~~has~~ wrongfully caused — or ~~engaged or~~ acquiesced in ~~wrongdoing~~ wrongfully causing — ~~that was intended to and did, procure the unavailability of the declarant as a witness~~ the declarant to be unavailable in order to prevent the declarant from attending or testifying.

Reporter Comment:

1. The intentionality requirement is important in this rule — indeed it is grounded in the Constitution, as the Court recently stated in *Giles v. California:* in order to find forfeiture, it is not enough to show wrongful conduct. It must be shown that the wrongful conduct was done with the intent to keep the witness from testifying. The Style Subcommittee's version of the rule deletes the words "intended to". The intentionality requirement appears to be addressed by the language "in order to prevent the declarant from attending or testifying." Given the important of the intentionality requirement, would it not be more advisable to include the word "intent" in the rule? If so, I would suggest the following change to the end of the rule:

> **A statement offered against the party that wrongfully caused — or acquiesced in wrongfully causing — the declarant to be unavailable ~~in order~~ with the intent to prevent the declarant from attending or testifying.**

2. The current rule refers to procuring the unavailability of the declarant "as a witness." This has been changed to preventing the declarant from "attending or testifying." Why add "attending" to testifying? The apparent goal is to establish some parallelism with the language of Rule 804(a)— a provision that is distinguishable because it deals with excluding, not admitting hearsay statements. At any rate, even if the two provisions are to be treated in lockstep, the better fix is to delete the word "attending" in Rule 804(a), rather than adding it here. "Attending" seems to add nothing to "testifying" and it could raise unnecessary questions about whether something meaningful has been added to this rule.

Rule 805

Rule 805. Hearsay Within Hearsay

Hearsay ~~included~~ within hearsay is not excluded ~~under the~~ by the rule against hearsay ~~rule~~ if each part of the combined statements conforms with an exception to the ~~hearsay~~ rule ~~provided in these rules~~.

Comment: This is another example of the problematic use of the term "rule against hearsay."

Rule 806

Rule 806. Attacking and Supporting the Declarant's Credibility ~~of Declarant~~

When a hearsay statement~~,~~ ~~—~~ or a statement defined in Rule 801(d)(2)(C), (D), or (E)~~;~~ ~~—~~ has been admitted in evidence, the declarant's credibility ~~of the declarant~~ may be attacked, and ~~if attacked may be~~ then supported, by any evidence ~~which~~ that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of [the evidence may consist of] an inconsistent ~~Evidence of a~~ statement or conduct by the declarant, regardless of when it occurred or whether the declarant had ~~by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded~~ an opportunity to ~~deny or~~ explain or deny it. If the party against whom ~~a hearsay~~ the statement ~~has been~~ was admitted calls the declarant as a witness, the party ~~is entitled to~~ may examine the declarant on the statement as if ~~under~~ on cross-examination.

Reporter comments:

1. Bracket, "the evidence may consist of", lines 7-8. It would seem to be a style call. "The court may admit" sounds better than "the evidence may consist of".

2. Lines 9-10: The language "when it occurred" is awkward when applied to a statement. It's awkward to refer to a statement as having "occured." It's would seem more idiomatic to refer to a statement as having been "made."

Rule 807

Rule 807. Residual Exception

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if it is ~~A statement~~ not specifically covered by Rule 803 or 804:

(1) the statement has ~~but having~~ equivalent circumstantial guarantees of trustworthiness; ~~is not excluded by the hearsay rule;~~ ; and

(2) ~~if the court determines that~~ all the following apply:

(A) the statement is offered as evidence of a material fact;

(B) the statement is more probative on the point for which it is offered than any other evidence ~~which~~ that the proponent can ~~procure~~ obtain through reasonable efforts; and

(C) ~~the general~~ admitting the statement will best serve the purposes of these rules and the interests of justice ~~will best be served by admission of the statement into evidence~~.

(b) Notice. ~~However, a statement may not be admitted under this exception unless~~ The statement is admissible only if, before the hearing or trial, the proponent ~~of it makes known to the~~ gives an adverse party reasonable notice ~~sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention~~ of the intent to offer the statement and ~~the~~ its particulars ~~of it~~, including the declarant's name and address, ~~of the declarant~~ so that the party has a fair opportunity to meet it.

[Trying for as much consistency as possible with 404(b)(2) and 609(b). Note our continuing problem with *hearing or trial* 404(b)(2) uses *trial* only.]

Reporter comments:

1. "Rule against hearsay" — as in Rule 803 and 804, Professor Saltzburg's suggestion is sound — there is no "rule against hearsay", and a better reference is to Rule 802 specifically.

2. Bracketed comment on consistency — this should be deleted before the rules are sent to the Standing Committee. It's not about any outstanding issue that the Standing Committee will have to resolve.

Rule 901

Rule 901. ~~Requirement of Authentication or Identification~~ Authenticating or Identifying Evidence

(a) In General ~~Provision~~. When an exhibit or other item must be authenticated or identified in order to have it admitted, the requirement ~~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~~ item is what its proponent claims.

(Alternative) To authenticate or identify an exhibit or other item in order to have it admitted, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

Reporter's comment:

This restyling raises a number of problems. First, why is there a need to refer to exhibits specifically? There is no such reference in the original. Referring to exhibits raises the inference that the rule is *mainly* about exhibits, which is not correct.

Professor Kimble's response:

I got the idea of using *exhibit* from *Weinstein's Evidence Manual* (7th ed.). He uses *exhibit* throughout his discussion of 901 to refer to what I call *item*. Regardless of whether we drop *exhibit or*, we badly need some generic term to refer to the items in (b)(1)–(10).

Second, and more important, the rule is limited to authenticating "items." But many forms of evidence that aren't "items" may nonetheless require authentication. For example, a purported telephone conversation with a party cannot be admitted unless it is shown that the party was the one talking. A conversation is not an "item" in any user-friendly sense. The current rule uses the term "matter in question" which, though perhaps not ideal, is far broader and more accurate than "item." Limiting authenticity questions to "items" is likely to be found a substantive change. I suggest a return to "matter in question" or, as an alternative, "proffered evidence."

Professor Kimble's response.

The trouble with *matter* is that it's generally abstract; it refers to a subject of some kind. But most of the items in (b)(1)–(10) are more concrete — handwriting, a specimen, appearance or contents, public records, ancient documents, a process or system. These are not easily thought of as matters. We need some term. I think *item* works for more of the, uh, items than *matter*. I'm opposed to *proffered evidence*.

Judge Hinkle suggests using "evidence" instead of "exhibit or other item" — then the word "evidence sufficient to support a finding" could be changed to "proof sufficient to support a finding" and so forth. Judge Hinkle also suggests that "in order to have it admitted" be changed to "in order to be admitted."

Judge Ericksen: *If we can't say **matter** (and I agree we can't) and we can't say **items** (again, we can't) and we're not allowed to say "proffered evidence," how about "evidence" OK, we're talking about what it takes to become "evidence." But then how is it we can turn right around and speak of "evidence that satisfies the requirement" in (b)?*

Saltzburg. *It should be "When evidence must be authenticated or identified, the requirement " Why do we need more?*

Judge Keenan: *I don't see why we have to change the old language Obviously, it is going to be an exhibit that is offered - - so I don't see why we have to include that word, "exhibit," or certainly not "item "*

Broun: *I am bothered by the use of either "items" or "exhibits." Yes, there is some vagueness in the current rule, but again, it is vagueness that the courts are used to I suppose there is little likelihood of a substantive change, but it is nevertheless not accurate in terms of what the rule actually does I don't think there is enough gain from the change in order to make it worthwhile.*

Professor Kimble, 2/10/09

On the use of the word *item*. the current rule uses the word *matter*. As I said in my initial response, *matter* does not work for most of the items in (b). (It's abstract, whereas most of the items in (b) are concrete.) Since *item* improves on the current rule, I'm mystified by the resistance. In actual practice, for all the "things" that lawyers authenticate or identify under 901, what percentage would not be covered by *exhibit or other item*? Finally, I've attached two pages from *Weinstein's Evidence Manual* (7th ed.). Notice how he uses *exhibit* for the generic term. I don't see how *exhibit or other item* can be a substantive change

Reporter's response:

Joe fails to address the many suggestions of Committee members that the word "evidence" is far better than the word "item." If "evidence" is used, everyone will know what we are talking about. "Item" is really a made up word for these purposes, with no prior referent in the Evidence Rules. What's wrong with "evidence"? It's more accurate, in that it covers every possible thing that can be offered under this rule.

Return to the Rule — 901(b):

(b) ~~Illustrations~~ Examples. ~~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~~ The following are examples only — not a complete list — of evidence that satisfies the requirement.

(1) Testimony of a Witness with Knowledge. Testimony that ~~a matter~~ an item is what it is claimed to be.

Reporter's Comment: The use of the term "item" is problematic for reasons stated above. It should either be returned to the original "a matter" or changed to "proffered evidence."

Saltzburg: Why not "evidence" instead of "item" or "matter"?

(2) Nonexpert Opinion ~~on~~ About Handwriting. ~~Nonexpert~~ A nonexpert's opinion ~~as to the genuineness of~~ that the handwriting is genuine, based ~~upon~~ on a familiarity with it that was not acquired for ~~purposes of~~ the current litigation.

(3) Comparison by ~~Trier or~~ an Expert Witness or the Trier of Fact. ~~Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated~~. A comparison with an authenticated specimen by an expert witness or the trier of fact.

Reporter's comment: I'm not sure why it's important to flip the trier of fact and the expert witness. There doesn't seem to be any logical or stylistic reason to make that change. Certainly when all things are equal, we should leave the original intact.

Professor Kimble's response.

Wouldn't the expert witness come before the trier of fact?

Reporter's response: Under the rule, there wouldn't have to be an expert witness at all.

Professor Kimble, 2/10/09:

The rule mentions expert witness and trier of fact. It doesn't make any difference whether you would or wouldn't have to have an expert witness. If you're going to mention two possibilities, there ought to be a logical order. Every series should have a logical progression.

Reporter's response: But why is your choice more "logical" than the one chosen by the drafters, in this example, where there is no actual progression at all, it's just two different concepts? This seems to be needless tinkering.

Return to the Rule, 901(b)(4)

*(4) **Distinctive Characteristics and the Like.*** The appearance ~~Appearance~~, contents, substance, internal patterns, or other distinctive characteristics of the item, taken ~~in conjunction~~ together with all the circumstances.

Reporter comments:

1. Use of "item" is problematic as discussed previously.

Saltzburg. Why not "evidence" instead of "item" or "matter"?

Return to the Rule: 901(b)(5)

(5) Opinion About a Voice ~~*Identification.*~~ ~~Identification of~~ An opinion identifying a person's voice~~;~~ — whether heard firsthand or through mechanical or electronic transmission or recording~~;~~ — ~~by opinion~~ based ~~upon~~ on hearing the voice at any time under circumstances ~~connecting~~ that connect it with the alleged speaker.

Reporter comment: The provisions for identifying a voice show that the use of the term "item" in the restyled version is problematic. It's doesn't seem to be an improvement to label a voice as "an item."

Professor Kimble's response:

> I think (5) and (6) are the only ones that *item* doesn't work well for. But we don't have to actually use the word *item* in (5) and (6). So I think the problem is minor compared with the gain of having a generic term.

Reporter response: Even if you don't use "item" in (5) and (6), they are already described as "items" in the introductory clause. That's what's confusing — giving a list of "items" and things on that list are not really "items."

(6) Evidence About a ~~Telephone~~ Phone [to cover a cell] ***Conversations.*** ~~Telephone conversations, by~~ For a phone conversation, evidence that a call was made to the number assigned at the time to: ~~by the telephone company to a particular person or business, if~~

(A) ~~in the case of~~ a particular person, if circumstances, including self-identification, show that the person answering ~~to be~~ was the one called; ; or

(B) ~~in the case of~~ a particular business, if the call was made to a ~~place of~~ business and the ~~conversation~~ call related to business reasonably transacted over the ~~telephone~~ phone.

Reporter Comments:

1. The circumstantial proof allowed under 901(b)(6)(A) is the same as that allowed under 901(b)(4). I note that there is no reference to "related" circumstances in the restyled (6)(A). This is all the more reason to delete "related" from (4).

2. The bracketed explanation "to cover a cell" should be deleted before the rules are sent to the Standing Committee. There is no disagreement about the provision.

(7) Evidence About Public Records or Reports. Evidence that: ~~a~~

(A) a public record ~~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 or agency where items of this ~~nature~~ kind are kept; ; or

(B) a document was lawfully recorded or filed in a public office or agency.

Reporter's Comments:

1. In a footnote to the side by side, the Style Subcommittee notes that it wants to make sure that the term "lawfully" captures the meaning of the current rule. The change is from a writing "authorized by law to be recorded" to a writing "lawfully recorded." Are there examples of filings lawfully made in a public office that are not authorized by law to be made there? I did a check of the cases on the handful of cases discussing 901(b)(7) and saw nothing to clarify this matter. Literally, the term "authorized by law to be recorded" would seem to refer to the *type* of writing, e.g., a license or patent application, as opposed to something that the law doesn't authorize to be recorded (e.g., a personal letter?).

2. The reference to "public office or agency" should be integrated with the proposed new rule on definitions — currently Rule 1102 — which defines public office as including a public agency.

Return to the Rule — 901(b)(8)

(8) Evidence About Ancient Documents or Data Compilations. ~~Evidence that a~~ For a document or data compilation, in any form, evidence that it:

(A) is in ~~such~~ a condition ~~as to create~~ that creates no suspicion ~~concerning~~ about its authenticity; ;

(B) was in a place where ~~it~~, if authentic, it would likely be; ; and

(C) ~~has been in existence~~ is at least 20 years ~~or more at the time it is~~ old when offered.

Judge Hinkle: *Global issue on how to refer to writings If nothing is excluded here, couldn't we just say, "Evidence that a writing (A) is in a condition . "? Or does "document" mean only certain kinds of writings?*

Professor Kimble, 2/10/09

I'm tempted by Judge Hinkle's suggestion to simply use *writing*, but then we'd have to think about the use of *document* in Rule 902(b) I'll try to deal with all the "writing" stuff, including *in any form*, in the top-to-bottom review, but it'll be a challenge. [See Rule 1102 for Joe's proposed fix].

(9) Evidence About a Process or System. Evidence describing a process or system ~~used to produce a result~~ and showing that ~~the process or system~~ it produces an accurate result.

(10) Methods Provided by a Statute or Rule. Any method of authentication or identification provided by ~~Act of Congress~~ a federal statute or by ~~other rules~~ a rule prescribed by the Supreme Court ~~pursuant to~~ [under statutory authority?].

Reporter's comment:

1. Bracket, under statutory authority — this is a universal question, also raised in Rules 402, 501 and 802 — for reasons expressed in the comment to Rule 802, this language should probably be retained. But see the proposed fix with a global definition, in new Rule 1102.

Rule 902

Rule 902. ~~Selfauthentication~~ Items That Are Self-Authenticating

Reporter's comment on heading:

Again we have the use of "items." For Rule 902, this is not as deeply problematic, as the list is exclusive (not illustrative) and it's arguable that the evidence covered in the rule appears to be accurately characterized as "items." Still, the Committee might wish to consider doing away with the new term "items" in this rule as well, for these reasons: 1) consistency would be better served by referring to "proffered evidence" – or to "the following" as under the existing rule; 2) "items" is a new term that is likely to cause confusion and litigation; 3) there is a colorable question of whether a statutory presumption might cover something that is not an "item" (see 902(10)); and (4) it is possible at a later date that the Committee may want to add to the 902 list something that should be self-authenticating and yet cannot be accurately referred to as an "item"

Professor Kimble's response on the title:

> First, the title of the current rule is odd. It sounds like a person is authenticating himself or herself. Second, Dan acknowledges that all the items in (b)(1)–(11) are indeed items. Third, I don't see why such a common term would be likely to cause confusion or litigation. Finally, I think that lawyers will easily adjust to the new term and that, having adjusted, they won't have any trouble with adding something that is not exactly an item, like a phone conversation. I understand not wanting to seem radical, but I don't think *item* is radical. And I think we should have a little more confidence that readers will not overreact to minor changes like this. For heaven's sake, we changed *averments* to *allegations* in the civil rules. Nobody raised a peep (that I remember).

Return to the text — 902(a)

(a) In General. ~~Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:~~ The items described in this rule are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted.

Reporter Comments:

1. This is an attempt to create subdivisions to get out of the so-called number after number "anomaly" (i.e., 902(1), etc.). The effort is transparent, because the new subdivision (a) is redundant. It says that the "items described" are self-authenticating — which is exactly the same principle as the first clause of new subdivision (b): "The following are self-

authenticating." Adding the same provision twice, simply to add a lettered subdivision, would seem very hard to justify to the practicing bar.

After all that has been done to avoid repetition in these rules (including hours of research to determine whether similar language is in fact repetitive) it seems ironic to add repetitive language, for the sole purpose of adding a letter between two numbers. It's for the Committee to consider whether the transactional costs (disruption of electronic research, integrity of the project, etc.) are justified by the benefit of having a letter between two numbers.

Professor Kimble's response:

The repetition is absolutely minimal — and worth it to get consistent numbering.

2. Another use of the problematic term "items." See the discussion of the heading, above.

Saltzburg: *Why not say "The evidence described in this rule is self-authenticating and no extrinsic evidence of authenticity is required."*

Return to the rule — new subdivision (b):

(b) **The Items.** The following are self-authenticating:

Reporter comment: Another use of "items," here in the heading. See the discussion above.

(1) Domestic Public Documents ~~under Seal~~ That Are Signed and Sealed. A document ~~bearing~~ that bears:

(A) a signature purporting to be an execution or attestation [which is the more logical order?]; and

(B) a seal purporting to be that of the United States; , ~~or of~~ any ~~State~~ state, district, ~~Commonwealth~~ commonwealth, territory, or insular possession ~~thereof;~~ of the United States; ~~or~~ the former Panama Canal Zone; ; ~~or~~ the Trust Territory of the Pacific Islands; ; or ~~of a political subdivision,~~ department, agency, or officer, ~~or agency thereof, and a signature purporting to be an attestation or execution~~ [check order of *agency* or *officer*] of any entity named above.

Judge Hinkle on "department, agency or officer":

This is a global issue on how we refer to subdivisions. Perhaps this rule is different, but we don't want this reference to an officer to suggest that other rules --- where we refer to a public office or agency --- somehow don't extend to officers Could the last two clauses be combined to say "a political subdivision or public office or agency of any of these entities"?

(2) Domestic Public Documents ~~Not Under Seal~~ That Are Signed But Not Sealed. A document that bears no seal, if

(A) ~~purporting to bear~~ it bears the signature ~~in the official capacity~~ of an officer or employee of any entity ~~included in paragraph (1) hereof, having no seal,~~ named in Rule 902(b)(1)(B); and

(B) ~~if a~~ another public officer having a seal and ~~having~~ official duties ~~in the district or political subdivision of the officer or employee~~ within that same entity certifies under seal — or its equivalent — that the signer has the official capacity and that the signature is genuine

Reporter comment:

"Or its equivalent" in (2)(B) — A few years ago, the Justice Department asked the Committee to consider an amendment to Rule 902 because some states were no longer sealing documents. The Justice Department for reasons unknown abandoned the proposal. But the fact remains that the concept of "sealing" is fading in the era of electronic information. As a major goal of the restyling is to bring the Evidence Rules up to date with electronic information, it seems to make sense to add "or its equivalent" to the provision for public documents in cases where no seal is provided. It's analogous to the use of "in any form" with respect to records and documents.

Broun. I like the idea of adding "or its equivalent" in light of the phasing out of the "seal"

(3) Foreign Public Documents. A document ~~purporting~~ that purports to be ~~executed~~ signed or attested ~~in an official capacity~~ by a person authorized by ~~the laws of~~ a foreign country's law to do so. ~~to make the execution or attestation, and~~ The document must be accompanied by a final certification that certifies ~~as to~~ the genuineness of the signature and official position ~~(A) of the executing or attesting person, or (B)~~ of the signer or attester — or of any foreign official whose certificate of genuineness ~~of~~ relates to the signature ~~and official position relates to the execution~~ or

attestation or is in a chain of certificates of genuineness ~~of~~ relating to the signature ~~and official position relating to the execution~~ or attestation. ~~A final~~ The certification may be made by a secretary of ~~an~~ a United States embassy or legation; ; by a consul general, ~~consul,~~ vice consul, or consular agent of the United States; ;or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If ~~reasonable opportunity has been given to~~ all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy ~~of official documents~~, the court may, for good cause shown, either:

(A) order that ~~they~~ it be treated as presumptively authentic without final certification; or

(B) permit ~~them~~ it to be evidenced by an attested summary with or without final certification.

[Note: A tough paragraph. I tried to follow Civil Rule 44(a)(2) as much as I could.]

Reporter Comment: the bracketed comment at the end of the rule should be deleted before the Rules are sent to the Standing Committee.

(4) Certified Copies of Public Records. A copy of an official record, ~~or~~ report, data compilation ~~or entry~~ ~~therein,~~ [what happened to *statement*? Cf. 901(b)(7)] — or a copy of a document [901(b)(7) uses *writing*] that was lawfully ~~authorized by law to be~~ recorded or filed ~~and actually recorded or filed~~ in a public office or agency; — ~~including data compilations in any form~~ if the copy is certified as correct by:

(A) the custodian or other person authorized to make the certification; ; or

(B) ~~by~~ a certificate ~~complying~~ that complies with ~~paragraph~~ Rule 902(b) (1), (2), or (3) ~~of this rule or complying with any Act of Congress~~ , a federal statute, or a rule prescribed by the Supreme Court ~~pursuant to~~ [under statutory authority?].

Reporter comment:

1. As with 901(b)(7), the Style Committee asks whether "lawfully recorded" is the same as "authorized by law to be recorded."

2. Office or agency — needs to be integrated with whatever is done with the definitions rule, currently Rule 1102.

3. Two bracketed comments — the bracketed comments in the rule should be deleted before the rules are sent to the standing committee.

(5) Official Publications. ~~Books,~~ A book, pamphlets, or other publications purporting to be issued by a public authority.

(6) Newspapers and Periodicals. Printed materials purporting to be a newspapers or periodicals.

(7) Trade Inscriptions and the Like. ~~Inscriptions,~~ An inscription, signs, tags, or labels purporting to have been affixed in the course of business and indicating origin, ownership, or control~~, or origin~~.

(8) Acknowledged Documents. ~~Documents~~ A document accompanied by a certificate of acknowledgment ~~executed in the manner provided by law~~ that is lawfully signed by a notary public or ~~other~~ another officer who is authorized ~~by law~~ to take acknowledgments.

(9) Commercial Paper and Related Documents. Commercial paper, ~~signatures thereon~~ a signature on it, and related documents, ~~relating thereto~~ to the extent provided by general commercial law.

(10) Presumptions Under ~~Acts of Congress~~ a Federal Statute. ~~Any~~ A signature, document, or ~~other matterdeclared by Act of Congress~~ anything else that a federal statute declares to be presumptively or prima facie genuine [~~or authentic~~? omit? We use *genuine* alone in (2)(B) and (3)].

Saltzburg: Why not simply say "Any evidence that a federal statute declares . . ."

Reporter comment:

1. Bracket, delete "authentic"? As the rule is about authenticity, one would think that the preferred word to use would be "authentic". This is not a big deal, as authenticity and genuineness are considered equivalent in the case law. But using "authentic" makes more sense given the introductory language to this rule.

Professor Kimble's response

We use *genuine* with *signature* in (b)(2)(B) and throughout (b)(3). I was trying for consistent use with the term *signature*.

(11) Certified Domestic Records of a Regularly Conducted Activity. The original or a ~~duplicate~~ copy of a domestic record ~~of regularly conducted activity that would be admissible under~~ that meets the requirements of Rule 803(6), modified as follows: the conditions referred to in 803(a)(6)(D) must be shown by a ~~if accompanied by a written declaration of its~~ certification of the custodian or other qualified person~~, in a manner complying with any Act of Congress~~ that complies with a federal statute or a rule prescribed by the Supreme Court ~~pursuant to~~ under statutory authority [let's revisit *under statutory authority*]~~, certifying that the record —~~

~~(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;~~

~~(B) was kept in the course of the regularly conducted activity; and~~

~~(C) was made by the regularly conducted activity as a regular practice.~~

~~A party intending to offer a record into evidence under this paragraph~~ Before the hearing or trial, the proponent must ~~provide~~ give an adverse party [cf. 807(b), which uses the singular] written notice of ~~that intention to all adverse parties~~ of the intent to offer the statement~~;~~ — and must make the record and ~~declaration~~ certification available for inspection — ~~sufficiently in advance of their offer into evidence to provide an adverse~~ so that the party ~~with~~ has a fair opportunity to challenge them.

Reporter comment:

1. Notice requirement: The "written" notice needs to connect with a universal solution of "in any form"– which Joe proposes in Rule 1102.

2. Under statutory authority — Joe proposes a fix in Rule 1102, and whatever is done there must be implemented here.

(12) Certified Foreign Records of a Regularly Conducted Activity. In a civil case, the original or a ~~duplicate~~ copy of a foreign record ~~of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record — (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (B) was kept in the course of the regularly conducted activity; and (C) was made by the regularly conducted activity as a regular practice. The declaration~~ that meets the requirements of Rule 902(b)(11), modified as follows: the declaration, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty ~~under the laws of~~ in the country where the declaration is signed. ~~A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them~~

[No need to repeat the notice requirement; it's already in (11)]

[Note: I'll deal with *in any form* in the top-to-bottom review. Such a problem!]

Reporter Comment: The two bracketed comments should be deleted before these rules go to the Standing Committee.

Rule 903

Rule 903. Subscribing [Attesting?] Witness's Testimony ~~Unnecessary~~

~~The~~ A subscribing [attesting?] ~~testimony of a subscribing~~ witness's testimony is ~~not~~ necessary to authenticate a writing ~~unless~~ only if required by the laws of the jurisdiction ~~whose laws~~ that governs ~~the~~ its validity ~~of the writing~~

Reporter comment:

Bracket, "attesting?" — why? Is it worth it to try to figure out whether there is some case that treats subscribing differently from attesting (or to take the risk of making an inadvertent substantive change)? Everyone knows what subscribing means, why change it?

Professor Kimble's comment:

We use *attesting* elsewhere, I believe. And I think we should be consistent

Judge Keenan: We don't need "attesting." *Meyers agrees with Judge Keenan*

Broun. *I wouldn't want to test whether attesting is the same thing as subscribing. I'd leave it subscribing*

Rule 1001

Rule 1001. Definitions That Apply to This Article

~~For purposes of this article the following definitions are applicable:~~

~~(1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.~~

(a) Writing. "Writing" means any object or medium on which letters, words, numbers or their equivalent are set down.

(b) Recording. "Recording" means any object or medium on which an image is stored.

Reporter Comment: Use of the term "object" is problematic, especially given electronic evidence. If a recording is located on the internet, is that an "object"? It seems prudent to return to the original rule, which puts together writings and recordings, and covers electronic information quite adequately. The alternative is two separate definitions which seem too obvious, and moreover the problematic use of the term "object." Joe's revision to add the word "medium" doesn't solve the problem created, because the internet itself could be found to be a medium.

Professor Kimble's response:

The problem with the current rule is that it attempts two definitions at once. Which words go with which definition? If they all go with both, then we only need one word. It's a mishmash. If *object* is objectionable, then a simple fix might be to use *medium*. Or combine the two: *any object or medium*.

Judge Ericksen: *I advocate a return to the original Why break it down? The rule isn't meant to make a distinction between writings and recordings for purposes of this definition I'd say the definition isn't trying to do two things, but give one definition to two words. Breaking it down is, I agree with Prof Kimble, too obvious.*

Justice Hurwitz: *I agree with Dan's concerns about "object"*

Reporter comment: How does the definition of "writing" square with the proposed definition of "written material" in new Rule 1102? I think it works in this rule because the heading refers to "definitions that apply to this article." But it might be necessary to make a clarification in Rule 1102 that the definition is not applicable to Article 10.

Return to the Rule— 1001(c)

~~(2)~~ (c) **Photographs.** ''Photographs'' ~~include still photographs, X-ray films, video tapes, and motion pictures~~ means an image in any form

Reporter's comment: The Committee members who commented unanimously agreed that the best definition of a photograph would be "an image stored in any form." Joe implemented this suggestion with one exception. He does not include the word "stored." I am not sure whether this is an important word substantively; it sounds like a useful limiting word, and it is used in the original rule, so there should be a good reason for discarding it.

~~(3)~~ (d) **Original.** An ''original'' of a writing or recording ~~is~~ means the writing or recording itself or any counterpart intended to have the same effect by ~~a~~ the person ~~executing or issuing~~ who executed or issued it. ~~An ''original'' of a photograph includes the negative or any print therefrom. If~~ For data ~~are~~ stored in a computer or similar device, "original" means any printout ~~—~~ or other output readable by sight, ~~— shown to reflect the data accurately, is an ''original''~~ if it accurately reflects the data.

~~(4)~~ (e) **Duplicate.** ~~A ''duplicate'' is~~ "Duplicate" means a counterpart produced ~~by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or~~ by a mechanical, chemical, or electronic ~~rerecording, or by chemical reproduction, or by other equivalent techniques which~~ or other equivalent process or technique that accurately reproduces the original.

Rule 1002

Rule 1002. Requirement of the Original

~~To prove the content of a writing, recording, or photograph, the~~ An original writing, recording, or photograph is required in order to prove its content, ~~except as otherwise provided in~~ unless these rules or ~~by Act of Congress~~ a federal statute provides otherwise

Rule 1003.

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless ~~(1)~~ a genuine question is raised ~~as to~~ about the original's authenticity ~~of the original~~ or ~~(2) in~~ the circumstances ~~it would be~~ make it unfair to admit the duplicate ~~in lieu of the original~~.

Rule 1004

Rule 1004. Admissibility of Other Evidence of Contents~~—~~

~~The~~ An original is not required~~,~~ and other evidence of the contents of a writing, recording, or photograph is admissible if~~—~~:

~~(1) Originals lost or destroyed.—All~~

(a) all the originals are lost or ~~have been~~ destroyed, ~~unless~~ and not by the proponent ~~lost or destroyed them~~ acting in bad faith; ~~or~~

~~(2) Original not obtainable.—No~~

(b) an original ~~can~~ cannot be obtained by any available judicial process ~~or procedure~~; ~~or~~

~~(3) Original in possession of opponent.—At a time when an original was under the control of~~

(c) the party against whom the original would be offered~~,~~ had control of the original; ~~that party~~ was at that time put on notice, by ~~the~~ pleadings or otherwise, that the ~~contents~~ original would be a subject of proof at the trial or hearing ~~;~~ ; and ~~that party does not~~ fails to produce ~~the original~~ it at the trial or hearing; or

~~(4) Collateral matters.—The~~

(d) the writing, recording, or photograph is not closely related to a controlling issue

Reporter comment:

Trial/hearing — a universal question.

Rule 1005

Rule 1005. Copies of Public Records to Prove Content

The proponent may use a copy to prove the contents of an official record, report or data compilation [what happened to *report* and *entry?* Cf. 902(b)(4)] — or of a document ~~authorized to be recorded or filed and actually~~ that was lawfully recorded or filed; ~~,~~ in a public office or agency — ~~including data compilations in any form,~~ if these conditions are met: the record or document is otherwise admissible~~,~~ ; ~~may be proved by~~ and the copy; is certified as correct in accordance with Rule 902(b)(4) or is testified to be correct by a witness who has compared it with the original. If a no such copy ~~which complies with the foregoing cannot~~ can be obtained by ~~the exercise of~~ reasonable diligence, then the proponent may use other evidence ~~of the contents may be given~~ to prove the content.

Reporter comment:

As with 901b7 and 902b4, the Style Subcommittee inquires whether there is a difference between a document "authorized by law to be recorded" and a document "lawfully" recorded.

Judge Hinkle re bracketed material, what happened to report and entry?

We should coordinate the terminology not only with 902(b)(4) but also with 901(b)(7), if possible

Rule 1006

Rule 1006. Summaries to Prove Content

The ~~contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart~~, proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals, or duplicates, ~~shall be made~~ available for examination or copying, or both, by other parties at reasonable time and place. ~~The~~ And the court may order ~~that they be produced in court~~ the proponent to produce them.

Rule 1007

Rule 1007. Testimony or ~~Written~~ Admission of a Party to Prove Content

~~Contents of writings, recordings, or photographs may be proved by~~ The proponent may use the testimony, ~~or~~ deposition, or written admission of the party against whom a writing, recording, or photograph is offered ~~or by that party's written admission, without accounting~~ to prove its content. The proponent need not account for ~~the nonproduction of the~~ the original.

Rule 1008

Rule 1008. Functions of the Court and Jury

~~When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104.~~ Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording or photograph under Rule 1004 or 1005. ~~However, when an issue is raised~~ But in a jury trial, the jury determines — in accordance with Rule 104(b) — any issue about whether:

(a) ~~whether the~~ an asserted writing, recording or photograph ever existed~~, or~~ ;

(b) ~~whether~~ another ~~writing, recording, or photograph~~ one produced at the trial [or hearing?] is the original~~;~~ ; or

(c) ~~whether~~ other evidence of contents ~~correctly~~ accurately reflects the contents~~, the issue is for the trier of fact to determine as in the case of other issues of fact~~.

Reporter's Comment: Another reference to trial or hearing that needs to be uniform.

Rule 1101

Rule 1101. Applicability of the Rules

(a) To Courts and Judges. These rules apply to proceedings before:

- ~~the~~ United States district courts; ;
- United States bankruptcy and magistrate judges;
- United States courts of appeals;
- the United States Court of Federal Claims; and
- the district courts of Guam, the ~~District Court of the~~ Virgin Islands, and the ~~District Court for the~~ Northern Mariana Islands~~, the United States courts of appeals, the United States Claims Court, and to United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include United States bankruptcy judges and United States magistrate judges~~.

Reporter comment:

Ken Broun graciously did research on whether the territorial courts needed to be specifically mentioned, or whether it would be sufficient to refer to United States district courts. Here are excerpts from his report:

> My conclusion is that the District Courts of Guam, the Northern Mariana Islands and the United States Virgin Islands are probably not "courts of the United States" so as to be automatically covered by the existing language of Fed.R.Evid. 101. To avoid any possibility of a problem, those courts should be listed separately as they are presently in Rule 1101 The case law is consistent in recognizing that these courts are not Article III courts, but instead were created under Article IV of the United States Constitution.
>
> The most important case dealing with the issue is *United States v George,* 625 F.2d 1081 (3d Cir. 1980). In *George*, the defendant was charged, among other things, under 18 U.S.C. § 1503 with the crime of making threats by force to endeavor to influence, intimidate or impede "any officer of a court of the United States" in the discharge of his duty. The court held that the District Court of the Virgin Islands was not a court of the United States within the meaning of the statute. . The court reached the conclusion that it was a "territorial court," adding:
>
> > Indeed, the fact that Congress expressly named it the District Court of the Virgin Islands rather than a district court for the Virgin Islands serves to reinforce this view. It is, of course, a court created by act of Congress, under the power to make rules and regulations respecting the territory belonging to the United States given by Article IV, section 3 of the Constitution, but it is not a court of the United States created under Article III, section 1 The fact that its judges do not hold office during good behavior and that the court is thus excluded from the definition of "court of the United States" which is contained in 28 U S.C. § 451 is confirmatory of this.
> >
> > Two more recent cases are also worth noting for language consistent with George.

In *Parrott v. Government of the Virgin Islands,* 230 F.3d 615 (3d Cir. 2000), the court held that under the current law governing the courts in the Virgin Islands, the proper forum for a habeas petition was the Territorial Court, not the District Court for the Virgin Islands In support of its holding, the court noted that the Territorial Court and the District Court both derived their respective jurisdictional grants from Congress exercising its authority under Article IV, '3 See Parrott at 622-23. The court added:

> As a result, the District Court does not derive its jurisdiction, as do other federal courts, from Article III. [citing George supra at 1088-89] Nor has the District Court previously been treated as "a court of the United States" or, as we say more commonly, as an Article III court. [citing Kennings, supra] . . . Indeed, the District Court continues, even after the 1984 amendments, to classify itself as territorial, rather than federal in a constitutional sense. See 35 Acres Assoc. v. Adams, 962 F. Supp. 687, 690 (D. V.I. 1997).

In *Edwards v Hovensa, LLC,* 497 F.3d 355 (3d Cir. 2007) the court held that, in a diversity case, the Erie doctrine and the Rules of Decision Act were applicable to the District Court of the Virgin Islands In that case, the court referred to the District Court as a "federal court" for purposes of the decision. See Edwards at 360. Whatever it meant by that reference, the court also states, "The Virgin Islands, of course, is a territory, not a state and the District Court is not a 'court of the United States.'"

My recommendation is that we specifically mention the courts of these territories in the Rules as restyled

Comment on Court of International Trade:

The Evidence Rules also apply in the Court of International Trade. That court is not currently mentioned in Rule 1101. Ken Broun's research indicates that the Evidence Rules are made applicable in that court by statute, 28 U.S.C. § 2641(a). Ken notes that there are some minor deviations from the rules in § 2641(b) (involving some privileged information) and § 2639(involving a presumption of correctness of decisions of the Secretary of the Treasury, the International Trade Commission or other administering agency and specific provisions for the admission of reports or depositions of customs officers as well as price lists and catalogues).

Several cases have applied specific evidence rules in the Court of International Trade. *See, e.g., Zani v. United States*, 86 F. Supp. 2d 1334 (CIT 2000) (Fed.R.Evid. 901); *Air-Sea Brokers, Inc. v. United States*, 454 F. Supp. 451 (Cust. Ct. 1978) (Fed.R.Evid. 401; the Customs Court was the predecessor court). A few cases have held that the rules were inapplicable to review of administrative decisions, holding that the APA governs instead. *See e.g., Anderson v. United States,* 799 F. Supp. 1198 (CIT 1992). This is simply an application of the usual administrative law rules.

The Advisory Committee may wish to consider whether to add the Court of International Trade to Rule 1101. But there appears to be a good argument not to make the addition; it would not make any substantive difference, as the Evidence Rules apply anyway to the Court of International Trade. And including a reference would probably require the

Committee to consider adding other courts in which the Evidence Rules are made applicable by independent statutes. That would create a risk of underinclusion and would raise arguments about having made a substantive change.

Return to the Rule— 1101(b):

(b) To Proceedings ~~generally~~. These rules apply in:

- ~~generally to~~ civil actions and proceedings, including admiralty and maritime cases; ;
- ~~to~~ criminal cases and proceedings;
- ~~to~~ contempt proceedings, except those in which the court may act summarily; ; and
- ~~to~~ proceedings and cases under ~~title 11, United States Code~~ 11 U.S.C..

(c) Rules ~~of~~ on Privilege. The rules on ~~with respect to~~ privileges ~~applies at~~ apply to all stages of ~~all actions;~~ a cases~~;~~ ~~and~~ or proceedings.

(d) ~~Rules Inapplicable.~~ Exceptions. ~~The~~ These rules ~~(other than with respect to privileges)~~ — except for those on privilege — do not apply ~~in~~ to the following ~~situations~~:

(1) ~~Preliminary questions of fact.— The~~ the court's determination, under Rule 104 (a) [(a) and (b)? we should be as accurate as possible] ~~of questions of fact~~ on a preliminary question of fact governing ~~to~~ admissibility ~~of evidence when the issue is to be determined by the court under rule 104.~~ ;

(2) ~~Grand jury.—Proceedings before grand juries~~ grand jury proceedings; and

(3) ~~Miscellaneous proceedings.—~~ Miscellaneous proceedings, such as: ~~for~~

- extradition or rendition;
- issuing an arrest warrant, criminal summons, or search warrant,
- a preliminary examinations in a criminal cases;
- sentencing; ; ~~or~~
- granting or revoking probation or supervised release; ~~issuance of warrants for arrest, criminal summonses, and search warrants~~; and
- ~~proceedings with respect to release~~ considering whether to release on bail or otherwise.

Reporter comment:

1. Bracket, (a) and (b)? The reference, if it needs to be specific, should be to Rule 104(a) only. As to 104(b), if the evidence is going to be sent to the jury, the ultimate question will be determined by the jury, and that will have to be by way of admissible evidence. Perhaps just a reference to Rule 104 would be useful to avoid these subtleties.

2. Miscellaneous proceedings, "such as" — there are a number of proceedings not on the list as to which courts have held that the rules are not applicable. Examples include supervised release revocation proceedings and proceedings to determine whether a juvenile should be tried as an adult. See also *United States v. Palesky,* 855 F.2d 34 (1st Cir. 1988)(Evidence Rules are not applicable in hearings held to determine whether a person will be committed to or released from a psychiatric facility). It would seem useful to let the practitioner know that the rule is not exclusive. Adding "such as" not a substantive change because it simply recognizes, and does not attempt to change, the substantive law.

Judge Hinkle suggestion re "granting or revoking probation"

should we add "or supervised release?"

Reporter response to Judge Hinkle's suggestion: the case law uniformly holds that the rules (except those with respect to privilege) are not applicable to supervised release proceedings. So it would not be a substantive change to add "supervised release" to the list of exceptions. The problem is that there are so many other exceptions that are *not* included on the list that it could raise an inference that including only supervised release proceedings is some indication that the rules *do* apply to proceedings to determine whether the defendant should be tried as a juvenile, suppression hearings, etc. So there is a good argument to just leave the rule alone. [Note that the Style Subcommittee voted to include the reference to supervised release proceedings.]

(d) ~~Rules Inapplicable.~~ Exceptions. ~~The~~ These rules ~~(other than with respect to privileges)~~ — except for those on privilege — do not apply ~~in~~ to the following ~~situations~~:

(1) ~~Preliminary questions of fact.— The~~ the court's determination, under Rule 104 (a) [(a) and (b)? we should be as accurate as possible] ~~of questions of fact~~ on a preliminary question of fact governing ~~to~~ admissibility ~~of evidence when the issue is to be determined by the court under rule 104.~~ ,

(2) ~~Grand jury.—Proceedings before grand juries.~~ grand jury proceedings; and
(3) ~~Miscellaneous proceedings.—~~ Miscellaneous proceedings, such as: ~~for~~

- extradition or rendition;
- issuing an arrest warrant, criminal summons, or search warrant;
- a preliminary examinations in a criminal cases;
- sentencing; ~~;~~ ~~or~~
- granting or revoking probation [or supervised release?]; ~~issuance of warrants for arrest, criminal summonses, and search warrants~~; and
- ~~proceedings with respect to release~~ considering whether to release on bail or otherwise.

Reporter comment:

1. Bracket, (a) and (b)? The reference, if it needs to be specific, should be to Rule 104(a) only. As to 104(b), if the evidence is going to be sent to the jury, the ultimate question will be determined by the jury, and that will have to be by way of admissible evidence. Perhaps just a reference to Rule 104 would be useful to avoid these subtleties.

2. Miscellaneous proceedings, "such as" — there are a number of proceedings not on the list in which courts have held that the rules are not applicable. Examples include supervised release revocation proceedings and proceedings to determine whether a juvenile should be tried as an adult. See also *United States v. Palesky,* 855 F.2d 34 (1st Cir. 1988)(Evidence Rules are not applicable in hearings held to determine whether a person will be committed to or released from a psychiatric facility). It would seem useful to let the practitioner know that the rule is not exclusive. It's not a substantive change because it simply recognizes, and does not attempt to change, the substantive law.

Judge Hinkle suggestion re "granting or revoking probation"

should we add "or supervised release?"

Reporter response to Judge Hinkle's suggestion: the case law uniformly holds that the rules (except those with respect to privilege) are not applicable to supervised release proceedings. So it would not be a substantive change to add "supervised release" to the list of exceptions. The problem is that there are so many other exceptions that are not included on the list that it could raise an inference that including only supervised release proceedings is some indication that the rules *do* apply to proceedings to determine whether the defendant should be tried as a juvenile, suppression hearings, etc. So there is a good argument to just leave the rule alone.

Return to the Rule — subdivision (e)

~~(e) Rules applicable in part. In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of misdemeanors and other petty offenses before United States magistrate judges; review of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act entitled "An Act to authorize association of producers of agricultural products" approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f, 499g(c)); naturalization and revocation of naturalization under sections 310–318 of the Immigration and Nationality Act (8 U.S.C. 1421–1429); prize proceedings in admiralty under sections 7651–7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled "An Act authorizing associations of producers of aquatic products" approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of the Act entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes", approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581–1624), or under the AntiSmuggling Act (19 U.S.C. 1701–1711); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301–392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256–258); habeas corpus under sections 2241–2254 of title 28, United States Code; motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act entitled "An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes", approved March 3, 1925 (46 U.S.C. 781–790), as implemented by section 7730 of title 10, United States Code.~~

Reporter comment:

It was my suggestion to delete this provision. The suggestion stemmed from research conducted for the Committee when it was considering whether to amend Rule 1101 several years ago. What follows is an excerpt from that memo to the Committee:

> Evidence Rule 1101(e) sets forth a laundry list of proceedings in which the Evidence Rules are applicable to the extent that matters of evidence are not governed by other rules or statutes. It appears that this provision is devoid of substantive effect. All of the proceedings specified are civil actions or proceedings tried in the federal courts (e.g., habeas corpus proceedings). The Evidence Rules are already applicable to these proceedings under the provisions of Rule 1101(a) and (c). So the only apparent purpose for subdivision (e) is to highlight the fact that other rules and statutes might trump the Evidence Rules in particular

circumstances. Yet this merely states the obvious. As indicated by the attached memorandum [I'll spare the current Committee that memo] there are a large number of statutes that trump the Evidence Rules in specific circumstances. Rule 1101(e) provides some (incomplete) guidance, but it appears to have no independent content.

It could be argued that Rule 1101(e) should be retained in any amendment because it is necessary to prevent the enumerated statutes from being superseded by the Evidence Rules. But these independent statutes will not be superseded if Rule 1101(e) is abrogated. This is because the Evidence Rules are written so as not to supersede any statutory rule of evidence. The statutory rules of evidence generally govern one of five topics: 1) presumptions, 2) relevance and prejudice; 3) privilege; 4) hearsay; and 5) authentication On none of these topics do the Evidence Rules preclude statutory authority from determining whether evidence is admissible. For example, Rule 301 provides a rule on presumptions to the extent "not otherwise provided for by Act of Congress". Rule 402 says that relevant evidence is admissible, unless otherwise provided by Act of Congress, etc.. Rule 501 provides for a federal common law of privilege except as otherwise provided by Act of Congress, etc.. Rule 802 provides that hearsay is not admissible except as otherwise provided by Act of Congress, etc.. And Rule 901 governs authenticity, but does not purport to supersede statutes that provide for authentication; the examples in 901 are illustrative only

In sum, as Mueller and Kirkpatrick put it, Rule 1101(e) is not needed to preserve existing statutory rules of evidence, because "this purpose would be achieved by the various qualifications found elsewhere in the rules "

Moreover, if Rule 1101(e) *were* needed to preserve pre-existing statutes, it would be doing a poor job of it. The Rule clearly makes no attempt to be inclusive. A quick look at the statutes affecting evidence shows that those cited in Rule 1101(e) are merely a drop in the bucket. At least one of the statutory references (that dealing with immigration) is erroneous. (It should be read to refer to "judicial proceedings for naturalization or revocation of naturalization under sections 310-360 of the Immigration and Nationality Act (8 USCS §§ 1421-1503)"). And at least two of the statutory references in the Rule are outmoded or require updating

There might be a concern that deletion of subdivision (e) might send the wrong signal that the intent of the amendment is to supersede the statutory evidence rules in the specified statutes. But any such concern could be addressed in the Committee Note. The Note might say that subdivision (e) is deleted because it is unnecessary, that the intent of the original Advisory Committee was to signal to courts and practitioners that statutory rules of evidence remained in existence; but that such a reminder is no longer needed, especially because some of the statutes referred to have been abrogated or relocated. In a recent conversation between the Reporter and Roger Pauley [then the DOJ representative on the Committee], Roger agreed that it would be useful to abrogate subdivision (e) so long as the Committee Note emphasized that there is no intent to supersede any statutory rules of evidence.

Rule 1102 — Definitions

In these rules:

(a)"civil case" means a civil action or proceeding;

(b)"criminal case" includes a criminal proceeding;

(c) "public office" includes a public agency;

(d) a "rule prescribed by the Supreme Court" means a rule adopted by the Supreme Court under statutory authority; and

(e) a reference to any kind of written material, such as a document or record [we can play with the examples], includes the electronic form of the material.

Reporter's Comment:

1. Placement — When the Committee previously considered a definitions rule to accommodate electronic evidence, it tentatively decided to place it as a new Rule 107. That way, it would be more in the "flow" of the Rules. A definitions section designated as 1102 is less likely to be found and referenced. So the Committee may wish to change the placement of this rule.

2. Examples of written material — we should probably try to add a few more examples from the rules, such as "memorandum" or "paper." It would be counterproductive to try to be comprehensive, however, because there are so many paper-based terms in the rule. For comparison purposes, here was the draft of Rule 107 that the Committee previously considered:

Rule 107. Electronic Form

As used in these rules, the following terms, whether singular or plural, include information in electronic form: "book," "certificate," "data compilation," "directory," "document," "entry," "list," "memorandum," "newspaper," "pamphlet," "paper," "periodical," "printed", "publication," "published", "record," "recorded", "recording," "report," "tabulation," "writing" and "written." Any "attestation," "certification," "execution" or "signature" required by these rules may be made electronically. A certificate, declaration, document, record or the like may be "filed," "recorded," "sealed" or "signed" electronically.

3. Trial/Hearing : Would it be worth it to add a definition that whenever the rule says trial it means hearing or trial? Of course the Committee would have to go back through the rules to make conforming changes, and there is at least the possibility that some rules are not intended to treat hearings and trials interchangeably.

Rule 1102 3. Amendments

~~Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code.~~ These rules may be amended as provided in 28 U.S.C. § 2072.

Rule 1103~~-~~4. Title

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

TAB 2B

ARTICLE VIII. HEARSAY Rule 801. Definitions	ARTICLE VIII. HEARSAY[1] Rule 801 — Definitions That Apply To This Article
The following definitions apply under this article. **(a) Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion	**(a) Statement.** "Statement" means **(1)** a person's oral or written assertion; or **(2)** a person's nonverbal conduct, if the person intended it as an assertion
(b) Declarant. A "declarant" is a person who makes a statement.	**(b) Declarant.** "Declarant" means the person who made the statement
(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.	**(c) Hearsay.** "Hearsay" means a prior statement – one not made by someone while testifying at the current trial or hearing – that a party offers in evidence to prove the truth of the matter asserted by the declarant
(d) Statements which are not hearsay. A statement is not hearsay if— **(1) Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or	**(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay: **(1)** ***A Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about the statement, and the statement **(A)** is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; **(B)** is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from an improper influence or motive in so testifying; or **(C)** identifies a person as someone the declarant perceived earlier.

[1] The date of this version is March 25, 2009.

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).	(2) *An Opposing Party's Statement* The statement is offered against an opposing party and **(A)** was made by the party in an individual or representative capacity, **(B)** is one that the party adopted or the party accepted as true, **(C)** was made by a person whom the party authorized to make a statement on the subject; **(D)** was made by the party's agent or employee on a matter within the scope of that relationship and while it existed, or **(E)** was made by the party's co-conspirator during the conspiracy and to further it The statement must be considered but does not by itself establish the declarant's authority under (C), the existence or scope of the relationship under (D), or the existence of the conspiracy or participation in it under (E). [Special note 801(d) and the rules that follow adopt a format that we generally don't use. They create a hybrid of a list and independent subparts. When we set up a list, often signaled by words like *the following* and a colon, we normally don't use a heading for each item in the list, and we don't start a new sentence inside the list, as in current 803(5)]

Rule 802. Hearsay Rule	Rule 802 — General Inadmissibility of Hearsay
Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress	Hearsay is not admissible unless any of the following provides otherwise • a federal statute, • these rules, or • other rules prescribed by the Supreme Court [under statutory authority?].

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial	Rule 803 — Exceptions to the Hearsay Rule — Regardless of Whether the Declarant Is Available as a Witness
The following are not excluded by the hearsay rule, even though the declarant is available as a witness	(a) **The Exceptions.** The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness
(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter	(1) ***Present Sense Impression.*** A statement describing or explaining an event or condition, made while the declarant was perceiving it or immediately after perceiving it
(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.	(2) ***Excited Utterance.*** A statement related to a startling event or condition, made while the declarant was under the stress or excitement that it caused.
(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.	(3) ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will
(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.	(4) ***Statement Made for Medical Diagnosis or Treatment.*** A statement that **(A)** is made for — and is reasonably pertinent to — medical diagnosis or treatment; and **(B)** describes medical history, past or present symptoms or sensations; or the inception or general character of their cause.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party	(5) ***Recorded Recollection.*** A record that **(A)** is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately, **(B)** was made or adopted by the witness when the matter was fresh in the witness's memory, and **(C)** accurately reflects the witness's knowledge If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party
(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.	(6) ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if **(A)** the record was made at or near the time by — or from information transmitted by — someone with knowledge, **(B)** the record was kept in the course of a regularly conducted business activity, **(C)** making the record was a regular practice of that business activity, **(D)** all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(b)(11) or (12) or with a statute permitting certification; and **(E)** the opponent [note a good contrast with *proponent*? we'd have to check for consistency] does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness "Business" in this paragraph (6) includes any kind of organization, occupation, or calling, whether or not conducted for profit

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness	(7) ***Absence of an Entry in a Record of a Regularly Conducted Activity.*** Evidence that a matter is not included in a record described in paragraph (6), if **(A)** the evidence is offered to prove that the matter did not occur or exist, **(B)** a record was regularly kept for a matter of that kind, and **(C)** the opponent does not show that the possible source [why is the current rule plural? cf. (6)(E)] of the information or other circumstances indicate a lack of trustworthiness.
(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness	(8) ***Public Records.*** A record of a public office or agency [check for consistency] setting out **(A)** the office's or agency's activities, **(B)** a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by someone officially engaged in law-enforcement [the current plural suggests that two persons have to observe]; or **(C)** in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation But the record is not admissible if the opponent shows that the source of information or other circumstances indicate a lack of trustworthiness
(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law	(9) ***Public Records of Vital Statistics.*** A record of a birth, death, or marriage, if reported to a public office or agency in accordance with a legal duty.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry	(10) ***Absence of a Public Record or an Entry in a Public Record.*** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record, or an entry in one, if the testimony or certification is offered to prove that **(A)** the record or entry does not exist, or **(B)** a matter did not occur or exist, even though a public office or agency regularly kept a record for a matter of that kind
(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization	(11) ***Records of Religious Organizations Concerning Personal or Family History.*** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization
(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter	(12) ***Certificates of Marriage, Baptism, and Similar Ceremonies.*** A statement of fact contained in a certificate **(A)** made by a person who is authorized by a religious organization or by law to perform the act certified, **(B)** attesting that the person performed a marriage or similar ceremony or administered a sacrament, and **(C)** purporting to have been issued at the time of the act or within a reasonable time after it
(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like	(13) ***Family Records.*** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office	(14) ***Records of Documents That Affect an Interest in Property.*** The record of a document that purports to establish or affect an interest in property if **(A)** the record is offered to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it, **(B)** the record is kept in a public office, and **(C)** a statute authorizes recording documents of that kind in that office
(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document	(15) ***Statements in Documents That Affect an Interest in Property.*** A statement contained in a document that purports to establish or affect an interest in property if: **(A)** the matter stated was relevant to the document's purpose, and **(B)** the opponent does not show that later dealings with the property are inconsistent with the truth of the statement or the purport of the document
(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established	(16) ***Statements in Ancient Documents.*** A statement in a document that is at least 20 years old and whose authenticity is established.
(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.	(17) ***Market Reports and Similar Commercial Publications.*** Market quotations, lists, directories, or other compilations — published in any form — generally relied on by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice If admitted, the statements may be read into evidence but may not be received as exhibits	(18) ***Statements in Learned Treatises, Periodicals, or Pamphlets.*** A statement contained in a treatise, periodical, or pamphlet — published in any form — if the publication is: **(A)** called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination, and **(B)** established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice If admitted, the statement may be read into evidence but not received as an exhibit
(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history	(19) ***Reputation About Personal or Family History.*** A reputation among a person's family by blood, adoption, or marriage — or among a person's associates or in the community — about the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history
(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.	(20) ***Reputation About Boundaries or General History.*** A reputation in a community — arising before the controversy — about boundaries of land in the community or customs that affect the land, or about general historical events important to that community, state, or nation.
(21) Reputation as to character. Reputation of a person's character among associates or in the community	(21) ***Reputation About Character.*** A reputation among a person's associates or in the community about the person's character. [Note on (19)–(21): is there a better word than *reputation*? The whole idea seems fuzzy here There's a hearsay exception for "reputation" — an abstract idea, as opposed to a record, etc I can't see what is being offered or who is testifying]

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused The pendency of an appeal may be shown but does not affect admissibility	**(22)** ***Judgment of a Previous Conviction.*** Evidence of a final judgment of conviction — even one on appeal — if **(A)** the judgment was entered after a trial or guilty plea, but not a nolo contendere plea, **(B)** the judgment was for a crime punishable by death or by imprisonment for more than a year; **(C)** the evidence is intended to prove any fact essential to the judgment, and **(D)** when offered by the government in a criminal prosecution [case?] for a purpose other than impeachment, the judgment was against the defendant The opponent may show that an appeal is pending [really needed?]

(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation	(23) ***Judgments Involving Personal, Family, or General History or a Boundary.*** A judgment that is offered to prove a matter of personal, family, or general history, or boundaries, if the matter **(A)** was essential to the judgment, and **(B)** could be proved by evidence of reputation
(24) [Other exceptions.] [Transferred to Rule 807]	
	(b) Definition of "Record." In paragraphs (a)(5)–10, "record" includes a memorandum, report, or data compilation, in any form. [This omits *statement* from (8) & (10). I think it may be swallowed up by *report* I assume that we're not talking about "statements" to the newspaper, for instance] [Special note current 803 changes the numbering scheme; for the first time, a number follows a number — e g , 803(6) Nothing like that in any of the restyled rules Surely, we don't want to leave that anomaly And the definition in (b) saves gobs of repetition]

Rule 804. Hearsay Exceptions; Declarant Unavailable	Rule 804 — Exceptions to the Hearsay Rule — When the Declarant Is Unavailable as a Witness
(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 a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) 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	**(a) Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant: **(1)** is exempted by a court ruling on the ground of having a privilege to not testify about the subject matter of the declarant's statement, **(2)** refuses to testify about the subject matter despite a court order to do so; **(3)** testifies to not remembering the subject matter; **(4)** cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness, or **(5)** is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure **(A)** the declarant's attendance, or **(B)** in the case of a hearsay exception under subdivision (b)(2), (3), or (4) below, the declarant's attendance or testimony. But this Rule 804 does not apply if the statement's proponent wrongfully caused the declarant to be unavailable in order to prevent the declarant 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, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination	**(b) The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness **(1)** ***Former Testimony.*** Testimony that **(A)** was given as a witness at a trial, hearing, or deposition, whether given during the current proceeding or a different one, and **(B)** is now offered against a party — or, in a civil case, a predecessor in interest — who had an opportunity and similar motive to develop it by direct, cross-, or redirect examination
(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.	**(2)** ***Statement Under the Belief of Imminent Death.*** In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances
(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, that a reasonable person in the declarant's position would not have made the statement unless believing 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.	**(3)** ***Statement Against Interest.*** A statement that: **(A)** a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability, and **(B)** is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring 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	(4) ***Statement of Personal or Family History.*** A statement about **(A)** the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact, or **(B)** another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is probably accurate
(5) [Other exceptions.] [Transferred to Rule 807] **(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	(5) ***Statement Offered Against a Party Who Wrongfully Caused the Declarant's Unavailability.*** A statement offered against the party that wrongfully caused – or acquiesced in wrongfully causing – the declarant to be unavailable in order to prevent the declarant from attending or testifying.

Rule 805. Hearsay Within Hearsay	Rule 805 — Hearsay Within Hearsay
Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules	Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule

Rule 806. Attacking and Supporting Credibility of Declarant	Rule 806 — Attacking and Supporting the Declarant's Credibility
When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.	When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness The court may admit evidence of [The evidence may consist of] an inconsistent statement or conduct by the declarant, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination

Rule 807. Residual Exception	Rule 807 — Residual Exception
A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant	**(a) In General.** Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804 **(1)** the statement has equivalent circumstantial guarantees of trustworthiness, and **(2)** all the following apply. **(A)** the statement is offered as evidence of a material fact, **(B)** the statement is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and **(C)** admitting the statement will best serve the purpose of these rules and the interests of justice **(b) Notice.** The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it [Trying for as much consistency as possible with 404(b)(2) & 609(b) Note our continuing problem with *hearing or trial*. 404(b)(2)(B) uses *trial* only.]

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION **Rule 901. Requirement of Authentication or Identification**	ARTICLE IX. AUTHENTICATION AND IDENTIFICATION **Rule 901 — Authenticating or Identifying Evidence**
(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	**(a) In General.** When an exhibit or other item must be authenticated or identified in order to have it admitted, the requirement is satisfied by evidence sufficient to support a finding that the item is what its proponent claims (Alternative) To authenticate or identify an exhibit or other item in order to have it admitted, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is
(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	**(b) Examples.** The following are examples only — not a complete list — of evidence that satisfies the requirement.
(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.	**(1)** ***Testimony of a Witness with Knowledge.*** Testimony that an item 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	**(2)** ***Nonexpert Opinion About Handwriting.*** A nonexpert's opinion that the handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation
(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated	**(3)** ***Comparison by an Expert Witness or the Trier of Fact.*** A comparison with an authenticated specimen by an expert witness or the trier of fact.
(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances	**(4)** ***Distinctive Characteristics and the Like.*** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the 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.	(5) ***Opinion About a Voice.*** An opinion identifying a person's voice — whether heard firsthand or through mechanical or electronic transmission or recording — based on hearing the voice at any time under circumstances that connect 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	(6) ***Evidence About a Phone*** [to cover a cell] ***Conversation.*** For a phone conversation, evidence that a call was made to the number assigned at the time to **(A)** a particular person, if circumstances, including self-identification, show that the person answering was the one called, or **(B)** a particular business, if the call was made to a business and the call related to business reasonably transacted over the phone
(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	(7) ***Evidence About Public Records or Reports.*** Evidence that **(A)** a public record, report, or data compilation is from the public office or agency where items of this kind are kept; or **(B)** a document was lawfully[2] recorded or filed in a public office or agency
(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	(8) ***Evidence About Ancient Documents or Data Compilations.*** For a document or data compilation, in any form, evidence that it **(A)** is in a condition that creates no suspicion about its authenticity, **(B)** was in a place where, if authentic, it would likely be, and **(C)** is at least 20 years old when offered

[2] The Style Subcommittee wants to make sure that "lawfully" captures the meaning of the current rule. The current rule refers to a "writing authorized by law to be recorded or filed . in a public office." The restyled version refers to a "writing that was lawfully filed or recorded in a public office or agency." Are there examples of filings "lawfully" made in a public office that are not "authorized by law" to be made there? In other words, is the intent of "lawfully recorded" to describe the methodology of recording, or whether the document is authorized by law to be recorded?

(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	(9) ***Evidence About a Process or System.*** Evidence describing a process or system and showing that it produces an accurate result
(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.	(10) ***Methods Provided by a Statute or Rule.*** Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court [under statutory authority?].

Rule 902. Self-authentication	Rule 902 — Items That Are Self-Authenticating
Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following **(1) Domestic public documents under seal.** A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution	(a) **In General.** The items described in this rule are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted (b) **The Items.** The following are self-authenticating (1) ***Domestic Public Documents That Are Signed and Sealed.*** A document that bears (A) a signature purporting to be an execution or attestation [which is the more logical order?], and (B) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone, the Trust Territory of the Pacific Islands; a political subdivision of any of these entities, or a department, agency, or officer [check order of *agency* or *officer*] of any entity named above
(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine	(2) ***Domestic Public Documents That Are Signed But Not Sealed.*** A document that bears no seal, if (A) it bears the signature of an officer or employee of an entity named in Rule 902(b)(1)(B); and (B) another public officer who has a seal and official duties within that same entity certifies under seal — or its equivalent — that the signer has the official capacity and that the signature is genuine

(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification	(3) ***Foreign Public Documents.*** A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester — or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation The certification may be made by a secretary of a United States embassy or legation, by a consul general, vice consul, or consular agent of the United States, or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either **(A)** order that it be treated as presumptively authentic without final certification, or **(B)** permit it to be evidenced by an attested summary with or without final certification [Note A tough paragraph. I tried to follow Civil Rule 44(a)(2) as much as I could]
(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority	(4) ***Certified Copies of Public Records.*** A copy of an official record, report, data compilation [what happened to *statement*? cf 901(b)(7)] — or a copy of a document [901(b)(7) uses *writing*] that was lawfully[3] recorded or filed in a public office or agency — if the copy is certified as correct by **(A)** the custodian or another person authorized to make the certification; or **(B)** a certificate that complies with Rule 902(b) (1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court [under statutory authority?]

[3] The Style Subcommittee wants to make sure that "lawfully" captures the meaning of the current rule. The current rule refers to a "writing authorized by law to be recorded or filed . . in a public office " The restyled version refers to a "writing that was lawfully filed or recorded in a public office or agency." Are there examples of filings "lawfully" made in a public office that are not "authorized by law" to be made there? In other words, is the intent of "lawfully recorded" to describe the methodology of recording, or whether the document is authorized by law to be recorded?

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority	(5) ***Official Publications.*** A book, pamphlet, or other publication purporting to be issued by a public authority
(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals	(6) ***Newspapers and Periodicals.*** Printed material purporting to be a newspaper or periodical
(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.	(7) ***Trade Inscriptions and the Like.*** An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control
(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments	(8) ***Acknowledged Documents.*** A document accompanied by a certificate of acknowledgment that is lawfully signed by a notary public or another officer who is authorized to take acknowledgements
(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law	(9) ***Commercial Paper and Related Documents.*** Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law
(10) Presumptions under Acts of Congress. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic	(10) ***Presumptions Under a Federal Statute.*** A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine [or authentic? omit? we use *genuine* alone in (2)(B) and (3)].

(11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record— **(A)** was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters, **(B)** was kept in the course of the regularly conducted activity, and **(C)** was made by the regularly conducted activity as a regular practice A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them	(11) ***Certified Domestic Records of a Regularly Conducted Activity.*** The original or a copy of a domestic record that meets the requirements of Rule 803(a)(6), modified as follows: the conditions referred to in 803(a)(6)(D) must be shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court under statutory authority [let's revisit *under statutory authority*] Before the trial or hearing, the proponent must give an adverse party [cf 807(b), which uses the singular] written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them

(12) Certified foreign records of regularly conducted activity. In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record— **(A)** was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters, **(B)** was kept in the course of the regularly conducted activity; and **(C)** was made by the regularly conducted activity as a regular practice The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them	**(12)** ***Certified Foreign Records of a Regularly Conducted Activity.*** In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(b)(11), modified as follows the declaration, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the declaration is signed [No need to repeat the notice requirement; it's already in (11)] [Note· I'll deal with *in any form* in the top-to-bottom review Such a problem!]

Rule 903. Subscribing Witness' Testimony Unnecessary	Rule 903 — Subscribing [Attesting?] Witness's Testimony
The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing	A subscribing [attesting?] witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS Rule 1001. Definitions	ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS Rule 1001 — Definitions That Apply to This Article
For purposes of this article the following definitions are applicable **(1) Writings and recordings.** "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation **(2) Photographs.** "Photographs" include still photographs, X-ray films, video tapes, and motion pictures **(3) Original.** An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original" **(4) Duplicate.** A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original	**(a) Writing.** "Writing" means any object or medium on which letters, words, numbers, or their equivalent are set down **(b) Recording.** "Recording" means any object or medium on which letters, words, numbers, or their equivalent are recorded **(c) Photograph.** "Photograph" means an image in any form **(d) Original.** An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it For data stored in a computer or similar device, "original" means any printout — or other output readable by sight — if it accurately reflects the data. An "original" of a photograph includes the negative or a print from it. **(e) Duplicate.** "Duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original

Rule 1002. Requirement of Original	Rule 1002 — Requirement of the Original
To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress	An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise

Rule 1003. Admissibility of Duplicates	Rule 1003 — Admissibility of Duplicates
A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original	A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate

Rule 1004. Admissibility of Other Evidence of Contents	Rule 1004 — Admissibility of Other Evidence of Content
The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—	An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if
(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith, or	**(a)** all the originals are lost or destroyed, and not by the proponent acting in bad faith,
(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or	**(b)** an original cannot be obtained by any available judicial process,
(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing, or	**(c)** the party against whom the original would be offered had control of the original, was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing, and fails to produce it at the trial or hearing, or
(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue	**(d)** the writing, recording, or photograph is not closely related to a controlling issue

Rule 1005. Public Records	Rule 1005 — Copies of Public Records to Prove Content
The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given	The proponent may use a copy to prove the content of an official record, report, or data compilation [what happened to *report* and *entry*? cf 902(b)(4)] — or of a document that was lawfully[4] recorded or filed in a public office or agency — if these conditions are met. the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(b)(4) or is testified to be correct by a witness who has compared it with the original If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content

[4] The Style Subcommittee wants to make sure that "lawfully" captures the meaning of the current rule The current rule refers to a "writing authorized by law to be recorded or filed . . in a public office " The restyled version refers to a "writing that was lawfully filed or recorded in a public office or agency." Are there examples of filings "lawfully" made in a public office that are not "authorized by law" to be made there? In other words, is the intent of "lawfully recorded" to describe the methodology of recording, or whether the document is authorized by law to be recorded?

Rule 1006. Summaries	Rule 1006 — Summaries to Prove Content
The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place The court may order that they be produced in court.	The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time or place And the court may order the proponent to produce them

Rule 1007. Testimony or Written Admission of Party	Rule 1007 — Testimony or Admission of a Party to Prove Content
Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original	The proponent may use the testimony, deposition, or written admission of the party against whom a writing, recording, or photograph is offered to prove its content The proponent need not account for the original.

Rule 1008. Functions of Court and Jury	Rule 1008 — Functions of the Court and Jury
When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104 However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact	Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005 But in a jury trial, the jury determines — in accordance with Rule 104(b) — any issue about whether **(a)** an asserted writing, recording, or photograph ever existed, **(b)** another one produced at the trial [or hearing?] is the original, or **(c)** other evidence of content accurately reflects the content

XI. MISCELLANEOUS RULES Rule 1101. Applicability of Rules	XI. MISCELLANEOUS RULES Rule 1101 — Applicability of the Rules
(a) Courts and judges. These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, 1 and to United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include United States bankruptcy judges and United States magistrate judges	**(a) To Courts and Judges.** These rules apply to proceedings before. • United States district courts, • United States bankruptcy and magistrate judges, • United States courts of appeals, • the United States Court of Federal Claims; and • the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands
(b) Proceedings generally. These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code	**(b) To Proceedings.** These rules apply in • civil actions and proceedings, including admiralty and maritime cases; • criminal cases and proceedings, • contempt proceedings, except those in which the court may act summarily, and • cases and proceedings under 11 U.S C
(c) Rule of privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings	**(c) Rules on Privilege.** The rules on privilege apply to all stages of a case or proceeding
(d) Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations: **(1) Preliminary questions of fact.** The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104 **(2) Grand jury.** Proceedings before grand juries **(3) Miscellaneous proceedings.** Proceedings for extradition or rendition; preliminary examinations in criminal cases, sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants, and proceedings with respect to release on bail or otherwise	**(d) Exceptions.** These rules — except for those on privilege — do not apply to the following· **(1)** the court's determination, under Rule 104(a) [(a) and (b)? we should be as accurate as possible] on a preliminary question of fact governing admissibility, **(2)** grand-jury proceedings; and **(3)** miscellaneous proceedings such as: • extradition or rendition, • issuing an arrest warrant, criminal summons, or search warrant, • a preliminary examination in a criminal case; • sentencing; • granting or revoking probation or supervised release, and • considering whether to release on bail or otherwise.

(e) Rules applicable in part. In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority the trial of misdemeanors and other petty offenses before United States magistrate judges, review of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code, review of orders of the Secretary of Agriculture under section 2 of the Act entitled "An Act to authorize association of producers of agricultural products" approved February 18, 1922 (7 U.S C 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U S C 499f, 499g(c)); naturalization and revocation of naturalization under sections 310–318 of the Immigration and Nationality Act (8 U S C 1421–1429); prize proceedings in admiralty under sections 7651–7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled "An Act authorizing associations of producers of aquatic products" approved June 25, 1934 (15 U S C 522); review of orders of petroleum control boards under section 5 of the Act entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes", approved February 22, 1935 (15 U.S C 715d), actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U S C 1581-1624), or under the Anti-Smuggling Act (19 U.S C 1701–1711); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S C. 301–392), disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U S.C 256–258), habeas corpus under sections 2241–2254 of title 28, United States Code, motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U S C 679), 2 actions against the United States under the Act entitled "An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes", approved March 3, 1925 (46 U S.C 781–790), as implemented by section 7730 of title 10, United States Code

Rule 1102. Amendments	Rule 1102 — Definitions
	In these rules **(a)** "civil case" means a civil action or proceeding, **(b)** "criminal case" includes a criminal proceeding, **(c)** "public office" includes a public agency, **(d)** a "rule prescribed by the Supreme Court" means a rule adopted by the Supreme Court under statutory authority, and **(e)** a reference to any kind of written material, such as a document or record [we can play with the examples], includes the electronic form of the material

Rule 1102. Amendments	Rule 1103 — Amendments
Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code	These rules may be amended as provided in 28 U S C § 2072

Rule 1103. Title	Rule 1104 — Title
These rules may be known and cited as the Federal Rules of Evidence	These rules may be cited as the Federal Rules of Evidence

TAB 2C

MEMORANDUM

TO: Advisory Committee

FROM: Joe Kimble

DATE: March 24, 2009

RE: Rules 801–1104

I respectfully offer a few reminders on the restyling process as we approach the last (and most difficult) of our three groups. My main purpose is to urge us to keep the big picture in mind.

As the Advisory Committee knows, the goal of all the restylings has been to improve clarity, consistency, and readability — not only within each set of rules but also across the different sets. Early on in the evidence process, I prepared for the Style Subcommittee and the Advisory Committee a memo called "Some First Principles." One part of it said:

> A major reason for that success [of the three previous stylings] was our drafting and style guidelines. To maintain a consistent approach, we followed Bryan Garner's authoritative *Guidelines for Drafting and Editing Court Rules*. We rarely, if ever, deviated from the principles in that pamphlet. And for usage and style generally, we followed Garner's *Dictionary of Modern Legal Usage*. I sometimes checked with Bryan as questions arose during other restylings, and I'll probably do the same during this one.

I believe there has been a tacit understanding, in all the restylings, that we would follow our guidelines. Otherwise, decisions are made ad hoc — and we begin to lose the drafting consistency that we're trying to achieve. I don't mean to suggest that we haven't been following our guidelines, but as you'll see, some of the decisions in the last group depend on whether we continue to do so.

As decisions are weighed, there's probably a natural tendency to feel more comfortable with the old, familiar language and to prefer it more or less by default. I understand that. At the same time, we're trying to improve the style, and as long as there's no substantive change, I trust that we'll decide on the basis of the best style — and not on how long certain words have been around. As I say in one of my responses, I hope that we'll take the long view.

Along the same lines, I hope we'll have confidence in readers to approach the rules in good faith and in the same spirit as with the other restylings. In the civil rules, for instance, we changed *averments* to *allegations*; we changed the longstanding *effect service* to *serve*; we changed *application* to *motion*; we changed *denominated* to *designated*; we changed *append* to *attach*; we changed *harmonious* to *consistent*; and so on. People did not complain about wording changes like these. They understood what the restyling was about, and they should certainly be used to restyling by now. This is our fourth round.

As for "sacred phrases," I think the test should not just be how familiar they are; if that were the test, little would change. I think the phrase should rise to some level of special importance to be "sacred." For example: *failure to state a claim upon which relief can be granted*; *genuine issue as to any material fact*; *offered to prove the truth of the matter asserted*. I don't remember having more than four or five of these during the civil rules, which are a lot longer than the evidence rules.

Finally, the rules will be published for comment. Of course, we want them to be well received. But for a few of the more salient decisions — like using *item* in the authentication rules — we can see whether they provoke a reaction. If they do, we can revisit them.

Thanks, everyone. We'll be talking next week.

Searching for the phrase "Rule Against Hearsay"

11 U S. Supreme Court
213 U.S. Court of Appeals (published)
70 U.S. Court of Appeals (unpublished since 1986)
119 Federal District Court opinions (published)
161 Federal District Court opinions (unpublished)
110 Other federal courts (Military, Tax, Bankruptcy, etc)

684

(2696 All state Supreme Courts and Courts of Appeals combined)
A search of the phrase "rule against hearsay" within the same paragraph as 801! or 802! or 803! brings up 301 documents But it is clear from the context of the others that I browsed that they are all referring to the Federal Rules of Evidence)

Randy

HERE ARE 11 U.S. Supreme Court opinions that use the phrase

In Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed 397 (1956), this Court declined to apply the rule against hearsay to grand jury proceedings. Strict observance of trial rules in the context of a grand jury's preliminary investigation "would result in interminable delay but add nothing to the assurance of a fair trial." Id., at 364, 76 S.Ct., at 409.

U.S. v. R. Enterprises, Inc. **498 U.S. 292, 298, 111 S.Ct. 722, 726 U.S.Va.,1991)**

Although the procedural guidelines propounded by the court below may well enhance the reliability of out-of-court statements of children regarding sexual abuse, we decline to read into the Confrontation Clause a preconceived and artificial litmus test for the procedural propriety of professional interviews in which children make hearsay statements against a defendant.
The State responds that a finding of "particularized guarantees of trustworthiness" should instead be based on a consideration of the totality of the circumstances, including not only the circumstances surrounding the making of the statement, but also other evidence at trial that corroborates the truth of the statement. We agree that "particularized guarantees of trustworthiness" must be shown from the totality of the circumstances, but we think the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief.

This conclusion derives from the rationale for permitting exceptions to the general rule against hearsay:

> "The theory of the hearsay rule ... is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation." 5 J. Wigmore, Evidence § 1420, p 251 (J Chadbourn rev. 1974).

***Idaho v. Wright*, 497 U.S. 805, 818, 110 S.Ct. 3139 (U.S. Id., 1990)**

That the ability of a witness to see the defendant while the witness is testifying does not constitute an essential part of the protections afforded by the Confrontation Clause is also demonstrated by the exceptions to the rule against hearsay, which allow the admission of out-of-court statements against a defendant.

***Coy v. Iowa*, 487 U.S. 1012, 1030, 108 S.Ct. 2798, 2807 - 2808 (U.S.Iowa,1988)**

When the prosecution introduces the statements of a co-conspirator merely to show what the declarant might have been thinking or what he wished his listeners to believe at the time he spoke, neither the rule against hearsay nor the Confrontation Clause is implicated by their admission against a defendant.

***U.S. v. Inadi* 475 U.S. 387, 404, 106 S.Ct. 1121, 1131 (U.S.Pa.,1986)**

The basic rule against hearsay, of course, is riddled with exceptions developed over three centuries. See E. Cleary, McCormick on Evidence § 244 (2d ed. 1972) (McCormick) (history of rule); id., §§ 252-324 (exceptions)

> FN4 These exceptions vary among jurisdictions as to number, nature, and detail. See, e. g., Fed Rules Evid 803, 804 (over 20 specified exceptions).

***Ohio v. Roberts* 448 U.S. 56, 62, 100 S.Ct. 2531, 2537 (U.S.Ohio,1980)**

The conversion of a clause intended to regulate trial procedure into a threat to much of the existing law of evidence and to future developments in that field is not an unnatural shift, for the paradigmatic evil the Confrontation Clause was aimed at-trial by affidavit can be viewed almost equally
well as a gross violation of the rule against hearsay and as the giving of evidence by the affiant out of the presence of the accused and not subject to cross-examination by him. But however natural the shift may be, once made it carries the seeds of great mischief for enlightened development in the law of evidence.

Dutton v. Evans **400 U.S. 74, 94-95, 91 S.Ct. 210, 222 (U.S.Ga. 1970)**

FN15. Whether admission of the statement would have violated federal evidentiary rules against hearsay, see 391 U.S., at 128, 88 S.Ct., at 1623, n. 3, is, as emphasized earlier in this opinion, a wholly separate question. Indeed, failure to comply with federal evidentiary standards appears to be the reason for the result in Bridges v. Wixon, 326 U.S. 135, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945)-the only case which might be thought to suggest the existence of a possible constitutional problem in admitting a witness' prior inconsistent statements as substantive evidence.

California v. Green **399 U.S. 149, 164, 90 S.Ct. 1930, 1938 (U.S.Cal. 1970)**

There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.

The testimony now questioned faced backward and not forward. This at least it did in its most obvious implications. What is even more important, it spoke to a past act, and, more than that, to an act by some one not the speaker.

Shepard v. U.S. **290 U.S. 96, 106, 54 S.Ct. 22, 26 (U.S. 1933)**

One of the exceptions to the rule excluding it is that which permits the reception, under certain circumstances and for limited purposes, of declarations of third parties, made contrary to their own interest; but it is almost universally held that this must be an interest of a pecuniary character; and the fact that the declaration alleged to have been thus extrajudicially made would probably subject the declarant to a criminal liability is held not to be sufficient to constitute it an exception
to the rule against hearsay evidence.

Donnelly v. U.S. **228 U.S. 243, 273, 33 S.Ct. 449, 459 - 460 (U.S.1913)**

True, the testimony could not have been admitted without the consent of the accused, first, because it was within the rule against hearsay, and, second, because the accused was entitled to meet the witnesses face to face. But it was not admitted without his consent, but at his request, for it was he who offered it in evidence. So, of the fact that it was hearsay, it suffices to observe that when evidence of that character is admitted without objection, it is to be considered and given its natural probative effect as if it were in law admissible. Damon v. Carrol, 163 Mass. 404, 408, 40 N. E. 185; Sherwood v. Sissa, 5 Nev. 349, 355; United States v. McCoy, 193 U. S. 593, 598, 48 L. ed. 805, 807, 24 Sup. Ct. Rep. 528, Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 9, 51 L. ed. 681, 685, 27 Sup. Ct. Rep. 407; Neal v. Delaware, 103 U. S. 370, 396, 26 L. ed. 567, 573; Foster v. United States, 101 C C. A 485, 178 Fed. 165, 176.

Diaz v. U.S. 223 **U.S. 442, 450, 32 S.Ct. 250, 252 (U.S.1912)**

The proof to show pedigree forms a well-settled exception to the rule which excludes hearsay evidence. This exception has been recognized on the ground of necessity; for as in inquiries respecting relationship or descent facts must often be proved which occurred many years before the trial, and were known to but few persons, it is obvious that the strict enforcement in such cases of the rules against hearsay evidence would frequently occasion a failure of justice. Tayl. Ev. § 635. Traditional evidence is therefore admissible. Jackson v. Cooley, 8 Johns. 99; Jackson v. Browner, 18 Johns. 37; Jackson v. King, 5 Cow. 237; Davis v. Wood, 1 Wheat. 6. The rule is that declarations of deceased persons who were de jure related by blood or marriage to the family in question may be given in evidence in matters of pedigree. Jewell v. Jewell, 1 How. 219; Blackburn v. Crawfords, 3 Wall. 175; Johnson v. Lawson, 2 Bing. 86; Vowles v. Young, 13 Ves. 147; Monkton v. Attorney General, 2 Russ. & M. 159; White v. Strother, 11 Ala. 720.

Fulkerson v. Holmes **117 U.S. 389, 397, 6 S.Ct. 780, 784 (U.S.1886)**

Advisory Committee Notes

here involved. Wigmore describes the need for authentication as "an inherent logical necessity" 7 Wigmore § 2129, p. 564

This requirement of showing authenticity or identity falls in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b).

The common law approach to authentication of documents has been criticized as an "attitude of agnosticism," McCormick, Cases on Evidence 388, n. 4 (3rd ed. 1956), as one which "departs sharply from men's customs in ordinary affairs," and as presenting only a slight obstacle to the introduction of forgeries in comparison to the time and expense devoted to proving genuine writings which correctly show their origin on their face, McCormick § 185, pp. 395, 396. Today, such available procedures as requests to admit and pretrial conference afford the means of eliminating much of the need for authentication or identification. Also, significant inroads upon the traditional insistence on authentication and identification have been made by accepting as at least prima facie genuine items of the kind treated in Rule 902, infra. However, the need for suitable methods of proof still remains, since criminal cases pose their own obstacles to the use of preliminary procedures, unforeseen contingencies may arise, and cases of genuine controversy will still occur.

Subdivision (b). The treatment of authentication and identification draws largely upon the experience embodied in the common law and in statutes to furnish illustrative applications of the general principle set forth in subdivision (a). The examples are not intended as an exclusive enumeration of allowable methods but are meant to guide and suggest, leaving room for growth and development in this area of the law

The examples relate for the most part to documents, with some attention given to voice communications and computer print-outs. As Wigmore noted, no special rules have been developed for authenticating chattels. Wigmore, Code of Evidence § 2086 (3rd ed. 1942).

It should be observed that compliance with requirements of authentication or identification by no means assures admission of an item into evidence, as other bars, hearsay for example, may remain.

Example (1) contemplates a broad spectrum ranging from testimony of a witness who was present at the signing of a document to testimony establishing narcotics as taken from an accused and accounting for custody through the period until trial, including laboratory analysis. See California Evidence Code § 1413, eyewitness to signing.

Example (2) states conventional doctrine as to lay identification of handwriting, which recognizes that a sufficient familiarity with the handwriting of another person may be acquired by seeing him write, by exchanging correspondence, or by other means, to afford a basis for identifying it on subsequent occasions. McCormick § 189. See also California Evidence Code § 1416. Testimony based upon familiarity acquired for purposes of the litigation is reserved to the expert under the example which follows.

Example (3) The history of common law restrictions upon the technique of proving or disproving the genuineness of a disputed specimen of handwriting through comparison with a genuine specimen, by either the testimony of expert witnesses or direct viewing by the triers themselves, is detailed in 7 Wigmore

§§ 1991–1994 In breaking away, the English Common Law Procedure Act of 1854, 17 and 18 Vict., c. 125, § 27, cautiously allowed expert or trier to use exemplars "proved to the satisfaction of the judge to be genuine" for purposes of comparison The language found its way into numerous statutes in this country, e g , California Evidence Code §§ 1417, 1418. While explainable as a measure of prudence in the process of breaking with precedent in the handwriting situation, the reservation to the judge of the question of the genuineness of exemplars and the imposition of an unusually high standard of persuasion are at variance with the general treatment of relevancy which depends upon fulfillment of a condition of fact. Rule 104(b). No similar attitude is found in other comparison situations, e.g., ballistics comparison by jury, as in Evans v Commonwealth, 230 Ky 411, 19 S.W.2d 1091 (1929), or by experts, Annot., 26 A L.R.2d 892, and no reason appears for its continued existence in handwriting cases. Consequently Example (3) sets no higher standard for handwriting specimens and treats all comparison situations alike, to be governed by Rule 104(b). This approach is consistent with 28 U.S.C. § 1731: "The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person."

Precedent supports the acceptance of visual comparison as sufficiently satisfying preliminary authentication requirements for admission in evidence Brandon v Collins, 267 F.2d 731 (2d Cir.1959); Wausau Sulphate Fibre Co. v Commissioner of Internal Revenue, 61 F 2d 879 (7th Cir.1932); Desimone v United States, 227 F.2d 864 (9th Cir 1955)

Example (4) The characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety. Thus a document or telephone conversation may be shown to have emanated from a particular person by virtue of its disclosing knowledge of facts known peculiarly to him, Globe Automatic Sprinkler Co. v. Braniff, 89 Okl. 105, 214 P 127 (1923), California Evidence Code § 1421; similarly, a letter may be authenticated by content and circumstances indicating it was in reply to a duly authenticated one McCormick § 192; California Evidence Code § 1420 Language patterns may indicate authenticity or its opposite. Magnuson v. State, 187 Wis. 122, 203 N W 749 (1925); Arens and Meadow, Psycholinguistics and the Confession Dilemma, 56 Colum.L.Rev. 19 (1956).

Example (5). Since aural voice identification is not a subject of expert testimony, the requisite familiarity may be acquired either before or after the particular speaking which is the subject of the identification, in this respect resembling visual identification of a person rather than identification of handwriting. Cf Example (2), supra, People v Nichols, 378 Ill. 487, 38 N E.2d 766 (1942), McGuire v. State, 200 Md. 601, 92 A.2d 582 (1952); State v McGee, 336 Mo 1082, 83 S W 2d 98 (1935).

Example (6). The cases are in agreement that a mere assertion of his identity by a person talking on the telephone is not sufficient evidence of the authenticity of the conversation and that additional evidence of his identity is required. The additional evidence need not fall in any set pattern Thus the content of his statements or the reply technique, under Example (4), supra, or voice identification under Example (5), may furnish the necessary foundation. Outgoing calls made by the witness involve additional factors bearing upon authenticity The calling of a number assigned by the telephone company reasonably supports the assumption that the listing is correct and that the

PARK, LEONARD & GOLDBERG, EVIDENCE LAW (2d ed.)

Chapter 11

AUTHENTICATION, IDENTIFICATION, AND EXHIBITS

Table of Sections

§ 11.01 Authentication and Identification Under the Rules [FRE 901, 902]

Any tangible item that a lawyer intends to offer into evidence must first be authenticated. Rule 901(a) requires the lawyer to present evidence "sufficient to support a finding that the matter in question is what its proponent claims." Is the computer offered into evidence the very computer that was stolen from the victim? Is the white powder being offered into evidence the same powder that was found when the police searched the defendant? Is the letter containing an offer to sell corn one that was sent by the person alleged to be the offeror? Each of the foregoing is a question of authentication. Rule 901 applies, also, to some *viva voce* evidence. A party to a telephone conversation, for example, may not testify to the contents of that conversation or even establish the existence of the call without sufficient identification of the party on the other end of the line [1]

Some items are self-authenticating. Rule 902 lists twelve items that will be admitted into evidence without any extrinsic evidence of authen-

1. Fed R. Evid. 901(b)(5) & (6)

ticity, including various official, public, or acknowledged documents[2] newspapers,[3] trade inscriptions,[4] commercial paper,[5] and certified "business" records.[6]

Most items require extrinsic evidence of authenticity. Rule 901(b) contains ten illustrations (the list is not exclusive) of the kind of extrinsic evidence that meets the rule's authentication and identification requirements. Opinion about the similarity of handwriting or other specimens,[7] distinctive characteristics of items,[8] and demonstration that various processes produce accurate results[9] are exemplary.

The authentication required before an item may be admitted into evidence is not the same as a determination that the item is authentic. The difference between the process of "authentication" for an item to be admitted into evidence and a finding that the item is "authentic" has to do with who decides and how much proof is needed

The division of labor contemplated by Rule 104(a) and (b) applies to authentication. The judge decides whether the "authentication" is sufficient for an item to be admitted into evidence.[10] The jury decides whether the evidence is sufficient to decide that the item is, in fact, "authentic."[11]

"Authentication"—the judge's call—requires only enough extrinsic evidence to establish a *prima facie* case that the item is what it purports to be.[12] If the evidence persuades the judge that a reasonable jury could find the item to be what the proponent claims it to be, that is enough, even if the judge personally believes that, on balance, the item is not what it purports to be.[13] As a practical matter, the judge looks only to the

2. Fed R Evid 902(1),(2)(3),(4),(5),(8), & (10)

3. Fed. R. Evid 902(6).

4. Fed. R. Evid 902(7)

5. Fed. R. Evid 902(9).

6. Fed R. Evid. 902 (11) & (12).

7. Fed. R. Evid 901(b)(2) & (3)

8. Fed. R. Evid. 901(b)(4).

9. Fed. R. Evid. 901(b)(9).

10. *See* Fed. R. Evid. 901 advisory committee's note. This requirement of showing authenticity or identity falls in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b) *Id. See also* 2 McCormick on Evidence § 227 (5th ed 2001) The judge's ruling on an authentication question can only be reversed on the basis of an abuse of discretion. *See e g*, United States v Mirelez, 59 Fed.Appx. 286, 287 (10th Cir. 2003), United States v Hemphill, 40 Fed.Appx 809 (4th Cir. 2002); United States v. Thomas, 294 F 3d 899, 904 (7th Cir. 2002)

11. Reeves v. Sanderson Plumbing Prods., Inc, 530 U S 133, 153 (2000); United States v. Beidler, 110 F 3d 1064, 1067 (4th Cir 1997) ("The jury, not the reviewing court, weighs the credibility of the evidence and resolves any conflicts in the evidence presented " (internal quotes omitted)).

12. *See* Fed R Evid 901(a), United States v Thomas, 294 F.3d 899, 904 (7th Cir. 2002); United States v. Tropeano, 252 F.3d 653, 661 (2d Cir. 2001) ("The burden of authentication does not require the proponent of the evidence to rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be Rather, the standard for authentication, and hence for admissibility, is one of reasonable likelihood.")

13. *See* United States v. Alicea–Cardoza, 132 F.3d 1, 4 (1st Cir. 1997) ("Generally, if the district court is satisfied that the evidence is sufficient to allow a reasonable person to believe the evidence is what it purports to be, Rule 901(a) is satisfied and the jury may decide what weight it will give the evidence "). 5 Weinstein, *supra* note 11, at § 901 02[2] ("The rule requires only that the court admit evidence if sufficient proof

Goode & Wellborn, Courtroom Evidence Handbook (2006-2007 ed.)

(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) *Methods Provided by Statute or Rule.* Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

AUTHORS' COMMENTS

(1) Scope and purpose of Rule 901. Rule 901 prescribes the general principles of authentication and identification and gives a number of examples of foundations that satisfy the requirements

(2) General principles of authentication. Rule 901(a) prescribes that authentication or identification of an item requires only evidence sufficient to support a finding—a "prima facie case"—that the item is genuine. A bona fide dispute as to authenticity or identity is not to be decided by the judge, but rather is to go to the jury. Ricketts v. City of Hartford, 74 F.3d 1397, 1409–11 (2d Cir.1996), cert. denied, 519 U.S. 815, 117 S.Ct. 65, 136 L.Ed.2d 26 (1996); United States v. McGlory, 968 F.2d 309, 328–29 (3d Cir.1992), cert. denied 507 U.S. 962, 113 S.Ct. 1388, 122 L.Ed.2d 763 (1993). In other words, conflicting evidence on genuineness goes to weight, not admissibility, so long as some reasonable person could believe that the item is what it

is claimed to be. Ricketts v. City of Hartford, supra, 74 F 3d at 1411, United States v Johnson, 637 F.2d 1224, 1247 (9th Cir.1980)

> **Example—Admissible.** "The district court's determination that it 'was not satisfied that the voice on the tape was that of Davis' * * * is inconsistent with these principles So long as a jury is entitled to reach a contrary conclusion, it must be given the opportunity to do so. * * * [T]he district court erred in excluding the tape on authentication grounds without making a finding that no rational juror could have concluded that Davis made the statement at issue." Ricketts v City of Hartford, supra, 74 F.3d at 1411.
>
> **Example—Admissible.** "We have repeatedly noted that '[t]he burden of proof for authentication is slight.' * * * When we combine White's testimony with the circumstantial evidence of the authenticity of the document, in particular the fact that it was produced by Lexington pursuant to discovery requests, we believe that there is a sufficient foundation for a jury to determine that this document is what it is purported to be a Lexington HPL Create Sheet. * * * While it is troubling to us that the author of the handwritten notations remains unknown, and that White could not be sure of correct date, there does not appear to be any genuine dispute that the HPL Create Sheet was filled out by a Lexington employee for the purpose for which this sheet is typically used, i.e., to search for data on a claim." Lexington Ins. Co v. Western Pennsylvania Hosp., 423 F.3d 318, 329 (3d Cir.2005).

(3) Illustrations. Rule 901(b) lists nine examples of authentication techniques, plus a tenth provision incorporating by reference any additional methods that might be recognized by statute or court rule. The examples are explicitly stated not to be exclusive. United States v. Simpson, 152 F.3d 1241, 1249–50 (10th Cir.1998); United States v Jimenez Lopez, 873 F.2d 769, 772 (5th Cir.1989).

(4) Testimony of witness with knowledge; chain of custody. In the case of an object or document that has unique or distinctive characteristics, testimony of a single person who perceived the item at the relevant time normally suffices to identify it in court. Reyes v. United States, 383 F.2d 734 (9th Cir 1967).

Where the object is not distinctive in appearance, a so-called "chain of custody" may be required in order to establish that the item presented at trial is indeed the same one that had a role in the events in issue. A chain of custody consists of testimony of each person who had custody of the item from the time of its discovery or initial connection with the case to the time of its presentation at trial. United States v. Zink, 612 F.2d 511, 514 (10th Cir.1980).

When real evidence is offered, often its condition as well as its identity is important. When this is so, a proper foundation must include evidence that the item is in substantially the same condition when presented as at the legally material time, e.g., the time of the accident, the time of first discovery, etc. United States v. Dickerson, 873 F 2d 1181, 1185 (9th Cir.1988). Like identity, continuity of condition can sometimes be shown by a single witness. If any plausible material change in the object would be palpable, it suffices that the witness who identifies the object also testifies that it appears to be in the same condition as when previously perceived by him. Hammett v. State, 578 S.W.2d 699, 708 (Tex.Crim.App.1979), cert. denied, 448 U.S. 725, 100 S.Ct. 2905, 65 L.Ed.2d 1086 (1980). If, on the other hand, the object is

GIANNELLI, UNDERSTANDING EVIDENCE (2d ed.)

Chapter 28

AUTHENTICATION OF WRITINGS: FRE 901–903

§ 28.01 Introduction

Documents are generally not self-authenticating — i.e., a confession purportedly signed by the accused may not be admitted simply based on the signature An authenticating witness (e.g., the detective who took the confession) must testify that she saw the accused sign the document. This process is known as "laying the foundation" for admissibility

Federal Rule 901 governs the authentication of documents, the identification of real evidence, and the verification of a speaker's voice The latter two issues are examined in chapters 26 and 27. A different rule, Rule 902, provides for the *self-authentication* of certain types of documents. Rule 903 makes the testimony of subscribing witnesses unnecessary unless required by the law of the appropriate jurisdiction.[1]

Rule 901 deals only with authentication. A document properly authenticated under Rule 901 may nevertheless be inadmissible because it fails to satisfy the requirements of the hearsay rule[2] or the best evidence rule,[3] or because its probative value is substantially outweighed by its prejudicial effect under Rule 403

§ 28.02 General Rule

The authentication requirement imposes on the offering party the burden of proving that an item of evidence is genuine — that it is what the proponent says it is. Rule 901(a) is the general provision governing authentication. Rule 901(b) presents examples of traditional methods of authentication. These examples are merely illustrative.[4] Different methods of authentication may be used by themselves or in combination.

Reliability (truthfulness). The authentication rule is not concerned with the truthfulness of a document's contents, an issue left to the hearsay rule. Thus, an authentic (genuine) document may contain errors and even lies — for example, a newspaper article may contain erroneous information.

---

[1] *See infra* § 28 12 (subscribing witnesses)

[2] Fed. R. Evid 802

[3] Fed R. Evid. 1002

[4] *See* United States v Simpson, 152 F.3d 1241, 1249–50 (10th Cir 1998) ("The specific examples of authentication referred to by Simpson are merely illustrative, however, and are not intended as an exclusive enumeration of allowable methods of authentication")

WEINSTEIN'S FEDERAL EVIDENCE (2d ed.)

Chapter 901

Requirement of Authentication or Identification *

Scope of Chapter

This chapter discusses every aspect of Rule 901, which requires that each item of evidence be authenticated or identified by a showing that the matter in question is what its proponent claims. Rule 901(b) also provides examples of what is necessary to authenticate certain types of evidence, including methods such as the testimony of a witness with knowledge, an expert or non-expert opinion on handwriting, comparison of the item with an exemplar, identification by distinctive characteristics, voice identification, and methods provided by a statute or rule. The rule also provides methods for authenticating evidence such as telephone conversations, public records, ancient documents, and the results of applying a process or system. The amendment history of the Rule and relevant Advisory Committee Notes are set forth in the Historical Appendix to this chapter.

Related topics are discussed in Ch. 902, *Self-Authentication* For discussion of the tactical issues related to the authentication and identification of evidence, see Imwinkelried & Schlueter, FEDERAL EVIDENCE TACTICS § 9.01 (Matthew Bender).

* Chapter revised in 2001 by G. Richard Poehner, Member of the District of Columbia Bar and the State Bar of Texas.

WEINSTEIN'S EVIDENCE MANUAL (7th Student ed.)

§ 8.01 Requirement of Authentication or Identification—Rule 901

[1]—Approach and Text of Rule 901[1]

Rule 901(a) provides that the evidentiary requirement of authentication or identification is satisfied by evidence sufficient to support a finding that the proffered evidence is what it purports to be.[2] Proof of authenticity entails a showing of how the proffered exhibit is related to the factual issue at hand.

As a prerequisite to admissibility, the proffering party must identify the exhibit in such a fashion as to indicate the information it contains or otherwise reveals is relevant to the pertinent factual issues.[3] Thus, a document may contain information that is apparently of significance to an issue the trier of fact has to decide, but it remains inadmissible unless the proffering party shows that the document is somehow related to the dispute before the court, as, for example, by showing that it is a business record containing pertinent information the proffering party generated in connection with the transaction that is at the heart of the dispute between the parties.[4] The burden of authenticating exhibits, however, is not difficult to satisfy.[4.1]

Rule 901(a) provides

> **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.

---

[1] *See* **Treatise** at § 901.02.

[2] Fed. R. Evid. 901(a).

[3] *See, e.g.*, Cooper v. Eagle River Mem. Hosp., Inc., 270 F.3d 456, 463–464 (7th Cir. 2001) (pathology slide was properly authenticated as containing specimen of plaintiff's placenta when reference number of slide matched specimen number in plaintiff's pathology report).

[4] *See, e.g.*, Research Sys. Corp. v. IPSOS Publicite, 276 F.3d 914, 923 (7th Cir. 2002) (when document was offered to show it was in specific person's files and was available to that person at critical times and evidence was sufficient to support jury's conclusion those facts were true, it was not necessary for proponent to prove additional facts, such as identity of document's author, to gain admission).

[4.1] *See, e.g.*, United States v. Tin Yat Chin, 371 F.3d 31, 37 (2d Cir. 2004) ("Rule 901 does not erect a particularly high hurdle")

show that the exhibit is what the proponent claims it to be.[5] This burden is inherent in Rule 402's requirement that the courts permit the fact finder to consider only relevant evidence.[6] Once the proponent has made the requisite showing, the trial court should admit the exhibit, assuming it meets the other prerequisites to admissibility, such as relevance and avoidance of the hearsay rule, in spite of any demonstration the opponent may make that the authenticity of the exhibit is defective.[7]

The trial court's admission of the exhibit means only that the fact finder may consider the exhibit during its deliberations. The fact finder remains free to disregard the exhibit if it chooses to do so in light of the defects the opponent may illuminate during cross-examination of the sponsoring witness or through the presentation of direct evidence.[8]

Because authentication rulings are necessarily fact specific, the court reviews such rulings only for mistake of law or abuse of discretion.[9]

Rule 903 [10] adds an additional requirement to establishing authenticity in instances involving documents that under state law require the testimony of an attesting witness. The Rule provides as follows.

> **Rule 903. Subscribing Witness' Testimony Unnecessary.**
>
> The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

Only when the validity of the document is in issue need the state's law on

---

[5] Fed. R. Evid. 901(a)

[6] *See, e.g.*, United States v. Meienberg, 263 F.3d 1177, 1181 (10th Cir. 2001) (documentary evidence is viewed as irrelevant in absence of proponent's introduction of foundation evidence demonstrating that evidence is what its proponent claims); United States v. Branch, 970 F.2d 1368, 1370 (4th Cir. 1992) (authentication is special aspect of relevance, since evidence cannot have tendency to make existence of disputed fact more or less likely if it is not what proponent claims it to be)

[7] *See, e.g.*, United States v. Patterson, 277 F.3d 709, 713 (4th Cir. 2002) (proffering party needs only to introduce sufficient evidence to provide jury with basis to resolve authenticity question in his or her favor)

[8] *See, e.g.* Orr v. Bank of Am., NT & SA, 285 F.3d 764, 773 n. 6 (9th Cir. 2002) (trial judge's function is to determine whether proponent has presented prima facie evidence of genuineness, if so, evidence is admitted, and trier of fact makes its own determination of evidence's authenticity and weight)

[9] *See, e.g.*, United States v. Meienberg, 263 F.3d 1177, 1180–1181 (10th Cir. 2001) (trial court's authentication decisions are reviewed for abuse of discretion, that is, they are reversed only when trial court's decision was "arbitrary, capricious, whimsical, or unreasonable")

[10] *See* Treatise at § 903.02

(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 **ITEM**s of this nature are kept.

FEDRLSEV R 901(b)(7)

Public records or reports such as Mr. Peals' alleged complaint against Officer Gilbert may be authenticated by showing evidence that the writing "is from the public office where **ITEMS** of this nature are kept." Fed.R.Evid. 901(b)(7).

Peals v. Terre Haute Police Dept. 535 F.3d 621, 627 (C.A.7 (Ind.),2008)

"[a]ny combination of **ITEMS** of evidence illustrated by Rule 901(b) ... will suffice so long as Rule 901(a) is satisfied." 5 Weinstein's Evidence ¶ 901(b)(1)[01] at 901-32.

U.S. v. Reilly 33 F.3d 1396, 1404 (C.A.3 (Del.),1994)

The Advisory Notes to Rule 901(b)(4), which provides that evidence may be authenticated by distinctive characteristics, state: "The characteristics of the offered **ITEM** itself, considered in the light of circumstances, afford authentication techniques in great variety."

U.S. v. Damrah 412 F.3d 618, 628 (C.A.6 (Ohio),2005)

Rule 901(a) is applicable to offers of real proof as opposed to testimonial proof. *See* 5 J. Weinstein and M. Berger, *Weinstein's Evidence* ¶ 901(a)[01], at 901-15 (1983). Pursuant to Rule 901 , **ITEMS** such as tape recordings, writings, records, and the like, must be authenticated and identified before they are admitted into evidence to ensure that the offered evidence is relevant to the issues being litigated. *See* Advisory Committee Note to Fed.R.Evid. 901(a).

Cook v. Hoppin 783 F.2d 684, 688 (C.A.7 (Ill.),1986)

See McCormick on Evidence 885 n. 6 (3d ed. 1984) ("The emphasis of Rule 901 is upon showing that the offered **ITEM** [e.g., a computer printout] is what it is claimed to be, i.e., that it is genuine . . rather than that what is in the [computer] is correct.").

U.S. v. Downing 753 F.2d 1224, 1240 (C.A.Pa.,1985)

Establishing a chain of custody is one form of proof sufficient to support a finding that the matter in question is what its proponent claims. Fed.R.Evid. 901(a).

The ultimate question is whether the authentication testimony is sufficiently complete so as to convince the court of the improbability that the original **ITEM** had been exchanged with another or otherwise tampered with. *United States v Howard-Arias, supra,* 679 F.2d at 366

U.S. v. Mendel 746 F.2d 155, 166 (C.A.N.Y.,1984)

Rule 901 of the Federal Rules of Evidence requires that **ITEMS** be authenticated or identified before they can be admitted into evidence. Fed.R.Evid. 901(a).

U.S. v. De Gudino 722 F.2d 1351, 1355 (C.A.Ill.,1983)

The "chain of custody" rule is but a variation of the principle that real evidence must be authenticated prior to its admission into evidence See Fed.R.Evid. 901; McCormick, Handbook on the Law of Evidence s 213 (2d ed. E Cleary ed. 1972).... Therefore, the ultimate question is whether the authentication testimony was sufficiently complete so as to convince the court that it is improbable that the original **ITEM** had been exchanged with another or otherwise tampered with. United States v. Brewer, 630 F.2d 795 (10th Cir. 1980).

U.S. v. Howard-Arias 679 F.2d 363, 366 (C.A.Va., 1982)

TAB-3

FORDHAM

University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail.dcapra@law.fordham.edu
Fax: 212-636-6899

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Rules 101-415
Date: March 23, 2009

Rules 101-415 have already been approved by the Standing Committee for release for public comment. But before they are so released, the Committee may wish to take a final look at them for the following purposes:

1. Any problems seen by any member after another review of the changes.

2. Any resolution of footnotes in the side by side.

3. Conforming changes made necessary by changes made in Rules 501-1104.

The restyled version of Rules 101-415 is set forth behind this memo in side by side form. What follows are the Reporter's observations about possible outstanding issues that the Committee may wish to consider.

Each Committee member may wish to review these Rules to determine whether there are any problems that have not been addressed previously. It would be most useful if any such problems could be raised by email before the Committee meets in April.

1. Rule 106

The last sentence of the restyled rule provides that "writing" covers material in electronic form. New Rule 1102 provides a universal definition that now covers the concern addressed by Rule

106. So if the definitions rule is approved, the last sentence of Rule 106 should be deleted.

2. Rule 404(b)

This Rule contains outstanding footnotes about the Advisory Committee choosing to retain the heading "permitted uses" and the language in the Rule that a bad act "may be admissible" if offered for a not-for-character purpose. It appears that the Subcommittee intends to raise this dispute with the Standing Committee in June.

What follows is the entry of the minutes on the Advisory Committee's determination to retain the heading and the language. This entry covers the Committee's *second* vote on the matter.

> The Committee considered the changes to Rule 404(b) proposed by the Style Subcommittee and unanimously rejected them on the ground that they would effect substantive changes to the Rule The DOJ representative noted that hundreds of cases had established that Rule 404(b) was a rule of inclusion — not an "exception." It was also noted that Congress explicitly changed the original Advisory Committee draft of Rule 404(b) — which used more exclusionary language — to "may be admissible," thus indicating a legislative intent that Rule 404(b) is to be treated as an inclusionary rule. Under the Style protocol, language in a rule that is a "sacred phrase" is considered substantive and is not to be changed. The Committee unanimously determined that changing the heading to "Exceptions" and changing the text of the Rule to "the court may admit" was substantive both because 1) it made the rule potentially less permissive and 2) it would alter a "sacred phrase." Many members noted that the cost of stylistic uniformity would be high, given the Justice Department's strong and considered objections to any attempt to change Rule 404(b) in a way that might be considered less permissive.

Given that the Committee has voted twice to retain the disputed heading and language, it would appear that a new vote at the Spring 2009 Committee meeting would be counterproductive. If the Style Subcommittee does decide to raise the issue to the Standing Committee, I will have the footnotes amended to include the above account from the Minutes.

3. Rule 412(a)

The Rule refers to a "civil or criminal proceeding" ---- this terminology needs to be conformed with the definitions set forth in new Rule 1102. The language should be changed to "a civil or criminal case" — which under Rule 1102 includes "proceedings."

ARTICLE I. GENERAL PROVISIONS Rule 101. Scope	ARTICLE I. GENERAL PROVISIONS[1] Rule 101 — Scope
These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101	These rules apply to proceedings before United States courts The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101

[1] The date of this version is September 25, 2008.

Rule 102. Purpose and Construction	Rule 102 — Purpose
These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined	These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination

Rule 103. Rulings on Evidence	Rule 103 — Rulings on Evidence
(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and **(1) Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context, or **(2) Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal	(a) **Preserving a Claim of Error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and (1) if the ruling admits evidence, the party, on the record (A) timely objects or moves to strike, and (B) states the specific ground, unless it was apparent from the context, or (2) if the ruling excludes evidence, the party informs the court of its substance by an offer of proof, unless the substance was apparent from the context. (b) **Not Needing to Renew an Objection or Offer of Proof.** Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal
(b) Record of offer and ruling The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form	(c) **Court's Statements About the Ruling; Directing an Offer of Proof.** The court may make any statement about the character or form of the evidence, the objection made, and the ruling The court may direct that an offer of proof be made in question-and-answer form
(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury	(d) **Preventing the Jury from Hearing Inadmissible Evidence.** To the extent practicable, the court must conduct the proceedings in a jury trial so that inadmissible evidence is not suggested to the jury by any means
(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court	(e) **Taking Notice of Plain Error.** A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved

Rule 104. Preliminary Questions	Rule 104 — Preliminary Questions
(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b) In making its determination it is not bound by the rules of evidence except those with respect to privileges	(a) **In General.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible In so deciding, the court is not bound by evidence rules, except those on privilege
(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition	(b) **Relevancy That Depends on a Fact.** When the relevancy of evidence depends on fulfilling a factual condition, the court may admit it on, or subject to, the introduction of evidence sufficient to support a finding that the condition is fulfilled
(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests	(c) **Matters That the Jury Must Not Hear.** A hearing on a preliminary question must be conducted outside the jury's hearing if: (1) the hearing involves the admissibility of a confession, (2) a defendant in a criminal case is a witness and requests that the jury not be present, or (3) justice so requires
(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.	(d) **Testimony by a Defendant in a Criminal Case.** By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.
(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.	(e) **Evidence Relevant to Weight and Credibility.** This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

Rule 105. Limited Admissibility	Rule 105 — Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes
When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly	If the court admits evidence that is admissible against a party or for a purpose — but not against another party or for another purpose — the court, on request, must restrict the evidence to its proper scope and instruct the jury accordingly

Rule 106. Remainder of or Related Writings or Recorded Statements	Rule 106 — Rest of or Related Writings or Recorded Statements
When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.	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 should in fairness be considered at the same time This rule applies to a writing or recorded statement in any form

ARTICLE II. JUDICIAL NOTICE **Rule 201. Judicial Notice of Adjudicative Facts**	ARTICLE II. JUDICIAL NOTICE **Rule 201 — Judicial Notice of Adjudicative Facts**
(a) Scope of rule. This rule governs only judicial notice of adjudicative facts	**(a) Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact
(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned	**(b) Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it **(1)** is generally known within the court's territorial jurisdiction, or **(2)** can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned
(c) When discretionary. A court may take judicial notice, whether requested or not **(d) When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information	**(c) Taking Notice.** At any stage of the proceeding, the court **(1)** may take judicial notice on its own, or **(2)** must take judicial notice if a party requests it and the court is supplied with the necessary information.
(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken	**(d) Opportunity to Be Heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the noticed fact. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.
(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.	
(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.	**(e) Instructing the Jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS **Rule 301. Presumptions in General in Civil Actions and Proceedings**	ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS **Rule 301 — Presumptions in a Civil Case Generally**
In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.	In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of going forward with evidence to rebut the presumption But this rule does not shift the burden of proof in the sense of the risk of nonpersuasion, the burden of proof remains on the party who has it originally

Rule 302. Applicability of State Law in Civil Actions and Proceedings	Rule 302 — Effect of State Law on Presumptions in a Civil Case
In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law	In a civil case, state law governs the effect of a presumption related to a claim or defense for which state law supplies the rule of decision

ARTICLE IV. RELEVANCY AND ITS LIMITS **Rule 401. Definition of "Relevant Evidence"**	ARTICLE IV. RELEVANCY AND ITS LIMITS **Rule 401 — Definition of Relevant Evidence**
"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence	Evidence is relevant if it has any tendency to make more or less probable the existence of a fact that is of consequence in determining the action

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible	Rule 402 — General Admissibility of Relevant Evidence
All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority Evidence which is not relevant is not admissible	Relevant evidence is admissible unless any of the following provide otherwise • the United States Constitution, • a federal statute, • these rules, or • other rules prescribed by the Supreme Court Irrelevant evidence is not admissible

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time	Rule 403 — Exclusion of Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons
Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence	The court may exclude relevant evidence if its probative value is substantially outweighed by one or more of the following a danger of unfair prejudice, confusing the issues, or misleading the jury, or considerations of undue delay, wasting time, or needlessly presenting cumulative evidence

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes	Rule 404 — Character Evidence; Crimes or Other Acts
(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except **(1) Character of accused.** In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution, **(2) Character of alleged victim.** In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor, **(3) Character of witness.** Evidence of the character of a witness, as provided in Rules 607, 608, and 609.	**(a) Character Evidence.** **(1)** ***Prohibited Uses.*** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait **(2)** ***Exceptions in a Criminal Case.*** The following exceptions apply in a criminal case: **(A)** a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it, **(B)** subject to the limitations in Rule 412, a defendant may offer evidence of an alleged crime victim's pertinent trait, and if the evidence is admitted, the prosecutor may **(i)** offer evidence to rebut it, and **(ii)** offer evidence of the defendant's same trait; and **(C)** in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor **(3)** ***Exceptions for a Witness.*** Evidence of a witness's character may be admitted under Rules 607, 608 and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial	**(b) Crimes or Other Acts.** **(1)** ***Prohibited Uses.*** Evidence of a crime or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character **(2)** ***Permitted Uses[2]; Notice.*** This evidence may be admissible[3] for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident On request by a defendant in a criminal case, the prosecutor must **(A)** provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial, and **(B)** do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice

[2] Style Subcommittee comment The Advisory Committee changed this from *Exceptions* The heading is now not parallel with 404(a)(2) & (3), 408(b), 410(b), and 412(b). Notice the consistent pattern that we have tried to use the heading to one subpart says *Prohibited Uses*, and the heading to the following subpart says *Exceptions*. We believe that the heading should probably be changed back. For now, this could be added to the list of global issues

[3] Style Subcommittee comment: The Style Subcommittee believes that it's critically important to be consistent in phrasing the court's discretionary authority to admit evidence See the footnote to Rule 407 In nine other places, the rules now use *the court may admit*: 407, 408(b), 411, 412(b)(1), 412(b)(2)(twice), 413(a), 414(a), and 415(a) The Advisory Committee concluded that *may be admissible* is substantive in 404(b)(2), but we think that decision should be reconsidered

Professor Capra comment: A majority of the Advisory Committee determined that "may be admissible" is substantive and had to be retained for the following reasons 1) hundreds of cases have established that Rule 404(b) is a rule of "admissibility" and not exclusion, so any change to the language that could even be conceived as changing or narrowing the existing language threatens this uniform case law; 2) Congress carefully considered this language, revising the original Advisory Committee draft, which had provided that the rule "does not exclude" bad act evidence if offered for a proper purpose. Congress made the change to place "greater emphasis on admissibility." The Committee was reluctant to change the language carefully chosen by Congress; 3) the change was opposed by the Justice Department, as signaling a less generous approach to bad act evidence; and 4) the language of Rule 404(b), as vetted and cited in so many cases, is a "sacred phrase" and therefore substantive under the restyling protocol

Rule 405. Methods of Proving Character	Rule 405 — Methods of Proving Character
(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion On cross-examination, inquiry is allowable into relevant specific instances of conduct	(a) **By Reputation or Opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by opinion testimony On cross-examination, the court may allow an inquiry into relevant specific instances of the person's conduct
(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct	(b) **By Specific Instances of Conduct.** When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct

Rule 406. Habit; Routine Practice	Rule 406 — Habit; Routine Practice
Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice	Evidence of a person's habit or an organization's routine practice is relevant to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice This evidence is relevant regardless of whether it is corroborated or whether there was an eyewitness

Rule 407. Subsequent Remedial Measures	Rule 407 — Subsequent Remedial Measures
When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment	When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove • negligence, • culpable conduct, • a defect in a product or its design, or • a need for a warning or instruction But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures

Rule 408. Compromise and Offers to Compromise	Rule 408 — Compromise Offers and Negotiations
(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction **(1)** furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim, and **(2)** conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority	**(a) Prohibited Uses.** Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction **(1)** furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in order to compromise the claim, and **(2)** conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office or agency in the exercise of its regulatory, investigative, or enforcement authority
(b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay, and proving an effort to obstruct a criminal investigation or prosecution	**(b) Exceptions.** The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution

Rule 409. Payment of Medical and Similar Expenses	Rule 409 — Offers to Pay Medical and Similar Expenses
Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury	Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements	Rule 410 — Pleas, Plea Discussions, and Related Statements
Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions (1) a plea of guilty which was later withdrawn, (2) a plea of nolo contendere, (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas, or (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in 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	(a) **Prohibited Uses.** In any civil or criminal proceeding, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions (1) a guilty plea that was later withdrawn, (2) a plea of nolo contendere, (3) a statement about either of those pleas made during a proceeding under Federal Rule of Criminal Procedure 11 or a comparable state procedure, or (4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea (b) **Exceptions.** A statement described in Rule 410(a)(3) or (4) is admissible· (1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if both statements should in fairness be considered at the same time; or (2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and in the presence of counsel

Rule 411. Liability Insurance	Rule 411 — Liability Insurance
Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness	Evidence that a person did or did not have liability insurance is not admissible to prove that the person acted negligently or otherwise wrongfully But the court may admit this evidence for another purpose, such as proving agency, ownership, control, or a witness's bias or prejudice

Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition	Rule 412 — Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition
(a) Evidence Generally Inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c) **(1)** Evidence offered to prove that any alleged victim engaged in other sexual behavior **(2)** Evidence offered to prove any alleged victim's sexual predisposition.	**(a) Prohibited Uses.** The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct: **(1)** evidence offered to prove that a victim engaged in other sexual behavior, or **(2)** evidence offered to prove a victim's sexual predisposition
(b) Exceptions. **(1)** In a criminal case, the following evidence is admissible, if otherwise admissible under these rules: **(A)** evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence, **(B)** evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution, and **(C)** evidence the exclusion of which would violate the constitutional rights of the defendant. **(2)** In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.	**(b) Exceptions.** **(1)** ***Criminal Cases.*** The court may admit the following evidence in a criminal case. **(A)** evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence, **(B)** evidence of specific instances of a victim's sexual behavior toward the defendant, if offered by the prosecutor or if offered by the defendant to prove consent, and **(C)** evidence whose exclusion would violate the defendant's constitutional rights **(2)** ***Civil Cases.*** In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy

(c) Procedure To Determine Admissibility. **(1)** A party intending to offer evidence under subdivision (b) must— **(A)** file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial, and **(B)** serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative **(2)** Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise	**(c) Procedure to Determine Admissibility.** **(1)** ***Motion.*** If a party intends to offer evidence under Rule 412(b), the party must **(A)** file a motion that specifically describes the evidence and states the purpose for which it is to be offered, **(B)** do so at least 14 days before trial unless the court, for good cause, sets a different time, **(C)** serve the motion on all parties, and **(D)** notify the victim or, when appropriate, the victim's guardian or representative **(2)** ***Hearing.*** Before admitting evidence under this rule, the court must conduct an in-camera hearing and give the victim and parties a right to attend and be heard Unless the court orders otherwise, the motion, related materials, and record of the hearing must be and remain sealed
	(d) Definition of "Victim." In this rule, "victim" includes an alleged victim

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases	Rule 413 — Similar Crimes in Sexual-Assault Cases
(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant	(a) **Permitted Uses.** In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault The evidence may be considered on any matter to which it is relevant
(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause	(b) **Disclosure.** If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule	(c) **Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule
(d) For purposes of this rule and Rule 415, ''offense of sexual assault'' means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved— (1) any conduct proscribed by chapter 109A of title 18, United States Code; (2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person; (3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body, (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4)	(d) **Definition of "Sexual Assault."** In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law (as "state" is defined in 18 U S C. § 513) involving (1) any conduct prohibited by 18 U S C chapter 109A, (2) contact, without consent, between any part of the defendant's body — or an object — and another person's genitals or anus; (3) contact, without consent, between the defendant's genitals or anus and any part of another person's body, (4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).

Rule 414. Evidence of Similar Crimes in Child Molestation Cases	Rule 414 — Similar Crimes in Child-Molestation Cases
(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant	**(a) Permitted Uses.** In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other act of child molestation The evidence may be considered on any matter to which it is relevant
(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause	**(b) Disclosure.** If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.	**(c) Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, ''child'' means a person below the age of fourteen, and ''offense of child molestation'' means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—	**(d) Definition of "Child" and "Child Molestation."** In this rule and Rule 415
(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child,	**(1)** "child" means a person below the age of 14; and
(2) any conduct proscribed by chapter 110 of title 18, United States Code,	**(2)** "child molestation" means a crime under federal law or under state law (as "state" is defined in 18 U S C § 513) involving.
(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;	**(A)** any conduct prohibited by 18 U S.C chapter 109A and committed with a child;
(4) contact between the genitals or anus of the defendant and any part of the body of a child,	**(B)** any conduct prohibited by 18 U.S C chapter 110,
(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child, or	**(C)** contact between any part of the defendant's body — or an object — and a child's genitals or anus,
(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(5).	**(D)** contact between the defendant's genitals or anus and any part of a child's body,
	(E) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or
	(F) an attempt or conspiracy to engage in conduct described in paragraphs (A)–(E)

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation	Rule 415 — Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation.
(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules	(a) **Permitted Uses.** In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or act of child molestation The evidence may be considered as provided in Rules 413 and 414.
(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause	(b) **Disclosure.** If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony The party must do so at least 15 days before trial or at a later time that the court allows for good cause
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.	(c) **Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule

TAB - 4

FORDHAM
University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu
Fax: 212-636-6899

Memorandum To. Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Rules 501-706
Date: March 23, 2009

Rules 501-706 have already been approved by the Standing Committee for release for public comment. But before they are so released, the Committee may wish to take a final look at them for the following purposes.

1. Any problems seen by any member after another review of the changes.

2. Any resolution of footnotes in the side by side.

3. Conforming changes made necessary by changes made in Rules 101-415 and 801-1104.

The restyled version of Rules 501-706 is set forth behind this memo in side by side form. What follows are the Reporter's observations about possible outstanding issues that the Committee may wish to consider.

Each Committee member may wish to review these Rules to determine whether there are any problems that have not been addressed previously. It would be most useful if any such problems could be raised by email before the Committee meets in April.

1. Rule 501

The language in the restyled Rule has been amended since the Committee last reviewed it. Judge Hartz, a member of the Standing Committee, noticed that the language that had been approved

by the Committee could be thought to make a substantive change in cases where there are claims under both federal and state law, and the rules of privilege are different under the respective laws The amendment hews more closely to the existing rule — which does not actually capture the practice of the courts, which is to apply federal law of privilege to all the claims in mixed-claims cases. (A conforming change was made to Rule 601, which raises the same question.)

Also, the rule refers to Supreme Court rules "under statutory authority." This language is no longer necessary if the definition in Rule 1102 is approved. Upon approval of Rule 1102, the language "under statutory authority" — and the bracketed question that follows — should be deleted

2. Rule 502

Rule 502 has not been reviewed in the most recent restyling effort. But it was intensely restyled before it was approved, and its language was strictly scrutinized in its long and painful path through Congress. Given the congressional sensitivity about this rule, and the fact that it has already been restyled, there is every reason not to tinker with the rule any further.

ARTICLE V. PRIVILEGES **Rule 501. General Rule**	ARTICLE V. PRIVILEGES[1] **Rule 501 — Privilege in General**
Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law	The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provide otherwise • the United States Constitution, • a federal statute, or • other rules prescribed by the Supreme Court under statutory authority [restore *under statutory authority* to 402] But in a civil case, with respect to a claim or defense for which state law supplies the rule of decision, state law governs the claim of privilege.

[1] The date of this version is January 22, 2009

	Rule 502 — Attorney-Client Privilege and Work Product; Limitations on Waiver
	The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection
	(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver. When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if **(1)** the waiver is intentional; **(2)** the disclosed and undisclosed communications or information concern the same subject matter; and **(3)** they ought in fairness to be considered together
	(b) Inadvertent Disclosure. When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if **(1)** the disclosure is inadvertent, **(2)** the holder of the privilege or protection took reasonable steps to prevent disclosure, and **(3)** the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

	(c) **Disclosure Made in a State Proceeding.** When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure (1) would not be a waiver under this rule if it had been made in a Federal proceeding, or (2) is not a waiver under the law of the State where the disclosure occurred
	(d) **Controlling Effect of a Court Order.** A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding
	(e) **Controlling Effect of a Party Agreement.** An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order
	(f) **Controlling Effect of this Rule.** Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision
	(g) **Definitions.** In this rule: (1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications, and (2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial

ARTICLE VI. WITNESSES **Rule 601. General Rule of Competency**	ARTICLE VI. WITNESSES **Rule 601 — Competency to Testify in General**
Every person is competent to be a witness except as otherwise provided in these rules However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law	Every person is competent to be a witness unless these rules provide otherwise But in a civil case, with respect to a claim or defense for which state law supplies the rule of decision, state law governs the witness's competency

Rule 602. Lack of Personal Knowledge	Rule 602 — Need for Personal Knowledge
A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses	A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter Evidence to prove personal knowledge may consist of the witness's own testimony This rule does not apply to testimony by an expert witness under Rule 703

Rule 603. Oath or Affirmation	Rule 603 — Oath or Affirmation to Testify Truthfully
Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so	Before testifying, a witness must give an oath or affirmation to testify truthfully. The oath or affirmation must be in a form designed to impress that duty on the witness's conscience.

Rule 604. Interpreters	Rule 604 — Interpreter
An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation	An interpreter must be qualified and must give an oath or affirmation to make a true translation

Rule 605. Competency of Judge as Witness	Rule 605 — Judge's Competency as a Witness
The judge presiding at the trial may not testify in that trial as a witness No objection need be made in order to preserve the point	The presiding judge may not testify as a witness at the trial A party need not object to preserve the issue

Rule 606. Competency of Juror as Witness	Rule 606 — Juror's Competency as a Witness
(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury	**(a) At the Trial.** A juror may not testify as a witness before the other jurors at the trial If a juror is called to testify, the court must give an adverse party an opportunity to object outside the jury's presence
(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying	**(b) During an Inquiry into the Validity of a Verdict or Indictment.** **(1)** ***Prohibited Testimony or Other Evidence.*** During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations, the effect of anything on that juror's or another juror's vote, or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters **(2)** ***Exceptions.*** A juror may testify about whether· **(A)** extraneous prejudicial information was improperly brought to the jury's attention, **(B)** any outside influence was improperly brought to bear on a juror, or **(C)** a mistake was made in entering the verdict on the verdict form

Rule 607. Who May Impeach	Rule 607 — Who May Impeach a Witness
The credibility of a witness may be attacked by any party, including the party calling the witness	Any party, including the party that called the witness, may attack the witness's credibility

Rule 608. Evidence of Character and Conduct of Witness	Rule 608 — A Witness's Character for Truthfulness or Untruthfulness
(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise	**(a) Opinion or Reputation Evidence.** A witness's credibility may be attacked or supported by evidence in the form of an opinion about — or a reputation for — having a character for truthfulness or untruthfulness But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked
(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.	**(b) Specific Instances of Conduct.** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct, in order to attack or support the witness's character for truthfulness But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: **(1)** the witness; or **(2)** another witness whose character the witness being cross-examined has testified about **(c) Privilege Against Self-Incrimination.** By testifying about a matter that relates only to a character for truthfulness, a witness does not waive the privilege against self-incrimination.

Rule 609. Impeachment by Evidence of Conviction of Crime	Rule 609 — Impeachment by Evidence of a Criminal Conviction
(a) General rule. For the purpose of attacking the character for truthfulness of a witness, **(1)** evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused, and **(2)** evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness	**(a) In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction **(1)** for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence. **(A)** must be admitted, subject to Rule 403, if the witness is not a defendant in a criminal case; and **(B)** must be admitted if the witness is a defendant in a criminal case and the court determines that the probative value of the evidence outweighs its prejudicial effect, and **(2)** for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.
(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence	**(b) Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the conviction or the witness's release from confinement for the conviction, whichever is later Evidence of the conviction is admissible only if the court determines that its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect. But before offering the evidence, the proponent must give an adverse party reasonable written notice, in any form, of the intent to use it so that the party has a fair opportunity to contest its use.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence	(c) **Effect of a Pardon, Annulment, or Certificate of Rehabilitation.** Evidence of a conviction is not admissible if **(1)** the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year, or **(2)** the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence
(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence	(d) **Juvenile Adjudications** Evidence of a juvenile adjudication is admissible under this rule only if **(1)** it is offered in a criminal case, **(2)** the adjudication was of a witness other than the defendant, **(3)** a conviction of an adult for that offense would be admissible to attack the adult's credibility; and **(4)** admitting the evidence is necessary to fairly determine guilt or innocence
(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible Evidence of the pendency of an appeal is admissible.	(e) **Pendency of an Appeal.** A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible

Rule 610. Religious Beliefs or Opinions	Rule 610 — Religious Beliefs or Opinions
Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced	Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility

Rule 611. Mode and Order of Interrogation and Presentation	Rule 611 — Mode and Order of Questioning Witnesses and Presenting Evidence
(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment	**(a) Control by the Court; Purposes.** The court should exercise reasonable control over the mode and order of questioning witnesses and presenting evidence so as to **(1)** make those procedures effective for determining the truth, **(2)** avoid wasting time, and **(3)** protect witnesses from harassment or undue embarrassment.
(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination	**(b) Scope of Cross-Examination.** Cross-examination should not go beyond the subject matter of the direct examination and matters affecting a witness's credibility. The court may permit inquiry into additional matters as if on direct examination
(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions	**(c) Leading Questions.** Leading questions should not be used on direct examination except as necessary to develop the witness's testimony Ordinarily, the court should permit leading questions on cross-examination. And the court should permit leading questions when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party

Rule 612. Writing Used to Refresh Memory	Rule 612 — Writing Used to Refresh a Witness's Memory
Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either--- (1) while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in 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 objections 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	(a) **General Application.** This rule gives an adverse party certain options when a witness uses any form of a writing to refresh memory (1) while testifying, or (2) before testifying, if the court decides that justice requires a party to have those options (b) **Adverse Party's Options; Deleting Unrelated Matter.** Unless 18 U S C § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony If the producing party claims that the writing includes unrelated matter, the court must examine the writing 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. (c) **Failure to Produce or Deliver.** If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial.

Rule 613. Prior Statements of Witnesses	Rule 613 — Witness's Prior Statement
(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel	(a) **Showing or Disclosing the Statement During Questioning.** When questioning a witness about the witness's prior statement, the party need not show it or disclose its contents to the witness But the party must, on request, show it or disclose its contents to an adverse party's attorney
(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).	(b) **Extrinsic Evidence of a Prior Inconsistent Statement.** Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to question the witness about it, or if justice so requires This subdivision (b) does not apply to a party opponent's admission under Rule 801(d)(2)

Rule 614. Calling and Interrogation of Witnesses by Court	Rule 614 — Court's Calling or Questioning a Witness
(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called	**(a) Calling.** The court may call a witness on its own or at a party's suggestion. Each party is entitled to cross-examine the witness
(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party	**(b) Questioning.** The court may question a witness regardless of who calls the witness
(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present	**(c) Objections.** A party may object to the court's calling or questioning a witness either at that time or at the next opportunity when the jury is not present.

Rule 615. Exclusion of Witnesses	Rule 615 — Excluding Witnesses
At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present	At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony Or the court may do so on its own But this rule does not authorize excluding **(a)** a party who is a natural person, **(b)** an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; **(c)** a person whose presence a party shows to be essential to presenting the party's claim or defense, or **(d)** a person authorized by statute to be present.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY **Rule 701. Opinion Testimony by Lay Witnesses**	ARTICLE VII. OPINIONS AND EXPERT TESTIMONY **Rule 701 — Opinion Testimony by Lay Witnesses**
If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702	If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is **(a)** rationally based on the witness's perception; **(b)** helpful to clearly understanding the witness's testimony or to determining a fact in issue; and **(c)** not based on scientific, technical, or other specialized knowledge within the scope of Rule 702

Rule 702. Testimony by Experts	Rule 702 — Testimony by Expert Witnesses
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case	A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, **(b)** the testimony is based on sufficient facts or data; **(c)** the testimony is the product of reliable principles and methods, and **(d)** the expert has reliably applied the principles and methods to the facts of the case

Rule 703. Bases of Opinion Testimony by Experts	Rule 703 — Bases of an Expert's Opinion Testimony
The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if the court determines that their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect

Rule 704. Opinion on Ultimate Issue	Rule 704 — Opinion on an Ultimate Issue
(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact	**(a) In General.** An opinion is not objectionable just because it embraces an ultimate issue
(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto Such ultimate issues are matters for the trier of fact alone	**(b) Exception.** In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion	Rule 705 — Disclosing the Facts or Data Underlying an Expert's Opinion
The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise The expert may in any event be required to disclose the underlying facts or data on cross-examination	Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data But the expert may be required to disclose those facts or data on cross-examination

Rule 706. Court Appointed Experts	Rule 706 — Court-Appointed Expert Witnesses
(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection An expert witness shall not be appointed by the court unless the witness consents to act A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate A witness so appointed shall advise the parties of the witness' findings, if any, the witness' deposition may be taken by any party, and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.	**(a) Appointment Process.** On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations The court may appoint any expert witness that the parties agree on and any of its own choosing But the court may only appoint someone who consents to act **(b) Expert's Role.** The court must inform the expert in writing, in any form, of the expert's duties and have a copy filed with the clerk. Or the court may so inform the expert at a conference in which the parties have an opportunity to participate The expert **(1)** must advise the parties of any findings the expert makes, **(2)** may be deposed by any party, **(3)** may be called to testify by the court or any party, and **(4)** may be cross-examined by any party, including the party that called the expert
(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs	**(c) Compensation.** The expert is entitled to whatever reasonable compensation the court allows The compensation is payable as follows **(1)** in a criminal case and in a civil action or proceeding involving just compensation under the Fifth Amendment, from any funds that are provided by law; and **(2)** in any other civil action or proceeding, by the parties in the proportion and at the time that the court directs — and the compensation is then charged like other costs
(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.	**(d) Disclosing the Appointment.** The court may authorize disclosure to the jury that the court appointed the expert
(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection	**(e) Parties' Choice of Their Own Experts.** This rule does not limit a party in calling its own experts.

TAB - 5

FORDHAM
University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu
Fax: 212-636-6899

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Committee Notes to Restyled Rules Released for Public Comment
Date: March 23, 2009

If the restyled Evidence Rules are going to be released for public comments, the Committee needs to approve Committee Notes for those rules.

The previous restyling projects have used the following template for Committee Notes to each of the restyled rules:

Committee Note

The language of Rule [ ] has been amended as part of the restyling of the [Evidence] Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The Evidence Rules Committee needs to vote at this meeting on whether to employ the above template, or to provide some alternative. Given the uniform practice of the style projects to this point, it would appear that the best solution is to use the template.

This leaves two questions for the Committee with respect to Committee Notes: 1) Should there be an introductory Committee Note — attached to Rule 101 — that would describe the goals and methods of the restyling project?; and 2) Are there any particular rules in which the Note should provide more information than the simple disclaimer in the template? The remainder of this memorandum discusses these two questions.

A. Possible Committee Note to Rule 101, Describing the Restyling Project

The Civil Rules restyling project included a Committee Note to Rule 1 that was more fulsome than the template. That note provided a short description of the process and the goals of restyling. It would seem appropriate for the Evidence restyling to contain a similar note — in this case to Evidence Rule 101.

What follows is the Committee Note to the restyled Civil Rule 1, as amended to apply to a Committee Note Evidence Rule 101:

Committee Note

The language of Rule 101 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Style Project

The Evidence Rules are the fourth set of national procedural rules to be restyled. The restyled Rules of Appellate Procedure took effect in 1998. The restyled rules of Criminal Procedure took effect in 2002. The restyled Rules of Civil Procedure took effect in 2007. The restyled Rules of Evidence apply the same general drafting guidelines and principles used in restyling the Appellate, Criminal and Civil Rules.

1 General Guidelines

Guidance in drafting, usage, and style was provided by Bryan Garner, *Guidelines for Drafting and Editing Court Rules,* Administrative Office of the Unites States Courts (1969) and Bryan Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995). *See also* Joseph Kimble, *Guiding Principles for Restyling the Civil Rules,* in *Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure,* at x (Feb. 2005) (available at http://www.uscourts.gov/rules/Prelim_draft_proposed_pt1.pdf).

2. Formatting Changes

Many of the changes in the restyled Evidence Rules result from using format to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are used throughout. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words are not changed. Rule 103 illustrates the benefits of formatting changes.

3 Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. For example, consistent expression is achieved without affecting meaning by the changes from "accused" in many rules to "defendant in a criminal case" in all rules

The restyled rules minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or something else, depending on context. The potential for confusion is exacerbated by the fact the word "shall" is no longer generally used in spoken or clearly written English. The restyled rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule.

The restyled rules minimize the use of redundant "intensifiers". These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. The absence of intensifiers in the restyled rule does not change their substantive meaning. *See, e.g.,* Rule 103 (changing "interests of justice" to "justice").

The restyled rules also remove words and concepts that are outdated or redundant.

4. Rule Numbers

The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity.

5 No Substantive Change

The Committee made special efforts to reject any purported style improvement that might result in a substantive change in the application of a rule. The Committee considered a change to be "substantive" if any of the following conditions were met:

a. Under the existing practice in any circuit, the change could lead to a different result on a question of admissibility (e.g., a change that requires a court to provide either a less or more stringent standard in evaluating the admissibility of particular evidence);

b. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made (e.g., a change in the time in which an objection must be made, or a change in whether a court must hold a hearing on an admissibility question);

c. It alters the structure of a rule in a way that creates tension with the approach that courts and litigants have thought about, and argued about, questions of admissibility (e.g., merging Rules 104(a) and 104(b) into a single subdivision); or

d. It changes a "sacred phrase" — phrases that have become so familiar in practice that to alter them would be unduly disruptive Examples in the Evidence Rules include "unfair prejudice" and "truth of the matter asserted."

B. Possible Statements to be Added to Specific Evidence Rules

Generally speaking, there should be no need to add any "extra" statement to the Committee Note of any particular restyled Evidence Rule. The idea of restyling is just to restyle and not to make any substantive change, so ideally the product should speak for itself.

When the Civil Rules were restyled, the Committee Notes to most of the rules were simply the template statement set forth above A few rules, however, had more fulsome notes. For example, Civil Rule 45 contained the following extra statement:

> The reference to discovery of "books" in former Rule 45(a)(1)(c) was deleted to achieve consistent expression throughout the discovery rules Books remain a proper subject of discovery.
>
> Former Rule 45(b)(1) required "prior notice" to each party of any commanded production of documents and things or inspection of premises. Courts have agreed that notice must be given "prior" to the return date, and have tended to converge on an interpretation that requires notice to the parties before the subpoena is served on the person commanded to produce or permit inspection. That interpretation is adopted in amended Rule 45(b)(1) to give clear notice of general present practice.
>
> The language of former Rule 45(d)(2) addressing the manner of asserting privilege is replaced by adopting the wording of Rule 26(b)(5). The same meaning is better expressed in the same words.

Notably, the Civil Rules were not solely about restyling. The Committee also made a number of changes that were in the nature of technical, but substantive amendments. It's difficult to determine, from the Note above, just what was thought to be substantive and what procedural in the amendment to Rule 45. Presumably the deletion of the word "books" is one of style, whereas the tweaking of "prior notice" could be thought to be substantive (because it codified case law consistently with the way courts have "tended to converge").

Ed Cooper explained the additions to the Notes in an email to me, an excerpt of which follows:

> I'm not sure I can articulate it * * * If there was a pattern, it was to note anything that had been seen as a difficult choice, to explain acts that seemed particularly likely to generate arguments that new language had changed the meaning, and to justify changes that might be challenged as inconsistent with the purposes of the Style Project.

In light of prior practice, a working principle for additional comment in a Committee Note — consistent with the Civil Rules project and also with the presumption that no statement should be added — might be this:

An extra, short statement can be used in Rules where a change has been made that a reasonable lawyer might think is more than purely stylistic.

Under that working principle, the Committee might consider adding short explanations in the following Rules (as well as, of course, any Rules not including here as the Committee sees fit):

1. Rules 407, 408 and 411.

These rules had always been rules of exclusion. They had never provided a ground of admissibility The rules stated that certain evidence was inadmissible if offered for certain purposes, but that the preclusion *did not apply* if the evidence were offered for other purposes. The restyling has turned them into positive rules of admissibility. They now state that the court *may admit* the evidence if offered for a permissible purpose. Having spoken to a number of professors and practitioners on this matter, it seems likely that in the public comment period there will be some objection that the change to these rules is substantive (though the Committee has taken a vote and found the changes to be stylistic only). At any rate, it may be useful to add something like the following statement to the Committee Notes to these Rules:

> The Rule previously provided that evidence was not excluded if offered for a purpose not prohibited by the rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

2. Rule 608(b)

Rule 608 allows specific acts to be inquired into "on cross-examination." But because of Rule 607, impeachment with specific acts may also be permitted on direct examination. The courts have permitted such impeachment on direct in appropriate cases despite the language of Rule 608(b). The restyling makes no change to the language "on cross-examination" on the ground that there is no reason to make a change because courts are already applying the rule properly. A reasonable lawyer might wonder whether the Committee, by keeping the language, intends that it apply the way it is written. (The Civil Rules Committee tried to add a Note if retained language was inconsistent with the practice.) The following additional statement might be added to Rule 608:

The Committee is aware that the Rule's limitation of bad act impeachment to "cross-examination" is trumped by Rule 607, which allows a party to impeach witnesses on direct examination. Courts have not relied on the term "on cross-examination" to limit impeachment that would otherwise be permissible under Rules 607 and 608. The Committee therefore concluded that no change to the language of the Rule was necessary in the context of a restyling project.

3. Rules 701, 703, 704 and 705.

These restyled rules cut out all references to an "inference." The Committee determined that the change was stylistic only, but as the term "inference" is often thrown about by lawyers, it might be anticipated that some could think that the change is more important than intended. Therefore, the Committee might consider adding the following language to the Committee Notes to these Rules.

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

4. Rules 801(d)(1)(B); 801(d)(2); 801(d)(2)(E); 803(6); 803(8); 804(b)(3); and 803, 902 and 1001 (addition of subdivisions).

These Rules have not yet been approved by the Committee and so it would be difficult at this point to determine whether a Committee Note is necessary to explain the proposed changes. But the following proposals might be considered if the Committee approves these rules in the form proposed by the Style Subcommittee:

Rule 801(d)(1)(B)

The amendment restyles the standard term "recent fabrication or improper motive" but it does not change the meaning of that phrase as it has been used by the courts applying this Rule.

Rule 801(D)(2)

Statements falling under this hearsay exemption are no longer referred to as "admissions" in the title to the Rule. The term "admissions" is confusing because not all statements covered by exemption are admissions in the colloquial sense— a statement can be admissible under the exemption even it "admitted" nothing and was not against the party's interest when made. The term also raises confusion in comparison with the Rule 804(b)(3) exception for declarations against interest. No change in application of the exemption is intended.

Rule 801(d)(2)(E)

The amendment restyles the standard term "during the course and in furtherance of the conspiracy" but it does not change the meaning of that phrase as it has been used by the courts applying this Rule.

Rule 803(6)

The amendment clarifies that the burden of showing that a record is untrustworthy is on the opponent of the evidence. This clarification accords with the current practice.

Rule 803(8)

The amendment clarifies that the trustworthiness requirement applies to any public report offered under the Rule. This clarification accords with the current practice.

Rule 804(b)(3)

The amendment provides that the corroborating circumstances requirement applies not only to declarations against penal interest offered by the defendant in a criminal case, but also to such statements offered by the government. The language in the original rule does not so provide, but a proposed amendment to Rule 804(b)(3) — released for public comment in 2008 — explicitly extends the corroborating circumstances requirement to statements offered by the government.

Rules 803/902 and 1001

The restyling changes the structure of these rules to add lettered subdivisions. The Committee is aware that these changes may disrupt electronic searches, but found it

necessary to correct the anomaly of numbered rules followed directly by numbered subdivisions.

TAB - 6

FORDHAM
University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@mail.lawnet.fordham.edu
Fax: 212-636-6899

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Proposed Amendment to Evidence Rule 804(b)(3) — consideration of public comment and final approval.
Date: April 1, 2009

At its Spring 2008 meeting the Evidence Rules Committee approved an amendment to Evidence Rule 804(b)(3) with the recommendation to the Standing Committee that it be released for public comment. The Standing Committee agreed with the recommendation and the proposed amendment was issued for public comment in August 2008. Five public comments were filed.

This memorandum is intended to assist the Committee in its consideration of the public comments, and in its decision whether to recommend that the proposed amendment to Rule 804(b)(3) be sent for final approval to the Standing Committee, Judicial Conference and Supreme Court. The memorandum updates (and in many parts replicates) the Reporter's memoranda on Rule 804(b)(3) that have been distributed for previous meetings.

In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest; but by its terms the Rule imposes no similar requirement on the prosecution. The proposed amendment would extend the corroborating circumstances requirement to all proffered declarations against penal interest. The Evidence Rules Committee proposed a similar amendment several years ago, but eventually it was withdrawn because of perceived problems in the relationship between the amendment and the Confrontation Clause. That withdrawal occurred, however, before the Supreme Court's decisions in *Crawford v. Washington* and especially *Whorton v. Bockting*, which lifted any constitutional concerns about the amendment — the amendment by definition applies only to non-testimonial statements and accordingly is not constrained by the Confrontation Clause.

This memorandum is in five parts. Part One sets forth the proposed amendment and Committee Note as it was released for public comment. Part Two provides background on the

current Rule's one-way application of the corroborating circumstances requirement. Part Three describes the argument for extending the corroborating circumstances requirement to statements offered by the government. Part Four summarizes the drafting decisions — particularly some suggestions for change that were rejected — by this Committee in the process of approving the proposed amendment to Rule 804(b)(3). Part Five reviews the suggestions for change made in the public comment.

In reviewing the materials below, the Committee should consider that a restyled version of Rule 804(b)(3) will be proposed as part of the restyling project. If the schedule holds, the substantive amendment to Rule 804(b)(3) — the extension of the corroborating circumstances requirement to statements offered by the government — will take effect on December 1, 2010, and the restyling amendments will take effect on December 1, 2011. The plan is for the restyled version to include any substantive change made by the proposed amendment now being considered by the Committee. As it happens, however, a number of the public comments received on the proposed amendment call for style changes that are already being implemented in the restyling. The Committee may or may not wish to implement those changes so that they will take effect in 2010. The differences between the restyled rule and the existing rule will be explored in the section on public comments.

I. Proposed Amendment to Rule 804(b)(3) As It Was Released For Public Comment

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 804(b)(3)

Rule 804. Hearsay Exceptions; Declarant Unavailable

* * *

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

* * *

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

Committee Note

The second sentence of Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. A number of courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. *See, e.g., United States v. Alvarez,* 584 F.2d 694, 701 (5thCir. 1978) ("by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)");*United States v Shukri,* 207 F.3d 412 (7th Cir 2000) (requiring corroborating circumstances for against-penal-interest statements offered by the government). A unitary approach to declarations against penal interest helps to assure both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.

The Committee found no need to address the relationship between Rule 804(b)(3) and the Confrontation Clause. The Supreme Court in *Crawford v. Washington,* 541 U.S. 36, 53-54 (2004), held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Courts after *Crawford* have held that for a statement to be admissible under Rule 804(b)(3), it must be made in informal circumstances and not knowingly to a law enforcement officer — and those very requirements of admissibility assure that the statement is not testimonial under *Crawford. See, e.g., United States v. Johnson,* 495 F.3d 951 (8th Cir. 2007) (accomplice's statements implicating himself and the defendant in a crime were not testimonial as they were made under informal circumstances to another prisoner, with no involvement of law enforcement; for the same reasons, the statements were admissible under Rule 804(b)(3)); *United States v. Franklin,* 415 F.3d 537 (6th Cir. 2005) (admissions of crime made informally to a friend were not testimonial, and for the same reason they were admissible under Rule 804(b)(3)).

The amendment does not address the use of the corroborating circumstances for declarations against penal interest offered in civil cases.

II. Background on the Amendment

A. The One-Way Corroboration Requirement

A hypothetical illustrates the asymmetry in the text of the current Rule: A bank robber comes home one day and is having a casual, intimate conversation with his girlfriend. She asks him how his day went. He says:

> "Fine. I robbed a bank with Bill. I wanted to get Jimmy to help me because it was a complex job, but I couldn't persuade him to come."

That statement is against the declarant's penal interest under *Williamson v. United States,* 512 U.S. 594 (1994). *Williamson* requires each declaration, including identification of other individuals, to be "truly self-inculpatory." In this example, identification of Bill is disserving to the speaker because it demonstrates inside information and involves the declarant in a conspiracy as well as felony murder. The reference to Jimmy is also inculpatory of the speaker because it is an admission that he tried to enlist another person in the conspiracy. Moreover, the declarant made his statement to a trusted loved one, with no apparent intent to shift blame to others or curry favor with the authorities. Statements such as those in the example are routinely found to be disserving after *Williamson. See, e.g., United States v. Shukri,* 207 F.3d 412 (7th Cir. 2000) (statements made by cohorts to another cohort about a prior crime involving Shukri and identifying Shukri by name were against the declarants' penal interest, because they were made to friends and "because Kartoum discussed his intimate knowledge of and involvement in the multiple thefts for which both he and Shukri were arrested."); *United States v. Desena,* 260 F.3d 150 (2d Cir. 2001) (statement at a Hell's Angel's meeting about an arson in which defendant was involved was disserving because it was made to associates and identified the declarant and the defendant as conspirators).

The way the Rule currently reads, the declarant's statement to his girlfriend (assuming he is unavailable) would be admissible against Bill simply because it is against the declarant's penal interest – no additional admissibility requirement must be met. In contrast, more is required for the defendant Jimmy to have the exact same statement admitted in his favor at his trial. Jimmy must show not only that the statement is disserving to the declarant, but also that there are corroborating circumstances clearly indicating the trustworthiness of the statement.

B. Legislative History

The legislative history of the second sentence of Rule804(b)(3) indicates that the merits of a one-way corroborating circumstances requirement were never seriously considered or debated. Professor Tague has done an exhaustive search of the Advisory Committee proceedings, Standing

Committee proceedings, and Congressional proceedings on Rule 804(b)(3). See Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 Georgetown L.J. 851 (1981). His research indicates the following:

1) The initial Advisory Committee proposal had no corroboration requirement at all. To the contrary, the proposal contained a sentence referred to as "the *Bruton* sentence". This sentence provided that "a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused", was not admissible under the exception. (This language was adopted in several state versions of the Rule). Thus, the initial proposal was basically a one-way rule of admissibility *in favor* of criminal defendants

2) Senator McClellan vigorously opposed the proposed Rule. This opposition threatened to scuttle all of the proposed Evidence Rules, and the Advisory Committee thought that it might even lead to Congressional change of the Rules process itself. Senator McClellan was concerned that defendants would get unsavory characters to claim out of court that they and not the defendant did the crime charged — then these unsavory characters would simply declare the privilege and refuse to testify at the defendant's trial. He suggested a corroboration requirement, so that at least it would appear that the exculpatory declarant might actually have committed the crime. The Advisory Committee saw no problem with a corroboration requirement because Professor Cleary, the Reporter, believed that it was already inherent in the "against penal interest" requirement. Cleary also reasoned that any corroboration requirement would be automatically met by a simple declaration from the defendant that he was innocent. So essentially, the Advisory Committee saw no harm in throwing Senator McClellan a bone. As a result, the Advisory Committee added the following sentence to the proposed Rule:

> "Statements tending to expose the declarant to criminal liability and offered to exculpate the accused must, in addition, be corroborated."

3) Apparently the Committee saw no need to consider the application of a corroboration requirement to statements offered by the prosecution, because under its proposal, declarations against penal interest could not even be offered by the prosecution due to the *Bruton* sentence. But Senator McClellan was not satisfied. He demanded that the Committee delete the *Bruton* sentence. He convinced the Committee that the *Bruton* sentence was overbroad "because not every statement made by a declarant implicating the accused is an attempt to curry favor with the authorities." The Committee decided to delete the *Bruton* sentence from the rule and to change the note to state that a court should determine the penal interest effect of an inculpatory statement in each case. But the Committee never addressed or recognized the disparity it then created by imposing a corroboration requirement on the accused but not on the prosecution. This seems simply to have been an oversight due to the sequencing of the changes — first the addition of a corroboration requirement at a time when inculpatory statements were inadmissible under the rule; then a change to the rule to permit some admissibility of inculpatory statements, without thinking about how the two changes would fit together. The Standing Committee approved the Advisory Committee's amendments, again without focusing on the anomaly of a one-way corroboration requirement.

4) Even after all that, the Department of Justice opposed Rule 804(b)(3) as it was sent to the Supreme Court. Apparently DOJ was of the view that the exception could be used only by criminal defendants DOJ saw a risk of unreliable confederates trying to get their friends acquitted through hearsay. It believed that the simple corroboration requirement set forth in the proposal was not enough protection against unreliable hearsay; DOJ was of the opinion that the corroboration requirement could be met by a defendant's simple protestation of innocence. DOJ complained to the Supreme Court. Chief Justice Burger responded by returning the proposed Rule 804(b)(3) to the Standing Committee for reconsideration. The Standing Committee, upon reconsideration, rejected the arguments of DOJ, specifically stating that the corroboration requirement could not be met by a simple protestation by the defendant that he was innocent, and that trial judges could be trusted to exclude statements of confederates if they were not disserving in context. The Standing Committee made no changes in the proposal and it was sent back to the Supreme Court. The Supreme Court approved the proposal as well, and the proposed Rule 804(b)(3) was then reviewed by the House Subcommittee on Criminal Justice.

5) The House Subcommittee decided to beef up the corroboration requirement--apparently unconvinced that the Advisory Committee version would prevent the accused from corroborating by a simple protestation of his own innocence. The Subcommittee changed the second sentence of the rule to provide that "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." The House Subcommittee also decided to put the "*Bruton* sentence" back into the Rule, apparently because the Subcommittee thought it would violate the Confrontation Clause to admit accomplice hearsay against an accused.

6) The Advisory and Standing Committees suggested to the House Subcommittee that the word "clearly" be taken out of the redrafted corroboration requirement. That word would, in the Committees' view, impose "a burden beyond those ordinarily attending the admissibility of evidence, particularly statements offered by defendants in criminal cases." Neither the House Subcommittee nor the Judiciary Committee responded to this suggestion. The rule as proposed by the House Subcommittee (including the "*Bruton* sentence") passed the House without discussion.

7) The Senate Judiciary Committee accepted the House's version of the rule and the corroboration requirement, but deleted the *Bruton* sentence. The Senate passed this version of the rule without discussion. The Senate's position on the *Bruton* sentence prevailed in Conference. The rationale for deleting the *Bruton* sentence was that the Evidence Rules should avoid trying to codify constitutional doctrine. No thought was given to the evidentiary question of whether the Rule would permit uncorroborated declarations against penal interest when offered by the prosecution.

8) Only one person in the entire legislative process flagged the anomaly of the one-way corroboration requirement. During a markup session in the House Subcommittee, Representative Holtzman asked why the corroboration requirement should not be imposed on the government. Associate counsel to the subcommittee responded that a corroboration requirement imposed on the government would be superfluous "because *Bruton* created a confrontation clause bar to all

government offered penal interest statements by an unavailable declarant." Thus, the Subcommittee was (mis)informed that inculpatory penal interest statements would *never* be admissible as a constitutional matter, rendering a corroboration requirement for such statements unnecessary. Clearly, *Bruton* does not extend so far as to exclude all against-penal-interest statements offered against the accused.

Conclusion on Legislative History

It is fair to state that the one-way corroboration requirement for declarations against penal interest did not result from a considered decision by anybody involved in the process. Rather, it is a product of mistaken assumptions and oversight. Thus, an amendment changing the language of the corroborating circumstances requirement would not be contrary to the legislative history.

C. Criticism of the One-Way Corroboration Requirement

Commentators are unanimous in their view that the one-way corroboration requirement set forth in Rule 804(b)(3) is unfair, unwarranted, and possibly unconstitutional. For example, Professor Tague, supra, argues that the Rule as written violates a defendant's right to a fair trial because it imposes an evidentiary burden on the defendant that is not imposed on the prosecution. He cites *Washington v Texas,* 388 U.S. 14 (1967), in which the Court invalidated a Texas statute that prohibited accomplices from testifying *in favor* of a defendant, but permitted accomplices to testify *against* a defendant.

Professor Jonakait, in *Biased Evidence Rules. A Framework for Judicial Analysis and Reform*, 1992 Utah Law Review 67, has this to say about the Rule 804(b)(3) corroboration requirement:

> Rule 804(b)(3) imposes a corroboration requirement on an accused seeking to admit a statement against penal interest, but not on the prosecution introducing such hearsay. Commentators have denounced the assymetric corroboration requirement as "constitutionally suspect," and a number of courts have responded by, in effect, rewriting the rule and creating a corroboration requirement for the prosecution as well.

Professor Jonakait urges amendment of the rule, but argues that in the absence of an amendment, the courts have the power "to disregard the literal language" of the rule and thereby "produce neutrality in the present version of Rule 804(b)(3)."

D. Federal Case Law Construing the One-Way Corroborating Circumstances Requirement

Many of the circuits have not read the corroborating circumstances requirement the way it is written. These circuits impose a corroborating circumstances requirement on the government as well as the accused. There are three reasons generally given for this divergence from the text of the Rule (to the extent the matter is discussed at all): 1) a showing of corroborating circumstances is required to protect the accused's right to confrontation — a rationale that is no longer applicable after *Crawford* and *Whorton v Bockting* (which held that the Confrontation Clause only bars testimonial hearsay and imposes no reliability requirement on non-testimonial hearsay); 2) it makes no sense and is unfair to impose a corroboration burden on the accused, but not on the prosecution— a rationale that becomes more important after *Whorton v Bockting* as there is no longer a constitutional "backstop" requiring reliability; and 3) it is more efficient to have a unitary test for declarations against penal interest — rather than two different tests depending on the party offering the statement.

Here is a short summary of case law in the circuits *imposing* a corroborating circumstances requirement on the prosecution:

First Circuit:

United States v. Barone, 114 F.3d 1284 (1st Cir. 1997) ("Although this court has not expressly extended the corroboration requirement to statements that inculpate the accused, we have applied the rule as if corroboration were required for such statements."); *United States v. Lubell,* 301 F.Supp.2d 88, 91 (D.Mass. 2007) (declarations against penal interest offered by the government are admissible only when corroborating circumstances clearly indicate that the statements are trustworthy).

Fifth Circuit:

United States v. Alvarez, 584 F.2d 694 (5thCir. 1978): This is the most influential decision applying the corroboration requirement to government-offered statements. Most cases imposing a corroborating circumstances requirement on the government simply do so by citing *Alvarez.*

The *Alvarez* court reasoned that a corroboration requirement was essential to comply with the Confrontation Clause's "mandate for reliability." By imposing a corroboration requirement on the government, the court sought to "avoid the constitutional difficulties that Congress

acknowledged but deferred to judicial resolution." This confrontation-based rationale is no longer applicable, as *Crawford* rejected a reliability-based test for confrontation, and *Whorton* held that if a hearsay statement is non-testimonial (as it must be in order to satisfy *Crawford*), the Confrontation Clause poses no reliability-based bar to admitting the statement

But the *Alvarez* court also reasoned that "by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)." This quest for a unitary standard is as relevant today as it was when *Alvarez* was written.

Sixth Circuit:

United States v Franklin, 415 F.3d 537, 547 (6th Cir. 2005) (inculpatory statement against penal interest was admissible only when "corroborating circumstances truly establish the trustworthiness of the statement"); *Harrison v. Chandler,* 1998 WL 786900 (6th Cir. 1998) (holding that an inculpatory statement should have been excluded for failing to meet the corroboration requirement; dissenting opinion notes that imposing a corroboration requirement on the government is contrary to the text of the Rule).

Seventh Circuit:

United States v. Shukri, 207 F.3d 412 (7th Cir. 2000) ("For the Rule 804(b)(3) exception to apply, the proponent of an inculpatory statement must show that * * * corroborating circumstances bolster the statement's trustworthiness.").

Eighth Circuit:

United States v. Rasmussen, 790 F.2d 55 (8th Cir. 1986) (applying corroboration requirement to government-offered statements); *United States v. Honken,* 378 F.Supp.2d 928 (D. Iowa 2004) (statement offered by government must be supported by corroborating circumstances clearly indicating the trustworthiness of the statement; corroborating circumstances found because the declarant's statement was supported by independent evidence).

One Circuit clearly applies the text of the rule as written — corroborating circumstances are not necessary for government-offered statements

Fourth Circuit:

United States v. Jordan, 509 F.3d 191 (4th Cir. 2007): "The district court, citing *United States v. Lowe*, 65 F.3d 1137, 1145 (4th Cir. 1995), stated that for Brown's statements [inculpating the defendant] to be admissible as statements against penal interest, the Fourth Circuit requires 'corroborating circumstances clearly indicating the trustworthiness of the statement.' As Rule 804(b)(3) makes clear, however, corroborating circumstances are only required if the statement is 'offered to exculpate the accused.' *Lowe* involved evidence offered to exculpate the accused. Here, it is plain that Brown's statements were in no way offered to exculpate Gordon or Jordan. Thus, the district court need not have discussed whether 'corroborating circumstances' existed."

Some Circuits have not decided whether to impose a corroboration requirement on statements offered by the government:

D.C. Circuit:

No discussion found.

Third Circuit:

United States v. Palumbo, 639 F.2d 123 (3d Cir. 1981) (post-custodial statement implicating defendant was not sufficiently disserving to be admissible; concurring opinion urges that prosecution be required to provide corroborating circumstances clearly indicating trustworthiness).

Ninth Circuit:

United States v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995): In a prosecution arising out of arson of a home, the court declined to decide whether corroborating circumstances are required when a declaration against interest is offered to inculpate an accused. The court found that, even if such circumstances are required, they existed in this case.

Two Circuits have case law going both ways:

Second Circuit:

United States v Casamento, 887 F.2d 1141 (2d Cir. 1989) ("this Circuit requires corroborating circumstances even when the statement is offered, as here, to inculpate the accused.").

United States v. Bakhtiar, 994 F.2d 970 (2d Cir. 1993) (noting that corroboration is required only if the statement is offered to exculpate the accused: "here, of course, it was offered by the government" so the statement could be admitted without a showing of corroborating circumstances).

United States v. Wexler, 522 F.3d 194 (2d Cir. 2008): Noting circuit case law going both ways; stating that "the rule provides that corroborating circumstances clearly indicating trustworthiness are necessary only when the statement is offered to exculpate the accused"; finding no need to resolve the question because the hearsay statement was corroborated by non-hearsay testimony and record evidence.

Eleventh Circuit:

United States v Westry, 524 F.3d 1198 (11th Cir. 2008) (government must meet corroborating circumstances requirement; requirement met here by testimony of other witnesses supporting the declarant's account, i.e., by corroborating evidence).

United States v. Tobin, 227 Fed. Appx. 878 (11th Cir. 2007): In a case involving an exculpatory statement offered by the defendant, the court stated in dictum that the corroborating circumstances requirement applied only to exculpatory statements and not to those offered by the government against the accused.

Conclusion on Federal Case Law:

Most of the circuits do not apply the text of the existing rule as it is written. The amendment would bring the text in line with the existing practice in most circuits. And it would provide uniformity on an issue that is dividing the circuits.

E. The Previous Attempt to Amend Rule 804(b)(3):

In 2003, the Advisory Committee proposed an amendment to Rule 804(b)(3) that was intended to extend the corroborating circumstances requirement to government-offered statements The text was not exactly the same as the current proposal, because the Confrontation Clause at the time required a standard of reliability that was stated as "particularized guarantees of trustworthiness" — *not* "corroborating circumstances clearly indicating trustworthiness." So the evidentiary standard in the proposed amendment required that the government show "particularized guarantees of trustworthiness" before a declaration against interest could be admitted against the accused. The intent at the time was to codify the constitutional standard so that the rule could not be unconstitutionally applied. The amendment was approved by the Judicial Conference and sent to the Supreme Court. The Supreme Court sent it back because it had just decided *Crawford*, and so the reliability-based standard of "particularized guarantees of trustworthiness" was no longer mandated by the Confrontation Clause.

Relevance of Prior History

The prior history indicates that the major objection to extending the corroborating circumstances requirement to statements against penal interest offered by the prosecution was its problematic relationship with the standard of "particularized guarantees of trustworthiness" under the Confrontation Clause. That problem no longer exists. The Confrontation Clause no longer requires a showing of particularized guarantees of trustworthiness — that was made clear by *Whorton v. Bockting*. Thus, the need for a two-way corroborating circumstances requirement (and a level playing field) can now be addressed on its own terms.

It can also be argued that a corroborating circumstances requirement for government-offered statements is all the more critical after *Crawford* and *Whorton v. Bockting* Those cases make clear that the Evidence Rules provide the primary if not only guarantee against admitting unreliable hearsay. So it would appear that the amendment — which is intended to guarantee that declarations against penal interest offered by the government are reliable — is more necessary now than it was when originally proposed.

IV. The Case for Extending the Corroborating Circumstances Requirement to Declarations Against Interest Offered by the Government

The premise of the amendment is that a hearsay statement that "tends" to subject a declarant to criminal liability may still be unreliable, and something extra is required to assure that the declarant is being truthful — specifically, corroborating circumstances supporting the declarant's account. An example might help to support the argument. One good illustration is *United States v. Shukri*, 207 F.3d 412 (7th Cir. 2000). Kartoum and Al-Qaisi were brothers-in-law involved in a theft operation. Kartoum made statements to Al-Qaisi concerning a prior theft operation in which he and Shukri were involved. He mentioned Shukri by name as his former confederate. On appeal, Shukri conceded that Kartoum's statements were disserving under *Williamson*: they were not made to curry favor or shift blame, and by identifying Shukri, Kartoum admitted not only to theft, but also to a conspiracy with an identified individual. Thus, the statement was "truly self-inculpatory" under *Williamson* even insofar as it identified Shukri by name. Shukri argued, however, that Kartoum's statement did not satisfy the "corroborating circumstances" requirement of the Rule.

The Court noted that Shukri's strategy of conceding that the statement was against interest but that there were insufficient corroborating circumstances was a sound one, because lack of corroborating circumstances was the stronger argument–thus the Court implicitly noted that there is a difference between the two requirements.

The *Shukri* Court found that the corroborating circumstances requirement (that the Seventh Circuit has read into the Rule for inculpatory statements) was met under the facts of the case:

> Carrying $2,800 in case, Shukri suddenly left his store in the middle of the day to help Kartoum * * * rent storage space and move merchandise from the Orland Park warehouse. Shukri assisted Kartoum * * * even though he [subsequently admitted that he] felt that the goods were stolen and knew that the police were investigating. Furthermore, Kartoum and Al-Qaisi [the witness] shared a confidential relationship within which candor is presumed: they are brothers-in-law and were confederates in a theft conspiracy at the time of Kartoum's statements. Statements between confidants are generally more reliable and trustworthy because such relationships bespeak candor and confidence. Shukri was closely involved with Kartoum * * * in possessing and transporting stolen goods, and Kartoum's statements were consistent with Shukri's involvement."

Most of the corroborating circumstances pointed to are in the nature of corroborating evidence. One factor–the statement was made to a trusted confidant– is a circumstantial guarantee of reliability.

To show the necessity for the corroborating circumstances requirement, consider the situation if all of the factors in the blocked paragraph are missing. Then what would be admitted is Kartoum's statement to an associate that Shukri was involved in a prior theft operation. While this is technically disserving, its admission should be questioned if the government could provide nothing else to support the truth of the statement. Certainly Kartoum could have had other motivations for

implicating Shukri in a prior crime–he might hate Shukri, he might be settling a score, Shukri might have stolen his wife He might be crazy And while mentioning Shukri by name does in some sense subject Kartoum to a risk of conviction for conspiracy, it would not take much for Kartoum to falsely substitute the name of Shukri for the real coconspirator.

These reliability concerns are significantly mitigated by the factors that are listed in the blocked paragraph Most importantly, the presence of significant corroborating evidence indicates that Kartoum was not in fact making up a story and was not falsely implicating Shukri for some nefarious motive.

The importance of corroborating evidence is recognized in trials every day. A witness's testimony about a financial transaction might seem highly doubtful–until the records are produced. The statement of a dubious eyewitness that the defendant robbed a bank may seem untrustworthy–until trace money and an exploded paint canister are found in the defendant's bedroom. It is clear that corroborating evidence can alleviate concerns over the unreliability of hearsay in the same way as it does with respect to witness testimony. And, of course, other circumstantial guarantees of reliability, beyond the mere tendency to disserve, are also important in assuring the reliability of a declaration against interest.

Relationship of Corroborating Circumstances Requirement to the Co-conspirator Exception to the Hearsay Rule

It would not seem unduly burdensome for the government to provide some evidence corroborating the truth of a hearsay statement offered to prove the defendant's guilt. Hopefully corroborative evidence would be provided as a matter of course. In the analogous area of coconspirator statements, the government is required by Rule 801(d)(2)(E) to provide independent corroborating evidence of a conspiracy before coconspirator hearsay can be considered by the jury. This requirement has not seemed unduly burdensome, and has served to protect defendants from being convicted solely out of the mouths of self-appointed coconspirators.

Indeed there is an anomaly that exists when corroborating evidence is required for the coconspirator exception but not for the against penal interest exception. If a statement of a coconspirator is offered under Rule 801(d)(2)(E) it must be corroborated with independent evidence of conspiracy. Yet under Rule 804(b)(3), as it currently reads, the same statement is admissible without any corroboration, because it is disserving to the declarant's interests when made to associates and the like in furtherance of the conspiracy. So the absence of a corroborating evidence requirement in Rule 804(b)(3) may allow a prosecutor to ignore the procedural and substantive safeguards of Rule 801(d)(2)(E).

For all these reasons, the Committee's decision to impose a corroborating circumstances requirement on declarations against penal interest offered by the government appears to be sound and necessary.

IV. Other Proposed Modifications to Rule 804(b)(3) Previously Rejected by the Advisory Committee

The proposed amendment to Rule 804(b)(3) would solve one problem in the application of the Rule — whether the corroborating circumstances requirement should apply to statements offered by the government. The Advisory Committee has been considering some kind of amendment to Rule 804(b)(3) off-and-on for about eight years. During that time, the Committee reviewed a number of other suggestions for amending the Rule. All of these suggestions were rejected — the two-way corroborating circumstances requirement was the only one left standing. This section discusses the consideration and rejection of other proposed amendments. (The section is especially pertinent because many of the suggestions in the public comment suggest amendments that have already been rejected, as discussed below).

Lowering the Threshold for Corroborating Circumstances?

In 2003, in response to a public comment, the Committee considered whether to amend the Rule to lower the threshold of corroborating circumstances required to support admissibility under Rule 804(b)(3). The Rule currently requires a showing that corroborating circumstances "clearly" indicate the trustworthiness of the statement. Some judges and commentators have argued that this standard is too stringent. One possibility was to delete the word "clearly" from the Rule. Committee members noted, however, that deletion of the word "clearly", in light of the extensive case law on the subject, might send out the wrong signal and would be disruptive to the courts. Deletion of "clearly" might also lead to unreliable hearsay being admitted under the exception. The Committee resolved unanimously to retain the word "clearly" in Rule 804(b)(3).

Eliminating the Corroborating Circumstances Requirement Entirely?

One way to level the playing field as to the corroborating circumstances requirement is to delete it from the Rule entirely. The Committee considered this possibility and quickly rejected it. As the legislative history above indicates, the corroborating circumstances requirement was a critical part of the rule — essential to getting the rule enacted. Moreover, on the merits, the Committee agreed with the concern initially expressed by Senator McClellan: there is a danger that an accused could enlist a declarant to confess to a crime, thus making a statement technically "against interest", without any real concern of punishment because all of the evidence pointed to the accused and not the declarant. The corroborating circumstances requirement tends to make it much more difficult for an accused to enlist a declarant, because that declarant by definition has to be one against whom the evidence is directed — such a declarant is likely to be reluctant to implicate himself falsely when there is a risk that his statement could be used against him in a viable prosecution.

Setting Forth the Standards For Corroborating Circumstances in the Text of the Rule?

In both 2003 and 2008 the Committee considered whether the factors pertinent to the corroborating circumstances requirement should be explicated in the text of the Rule. The Committee resolved each time that any such explication in the text would be problematic because it would create a risk that some pertinent factors might not be included. Moreover, the Evidence Rules do not ordinarily contain a list of factors in the text. (For example, Rule 502 does not list the factors that are pertinent to the reasonable steps required to avoid waiver from mistaken disclosure).

Committee members in 2008 noted that there are a few decisions that define "corroborating circumstances" as prohibiting any consideration of independent evidence that corroborates the assertions of the hearsay declarant. These courts appear to be relying on pre-*Crawford* Confrontation Clause jurisprudence that is no longer applicable. Members considered whether the Rule should be amended to specify that "corroborating circumstances" included corroborating evidence. Members noted, however, that the disagreement in the courts about the meaning of "corroborating circumstances" did not run very deep, and that the few courts that are relying on outmoded constitutional law are likely to change their approach when the issue is directly addressed — the vast majority of courts consider corroborating evidence as relevant to the corroborating circumstances inquiry. *See, e.g., United States v. Westry,* 524 F.3d 1198 (11th Cir. 2008) (corroborating circumstances requirement met by testimony of other witnesses supporting the declarant's account, i.e., by corroborating evidence). Eight members of the Committee voted not to include any definition of corroborating circumstances in the text or Committee Note to the proposed amendment. One member dissented.

Should the Corroborating Circumstances Requirement Be Extended to Civil Cases?

In both 2003 and 2008, the Committee considered whether the corroborating circumstances requirement for declarations against penal interest should also be extended to civil cases. In *American Automotive Accessories, Inc. v. Fishman,* 175 F.3d 534 (7th Cir. 1999), the court held that the corroborating circumstances requirement applied to declarations against penal interest offered in a civil case. *Fishman* appears to be the only reported circuit court opinion on the corroborating circumstances requirement as applied to declarations against penal interest offered in civil cases. There are a few district court decisions that either hold or assume that the corroborating circumstances requirement applies in civil cases. *See SEC v. 800America.com,* 2006 U.S. Dist. LEXIS (S.D.N.Y.) (SEC enforcement proceeding; statement exculpating the defendant is not admissible as a declaration against penal interest because the defendant did not provide corroborating circumstances indicating that the statement was reliable); *Farr Man Coffee v. Chester,* 1993 U.S. Dist. LEXIS 8992 (D.N.Y.); (corroborating circumstances required, and found, in a civil case); *JVC Am., Inc. v. Guardsmark, LLC,* 2007 U.S. Dist. LEXIS 71529 (N.D. Ga.) (stating in dictum that corroborating circumstances are required for declarations against interest offered in civil cases);

The Evidence Rules Committee's 2003 proposal to amend Rule 804(b)(3) would have extended the corroborating circumstances requirement to civil cases — relying on *Fishman.* Notably, that proposal received a negative public comment from the American College of Trial Lawyers. The College argued that it would "move a difficult aspect of the criminal procedural law into the civil procedural law, without any compelling reason to do so." The College thought that any change to civil cases should at least await more case law on the subject. It was especially concerned that the change would create proof problems for plaintiffs in antitrust cases, and saw no justification for imposing an extra evidentiary requirement in such cases.

In 2008 the Committee revisited the question of the applicability of the corroborating circumstances requirement to civil cases. The Committee noted the dearth of case law, and the different policy questions that might be raised with respect to declarations against penal interest offered in civil cases. It decided unanimously not to address the applicability of the corroborating circumstances requirement to civil cases. A short statement was added to the Committee Note indicating that the Committee was taking no position on the applicability of the corroborating circumstances requirement in civil cases.

Should the Amendment Consider the Applicability of the Supreme Court's Decision in Crawford v. Washington?

Under *Crawford v. Washington,* a declaration against penal interest cannot be admitted against an accused if it is testimonial. Committee members in 2008 considered whether to provide a textual limitation in Rule 804(b)(3), i.e., that "testimonial" declarations against penal interest are not admissible against the accused. The Committee determined that this language was unnecessary, because federal courts after *Crawford* have uniformly held that if a statement is testimonial, it by definition cannot satisfy the admissibility requirements of Rule 804(b)(3). A statement is "testimonial" when it is made to law enforcement officers with the primary motivation that it will be used in a criminal prosecution — but such a statement *cannot be a declaration against penal interest within Rule 804(b)(3),* because the Supreme Court held in *Williamson v. United States* that statements made to law enforcement officers cannot qualify under the exception as a matter of evidence law. Because of the fit between the hearsay exception and the right to confrontation, at least at this time, Committee members saw no need to refer to the *Crawford* standard in the text of the rule — especially since to do so could create a negative inference with respect to the hearsay exceptions that are not amended. The Committee agreed, however, to add language to the Committee Note to explain why the text of the Rule does not address *Crawford.* The Note also cites cases indicating the congruence between Rule 804(b)(3) and the Confrontation Clause after *Crawford,* i.e., that if a statement is testimonial, it is also inadmissible under Rule 804(b)(3).

V. Public Comments

The public comments on the proposed amendment to Rule 804(b)(3) propose a number of changes. Some are stylistic and will be considered first. Some are substantive. Many of the substantive are the same that were made when the Rule was sent out for public comment in 2003 — indeed by the same person. Most of those comments were reviewed and rejected by the Committee at that time.

A. Style Suggestions:

1. Clarifying That the Corroborating Circumstances Requirement Applies Only to Rule 804(b)(3):

David F. Binder, (08-EV-001) approves of the extension of the corroborating circumstances requirement to statements offered by the government. He notes that several circuit courts "have amended judicially the current Rule 804(b)(3) to so provide in their particular circuits, though I am not sure where they got the authority to do this." Mr. Binder notes a style anomaly in the following sentence:

> A statement tending to expose the declarant to criminal liability and offered ~~to exculpate the accused~~ in a criminal case *is not admissible* unless corroborating circumstances clearly indicate the trustworthiness of the statement. (Emphasis added).

The language "is not admissible" seems to imply that a hearsay statement is *never* admissible unless it is supported by corroborating circumstances clearly indicating trustworthiness. In other words, the "not admissible" language could be read to be a general limitation and not exception-specific.

It should be noted that the "is not admissible" language is not part of the amendment. It's in the original rule. It has never created any misunderstandings in any reported case. Nobody appears to have argued, for example, that a dying declaration is inadmissible because there was no showing of corroborating circumstances as mandated by Rule 804(b)(3). The language has only been applied to hearsay offered under Rule 804(b)(3).

It should also be noted that the restyled version of Rule 804(b)(3) — being considered by the Committee at this meeting — intends to rectify the problem raised by Mr. Binder. The restyled version reads as follows:

> ***(3) Statement Against Interest.*** A statement ~~which~~ that:
>
> (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; ~~was at the time of its making so far contrary to the declarant's pecuniary or~~

~~proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true~~ , and

(B) ~~A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless~~ is supported by corroborating circumstances that clearly indicate ~~the~~ its trustworthiness ~~of the statement~~ , if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

The language at the end of the rule — "if it is offered in a criminal case as one that tends to expose the declarant to criminal activity"— limits the corroborating circumstances requirement to statements against penal interest. It therefore corrects any problem raised by the public comment.

The Committee has three options in responding to Mr. Binder's argument that the "is not admissible" language in the current rule needs to be amended.

1. It can decide not to make any change. This decision could be supported on two grounds: a) the "is not admissible" language is in the existing rule and nobody has ever had a problem with it; and b) the restyling, which will take effect only one year later, is going to rectify the problem.

2. It can decide to implement the style change that it is currently reviewing as part of the style package. The possible problem with this option is that the rule is being restyled *in its entirety*, and to keep everything in context, it would probably be appropriate to include all of the style changes proposed — not just the changes to the last sentence of the rule. The problem with that solution is that it would seem confusing, when the restyling package is proposed, to have one of the restyled rules on an earlier track.

3. The Committee can decide to leave restyling where it is and make a minor change to the existing rule, as follows:

A statement tending to expose the declarant to criminal liability and offered ~~to exculpate the accused~~ in a criminal case is not admissible under this exception unless corroborating circumstances clearly indicate the trustworthiness of the statement.

On balance, it can be argued that in light of the impending restyling, the most important goal of the amendment to Rule 804(b)(3) is to make the substantive change and not mess with the style on an interim basis — especially when the style question concerns language that was not part of the amendment.

2. Adding "or proceeding" to "criminal case":

The Federal Magistrate Judges Association (08-EV-003) agrees with the general principle that the corroborating circumstances requirement should apply to all declarations against penal interest offered in criminal cases. It suggests, however, that adding the words "or proceeding" after the amendment language *criminal case* "would render it more consistent with other pertinent rules of evidence." The Association notes that Rule 1101 refers to "criminal cases and proceedings." It also notes that the word "proceeding" is used throughout the Criminal Rules, and so including the word "proceeding" in the amendment would render Rule 804(b)(3) more consistent with the Criminal Rules. Finally, adding the word "proceeding" would also "remove any ambiguity concerning whether the proposed amended rule is intended to apply only to criminal trials . . . as opposed to being applicable to all criminal proceedings to which the rules of evidence would otherwise be applicable."

The fix proposed by the Federal Magistrate Judges Association would be easy:

> A statement tending to expose the declarant to criminal liability and offered ~~to exculpate the accused~~ — in a criminal case or proceeding is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Moreover, while essentially a style suggestion, it differs from the previous suggestion (revising the words "is not admissible") because it is directed to the language of the amendment itself, not pre-existing language in the rule. And on the merits, the suggestion appears to be sound, for all the reasons stated by the Magistrate Judge Association. The question is how the suggestion can be most efficiently implemented.

On the question of implementation, the Style project is trying to reach a universal solution for the "criminal case" concept. That determination is being made at this meeting. The proposal is to define "criminal case" as including a criminal proceeding. See proposed Rule 1102, in the memorandum on restyling in this agenda book. Assuming that suggestion is adopted, it would solve the concern of the Magistrate Judges— only the solution would occur one year after the substantive change has been made. The question then is whether the Committee wants to make a change for that interim period. This can be done by adding "or proceeding" after *criminal case* in the proposed amendment to Rule 804(b)(3). The Magistrate Judges' suggestion seems reasonable and there would appear to be no reason not to include this language in the interim period, before all the rules are restyled.

B. Substantive Suggestions:

1. Switching the Playing Field: Applying the Corroborating Circumstances Requirement to Statements Offered by the Prosecution, But Not to Those Offered By the Accused.

The National Association of Criminal Defense Lawyers (08-EV-005), supports the amendment insofar as it requires declarations against interest offered by the government to be supported by corroborating circumstances clearly indicating trustworthiness. The NACDL states that the corroborating circumstances requirement is warranted given "the powerful incentives for making such statements [implicating another] in today's federal criminal justice system." NACDL argues that declarations against interest generally "will be the sort of bragging, self-aggrandizing, and merely narrative statements that are made by criminals about others but not during and in furtherance of joint criminal activity" (because otherwise the statement would be admissible under the co-conspirator exemption).

But NACDL recommends that the Rule be further amended to *abrogate* the corroborating circumstances requirement as it applies to statements offered by the accused. It doesn't want to level the playing field, it wants to reverse the imbalance that exists today. It argues that the "against interest" admissibility requirement is sufficient to guarantee reliability with respect to declarations against penal interest when offered against an accused.

Reporter's Comment on Suggestion to Delete the Corroborating Circumstances Requirement as Applied to Statements Offered by the Accused

NACDL made the same suggestion with respect to the proposed amendment in 2003. The Committee unanimously rejected it then, and nothing in the case law or any other development suggests that the Committee's decision should be changed. The deletion of the corroborating circumstances requirement as it applies to exculpatory statements would be contrary to the legislative history of the Rule and would reverse almost forty years of case law. If one thing is clear, it is that Congress was extremely concerned about the reliability of exculpatory declarations against interest — in fact so concerned that it was prepared to scuttle the *whole project* unless the "corroborating circumstances" requirement was included in Rule 804(b)(3). Assuming that Congressional concern had some merit and is entitled to some deference, nothing since then has occurred to indicate that exculpatory declarations against penal interest are more reliable than they once were. There is still the danger that an accused will persuade or hire an associate to make a statement that takes responsibility for the crime, in an attempt to get the defendant off the charges — with the declarant safe in the knowledge that there is insufficient evidence to convict him, or that he can simply disappear, or invoke the privilege.

An example, discussed in previous memos, will show the importance of the corroborating circumstances requirement when applied to exculpatory statements. In *United States v. Lowe,* 65 F.3d 1137 (4th Cir. 1995), the defendant was charged with shooting somebody who crossed a picket line. Evidence indicated that the shooter used a Colt revolver, and that the defendant owned a Colt

revolver. The defendant offered a hearsay statement from a fellow union member, Starkey, in which Starkey claimed that he bought the gun from the defendant before the incident. This statement was probably disserving under *Williamson*, because it could *tend* to subject Starkey to a risk of prosecution. But the court held the statement properly excluded for lack of corroborating circumstances. The court noted that there was no other evidence to indicate that Starkey ever had the gun. Moreover, the government could place the defendant at the scene, but not Starkey.

Lowe shows the danger of admitting exculpatory declarations against penal interest without any corroborating circumstances requirement. Starkey might well have made the statement in an effort to free Lowe (a fellow union member) from any charges, knowing that the actual risk of being charged himself was minimal — after all, no evidence put him at the scene of the crime. *Lowe* is simply one of a large number of cases that have excluded exculpatory declarations against penal interest for lack of corroboration. See, e.g., *United States v. Ironi,* 525 F.3d 683 (8th Cir. 2008) (statement "don't tell Ironi that I am selling drugs at his house" was properly excluded because there was no corroborating evidence to support its truth); *United States v. Forest,* 355 F.3d 942 (6th Cir. 2004) (statement by codefendant implying that the defendant did not know the import of a trip in which drugs were picked up was properly excluded because there was no corroborating evidence supporting its truth); *United States v. Jernigan,* 341 F.3d 1273 (11th Cir. 2003) (declarant's statement that he, and not the defendant, placed a gun in the defendant's truck was properly excluded as there was no corroborating evidence and in fact the statement "was contradicted by all of the government's evidence implicating Jernigan"); *United States v. Bradshaw,* 281 F.3d 278 (1st Cir. 2002) (insufficient corroboration where the declarant stated an alternative theory of the crime for which there was no supporting evidence). The proposal to delete the corroborating circumstances requirement would invalidate all this case law.

If the Committee, despite all these reservations, approves a proposal to delete the corroborating circumstances requirement, the question arises whether that change could be made without another round of public comment. It would seem that the change is relatively sweeping in effect by abrogating a good deal of case law; and it is clearly a change that is substantially different from the amendments previously released for public comment. So there is a strong argument that deletion of the corroborating circumstances requirement necessitates another round of public comment. Certainly the Justice Department would want to be heard about such a fundamental change in the Rule. And, by sending the rule out for a new round of public comment, the Committee would be extending the process of amending Rule 804(b)(3) into double-digit years.

2. Adding a Sentence Indicating That the Credibility of the In-Court Witness Is Irrelevant.

Richard Friedman (08-EV-006), suggests that the text of the rule be amended to specify that in assessing the admissibility of a declaration against penal interest, the court is not to take into account whether the in-court *witness* is credible. Concern about the reliability of the in-court witness is a classic and elementary mistake in hearsay analysis. The hearsay concern is that the out-of-court declarant may not be telling the truth — and the lie will not be uncovered because the declarant is

not subject to oath, cross-examination, and an opportunity for the factfinder to view his demeanor. The risk that an in-court witness is lying does not raise a hearsay concern, because he is doing his lying in court, subject to the traditional testimonial guarantees.

Why should the text of a hearsay exception even address the question of the reliability of the in-court witness? Unfortunately, a few courts have in fact focused on the unreliability of the in-court witness in excluding hearsay offered under Rule 804(b)(3). *See, e g., United States v. Jernigan,* 341 F.3d 1273 (11th Cir. 2003) (exculpatory statement excluded in part because the witness who purportedly heard it was an unreliable person with a criminal record); *United States v Rasmussen,* 790 F.2d 55 (8th Cir. 1986). Other courts have held explicitly and correctly to the contrary, stating that the credibility of the in-court witness is irrelevant to the admissibility of the statement *United States v Katsougrakis,* 715 F.2d 769 (2d Cir. 1985) (credibility of in-court witness may not be considered because to do so would usurp the authority of the jury).

The 2003 proposal to amend Rule 804(b)(3) contained a short paragraph at the end of the Committee Note that addressed the question of the credibility of the in-court witness. The paragraph provided as follows:

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

The 2008 Committee Note does not address the question of the in-court witness. Friedman agrees with the provision of the 2003 Note, and suggests it be elevated to the text of the Rule. He made this suggestion previously and the Committee unanimously rejected any amendment to the text. The following comment addresses two questions: 1) whether the irrelevance of the witness's credibility should be addressed in the text of the Rule, as Friedman suggests; and 2) whether the irrelevance of the witness's credibility should be addressed in the Committee Note, as it was in 2003.

Reporter's Response to the Suggestion to Address the Irrelevance of the Witness's Credibility in the Text of Rule 804(b)(3):

Amending the text of Rule 804(b)(3) to provide that the credibility of the in-court witness is irrelevant would likely cause confusion. This is because the credibility of the in-court witness is *never* relevant to determine the admissibility of *any* hearsay statement. The credibility of the in-court witness is pertinent only to the question of whether a hearsay statement was *made*–and whether a hearsay statement was made is inherently a jury question, because the jury can assess the in-court witness's credibility when she testifies that she heard the statement. The hearsay question focuses on whether the out-of-court statement is *reliable, assuming it was made.* So it is a classic error to confuse the admissibility of a hearsay statement with the credibility of an in-court witness.

Thus, if language rejecting the relevance of the credibility of the witness is to be added to the text of Rule 804(b)(3), it should also be added to every other hearsay exception — it's the same issue regardless of the exception. Put another way, if the language is added *only* to Rule 804(b)(3), a negative, confusing and misleading inference will be raised, i e., that the credibility of the witness *is* pertinent to the admissibility of a statement offered under any of the other hearsay exceptions.

As stated above, the Committee determined in 2003 that stating the obvious in the text of the Rule — that the witness's credibility is irrelevant to the admissibility of hearsay — would be confusing and would create tension with the other exceptions. Nothing has occurred since 2003 to change that rationale.

It is true, though, that there are cases — which have not been overruled since 2003 — that specifically allow the trial court to exclude a declaration against interest at least in part because of a doubt about the reliability of the witness, i.e., a doubt about whether the statement was made at all. One could argue, though, that the text of the rule is not the place to give a court a basic hearsay lesson — or if it is, that lesson is already given by the definition of hearsay in Rule 801, which covers only out-of-court statements and not in-court testimony. And the discussion has to come back to the problem that if the misconception is to be corrected in this exception, it probably needs to be corrected in all the others as well.

If the Committee decides in the end to include language about the credibility of the in-court witness to the text of the amendment, the language might look like this:

Rule 804. Hearsay Exceptions; Declarant Unavailable

* * *

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

* * *

(3) Statement against interest. — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered ~~to exculpate the accused~~ in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. The credibility of the witness relating the hearsay statement is irrelevant to its admissibility [to the existence of corroborating circumstances?] under this [or any other?] exception.

Reporter's Response to the Suggestion to Address the Irrelevance of the Witness's Credibility in the Text of Rule 804(b)(3):

As stated above, a paragraph in the 2003 Committee Note directly addressed the irrelevance of the witness's credibility in assessing corroborating circumstances under Rule 804(b)(3). Having written both the 2003 Note and the current one, it might be useful to discuss my motivation for deleting it from the current Note. That motivation was not because the paragraph had become less useful or that the problem it addressed had gone away. As Friedman notes, the substance of the paragraph in the 2003 Note is "just right" today.

The reason for deleting the paragraph from the existing Note was that since 2003, the Reporters have seen an aversion on the part of some (maybe most) Standing Committee members to language in Committee Notes that addresses matters not covered by the text of the rule. In the view of these members, the best Committee Note in the world is five words long.

"The rule speaks for itself."

The rationale stated by these Standing Committee members for pruning the Notes is that many people don't read them, and it would therefore be a trap for the unwary in trying to establish a rule of law other than in the text of the rule. I've also heard the complaint that Notes create "transaction costs" when they cite cases or go beyond the text of the Rule.

So, to speak frankly, I cut the paragraph in fear of a poor reception by the "limit-the-Note" forces on the Standing Committee. In retrospect, I may have overreacted, for at least four reasons: 1) Standing Committee membership is dynamic; 2) the Standing Committee has never formally adopted a policy with respect to Notes — there has never been a vote on the policy question of how helpful Notes can be; 3) the particular paragraph on the credibility of the witness, while not on a topic covered by the text of the rule, does no more than state an elementary point of hearsay doctrine, i.e., that the focus is on the declarant, not on the witness; it doesn't establish some unexpected or novel theory that would take lawyers and courts by surprise; and it doesn't cite cases, so it avoids those "transaction costs"; and 4) in the end, Notes are supposed to be helpful — they are supposed to help the reader solve problems; they are often cited and relied on by courts to determine some nuance in the application of the Rule; and so maybe the Note can be used to persuade wayward courts that they are not to focus on the credibility of the in-court witness.

In sum, there appears to be merit in including the following paragraph to the end of the Note, as it was included in the proposed amendment in 2003:

> The Committee observes that in assessing whether corroborating circumstances exist, some courts have focused on the credibility of the witness who relates the hearsay statement in court. But the credibility of the witness who relates the statement is not a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of

determining the credibility of testifying witnesses.

Putting this language in the Note rather than the text tends to avoid the problem of a negative inference that could be drawn by not including similar language in other hearsay exceptions. Moreover, while the language covers an obvious point, one can argue that the Note is a good place to tell some courts that they have been interpreting the rule incorrectly — better than stating the obvious in the text.

3. Amending Rule 804(b)(3) to Overrule the Supreme Court's Decision in Williamson:

Richard Friedman suggests that the Committee should take this occasion to reject the Supreme Court's decision in *Williamson v. United States,* 512 U.S. 594 (1994). In that case, the Court held that every statement admitted under Rule 804(b)(3) had to be truly self-inculpatory of the declarant's interest. The Court specifically rejected the notion that a disserving statement could carry into evidence other related statements made at the same time even though those latter statements were not themselves disserving. That is, neutral or self-serving aspects of a broader declaration are not admissible under the Rule. Justice O'Connor, writing for six Justices on this point, began her analysis by noting two possible readings of the term "statement" in the Rule:

> One possible meaning, "a report or narrative," Webster's Third New International Dictionary 2229, defn. 2(a) (1961), connotes an extended declaration. Under this reading, Harris' entire confession — even if it contains both self-inculpatory and non-self-inculpatory parts — would be admissible so long as in the aggregate the confession sufficiently inculpates him. Another meaning of "statement," "a single declaration or remark," ibid., defn. 2(b), would make Rule 804(b)(3) cover only those declarations or remarks within the confession that are individually self-inculpatory.

Justice O' Connor contended that the narrower meaning of "statement" was mandated by the "principle behind the Rule." She elaborated as follows:

> Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true. This notion simply does not extend to the broader definition of "statement." The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.
>
> * * *

...

> In our view, the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. The district court may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else.

Professor Friedman would have the Committee reject the *Williamson* construction of the Rule and insert new language to provide that a neutral or self-serving statement is admissible if such a statement is made in conjunction with a disserving statement and "given that the declarant's inclination to tell the truth was so strong that she made the adverse assertion" it is "probable that the declarant made the non-adverse assertion only if she believed it to be true."

Reporter's Comment on the Proposed Rejection of the Williamson Rule:

The most obvious problem with the proposal is that it would upset a clear Supreme Court precedent, as well as about 250 lower court cases construing that precedent, while providing no major advantage. The lower federal courts have embraced the *Williamson* definition of "statement" and have indeed *extended* that definition to declarations against interest offered in civil cases, (*Silverstein v. Chase,* 216 F.3d 142 (2d Cir. 2001); to statements offered under the residual exception (*United States v. Canan*, 48 F.3d 954, 960 (6th Cir. 1995) (relying on *Williamson* to declare that the term "statement" must mean "a single declaration or remark for purposes of all of the hearsay rules.")); and to statements construing what is admissible as a party-admission under Rule 801(d)(2) (*United States v. Ortega,* 203 F.3d 675 (9th Cir. 2000) (noting that an exculpatory part of a confession is not admissible simply because it is part of a broader inculpatory narrative, citing *Williamson)*). Thus, any rejection of *Williamson* would constitute a rejection of a consistent body of case law and would affect not only Rule 804(b)(3) *but other hearsay exceptions as well* — indeed potentially *all* the hearsay exceptions, because the exceptions do not apply unless the evidence offered is a "statement" under Rule 801. See *Canan, supra,* noting that its ruling applying the *Williamson* definition of "statement" to all hearsay exceptions "is consistent with the idea implicit in Rule 801(a): that there is an overarching and uniform definition of 'statement' applicable under all of the hearsay rules. Rule 801(a) indicates that its definition of statement covers Article VIII (Hearsay) of the Federal Rules of Evidence entirely. It would make little sense for the same defined term to have disparate meanings throughout the various subdivisions of the hearsay rules." So, *Williamson* is not so much an interpretation of Rule 804(b)(3) as it is an interpretation of Rule 801. Making the suggested change in Rule 804(b)(3) is at best a piecemeal approach.

Rejecting the *Williamson* definition of "statement" would be to take an aggressive, activist position that is inconsistent with this Committee's traditional approach to rulemaking, and is therefore unlikely to be successful. Notably, the Committee has never in its history proposed an

amendment that would overrule a Supreme Court decision. The closest case was the Committee's decision, before my tenure, to amend Rule 801(d)(2)(E) to overrule *Bourjaily v. United States*. Interestingly, the finished product was an amendment in 1997 that *codifies Bourjaily*!

The costs to the Committee, to the courts, and to the rulemaking process of such a disruptive amendment do not appear in any way to be justified by any benefit. The concern over the reliability of declarations against penal interest is longstanding and justified by experience. That concern is alleviated, somewhat, by the assurance that only those statements that are truly self-inculpatory will be admitted under the exception — that is what *Williamson* guarantees. In contrast, the concern over reliability is exacerbated if neutral and even self-serving statements can be admitted as "tag-alongs" to disserving statements.

Nor is this concern alleviated by Friedman's proposed test that a neutral or self-serving statement should only be admissible if, given its temporal relationship with a disserving statement, "it appears likely that the declarant would make the statement in question only if believing it to be true." How is one to determine whether that standard has been met if the statement itself is not disserving to the declarant's interest? Is one to rely on residual-exception-type circumstantial guarantees of reliability? If so, why not use the residual exception to admit the statements? Why rely on a vague addendum to Rule 804(b)(3)?

Moreover, a strong argument can be made that the Supreme Court in *Williamson* was indeed correct on the merits. Experience indicates that people who make disserving statements also include neutral and self-serving statements as part of a broader narrative, and that these statements are often found to be false.

It thus appears that any attempt to reject the *Williamson* definition of "statement" in favor of a vague "likely to believe it to be true" standard imposes substantial costs without anything near a corresponding benefit. It is for the Committee to decide whether this change should be made, however. If the Committee agrees with Friedman that the Rule should be amended to reject *Williamson*, then the proposed amendment would have to be released for a third round of public comment, because such a change would constitute a substantial change from the previous proposals.

Conclusion

Here is what the proposed amendment would look like if the Committee accepted the following suggestions, all discussed above: 1) Clarifying that the corroborating circumstances requirement applies only to statements offered under Rule 804(b)(3); 2) Adding a reference to criminal proceedings as well as criminal cases; and 3) Adding a paragraph to the Committee Note to the effect that the credibility of the in-court witness is irrelevant to admissibility.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 804(b)(3)

Rule 804. Hearsay Exceptions; Declarant Unavailable

* * *

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

* * *

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

admissible under this exception unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Committee Note

The second sentence of Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. A number of courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. *See, e.g , United States v Alvarez,* 584 F.2d 694, 701 (5thCir. 1978) ("by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)");*United States v. Shukri,* 207 F.3d 412 (7th Cir. 2000) (requiring corroborating circumstances for against-penal-interest statements offered by the government). A unitary approach to declarations against penal interest helps to assure both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.

The Committee found no need to address the relationship between Rule 804(b)(3) and the Confrontation Clause. The Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Courts after *Crawford* have held that for a statement to be admissible under Rule 804(b)(3), it must be made in informal circumstances and not knowingly to a law enforcement officer — and those very requirements of admissibility assure that the statement is not testimonial under

Crawford. See, e.g., United States v. Johnson, 495 F.3d 951 (8th Cir. 2007) (accomplice's statements implicating himself and the defendant in a crime were not testimonial as they were made under informal circumstances to another prisoner, with no involvement of law enforcement; for the same reasons, the statements were admissible under Rule 804(b)(3)); *United States v Franklin,* 415 F 3d 537 (6th Cir. 2005) (admissions of crime made informally to a friend were not testimonial, and for the same reason they were admissible under Rule 804(b)(3)).

The amendment does not address the use of the corroborating circumstances for declarations against penal interest offered in civil cases.

The Committee observes that in assessing whether corroborating circumstances exist, some courts have focused on the credibility of the witness who relates the hearsay statement in court. But the credibility of the witness who relates the statement is not a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses.

TAB - 7

Calendar for September–November 2009 (United States)

September

Su	Mo	Tu	We	Th	Fr	Sa
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30			

October

Su	Mo	Tu	We	Th	Fr	Sa
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

November

Su	Mo	Tu	We	Th	Fr	Sa
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30					

Holidays and Observances:

Sep 7 Labor Day
Oct 12 Columbus Day (Most regions)
Nov 11 Veterans Day
Nov 26 Thanksgiving Day

Calendar generated on www.timeanddate.com/calendar