ADVISORY COMMITTEE
ON
EVIDENCE RULES
New York, NY
April 22-23, 2010

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

New York, N.Y.

April 22-23, 2010

I. Opening Business

Opening business includes approval of the minutes of the Fall 2009 meeting and a report on the January 2010 meeting of the Standing Committee.

II. Final Approval of Restyled Evidence Rules

Professor Kimble, the Reporter, and the Style Subcommittee of the Standing Committee have reviewed the public comments received on the restyled Evidence Rules. At this meeting, the Evidence Rules Committee will review those comments and the proposals for change in response to those comments. The Committee will also review, one last time, the restyled rules for which no public comment was received. The Committee's objective is to review and give final approval to the restyled rules so that they can be referred to the Standing Committee with the recommendation that the rules be sent to the Judicial Conference.

The agenda book contains the following pertinent materials:

1. A memorandum from the Reporter setting forth a side-by-side of each Evidence Rule, and discussing each of the public comments meriting consideration by the Committee, with comments from the Reporter, Professor Kimble, and the Style Subcommittee.

2. A memorandum from the Reporter on Committee Notes to the restyled Rules of Evidence.

3. All the public comments received on the restyled rules.

III. Next Meeting

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

CHAIRS and REPORTERS

Effective October 1, 2009

Chairs:	Reporters:
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	Professor Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459
Honorable Jeffrey S. Sutton United States Circuit Judge United States Court of Appeals 260 Joseph P. Kinneary 85 Marconi Boulevard Columbus, OH 43215	Professor 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 Univ. 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	Professor Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215
Honorable Richard C. Tallman United States Court of Appeals 902 William Kenzo Nakamura United States Courthouse 1010 Fifth Avenue Seattle, WA 98104-1195	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	Professor Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023

ADVISORY COMMITTEE ON EVIDENCE RULES

Chair: Honorable Robert L. Hinkle United States District Court United States Courthouse 111 North Adams Street Tallahassee, FL 32301-7717	**Reporter:** Professor Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023
Members: Honorable Joseph F. Anderson, Jr. United States District Court Matthew J. Perry, Jr. United States 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 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
Honorable Lisa Monaco Associate Deputy Attorney General 950 Pennsylvania Avenue, N.W. – Room 4208 Washington, DC 20530	Elizabeth J. Shapiro AD, Federal Programs Branch Civil Division U.S. Department of Justice 20 Massachusetts Ave., 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.)

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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	

LIAISON MEMBERS

Appellate:	
Judge Harris L Hartz	(Standing Committee)
Bankruptcy:	
Judge James A. Teilborg	(Standing Committee)
Civil:	
Judge Eugene R. Wedoff	(Bankruptcy Rules Committee)
Judge Diane P. Wood	(Standing Committee)
Criminal:	
Judge Reena Raggi	(Standing Committee)
Evidence:	
Judge Judith H. Wizmur	(Bankruptcy Rules Committee)
Judge Michael M. Baylson	(Civil Rules Committee)
Judge John F. Keenan	(Criminal Committee)
Judge Marilyn Huff	(Standing Committee)

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Jeffrey N. Barr Attorney-Advisor Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
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Ms. Amaya Bassett Staff Assistant Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
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ADVISORY COMMITTEE ON EVIDENCE RULES

Members	Position	District/Circuit	Start Date	End Date
Robert L. Hinkle	D	Florida (Northern)	Member: 2002	----
Chair			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	2012
Andrew D. Hurwitz	JUST	Arizona	2004	2010
John F. Keenan**	D	New York (Southern)	2007	2010
Marjorie A. Meyers	FPD	Texas (Southern)	2006	2013
William W. Taylor III	ESQ	Washington, DC	2004	2010
Lisa Monaco	DOJ	Washington, DC	----	Open
Daniel J. Capra **Reporter**	ACAD	New York	1996	Open

Principal Staff:

Peter G. McCabe	(202) 502-1800
John K. Rabiej	(202) 502-1820

** Ex-Officio, non-voting members' terms coincide with terms on Civil and Criminal Rules

TAB 1

Advisory Committee on Evidence Rules

Minutes of the Meeting of November 20, 2009

Charleston, S.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on November 20th in Charleston, S.C..

The following members of the Committee were present:

Hon. Robert L. Hinkle, Chair
Hon. Anita B. Brody
Hon. Joan N. Ericksen.
Hon. Andrew D. Hurwitz
Marjorie A. Meyers, Esq.,
William W. Taylor, III, Esq.
John Cruden, 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. Michael M. Baylson, Liaison from the Civil Rules Committee
Hon. Judith H. Wiznur, 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
Professor Daniel R. Coquillette, Reporter to the Standing Committee
Elizabeth J. Shapiro, Esq., Department of Justice
Timothy Reagan, Esq., Federal Judicial Center
Jeffrey Barr, Esq., Rules Committee Support Office
Professor Stephen A. Saltzburg, Representative of the ABA Section on Criminal Justice
Landis Best, Esq., Representative of the ABA Section of Litigation

Kenneth Lazarus, Esq.
Andrea Kuperman, Law Clerk to Judge Rosenthal

Opening Business

Judge Hinkle welcomed the members of the Committee and other participants to the meeting. He welcomed John Cruden, the new representative of the Justice Department, and Landis Best, the new representative of the ABA Section of Litigation.

The Committee approved the minutes of the Spring 2009 meeting, with two minor changes suggested by Professor Kimble.

Judge Hinkle then reported on the Spring 2009 meeting of the Standing Committee. The Standing Committee unanimously approved the amendment to Evidence Rule 804(b)(3) proposed by the Advisory Committee. That amendment requires the government to provide corroborating circumstances clearly indicated the trustworthiness of a hearsay statement before it may be admitted against the accused as a declaration against penal interest. That amendment should go into effect on December 1, 2010. Judge Hinkle also noted that the Standing Committee approved all of the restyled Evidence Rules for release for public comment. The Standing Committee's vote in favor of publication was unanimous — though two members expressed some reservations about the use of certain style conventions. For example, one member of the Standing Committee objected to the use of bullet points, and another objected to the use of double dashes for any purpose other than to include a collateral point in a sentence. Judge Hinkle stated that it was important to convince these Standing Committee members that the style conventions employed in the Evidence Rules are the same as were used — very successfully — in the restylings of the Criminal, Civil and Appellate rules.

I. Restyling Project

A. Introduction

At its 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. Over the next two years, the Committee prepared restyled versions of all the Evidence Rules. As discussed above, the restyled Rules were approved for publication by the Standing Committee at its Spring 2009 meeting. The public comment period runs until February 15, 2010. Three hearings have been scheduled for comment on the restyled Rules.

The first draft of the restyled Rules was prepared by Professor Kimble. The Evidence Rules Committee has reviewed each Rule to determine whether any proposed 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 should not be implemented. The Committee has also reviewed each rule to determine whether to recommend that a change, even though stylistic only, might be improved in any respect and reconsidered by the Style Subcommittee of the Standing Committee.

At the Fall 2009 meeting, the Committee considered comments that it had received on the restyled rules issued for public comment. Some comments were from members of the public — most importantly a detailed set of comments from the American College of Trial Lawyers. Other comments were submitted by Professor Kimble, the Reporter, or other Committee members after a top-to-bottom review of the restyled rules.

The Committee's review of these comments at the Fall meeting was tentative, because it anticipates receiving many more public comments. Nonetheless, the review indicated a number of rules that might be improved in some important respects.

What follows is a description of the Committee's tentative determinations, rule by rule.

Rule 101(b)(4)

Restyled Rule 101(b)(4) provides a definition of the term "record" — so that related and repetitive terms such as "memorandum," "report," etc. could be dropped from Rules such as 803(6) and 803(8). Professor Kimble was concerned that references in the Evidence Rules to rulings "on the record" might somehow raise confusion if applied to the definition of "record" under Rule 101(b)(4). So Rule 101(b0(4), as issued for public comment, provided a drafting alternative to distinguish a "record" that was evidence from a court record or a ruling on the record.

Rule 101(b)(4), as issued for public comment, reads as follows:

(b) **Definitions.** In these rules:

* * *

(4) "record" [in Rules 803, 901, 902, and 1005] includes a memorandum, report, or data compilation;

Committee Discussion:

The Reporter suggested that the bracketed material be deleted, because there was little chance that any reader would confuse a record offered as evidence and a ruling "on the record" — the definition could not possibly apply to the reference "on the record." Professor Kimble suggested that a reader might think the Committee had made an oversight in defining "record" without treating or mentioning different uses of the term.

The Committee determined that the bracketed language should be dropped, because if the languages is added to the existing text it would read "In these rules record in Rules 803, 901," etc. The repetitive reference to rules would be awkward. The Committee approved two alternatives for Professor Kimble and the Style Subcommittee to consider for the next meeting. The first alternative is:

"a record includes a memorandum, report, or data compilation."

The Committee reasoned that adding the article "a" sufficiently distinguished a record as evidence from a ruling on the record. The use of the "a" was also useful to distinguish the noun "record" from the verb "record."

The second alternative approved by the Committee is:

"a record includes a memorandum, report, or data compilation, except in a phrase such as 'on the record.'"

The Committee will review Professor Kimble's rewrite before the next meeting.

Rule 101(b)(6)

Rule 101(b)(6) is intended to clarify that paper-based references in the Evidence Rules cover electronically stored information.

The Rule as issued for public comment provides as follows:

(b) Definitions. In these rules:

* * *

(6) a reference to any kind of written material includes electronically stored information.

Committee Discussion:

The Committee addressed a concern expressed by the Reporter to the Civil Rules Committee, that the reference to "any kind of written material" was not sufficiently comprehensive to cover all the electronically stored information that might be offered and admitted. For example, would "any kind of written material" cover a photograph offered in digital form? Another concern was that the term might not be as comprehensive as the use of the term "electronically stored information" in Civil Rule 34.

The Committee agreed that the term "any kind of written material" could be usefully expanded. But the definition could not be stated so broadly as to cover, for example, oral testimony of a witness. After discussing a number of alternatives, the Committee tentatively agreed on the following change to Rule 101(b)(6) as it was issued for public comment.

(b) Definitions. In these rules:

* * *

(6) a reference to any kind of written material or other medium includes electronically stored information.

The Committee also resolved to add a reference to Civil Rule 34 to the Committee Note to Rule 101(b)(6).

Rule 104(b)

Professor Kimble suggested an amendment to restyled Rule 104(b) — the rule governing conditional relevance. This proposal stemmed from suggestions of the American College of Trial Lawyers.

The proposal, blacklined for changes from the Rule as issued for public comment, was as follows:

Relevancy That Depends on a Fact. When the relevancy of evidence depends on ~~fulfilling a factual condition~~ whether a fact exists, the court may admit ~~it~~ the evidence on, or subject to, the introduction of evidence sufficient to support a finding that the ~~condition is fulfilled~~ fact does exist.

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Committee Discussion:

The Reporter was concerned with the use of "may admit." That could be read as giving a trial court discretion to exclude evidence conditioned on the existence of a fact even when the judge determines that there is evidence sufficient to support a finding. One member responded that "may admit" could instead be read to refer to the fact that even if the standard for conditional relevance is met, the proffered evidence might nonetheless be excluded under other rules such as 403 and 801. But the Reporter responded that the Rule could accomplish both objectives — requiring the court to find the conditional relevance standard met if there is evidence sufficient to support a finding, and providing for the possibility of exclusion under other rules — by the following change:

> When the relevancy of evidence depends on ~~fulfilling a factual condition~~ whether a fact exists, the ~~court may admit it~~ proponent must provide the court with ~~on, or subject to, the introduction of~~ evidence sufficient to support a finding that the ~~condition is fulfilled~~ fact does exist.

But the problem with this alternative is that it does not treat the "sequencing" function of the Rule. Rule 104(b) has two functions: 1) establishing the evidentiary standard for questions of conditional relevance; and 2) allowing the judge to make a determination either at the time the evidence offered, or to admit the evidence subject to a showing of the conditional fact.

After discussion, the Committee suggested that Professor Kimble and the Style Subcommittee consider a revision that will more clearly set out the two functions of the Rule. One possibility might look like this:

When the relevancy of evidence depends on fulfilling a factual condition, a proponent must provide the court, at the time the evidence is offered or later in the trial, with evidence sufficient to support a finding that the fact does exist.

> When the relevancy of evidence depends on ~~fulfilling a factual condition~~ whether a fact exists, the ~~court may admit it~~ proponent must provide the court with ~~on, or subject to, the introduction of~~ evidence sufficient to support a finding that the ~~condition is fulfilled~~ fact does exist. The proponent's showing may be made at the time the evidence is offered or later in the trial.

Professor Kimble will revise Rule 104(b) to cover both functions of the rule, and the Committee will consider the revisions before the next meeting.

Rule 104(c)

Professor Kimble suggested a change to the heading of Rule 104(c), as follows:

~~Matters That the Jury Must Not Hear.~~ Conducting a Hearing Outside the Jury's Presence. 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.

Committee Discussion:

Committee members noted that the word "presence" is not accurate because many preliminary determinations are made sidebar while the jury is still in the courtroom. Thus, "outside the jury's hearing" — the term used in the text, is correct.

The Committee, therefore, rejected the use of the word "presence" in the heading of the Rule, but did not disagree with Professor Kimble that the heading in the restyled rule could be improved. Members also noted that the text of the Rule was somewhat awkward because there are two different uses of the word "hearing" — the hearing conducted by the court and the protection against the jury hearing the evidence.

Professor Kimble will try to revise the Rule to sharpen the heading and to avoid the multiple references to "hearing." The Committee will review that proposal before the next meeting.

Rule 104(d)

Professor Kimble, and the Style Subcommittee, suggested a change to the heading of the Rule as it was issued for public comment:

~~Testimony by~~ Limited Cross-Examination of 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.

Professor Kimble argued that the current heading is incomplete because the rule is not about a defendant's testimony, but rather about limiting cross-examination of a criminal defendant who testifies on a preliminary question.

Committee Discussion:

Committee members were concerned that the heading was misleading — it seems to imply that cross-examination of a criminal defendant is limited in all cases. Nothing in the heading refers to the context of the rule — preliminary questions. Professor Kimble responded that all of Rule 104 is about preliminary questions — the Rule is titled "Preliminary Questions" — so there is no need to refer to preliminary questions in the heading of a subdivision. But Committee members remained concern that the broad reference to "a defendant in a criminal case" — made necessary by the fact that all references to an accused have been changed to "defendant in a criminal case" — would be misleading.

After discussion, the Committee and Professor Kimble agreed that the word "limited" should be taken out of the heading. So there was tentative agreement on the following heading

"Cross-Examining a Defendant in a Criminal Case"

Rule 201(d)

The American College of Trial Lawyers suggested a slight change to Rule 201(d), and Professor Kimble implemented that suggestion. The proposed change to the Rule, blacklined from the Rule as issued for public comment, is as follows:

> **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 to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

Committee Discussion:

The Reporter noted that the reason for possible change is that a reference to "the noticed fact" is not completely accurate — because, at the time of the hearing, the fact has not yet been noticed.

The Committee unanimously approved the change to Rule 201(d).

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Rule 301

The restyled Rule 301, as issued for public comment, reads as follows:

> 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 had it originally.

The American College of Trial Lawyers suggested that the phrase "in the sense of the risk of nonpersuasion" was awkward and that the Rule could be sharpened. The suggestion led to a broad discussion of the Rule at the Committee meeting.

Committee Discussion:

Committee members noted that the two sentences in the restyled Rule address different questions. The first allocates a burden of *production* while the second allocates a burden of *persuasion.* The current restyled Rule uses the term "burden of going forward" for the former concept and "burden of proof in the sense of the risk of the burden of nonpersuasion" for the latter. While these terms are taken from the original Rule 301, the Committee discussed how the terminology might be improved to make the rule more easily understood. After significant discussion, the Committee unanimously approved tentative changes to the restyled Rule 301. Those changes provide as follows:

> 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~~ producing 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~~ persuasion, which remains on the party who had it originally.

Rule 401

Restyled Rule 401 provides as follows:

> 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.

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The Committee considered suggestions raised by a law professor on a listserve that the term "more or less" might somehow make a substantive change in the standard for relevance. The Committee also addressed a concern that the term "more or less" might be taken for the colloquialism for a rough approximation. The Style Subcommittee had reviewed these concerns and voted to retain Rule 401 as it was released for public comment. After discussion, the Evidence Rules Committee agreed that no change to the published rule was needed.

Rule 404a

Professor Kimble proposed some minor changes to Rule 404(a): an addition to the heading of Rule 404(a)(2), and deletion of the word "crime" before "victim" in Rule 404(a)(2) (B). The restyled Rule, blacklined to indicate the proposed changes, is as follows:

(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 for a Defendant or a Victim 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.

Committee Discussion:

The Committee agreed that the deletion of the word "crime" was appropriate because that word is superfluous. Rule 404(a)(2) operates only in the context of a criminal case, and the reference to a victim can only be to a victim of crime.

A member questioned whether the proposed change to the heading was accurate. The use of the word "for" might make it seem like the defendant or victim were obtaining a benefit, when in fact the rule contemplates that evidence attacking their character may be admitted. But the Committee determined that in context, the heading must be read to mean that it is providing an exception for *character evidence* of a defendant or a victim — the rule is designated "character evidence" and under the restyling protocol, subheadings are assumed to incorporate the title of the rule.

The Committee therefore tentatively approved the suggested changes to Rule 404(a).

Rule 404(b)(2)

Professor Kimble suggested a minor clarification of the heading to Rule 404(b)(2), as follows:

(2) ***Permitted Uses; Notice*** <u>***in a Criminal Case.***</u>

Committee Discussion

The Committee determined that the change was helpful in sharpening the heading and more accurately describing the text. The Committee unanimously approved the change.

Rule 405(a)

Professor Kimble proposed a change to Rule 405(a), the rule governing the means of proving character. The suggested change to the rule as published was as follows:

Methods of Proving Character.

(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 testimony in the form of an opinion. On cross-examination of the witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

Committee Discussion:

Professor Kimble suggested this change out of concern that the restyled version did not make it exactly clear that the witness being cross-examined would ordinarily be different from the person whose character is being proved. An evidence professor made a similar suggestion on the Evidence ListServ.

The Committee found that the clarification was useful. The Reporter noted that any problem of ambiguity could be made even more clear by referencing the witness as a *character witness*. The Committee agreed and tentatively approved the following change to the rule as issued for public comment:

(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 testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

Rule 406

Restyled Rule 406, as released for public comment, provides as follows:

Habit; Routine Practice

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

The American College of Trial Lawyers suggested that the second sentence of the Rule should be deleted as unnecessary, because it simply emphasized the apparent point that relevant evidence is admissible.

Committee Discussion:

Members were opposed to deleting the second sentence of Rule 406, because that sentence was necessary to explain the historical background of the Rule. Pre-Rules common law barred habit evidence 1) where there was no corroboration, or 2) if there was an eyewitness to the event. The original Advisory Committee determined that the second sentence of Rule 406 was necessary to emphasize that these prior limitations on habit evidence were abrogated. Indeed, the second sentence was the *major reason* for Rule 406, because the first sentence simply provides that a certain type of relevant evidence is admissible. The Committee reasoned that in light of the history, deleting the second sentence would raise an argument that the rule on habit evidence had restored the common-law limitations.

The Committee therefore unanimously rejected the suggested modification of Rule 406, as it called for a substantive change.

Rule 410

The American College of Trial Lawyers suggested a set of substantial revisions of restyled Rule 410, in order to clarify two asserted ambiguities in the existing Rule 410: 1) What is a "guilty plea" as defined in Rule 410?; and 2) When is a guilty plea considered "withdrawn" under Rule 410?

The American College noted that its proposals appeared to call for substantive changes and so were outside the scope of the restyling project. For example, the proposal provided for protection of statements regarding pleas when made in *any* proceeding, whereas courts have held that under the terms of the existing Rule 410 there is no protection for plea statements made in foreign proceedings. And generally speaking, the College called for somewhat broader protection for statements made during the guilty plea process than is currently provided by Rule 410.

Before the meeting, the Reporter referred the proposal to the DOJ for its opinion on whether the substantive changes proposed would be useful or necessary. The DOJ representative reported back that the line prosecutors interviewed had generally concluded that the Rule was clear and had not raised any serious problems of application.

When the restyling is completed, the Reporter will review the College's substantive proposals and report to the Committee.

While the College's substantive proposals were deferred, both the College and the DOJ noted a possible substantive change made in restyling the provisions describing the information protected by the Rule.

Specifically, the current Rule 410 in pertinent part protects the following statements:

"(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;* * * *"

The restyled version of Rule 410 in pertinent part protects the following statements:

"(1) a guilty plea that was later withdrawn;

(2) a nolo contendere plea;

(3) a statement *about either of those pleas* made during a proceeding under Federal Rule of Criminal Procedure 11 or a comparable state procedure; * * *"

The Department of Justice representative explained how the restyled language in subdivision (3) creates a substantive change: the restyling unintentionally narrows the class of statements that are inadmissible to those only "about the pleas." It appears that the restyling assumed that the phrase "regarding either of the foregoing pleas" modified the word "statement." Thus, the restyled rule limits the non-admissibility to only statements "about the pleas" as opposed to any statements made during the defined proceedings. But the currently understood meaning among practitioners is that the phrase "regarding either of the foregoing pleas" modifies the *comparable state procedure*, not the statement. Thus, under the current rule, a broader range of statements -- those made "in the course of any proceedings" would be excluded.

The Committee agreed with the Department's position that the restyled version of Rule 410 needed to be revised in order to avoid a substantive change by narrowing the class of statements subject to Rule 410 protection. Professor Kimble and the Reporter promised to come up with a rewrite for the Committee's consideration before the next meeting.

Rule 411

The restyled Rule 411 provides as follows:

Liability Insurance

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 a witness's bias or prejudice or — if

disputed — proving agency, ownership, or control.

An Evidence professor on a listserve contended that the restyling made a substantive change because the current rule states that evidence of insurance is not admissible "upon the issue whether the person acted negligently or otherwise wrongfully." The academic contended that under the existing rule, a *plaintiff* is prohibited from proving that he is *not* insured, when the evidence is offered to prove that the plaintiff therefore had an incentive to be careful. But under the restyled rule, plaintiff's evidence of his own lack of insurance would be admissible because it would not be offered to prove that he acted negligently.

Committee Discussion:

The Committee concluded that the scenario posited by the academic — a plaintiff proving his own lack of insurance — was a farfetched hypothetical. Nonetheless, to avoid any contention that a substantive change has been made, the Committee adopted Professor Kimble's suggestion for a slight change to the restyled Rule 411.

The Committee tentatively approved the following change to the restyled Rule 411:

> Evidence that a person did or did not have liability insurance is not admissible to prove ~~that~~ whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or — if disputed — proving agency, ownership, or control.

Rule 412(b)(2)

The restyled Rule 412(b)(2) provides that in a civil case involving sexual misconduct, "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." (Emphasis added.)

The American College of Trial Lawyers recommended changing "any victim" to "a victim" on the ground that even in a multi-victim case, "only harm to the impeached victim" is to be

considered.

Committee Discussion:

The Committee noted that Rule 412(b)(2) is primarily about admitting substantive evidence, not impeachment. The rule was designed to protect *all* victims against harm in a multi-victim case. Thus, the Committee determined that the American College's suggestion would result in a substantive change in the rule — it would change the application of the balancing test in a multi-victim case.

Rule 412(c)(2)

The restyled Rule provides that the court must conduct an "in-camera hearing." Professor Kimble suggested deleting the hyphen. The Committee approved the change.

Rule 413(a) and Rule 414(a)

The American College of Trial Lawyers suggested the following change to restyled Rule 413(a) — and an identical change to the identical words in Rule 414(a):

> **Rule 413. Similar Crimes in Sexual Assault Cases**
>
> **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~~ to prove predilection/predisposition.

Committee Discussion:

The American College suggested that the rule would be improved by clarifying the purpose for which evidence of sexual assault would be relevant. But the Committee noted that the description in the existing rule is accurate — the evidence is admissible for any matter to which it is relevant. Admissibility is *not* limited to proving the defendant's propensity. For example, in appropriate cases the evidence could also be admitted for a non-character purpose such as to prove intent, motive, identity, etc. So limiting admissibility to predisposition is unquestionably a substantive change, as it limits the breadth of the existing rule. The Committee voted unanimously

to reject the suggested change as beyond the scope of restyling.

Rule 413(b) and Rule 414(b)

The Committee agreed with Professor Kimble's suggestion that the heading of these subdivisions governing notice should be changed from "Disclosure" to "Disclosure to the Defendant." The change makes the heading more descriptive and useful to the reader.

Rule 413(d) and 414(d)

The American College of Trial Lawyers notes that the definition of "sexual assault" in Rule 413(d) (and the definition of "child molestation" under Rule 414(d)) is tied to "any conduct prohibited by 18 U.S.C. chapter 109A." The American College states that the conduct covered by chapter 109A requires crossing a state line and states that "if the drafters intend to include state law violations * * * they might consider reviewing the language accordingly."

Committee Discussion:

The Committee was unanimously opposed to expanding the number of crimes covered by the Rules, as that would be a substantive change — the rule would be admitting more evidence than previously.

Members noted that the description of covered crimes in the existing Rule is not limited to conduct prohibited by chapter 109(a). The coverage is quite comprehensive. So a reference to state law violations either be unnecessary because such crimes are already covered, or it would add more crimes to the list, in which case it would be substantive. Accordingly, the Committee unanimously rejected the suggestion for change.

Rule 606(a)

Restyled Rule 606(a) provides as follows:

Rule 606. 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.

Professor Kimble suggested that the words "as a witness" were superfluous because the only way a person could testify under the terms of the rule would be as a witness. The Committee agreed that the words "as a witness" should be deleted.

Rule 608(a)

The American College suggested the following changes to the restyled Rule 608(a):

Rule 608. A Witness's Character for Truthfulness or Untruthfulness

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by ~~testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by~~ testimony in the form of an opinion about — or a reputation for — truthfulness or untruthfulness ~~that character~~. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

The American College thought the phrase "having a character for truthfulness" was awkward.

Committee Discussion:

The sense of the Committee was that the restyled version issued for public comment was precise and accurate. The Committee saw no need for change, and noted that the College's proposal tended to mute the purpose of the Rule — it made it less clear that the only attack permitted by the Rule is an attack on the witness's character for truthfulness.

Rule 608(c)

Restyled Rule 608(c) is a new subdivision, breaking out what is a hanging paragraph in the current Rule 608(b).

The restyled Rule 608(c) provides as follows:

(c) Privilege Against Self-Incrimination. A witness does not waive the privilege against

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self-incrimination by testifying about a matter that relates only to a character for truthfulness.

The language in current Rule 608(b), from which restyled Rule 608(c) is taken, provides as follows:

> 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.

Committee Discussion:

Professor Kimble suggested a change at the end of restyled Rule 608(c) to clarify that the "matter" relates to *the witness's* character for truthfulness. As this change was being discussed, Professor Saltzburg raised the argument that the restyled provision makes a substantive change by providing that there is no waiver "by testifying about a matter that relates only to a character for truthfulness." He noted that the original rule states that there is no waiver when the witness is "examined" on matters related only to truthfulness.

There is a difference between "testifying" about matters relating to character for truthfulness and being examined with respect to them. The provision is intended to allow a witness to refuse to answer questions about his past when they are offered solely to attack his character. For example, if a witness testifies as a bystander to a crime, Rule 608 might allow the cross-examiner to ask the witness about a prior fraud that he committed, unrelated to the instant case. The provision would allow the witness to refuse to answer if the answer would tend to incriminate him — and the cross-examiner could not argue that the witness waived the privilege by testifying, because the prior fraud is being offered only to attack the witness's character for truthfulness.

The rule as restyled could be read to allow a witness to refuse to answer a question about his past whenever his *direct testimony* related only to a character for truthfulness. Thus, a witness who testified solely as a character witness might be able, under the terms of the restyling, to refuse to answer questions about criminal activity that might bear on his qualifications as a character witness. The focus of the restyled rule thus shifts from the adversary's attack (whether the bad act is offered solely to attack character for truthfulness) to the witness's direct testimony.

The Committee recognized that the restyled Rule 608(c) might be interpreted to make a substantive change. Professor Kimble and the Reporter resolved to work on a revision for the Committee's review before the next meeting. One possibility is to use the words of the existing rule — that there is no waiver when the witness is "examined about" matters relating only to the witness's character for truthfulness. Another possibility is to retain the emphatic reference to criminal defendants in the existing rule.

Rule 609(b)

Professor Kimble suggested the following change to restyled Rule 609(b)— the rule governing impeachment with prior convictions — as it was released for public comment:

> **Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for ~~the conviction~~ it, whichever is later. Evidence of the conviction is admissible only if: * * *

The Committee approved the change.

Rule 609(d)(3)

The Committee approved a slight stylistic change: from "a conviction of an adult" to "an adult's conviction."

Rule 612

Restyled Rule 612 provides as follows:

Rule 612. Writing Used to Refresh a Witness's Memory

(a) Scope. This rule gives an adverse party certain options when a witness uses 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,

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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.

The Committee considered three suggestions for change:

1. The American College suggested that the reference to the Jencks Act, 18 U.S.C. § 3500, should be moved to the beginning of the rule, as it is in the current rule.

2. Professor Kimble suggested putting "adverse" before "party" in (a)(2).

3. Professor Kimble suggested changing the heading of subdivision (c) to "Failure to Produce or Deliver <u>the Writing</u>."

Committee Discussion:

1. The Committee saw no reason to move the reference to the Jencks Act. Professor Kimble noted that the location in the restyled rule made the rule flow more smoothly. And Committee members noted that there was no substantive reason to put the reference in subdivision (a), as that subdivision is descriptive only.

2. The Committee saw no reason to add "adverse" in (a)(2) as the rule is clear, and the term "adverse" is used throughout the rule and would essentially be repetitive here.

3. The Committee approved the suggestion to change the heading of subdivision (c) as it made the heading more descriptive and user-friendly.

Rule 613

Restyled Rule 613 provides as follows:

Rule 613. Witness's Prior Statement

(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 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 an opposing party's statement under Rule 801(d)(2).

Professor Kimble suggested a minor change to subdivision (a): "a ~~the~~ party need not show it or disclose its content to the witness." This change was approved.

Professor Kimble also noted that the use of "adverse" and "opposing" should be made consistent in this rule, and indeed throughout the rules.

The Reporter noted that the use of "opposing" in the last sentence of subdivision (b) was necessary to tie in with the hearsay exception for statements of a party-*opponent* in Rule 801(d)(2). As to uniformity in the use of "adverse" and "opposing" the Reporter noted that some courts had construed "opponent" in Rule 801(d)(2) to mean that the parties had to be on opposite sides of the "v" — thus, some courts have held that co-defendants are not "opponents" for purposes of Rule 801(d)(2) even though they may be taking adversarial positions in a litigation. Under this view, "adverse" and "opposing" are not the same — at least under Rule 801(d)(2) — and so it might create a substantive change to use one term rather than the other throughout the rules. The Reporter agreed to check every use of "adverse" and "opposing" in the restyled rules to ensure that no substantive change has been made.

Rule 614(a)

The restyled Rule 614(a) reads as follows:

Rule 614. 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.

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Professor Kimble suggested that the word "suggestion" — which comes from the original — should be replaced with "request." The Committee agreed, noting that the word "request" was more consistent with terminology used throughout the Evidence Rules.

Rule 706(d)

Professor Kimble suggested that the heading, "Disclosing the Appointment" should be changed to "Disclosing the Appointment to the Jury." The Committee approved the change, as it made the heading more specific and would aid users in applying the rules.

Rule 801(a)

The current Rule 801 defines hearsay as a "statement * * * offered in evidence to prove the truth of the matter asserted." Thus evidence must be a "statement" to be excluded as hearsay. Current Rule 801(a) defines a "statement" as follows:

> (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

The existing rule is vague on whether an oral written assertion can be hearsay if it is not intended to be so. The rule requires a showing of intent to assert for nonverbal conduct. But the placement of the word "it" could be read to refer either to nonverbal conduct only, or to both verbal and nonverbal conduct.

This vagueness in drafting is clarified by the restyled version of Rule 801(a), which defines "statement" as follows:

> **(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.

The restyled version is structured to make it clear that an oral assertion is a statement even if it is not intended as such. But the problem with the restructuring is that many courts—in part perhaps because of the vagueness of the current rule — have held that an oral or written assertion cannot be hearsay unless the speaker intends to make the assertion that the proponent is offering into evidence.

The Committee therefore considered whether the restyled Rule 801(a) would make a

substantive change in the hearsay rule. One member argued that the restructuring would not change any result in the cases because the intent requirement can be found in Rule 801(c), which defines hearsay as statements offered for the truth of the "matter asserted." Under this argument, "asserted" must mean intentionally asserted. But some of the literature and case law puts the intent requirement in the definition of "statement" under Rule 801(a).

Some Committee members suggested that the best way to avoid any substantive change in this difficult area is to return, as closely as possible, to the original rule. That would mean that the rule would remain vague, but it would keep the existing case law intact. The Reporter noted that a "restyled" version that hews closest to the original would provide as follows:

> "Statement" means an oral or written assertion or nonverbal conduct of a person if it is intended by the person as an assertion.

Professor Kimble and the Reporter agreed to work on a possible change to the restyled version of Rule 801(a), for the Committee to consider before the next meeting.

Rule 801(d)(2)(B)

The hearsay exemption for adoptive admissions currently covers "a statement of which the party has manifested an adoption or belief in its truth."

The restyled version released for public comment covers a statement "that the party appeared to adopt or accept as true."

The Committee discussed whether the change from "manifested an adoption or belief" to "appeared to adopt or accept" was a substantive change. On its face the restyled language would appear to allow courts to find an adoptive admission more easily. The language "appeared to adopt" seems more diffident or passive than "manifested an adoption." Members noted, however, that the case law under the existing Rule does *not* require active conduct for an adoption — cases abound where parties are found to adopt by silence.

The restyled language seems less active and therefore more in accord with existing case law. But there is a legitimate concern that the less aggressive language may be interpreted as a signal for a substantive change that would liberalize *even further* the already minimal showing necessary for adoption.

Committee members determined that, in light of the problematic interface of rule language

and case law, the restyled version should hew as closely to the existing rule as possible. Some members contended that under the circumstances, "manifested" was a sacred word that could not be restyled. The Committee voted to return to the word "manifested" in Rule 801(d)(2)(B) — subject of course, to receiving public comment on the question. (Comment on Rule 801(d)(2)(B) was specifically invited in the cover letter to the public). Professor Kimble agreed to revise the restyled version to include the word "manifested" and to submit it for the Committee's review before the next meeting.

Rule 801(d)(2)(E)

The existing rule on coconspirator hearsay provides an exemption for:

(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The restyled version of the rule provides the exemption in the following language:

(2) **An Opposing Party's Statement.** The statement is offered against an opposing party and:

* * *

(E) was made by the party's co-conspirator during and in furtherance of the conspiracy.

Professor James Duane argues that the restyled version makes a substantive change because the existing rule's reference to "a coconspirator of *a* party" allowed the government to admit a statement against *any* defendant so long as the government could prove that the declarant conspired with any one defendant in the case. As he puts it: "taken literally and at face value, [the existing language] has always meant that a statement is technically admissible against all of the defendants in a criminal case, as long as it was made in furtherance of a conspiracy that included any one of the defendants as a member." Professor Duane notes that this possibility is precluded in the restyled version, as the statement must be made by a coconspirator of the party against whom it is offered.

The Committee considered whether Professor Duane's contention had merit. Members noted that the existing rule has *never* been construed to allow the admission of coconspirator hearsay against a party who has not conspired with the declarant. There is no rationale in the coconspirator exception that would allow a court to pin admissibility on the fact that the defendant happened to be unluckily joined in a case with a party who did conspire with the declarant. The notion that a coconspirator statement can be admitted against one who is not a coconspirator is made extremely

doubtful by other language in the existing rule. The final sentence of current Rule 801(d)(2) provides as follows:

> The contents of the statement shall be considered but are not alone sufficient to establish * * * the existence of the conspiracy and the participation therein *of the declarant and the party against whom the statement is offered* under subdivision (E).

That language indicates that admissibility is predicated on a conspiracy between the declarant and the party against whom the statement is offered — not on the declarant's relationship to any other party in the case.

Members noted that there does not appear to be a single case in which coconspirator hearsay was admitted in the absence of a finding of a conspiracy between the declarant and the defendant against whom the statement is offered. To the contrary, *all* the reported case law on the subject requires a showing of conspiracy between the declarant and the party against whom the statement is offered. See, e.g., *United States v. Bulman,* 667 F.2d 1134 (11th Cir. 1982) (coconspirator's statement properly excluded as to one defendant, while admitted against others, where government failed to establish a connection between the defendant and the declarant).

Under the restyling protocol, the definition of a substantive change is one that changes an admissibility determination under existing law. As applied to the restyling of the coconspirator exception, there is no substantive change because the law is as before — admissibility is dependent on a conspiratorial connection between the declarant and the party against whom the evidence is offered. The restyled version *clarifies* the existing rule, but it does not change any evidentiary result. The Committee therefore unanimously agreed to retain the restyled Rule 801(d)(2)(E).

Rule 803(2)

The existing Rule 803(2) provides a hearsay exception for statements relating to a startling event "made while the declarant was under the *stress of excitement*" caused by the event.

The restyled version of Rule 803(2) covers statements made while the declarant was under the "stress *or* excitement" caused by the event.

The change was made because "stress or excitement" was a more common usage than "stress of excitement." But research by Professor Broun indicated that the term "stress of excitement" was carefully chosen by the original Advisory Committee. The Advisory Committee specifically relied on pre-Rules case law that used the term "stress of excitement." In light of this history, the Committee determined, unanimously, that there was not a sufficient justification for the change to "stress or excitement." The Committee therefore voted to retain the original language.

Rule 803(6), (7) and (8)

The exceptions for business records, absence of business records, and public records each contain a clause providing that the court may exclude a proffered record if the source of information or the method or circumstances of preparation indicate lack of trustworthiness. Under the restyled versions issued for public comment, each of those Rules located the trustworthiness clause in a hanging paragraph at the end of each Rule. For example, restyled Rule 803(6) provides as follows:

> **(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 activity of a business, organization, occupation, or calling, whether or not for profit;
>
> **(C)** making the record was a regular practice of that activity; and
>
> **(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.
>
> But this exception does not apply if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Restylists try to avoid hanging paragraphs.

Professor Saltzburg proposed that the hanging paragraph be reconfigured as a new subdivision (E), which would provide as follows:

> ***(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.***

Professor Kimble agreed with this suggestion, and it was approved by the Style Subcommittee. At the meeting, the Committee voted unanimously in favor of the new subdivision (E).

Discussion then turned to whether the same solution could be employed in Rule 803(7) and (8). The Committee determined that the subdivision would work in subdivision (7) because the

introductory clause of that Rule was the same as that of Rule 803(6).

The fix would *not* work for revised Rule 803(8) as currently conceived, however, because the introductory language to that Rule does not introduce admissibility requirements. Rather, it simply describes the records that are admissible under the Rule. Thus, starting the trustworthiness clause with a "neither" would make no sense.

Professor Kimble agreed to work on a solution by which the hanging paragraph in Rule 803(8) could be recast as a new subdivision. It that could not work, the hanging paragraph would be retained. The Committee resolved to review the matter at the next meeting.

Rule 1001

The Committee reviewed, and approved, Professor Kimble's suggested technical changes to the definitions section for the Best Evidence Rule — Rule 1001. The change are shown below in blacklined form:

In this article~~, the following definitions apply~~:

(a) ~~**Writing.**~~ A "writing" consists of letters, words, numbers, or their equivalent set down in any form.

(b) ~~**Recording.**~~ A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner.

(c) ~~**Photograph.**~~ "Photograph" means a photographic image or its equivalent stored 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 electronically stored information, "original" means any printout — or other output readable by sight — if it accurately reflects the information. 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 1101

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Rule 1101 describes the cases and proceedings to which the Evidence Rules are applicable. Bankruptcy Judge Isgur provided a comment to the Committee in which he suggested that restyled Rule 1101 might make an inadvertent substantive change with respect to the applicability of the Evidence Rules in Bankruptcy Courts. He noted that the restyled Rule 1101 provides that the Evidence Rules are applicable to "cases and proceedings under 11 U.S.C." — but that not all proceedings before Bankruptcy Judges are brought under that Chapter.

Committee Discussion:

Judge Wiznur, the liaison from the Bankruptcy Rules Committee, helpfully assisted the Committee in determining whether the restyled Rule 1101 changed the applicability of the Evidence Rules in any bankruptcy proceeding. She noted that the restyled language ("cases and proceedings under 11 U.S.C.") was not substantively different from the reference to Title 11 in the existing Rule. She recommended, however, that any question of coverage could be answered by simply adding "bankruptcy" to the civil cases and proceedings explicitly covered by the Rule. Thus, the first bullet point in Rule 1101(b) could provide as follows:

These rules apply in:

• civil cases and proceedings, including bankruptcy, admiralty and maritime cases;

When coupled with the later reference to "cases and proceedings under 11 U.S.C.," there should be no question about the Evidence Rules' applicability to all bankruptcy proceedings.

The Committee unanimously agreed that the reference to bankruptcy should be added in the first bullet point. It also voted unanimously to change the heading of subdivision (b) from "Proceedings" to "Cases and Proceedings" — because the term "cases and proceedings" is used throughout the text of the Rule.

Final Point

The Committee thanked and commended Professor Kimble for his outstanding efforts in restyling the Evidence Rules. Professor Kimble's dedication and professionalism were critical to the success of the project.

II. Proposals by a Physician Interest Group

A physician interest group suggested a number of changes to the Evidence Rules. The Committee reviewed the suggestions at the meeting.

1. The physician group suggested that the Committee draft and propose a doctor-patient privilege. After discussion, the Committee rejected the suggestion. Committee members, fresh from the experience of working for the enactment of Rule 502, found it unlikely that any proposal for a doctor-patient privilege would be enacted by Congress. Moreover, any physician-patient privilege would raise a number of difficult drafting questions and policy objections — for example, the Department of Justice would be concerned about application of the privilege to cases involving Medicaid fraud. The privilege is not uniform in the states and so a number of difficult policy questions would have to be resolved. The Committee determined that any effort to codify a new privilege should begin in Congress (as was the case with Rule 502). If Congress then wanted the assistance of the Committee in helping to draft the privilege, the Committee might at that point be of assistance.

2. For similar reasons, the Committee rejected the physician group's suggestion that it draft and propose a privilege protecting peer review. In addition, the Committee noted that the Supreme Court had refused to adopt a peer review privilege under federal common law — meaning that the difficulties of enacting a privilege were even more daunting.

3. The physician group suggested that Rule 407 — the Rule excluding subsequent remedial measures when offered to show fault or product liability — be amended to limit or prevent the use of subsequent remedial measures when offered to prove feasibility or for impeachment. The group contended that these exceptions had been used so broadly as to provide exceptions that swallowed the rule excluding subsequent remedial measures. The Committee rejected the suggestion that an amendment was needed. Reviewing the case law under Rule 407, the Committee noted that the courts had reasonably limited those exceptions. As to feasibility, courts have limited the exception to situations in which the defendant actively contested feasibility; and when feasibility *is* actively contested, it would be unfair for the defendant to then argue that a subsequent remedial measure could not be admitted to prove the change was feasible. As to impeachment, the courts have refused to apply the exception to every case in which the remedial measure could contradict a defense witness; that is, the courts refuse to apply the impeachment exception in a way that would swallow the rule. Because the Committee rejected the physician group's premise that the feasibility and impeachment exceptions have been too broadly interpreted, it voted unanimously against any amendment to Rule 407 at this time.

4. The physician interest group suggested that Rule 702 be amended to require the court to instruct the jury to give added weight to an expert "with an advanced level of experience, training, education or certification relevant to the fact at issue in the case." The Committee voted unanimously against the proposal, on the following grounds: a) the Evidence Rules govern admissibility and not weight; b) the suggestion raises the specter of a judge invading the jury's province; c) many states

have rules prohibiting the judge from commenting on the evidence, and so any rule in that regard in the Federal Rules would create disuniformity with those states; and d) practical problems would arise in giving such an instruction, such as, how much weight should be given, how much specialization must be found before an instruction is required, etc.

5. The physician interest group proposed a new evidence rule (numbered 707) that would require courts to hold *Daubert* hearings. The Committee unanimously rejected this suggestion for a number of reasons: a) the Evidence Rules are not ordinarily the place to set out procedural requirements; b) the Committee already rejected an absolute requirement for a hearing on experts when it drafted the 2000 amendment to Rule 702 — as the Committee Note to Rule 702 indicates, the Committee believed then, as it does now, that the trial court must have flexibility in evaluating challenged expert testimony; c) any amendment requiring hearings would be contrary to the law in every circuit, which indicates that judges have discretion to dispense with a *Daubert* hearing; d) the proposal conflicts with the Supreme Court's opinion in *Kumho Tire*, in which the Court declared that trial courts have discretion in how to evaluate an expert's opinion under *Daubert*; e) in many cases, the trial court will have more than enough information upon which to make a *Daubert* determination, and in those cases a hearing would be an empty exercise; and f) any concern that trial courts will make a *Daubert* ruling without sufficient information is sufficiently addressed by the case law providing that a trial court abuses its discretion in those circumstances.

In the end, the Committee thanked Mr. Lazarus, the representative of the physician interest group who attended the Fall meeting. While the Committee decided not to act on any of the group's suggestions, members noted that the Committee greatly appreciated input from the public. For his part, Mr. Lazarus thanked the Committee for its careful consideration of the proposals and expressed the physician group's interest in working with the Committee in the future.

III. Possible Amendments to the Evidence Rules in Response to Supreme Court Cases on the Right to Confrontation

For the Committee meeting, the Reporter prepared a memorandum on the Supreme Court's recent decision in *Melendez-Diaz v. Massachusetts.* The *Melendez-Diaz* Court held that certain certificates reporting the results of forensic tests were "testimonial" and therefore the admission of such a certificate violated the accused's right to confrontation, unless the person who prepared the certificate were produced to testify. The Court reasoned that the certificates were prepared exclusively for use in a criminal trial, as substitutes for trial testimony, and so were testimonial within the meaning of the Confrontation Clause as construed by *Crawford v. Washington.*

Melendez-Diaz raises serious questions about the admissibility of certificates offered to prove the absence of a public record under Rule 803(10). Like the certificates at issue in *Melendez-Diaz,* a certificate proving up the absence of a public record is prepared with the sole motivation that it will

be used at trial — as a substitute for live testimony. *Melendez-Diaz* is less likely to have an impact on the Federal Rules exceptions for business and public records (Rules 803(6) and (8)) because the federal courts have largely construed those exceptions to be inapplicable to records prepared solely in anticipation of litigation. The effect of *Melendez-Diaz* on provisions permitting the authenticity of evidence to be proven by certificate is uncertain.

The Reporter suggested that it would be premature to propose any amendment to the Evidence Rules to respond to *Melendez-Diaz*. The Supreme Court has another case on its docket this term — *Briscoe v. Virginia* — that will examine and perhaps alter the impact of *Melendez-Diaz*. Moreover, time is needed for lower courts to weigh in on any effect that *Melendez-Diaz* has on the Federal Rules of Evidence. The Committee asked the Reporter to continue to monitor the case law and to report to the Committee at the next meeting.

IV. Civil Rule 6(d) — Three Day Rule

Civil Rule 6(d) adds three days to any time specified to act after service is made by any means other than in-hand delivery or leaving the paper at a person's home or office. The Civil Rules Committee is considering whether to propose an amendment to Rule 6(d). The most important question is whether the three day bonus should be retained when service is made electronically. The initial reason for giving the three days for electronic service was that there may be glitches in the technology that justify the three-day protection.

The Civil Rules Committee is asking all the Advisory Committees for any views they may have about the need to amend Rule 6(d). The Evidence Rules Committee discussed the matter, and none of the members thought there was any need for an amendment to Rule 6(d) at this time. As to electronic service, members noted that technological glitches remain frequent enough to justify continuing the three-day rule.

V. Next Meeting

The Spring 2010 meeting of the Committee is tentatively scheduled for April 22-23 in New York City.

Respectfully submitted,

Daniel J. Capra
Reporter

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 7-8, 2010
Phoenix, Arizona
Draft Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Thursday and Friday, January 7 and 8, 2010. All the members were present:

Judge Lee H. Rosenthal, Chair
Dean C. Colson, Esquire
Douglas R. Cox, Esquire
Judge Harris L Hartz
Judge Marilyn L. Huff
John G. Kester, Esquire
Dean David F. Levi
William J. Maledon, Esquire
Deputy Attorney General David W. Ogden
Judge Reena Raggi
Judge James A. Teilborg
Judge Diane P. Wood

In addition, the Department of Justice was represented by Karen Temple Clagget and S. Elizabeth Shapiro.

Also participating in the meeting were Judge Anthony J. Scirica, former chair of the committee and current chair of the Judicial Conference's Executive Committee; committee consultants Joseph F. Spaniol, Jr. and Professor Geoffrey C. Hazard, Jr.; and committee guests Professor Robert G. Bone, Dean Paul Schiff Berman, Dean Georgene M. Vairo, and Professor Todd D. Rakoff.

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
Joe Cecil	Research Division, Federal Judicial Center
Tim Reagan	Research Division, Federal Judicial Center
Andrea Kuperman	Judge Rosenthal's rules law clerk

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Jeffrey S. Sutton, 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
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Rosenthal welcomed the committee members and guests.

Judge Scirica reported that all the rule changes recommended by the committee had been approved without discussion by the Judicial Conference at its September 2009 session. The fact that rule amendments are so well received, he said, is a sign of the great esteem that the Conference has for the thorough and thoughtful work of the rules committees.

Judge Rosenthal added that the rules approved by the Conference in September 2009 included: (1) important changes to FED. R. CIV. P. 26 (disclosure and discovery) that make draft reports of expert witnesses and conversations between lawyers and their experts generally not discoverable; (2) a major rewriting of FED. R. CIV. P. 56 (summary judgment); and (3) amendments to FED. R. CRIM. P. 15 (depositions) that would allow, under carefully limited conditions, a deposition to be taken of a witness outside the United States and outside the physical presence of the defendant. She explained that the advisory committees had reached out specially to the bar for additional input on these amendments and had crafted them very carefully.

Judge Rosenthal reported that the Judicial Conference also approved proposed guidelines giving advice to the courts on what matters are appropriate for inclusion in standing orders vis a vis local rules of court. Professor Capra, she noted, deserved a great deal of thanks for his work on the guidelines.

She noted that several new rules had taken effect by operation of law on December 1, 2009, most of them part of the comprehensive package of time-computation amendments. She thanked Judges Kravitz and Huff and Professor Struve for their extensive work in this area.

Judge Rosenthal pointed out that the agendas for the January meetings of the Standing Committee are customarily lighter than those for the June meetings because most amendments are presented for publication or final approval in June, given the cycle prescribed by the Rules Enabling Act. The January meetings, therefore, give the committee an opportunity: (1) to discuss upcoming amendments that the advisory committees believe merit additional discussion before being formally presented for publication or approval; and (2) to consider a range of other matters and issues that may impact the federal rules or the rule-making process.

Judge Rosenthal also noted that Mr. McCabe had just reached the milestone of 40 years of service with the Administrative Office, including 27 years as assistant director and 18 as secretary to the rules committees.

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 1-2, 2009.

LEGISLATIVE REPORT

Adjustment of Legislative Responsibilities

Judge Rosenthal reported that the Director of the Administrative Office had assigned Mr. Rabiej to take a more visible and extensive role in coordinating legislative matters that affect the federal rules. She explained that Congress appears to be taking greater interest in, and giving greater scrutiny to, the federal rules. She noted that most of the bills in Congress that would affect the rules involve difficult and technical issues. For that reason, it is essential that the Administrative Office coordinate its communications with Congressional staff through a lawyer who has a deep, substantive knowledge of the rules themselves, of the rule-making process, and of the agendas of the rules committees.

She noted that communications between the rules committees and Congress are different in several respects from those of other Judicial Conference committees. The rules committees, she noted, do not approach Congress to seek funding or to advance the needs of the judiciary, but to explain rule amendments that benefit the legal system as a whole. As a structural matter, she said, it is better to separate the staff who present bread and butter matters to Congress from those who explain rules matters. She pointed out that the new arrangements are working very well.

Proposed Sunshine in Litigation Act

Judge Rosenthal reported that the proposed Sunshine in Litigation Act would prohibit sealed settlements in civil cases and impose substantial restrictions on a court issuing protective orders under FED. R. CIV. P. 26(c). Under the legislation, a judge could issue a protective order only if the judge first finds that the information to be protected by the order would not affect public health or safety. That provision, she said, has been introduced in every Congress since 1991, and Judge Kravitz testified against the legislation at hearings in 2008 and 2009. But, she added, there had been little activity on the legislation for the last several months.

Judge Rosenthal explained that the Judicial Conference opposed the legislation because it would amend Rule 26 without following the Rules Enabling Act process. Moreover, the legislation: (1) lacks empirical support; (2) would be very disruptive to the

civil litigation process; and (3) is unworkable because it would require a judge to make important findings of fact without the assistance of counsel and before any discovery has taken place in a case.

Judge Kravitz added that Congressional staff now appear to understand the serious problems that the bill would create. But, he noted, it is the members of Congress who vote, not the staff, and it is difficult for members to oppose any bill that carries the label "sunshine." He noted that he had presented Congress with a superb, comprehensive memorandum prepared by Ms. Kuperman detailing the case law on protective orders in each federal circuit and demonstrating that trial judges act appropriately whenever there is a question of public health or safety.

Congressional Activity on the Rules that Took Effect on December 1, 2009

Judge Rosenthal pointed out that there has been increased Congressional scrutiny of the rule-making process. The rules committees, she said, have taken pains to make sure that Congress knows what actions the committees are contemplating early in the rules process, especially on proposals that may have political overtones or affect special interest groups.

She noted that Congressional staff in late 2009 had voiced two separate sets of concerns over the rule amendments scheduled to take effect on December 1, 2009, and they had suggested that implementation of the rules be delayed until their concerns were resolved. Staff asserted, for example, that some of the bankruptcy rules in the package of time-computation amendments might create a trap for unwary bankruptcy debtors and lawyers by reducing certain deadlines from 15 days to 14 days.

Judge Swain explained that it is common for debtors to file only a skeleton petition at the commencement of a bankruptcy case. The rules currently give debtors 15 additional days to file the required financial schedules and statements. The amended rules, though, would reduce that period to 14 days. Some bankruptcy lawyers may not be aware of the shortened deadline and may fail to file their clients' documents on time.

She said that the Advisory Committee on Bankruptcy Rules had persuaded the legislative staff to allow the rules to take effect as planned on December 1, 2009, by taking two visible steps to assist attorneys who may not be aware that they will have one day less to meet certain deadlines. First, the committee wrote to all bankruptcy courts to inform them of the committee's position that, during the first six months under the revised rules, missing any of the shortened time deadlines should be considered as "excusable neglect" that justifies relief. Second, the committee recommended adding a notice to CM/ECF and asking the courts to add language to their respective web sites warning the bar of the revised deadlines in the rules. Letters were sent to Congress documenting these steps.

Judge Rosenthal reported that the second set of concerns voiced by Congressional staff focused on proposed new Rule 11 of the Rules Governing Section 2254 Cases and a companion new Rule 11 of the Rules Governing Section 2255 Proceedings. The new rules require a district court to issue or deny a certificate of appealability at the same time that it files the final order disposing of the petition or motion on the merits. The concern expressed through staff related to two sentences of the new rules, stating that: (1) denial of a certificate of appealability by a district court is not separately appealable; and (2) motions for reconsideration of the denial of a certificate of appealability do not extend the time for the petitioner to file an appeal from the underlying judgment of conviction.

The new rules, Judge Tallman said, were relatively minor in scope and designed to avoid a trap for the unwary in habeas corpus cases brought by pro se plaintiffs. Perfecting a challenge to a conviction is a byzantine process, and petitioners will lose appeals if they do not understand the complicated provisions.

By statute, a petitioner may not appeal to a court of appeals from a final order of the district court denying habeas corpus relief without first filing a certificate of appealability. Even if the district court denies the certificate of appealability, the court of appeals may grant it. Separately, the petitioner must also file a notice of appeal from the final order denying habeas corpus relief within the deadlines set in FED. R. APP. P. 4(a). So, in order for an appellate court to have jurisdiction over an appeal, the petitioner must have both: (1) filed a timely notice of appeal; and (2) received a certificate of appealability from either the district court or the court of appeals.

The trap for the petitioner occurs because once a district judge denies the habeas corpus petition itself, the clock begins to run on the time to file a notice of appeal, regardless of any action on the certificate of appealability. The accompanying committee note explains to petitioners that the grant of a certificate of appealability does not eliminate their need to file a notice of appeal.

Judge Tallman pointed out that the concerns brought to Congressional staff were misplaced. He explained in a memorandum for them that the new rules do not in any way alter the current legal landscape regarding the tolling effect of motions for reconsideration or the deadlines for filing a notice of appeal challenging the underlying judgment. All that they do, he noted, is codify and explain the existing law for the benefit of petitioners in response to reports received by the advisory committee that many forfeit their right to appeal, especially pro se filers, because they unwittingly file their appeals too late.

Judge Rosenthal emphasized the importance of the advisory committees: (1) reaching out to affected groups to give them a full opportunity to provide input on proposed rules; and (2) fully documenting on the record how their concerns have been

addressed. Some committee members suggested that the recent communications from Congressional staff on the 2009 rules may portend new challenges in the rules process. Last-minute communications with Hill staff, they said, may become a new strategy for parties whose views are not adopted on the merits through the rule-making process. A participant added that it is particularly difficult to predict problems of this sort in advance because staff may be hearing from their friends or from individuals in an organization, rather than the organization itself.

Civil Pleading Standards

Judge Rosenthal reported that legislation had been introduced in each house of Congress to restore pleading standards in civil cases to those in effect before the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), and *Ashcroft v. Iqbal,* 556 U.S. ___, 129 S. Ct. 1937 (2009). The Senate and House bills are phrased differently, but both attempt to legislatively supersede the two decisions and return the law on pleading to that in effect on May 20, 2007. But, she said, the drafting problems to accomplish that objective are truly daunting, and both bills have serious flaws. Both would impose an interim pleading standard that would remain in place until superseded by another statute or by a federal rule promulgated under the Rules Enabling Act process.

The short-term challenge, she suggested, was to identify the proper approach for the rules committees in light of the pending legislation, recognizing that much of the discussion in Congress is intensely political. She reported that she and Judge Kravitz had written a carefully drafted letter to Congress that avoids dragging the committees into the political fray, but accepting the committees' obligation to consider appropriate amendments to the rules. She added that the letter had provided a link to Ms. Kuperman's excellent memorandum documenting the extensive case law developed in the wake of *Twombly* and *Iqbal.* The memorandum, she said, is continually being updated, and it shows that the courts have responded very responsibly in applying the two decisions.

The letter also provided a link to Administrative Office statistical data on the number of motions to dismiss filed before and after *Twombly* and *Iqbal*, the disposition of those dismissal motions, and the breakdown of the statistics by category of civil suit. But no data were available to detail whether the motions to dismiss had been granted with prejudice or with leave to amend and whether superseding complaints were filed. That information will be gathered by staff of the Federal Judicial Center, who will read the docket sheets and case papers and prepare a report for the May 2010 civil rules conference at Duke Law School.

Judge Rosenthal noted that the Advisory Committee on Civil Rules was closely monitoring the intensive political fight taking place in Congress, the substantive debate

unfolding among academics and within the courts, and the actions of practicing lawyers in response to *Twombly* and *Iqbal.* She predicted that there will be a substantial effort in Congress to get the legislation enacted in the current Congress, and a number of organizations have made it a top priority. The rules committees, she said, have two goals: (1) to protect institutional interests under the Rules Enabling Act rule-making process; and (2) to fulfill their ongoing obligation under the Act to monitor the operation and effect of the rules and recommend changes in the rules, as appropriate. She suggested that Congress is likely to leave the eventual solution to the pleading controversy up to the rules process. Therefore, the Advisory Committee on Civil Rules will have to decide whether the current pleading standard in the rules is fair and should be continued or changed.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of December 7, 2009 (Agenda Item 6). Judge Sutton reported that the advisory committee had no action items to present.

Informational Items

FED. R. APP. P. 4(a)(1) and 40(a)

Judge Sutton reported that the advisory committee had been considering proposed amendments requested by the Department of Justice to FED. R. APP. P. 4(a)(1) (time to file an appeal in a civil case) and FED. R. APP. P. 40(a) (time to file a petition for panel rehearing). Both rules provide extra time in cases where the United States or its officer or agency is a party. The proposed amendments would make it clear that additional time is also provided when a federal officer or employee is sued in his or her individual capacity for an act or omission occurring in connection with official duties.

The advisory committee, he said, had presented proposed amendments to the Standing Committee. But the Standing Committee returned them for further consideration in light of the Supreme Court's recent decision in *United States ex rel. Eisenstein v. City of New York,* 129 S. Ct. 988 (2009). The problem is that the time limits in FED. R. APP. P. 4(a)(1) are fixed by statute, 28 U.S.C. § 2107, and therefore may be jurisdictional for the court of appeals under *Bowles v. Russell,* 551 U.S. 205 (2007).

The Department of Justice recommended proceeding with the proposed amendment to Rule 40, but deferring action on Rule 4 because of the *Bowles* problem. The advisory committee, however, was reluctant to seek a change in one rule without a corresponding change in the other, since both use the exact same language. Therefore, it is considering a

coordinated package of amendments to the two rules and a companion proposal for a statutory amendment to 28 U.S.C. § 2107. A decision on pursuing that approach has been deferred to the committee's April 2010 meeting in order to give the Department of Justice time to decide whether seeking legislation is advisable. Judge Rosenthal pointed out that the recent time-computation package of coordinated rule amendments and statutory changes provides relevant precedent for the suggested approach.

INTERLOCUTORY APPEALS FROM THE TAX COURT

Judge Sutton reported that the advisory committee was considering a proposal to amend the rules to address interlocutory appeals from decisions of the Tax Court. A 1986 statute, he explained, had authorized interlocutory appeals, but the Federal Rules of Appellate Procedure have never been amended to take account of such appeals. Permissive interlocutory appeals from the Tax Court appear to be very few in number. The advisory committee, he said, will informally solicit the views of the judges of the Tax Court, the tax bar, and others regarding proposed amendments.

OTHER ITEMS

Judge Sutton reported that the advisory committee had deferred action on suggestions to eliminate the three-day rule in FED. R. APP. P. 26(c) (computing and extending time) that gives a party an additional three days to act after a paper is served on it by means other than in-hand service.

The committee had received suggestions to require that briefs be printed on both sides. But, Judge Sutton said, there are strong differences of opinion on the subject, and courts are divided on whether to allow double-sided printing of briefs. As the courts continue to move away from paper filings, he said, time may overtake the suggestions.

Judge Sutton reported that the advisory committee was responding to a suggestion that Indian tribes be added to the definition of a "state" in some of the rules, particularly Appellate Rule 29 (amicus briefs), and the committee is researching how the state courts are handling amicus filings by Indian tribes.

Finally, Judge Sutton reported that the advisory committee was collaborating with the Advisory Committee on Bankruptcy Rules on the bankruptcy appellate rules project and with the Advisory Committee on Civil Rules on overlapping issues that affect both the appellate and civil rules.

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 attachment of December 7, 2009 (Agenda Item 9). Judge Swain reported that the advisory committee had no action items to present.

Informational Items

HEARING ON PUBLISHED RULES

Professor Gibson reported that three of the rules published for comment in August 2009 had attracted substantial public interest and several requests had been received to testify at the hearing scheduled in New York in February 2010.

The proposed amendments to FED. R. BANKR. P. 3001 (proof of claim) and new FED. R. BANKR. P. 3002.1 (notice relating to claims secured by a security interest in the debtor's principal residence) would, among other things: (1) prescribe in greater detail the supporting documentation that must accompany certain proofs of claim; and (2) require a holder of a home mortgage claim in a chapter 13 case to provide additional notice of post-petition fees, expenses, and charges assessed against a debtor.

The proposed amendments to FED. R. BANKR. P. 2019 (disclosure) would require committees and other representatives of creditors and equity security holders to disclose additional information about their economic interests in chapter 9 and chapter 11 cases.

She added that many of the persons requesting to testify represent organizations that purchase consumer debt in bulk and are opposed to the additional disclosures.

BANKRUPTCY APPELLATE RULES

Professor Gibson said that the advisory committee had conducted two very successful conferences with members of the bench, bar, and academia to discuss whether Part VIII of the bankruptcy rules needs comprehensive revision. (Part VIII governs appeals from a bankruptcy judge to the district court or a bankruptcy appellate panel.)

She reported that the committee had decided to move forward on the project with two principal goals in mind: (1) to make the Part VIII rules conform more closely to the Federal Rules of Appellate Procedure; and (2) to recognize more explicitly that records in bankruptcy cases are now generally filed and maintained electronically. She said that the committee would work closely on the project with the Advisory Committee on Appellate Rules and would like to work with the other advisory committees in considering the impact of the new electronic environment on the rules.

BANKRUPTCY FORMS MODERNIZATION

Judge Swain reported that the advisory committee's other large project is to modernize the bankruptcy forms. It had created a joint working group of members and others: (1) to examine all the bankruptcy forms for their substance and effectiveness; and (2) to consider how the forms might be adapted to the highly technological environment of the bankruptcy system. She explained that, unlike the illustrative civil forms appended to the civil rules, the bankruptcy official forms are mandatory and must be used in bankruptcy cases under FED. R. BANKR. P. 9009 (forms).

She noted that the working group had started reviewing the forms in January 2008 and had retained a nationally recognized forms-design expert as a special consultant. The focus of the group's initial efforts has been on improving the petition, schedules, and statements filed by an individual debtor at the outset of a case. The consultant, she said, has substantial experience in designing forms used by the general public and has really opened up the eyes of the judges and lawyers on ways that the bankruptcy forms could be simplified, rephrased, and reordered to elicit more accurate information from the public.

Judge Swain reported that the forms working group was also examining trends in technology and how they affect the way that lawyers, debtors, creditors, trustees, judges, clerks, and others use the bankruptcy forms and the pieces of information contained in them. To that end, she said, the Federal Judicial Center had drafted a survey for the committee to send to lawyers and the courts. In addition, the working group was working closely with both the Court Administration and Case Management Committee of the Judicial Conference and the functional-requirement groups designing the "Next Generation" replacement project for CM/ECF (the courts' electronic files and case management system).

Judge Swain noted that the advisory committee had recommended that the Next Generation CM/ECF system be capable of accepting bankruptcy forms, not just as PDF images, but as a stream of data elements that can be manipulated and distributed. The new electronic system must be capable of providing different levels of access to different users in order to guard privacy and security concerns. She noted that the working group would meet again in Washington in January 2010.

FORM 240A

Professor Gibson reported that, in addition to drafting the official, mandatory bankruptcy forms, the advisory committee assists the Administrative Office in preparing optional "Director's Forms." One of the most important of these optional forms, she said, is Form 240A – which includes the reaffirmation agreement and related documents. Among other things, it sets forth the disclosures explicitly required by the Bankruptcy Code. During the course of the forms modernization project, a number of judges commented on the need to revise Form 240A, which is organized in a manner that makes it difficult for a court to find the most important information it needs to review a reaffirmation agreement.

Therefore, the advisory committee worked with the Administrative Office to revise Form 240A and make it more user-friendly. In December 2009, a revised form was posted on the Internet. Professor Gibson said that some lawyers have suggested that the revised form is deficient because it rewords some of the disclosures required by the statute. She said, however, that the advisory committee had recommended the revisions to improve clarity, and she noted that the statute itself permits rewording and re-ordering of most of the required disclosures as long as the meaning is not changed. She added that the advisory committee was taking the suggestions seriously, though, and it would recommend further changes if it determines that the revised form is unclear or inaccurate.

After the meeting, the advisory committee recommended some modest changes to the December 2009 version of Form 240A. It also recommended that the January 2007 version of the form be retained as an alternative version to provide statutory disclosures for those parties that elect to use their own reaffirmation agreement – a practice that the statute allows. The advisory committee concluded that an alternate version of the form was necessary because the December 2009 version was designed as an integrated set of documents that could not be used as a "wrap around" to provide all the necessary disclosures if the parties decide to use their own reaffirmation agreement.

AUTHORITATIVE VERSION OF THE BANKRUPTCY RULES

Judge Swain reported that there has never been an official version of the Federal Rules of Bankruptcy Procedure. The Administrative Office, however, had just succeeded in creating an authoritative version of the rules after months of intensive effort by interns under the leadership of Mr. Ishida. They compared the different commercial versions on the market and researched the original source documents, including rules committee minutes and reports, Supreme Court orders, and legislation to verify the accuracy of each rule. The new, authoritative rules, she said, would be posted shortly on the federal courts' Internet web site.

MASTERS

Professor Gibson noted that FED. R. BANKR. P. 9031 (masters not authorized) makes FED. R. CIV. P. 53 (masters) inapplicable in bankruptcy cases. She reported that the advisory committee had recently received suggestions to abrogate Rule 9031 and allow the appointment of masters in appropriate bankruptcy cases. The committee, she said, had reviewed and rejected the same suggestion on several occasions in the past. After careful deliberation, it decided again that the case had not been made to change its policy on the matter. Among other things, the committee was concerned about adding another level of review to the bankruptcy system, which already has several levels of review.

A member asked whether bankruptcy judges use other bankruptcy judges to assist them in huge cases. Judge Swain responded that judges usually have excellent lawyers and thorough support in large cases, and other judges frequently volunteer to help in various settlement matters. Professor Gibson added that the Bankruptcy Code authorizes the appointment of examiners in appropriate cases. Unlike masters, though, examiners are not authorized to make judicial recommendations.

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 attachment of December 8, 2009 (Agenda Item 5). Judge Kravitz reported that the advisory committee had no action items to present.

Informational Items

MAY 2010 CIVIL LITIGATION REVIEW CONFERENCE

Judge Kravitz reported that after completing work on the proposed amendments to FED. R. CIV. P. 26 (disclosure and discovery) and FED. R. CIV. P. 56 (summary judgment), the advisory committee decided to step back and take a hard look at civil litigation in the federal courts generally and to ask the bench and bar how well it is working and how it might be improved. About the same time, the Supreme Court rendered its decisions in *Twombly* and *Iqbal* regarding notice pleading, and bills were introduced in Congress to overturn those decisions.

The advisory committee agreed that the most productive way to have a dialogue with the bar and other users of the system would be to conduct a major conference and invite a broad, representative range of lawyers, litigants, law professors, and judges. Judge Kravitz noted that Judge John G. Koeltl, a member of the advisory committee, had

taken charge of arranging the conference, scheduled for Duke Law School in May 2010, and he was doing a remarkable job.

Judge Kravitz reported that the conference will rely heavily on empirical data to provide an accurate picture of what is happening in the federal litigation system. In addition, the committee wants to elicit the practical insights of the bar. To that end, it had asked the Federal Judicial Center to send detailed surveys to lawyers for both plaintiffs and defendants in all federal civil cases closed in the last quarter of 2008. The response level to the survey, he said, has been high, and the information produced is very revealing. In addition, Center staff has been conducting follow-up interviews with lawyers who responded to the surveys.

Additional data will be produced for the conference by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System. RAND, Fortune 200 companies, and some bar groups, such as the National Employment Lawyers Association, may also submit data. Among other things, the data may provide insight on whether new computer applications and techniques might be able to drive down the cost of discovery.

Judge Kravitz noted that the majority opinion in *Twombly* had cited a 1989 law review article by Judge Frank H. Easterbrook, based on anecdotal evidence, arguing that discovery costs are out of line and that district judges are not attempting to rein them in. The preliminary survey results from the Federal Judicial Center, however, show that little discovery occurs in the great majority of federal civil cases, and the discovery in those cases does not appear to be excessively costly, with the exception of 5% to 10% of the cases. That result, he said, is surprising to lawyers, but not to judges. Nevertheless, the extensive discovery in a minority of federal civil cases has caused serious discovery problems. The biggest frustration for lawyers, he said, occurs when they are unable to get the attention of a judge to resolve discovery issues quickly.

Judge Kravitz noted that Judge Koeltl had gathered an impressive array of topics and panelists for the conference, and several of the panelists have already written papers for the event. He said that the conference will hear from bar associations and from groups and corporations that litigate in the federal system. It will also examine the different approaches that states such as Arizona and Oregon take in civil litigation, as well as recent reform efforts in other countries, including Australia and the United Kingdom. The conference's proceedings will be recorded and streamed live, and the Duke Law Journal will publish the papers.

He added that enormous interest had been expressed by bench and bar in participating in the conference, and more than 300 people have asked to attend. Space, though, is limited, and the formal invitation list is still a work in progress. A web site has

been created for the conference, but is not yet available to the general public because several papers are still in draft form.

Judge Kravitz predicted that the conference will elicit a number of proposals for change that will be a part of the agenda for the Advisory Committee on Civil Rules for years to come. One cross-cutting issue, for example, is whether the civil rules should continue to adhere to the fundamental principle of trans-substantivity. He noted that several participants have suggested that different rules, or variations of the rules, should apply in different categories of civil cases. In addition, he said, the advisory committee may resurrect its work on a set of simplified procedures that could be used in appropriate civil cases.

PLEADING STANDARDS FOLLOWING *TWOMBLY* AND *IQBAL*

Judge Kravitz noted that pleading standards have been on the advisory committee's study agenda for many years. The committee, however, started looking at notice pleading much more closely after *Twombly* and *Iqbal*. At its October 2009 meeting, moreover, it considered a suggestion to expedite the normal rules process and prepare appropriate rule amendments in light of pending legislative efforts. Nevertheless, the committee decided that it was essential to take the time necessary to see how the two Supreme Court decisions play out in practice before considering any rule amendments. Therefore, it has been monitoring the case law closely, reaching out to affected parties for their views, and working with the Federal Judicial Center, the Administrative Office, and others to develop needed empirical data.

He reported that the statistics gathered by the Administrative Office show that there has been no substantial increase since *Twombly* and *Iqbal* in the number of motions to dismiss filed in the district courts or in the percentage of dismissal motions granted by the courts. He added that the motions data, though relevant, are not determinative, and the Federal Judicial Center will examine the cases individually.

In addition, Judge Kravitz noted that every circuit had now weighed in with in-depth analysis on what the Supreme Court cases mean. A review of court opinions shows that the case law is nuanced. Few decisions state explicitly that a particular case would have survived a motion to dismiss under *Conley v. Gibson*, but not under *Iqbal*. What is clearly important, he said, are the context and substance of each case.

There is the possibility, he suggested, that through the normal development of the common law, the courts will retain those elements of *Twombly* that work well in practice and modify those that do not. Accordingly, decisional law, including future Supreme Court decisions, may produce a pleading system that works very well in practice. By way of example, he noted that *Conley* by itself was not really the pleading standard

before *Twombly*. It had to be read in conjunction with 50 years of later case law development.

For the short term, he said, the committee cannot presently determine, and the Federal Judicial Center's research will not be able to show, whether people who would have filed a civil case in a federal court before *Twombly* are not doing so now. For example, it would be helpful to know from the plaintiffs' bar whether they are leaving the federal courts for the state courts or adapting their federal practices to survive motions to dismiss.

Judge Kravitz said that members of Congress and others involved in the pending legislation had expressed universally favorable comments about the rules process. Moreover, several members of the academy have argued pointedly that the Supreme Court did not respect the rule-making process in *Twombly* and *Iqbal*. Nonetheless, despite their support for the rules process, they are concerned that the process is too slow and that some people will be hurt by the heightened pleading standards in the next few years while appropriate rule amendments are being considered.

A member added that even though the great body of case law demonstrates that the courts are adapting very reasonably to *Twombly* and *Iqbal* and are protecting access to the courts, it will always be possible to find language in individual decisions that can be extracted to argue that immediate change is necessary. Even one bad case, he said, in an area such as civil rights, could be used to justify immediate action.

Judge Kravitz explained that the pleading problems tend to arise in cases where there is disparity of knowledge between the parties. The plaintiff simply does not have the facts, and the defendant does not make them available before discovery. As a result, he said, he and other judges in appropriate cases permit limited discovery and allow plaintiffs to amend their complaints.

Judge Kravitz stated that drafting appropriate legislation in this area is very difficult. Legislation, moreover, is likely to inject additional uncertainty and actually do more harm than good. All the bills proposed to date, he said, have enormous flaws and are likely to create additional litigation as to what the new standard means.

Judge Scirica expressed his thanks on behalf of the Executive Committee to Judges Rosenthal and Kravitz for handling a very difficult and delicate problem for the rules process. He said that what they have been doing is institutionally important to the judiciary, and they have acted with great intelligence, tact, and foresight.

PROFESSOR BONE'S COMMENTARY ON *TWOMBLY* AND *IQBAL*

Professor Bone was invited to provide his insights on the meaning of *Twombly* and *Iqbal* and his recommendations on what the rules committees should do regarding pleading standards. His presentation consisted of three parts: (1) a review of the two cases; (2) a discussion of the broader, complex normative issues raised in the cases; and (3) a discussion of whether, when, and how the rules process should be employed.

He explained that both *Twombly* and *Iqbal* adopted a plausibility standard. Both require merits screening of cases, and both question the efficacy of case management to control discovery costs. But, he said, there are significant differences between the two cases. *Twombly's* version of plausibility, he said, is workable on a trans-substantive basis, but *Iqbal's* is not.

Twombly, he suggested, had made only a minor change in the law of pleading, requiring only a slight increase in the plaintiff's burden. The allegations in the complaint in *Twombly* had merely described normal behavior. Under the rules, however, the plaintiff must tell a story showing that the defendant deviated in some way from the accepted baseline of normal behavior.

Twombly applied a "thin" screening model that does not require a high standard of pleading and calls for a limited inquiry by the court. Essentially, the purpose of the court's review is to screen out frivolous cases by asking the judge to interpret the complaint as a whole to see whether it is plausible and may have merit. *Twombly* did not adopt a two-pronged approach to the screening process, even though the opinion in *Iqbal* states that it did. In screening under *Twombly,* judges do not have to discard legal allegations in the complaint. Rather, the conclusory nature of any allegations is taken as part of the court's larger, gestalt review of the total contents of the complaint.

Iqbal, on the other hand, adopted a more substantial, "thick" pleading standard. The allegations in the *Iqbal* complaint did in fact tell a story of behavior that deviated from the accepted baseline conduct. The context of the complaint, taken as a whole, supported that conclusion. Yet *Iqbal* turned the plausibility standard into a broader test – not just to identify objectively those suits that lack merit, but also to screen out potentially meritorious suits that are weak.

Professor Bone asserted that *Iqbal's* two-pronged approach – of excluding legal conclusions from the complaint and then looking at the plausibility of the rest of the complaint – does not make sense. The real inquiry for the court has to be whether the allegations in the complaint, taken as a whole, support a plausible inference of wrongdoing.

He added that much of the academic analysis of the cases has been shallow and polarized. Many critics, for example, have framed the normative issues as a mere test between efficiency on the one hand and fairness and access rights on the other – weighing the potential costs of litigation against the need to maintain access to the courts. This analysis, however, is too simplistic. It does not work because economists, in fact, care deeply about fairness, and rights-based or fairness advocates care about litigation costs and fairness to defendants. It is really a balance between the two in either event.

As a matter of process, plaintiffs have a right of access to the courts that is not dependent on outcome. The "thin" *Twombly* screening process can be justified on moral grounds, as it requires the court to apply a moral balance between protecting court access for plaintiffs and considering fairness to defendants in having to defend against the allegations. The approach of *Iqbal,* on the other hand, is based on outcome and whether a case is strong or weak.

Professor Bone said that a normative analysis should be grounded in explaining why plaintiffs file non-meritorious suits. In reality, he said, this occurs in large measure because of the asymmetric availability of information between the parties. That asymmetry causes the problem that the stricter *Iqbal* standard of review is trying to address.

Professor Bone suggested that the central substantive question for the rules committees will be to specify how much screening a court must apply in order to dismiss non-meritorious suits at the pleading stage. Procedurally, he said, the committees need to address three key questions: (1) whether to get involved; (2) when to do so; and (3) how to do so.

The first question, he said, had already been decided, for the rules committees are already deeply involved in the pleading dispute. Indeed, he said, they should be involved forcefully – with or without Congressional action. And they should be prepared to confront political interest groups on the merits, if necessary. On the other hand, they also have to be pragmatic in protecting the integrity of the rules process itself, and they need to take the time necessary to achieve the right results.

Professor Bone emphasized that it was important to gather as much empirical information as possible. But considerable care and insight must be given to interpretation of the data. Even if the statistics reveal no significant change in dismissal rates since *Twombly* and *Iqbal,* the numbers are not definitive if they do not show whether plaintiffs are discouraged from filing cases in the first place. The ultimate metric for judging whether a pleading standard is working well is whether case outcomes are fair and appropriate, not whether the judges and lawyers are pleased.

He added that the Advisory Committee on Civil Rules should seriously consider deviating from the traditional trans-substantive approach of the rules in drafting a revised pleading standard. A revised rule, for example, might exclude certain kinds of cases, such as civil rights cases, from any kind of "thick" screening standard. It might also focus specifically on complex cases, or enumerate facts that courts should consider, such as informational asymmetry and the stakes and costs of litigation. In addition, the committee should use the committee notes more aggressively and cite examples to explain how and why the rule is being amended. It should not, however, try to develop pleading forms.

COMMITTEE DISCUSSION OF *TWOMBLY* AND *IQBAL*

Judge Kravitz pointed out that trans-substantivity has been a basic foundation of the Federal Rules of Civil Procedure for more than 70 years. Deviating from it would upset current expectations and entail serious political complications. Interest groups that use the federal courts, he said, have polar opposite views on certain issues. Some plaintiffs believe that the rules currently favor defendants, while some defendants believe that they are forced to settle meritless suits that should be dismissed on the pleadings. He added that the whole discussion is influenced in large part by discovery costs, and he noted that some corporations have designed their computer systems to accommodate potential discovery needs, rather than to address core business needs.

A participant agreed that it would be extremely difficult to deviate from trans-substantivity and to specify different rules for different categories of cases. For one thing, it is not always clear cut what category a case falls into. A more fruitful approach, he suggested, would be for a rule to focus on the parties' relative access to information, rather than on the subject nature of a case. Fundamental differences exist, he said, between those cases where the litigants have equal access to information and those where the plaintiff does not have access to the facts necessary to plead adequately. He suggested that this asymmetry prevails in many civil rights and employment discrimination cases. It also occurs in antitrust cases where the plaintiff alleges, but does not know for sure, that the defendant has engaged in a conspiracy or agreement. The plaintiff knows only that the defendants' behavior suggests it.

In addition, he said, it is difficult to isolate pleading from other aspects of a civil case – such as discovery, summary judgment, and judicial case management. The civil rules are linked as a whole, and if the pleading rules are changed, it may affect the application of several other rules. Another approach that the committee could consider in addressing information asymmetry would be to link pleading with preliminary discovery. Thus, in appropriate cases, the court could permit the plaintiff to frame a proper pleading by allowing some sort of preliminary inquiry into information that only the defendant possesses.

A lawyer member said that one of the great strengths of the rules process is that the advisory committees rely strongly on empirical evidence. He reported that he had not detected any changes or problems in practice as a result of *Twombly* and *Iqbal,* even though many interesting intellectual issues have been raised in the ensuing debates. A reasonable judge, he said, can almost always detect a frivolous case. Therefore, before proceeding with potential rule adjustments, the committee should obtain sound empirical data to ascertain whether any real problems have in fact been created by *Twombly* and *Iqbal.* Judge Kravitz added that the advisory committee needs to hear from lawyers directly, especially plaintiffs' lawyers, about any changes in their practice. For example, it would be relevant to know whether they have declined any cases that they would have taken before *Twombly* and *Iqbal* and whether they now must devote more pre-pleading work to cases.

A judge member concurred that, despite perceptions, there did not appear to have been much change since *Twombly* and *Iqbal,* except that the civil process may well turn out to be more candid. The trans-substantive nature of the civil rules, he said, is beneficial and allows for appropriate variation from case to case. The context of each case is the key. Thus, a plaintiff may have to plead more in an antitrust case than in a prisoner case. Instead of mandating different types of pleadings for different cases, the trans-substantive rules – which now incorporate an overarching plausibility standard – can be applied effectively by the courts in different types of cases. The bottom line, he suggested, is that even though plaintiffs may be concerned about *Twombly* and *Iqbal,* they are really not going to suffer.

Another member suggested, though, that the two Supreme Court opinions had in fact changed the outcome of some civil cases and may well affect the outcome of future cases. Use of the term "plausibility," moreover, is troubling because it borders on "believability" – which lies within the province of the jury. It may be that FED. R. CIV. P. 8 will become more like FED. R. CIV. P. 56, where practice in the courts has developed so far that it bears little resemblance to the actual language of the national rule. Procedural rules, she said, are sometimes made by Congress or the Supreme Court. But the rules committees are the appropriate forum to draft rules because the committees demand a solid empirical basis for amendments, seek public comments from all sides, and give all proposals careful and objective deliberation. Therefore, the Advisory Committee on Civil Rules should proceed to gather the empirical information necessary to support any change in the pleading rules.

Mr. Ogden reported that the Department of Justice had not taken a position on the debate, but it is very interested in the matter and has unique perspectives to offer since it acts as both plaintiff and defendant. In addition, he said, important government policies may be at stake.

A judge member suggested that a number of federal civil cases, especially *pro se* cases, are clearly without merit and do not state a federal claim. But where there is a genuine imbalance of information, dismissal of the case should be addressed at the summary judgment phase. The problem is that a dismissal motion normally occurs before any discovery takes place. Accordingly, a revised rule might borrow a procedure from summary judgment practice to specify that plaintiffs who oppose a motion to dismiss be allowed to explain why they cannot supply the missing allegations in the complaint and to seek some discovery to respond to the motion.

Other participants concurred in the suggestion. One recommended that a procedure be adapted from FED. R. CIV. P. 11(b)(3), which specifies that an attorney may certify to the best of his or her knowledge that the allegations in a pleading "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." That standard might be borrowed for use in dealing with motions to dismiss. A participant added, however, that the same suggestion had been made by the court of appeals in *Iqbal* and was rejected by the Supreme Court.

A lawyer member explained that, in current practice, plaintiffs confronting a motion to dismiss use the summary judgment mechanism and submit an affidavit to the court specifying what evidence they have and what they need. For many defendants, winning the motion to dismiss is really the entire ball game – not because of the merits of the case, but because the potential costs of discovery often exceed the value of the case to them. Therefore, if a dismissal motion is denied, a quick settlement of the case usually follows. This practical reality, he said, will not appear in the statistics. He concluded that the two Supreme Court decisions have not made a change in the law. Nor, he said, will allowing plaintiffs additional discovery make a difference.

Another lawyer member concurred that the two decisions had not affected his practice. The principal danger, he warned, is that Congress has already injected itself into the dispute and will likely try to resolve the matter politically at the behest of special interest groups. He asked what the committees' strategy should be if Congress were to enact a statute in the next month or so.

Judge Rosenthal explained that the committees have been concentrating on providing factual information to Congress, including statistical information on dismissal motions. She noted that the committees and staff have been working hard in examining the case law and statistics to ascertain whether there has been an impact since *Twombly* and *Iqbal.* The research to date, she said, shows that there has been little measurable change, even in civil rights cases. In addition, the committees have been commenting informally on proposed legislation and exploring less risky legislative alternatives, without getting involved in the politics. The central message to Congress, she said, has been to seek appropriate solutions through the rules process.

Judge Kravitz added that the rules committees cannot suggest appropriate legislation, even though they have been asked to do so, because they simply do not know what problems Congress is trying to solve. Interestingly, lawyers and other proponents of legislation have professed great confidence in the rules process and are urging action in part because they assert that the Supreme Court was not sufficiently deferential to the process. At the same time, though, they do not want to wait three years or more for the rules process to play out. They want to turn the clock back immediately while the rules process unfolds in a deliberate manner. He added that the committees have been reaching out to bar groups and others for several years, and the outreach efforts have been very beneficial for the rules process.

A participant reported that when the Private Securities Litigation Reform Act was being developed a few years ago, the rules committees decided that the most important interest was to protect the Rules Enabling Act process. Therefore, they chose not to participate, at least in a public way, with any statement or position on the proposed legislation. Instead, they concluded that it was an area of substantive law that Congress was determined to address, and anything the committees would say would not be given much weight. Moreover, any statement or position taken by the judiciary would likely be used by one side or the other in the political debate to their advantage, and to the ultimate detriment of the judiciary. In fact, he said, Congress did change the pleading standard in securities cases by legislation. In retrospect, the sky did not fall. Securities cases are still being filed and won, but now the pleadings contain more information.

Mr. Cecil reported that the research being conducted by the Federal Judicial Center will provide the committees with needed empirical structure, rather than anecdotal advice, in a very complex area. He said that Center staff are examining motions to dismiss filed from September to December during each of the last five years, *i.e.,* before and after *Twombly* and *Iqbal.* They are examining the text of the docket sheets and the text of the case documents themselves. They will look at whether dismissal motions were granted with leave to amend, whether the plaintiffs in fact amended the complaints, and whether the cases were terminated soon afterwards. Unfortunately, though, it may be impossible to ascertain some types of relevant information, such as whether there was differential access to information in a particular case, whether cases have shifted to the state courts, or whether the heightened pleading standards have discouraged filings.

FED. R. CIV. P. 45

Judge Kravitz reported that the advisory committee was considering several suggestions from the bar to revise FED. R. CIV. P. 45 (subpoenas). He noted that a subcommittee had been appointed to address the suggestions, chaired by Judge David G. Campbell and with Professor Richard L. Marcus as reporter.

Judge Kravitz said that the subcommittee had considered many different topics, but is focusing on four potential approaches. First, the subcommittee is considering completely reconfiguring Rule 45 to make it simpler and easier to use. It is a dense rule that is not well understood. Second, the subcommittee is examining a series of notice issues because the current notice requirements in the rule are often ignored. Third, it is exploring important issues concerning the proper allocation of jurisdiction between the court that has issued a subpoena and the court where a case is pending. Fourth, it is considering whether courts can use Rule 45 to compel parties or employees of parties to attend a trial, even though they are more than 100 miles from the courthouse.

On the other hand, there are two other issues that the committee probably will not address: (1) the cost of producing documents and sharing of production costs; and (2) whether service of the subpoena should continue to be limited to personal service or be broadened to be more like the service arrangements permitted under FED. R. CIV. P. 4 (service).

Judge Kravitz explained that if the committee decides to reconfigure the whole rule, it will not have a draft ready to be presented to the Standing Committee at the June 2010 meeting. But if it decides to address only a limited number of discrete issues, it might have a proposal ready by that time for publication.

Professor Cooper added that Rule 45 is too long and difficult to read. Moreover, it specifies that the full text of Rule 45(c) and (d) be reproduced on the face of the subpoena form. The advisory committee, he said, should at least attempt to simplify the language of the rule, and in doing so it will focus on three key issues: (1) which court should issue the subpoena – the district where it is to be executed or the court having jurisdiction over the case; (2) which court should handle issues of compliance with the subpoena; and (3) where the subpoena should be enforced when there is a dispute. He suggested that the rule might also contain a better transfer mechanism, such as one that would consider the convenience of parties.

A member stated that the rule needs a good deal of attention because substantial satellite litigation arises over these issues, especially in complex cases. In addition, the advisory committee should focus on notice issues. Under the current rule, he explained, subpoenas must be noticed to the other party. In practice, though, they are generally issued without notice to the other party, and there is no notice that the documents have been produced. He concluded that the advisory committee should take all the time it needs to revise this important rule carefully and deliberately.

OTHER ITEMS

Judge Kravitz reported that the advisory committee had formed an ad hoc joint subcommittee with the Advisory Committee on Appellate Rules, chaired by Judge Steven M. Colloton, to deal with common issues affecting the two committees.

He noted that the advisory committee was looking to see whether FED. R. CIV. P. 26(c) (protective orders) needs changes. He noted that the courts appear to be handling protective orders very well. Nevertheless, the text of the rule itself might need to be amended to catch up with actual practice, as with FED. R. CIV. P. 56 (summary judgment).

He reported that the advisory committee was considering whether to eliminate the provision in FED. R. CIV. P. 6(d) that gives a party an extra three days to act after receipt of service by mail and certain other means. The committee has decided, though, to let the new time-computation rules be digested before hitting the bar with another rule change that affects timing.

Finally, he said, the advisory committee was re-examining its role in drafting illustrative forms under authority of FED. R. CIV. P. 84 (forms), especially since the illustrative forms are generally not used by the bar. It might decide to reduce the number of illustrative forms, or it might turn over the forms to the Administrative Office to issue under its own authority. He cautioned, though, that any change in the pleading forms at this juncture might send a wrong signal in light of the *Twombly-Iqbal* controversy.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman and Professor Beale presented the report of the advisory committee, as set forth in Judge Tallman's memorandum and attachment of December 11, 2009 (Agenda Item 8). Judge Tallman reported that the advisory committee had no action items to present.

Informational Items

FED. R. CRIM. P. 16 – BRADY MATERIALS

Judge Tallman reported that the advisory committee had wrestled for more than 40 years with a variety of proposals to expand discovery in criminal cases. Most recently, in 2007, it had recommended, on a split vote, an amendment to FED. R. CRIM. P. 16 (discovery and inspection). The proposal, based on a suggestion from the American College of Trial Lawyers, would have codified the prosecution's obligations to disclose to the defendant all exculpatory and impeaching information in its possession.

He explained that the Department of Justice does not appear to have serious difficulty with a rule that would merely codify its obligations under *Brady v. Maryland,* 373 U.S. 83 (1963) – but only if the proposed rule were limited to exculpatory information and if it contained a materiality standard. On the other hand, the Department objects strongly to codifying disclosure of impeachment materials under *Giglio v. United States,* 405 U.S. 150 (1972). He added that a counter-proposal had been made within the advisory committee to limit disclosure under the proposed amendment to "material" information, but it failed to carry.

Judge Tallman reported that in 2007 the Standing Committee had received a lengthy letter from then-Deputy Attorney General Paul J. McNulty objecting to the rule proposed by the advisory committee. The Standing Committee, he said, recommitted the proposed amendment to the advisory committee on the explicit assurance from the Department of Justice that it would strengthen the advice it gives to prosecutors in the U.S. Attorneys' Manual regarding their *Brady-Giglio* obligations and undertake additional training of prosecutors. The Standing Committee believed that the Department would need time to assess the effectiveness of these measures, so it remanded the amendment to the advisory committee with a broad directive to continue monitoring the situation.

Not long afterwards, the celebrated case against Senator Theodore F. Stevens unfolded. It was alleged that a key prosecution witness in the case had changed his story. But the defense had not been notified of that fact, and it moved for a new trial. In early 2009, the new Attorney General, Eric H. Holder, Jr., authorized the prosecutor to move to dismiss the case because of the failure to disclose. He also directed that a working group be established within the Department of Justice to review fully what had happened in the Stevens case and whether the Department had faithfully carried out the promises made to the Standing Committee in 2007. In addition, Judge Emmet G. Sullivan, the trial judge in the Stevens case, wrote to the advisory committee and urged it to resubmit the proposed amendment to FED. R. CRIM. P. 16 that had been deferred by the Standing Committee.

Judge Tallman reported that the written results of the Department's review had just been made available. They include a comprehensive program of training and operational initiatives designed to enhance awareness and enforcement of *Brady-Giglio* obligations. He commended the Department and Deputy Attorney General Ogden for their enormous efforts on the project and the breadth of the proposed remedial measures. He emphasized that the proposed amendments to FED. R. CRIM. P. 16 would make a major change in criminal discovery, and he pointed out that criminal discovery poses very different concerns from civil discovery. Among other things, criminal discovery implicates serious issues involving on-going investigations, victims' rights, security of witnesses, and national security.

Deputy Attorney General Ogden thanked the committee for its careful and measured approach and explained that the Department continues to oppose any rule that

goes beyond *Brady* and the requirements of the Constitution. He assured the committee that the Department and its leadership are very serious about disclosure and have made it a matter of high priority. He pointed out that after the Stevens violations had been uncovered, the Department moved to dismiss the case, even though that was not an easy decision for it to make. It also convened a high-level working group of senior prosecutors and members of the Attorney General's team to study the Department's practices and make recommendations to minimize *Brady* violations going forward.

The group, he said, had met frequently and surveyed the U.S. attorneys on a regular basis. It endeavored to pinpoint the scope of the problem and measure the state of compliance. In so doing, it asked the Office of Professional Responsibility to examine not only those cases brought to its attention, but also to search for potential issues of non-compliance. The results of the Department-wide study, he said, reveal that there are no rampant violations or serious problems with compliance. The Office, for example, reported that there had been findings of violations in only 15 instances out of 680,000 criminal cases filed by the Department over nine years – an average of only one or two a year out of the thousands of cases prosecuted. The numbers, he said, put the scope of the problem in proper perspective.

Mr. Ogden said that the Department believes that the violations reflect a handful of aberrational occurrences that could not be averted by a new federal rule. Instead, a more comprehensive approach should be taken, including strict compliance with the existing rules, enhanced training of prosecutors and staff, and a number of other efforts. In addition, the Department will strive for greater uniformity in disclosure practices among the districts.

Training, he said, is extraordinarily important. Until recently, he noted, the U.S. Attorneys' Manual had not included instructions on *Brady* and *Giglio*, nor had *Brady* and *Giglio* obligations been included specifically in the Department's training. In 2006, however, the Department substantially revised the manual to address disclosure of both exculpatory and impeaching materials. In addition, a comprehensive new training program is now in place that requires all prosecutors to attend a seminar on *Brady* and *Giglio*. To date, 5,300 prosecutors have been trained in the new curriculum, and every prosecutor will be required to attend a refresher program every year.

Mr. Ogden reported that the Department had just sent detailed guidance to all prosecutors on disclosure obligations and procedures. It is also developing a central repository of information for all U.S. attorneys and a new disclosure manual that will incorporate lessons learned and inform prosecutors on what kinds of information they must disclose, what they must not disclose, and what they should bring to the attention of the court. A single official will be appointed permanently to administer the disclosure program on a national basis. At the local level, the Department has mandated that each U.S. attorney focus personally on the importance of the issue, designate a criminal

disclosure expert to answer questions and serve as a point of contact with Department headquarters, and develop a district-wide plan to implement the Department's national plan and adapt it to local circumstances. Other plans include training of paralegals and law enforcement officers and developing a case management process that incorporates disclosure. The Department is also speaking with the American Bar Association about ways to promote additional transparency.

A member suggested that the Department might also want to consider pulling some U.S. attorney files randomly for review, following the standard practice that many hospitals have in place. That step, he said, would provide a positive motivation for U.S. attorneys' offices to comply with their disclosure obligations.

Another member asked whether the Department's plan specifies the nature of the discipline that will be applied to prosecutors who violate *Brady* and *Giglio* obligations. Thus, if assistant U.S. attorneys know clearly that they could be terminated for violations, it could have a real impact on deterring inappropriate behavior.

Mr. Ogden said that in considering impeachment information under *Giglio*, it is essential to balance the value of disclosing the particular information in a case to the defense against the impact that disclosure may have on the privacy and security needs of witnesses. In many situations, he said, the information is dangerous or very embarrassing to a potential witness, and it is not central to the outcome of the case. It should not be disclosed because turning it over would chill witnesses from giving information in the future. The prosecutor, he said, is the appropriate officer to make the disclosure decision.

Judge Tallman reported that the advisory committee had met most recently in October 2009. At the meeting, Assistant Attorney General Lanny A. Breuer presented a preview of the Department's comprehensive program. The committee decided that it should also reach out and solicit the views and experiences of interested parties. To that end, it will convene an informal discussion session in Houston in February 2010 with a small group of U.S. attorneys and other Department of Justice officials, a representative of crime victims' rights groups, the president of the National Association of Criminal Defense Lawyers, a federal public defender, and other lawyers having substantial practical experience with *Brady* issues.

Judge Tallman said that one of the key questions for the participants at the session will be whether a change in the federal rules is needed, or indeed would be effective in preventing abuses. He noted that any rule change would have to be carefully drafted to be consistent with the Jencks Act, the Crime Victims' Rights Act, and statutes protecting juvenile records and police misconduct records.

Another important issue to be discussed at the session will be whether discovery should be required at an earlier stage of the process. In addition, he reported, the advisory

committee will continue to conduct empirical research by surveying practitioners and examining the procedures in those districts that have expanded disclosure practice on a local basis.

FED. R. CRIM. P. 5 - VICTIMS' RIGHTS

Judge Tallman reported that the advisory committee was continuing to make sure that the rights of victims are addressed on a regular, ongoing basis. He noted that he had reported to the Standing Committee in June 2009 that there was no need to recommend amending FED. R. CRIM. P. 5 (initial appearance) to specify that a magistrate judge take into account a victim's safety at a bail hearing because that requirement is already set forth in the governing statute and followed faithfully by judges. Nevertheless, he said, the advisory committee continues to be sensitive to the interests of the victims and will continue to reach out to them. Among other things, it has invited a victims' representative to participate in its upcoming Houston session on disclosure.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Hinkle and Professor Capra presented the report of the advisory committee, as set forth in Judge Hinkle's memorandum and attachment of December 14, 2009 (Agenda Item 7). Judge Hinkle reported that the advisory committee had no action items to present.

Informational Items

RESTYLED EVIDENCE RULES

Judge Hinkle reported that the advisory committee's major initiative was to complete work on restyling the Federal Rules of Evidence. The revised rules, he said, had been published, and the deadline for comments is in February 2010. Written comments had been received, including very helpful suggestions from the American College of Trial Lawyers. But only one witness had asked to appear at the scheduled public hearing. Therefore, the hearing will likely be cancelled and the witness heard by teleconference. He added that the Style Subcommittee has been doing an excellent job, and it has been working closely with the advisory committee on the revised rules.

The advisory committee, he explained, plans to complete the full package of style amendments at its April 2010 meeting and bring the package forward for approval at the June 2010 Standing Committee meeting. Judge Rosenthal added that the restyled evidence rules will be circulated to the Standing Committee in advance of the rest of the agenda book to give the members additional time to review the full package. Judge Hinkle recommended that if any member of the committee identifies an issue or a problem

with any rule, the member should let the advisory committee know right away so the issue may be addressed and resolved before the Standing Committee meeting.

CRAWFORD V. WASHINGTON

Judge Hinkle added that the advisory committee was continuing to monitor developments in the wake of the Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36 (2004), dealing with the admissibility of out-of-court "testimonial" statements under the Confrontation Clause of the Constitution. The case law, he said, is continuing to develop.

REPORT OF THE SEALING SUBCOMMITTEE

Judge Hartz, chair of the subcommittee, explained that the Federal Judicial Center had just filed its final report on sealed cases in the federal courts, written by Mr. Reagan. The report, he said, was excellent, and he recommended that all participants read it. At the subcommittee's request, the Center had examined all cases filed in the federal courts in 2006, and it identified and analyzed all cases that had been fully sealed by a court. The subcommittee members, he said, had reviewed the report carefully, and they take comfort in the fact that it reveals that there are very few instances in which a court appears to have made a questionable decision to seal a case. Nevertheless, he said, any error at all in improperly sealing a case is a concern to the judiciary.

He reported that the subcommittee was now moving quickly to have a report ready to present to the Standing Committee in June 2010. It will focus on several issues. First, he said, it will discuss whether there are cases in which sealing was improper. He noted that there appear to have been fewer than a dozen such cases nationally among hundreds of thousands of cases filed in 2006. Second, it will address whether sealing an entire case was overkill in a particular case, even though there may have been a need to seal certain documents in the case, such as a cooperation agreement with a criminal defendant. He noted, too, that in some districts juvenile cases are not sealed, but the juvenile is simply listed by initials. Third, the report will discuss cases in which sealing a case was entirely proper at an early stage of the proceedings, such as in a qui tam action or a criminal case with an outstanding warrant, but the court did not get around to unsealing the case later.

The subcommittee, he said, will not likely recommend changes in the rules, but it may use Professor Capra's recent report and guidelines on standing orders as a model to propose that the Judicial Conference provide guidance to the courts on sealing cases. For example, guidelines might specify that sealing an entire case should be a last resort. Courts should first consider lesser courses of action. Guidelines might also recommend developing technical assistance for the courts, such as prompts from the courts' electronic case management system to provide judges and courts with periodic notices of sealed

cases pending on their dockets. Guidelines might also recommend a procedure for unsealing executed warrants.

In addition, he said, there should be some type of court oversight over the sealing process. For example, no case should be sealed without an order from a judge. In addition, procedures might be established for notifying the chief judge, or all the judges, of a court of all sealed cases.

Judge Rosenthal added that the sealing subcommittee and the privacy subcommittee have been working very well together. Both, she said, are deeply concerned about protecting public access to court records, while also guarding appropriate security and privacy interests. She expressed thanks, on behalf of all the rules committees, to the Federal Judicial Center for excellent research efforts across the board that have provided solid empirical support for proposed rule amendments.

REPORT OF THE PRIVACY SUBCOMMITTEE

Judge Raggi, chair of the privacy subcommittee, reported that the subcommittee had been asked a year ago to review whether the 2007 privacy rules are working well, whether they are protecting the privacy concerns that they identify, and whether additional privacy concerns are being addressed by the courts on a local basis. In conducting that inquiry, she said, the subcommittee's first task had been to gather as much information as possible from the experiences of the 94 federal district courts. Therefore, it had asked the Federal Judicial Center to survey judges and clerks, and the Department of Justice to survey U.S. attorneys' offices.

She reported that the subcommittee had received superb staff assistance from Mr. Cecil and Meghan Dunn of the Federal Judicial Center in preparing and executing the surveys, Heather Williams of the Administrative Office in collecting all the local rules of the courts and comparing them to the national rules, and Mr. Rabiej of the Administrative Office in coordinating these efforts. In addition, she thanked Professor Capra for serving very effectively as the subcommittee's reporter.

Judge Raggi reported that the preliminary results obtained from the survey reveal that there have been no serious compliance problems with the new privacy rules, although there may be a need to undertake additional education efforts and to tweak some local rules and practices. But the subcommittee sees little need for major changes in the national rules.

Nevertheless, she said, two concerns have emerged. First, there are serious issues involving cooperating witnesses in criminal cases, and the courts have widely different views and practices on how to treat them. Some courts, for example, do not file

cooperation agreements, which do not appear on the public records. Others make them all public, at least in redacted form. Since the courts feel so strongly about the matter, she said, it seems unlikely that the subcommittee will recommend a specific course of action. But the subcommittee may at least identify the issues and provide the courts information about what other courts are doing.

Second, there are concerns about juror privacy. For example, the current national rule requires redaction of jurors' addresses from documents filed with the courts, but not redaction of jurors' names. Therefore, their names are available widely on the Internet. She noted that the courts themselves are responsible for protecting jurors, while the Department of Justice is responsible for the safety and privacy of cooperating witnesses.

Judge Raggi pointed out that the privacy subcommittee includes three members from the Judicial Conference's Court Administration and Case Management Committee, and the joint effort has proved to be very constructive. Some of the matters being examined by the subcommittee, she said, may be directed to the rules committees, while others may be handled by the court administration committee. The subcommittee, she said, plans to write a single report and is not concerned at this point about specific committee responsibilities.

She added that the subcommittee wants to hear directly from people who have given serious thought to the privacy rules and related issues. Public hearings, she said, are not necessary, but the subcommittee will conduct a conference at Fordham Law School in April 2010 with a representative group of knowledgeable law professors, practicing lawyers, and other court users. After hearing from the participants, she said, the subcommittee will be better able to report on the issues that need to be pursued.

PANEL DISCUSSION ON LEGAL EDUCATION

Dean Levi of Duke Law School moderated a panel discussion on trends in legal education and the legal economy, how they may affect the judiciary, and how academia and the judiciary may help one another. The panel included Professor Coquillette of Boston College, Dean Berman of Arizona State, Dean Vairo of Loyola Los Angeles, and Professor Rakoff of Harvard.

Professor Coquillette stated that it is not possible to have a first-class justice system without good legal education. He pointed out that many changes have occurred in law schools over the last several years. He noted that Max Weber, the great prophet of legal education who died in 1920, had made three predictions that have come to pass. First, he proclaimed that the world of law, driven by simple economic necessity, would shift over time from a system of local law to a system of state law, then to a national system of law, and then to an even broader system of international law.

Second, he suggested that legal systems would become less formal, as people will resort more to systems of private mediation and informal dispute resolution or negotiation. Students now engage in more hands-on application of law, not only with moot court competitions, but also in negotiation and dispute resolution classes and competitions.

Third, the law would become more specialized. It would also lose its sacredness of content, as lawyers and judges will come to be seen more as political actors, rather than priests of a sacred order. In a sense, he anticipated the critical legal studies movement, as law schools today are more infused with critical legal studies and with "law and economics" approaches.

He noted that at Boston College Law School, five of the last seven faculty appointments had been given to experts in international law. Most of them, he said, have foreign law degrees and bring an international perspective to the academy. In addition, the school has established programs in London and Brussels.

Professor Berman reported that a series of new initiatives have been undertaken at Arizona State University Law School. The core of the new efforts consists of three parts.

First, the model of what counts as legal education has been expanded greatly. The law school obviously has to train lawyers to practice law, but it also deals with many students who are not going to become lawyers but want to know about the law. To that end, the school is teaching law to non-lawyers, undergraduates, and foreign students. A full B.A. program in law is being developed for undergraduates and will be administered by the law school. In the past, he said, undergraduate courses in law had generally been taught by professors in other disciplines, but they are now being taught by lawyers.

Second, he said, the school wants to focus more on public policy and what it can do to contribute to the world. The law school, he suggested, should be a major player in public policy, and it is working with other faculties on joint programs to help train students to be players in public-policy debates. It has created a campus in Washington, D.C., and is creating think-tank experiences in which ten or so students work with a faculty member and focus on some aspect of public policy. In addition, he said, lawyers will benefit in their eventual legal careers by receiving training in statistics and data analysis. The law school is looking to participate in conducting university research on public policy areas for others, and it is asking companies and other organizations for modest funds to underwrite university research for them that the companies would not undertake on their own.

Third, the school is focusing on bridging the gap from law school to law practice. The students help start-up enterprises to incorporate, and they work with other parts of the university, including social work students, to help people with their legal problems. The law school, he said, has a large number of clinics, a legal advocacy program with dispute-resolution components, and a professional development training course that includes networking, starting up a law practice, performing non-legal work, and training in a variety of other areas that may be helpful to a student's career path. The school plans to do more to connect third-year students directly with members of the legal profession, such as by giving the students writing projects and having lawyers critique them. The school has added post-graduate fellowships and gives students a stipend to serve as fellows or volunteer interns to get a foot in the door of a legal career. It is also considering developing an apprentice model, where recent graduates do specific work in internships to develop their skills.

Dean Vairo reported that the Socratic model is still very much in place and dominant, at least in the first year of law school. She emphasized that the changes taking place in the legal profession and the economy will affect law schools. Most importantly, she said, law school is very expensive, and some commentators advocate moving toward an accelerated two-year program for economic reasons. Her school, she added, has a core social justice mission and is placing graduates in public service jobs. The traditional big-firm model, she said, is starting to collapse, as many students go into solo practice and are doing well at it.

The law school curriculum, she said, is changing, and the school has three main goals – to improve the legal experience, to improve the students' job prospects, and to cope with the costs of legal education. Like other schools, it is looking at de-emphasizing traditional courses to devote more time to problem solving, legislation, and regulation. She said that the faculty sees students engage in social networking every day in the classroom and should take advantage of the practice to keep students' attention in the current, wired world.

The law school will focus more on trans-national and international matters and on cross-disciplinary courses. It has been hiring more combination J.D.-Ph.D.s as faculty and will offer more advanced courses. The students, she said, particularly like the kinds of simulations that are offered in the third-year curriculum, where they are called upon to act as lawyers and represent clients. For the future, she suggested, the schools also need to consider what role distance-learning may play as part of the law school model, and whether schools can continue to pay law professors what they are currently being paid.

Professor Rakoff reported that the atmosphere at Harvard is less uncomfortable for students than it used to be. The school also offers new required courses and workshops in international law, legislation and regulation, and problem solving. In the latter, the students deal with factual patterns that mirror what happens when a matter first comes to a lawyer's attention. The focus is not just on knowing the law, but also on appreciating the practical restraints imposed on a lawyer and the institutions that may deal with a problem.

In short, the substance and doctrines of the law, which were central to the Langdellian system, are emphasized less now. Moreover, students are now absorbed with being on line. They do not look at books, but instead conduct legal research completely on line. Word searches, though, only supply a compilation of facts and results. They do not provide the conceptual structure emphasized in the past – when treatises were consulted and legal problems researched through analysis of issues and analogy. Nevertheless, he said, much of the core curriculum remains, such as basic courses in contracts, torts, and civil procedure. About two-thirds of a student's first year experience would be about the same as in the old days.

Dean Levi suggested that the several themes mentioned by the panel keep arising in discussions on law school reform – problem solving, working in teams, knowing international law, being ready to practice on Day One, building leadership skills, having a comfort level in other disciplines, and understanding business and public policy. All have been around in one form or another for generations. Yet teaching students to be analytical thinkers and to identify issues remains the core school function, and it continues to be difficult to accomplish.

He observed that the traditional role of a trial lawyer and the courtroom experience now have far less relevance to students. Moreover, the dominance of court actions and judicial decisions in the curriculum has decreased over the years.

A member asked the panel whether the legal profession will be able to absorb all the law school graduates being produced, or whether the number of schools and graduates will shrink. A panelist suggested that some law schools may well close or merge, and there will be fewer positions available for law professors. Some schools already are receiving fewer applications and are in serious financial trouble.

Nevertheless, many people in the community continue to be under-served by lawyers, and there is more need for legal services as a whole. Therefore, more lawyers in the future may serve in small units, rather than in traditional firms. A panelist added that it is not a bad idea for law students to strike out alone or in smaller units, rather than in large firms. He said that many law-firm associates are unhappy people.

A professor added that the current business model of many law schools will have to change. There will be fewer legal jobs available, but no less need for lawyers. Students are already changing their expectations of what they will get out of law school and how they will practice. There is likely to be more emphasis on public service.

A lawyer member observed that he is not sure that the young lawyers today think the way that older lawyers do. Experienced lawyers, he said, have been ingrained with substantive law and doctrines. But the newer attorneys have grown up with computers. They are skilled at finding cases on line, but they do not necessarily know what to do with all the information they succeed in compiling. A professor added that it is getting tougher to teach legal doctrines and analysis. He agreed that students generally are great at gathering piles of information quickly, but not in putting it all together or conducting deep analysis. Another added that some students now have a different view of what constitutes relevant knowledge. They do not draw as sharp a distinction between the legal rule and the rest of the world. This is clearly a different approach, but not necessarily a worse one.

A member asked how students can be encouraged to have a passion for the law. A panelist responded that her school encourages externships with local judges. The students are really enthusiastic about these experiences, and the schools need to expand them to include similar experiences with law firms. Law schools, moreover, should decrease the emphasis placed on monetary rewards.

A professor pointed out that judges provide a huge educational service through law clerkships. Law clerks, he said, generally perform better than non-clerks when they enter the legal world. Nevertheless, there is a disturbing trend towards hiring permanent law clerks in the judiciary, thereby reducing the clerkship opportunities for law school graduates.

A judge explained that he has to rely on his law clerks to keep up with his heavy docket. He expressed concern that since many law school reforms have lessened the emphasis on doctrinal law and critical analysis, judges may not be able to obtain the quality of law clerks they need to deal effectively with the cases before them. He noted that federal judges are hiring more permanent clerks today because they are a known quantity, and they know how to apply the law to cases.

A panelist said that many judges are now hiring law clerks who have a few years of law practice, and that is a good development. Another added that judges should

participate actively with law school groups to let them know how well they are doing in training new lawyers.

A professor said that the benefits to the judiciary from law clerks are enormous. Among other things, law clerks provide a large pool of talented lawyers who understand and admire judges because they have worked for them. Another added that law schools need the federal judiciary to serve this important educational function. But the judiciary also benefits greatly because the law clerks are life-long friends who understand the courts and are important, natural political allies.

A member argued that the practice of law has really changed, and students' law school expectations are not being met. There are far fewer trials than in the past, and far fewer opportunities for lawyers to develop their courtroom skills. Young lawyers, moreover, are generally not allowed by courts to practice on their own.

A member said that the changes in the law school curriculum are beneficial. But the schools should be urged to continue to teach the law with rigor and offer a wide variety of high-content classes. The law requires a good lawyer to be able to analyze across different areas of the law. Thus, students who have taken soft courses or only a particular line of courses, do not have the same ability to analogize as students who have had a more rounded, rigorous curriculum.

Other members cautioned against reducing the substantive content of law school classes, and especially opposed the suggestion to move to a two-year law school curriculum for financial reasons. They said that it is essential to have three years of critical thinking and substantive courses in law school. A panelist added that his school was creating more mini-courses of one credit each rather than full semester three-credit courses.

In addition, many very bright judges' law clerks want to teach, without first ever having practiced law. Many professors may have Ph.D. degrees and other educational achievements, but too many lack actual practice experience.

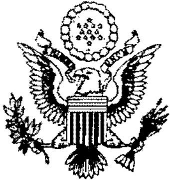
A panelist added that many of the faculty assigned to hire new law professors have an ingrained prejudice against practitioners. Interviewees with practical legal experience, he said, just do not sound like scholars to them. Many law schools, he added, are now introducing fellowships and visiting professorships for practitioners.

NEXT MEETING

The members agreed to hold the next meeting in June 2010. By e-mail exchange after the meeting, the committee fixed the dates as Monday and Tuesday, June 14-15, 2010. The meeting will be held in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 15, 2009

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All the following matters requiring the expenditure of funds were approved by the Judicial Conference *subject to the availability of funds* and to whatever priorities the Conference might establish for the use of available resources.

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At its September 15, 2009 session, the Judicial Conference of the United States --

EXECUTIVE COMMITTEE

Approved a resolution in recognition of the substantial contributions made by the Judicial Conference committee chairs whose terms of service end in 2009.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

Authorized the transfer of the official duty station for the vacant bankruptcy judgeship position in the Eastern District of California from Bakersfield to Sacramento.

COMMITTEE ON THE BUDGET

Approved the Budget Committee's budget request for fiscal year 2011, subject to amendments necessary as a result of (a) new legislation, (b) actions of the Judicial Conference, or (c) any other reason the Executive Committee considers necessary and appropriate.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

Adopted a courtroom sharing policy for magistrate judges in new courthouse and courtroom construction, to be included in the *U.S. Courts Design Guide*.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Approved proposed amendments to Appellate Rules 1, 4, and 29 and Form 4 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

With regard to bankruptcy procedures:

a. Approved proposed amendments to Bankruptcy Rules 1007, 1014, 1015, 1018, 1019, 4001, 4004, 5009, 7001, and 9001, and new Rule 5012 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

b. Approved proposed revisions of Exhibit D to Official Form 1 and of Official Form 23, to take effect on December 1, 2009.

Approved proposed amendments to Civil Rules 8(c), 26, and 56 and Illustrative Form 52 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Criminal Rules 12.3, 15, 21, and 32.1 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Evidence Rule 804(b)(3) and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed *Guidelines for Distinguishing Between Matters Appropriate for Standing Orders and Matters Appropriate for Local Rules and for Posting Standing Orders on a Court's Web Site* and agreed to transmit them, along with an explanatory report, to the courts.

TAB 2

FORDHAM University School of Law

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Daniel J. Capra
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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Final review of restyled Evidence Rules
Date: April 1, 2010

At its Spring 2010 meeting, the Evidence Rules Committee will consider — one last time — the proposed restyled Rules of Evidence. This memo considers a number of possible changes to the restyled rules as they were issued for public comment. The suggestions for changes have come from a number of sources:

1. Professor Kimble has provided a number of suggestions based on a final review, and also in response to recommendations reached by the Advisory Committee at its Fall 2009 meeting.

2. The Committee received public comment from a variety of parties, including bar associations, the Federal Magistrate Judges Association, the NACDL and a few law professors. This memo considers those suggested changes that Professor Kimble and the Reporter found creditable enough to merit consideration by the full Committee. The public comments are reproduced in full in the agenda book, behind this memo.

3. The Reporter also did a final review and raised some questions about both style and substance.

The possible changes to the rules as issued for public comment have been reviewed by the Style Subcommittee to the Standing Committee. The Style Subcommittee's determinations will be set forth in the discussion of each affected rule. The Style Subcommittee did not consider any rule for which no suggestion for change was received.

What follows is each restyled rule, side-by-side with the old rule. Then, if there is a suggestion for the Committee to consider, that suggestion is set forth with commentary from the Reporter. Professor Kimble's comments on the suggestion are also included.

Note: Some of the restyled rules are blacklined. These blacklines indicate changes to the rules as issued for public comment that were tentatively approved by the Advisory Committee at its Fall 2009 meeting.

Note: All the restyled rules are set forth. As this is a "last chance" review, we thought it appropriate for Committee members to take one last look at every rule, even those for which no changes have been suggested.

Note: Committee Notes will be reviewed in a memo later in this agenda book.

ARTICLE I. GENERAL PROVISIONS **Rule 101. Scope**	ARTICLE I. GENERAL PROVISIONS **Rule 101 — Scope; Definitions**
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.	(a) **Scope.** 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. (b) **Definitions.** In these rules: (1) "civil case" means a civil action or proceeding; (2) "criminal case" includes a criminal proceeding; (3) "public office" includes a public agency; (4) "record" ~~[in Rules 803, 901, 902, and 1005]~~ includes a memorandum, report, or data compilation; (5) a "rule prescribed by the Supreme Court" means a rule adopted by the Supreme Court under statutory authority; and (6) a reference to any kind of written material or other medium includes electronically stored information.

1. Rule 101(b)(4) — "a" record.

The Committee suggested putting "a" in the definition of record not only to avoid confusion with "on the record" but also to avoid confusion with the verb "ree-chord." [This is not set forth in the blackline because the Committee did not vote in favor of a tentative change, it was just a suggestion.] On review, Professor Kimble has opposed that change, as potentially confusing.

It seems fair to conclude that readers are unlikely to confuse the "record" in the definition with *either* "on the record" or the verb. The wording of the definition just doesn't make any sense as applied to those two other concepts.

2. Rule 101(b)(4) — deleting bracketed material.

At the last Committee meeting, the Reporter suggested that the bracketed material referring to other rules be deleted, because there was little chance that any reader would confuse a record offered as evidence and a ruling "on the record" — the definition could not possibly apply to the reference "on the record." Professor Kimble suggested that a reader might think the Committee had made an oversight in defining "record" without treating or mentioning different uses of the term.

The Committee determined that the bracketed language should be dropped, because if the language is added to the existing text it would read "In these rules record in Rules 803, 901," etc. The repetitive reference to rules would be awkward.

3. Style Subcommittee Determination Rule 101(b)(4)

The Style Subcommittee decided to retain the language of the restyled rule as published, plus any amendments made by the Advisory Committee since publication — i.e., with the deletion of the bracketed material.

4. Rule 101(b)(4) Public Comment, Suggestion re underinclusiveness of definition.

A public comment (09-EV-008) suggests that the definition of "record" is underinclusive. It notes that the Black's definition of "record" is "Information that is inscribed on a tangible medium or that, having been stored in an electronic or other medium, is retrievable in perceivable form."

Reporter's comment:

This public comment mistakes the intent of Rule 101(b)(4). It looks only at the definition of "record," and doesn't look to the definition that covers electronic information — Rule 101(b)(6). The definition of "record" is for a limited purpose — to avoid repetition of terms like memorandum and document. The definition for electronic information covers the concern expressed in the public comment.

5. Rule 101(b)(6) "or other medium"

At the last meeting the Committee addressed a concern expressed by the Reporter to the Civil Rules Committee, that the reference to "any kind of written material" was not sufficiently comprehensive to cover all the electronically stored information that might be offered and admitted. For example, would "any kind of written material" cover a photograph offered in

digital form? Another concern was that the term might not be as comprehensive as the use of the term "electronically stored information" in Civil Rule 34.

The Committee agreed that the term "any kind of written material" could be usefully expanded. But the definition could not be stated so broadly as to cover, for example, oral testimony of a witness. After discussing a number of alternatives, the Committee tentatively agreed to add the language "or other medium" as indicated in the blackline above. [A reference to Civil Rule 34 will also be added to the Committee Note.]

6. Rule 101(b)(6), Style Subcommittee Determination

The Style Subcommittee decided to retain the language of the blacklined side-by-side. The Subcommittee further agreed to defer to Prof. Kimble's future decision whether, as a matter of style, to change "or other medium" to "or any other medium."

> **Reporter's comment:** Because the intent of the definition is to be as comprehensive as possible with respect to electronic evidence, "any other medium" seems preferable to "or other medium."

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.

1. Rule 102, "end" of ascertaining the truth and securing a just determination.

The ABA Litigation Section suggests that the word should be "ends" because there are two of them — ascertaining the truth and securing a just determination. Professor Kimble responds that it is really one grand end, which is justice. He notes that the current rule uses the singular. This certainly looks like a style call.

2. Rule 102, Style Subcommittee Consideration

The Subcommittee decided to retain the language of the restyled rule as issued for public comment.

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 Statement 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 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.

1. Rule 103(a): "the" party * * * timely objects

The existing Rule 103(a) is written in the passive voice. A claim of error is preserved if a "timely objection or motion to strike appears of record." Professor Kimble has changed it to the active voice: "the party, on the record, timely moves * * *."

This change to active voice has created an inadvertent substantive change, because the rule now provides that a claim of error is preserved only if "the party" moves for it. But in mulitparty cases, case law provides that if one party timely objects, a claim of error is preserved *for all identically situated parties.* To quote the Federal Rules of Evidence Manual: "Courts have held that a nonobjecting party may appeal an evidentiary ruling on grounds specified at trial by an objecting party, when the parties are in the same situation with respect to the evidence." See, e.g., *United States v. Church*, 970 F.2d 401 (7th Cir. 1992) (objection by counsel for one defendant held to preserve a claim of error for two other defendants); *Howard v. Gonzales*, 658 F.3d 352 (5th Cir. 1981) ("Unless the identity of the party somehow affects the admissibility of the evidence, no reason appears why a party should be required to join in the objection or offer of another litigant aligned with him, in order to raise the issue on appeal.").

The question is how to fix the restyled version so that it provides that an identically situated party can take advantage of another party's objection in a multiparty case. One possibility is to change "the party" to "a party" in appropriate places in the rule. That solution would look like this:

> 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~~ a 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~~ a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

One concern with this solution is that it is arguably overstating the law because it implies that a non-objecting party can free-ride on another party's objection in all cases. But this is not so. The parties have to be identically situated with respect to the evidence. See, e.g., *United States v. Rivera-Figueroa,* 149 F.3d 1 (1st Cir. 1998) (non-objecting party's claim of error was not preserved by another party's objection, where the parties had differing interests with respect to the evidence). Arguably this is not a serious concern, because a court is unlikely to over-read "a party" to mean, essentially, "any party." But if the Committee is concerned that the use of "a party" is not sufficient to accurately capture the case law, then a more detailed solution could provide as follows:

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~~,~~ — or a party identically situated — 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 — or a party identically situated — informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

A third possibility is to try to return to the vagueness of the passive voice, thus preserving the law that construes the current language. This would not be easy, however. A return to the passive voice might look something like this:

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)~~ a timely objection or motion to strike is made on the record, ~~objects or moves to strike; and~~

~~(B) states~~ stating the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, ~~the party informs~~ the court is informed of its substance by an offer of proof, unless the substance was apparent from the context.

Reporter's comment:

Because the law on preserving objection in a multiparty case is nuanced, it may make sense to return to the passive voice. Then no argument can credibly be made that the restyling has made a substantive change.

Professor Kimble's response:

I object to returning to the passive voice. We have changed many, many passives to active in the restyled rules. More specifically, there is nothing to be gained except a perfunctory return to the current language. Using "a party objects" says the same thing, semantically, as "an objection is made." One is no more vague or precise than the other. When you say "an objection is made," you're saying that someone objects. I mean, someone has to do the objecting. Someone. Any party. A party.

The courts have apparently read into "an objection is made" the idea of a similarly situated party. That idea is not in the current words. Nor is it in " a party objects." Nothing has changed except the style, which has changed throughout the rules.

Everybody knows that this is a style project only, and I believe we should trust our readers to know that this was a style improvement only--as we say it is in every rule. That trust has held up through three restylings.

Style Subcommittee determination:

The Subcommittee decided to change "the party" to "a party" in both (a)(1) and (a)(2). In other words, rule 103(a)(1) will begin, "(1) if the ruling admits evidence, a party, on the record: . . . ." Rule 103(a)(2) will begin, "(2) if the ruling excludes evidence, a party informs the court of its substance . . . ."

2. Rule 103(d), deletion of examples

Current Rule 103(c) requires a judge to use all practicable efforts 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." The restyled version drops the "such as" examples. Professor Roger Park, in his public comment, suggests that the examples be retained. Professor Kimble states that he is not strongly opposed to the suggestion. But the examples are really so obvious as to not be necessary or helpful.

If the Committee wishes to retain the examples, the change to the restyled rule would look like this:

To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means, such as making statements or offers of proof or asking questions that the jury can hear.

Professor Kimble's comment:

The examples have a syntactic ambiguity: what does "in the hearing of the jury" modify? It would have to be something like "such as through statements, offers of proof, or questions that the jury can hear."

3. Rule 103(d), Style Subcommittee determination:

The Style Subcommittee approved Rule 103(d) as it was released for public comment, i.e., without the examples from the original.

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~~ Cross-Examining 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.

1. Rule 104(a) --- Cross-reference to Rule 104(b).

The current Rule 104(a) provides that preliminary questions of admissibility are determined by the court, "subject to the provisions of subdivision (b)." The restyled version drops this cross-reference. Professor Friedman in his public comment suggests that the cross-reference be retained.

Professor Kimble responds to Friedman's suggestion as follows:

> I don't see how either subdivision would be changed by adding the cross-reference. What do we gain by saying (a) is subject to (b)? Normally, there's no need to cross-reference an immediately following qualifier or exception — which speak for themselves. See, for instance, 404(a)(2) & (b)(2), 408(b), 410(b), and 412(b) & (c)(2).

Reporter's Comment:

The reference to 104(b) is superfluous. If you look at both subsections together, they fit perfectly without any such reference. (a) the court determines questions of admissibility; and (b) if it is a question of conditional relevancy, the court determines it by a special (more permissive) standard of proof.

It's not a big deal. The cross-reference won't kill anything. But if you do it here, there might be other places where you have to do it to be consistent, and that might be problematic. For example, Rule 403 runs underneath lots of rules (like the hearsay rule, Rule 407, etc.) But we don't keep referring to it in every one of those rules.

2. Style Subcommittee Determination on Rule 104(a)

The Style Subcommittee approved Rule 104(a) as it was released for public comment – thus rejecting the suggestion for a cross-reference to Rule 104(b).

3. Rule 104(b) --- deferring conditional relevance rulings.

The restyled Rule 104(b) does not specifically provide that a trial judge can defer a ruling on conditional relevance, allowing the proponent to connecting up at trial. What follows is the discussion from the Fall 2009 Committee meeting:

Professor Kimble suggested an amendment to restyled Rule 104(b) — the rule governing conditional relevance. This proposal stemmed from suggestions of the American College of Trial Lawyers.

The proposal, blacklined for changes from the Rule as issued for public comment, was as follows:

Relevancy That Depends on a Fact. When the relevancy of evidence depends on ~~fulfilling a factual condition~~ whether a fact exists, the court may admit ~~it~~ the evidence on, or subject to, the introduction of evidence sufficient to support a finding that the ~~condition is fulfilled~~ fact does exist.

Committee Discussion:

The Reporter was concerned with the use of "may admit." That could be read as giving a trial court discretion to exclude evidence conditioned on the existence of a fact even when the judge determines that there is evidence sufficient to support a finding. One member responded that "may admit" could instead be read to refer to the fact that even if the standard for conditional relevance is met, the proffered evidence might nonetheless be excluded under other rules such as 403 and 801. But the Reporter responded that the Rule could accomplish both objectives — requiring the court to find the conditional relevance standard met if there is evidence sufficient to support a finding, and providing for the possibility of exclusion under other rules — by the following change:

When the relevancy of evidence depends on ~~fulfilling a factual condition~~ whether a fact exists, the ~~court may admit it~~ proponent must provide the court with ~~on, or subject to, the introduction of~~ evidence sufficient to support a finding that the ~~condition is fulfilled~~ fact does exist.

But the problem with this alternative is that it does not treat the "sequencing" function of the Rule. Rule 104(b) has two functions: 1) establishing the evidentiary standard for questions of conditional relevance; and 2) allowing the judge to make a determination either at the time the evidence offered, or to admit the evidence subject to a showing of the conditional fact.

After discussion, the Committee suggested that Professor Kimble and the Style Subcommittee consider a revision that will more clearly set out the two functions of the Rule. One possibility might look like this:

When the relevancy of evidence depends on ~~fulfilling a factual condition~~ whether a fact exists, the ~~court may admit it~~ proponent must provide the court with ~~on, or subject to, the introduction of~~ evidence sufficient to support a finding that the ~~condition is fulfilled~~ fact does exist. The proponent's showing may be made at the time the evidence is offered or later in the trial.

Professor Kimble will revise Rule 104(b) to cover both functions of the rule, and the Committee will consider the revisions before the next meeting.

Professor Kimble worked on Rule 104(b) in response to the Committee's discussion, and initially proposed the following change from the version as issued for public comment:

> When the ~~relevancy~~ <u>relevance</u> of evidence depends on ~~fulfilling a factual condition~~ <u>whether a fact exists</u>, the ~~court may admit it~~ <u>proponent must provide the court with</u> ~~on, or subject to, the introduction of~~ evidence sufficient to support a finding that the ~~condition is fulfilled~~ <u>fact does exist</u>. <u>The court may admit the proposed evidence subject to the proponent's doing so later.</u>

Reporter's comment:

The change from "relevancy" to "relevance" is obviously a style call. And it looks like a good call, because "relevancy" sounds old and stodgy.

Judge Hinkle's comment on Professor Kimble's first revision:

> I remain concerned about the restyled Rule 104(b). First, the current rule requires "introduction" of the evidence that the fact exists. "Providing the court" with the evidence sounds like the evidence need not be introduced as part of the evidence before the jury. If, under the existing rule, the evidence must in fact be introduced, this is a substantive change. And it may not always be academic. Under 104(a), information provided to the court as a basis for admissibility of other evidence need not comply with the rules of evidence. If a proponent can establish a fact only with inadmissible evidence, this would matter. Perhaps "sufficient to support a finding" means the evidence must be admissible, but that is not obvious.
>
> Second, Joe's latest version requires the "proponent" to make the showing. Evidence already in the record, and put there by the opponent, surely counts. Perhaps the proponent makes the showing by point to evidence introduced by the opponent, but this seems an odd way to say it.

In response to Judge Hinkle's concerns, Professor Kimble provided a new proposal to amend the restyled version of Rule 104(b), which would: 1) provide that evidence sufficient to support a finding is required, but not necessary sufficient, to admit the evidence; 2) allow connecting up the foundation evidence later in the trial; 3) not require the foundation evidence to be necessarily produced by the proponent; and 4) not imply that the foundation evidence might itself be inadmissible.

Professor Kimble's revised proposal is as follows:

When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

Style Subcommittee Determination:

The Style Subcommittee approved Professor Kimble's revision to restyled Rule 104(b), set forth immediately above.

4. Rule 104(b) --- "fact or facts"

The ABA Litigation Section suggests that the rule explicitly cover both the singular and the plural--- when relevance depends on whether "one or more facts exist", the proponent must present sufficient evidence that "those facts or that fact exist."

Professor Kimble responds as follows:

That's unnecessary, and we would have to do it throughout the rules. By convention, the singular includes the plural.

Reporter's comment:

We have followed the convention referred to by Professor Kimble throughout restyling. We would have to make major changes throughout the rules to cover plurals, for no advantage. What's more, "that fact exist" is awkward.

5. Rule 104(b), Style Subcommittee Determination

The Style Subcommittee approved the revision proposed by Professor Kimble (rejecting the suggestion of pluralizing fact).

6. Rule 104(c) --- Hearing outside the jury's hearing.

The minutes of the last Advisory Committee meeting reflect a disagreement over the heading of the Rule --- which led to further questions about multiple usages of the word "hearing." The account is as follows:

Professor Kimble suggested a change to the heading of Rule 104(c), as follows:

> ~~**Matters That the Jury Must Not Hear.**~~ **Conducting a Hearing Outside the Jury's Presence.** 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.

Committee Discussion:

Committee members noted that the word "presence" is not accurate because many preliminary determinations are made sidebar while the jury is still in the courtroom. Thus, "outside the jury's hearing" — the term used in the text, is correct.

The Committee, therefore, rejected the use of the word "presence" in the heading of the Rule, but did not disagree with Professor Kimble that the heading in the restyled rule could be improved. Members also noted that the text of the Rule was somewhat awkward because there are two different uses of the word "hearing" — the hearing conducted by the court and the protection against the jury hearing the evidence.

Professor Kimble will try to revise the Rule to sharpen the heading and to avoid the multiple references to "hearing." The Committee will review that proposal before the next meeting.

Professor Kimble's response to the discussion at the Committee meeting is as follows:

It is difficult to redraft this rule without repeating the word *hearing*, as the Advisory Committee would like. Here's one possibility, somewhat more consistent with 103(d) (blacklined from the version issued for public comment).

> **Conducting a Hearing So That the Jury Cannot Hear It.** ~~A~~ The court must conduct a hearing on a preliminary question ~~must be conducted outside the jury's hearing~~ so that the jury cannot hear it if:

(1) the hearing involves the admissibility of a confession;

(2) a defendant in a criminal case is a witness and so requests ~~that the jury not be present~~; or

(3) justice so requires.

Reporter's comment:

This is a good fix. It takes out the multiple use of the word "hearing"; it focuses on the court and is in active voice; and it changes the reference to "presence" in (2) --- the Committee was concerned about the use of "presence" but did not focus on (2) at the last meeting.

7. Style Subcommittee determination on Rule 104(c).

The Style Subcommittee approved the changes suggested by Professor Kimble--- reflected in the blackline immediately above.

8. Rule 104(d), the heading.

The minutes of the last Committee meeting reflect a disagreement over the heading to Rule 104(d). The entry from the minutes is as follows:

> Professor Kimble, and the Style Subcommittee, suggested a change to the heading of the Rule as it was issued for public comment:
>
> > **~~Testimony by~~ Limited Cross-Examination of 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.
>
> Professor Kimble argued that the current heading is incomplete because the rule is not about a defendant's testimony, but rather about limiting cross-examination of a criminal defendant who testifies on a preliminary question.
>
> ***Committee Discussion:***
>
> Committee members were concerned that the proposed change to the heading would be misleading — it seems to imply that cross-examination of a criminal defendant

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is limited in all cases. Nothing in the heading refers to the context of the rule — preliminary questions. Professor Kimble responded that all of Rule 104 is about preliminary questions — the Rule is titled "Preliminary Questions" — so there is no need to refer to preliminary questions in the heading of a subdivision. But Committee members remained concern that the broad reference to "a defendant in a criminal case" — made necessary by the fact that all references to an accused have been changed to "defendant in a criminal case" — would be misleading.

After discussion, the Committee and Professor Kimble agreed that the word "limited" should be taken out of the heading. So there was tentative agreement on the following heading

"Cross-Examining a Defendant in a Criminal Case"

* * *

9. Rule 104(d) Style Subcommittee Determination

The Style Subcommittee approved the Advisory Committee's version of the heading:
Cross-Examining a Defendant in a Criminal Case

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.

1. Rule 105, "one purpose"

Professor Friedman prefers "one purpose" to the restyled "a purpose." The problem with "one purpose" is that, if read literally, it would deprive a party of a right to a limiting instruction if evidence were properly admissible for *two or more* purposes yet inadmissible for another. For example, assume a prior bad act in a criminal case is admissible for intent and knowledge, but not, of course, to prove the defendant's character. The "one purpose" language could be read to mean that this defendant is not entitled to a limiting instruction. [The same would be true with the language "one party" – literally it means that if evidence is inadmissible against more than one party, then none of the parties have a right to an instruction].

It is true, though, that the current rule has used the term "one purpose" and has not been construed in such a narrow fashion. So retaining "one purpose" may not lead to a substantive inaccuracy. Change to "a party" and "a purpose" does seem an improvement in clarifying how the rule actually applies, however.

2. Rule 105, Style Subcommittee determination.

The Style Subcommittee approved Rule105 as it was issued for public comment.

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 in fairness ought to be considered at the same time.

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 <u>fact to be</u> 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.

1. Rule 201(a) – "of a legislative fact"

The ABA Litigation Section suggests a minor style change:

This rule governs judicial notice of an adjudicative fact only, not of a legislative fact.

Professor Kimble responds as follows:

There's no need to add *of* before *legislative fact*. The parallelism works fine.

Reporter's Comment:

Joe is the man on stuff like this.

2. Style Subcommittee determination on Rule 201(a)

The Style Subcommittee approved the Rule as it was issued for public comment.

3. Rule 201(d) --- "fact to be noticed"

As indicated by the blackline, the Committee approved this change at the last meeting. The entry from the minutes is as follows:

> The American College of Trial Lawyers suggested a slight change to Rule 201(d), and Professor Kimble implemented that suggestion. The proposed change to the Rule, blacklined from the Rule as issued for public comment, is as follows:
>
> > **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 to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.
>
> ***Committee Discussion:***
>
> The Reporter noted that the reason for possible change is that a reference to "the noticed fact" is not completely accurate — because, at the time of the hearing, the fact has not yet been noticed.
>
> The Committee unanimously approved the change to Rule 201(d).

4. Style Subcommittee determination on Rule 201(d).

The Style Subcommittee approved the restyled rule including the change tentatively approved by the Advisory Committee.

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS Rule 301. Presumptions in General in Civil Actions and Proceedings	ARTICLE III. PRESUMPTIONS IN CIVIL CASES 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~~ producing 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~~ persuasion, which remains on the party who had it originally.

1. Rule 301, sorting out burden of going forward, burden of proof, etc.

At the last meeting, the Committee tentatively approved the blacklined changes in an attempt to streamline and clarify Rule 301. The minutes of that meeting provide as follows:

> The American College of Trial Lawyers suggested that the phrase "in the sense of the risk of nonpersuasion" was awkward and that the Rule could be sharpened. The suggestion led to a broad discussion of the Rule at the Committee meeting.
>
> ***Committee Discussion:***
>
> Committee members noted that the two sentences in the restyled Rule address different questions. The first allocates a burden of *production* while the second allocates a burden of *persuasion.* The current restyled Rule uses the term "burden of going forward" for the former concept and "burden of proof in the sense of the risk of the burden of nonpersuasion" for the latter. While these terms are taken from the original Rule 301, the Committee discussed how the terminology might be improved to make the rule more easily understood. After significant discussion, the Committee unanimously approved tentative changes to the restyled Rule 301. Those changes provide as follows:
>
>> 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~~ producing 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~~ persuasion, which remains on the party who had it originally.

* * *

Professor Kimble suggests that "burden of persuasion" should be changed to "burden of proof" --- as the Style Subcommittee originally suggested. He contends that "burden of proof" is a much more familiar phrase.

Reporter's Comment:

Burden of "persuasion" works better in a rule on presumptions. Burden of "proof" is a more familiar phrase indeed, but it is usually applied to a question of sufficiency and not admissibility --- i.e., the burden of a party to persuade a factfinder that all of the evidence it has presented has proved its case. Burden of "persuasion" is the term that is more commonly used with presumptions. That is what the original advisory committee was trying to do with its awkward phraseology, "burden of proof in the sense of the risk of nonpersuasion." If that committee had wanted to say "burden of proof" it could have done so. But it did not. Restyling gives the opportunity to clarify what the original rule was trying to say --- that the burden of persuasion remains with the party who had it in the first place.

2. Style Subcommittee Determination on Rule 301.

The Style Subcommittee approved the Rule with the changes tentatively approved by the Advisory Committee, i.e., the blacklined version above (including the use of "burden of persuasion").

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 regarding 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 — Test for 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.

1. Rule 401 --- more probable "than it would be without the evidence."

The restyled version drops the language "than it would be without the evidence." Professor Park and NACDL disagree with this change. They argue that the language is necessary to clarify and sharpen the definition of relevance. Without that language, a newcomer might think that evidence is relevant only when it makes the existence of a fact "more likely than not."

Reporter's Comment:

It's important to retain the emphasis of the original rule --- that relevance is a minimal test. A brick is not a wall. The language "than it would be without the evidence" helps to clarify the minimal standard. Taking that qualifying language out of the rule may lead some to think, incorrectly, that there is an intent to make the relevance standard more difficult to meet.

Professor Kimble's Revision

Professor Kimble suggests the following change in response to the comments from Professor Park and NACDL.

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

Reporter's Comment:

Joe's fix looks great. It not only restores the qualifying language in the existing rule, it breaks out the two separate concepts — relevance and materiality — something that is muddled in the existing rule.

2. Style Subcommittee Determination Rule 401.

The Style Subcommittee approved Professor Kimble's reworking of Rule 401, set forth immediately above.

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 provides otherwise: • the United States Constitution; • a federal statute; • these rules; or • other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible.

1. Rule 402, bullet points

That ABA Litigation Section opines that numbers or letters would be preferable to bullet points: "Use of numbers or letters facilitates citation, while still fulfilling the goal of visual clarity intended with use of the bullet points."

Professor Kimble responds as follows:

> If we used numbering rather than bullet points, we'd create so-called dangling text after the enumeration. The alternative is to create a bunch of new subdivisions in the rules. We should keep the bullets.

Reporter's Comment:

It would surely be awkward to have a rule providing that evidence is relevant unless any of the following provides otherwise: 1) the United States Constitution; etc. That would mean that Rule 402(1) is not itself a sentence or even a phrase. That type of numerology has never been done in the Federal Rules of Evidence, and it certainly should not be started in the context of a restyling project. The alternative, as Joe indicates, is to make the subdivisions full clauses, but all this does is add a number of unnecessary words to what was a compact and visually clear rule.

It should be noted that Joe has made a concerted effort to limit the use of bullet points to rules such as Rule 402, which contain a series of short words or concepts in the nature of a list. That point can be made to the Standing Committee if it has a concern about possible overuse of bullet points.

2. Rule 402, Style Subcommittee Determination.

The Style Subcommittee approved Rule 402 as it was issued for public comment, i.e., with the bullet points.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time	Rule 403 — Excluding 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 a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, 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 for a Defendant or a Victim 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; Notice <u>in a Criminal Case</u>.*** This evidence may be admissible 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.

1. Rule 404 --- Blacklined Changes Tentatively Approved by the Committee.

The minutes of the last Committee meeting reflect the reasons for the three minor changes to the restyled rule that are indicated by blackline above. Those minutes provide as follows with respect to the two changes to Rule 404(a):

> The Committee agreed that the deletion of the word "crime" was appropriate because that word is superfluous. Rule 404(a)(2) operates only in the context of a criminal case, and the reference to a victim can only be to a victim of crime.
>
> A member questioned whether the proposed change to the heading was accurate. The use of the word "for" might make it seem like the defendant or victim were obtaining a benefit, when in fact the rule contemplates that evidence attacking their character may be admitted. But the Committee determined that in context, the heading must be read to mean that it is providing an exception for *character evidence* of a defendant or a victim — the rule is designated "character evidence" and under the restyling protocol, subheadings are assumed to incorporate the title of the rule.

The Committee therefore tentatively approved the suggested changes to Rule 404(a).

The minutes reflect the following with the change to the heading in Rule 404(b)(2):

Professor Kimble suggested a minor clarification of the heading to Rule 404(b)(2), as follows:

(2) ***Permitted Uses; Notice in a Criminal Case.***

Committee Discussion

The Committee determined that the change was helpful in sharpening the heading and more accurately describing the text. The Committee unanimously approved the change.

2. Rule 404(a), deletion of "in conformity therewith"

A public comment attached to Professor Friedman's statement argues that the phrase "in conformity therewith" is a sacred phrase. This is a question for the Committee, but experience does not indicate frequent use of the term "in conformity therewith" by bench and bar when it comes to character evidence. A quick Westlaw search indicates 359 uses of the phrase "in conformity therewith" in the past two years. But virtually all of them were in the context of citing the language of existing Rule 404.

Professor Kimble notes that "in conformity therewith" is "hardcore legalese" and thus a high priority for deletion in any restyling.

3. Rule 404(a), character/trait of character

The ABA Litigation Section proposes to add "character" before "trait" in a number of places in Rule 404(a). The question of where to put "character" and where to put "trait" was discussed by the Advisory Committee for over two hours at its meeting in Boston. The relevant minutes of that meeting state as follows:

> 1. *Character/trait of character:* The existing rule sometimes refers to "character" and other times to "trait of character." The Style Subcommittee draft generally tried to refer to "character trait" or "trait" and deleted most of the broader references to "character". The Evidence Rules Committee found these changes to be substantive, because there is a reasoned difference between character and a character trait. In some cases, a party will be arguing that the adversary is making an undifferentiated attack — a character smear.

Rule 404 provides protections against these attacks. In other situations, a party may be attempting to introduce a particular aspect of a person's character, such as honesty or peaceableness. Rule 404 provides other rules to govern this situation. The Committee carefully reviewed the existing Rule and determined that the various uses of "character" and "trait of character" were well considered, and that any change of those usages would be substantive. So the existing references were restored to the restyled draft.

* * *

That should be enough to answer the ABA's comment. But there is more. If you look at the side by side you will see that the restyled version accords *exactly* with the existing rule--- when the existing rule uses character broadly, the restyled version does as well. When the existing rule refers more narrowly to a character trait, the restyled version does as well. Thus, there is no case to be made for a substantive change. The only difference is that the restyled rule refers generally to "trait" instead of "character trait." But this cannot be substantive. In the context of the rule, the term "trait" can only refer to a character trait. What else could it be? Thus, the restyling is an improvement because it clarifies the distinctions in the existing rule between character and a character trait--- it can be said to avoid confusion by avoiding the overuse of the word "character" when the reference is to a character trait.

4. Rule 404(a) Style Subcommittee Determination.

The Style Subcommittee approved Rule 404(a) as it was released for public comment, together with the minor changes tentatively approved by the Advisory Committee. Thus it rejected the changes proposed in public comment.

5. Rule 404(b), notice provision, deletion of "provided that"

The existing rule states that evidence of uncharged misconduct is admissible for a not-for-character purpose "provided that" in a criminal case the government gives proper notice to the defendant. That is a long sentence. The restyled version puts notice in a second sentence, taking out the words "provided that."

NACDL argues that the restyling makes a substantive change because the notice provision no longer conditions admissibility on satisfying notice. That is, it requires the government to provide notice, but it doesn't say that evidence is excluded if notice is not provided.

Professor Kimble has this response to the NACDL comment:

Provisos are verboten in good drafting, and here we see one reason why: *provided that* can mean "if," "but," "except," and even "and." So it's often

ambiguous. In this instance, *if* – the word for a condition – does not work grammatically. (Try reading the sentence using *if.*) The only substitution that works is a soft *but*; in effect, we've dropped the *but*. At any rate, I don't think we have changed the meaning. Surely, the court is required to not admit the evidence if the prosecutor fails to give notice. Other notice provisions in the rules – such as 413(b), 414(b), and 415(b) – do not explicitly condition admitting the evidence on the prosecutor's giving notice.

Reporter's Comment:

It seems quite unlikely that a prosecutor would argue, on the basis of the restyled rule, that a blatant violation of the Rule 404(b) notice requirement cannot result in exclusion of the evidence. Joe is correct that the notice provisions of Rules 413-415 contain no explicit requirement of inadmissibility for failure to satisfy the notice requirement. Neither does the notice provision of Rule 412. Yet those notice requirements have always been read to mean that if the requirement is not met, the evidence would be excluded.

It is for the Advisory Committee to determine whether deletion of "provided that" is a substantive change. But to read the restyled notice requirement to mandate some sanction other than exclusion for its violation would be an unusual reading of an evidence rule. The Evidence Rules are all about admissibility, not about sanctioning lawyers for their violation.

6. Rule 404(b), Style Subcommittee determination.

The Style Subcommittee approved the Rule as issued for public comment, together with the minor change to the heading that was tentatively approved by the Advisory Committee.

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 testimony in the form of an opinion. On cross-examination of the character witness, 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.

1. Rule 405(a), On cross-examination "of the character witness"

The Advisory Committee's decision to make this addition, seen in the blackline, is explained in the minutes of the last meeting:

> Professor Kimble suggested this change out of concern that the restyled version did not make it exactly clear that the witness being cross-examined would ordinarily be different from the person whose character is being proved. An evidence professor made a similar suggestion on the Evidence ListServ.
>
> The Committee found that the clarification was useful * * * and tentatively approved the following change to the rule as issued for public comment:
>
> **(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 testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

2. Rule 405(a), Style Subcommittee determination

The Style Subcommittee approved restyled Rule 405(a) with the blacklined addition previously approved by the Advisory Committee.

3. Rule 405(b) --- "relevant specific instances of the person's conduct"

A public comment at the end of Professor Friedman's submission argues that the addition of the word "relevant" is a substantive change because specific instances of a person's conduct don't have to be independently relevant "to the case at hand."

Reporter's Comment:

Rule 405(b) applies to cases in which character is in issue, and in those cases the rule allows proof of the character by specific acts. It's very difficult to see how a specific act could be admissible if it is irrelevant to the character sought to be proved. And it is very difficult to see how such a fact, if relevant to character, would somehow be irrelevant to "the case at hand" --- when character is the very issue that must be proved in the case at hand. So the public comment appears to miss the mark.

This is not to say that the addition of the word "relevant" is necessary as a substantive matter. All evidence must be relevant or it is not admissible. But the addition is useful, because it provides a parallel with Rule 405(a), where the term "relevant" is specifically used. In any case, there does not appear to be an argument that adding the word "relevant" is a substantive change.

4. Rule 405(b), Style Subcommittee determination

The Style Subcommittee approved Rule 405(b) as it was issued for public comment --- thus rejecting the suggestion to delete "relevant."

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 may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

1. Rule 406, replacing "is relevant" with "may be admitted."

The ABA Litigation Section is concerned that replacing "is relevant" with "may be admitted" could result in an unintended substantive change. It does not explain why this could be so. On reflection, the argument for a substantive change would be that the more positive statement, "may be admitted" could be seen as a more generous admissibility standard for habit evidence. Simply stating that habit is "relevant" doesn't mean that it will necessarily be admitted. Consider a habit that is relevant to a person's conduct, but not strongly so, perhaps because it is only a preparatory part of a series of acts. Now assume that the habit is completely disgusting and would prejudice the jury. Perhaps saying "may be admitted" is more positive about the chances of admissibility than a simple recognition that habit evidence is relevant.

The cautious and prudent approach is to return to the original language --- "is relevant." Use of that term is consistent with the history of this rule. The Advisory Committee thought this rule was needed to abrogate the common law limitations on habit evidence. The common law cases often stated that habit was not "relevant" if there was an eyewitness, and also that it was not "relevant" unless it was corroborated. Thus, using the term "relevant" was a direct response to the common law limitations. The rule as restyled doesn't have to say anything more than that.

Professor Kimble notes that: "When it comes to evidence, we have generally preferred *may admit* or *may be admitted* or *is admissible*." This is true, but in the unique historical context of Rule 406, it may be less confusing --- and certainly less likely to raise a question about a substantive change --- to retain the language "is relevant." Ultimately, of course, the question of whether a substantive change would be made by "may be admitted" is a call for the Advisory Committee.

Professor Kimble's comment:

> The words "the court may admit" are as neutral as can be. The court may. The court may not. Your call, Judge. Besides, no one except insiders know about the history of the rule. Readers coming to the rule will read "is relevant" and wonder (as I did), So what? What does that mean? This is the chance to say what we mean.

2. Rule 406, Style Subcommittee determination

The Style Subcommittee approved Rule 406 as it was issued for public comment. The Subcommittee noted that the Advisory Committee may wish to determine whether the change in language from the current rule -- from "is relevant" to "may be admitted" -- is substantive.

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.

1. Rule 407, bullet points

The ABA Litigation Section makes the same objection to bullet points as it made to Rule 402. The response from Professor Kimble and the Reporter are the same as well. But in the case of Rule 407, adding numbered subdivisions would be particularly difficult, because it would create a hanging paragraph at the end --- a result to be avoided in restyling.

2. Rule 407, change from "does not require the exclusion" to "the court may admit."

The ABA Litigation Section is "seriously concerned" about the change from "the rule does not require exclusion" to "the court may admit." The Section states that the "new phrasing seems affirmatively to encourage the court to admit the evidence, whereas the existing phrasing merely says that Rule 407 does not affect admissibility when the evidence is offered for another purpose."

The Section's concern is shared by the Reporter, who argued that Rule 407 made a substantive change – transforming a rule of exclusion into a grant of admissibility. The merits of this change to Rule 407 were discussed in detail at the Spring 2008 meeting. That section of the minutes recounts the discussion as follows:

> Among other changes, the restyled version of Rule 407 provides that evidence "may be admitted" if offered for one of the designated proper purposes in the rule. A number of Committee members argued that this was a change in the tone of the Rule. Current Rule 407 is a rule of exclusion; it becomes inapplicable if the proponent can articulate a purpose for the evidence that is not prohibited by the Rule. Rule 407 is not a rule that admits evidence. Committee members argued that by using the term "may be admitted" the tone of the rule was changed to one that provided a positive grant of admissibility. The Reporter noted that the language "does not require the exclusion of evidence" was

carefully chosen by the original Advisory Committee, and carefully vetted by Congress, which changed similar language in Rule 404(b) to provide a broader rule of admissibility, but made no such change to Rule 407. Professor Kimble argued in response that the phraseology "may be admitted" was to be preferred because it means the same thing and is "tighter" than "need not be excluded."

The Committee voted on whether the change in approach from "does not require exclusion" to "may be admitted" was a substantive change under the style protocol. Eight members of the Committee were of the view that the change was not substantive; one Committee member dissented from that view.

The Committee then voted on whether to suggest to the Style Subcommittee to return to the original iteration of the rule or some variation, e.g., "the rule does not require exclusion" or "the evidence need not be excluded" — or simply "the rule does not apply." The Committee voted 6 to 2 in favor of this style recommendation. The Committee's second choice for a style change was to provide that "a court may admit" rather than "may be admitted." Committee members reasoned that "a court may admit" seemed less compulsory (and more direct) than "the evidence may be admitted."

The Committee then voted on whether to approve the restyled Rule 407. It was approved by a vote of 8 to 1.

* * *

Reporter's Comment:

It may not be productive to revive the debate, given the facts that 1) only one member of the Committee thought the change was substantive, and 2) the Style Subcommittee declined to implement the change that was recommended by the Advisory Committee as one of style. If there had been extensive and unanimous public comment against the proposal, it would make some sense to revisit it. But that was not the case (which is not to minimize the weight of the Litigation Section's comments, but simply to note that only one comment was received on the subject).

Professor Kimble's comment:

The Section of Litigation is concerned that replacing *This rule does not require* with *But the court may admit* seems to affirmatively encourage the court to admit the evidence. But that's not what *may* means. Again, we have used *the court may admit* throughout the restyled rules to set out what the court may — or may not — do. See, for instance, 407, 408(b), 410(b), 411, and 412(b)(1) & (2). This is probably the most important consistency point in the rules.

3. Rule 407, adding "subsequent" before "measures" in the first sentence.

The ABA Litigation Section, and the American College of Trial Lawyers, suggest the following change to the first sentence:

> When <u>subsequent</u> 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 * * *

Professor Kimble's Response:

> There's no context for *subsequent* at that point: *When subsequent measures are taken*. Subsequent to what?

Reporter's Comment:

It's clearly a style call. And surely Joe has a point that the word "subsequent" that early in the rule raises the question of what it is supposed to be subsequent to.

4. Rule 407, use of the word "subsequent"

James Duane suggests that the word "subsequent" is superfluous as applied to remedial measures, that is, that remedial measures must always be subsequent to that remediated. He therefore would amend the rule as follows:

> **Rule 407. ~~Subsequent~~ Remedial Measures**
>
> 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 * * *

Reporter's Comment:

Duane's comment is misguided. The rule is known by all as "subsequent remedial measures." That word should only be deleted if it is superfluous. And it is not. It emphasizes that the measure must be taken *after* the plaintiff's *accident or injury*. Not all remedial measures are taken after the plaintiff's accident or injury. A remedial measure that precedes a particular plaintiff's accident or injury is not covered by the rule.

5. Rule 407, change from "controverted" to "disputed"

NACDL argues that the change from "controverted" to "disputed" in the last sentence of the Rule is substantive, because it makes it easier to admit subsequent remedial measures for one of the permissible purposes. NACDL contends that the word "controverted" means that the

defendant must "put in some affirmative evidence contesting the point" before the plaintiff can respond with subsequent remedial measure evidence. But that is not the case. The word "disputed" is an accurate description of the case law. For example, evidence of subsequent remedial measures is admissible to show that the plaintiff is not contributorily or comparatively negligent, and this is so when the defendant pleads such negligence as an affirmative defense. There is no requirement that the defendant must first put in evidence on the subject. *See, e.g., Pitasi v. Stratton Corp.* 968 F.2d 1558 (2d Cir. 1992) (subsequent remedial measure should have been admitted to show the plaintiff's lack of negligence after the defendant pleaded comparative negligence). Thus, case law does not require a defendant in all cases to introduce affirmative evidence contesting a point for subsequent remedial measures to be admissible. It's often enough to make an argument to the jury, or in a pleading.

This is not to say, though, that the word "disputed" is any better than "controverted." It is prudent to hew as close to the existing rule is possible, unless there is some significant style advantage in the change. It does not appear that "disputed" is stylistically superior to "controverted" --- and despite the NACDL comment, they mean the same thing. Unless the style case is made, it would make sense to return to the word "controverted" --- as a certain way to avoid any future argument that the Committee made a substantive change.

Professor Kimble's comment:

If it's a style call, we should use the plainer, more common word "disputed." There is such a thing as an excess of caution.

6. Rule 407, Style Subcommittee determination

The Style Subcommittee approved Rule 407 as it was issued for public comment.

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 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.

1. Rule 408(a)(1), "in order to compromise the claim"

The existing rule covers efforts made in "compromising or attempting to compromise the claim." This has been changed to efforts made "in order to compromise the claim." The ABA Section of Litigation fears that some might interpret this as a limitation on the existing rule, extending the protections "only to statements made in the course of settlement discussions that have in fact succeeded and resulted in an agreed-upon settlement."

Professor Kimble's response:

> The Section of Litigation is concerned that *in order to compromise the claim* suggests that the claim has indeed been settled. The point of the rule, obviously, is to encourage settlements. How likely is it that someone will argue that a settlement offer is admissible if the offer was not accepted? I suppose we could say *in an effort to compromise the claim*. But I think the Section is reading in what's not there.

Reporter's comment:

In answer to Joe's question: it is *quite often* the case that someone will argue that a settlement offer is admissible if the offer is not accepted. So if the rule could be construed as covering only completed settlements and not proposed settlements, that would undoubtedly be a major substantive change in the rule's protections.

It is not at all clear, though, why "in order to compromise the claim" would be read as not applying to attempted settlements. "In order to" pretty clearly refers to the intent of the party at the time of the offer or the statement. The entire phrase provides: "furnishing, promising or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in order to compromise the claim." "Offering" is one of the modifiers for "in order to compromise the claim." It doesn't mean that the claim will necessarily be compromised. It's just an offer to do so, and the reason for the offer is to compromise the claim.

Joe states that an alternative is to change "in order to" to "in an effort to." That seems just as good stylistically and is less susceptible to anyone misleading the rule to apply only to completed settlements. So the Committee may wish to approve that change.

2. Rule 408(a)(1), prior inconsistent statement

James Duane contends broadly that any reference in the Evidence Rules to "prior" before "inconsistent statement" can be deleted because the inconsistent statement must be definition be "prior."

Reporter's Comment:

It's fair to state that "prior inconsistent statement" is a term of art. The phrase is commonly used by courts. See, e.g., *United States v. Devine*, 934 F.2d 1325, 1344 (5th Cir.1991) ("It is well-settled that evidence of a prior inconsistent statement is admissible to impeach a witness.") The term has been used in 578 federal cases since 2009 --- and that is not counting the cases that quote the existing language of Rule 613(b). There would have to be a very good reason for getting rid of what is such a commonly used phrase. It's true that in the context of Rule 408, an inconsistent statement would have to be prior to the testimony it is offered to impeach, but really, how important is it to take out every single word that could be argued to be unnecessary? The downside of such academic purity is that courts and litigants, who have talked about "prior inconsistent statements" since time immemorial, may think that the restyling is doing more than it intends, or more than it should.

Note also that taking "prior" out from everywhere in the rules would complicate some of those rules. For example, Rule 806 specifically says that the inconsistent statement need not be prior to the (hearsay) statement to be admissible as impeachment. Is that language necessary if you take "prior" out of all the other places? Or does it now become superfluous? At the very least, the question is complicated. Given the minimal, if any, benefit of taking out the word

"prior" and the possibility of a ripple effect on other rules, there is a very strong case for keeping the word "prior" before "inconsistent statement" throughout the rules.

3. Rule 408, Style Subcommittee Determination

The Style Subcommittee approved restyled Rule 408 as it was issued for public comment --- thus rejecting the suggestion to delete the "prior" before "inconsistent statement."

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.

1. Rule 409, "promising to pay, or offering to pay"

James Duane declares that promising to pay and offering to pay are duplicative. He states that it would be better to say "paying or offering to pay." Joe Kimble thinks "paying or offering to pay" "would be clearer, but then do we make a comparable change to Rule 408(a)(1)?"

Reporter's Comment:

There is definitely a difference between an offer and a promise, so both terms are necessary. An example of an offer is the defendant going to see the plaintiff in the hospital, looking at him, and saying "I want to pay your medical expenses." An example of a promise is where the defendant goes to the hospital, and the plaintiff says, "I'll feel a lot better about the accident if you promise pay my medical expenses" and the defendant so promises. They are different fact situations and Rule 409 is intended to cover both.

The idea that "paying or offering to pay" is better is simply not the case. The use of "paying" is in fact superfluous, because the rule already covers "furnishing" medical expenses. For a guy so interested in avoiding duplication, Duane's fix seems pretty duplicative --- and less comprehensive than the current restyled rule, because it does not cover a promise.

So there are three acts covered by the rule --- paying, offering to pay, and promising to pay. The current restyled rule covers all these acts. The Duane proposal covers one act twice, and one act not at all.

And definitely, no change to 409 should mandate a change to Rule 408, as Joe implies — it should be the other way around. 408 is the far more important rule.

2. Rule 409, Style Subcommittee determination

The Style Subcommittee approved restyled Rule 409 as it was issued for public comment --- thus rejecting the suggestion to change "promising to pay, or offering to pay."

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 a civil or criminal case, 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 nolo contendere plea; **(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.** The court may admit a statement described in Rule 410(a)(3) or (4): **(1)** in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness both statements ought to be considered together; 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.

1. Rule 410(a)(2) – "a statement about either of those pleas"

At the last Committee meeting, the DOJ raised a substantive change made in the restyled Rule 410(a)(2). The minutes of the meeting describe the problem raised and the Committee's resolution:

> The Department of Justice representative explained how the restyled language in subdivision (3) creates a substantive change: the restyling unintentionally narrows the class of statements that are inadmissible to those only "about the pleas." It appears that the restyling assumed that the phrase "regarding either of the foregoing pleas" modified the word "statement." Thus, the restyled rule limits the non-admissibility to only statements "about the pleas" as opposed to *any* statements made during the defined

proceedings. But the currently understood meaning among practitioners is that the phrase "regarding either of the foregoing pleas" modifies the *comparable state procedure*, not the statement. Thus, under the current rule, a broader range of statements -- those made "in the course of any proceedings" would be excluded.

The Committee agreed with the Department's position that the restyled version of Rule 410 needed to be revised in order to avoid a substantive change by narrowing the class of statements subject to Rule 410 protection. Professor Kimble and the Reporter promised to come up with a rewrite for the Committee's consideration before the next meeting.

Professor Kimble's proposed change

(3) a statement made during a proceeding on ~~about~~ either of those pleas ~~made during a proceeding~~ under Federal Rule of Criminal Procedure 11 or a comparable state procedure;

DOJ comment:

Professor Kimble's proposed change was sent to Betsy Shapiro in advance of the meeting. She responded that the proposed change successfully addressed the problem that the Department had raised.

2. Rule 410(b)(1), technical change.

James Duane suggests the following change, with which Professor Kimble agrees:

(1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness ~~both~~ the statements ought to be considered together; or

Reporter's comment:

It's hard to see how this is any better. But it's style.

3. Rule 410, Style Subcommittee determination

The Style Subcommittee approved the proposed changes to restyled Rule 412: 1) Professor Kimble's proposed change to Rule 410(a)(3), set forth above; and 2) changing "both statements" to "the statements" in Rule 410(b)(1).

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~~ whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or — if disputed — proving agency, ownership, or control.

1. Rule 411—"insured against liability" vs. "have liability insurance"

The ABA Litigation Section states that the restyled language "have liability insurance" is not as comprehensive as the restyled language "insured against liability." It explains that having liability insurance, in common language, is thought to mean having a liability insurance policy. But the phrase "insured against liability" "has a broader connotation, including, for example, indemnity agreements that are not often thought of as liability insurance."

Professor Kimble states that if the Litigation Section is correct, "we would have to reinstate the current language."

Reporter's Comment:

The ABA's argument is persuasive. At the very least, it raises a colorable question about a substantive change. So caution should require a return to the existing language. It's not as if "have liability insurance" is so much better than "insured against liability" to justify the risk of a substantive change.

So the affected portion of the rule should read as follows:

Evidence that a person ~~did or did not have liability insurance~~ was or was not insured against liability is not admissible to prove * * *

2. Rule 411, blacklined change, "to prove ~~that~~ whether the person * * *"

This blackline is explained by the minutes of the last meeting, which state as follows:

An Evidence professor on a listserve contended that the restyling made a substantive change because the current rule states that evidence of insurance is not admissible "upon the issue whether the person acted negligently or otherwise wrongfully." The academic contended that under the existing rule, a *plaintiff* is

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prohibited from proving that he is *not* insured, when the evidence is offered to prove that the plaintiff therefore had an incentive to be careful. But under the restyled rule, plaintiff's evidence of his own lack of insurance would be admissible because it would not be offered to prove that he acted negligently.

Committee Discussion:

The Committee concluded that the scenario posited by the academic — a plaintiff proving his own lack of insurance — was a farfetched hypothetical. Nonetheless, to avoid any contention that a substantive change has been made, the Committee adopted Professor Kimble's suggestion for a slight change to the restyled Rule 411.

The Committee tentatively approved the following change to the restyled Rule 411:

Evidence that a person did or did not have liability insurance is not admissible to prove ~~that~~ <u>whether</u> the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or — if disputed — proving agency, ownership, or control.

3. Rule 411, addition of the words "if disputed" in the last sentence.

NACDL argues that adding the condition "if disputed" to the sentence allowing evidence of insurance for certain purposes is a substantive change. Stated simply, the "in dispute" requirement was not in the text of the existing rule, but it is in the text of the restyled rule.

Reporter's comment.

There are not enough cases to know whether agency, ownership or control have to be *disputed* to allow insurance evidence to be admitted. The idea of adding *disputed* was to parallel Rule 407 (which conditions admissibility of subsequent remedial measure on a dispute), but the rules aren't necessarily the same in scope. The prudent approach would be to delete the words "if disputed" from Rule 411. There is really not enough case law to know whether the change is substantive, but why risk it? It could be argued that agency, ownership or control would have to be disputed for the evidence to be relevant, but if that is so, then it could be argued that adding the language is unnecessary. Again, the prudent approach appears to be to delete "if disputed."

4. Rule 411, Style Subcommittee determination

1. The Style Subcommittee approved the change from "did or did not have liability insurance" to "was or was not insured against liability."

2. The Style Subcommittee approved the deletion of "if disputed." The Subcommittee did so on the assumption that this may be a substantive change. The Subcommittee notes that the Advisory Committee on Evidence Rules may wish to consider the issue of consistency in this regard between rule 407 and rule 411. The proposed restyling of rule 411 attempted to track the "-- if disputed --" language from rule 407. But the current rule 407 contains the language "if controverted," whereas the current rule 411 does not.

3. In all other respects, the Style Subcommittee approved restyled Rule 411 as it was issued for public comment, together with the blacklined change (substituting "whether" for "that") previously approved by the Advisory Committee.

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 the record of the hearing must be and remain sealed.
	(d) Definition of "Victim." In this rule, "victim" includes an alleged victim.

1. Rule 412(a) and (b) --- use of "offered to prove"

James Duane states broadly --- but without consideration of any fact situation and without citation to authority --- that the various references to evidence "offered to prove" are "gratuitous" and should be replaced by "evidence that" or "evidence of."

Reporter's Comment:

Duane is proposing a substantive change --- especially problematic in a rule that seeks to balance the victim's rights against the defendant's constitutional right to an effective defense. Take a case where the defendant is charged with raping the victim on April 12 in New York. The defendant wants to admit a letter written by the complainant. That letter talks about a sexual experience that the victim had on April 12, *in Europe*. The defendant could argue that "I am not offering it to prove any sexual behavior, I am offering it to prove the victim's location at a particular time." Under Duane's proposal, the letter would be excluded because it is "evidence

that a victim engaged in other sexual behavior." That would be a clear change from the existing rule.

"Offered to prove" is a substantive phrase because the rule does not apply if the defendant is offering evidence for a purpose other than proving sexual behavior. In that sense it is like Rule 404(b), which focuses on the purpose for which evidence is offered. The Committee wouldn't — couldn't — take the purpose requirement out of Rule 404(b). Why would it take it out of Rule 412?

Moreover, Duane can't credibly propose to take out *all* of the "offered to prove" language in Rule 412. Rule 412(b)(1)(A) also contains language about offered to prove. Try taking it out of there.

> **(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;

The remaining language makes no sense and there appears to be no easy way to fix it.

Taking out "offered to prove" is wrong, and it is substantive.

2. Rule 412(b)(1)(B) – "Sexual behavior toward the defendant."

Professor Friedman suggests that "sexual behavior toward the defendant" should be "sexual behavior with the defendant." He thinks "toward the defendant" sounds odd.

Reporter's comment:

Sexual behavior "with the defendant" probably makes the exception more limited than under current law, and so appears to be a substantive change. Case law, for example, allows defendants to admit sexual behavior of the victim when it is presented knowingly *in the view* of the defendant, or for the defendant's benefit, if offered to prove consent.

The term "toward" is broader, but it may not be completely accurate under the case law. That sounds like "facing" or "approaching" the defendant, and sexual behavior might be knowingly in the view of the defendant but arguably not "toward" them.

The current language --- "With respect to" --- was intended to be fuzzy, allowing courts some discretion. Given the difficult policy issues attendant to this rule --- and the likelihood that with this rule, parties will be likely to argue about anything that even looks like a substantive change – the most prudent approach is to return to the language of the original. If "with respect to" is considered too awkward for restyling, then a possible alternative is "concerning." So the rule would look like this:

(A) evidence of specific instances of a victim's sexual behavior ~~toward~~ [concerning] [with respect to] the defendant, if offered by the prosecutor or if offered by the defendant to prove consent;

3. Rule 412, moving the definition of "victim" earlier in the Rule

The public comment at the end of Professor Friedman's submission suggests that the definition of "victim" --- currently at the end of the rule --- should be moved up, apparently because the reader will have questions about the use of the word "victim" while reading through the rule, and the mystery won't be solved until the end.

Professor Kimble's response:

> We put the definition at the end to keep the numbering consistent with the current rule. If the question of "alleged" comes up, surely people will read to the end of the rule.

Reporter's comment:

The location of the definition is obviously a style call. And it makes good sense to adhere to the numbering in the existing rule if possible. Surely the location of the definition of victim can't be important enough to justify renumbering the subdivisions of the rule.

4. Rule 412(c), deleting the hyphen in "in camera."

The Advisory Committee agreed to this change at the last meeting.

5. Rule 412, Style Subcommittee determination

1. The Style Subcommittee agreed with the suggestion above, to change "toward the defendant" to "concerning the defendant" in Rule 412(b)(2)(B).

2. The Style Subcommittee rejected all other suggestions for change received in public comment --- thus approving the rule as issued for public comment, together with the deletion of the hyphen in "in camera" previously approved by the Advisory Committee.

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 to the Defendant.** 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).

1. Rule 413(b) heading, "Disclosure to the Defendant"

This change was approved by the Committee at the last meeting.

2. Rule 413(b), Style Subcommittee determination

The Style Subcommittee approved restyled Rule 413 as it was issued for public comment, with the addition of the blacklined change to the heading of subdivision (b) previously approved by the Advisory Committee.

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 <u>to the Defendant</u>.** 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— **(1)** any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child; **(2)** any conduct proscribed by chapter 110 of title 18, United States Code; **(3)** contact between any part of the defendant's body or an object and the genitals or anus of a child; **(4)** contact between the genitals or anus of the defendant and any part of the body of a child; **(5)** deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or **(6)** an attempt or conspiracy to engage in conduct described in paragraphs (1)–(5).	**(d)** **Definition of "Child" and "Child Molestation."** In this rule and Rule 415: **(1)** "child" means a person below the age of 14; and **(2)** "child molestation" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving: **(A)** any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child; **(B)** any conduct prohibited by 18 U.S.C. chapter 110; **(C)** contact between any part of the defendant's body — or an object — and a child's genitals or anus; **(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).

1. Rule 414(b) heading, "Disclosure to the Defendant"

This change was approved by the Committee at the last meeting.

2. Rule 414, Style Subcommittee determination

The Style Subcommittee approved restyled Rule 414 as it was issued for public comment, with the addition of the blacklined change to the heading of subdivision (b) previously approved by the Advisory Committee.

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.

1. Rule 415, "involving a claim for relief"

James Duane thinks that the language "involving a claim for relief based on a party's alleged" is superfluous. So he would change the first sentence of Rule 415(a) as follows:

> In a civil case involving a claim ~~for relief based on a party's alleged~~ of sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or act of child molestation

That is a substantive change. And it makes the rule confusing. The rule requires much more thought and subtlety than Duane gives it. Consider a case in which a plaintiff claims damages from someone who aids and abets another person's act of child molestation --- but the molester is a non-party, perhaps because he is dead or judgment-proof. Under the current Rule, the rule would not apply, because the case does not involve a claim for relief based on an assault by a party. Under the Duane "restyling" the rule would be applicable and the non-party's bad acts would be admissible to prove propensity. Except maybe not, because there is a reference *later* in the rule to evidence that "the party committed" the bad act. That reference would just be hanging there in the supposed restyling. So it is either substantive or confusing.

Also, "involving a claim" is not the same as "involving a claim for relief based on." For example, if a person is kidnapped and sues for kidnapping, that person may "claim" that the

defendant committed other acts of sexual assaults — not of the plaintiff — and that this somehow is relevant to the kidnapping. Is the rule now triggered? It would not be under the current provision, which requires that the claim for relief must be for the act of sexual misconduct itself.

It's an elementary point that "a claim" is different from "a claim for relief based on a party's act." The latter is narrower. It would of course be inappropriate for a restyling to expand the coverage of a rule that is already broad --- so broad that it was opposed by the Advisory Committee when it was being considered by Congress. The prudent course is to hew closely to the words of the existing rule, and not risk expanding it for the sake of dropping a few words.

2. Rule 415(b), the heading.

Professor Kimble notes that while the headings to the notice provisions of Rules 413 and 414 have been changed to make them more descriptive, the heading to Rule 415(b) has not. Professor Kimble would make the following change to the heading for parallelism with Rules 413(b) and 414(b):

Disclosure to the Opponent.

Reporter's Comment:

Good catch.

3. Rule 415, Style Subcommittee determination

The Style Subcommittee approved restyled Rule 415 as it was issued for public comment, with the addition of a change in the heading to Rule 415(b): Disclosure to the Opponent. Thus, the Style Subcommittee rejected the suggestion to delete "claim for relief based on a party's alleged" in the beginning of the rule.

ARTICLE V. PRIVILEGES **Rule 501. General Rule**	ARTICLE V. PRIVILEGES **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 provides otherwise: • the United States Constitution; • a federal statute; or • other rules prescribed by the Supreme Court. But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

1. Rule 501, bullet points.

See the discussion of the Litigation Section's critique in the commentary on Rules 402 and 407. With respect to Rule 501, the use of lettered subdivisions is unworkable for the same reasons as in those previous rules. The result would be subdivisions with dangling words, and a dangling paragraph at the end. Surely this is a style question.

2. Rule 501, "other rules prescribed by the Supreme Court"

The Litigation Section contends that "other" seems "misplaced." It can't be referring to the prior bullet points, because the Constitution and Federal Statutes are not rules prescribed by the Supreme Court. It could be a reference to rules "other than Rule 501" --- which might make some sense now that there is a Rule 502. But "other" is not in the original rule, and so it may not be worth it to raise possible confusion by adding it. Rule 502 already has a provision stating that it takes precedence over Rule 501, so the reference to "other" in Rule 501 is not necessary.

Professor Kimble agrees that the word "other" should be deleted.

3. Rule 501, Style Subcommittee determination

The Style Subcommittee decided to delete the word "other" from the third bullet point. In all other respects it approved Rule 501 as it was issued for public comment.

Rule 502 — Attorney-Client Privilege and Work Product; Limitations on Waiver	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.	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.	**(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).	**(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 occured.	**(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.	**(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.	**(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.	**(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.	**(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, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision.

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.

1. Rule 602, "Evidence to prove personal knowledge"

James Duane thinks that the beginning of the second sentence has unnecessary verbiage. He would change it to "Such evidence . . ."

Professor Kimble's response:

I prefer the few extra words to *Such evidence*. But what about *That evidence*?

Reporter's Comment:

This is a style call but it is not a user-friendly change at all. The reader has to figure out that "that evidence" means the evidence of personal knowledge referred to in the previous sentence. To understand this rule, the reader must sort out the testimony presented by the witness (which is of course evidence) from the evidence to support personal knowledge. The lead-in to the second sentence helps the reader separate out the two concepts. Is it worth it to cut out a few words when it would make the rule more difficult to figure out?

2. Rule 602, "testimony by an expert witness"

James Duane says that the word "witness" is superfluous because the rule is about testimony, and so the expert would have to be a witness to be subject to it. Professor Kimble agrees that "witness" should be deleted.

Reporter's Comment:

The word "witness" could be thought of as more emphatic than superfluous. But it is clearly a style call. That said, Duane makes the argument that the word "witness" should be deleted *every time it is paired with the word "expert."* We will see that in later rules painting with such a broad brush will result in confusion at best and a substantive change at worst.

3. Rule 602, Style Subcommittee determination

The Style Subcommittee decided to delete the word "witness" from the last sentence. That is, the Subcommittee agreed to the following language: "This rule does not apply to testimony by an expert under Rule 703." In all other respects, the Style Subcommittee approved Rule 602 as it was released for public comment --- thus rejecting any change to "Evidence to prove personal knowledge" at the start of the second sentence.

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. It must be in a form designed to impress that duty on the witness's conscience.

1. Rule 603 --- "give an oath"

James Duane says that "give an oath" should be changed to "take an oath." Professor Kimble agrees. It could be argued that the *court* is the one that takes the oath and the witness is the one who gives it. That said, most people say "the witness has to take an oath." And the Oxford English Dictionary uses "take."

2. Rule 603, Style Subcommittee determination

The Style Subcommittee rejected the proposed change from "give an oath" to "take an oath" and approved restyled Rule 603 as it was issued for public comment.

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.

1. Rule 604, interpreter qualification requirements

The ABA Litigation Section argues that the restyling makes a substantive change by deleting the specific reference to "qualification as an expert." It notes that the restyled rule "simply requires that a translator be qualified without cross-referencing the rules and case law related to qualification as an expert." It concludes that the restyled rule arguably lessens the requirements for qualifying as an interpreter.

The question raised by the Litigation Section was discussed for more than an hour at a previous Advisory Committee meeting. That discussion and Committee resolution is set forth in the minutes of the Fall 2008 meeting:

> 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."

Reporter's Comment:

It would not appear necessary to revisit whether a reference to Rule 702 would be a substantive change. As to lessening the existing requirements, the restyled rule does not do that because courts under current law qualify interpreters who are not experts --- e.g., family members who can understand what an impaired witness is saying. See, e.g., *United States v. Bell,* 367 F.3d 452 (5th Cir. 2004) (sister of a deaf mute witness properly allowed to interpret the witness's hand signals). It should be remembered that the rule still requires an interpreter to be "qualified" --- but that standard is flexible, in order to accord with the case law. Sometimes an interpreter will need to be qualified under traditional standards of expert testimony, and sometimes not.

In sum, there appears to be no need to change the restyled Rule 604.

2. Rule 604, Style Subcommittee determination

The Style Subcommittee approved Rule 604 as it was issued for public comment.

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.

1. Rule 605 – "as a witness"

James Duane thinks broadly that in every instance throughout the rules, "witness" is superfluous. In this rule, he would have it read: "The presiding judge may not testify ~~as a witness~~ at the trial.

But this rule shows that broad statements, unthinkingly applied, can result in substantive changes. At the Fall 2008 meeting the Committee resolved that the restyled rule should not in any way indicate that the rule imposed a limitation on the judge's ability to comment on the evidence. The language "as a witness" is important to clarify that the only situation governed by the rule is where the trial judge is actually testifying *as a witness*. If the language "as a witness" is deleted, then someone could (and therefore will) argue that a judge commenting on the evidence is in effect testifying, and this is prohibited by the restyled rule. That is precisely the result that the Committee sought to avoid.

At the very least, "as a witness" should be retained to avoid any confusion on this most sensitive subject, at least historically so --- a rule specifically allowing the judge to comment on the evidence was proposed in the Federal Rules that the original Advisory Committee sent to Congress. But it was deleted, on the ground that the issue was sensitive and should be left to common law development and judicial discretion.

2. Rule 605, Style Subcommittee determination

The Style Subcommittee approved restyled Rule 605 as it was issued for public comment --- thus rejecting the proposed deletion of "as a witness."

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)** an outside influence was improperly brought to bear on any juror; or **(C)** a mistake was made in entering the verdict on the verdict form.

1. Rule 606(a) --- deleting "as a witness"

At the last meeting, the Committee agreed to the deletion of "as a witness" from Rule 606(a), at Professor Kimble's suggestion. His reasoning was that the language was superfluous because the only way that a juror could testify under the terms of the rule is as a witness.

Having gone through the various uses of "as a witness" due to Duane's suggestion that it is always superfluous --- and finding in fact that it is not always so --- perhaps a new look at Rule 606(a) is required. Could there be a situation in which a juror could be asked to make a statement in front of the jury that could colorably be called "testimony" --- but where the juror is not

actually called as a witness? If so, then the deletion of "as a witness" --- which is in the original rule --- would be substantive, because it would prohibit a practice that is currently permitted. Perhaps polling the jury is an example. If there is any colorable reason to keep "as a witness" then of course it should be retained. Even if the question is close, the language should be retained because at worst it is superfluous.

2. Rule 606(a), Style Subcommittee determination

The Style Subcommittee decided to restore the words "as a witness" to the first sentence. That is, the Subcommittee decided that the first sentence should read, "A juror may not testify as a witness before the other jurors at the trial." In all other respects the Style Subcommittee approved the rule as it was released for public comment.

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) Reputation or Opinion Evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. 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.** A witness does not waive the privilege against self-incrimination by testifying about a matter that relates only to a character for truthfulness.

1. Rule 608(a) --- "having a character for truthfulness or untruthfulness"

The ABA Litigation Section supports the changes suggested by ACTL, on the ground that the restyled phrase "having a character for truthfulness or untruthfulness" is awkward. The proposed change is as follows:

> **(a) Reputation or Opinion Evidence.** A witness's credibility may be attacked or supported by ~~testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by~~ testimony in the form of an opinion about <u>— or a reputation for — truthfulness or untruthfulness</u> ~~that character~~. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

This proposal was rejected by the Committee at the last meeting. The minutes state as follows:

> The sense of the Committee was that the restyled version issued for public comment was precise and accurate. The Committee saw no need for change, and noted that the College's proposal tended to mute the purpose of the Rule — it made it less clear that the only attack permitted by the Rule is an attack on the witness's character for truthfulness.

Professor Kimble's response to the Litigation Section suggestion:

> The Section of Litigation raises questions that we have considered and reconsidered. The Section says we don't usually speak of "a" character in this context. I don't think that the phrase *having a character for truthfulness or untruthfulness* is awkward or confusing. And (b) in the current rule uses *the character for truthfulness or untruthfulness*. The Section's proposed alternative is this: *A witness's credibility may be attacked or supported by evidence in the form of an opinion about — or a reputation for — truthfulness or untruthfulness*. But that reads *evidence in the form of . . . a reputation for truthfulness or untruthfulness*. Does not seem to work well. Also, note that 405(a), which we are trying to make more parallel with 608(a), does not talk about "in the form of a reputation."

Reporter's Comment:

To the extent the matter needs to be revisited, it could be pointed out that one of the problems with the ACTL suggestion is that it deletes any mention of "character" in the first sentence. The rule is about character. This is one of the hardest rules of all to understand, and taking out the word that tells you what the rule is about does not appear to be a step in the right direction.

2. Rule 608(c) --- waiver by testifying about a matter that relates only to truthfulness

At the last meeting, Professor Saltzburg saw a possible substantive problem with restyled Rule 608(c) --- which is a new subdivision taken from the last paragraph of what is currently Rule 608(b). The minutes of the meeting reflect the Committee discussion and determination:

> Professor Saltzburg raised the argument that the restyled provision makes a substantive change by providing that there is no waiver "by testifying about a matter that relates only to a character for truthfulness." He noted that the original rule states that there is no waiver when the witness is "examined" on matters related only to truthfulness.

There is a difference between "testifying" about matters relating to character for truthfulness and being examined with respect to them. The provision is intended to allow a witness to refuse to answer questions about his past when they are offered solely to attack his character. For example, if a witness testifies as a bystander to a crime, Rule 608 might allow the cross-examiner to ask the witness about a prior fraud that he committed, unrelated to the instant case. The provision would allow the witness to refuse to answer if the answer would tend to incriminate him — and the cross-examiner could not argue that the witness waived the privilege by testifying, because the prior fraud is being offered only to attack the witness's character for truthfulness.

The rule as restyled could be read to allow a witness to refuse to answer a question about his past whenever his *direct testimony* related only to a character for truthfulness. Thus, a witness who testified solely as a character witness might be able, under the terms of the restyling, to refuse to answer questions about criminal activity that might bear on his qualifications as a character witness. The focus of the restyled rule thus shifts from the adversary's attack (whether the bad act is offered solely to attack character for truthfulness) to the witness's direct testimony.

The Committee recognized that the restyled Rule 608(c) might be interpreted to make a substantive change. Professor Kimble and the Reporter resolved to work on a revision for the Committee's review before the next meeting. One possibility is to use the words of the existing rule — that there is no waiver when the witness is "examined about" matters relating only to the witness's character for truthfulness. Another possibility is to retain the emphatic reference to criminal defendants in the existing rule.

Professor Kimble's proposed change to Rule 608(c):

> A witness does not waive [retains?] the privilege against self-incrimination when being cross-examined about a matter [about conduct?] that relates only to the witness's character for truthfulness.

Professor Kimble's explanation:

I offer the first bracketed change because it seems odd to talk about affirmatively waiving when you are not doing anything; you are passively being cross-examined. I offer the second bracketed change for a stronger tie to subdivision (b).

Reporter's Comment:

Joe's modification appears to solve whatever problem existed by referring to what the witness is examined about, rather than what the witness is testifying about. I have three suggestions:

1. It seems better to keep the word "waive" and delete the bracket "retains." The rule is about waiver. Moreover, saying that the witness retains the privilege is an affirmative statement that there is in fact a privilege to retain. That's a determination this

rule does not, and in fact cannot, make. All the rule is saying is that *if* you have a privilege, you don't waive it by being examined about matters that relate only to character for truthfulness.

2. It seems better to keep "about a matter" and delete "about conduct." This is obviously a complicated provision and it pays to hew as closely to the original to avoid any substantive change.

3. Consider deleting "cross-examined." It should be "examined" as in the existing rule. It is true that Rule 608(b) refers to cross-examination, but that is not an accurate term as applied to this Rule. The fact that the Committee decided not to change it, in order to avoid confusion about the import of the change, does not mean that the reference to cross-examination should be extended. But more importantly, it could happen that the character witness is asked about a matter on *redirect* — if the rule is limited to cross-examination, there could be a waiver on redirect, and that would make no sense. The limitation to cross-examination is simply wrong.

Professor Kimble's response:

First, we could say *retains any privilege against self-incrimination*; that's the same as "the privilege, if any." Second, regarding *about conduct*, I believe the Advisory Committee was concerned about the connection between (b) and (c). Using *about conduct* would tighten it. Third, instead of *examined*, I think we should use *questioned*. See the discussion under 613(a).

Reporter's response:

1. "retains *any* privilege against cross-examination" solves the problem of presuming a privilege that may not exist. But it doesn't answer the point that the rule is about waiver. The existing rule uses the term waiver.

2. I don't think the concern is about tightening (b) and (c). I think the concern is that some kind of examination about some matter --- not necessarily conduct --- could be thought to be a waiver without this rule being in place. The existing rule uses "matter" and that should be retained.

3. "examined" is the better word, I think, because a lawyer doesn't only ask questions when a witness is testifying.

3. Rule 608, Style Subcommittee determination

1. The Style Subcommittee agreed to the following change in restyled Rule 608(c):

"A witness does not waive the privilege against self-incrimination when being examined about a matter that relates only to the witness's character for truthfulness."

2. In all other respects, the Style Subcommittee approved Rule 608 as it was released for public comment.

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 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 witness's conviction or release from confinement for ~~the conviction~~ it, whichever is later. Evidence of the conviction is admissible only if: **(1)** its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and **(2)** the proponent gives an adverse party reasonable written notice 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~~ an adult's conviction 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.

1. Rule 609(b) and Rule 609(d), minor changes approved at the last meeting

The two blacklines above indicate the minor changes. 1. Substituting "it" for "the conviction" in (b); and 2. Substituting "an adult's conviction" for "a conviction of an adult" in (d).

2. Rule 609(a), argued substantive change

Jeffrey Bellin (09-EV-10) argues that restyled Rule 609(a) makes a substantive change as it applies to testifying criminal defendants. He notes that the existing rule states that a conviction "shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." That has been changed to a conviction "must be admitted if the witness is a defendant in a criminal case and the probative value of the evidence outweighs its prejudicial effect." He thinks that the change from "shall" to "must" means that the evidence is more likely to be admitted.

Reporter's Comment:

This does not appear to be a plausible reading of the restyled rule. The restyled rule does not say that all convictions must be admitted. It says they must be admitted if they satisfy the same balancing test that currently exists. So, no conviction that is currently inadmissible would be admissible under the restyled rule. Bellin argues that the rule could be read to allow the conviction to be admissible *even if* it does not satisfy the balancing test, but that is a result that cannot be reached --- given that the rule says "if the witness is a defendant in a criminal case *and* the probative value of the evidence outweighs its prejudicial effect."

3. Rule 609(a)(1)(B) --- "prejudice ~~to the accused~~"

The restyled version alters the words of the balancing test as applied to criminal defendants. The current balancing test is whether the probative value of the conviction "outweighs its prejudicial effect to the accused." The restyled balancing test considers whether "the probative value of the conviction outweighs its prejudicial effect." Thus "to the accused" has been deleted.

This appears to be a substantive change. It allows the court to consider prejudice to *any party* from the conviction, not just the criminal defendant being impeached. I asked Ken Broun about this and he came up with the following hypothetical:

> A and B are tried together for murder. B's defense is that he was along for the ride and that he had no knowledge of A's murderous intent. A testifies and A's prior manslaughter conviction is sought to be introduced against him. The possibility of prejudice against A certainly exists and the judge has to do the weighing. But the court could also conceivably add on the prejudice that the introduction of the conviction would have on B's defense of no knowledge.

Here is a hypothetical of my own: Two defendants are tried for conspiracy. One defendant testifies and he is impeached with a conviction for a similar conspiracy three years ago. The evidence indicates that the defendants are best friends and long-time business associates. The non-testifying defendant could be prejudiced by the jury speculation that he must have been involved in the testifying defendant's prior conspiracy. Under the current rule, the prejudice to the non-testifying defendant could not be considered. Under the restyled rule, it could. That makes for a substantive change. This analysis does not mean that the current rule reaches a good result as a matter of evidence law. But for purposes of the restyling project, the result is what it is.

In terms of a fix, the word "accused" is not used in this restyling project. The fix would probably need to be something like "must be admitted if the witness is a defendant in a criminal case and the probative value of the evidence outweighs its prejudicial effect to that defendant."

4. Rule 609(b), a single sentence.

The Litigation Section proposes that the lead-in sentence to Rule 609(b) should be deleted. Its version would read as follows:

> **Limit on Using the Evidence After 10 Years.** ~~This subdivision (b) applies if~~ When more than 10 years have passed since the witness's conviction or release from confinement for the conviction, whichever is later, ~~Evidence~~ evidence of the conviction is admissible only if:
>
> **(1)** its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and
>
> **(2)** the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

Professor Kimble is opposed to this change. It is clearly a question of style. It might also be noted that the Litigation Section's version makes for a sentence that is more than 50 words long.

5. Rule 609(b), unfair prejudice

Professor Katharine Traylor Schaffzin (09-EV-17) suggests that *prejudicial effect* be replaced with *unfair prejudice* for consistency with Rules 403 and 412(b)(2).

Professor Kimble's response:

> If that's not a substantive change, then I like the idea, although it will require more than a straight substitution. We would have to change to something like *substantially outweighs any unfair prejudice* [*to a party?*].

Reporter's Comment:

You open up a can of worms if you change this one reference to "unfair prejudice." There is a reference to "prejudice" without "unfair" in Rule 609a1B; there is another one in Rule703. Why would you add it to Rule 609(b) and not in those other places?

Moreover, there is a fairly creditable reason for using "prejudice" as opposed to "unfair prejudice" in Rules 609 and 703, while referring to unfairness in Rules 403 and 412. The reference in Rules 403 and 412 is arguably necessary to make the point that evidence is not prejudicial just because it is harmful. It must be unfair. When it comes to convictions and use of hearsay by an expert, it can at least be argued that any harm will *always* be unfair — because the jury *will* consider the evidence for an improper purpose (i.e., as proof that the witness is a bad person under Rule 609, or as proof of truth for hearsay offered under Rule 703). Under Rule 403, much evidence is offered that is argued to be prejudicial but it is really *only* harmful in the sense that it hurts the opponent's case. That's not the kind of prejudice that the rules are talking about.

This is not to say that the drafters had some amazing distinction in mind in using "unfair" in some places but not in others. But there should be a good deal of consideration before "unfair" is put in Rule 609b1 and not in the other places. Each rule will require significant thought. At this stage in the process, it seems problematic to undertake an "unfair prejudice" project.

6. Rule 609(d)(4) --- "admitting"

James Duane would make this change:

~~admitting~~ the evidence is necessary to fairly determine guilt or innocence.

Professor Kimble is in favor of this change.

Reporter's comment:

It's not a big deal, but it seems that "admitting the evidence" is more accurate. It is *admitting* it that is the important event that will affect the determination of determine guilt or innocence.

7. Rule 609, Style Subcommittee determination

1. Rule 609(a)(1)(B). The Style Subcommittee agreed to add the words "on the witness". That is, the Subcommittee agreed to the following language: . . . and the probative value of the evidence outweighs its prejudicial effect <u>on the witness</u>; and . . . ."

[Note: The Reporter's alternative is "prejudicial effect to that defendant"].

2. Rule 609(d)(4). The Subcommittee agreed to delete the word "admitting". That is, the Subcommittee agreed to the following language: "(4) the evidence is necessary to fairly determine guilt or innocence."

3. In all other respects, the Subcommittee approved the restyled Rule 609 as released for public comment, together with the changes approved by the Advisory Committee at the last meeting (set forth in the blackline). Thus, the Subcommittee rejected the proposal to add "unfair" to "prejudice" in Rule 609(b).

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

1. Rule 611(a) – "mode and order of questioning" witnesses.

Reviewing the reference in restyled Rule 613 to "questioning" witnesses, the Litigation Section suggests that the word should be "examining." See the discussion under Rule 613. On reflection, there is much to be said for the same change in Rule 611(a). The trial court has authority to regulate not only "questioning" but also anything addressed to the witness that is not in the form of a question. The existing rule uses the word "interrogation" and that is commonly thought to mean more than addressing the witness with a statement that ends in a question mark. (See the Miranda cases on interrogation, such as *Rhode Island v. Innis*, which defines interrogation as broader than questioning). So there is much to be said for changing "questioning" in Rule 611(a) to "examination."

Note that "question" is used throughout Rule 611(c), but those references should not be changed because the rule is in fact directed only toward questions --- leading questions.

2. Rule 611(b) --- "a witness's credibility"

The restyled Rule 611(b) provides that cross-examination "should not go beyond the subject matter of the direct examination and matters affecting *a* witness's credibility." James Duane says it should be "the" because it is only the witness being cross-examined whose credibility could be addressed. Professor Kimble agrees with this change. The current rule uses "the witness." It seems like a good change.

3. Rule 611(b) --- restoring "in the exercise of discretion"

The American College and the ABA Litigation Section suggest restoring "in the exercise of discretion" because it "provides meaning that is lacking in the proposed revision."

Professor Kimble's response:

> We most certainly should not restore *in the exercise of discretion* in the second sentence. That would raise the question of what the unadorned use of *may* means everywhere else in the rule. There is not a wisp of difference between *the court may* and *the court may, in the exercise of discretion.* We knocked that intensifier out of all the restyled rules — without exception.

Reporter's comment:

Discretion is inherent in the Evidence Rules. If discretion must be mentioned here, then there is an argument that it needs to be stated in every rule providing that the court "may" do something. That is a lot of rules.

4. Rule 611(c) --- Starting the second sentence with "and."

The Magistrate Judges Association (09-EV-011) objects (in order of generality) 1) to the restyling; 2) to the use of "And" and "But" to start sentences; and 3) to the use of "And" to start the third sentence of Rule 611(c). The Magistrate Judges find it difficult to divine the intention of starting that sentence with "And." They wonder whether the "And" is intended to refer to the "ordinarily" in the second sentence. They propose the following alternative:

> Ordinarily, the court should allow leading questions on cross-examination~~. And the court should allow leading questions~~ or when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Reporter's comment:

Under the existing rule, "ordinarily" modifies only the second sentence, not the third. It is probably not a substantive change to add "ordinarily" to the rule governing leading questions of hostile witnesses, because "ordinarily" such questions are allowed. So the Magistrate Judges' solution appears to be one of style only. It would seem, though, that the connection of the clauses should be an "and" and not an "or." It's not either/or, it's two separate fact situations in which leading questions should be allowed.

That is why, it appears, Joe started the third sentence with "And." If "And" is taken out, there is no transition between the two separate fact situations governed by the second and third sentences respectively. It sounds better to start with "And" than with no connector at all.

5. Rule 611, Style Subcommittee determination

1. The Style Subcommittee decided to change the title to substitute "Examining" for "Questioning":

Mode and Order of ~~Questioning~~ ExaminingWitnesses and Presenting Evidence

2. Rule 611(a). The Style Subcommittee decided to change "questioning" to "examining":

The court should exercise reasonable control over the mode and order of ~~questioning~~ examining witnesses and presenting evidence so as to: * * *

3. Rule 611(b). The Style Subcommittee decided to change "a witness's credibility" to "the witness's credibility".

4. Rule 611(c). The Style Subcommittee decided to change the last two sentences to the following (blacklined from the restyled version) :

Ordinarily, the court should allow leading questions:

(1) on cross-examination~~.~~ ; ~~And~~ and

(2) ~~the court should allow leading questions~~ when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

5. In all other respects, the Style Subcommittee approved restyled Rule 611 as it was released for public comment.

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)** **Scope.** This rule gives an adverse party certain options when a witness uses 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 <u>the Writing</u>.** 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.

1. Rule 612 --- moving the reference to the Jencks Act

The Section of Litigation agrees with the ACTL proposal to move the reference to the Jencks Act to subdivision (a). This proposal was rejected by the Advisory Committee at the last meeting. The account from the minutes is as follows:

> The Committee saw no reason to move the reference to the Jencks Act. Professor Kimble noted that the location in the restyled rule made the rule flow more smoothly. And Committee members noted that there was no substantive reason to put the reference in subdivision (a), as that subdivision is descriptive only.

2. Rule 612(a)(2) --- "<u>adverse</u> party"

Before the last meeting, the Style Subcommittee approved the following change to Rule 612(a)(2):

> This rule gives an adverse party certain options when a witness uses a writing to refresh memory:
>
> (1) while testifying; or
>
> (2) before testifying, if the court decides that justice requires ~~a~~ <u>an adverse</u> party to have those options.

At the last meeting, the Advisory Committee considered this change, and the minute reflect its determination as follows:

> The Committee saw no reason to add "adverse" in (a)(2) as the rule is clear, and the term "adverse" is used throughout the rule and would essentially be repetitive here.

Professor Kimble suggests that if "adverse" is not used, the proper language would be "the party" rather than "a party." But this may not be accurate. In multiple party cases, the Rule gives rights to any adverse party. A reference to "the" party could be read to be underinclusive as applying only to one party.

Professor Kimble responds as follows:

> We need to connect (2) back to (a). (a) starts with the broadest possibility: *a* [= any] *adverse party*. So when you get to (2), who are you talking about? That same party. I believe that's why the Style Subcommittee wanted to add *adverse*. But if we don't, we should use *the* to make sure we are talking about <u>the</u> same adverse party.

3. Rule 612(b) --- deleting "in evidence"

James Duane proposes the following change, on the ground that the words deleted are superfluous:

> 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.

Professor Kimble agrees with this change.

Reporter's comment:

The reference to "in evidence" should be kept. It makes a difference. It provides for a more extensive use of the document than, for example, allowing the party to refer to the portion on cross-examination. The party actually gets to introduce it in evidence. It is not superfluous. If the language is cut, solely to save a few words, the cost is that litigators may well be making arguments that the adverse party is no longer entitled to introduce the portion into evidence.

4. Rule 612(b) --- dividing into two subdivisions

The Litigation Section agrees with ACTL that subdivision (b) should be broken down into two subdivisions: (b) dealing exclusively with "Adverse Party's Options" and a new subdivision (c) dealing with "Deleting Unrelated Matter."

This suggestion was not specifically discussed at the last Committee meeting. It's clearly style. Professor Kimble has already considered it in the last review.

5. Rule 612(c) --- deletion of "justice" in one place and not another.

The last sentence of existing Rule 612 refers to "justice" twice:

> 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 comparable language of the restyled rule refers to "justice" only once:

> 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.

ACTL and the Litigation Section argue for consistency. "Justice" should be included both as to the order and to mistrial, or taken out of both concepts.

Reporter's comment:

There doesn't seem to be a good reason to take "justice" out in one place and leave it in another. There is no substantive difference between a mistrial and any other order that would make justice more or less important. The prudent course is to stay as close to the original rule

unless there is a good reason for change. So there is a good argument that the word "justice" should be retained in both places --- meaning that the first sentence should be changed as follows:

> If a writing is not produced or is not delivered as ordered, the court may issue any ~~appropriate~~ order justice requires.

Professor Kimble's comment:

> In the other restylings we generally just said "any appropriate order" without intensifiers like "any order that justice requires" or "any order appropriate under the circumstances." But there's no comparable short form in the second sentence.

6. Rule 612(c) --- blacklined change to heading.

"Failure to Produce the Writing" was approved at the last meeting.

7. Rule 612, suggestion to change the Jencks Act reference to Criminal Rule 26.2

James Duane declares that the "archaic" reference to the Jencks Act should be replaced by a reference to Criminal Rule 26.2. He acknowledges, however, that this would be a substantive change, because "Criminal Rule 26.2 is not identical to provisions of §3500 (because, for example, only the former applies to defense witnesses)." The Committee may well wish to consider amending Rule 612 to substitute the Criminal Rule for the Jencks Act as an exception. But it does not appear to be possible in the context of restyling.

8. Rule 612, Style Subcommittee determination

1. Rule 612(a)(2). The Style Subcommittee decided to change "a party" to "the party".

2. In all other respects, the Style Subcommittee approved restyled Rule 612 as it was issued for public comment, together with the blacklined change to the heading or Rule 612(c) (Failure to Produce the Writing) that was approved by the Advisory Committee at the last meeting.

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~~ a 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 an opposing party's statement under Rule 801(d)(2).

1. Rule 613(a), blacklined change "the" party to "a" party

Approved by the Committee at the last meeting.

2. Rule 613(a) and (b), "questioning" rather than "examining"

The ABA Litigation Section prefers the original, "examining" over "questioning" because everyone refers to "cross-examining" not "cross-questioning."

Professor Kimble's response:

We use the word *questioning* rather than *examining* for consistency with 611(a) and 614(b) & (c), among others.

Reporter's comment:

One could argue that "examining" is better not only because it ties into "cross-examining" but because not everything that a lawyer addresses to a witness is a question. As to Rule 611, if consistency is necessary, the restyled rule should also be changed to "examining." The existing Rule 611 does not use the word "questioning" it uses "interrogation" (as does Rule 613(b)) --- which is broader than questioning and more like "examining."

The idea that "questioning" must be used for consistency does not come from the original rules. Rather it comes from Professor Kimble's use of the term. If the term is under-descriptive, then the Committee may wish to consider using "examining" in Rules 611 and 613. (Not Rule 611(c), however, because that rule is clearly limited to questions --- leading questions).

[See the discussion in Rule 611; the Style Committee did in fact agree to change "questioning" to "examination" where appropriate. For consistency, that change was made in Rules 611, 613 and 614 --- but not to Rule 611(c), which covers leading questions.]

3. Rule 613 Style Subcommittee determination

1. ***The Style Subcommittee decided to change "Questioning" to "Examination" in the heading to Rule 613(a):***

Showing or Disclosing the Statement During ~~Questioning~~ <u>Examination</u>.

2. The Style Subcommittee decided to change "questioning" to "examining" in Rule 613(a):

When ~~questioning~~ <u>examining</u> 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.

3. In all other respects, the Style Subcommittee approved the restyled Rule 613 as it was released for public comment, together with the change previously approved by the Advisory Committee --- from "the party" to "a party" in subdivision (a).

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~~ request. 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.

1. Rule 614(a) blackline --- replace "suggestion" with "request"

Approved at the last meeting.

2. Rule 614(c), suggestion to delete language regarding timing

James Duane suggests the following change, purportedly designed to rid the restyled rules of dangerously superfluous language:

> 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.

Reporter's comment:

This change, in the name of streamlining, makes the rule unnecessarily difficult to comprehend, and it may well be a substantive change. The reader will think that taking out the language about the possibility for a contemporaneous objection was done for a purpose, so that the new meaning is that the party can object *only* at the next opportunity when the jury is not present. This is a problematic change.

3. Rule 614, Questioning/Examining

The argument to change "questioning" to "examining" is discussed under Rules 611 and 613. If that change is made --- and the Style Subcommittee has agreed to it --- then parallel changes should be made in this rule.

4. Rule 614, Style Subcommittee determination

1. Rule 614(c): The Style Subcommittee decided to change "at the next opportunity when the jury is not present" to "at the next opportunity when the jury cannot hear the objection"

Reporter's comment:

> **That change may make the rule difficult to apply --- because when exactly does the opportunity occur in which a party can make an objection without the jury hearing it? Moreover, the change may result in a finding that the party waived its objection where that would not be the case under the current rule. Assume the court calls a witness. Couldn't the party, *at any point in the testimony or immediately thereafter*, call for a sidebar? Would the opportunity to call for a sidebar --- at any time --- be "the next opportunity when the jury cannot hear the objection"? The existing rule does not contemplate that waiver is found when the objecting party fails to create an opportunity to object by asking for a sidebar. It appears to mean that the objecting party is permitted to wait until the next time the jury is out of the courtroom.**

2. The Style Subcommittee --- to maintain consistency with the changes in Rules 611 and 613, decided to change "Questioning" to "Examining" in the title; to change "Questioning" to "Examining" in the header to Rule 614(b); to change "question" to "examine" in the text of Rule 614(b); and to change "questioning" to "examining" in Rule 614(c).

4. In all other respects, the Style Subcommittee approved the restyled Rule 614 as it was released for public comment, together with the change previously approved by the Advisory Committee --- replacing "suggestion" with "request" in subdivision (a).

In sum, the Style Committee approved the rule, blacklined from the restyled version, as follows:

Rule 614. Court's Calling or ~~Questioning~~ Examining a Witness

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

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

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

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.

1. Rule 615, suggested change to the first sentence

James Duane once again roots out some supposedly unnecessary words, this time in the opening sentence to Rule 615. He suggests the following deletion:

> At a party's request, the court must ~~order witnesses excluded~~ exclude witnesses so that they cannot hear other witnesses' testimony.

Reporter's comment:

Rule 615 requires courts to enter an *order* of sequestration. Duane's change takes out the requirement of entering an order. Excluding witnesses is not the same as an order. Thus this is a substantive change --- an example of how important the existing words of a rule are, and how cavalierly deleting them can change the meaning of a provision. See Mueller and Kirkpatrick, section 339 ("the parties on request are entitled to a court order excluding witnesses").

2. Rule 615(a) and (b), deleting "natural" before "person"

Duane says that the word "natural" before "person" is superfluous. But it is not. It is common to distinguish individuals from entities by referring to individuals as natural persons. That is, corporations are ordinarily considered persons within the meaning of statutes and rules, and so the term natural person is used to distinguish individuals from corporate persons. There is no reason to abandon this common usage. See *Cook County Illinois v. United States ex. rel.*

Chandler, 538 U.S. 119 (2003) (when "person" is used in a statute it includes a corporation unless there is some affirmative indication to the contrary).

3. Subdivision (b), deleting "by its attorney"

James Duane would make the following change to subdivision (b):

. . . after being designated ~~as the party's~~ by the party as its representative ~~by its attorney~~.

Reporter's comment:

Duane argues that the designation will always be made by an attorney. But in fact this is a substantive change. The rule requires the designation to be made by the corporation's *attorney* and not, for example, by a corporate officer. There was a question on the multistate last year that tested this very point. (It was based on a case the judge had where the designation was in an affidavit signed by a corporate official and not made by the attorney). Whether it is a good rule or not, taking out the reference to the attorney is substantive.

4. Subdivision (c), deletion of "a party shows to be"

James Duane would make the following change to subdivision (c): "a person whose presence ~~a party shows to be~~ is essential to presenting the party's claim or defense."

Professor Kimble agrees with this change.

5. Rule 615, Style Subcommittee determination

1. 615(c). The Style Subcommittee decided to change "whose presence a party shows to be essential" to "whose presence is essential".

2. In all other respects, the Style Subcommittee approved the restyled Rule 615 as it was released for public comment.

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<tr><th>ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses</th><th>ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701 — Opinion Testimony by Lay Witnesses</th></tr>
<tr><td>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.</td><td>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.</td></tr>
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1. Rule 701, deletion of "inference"

The ABA Litigation Section thinks that deletion of the word "inference" --- in Rules 701, 703, 704, etc. --- could be a substantive change. The Section defines an opinion as "a belief or conclusion that is not necessarily based on substantiated proof or evidence" whereas an inference "is a result of reasoning from factual knowledge or evidence."

The Committee extensively considered and discussed the proposed deletion of "inference" from Article 7. Professor Broun did research on the subject and found no case in which an evidentiary ruling was based on any supposed difference between an opinion and an inference. And that is not surprising, because an inference is simply a type of opinion. It's not a fact.

The Advisory Committee's consideration on deleting the word inference is set forth in the minutes of the meeting in Fall 2008:

> 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.

Here is a summary of Ken Broun's research on the subject:

> Both my research assistant and I took a look at the "inference" and "opinion" language of 701 and 703. Every case and writer I could find used the terms synonymously. Example: *Teen-Ed, Inc. v. Kimball Intern. Inc.*, 620 F.2d 399 (3d Cir. 1980) ("The personal knowledge of appellant's balance sheets . . . was clearly sufficient . . . to qualify him as a witness eligible under Rule 701 to testify to his opinion of how lost profits could be calculated and to inferences that he could draw from his perception of Teen-Ed's books.") Blacks Legal Dictionary defines an inference as "A conclusion reached by considering other facts and deducing a logical consequence from them." Black's defines opinion as "A person's thought, belief, or inference, especially a witness's view about facts in dispute, as to opposed to personal knowledge of the the facts themselves." I ordinarily don't cite Blacks, but I couldn't find anything else. I think we did a pretty thorough search of the logical places where a court would have distinguished between the two things and really found nothing. The courts almost always say "opinions or inferences" in referring to the language of Rules 701 or 703. I think we can safely eliminate the terms from both Rules (as well as 704). * * * Another case is *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1206, n. 22 (3d Cir. 1995) "Lasere's bases for his opinion were . . . the reasonable inference that this design had a tendency to cause punctures of the tanks in roll-over accidents." The court in both these cases [*Teen-Ed* and *Asplundh*] uses inferences as the basis for opinion. But how could there be testimony about an inference without an opinon? When could it make a difference in terms of the application of Rules 701, 703 or 704? I admit that we are all used to seeing the two-word phrase and probably agree that opinions are based on inferences. But so what?

Reporter's comment:

Given the Committee's previous consideration and the substantial research already conducted on the subject, it may be unnecessary to revisit the question.

It should be noted that if inferences are put back in the rule, it would have to be in more places than under the existing rules, in order to have consistency. For example, the last sentence of Rule 703 uses "opinion" without "inference." And so forth. A detailed analysis would have to be done in every place where "opinion" is used, to make sure that "inference" is also *properly* used in light of some perceived difference between opinions and inferences.

It should also be noted that any risk of a substantive change is diminished by the Committee Note to Rules 701, 703 and 704. That Note provides as follows:

> 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.

2. Rule 701, Style Subcommittee determination

The Style Subcommittee approved restyled Rule 701 as it was released for public comment.

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.

1. Rule 702 --- deletion of "Witnesses" from the title

James Duane states that "Witnesses" is duplicative of "Testimony by Experts" and so should be deleted from the title.

Professor Kimble disagrees. He would keep "witness" in the title "for parallelism with the title to Rule 701. That should be more than enough to justify its retention.

2. Rule 702, Style Subcommittee determination

The Style Subcommittee approved the restyled Rule 702 as it was released for public comment.

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 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 — Not Automatically Objectionable.** 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.

1. Rule 704(b) --- deleting "witness"

James Duane would delete "witness" so that the rule would look like this:

> 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.

Professor Kimble agrees with this change.

Reporter's comment:

The word "witness" is probably needed here to avoid confusion. The rule is not trying to say that experts can *never* opine about a defendant's mental state in *any* aspect of a criminal case. What about a deposition? What about a submission to the court on a legal matter? The rule starts with "in a criminal case" and if the word "witness" is deleted it could be considered a prohibition on "stating an opinion" on the defendant's mental state in *any aspect of the criminal case.* That can't be. Thus, keeping "witness" at worst does not harm and at best clarifies the scope of the rule and avoids a substantive change.

2. Rule 704, Style Subcommittee determination

The Style Subcommittee approved the restyled Rule 704(b) as it was released for public comment.

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 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 or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and **(2)** in any other civil case, 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 to the jury.** 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.

1. Rule 706(a), deleting "witness"

Duane wants to take out "witness" after "expert" in the first and second sentence of the Rule. So those sentences would look like this:

> On a party's motion or on its own, the court may order the parties to show cause why experts ~~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.

Reporter's comment:

It is a big --- indeed embarrassing --- mistake to take "witness" completely out of the first two sentences of Rule 706. It is important to clarify that the rule is *not* about appointment of experts. It is about appointment of expert *witnesses.* A court can appoint an expert to act as a technical advisor, and in doing so is not bound by the requirements of this rule. *See, e.g., Reilly v. United States,* 863 F.2d 149 (1st Cir. 1988) (Rule 706 was not intended to regulate the judge's power to appoint a technical advisor). Deleting "witness" would be a substantive change because it would imply that the rule's requirements have been extended to the appointment of all experts including those who will not testify.

It is not especially objectionable to take the word "witness" out of the second sentence, because the first sentence, if it is unchanged, makes it clear that the rule is about court-appointed expert witnesses. But is it a really big advance to take out the word "witness"? It seems to be little improvement. We saved a word.

2. Rule 706(c) --- "expert is entitled"

James Duane thinks it's awkward to say that an expert is "entitled" to whatever reasonable compensation the court allows. He would change it to "the expert shall receive" --- but "shall" is a no-no, so Professor Kimble offers another choice:

> *The court must set [the amount of?] a reasonable compensation for the expert.*

Reporter's comment:

Changing it to "the court must set" sounds too obligatory. It's much more in keeping with the tenor of the rule to use the language in the rule as issued for public comment: "the court

allows." The use of the word "entitled" is not offensive. The expert is in fact entitled to the compensation that the court sets.

3. Rule 706(d) --- blackline change to heading

Disclosure of Compensation to the Jury.

Approved by the Committee at the last meeting.

4. Rule 706(d) --- "The court may authorize disclosure"

James Duane says that "the court may authorize disclosure" should be changed to "the court may disclose . . ." He argues that every judge, when given a choice between telling the jury and letting the lawyers do it, will always choose to do it himself or herself.

Reporter's comment:

The issue rises so infrequently that it is hard to say, as Duane so confidently does, that it will always be the court who notifies the jury of the court's appointment. For one thing, the ABA guidelines suggest that the jury *not be told at all* about the court's appointment. For another, the court might think that if the jury is going to know about the appointment, it would be less outcome-determinative if that information was imparted by someone other than the court --- perhaps it would be better for it to come out on cross-examination of the witness.

At any rate, changing it to "the court may disclose" could be read to mean "*only* the court may disclose" and that would be incorrect. On balance, the point is probably a trivial one, but there is no strong case for changing the restyled version.

5. Rule 706, Style Subcommittee determination

1. Rule 706(a): The Style Subcommittee agreed to delete the word "witness" from the second sentence but to retain "witness" in the first sentence. In other words, the Subcommittee agreed to the following second sentence: "The court may appoint any expert that the parties agreed on and any of its own choosing."

2. Rule 706(c): The Style Subcommittee decided to change "The expert is entitled to whatever reasonable compensation the court allows" to "The expert is entitled to a reasonable compensation, as set by the court."

3. In all other respects, the Style Subcommittee approved restyled Rule 706 as it was released for public comment, with the addition of the change to the heading of Rule 706(d) approved by the Advisory Committee at the last meeting: **Disclosure of Compensation <u>to the Jury.</u>**

ARTICLE VIII. HEARSAY Rule 801. Definitions	ARTICLE VIII. HEARSAY Rule 801 — Definitions That Apply to This Article; Exclusions from Hearsay
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 the declarant does not make 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 Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about the prior 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 a recent improper influence or motive in so testifying; or **(C)** identifies a person as someone the declarant perceived earlier.

Rule 801(d)

(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 appeared to adopt or accept 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 and in furtherance of the conspiracy. 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).

1. Rule 801(a) --- Intent requirement for assertions.

The minutes of the last meeting reflect the problem posed by the restyled version of Rule 801(a):

> The current Rule 801 defines hearsay as a "statement * * * offered in evidence to prove the truth of the matter asserted." Thus evidence must be a "statement" to be excluded as hearsay. Current Rule 801(a) defines a "statement" as follows:
>
> > (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
>
> The existing rule is vague on whether an oral or written assertion can be hearsay if it is not intended to be so. The rule requires a showing of intent to assert for nonverbal conduct. But the placement of the word "it" could be read to refer either to nonverbal conduct only, or to both verbal and nonverbal conduct.

This vagueness in drafting is clarified by the restyled version of Rule 801(a), which defines "statement" as follows:

> **(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.

The restyled version is structured to make it clear that an oral assertion is a statement even if it is not intended as such. ***But the problem with the restructuring is that many courts—in part perhaps because of the vagueness of the current rule — have held that an oral or written assertion cannot be hearsay unless the speaker intends to make the assertion that the proponent is offering into evidence.***

The Committee therefore considered whether the restyled Rule 801(a) would make a substantive change in the hearsay rule. One member argued that the restructuring would not change any result in the cases because the intent requirement can be found in Rule 801(c), which defines hearsay as statements offered for the truth of the "matter asserted." Under this argument, "asserted" must mean intentionally asserted. But some of the literature and case law puts the intent requirement in the definition of "statement" under Rule 801(a).

Some Committee members suggested that the best way to avoid any substantive change in this difficult area is to return, as closely as possible, to the original rule. That would mean that the rule would remain vague, but it would keep the existing case law intact. The Reporter noted that a "restyled" version that hews closest to the original would provide as follows:

> "Statement" means an oral or written assertion or nonverbal conduct of a person if it is intended by the person as an assertion.

Professor Kimble and the Reporter agreed to work on a possible change to the restyled version of Rule 801(a), for the Committee to consider before the next meeting.

* * *

Professor Kimble offers this response to the Committee's discussion at the last meeting:

The Advisory Committee grappled with whether the intent requirement applies to (a)(1). The structure of the current rule suggests no: the number (2) keeps the *if*-clause with the second item only. I have difficulty with the whole idea of calling something an "assertion" and then saying "if it was intended as an assertion." If it

wasn't intended as an assertion, then how can you call it an assertion in the first place? Goes in circles. At any rate, I think we wound up with something like this:

> Alternative #1: "Statement" means a person's oral or written assertion — or nonverbal conduct — if the person intended it as an assertion.
>
> Alternative #2: "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

But, again, is this the right reading? No one commented that the restyled rule is inaccurate on this point.

Reporter's Comment:

It is extremely important to keep the intent requirement as vague as it is in the current rule. *Most* courts in fact apply the intent requirement to verbal communications, so if you *do not* apply the intent requirement (as Joe suggests would be the case under the structure of the current rule) then you have changed the law in most courts. But *some* courts do not regulate implied assertions under an intent test --- so if you apply the intent requirement to all such statements, you have changed the law in those courts.

Joe states that we received no public comment on the restyled version, so it probably made no substantive change. To that there are two responses --- there frankly was not much public comment at all, and a number of substantive changes discussed in this memo (e.g. Rule 609(a) were not uncovered by the public). Second, there was in fact comment on Rule 801(a), from law professors to me by email. An example is from Professor Craig Callen:

> Dear Dan,
>
> I am just starting to look at the interesting restyling project. I started, naturally enough, on rules that I think are tricky. I noticed something that I thought I should mention, even though I suspect you have already seen it. I understand that the restyling is not to make any changes in the effect of the rules. I noticed something in Rule 801.
>
> You might have already considered this, but David Seidelson (and I think others) argued that the text "if it is intended by the person as an assertion" refers not just to nonverbal conduct but to "an oral or written assertion" so that an oral or written assertion conveys anything that the declarant meant to assert in making it, rather than being confined to propositions it directly asserts.

The fact that it is a hearsay nuance, that many people don't understand, doesn't mean it can be changed in a restyling project. Joe says that a major goal of a restyling project is clarity. That is certainly so, but if clear language changes the law, it is substantive.

Anyway, either of the alternatives proposed by Joe is fine in the sense that neither makes a substantive change.

2. Rule 801(a), adding "person"

Restyled Rule 801(a) adds "person" to the clause covering oral and written assertions. So it is changed from "an oral or written assertion" to "a person's" assertion. (The existing rule already refers to a "person" but in the clause on nonverbal conduct.) NACDL argues that adding "person" could be a substantive change because then the definition might not apply to corporations and other entities.

Reporter's comment:

If the restyled version said "natural person" then there would be a substantive concern. As discussed in the comment on Rule 615, supra, the convention is that "person" includes entities unless there is a clear indication otherwise. That is why, by the way, the word "natural" must be kept before "person" in Rule 615, as the subdivision in that rule is intended to apply only to individuals.

3. Rule 801(b), "the person"

Professor Friedman would change subdivision (b) as follows:

"Declarant" means ~~the~~ a person who made the statement.

Professor Friedman argues that there may be more than one declarant for a given statement.

Professor Kimble's response:

> "Professor Friedman would change "the person" to "a person." But it's odd to then talk about "the statement." He says there may be more than one declarant of a given statement. Would a court have any trouble in those circumstances? That is, will the court have any trouble reading the restyled rule as saying the person or persons? I don't think so.

Reporter's comment:

It's hard to see how a single statement can be made by more than one person in such a way as to be difficult to fit within the restyled definition. Even a joint statement is a statement made by each individual. In such a case it would be a separate statement by each person. And it is somewhat odd to say that declarant means "a person who made the statement."

4. Rule 801(c) --- "prior" statement

The restyled rule provides that hearsay is "a prior statement --- one the declarant does not make while testifying at the current trial or hearing --- that a party offers in evidence to prove * * *" The existing rule does not use the word "prior" – it defines hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing * * *"

Professor Friedman says that the use of "prior" constitutes a substantive change because the definition would no longer cover a situation where the witness testifies, and then leaves the witness stand and *then* makes a statement that is subsequently offered at trial. As he puts it, "prior statement" is not the same as "one the declarant does not make while testifying at the current trial or hearing."

The Magistrate Judges also oppose the use of "prior" but for a different, indeed contradictory reason. The Magistrate Judges argue that the hearsay statement would by definition have to be prior to the declarant's testimony, and so "prior" is redundant.

Professor Kimble's response:

> First, note that the heading to current 801(d)(1) uses the term *prior statement.* We were trying to clarify the rule by giving some sense of a time sequence. Second, in Professor Friedman's example of the witness who testifies and makes a statement, the statement would still be "prior" if then offered to prove the truth of what it asserts.

Reporter's Comment:

If the Magistrate Judges are right --- that "prior" is redundant --- then it should probably be retained as an emphasis, and a description of sequencing, in a very complex rule. But Professor Friedman's concern has merit. His fact situation is an extremely narrow one --- e.g., the witness takes the stand and says "the light was red" and that night, says to his friend "the light was green." That latter statement, if then offered at the trial, should be hearsay. But the restyled rule could nonetheless be thought not to cover it because it is not prior to the declarant's testimony. That is a substantive change, because there is no "prior" in the current definition. And if caution is required anywhere, it should be in the definition of hearsay.

Joe's first response (about the use of "prior" in Rule 801(d)(1)) is not persuasive. The reason that Rule 801d1 refers to "prior" statements is that they *must actually be* made prior to the witness testifying in the case. The witness must be subject to cross-examination about the statement in order for the statement to be admissible. Rule 801d1 is not trying to define hearsay. It's trying to define an exception to the hearsay rule.

Joe's second response is not persuasive. In the example presented — the witness gets off the stand and an hour later makes a statement — it would *not* be "prior" when later offered, unless *prior* means prior to the time it is offered, which would make the word *completely* unnecessary --- as opposed to emphatically redundant --- and pretty confusing. You would only be saying that the statement would have to be made before it could be offered, which is silly.

So, "prior" should probably be deleted.

Professor Kimble's response:

We use *prior statement* in a redundant way in other rules — *prior inconsistent statement*. See the discussion under 408(a).

Obviously, the statement has to be prior in time. So, yes, that's exactly what we mean here too. And that seems to take care of Professor Friedman's hypo. Also, in 801(d)(1), we use *the prior statement* — a verbatim link back to these words in (c). Finally, if we must drop *prior*, then the rule will not read right because *prior* sets up the contrast with what's inside the dashes. We'd have to change to something like this:

Hearsay means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

Reporter's comment:

Joe's fix looks good.

5. Rule 801(c) --- deleting "in evidence"

James Duane would make the following deletion:

"Hearsay" means a prior statement * * * that a party offers ~~in evidence~~ to prove the truth of the matter asserted * * *

Professor Kimble agrees with this change.

Reporter's comment:

Once again, what appears to be a simple change from James Duane creates substantive problems. What if a lawyer offers a hearsay statement in argument, or sidebar to the judge? This

is not offered *in evidence*, and therefore it is not hearsay. Under Duane's proposal, it would be hearsay and presumably could not be considered unless it fit a hearsay exception.

It seems rash to tinker with the hearsay rule by cutting words on the ground that they have no meaning when in fact they do. This kind of cut should definitely not be done at this late stage --- as there is too high a risk of unintended consequences and too little benefit.

6. Rule 801(c) --- "truth of the matter asserted *by the declarant.*"

The Magistrate Judges, and Professor Friedman, vigorously oppose the addition of the words "by the declarant." As the Magistrate Judges put it, "Hearsay is not a statement offered to bolster the truth of *any statement* made by the declarant; it is a statement offered to prove the truth of the matter asserted *in that very statement.*"

The Magistrate Judges propose that "by the declarant" should be deleted. Professor Friedman suggests a different solution: change *declarant* to *statement*. So the rule would read that hearsay means a statement "that a party offers in evidence to prove the truth of the matter asserted *in the statement.*"

In an email exchange with the Reporter, Professor John Scott of Cooley Law School agrees that "in the statement" is a good solution and provides a useful clarification from the existing rule, which simply states "truth of the matter asserted" without indicating where that assertion is made.

Reporter's comment:

The term "by the declarant" could result in having to consider a large body of statements that are made by a single declarant. What the hearsay rule focuses on is whether a *particular statement* is offered for the truth of the matter asserted. So deleting "by the declarant" avoids what could have been a substantive change. Moreover, adding "in the statement" is helpful to understanding the rule. It provides a useful point of reference, especially for novices. Experience shows that "truth of the matter asserted" is pretty bare and abrupt to the novice.

7. Rule 801(c) --- "truth of the ~~matter asserted~~ declarant's statement.

Professor Schaffzin (09-EV-017), while acknowledging that *the truth of the matter asserted* is perhaps the most sacred of phrases, proposes a change to *the truth of the declarant's statement*. She says this does not change the meaning and, because it refers to the *statement* mentioned earlier, the change will bring clarity to readers.

Professor Kimble's response:

First, her suggestion at least confirms our sense that *the truth of the matter asserted*, by itself, is incomplete; it needs to be rounded out. Second, note that in 801(a), *statement* is already defined as an "assertion." So "assertion" is already inherent in the idea of statement. When we say *truth of the statement* (as she proposes), we are already saying *truth of the assertion* or *truth of the matter asserted.* But it's obviously a substantive call.

Reporter's comment:

You can't get much more sacred than "truth of the matter asserted." That phrase is one of the *examples* of sacred phrases selected by the Committee at the start of the restyling project. It's one of the examples used in the Committee Note on the restyled rules. Moroever, this suggestion at clarification is already addressed by the fix in point 6, above --- i.e., "truth of the matter asserted *in the statement*" --- without having to alter the sacred phrase. That is, adding on to a sacred phrase is vastly preferable to changing it.

8. Rule 801(d)(2) --- revising the heading to cover statements attributed to the party

The restyled heading to Rule 801(d)(2) is "An Opposing Party's Statement."

Professor Friedman argues that the heading is underinclusive because the rule also covers statements not actually made by the opposing party --- specifically statements of agents and coconspirators.

Professor Friedman's point seems well-taken. The heading should be more descriptive of all the statements covered by the Rule.

Professor Kimble proposes the following fix:

An Opposing Party's Statement — or One Attributable to the Party.

Professor Friedman proposes the following fix:

A Statement by or Attributed to an Opposing Party.

Both appear accurate. The choice between them is one of style.

9. Rule 801(d)(2) --- use of "opposing"

The beginning of the Rule provides: "The statement is offered against an opposing party and * * *" "Opposing" is not in the existing rule.

Professor Friedman says that "opposing" is not needed because "it suffices to say that the statement is offered against the party."

Professor Kimble's response:

> Professor Friedman says that *opposing* is unnecessary in the text, but if we use it in the heading, we should use it in the text. And we used it in the heading to try to create a parallel with the heading to 801(d)(1).

Reporter's comment:

Besides Joe's style point, there is also a substantive reason for leaving "opposing" in the restyled rule. The only statements that a party can offer under the exception are those that are made by an *opposing* party. So, for example, an accused cannot offer a statement made by another accused, because they are not opponents. *See, e.g., United States v. Harwood,* 998 F.2d 91 (2d Cir. 1993) (as the rule is captioned, the statement must be made by a party-opponent, and a co-defendant is not a party-opponent). So "opposing" should be included in the text. Courts have cited the heading of the current rule to reach this result. Of course, it's much better to include it in the text.

10. Rule 801(d)(2)(B) --- "manifested"

The background on the adoptive admissions section, and the use of the word "manifested" as in the original, is reflected in the minutes from the last meeting:

> The hearsay exemption for adoptive admissions currently covers "a statement of which the party has manifested an adoption or belief in its truth."
>
> The restyled version released for public comment covers a statement "that the party appeared to adopt or accept as true."
>
> The Committee discussed whether the change from "manifested an adoption or belief" to "appeared to adopt or accept" was a substantive change. On its face the restyled language would appear to allow courts to find an adoptive admission more easily. The language "appeared to adopt" seems more diffident or passive than "manifested an adoption." Members noted, however, that the case law under the existing Rule does *not* require active conduct for an adoption — cases abound where parties are found to adopt by silence.

The restyled language seems less active and therefore more in accord with existing case law. But there is a legitimate concern that the less aggressive language may be interpreted as a signal for a substantive change that would liberalize *even further* the already minimal showing necessary for adoption.

Committee members determined that, in light of the problematic interface of rule language and case law, the restyled version should hew as closely to the existing rule as possible. Some members contended that under the circumstances, "manifested" was a sacred word that could not be restyled. The Committee voted to return to the word "manifested" in Rule 801(d)(2)(B) — subject of course, to receiving public comment on the question. (Comment on Rule 801(d)(2)(B) was specifically invited in the cover letter to the public). Professor Kimble agreed to revise the restyled version to include the word "manifested" and to submit it for the Committee's review before the next meeting.

Professor Kimble's response to the Committee's determination at the last meeting is as follows:

The problem with *manifest* goes beyond the word itself. The deeper problem is that it creates a clumsy construction, together with a difficult abstraction — manifested an adoption. Awful. Here are alternatives in descending order of my preference:

Alternative #1: is one that the party showed [that?] it adopted or believed to be true;

Alternative #2: is one that the party in a manifest way adopted or accepted as true;

Alternative #3: is one the party manifested that it adopted or believed to be true;

Alternative #4: is one that the party manifested an adoption of or a belief in its truth;

Reporter's comment:

The bottom line is that "manifest" is the word that captures the original meaning, and the Committee voted to include it as a substantive requirement. Therefore, option 1 does not work. So the options are 2-4. Option 2 is problematic, however, because it changes "manifest" from a verb to an adjective. Why do that? Alternative 3 accords with the Committee's position and Alternative 4 is basically the original rule. The choice between those two would appear to be one of style.

11. Rule 801(d)(2)(E)— changing "coconspirator" to "conspirator."

James Duane spends two single-spaced pages decrying the use of the word "coconspirator" --- because the "co" is inherent in the "conspirator."

Professor Kimble's response:

> I checked with Bryan Garner, and he will continue to recommend *coconspirator* (no hyphen) in the forthcoming third edition of his *Dictionary of Modern Legal Usage.*

Reporter's comment:

Passing the initial shock that the two stylist poobahs Garner and Duane could be at odds over the word "coconspirator," the proper result is to go with Garner. Not only because he wrote the book, but also because the "co" is a useful emphasis --- the declarant can't just be someone involved in a conspiracy. It has to be a person involved in the *defendant's* conspiracy.

12. Rule 801 Style Subcommittee determination

1. Rule 801(c): The Style Subcommittee approved the following change:

"Hearsay means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement."

Blacklined from the restyled rule as issued for public comment, the Style Subcommittee's approved version looks like this:

"Hearsay" means a ~~prior~~ statement — ~~one~~ that:

(1) the declarant does not make while testifying at the current trial or hearing; — and

(2) ~~that~~ a party offers in evidence to prove the truth of the matter asserted ~~by the declarant~~ in the statement.

2. Rule 801(d)(2) Title: The Style Subcommittee approved the following title:

"An Opposing Party's Statement -- or One Attributable to the Party".

3. Rule 801(d)(2)(B): The Subcommittee decided to adopt Professor Kimble's "Alternative #3." In other words, the Subcommittee agreed to the following language:

"(B) is one the party manifested that it adopted or believed to be true."

4. Rule 801(d)(2)(E)

The Style Subcommittee decided to delete the hyphen from "co-conspirator". It will be "coconspirator" instead of "co-conspirator".

5. In all other respects, the Style Subcommittee approved the restyled Rule 801 as it was released for public comment.

Rule 802. Hearsay Rule	Rule 802 — The Rule Against 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.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial	**Rule 803 — Exceptions to the Rule Against Hearsay — 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: **(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.	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 or immediately after the declarant perceived 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 relating to a startling event or condition, made while the declarant was under the stress ~~or~~ <u>of</u> 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; their inception; or their general 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 activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity; ~~and~~

(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) ~~But this exception does not apply if~~ neither the source of information ~~or~~ nor the method or circumstances of preparation indicate a lack of trustworthiness.

(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 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 admitted to prove that the matter did not occur or exist; ~~and~~ **(B)** a record was regularly kept for a matter of that kind~~.~~ ; and (C) ~~But this exception does not apply if~~ neither the possible source of the information ~~or~~ nor 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 setting out: **(A)** the office's activities; **(B)** a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or **(C)** in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation. But this exception does not apply if 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 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.*** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record if the testimony or certification is admitted to prove that: **(A)** the record does not exist; or **(B)** a matter did not occur or exist, even though a public office 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 admitted 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 the matter stated was relevant to the document's purpose — unless 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 that are 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 if: **(A)** the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and **(B)** the publication is 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 Concerning 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 — concerning 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 Concerning Boundaries or General History.*** A reputation in a community — arising before the controversy — concerning boundaries of land in the community or customs that affect the land, or concerning 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 Concerning Character.*** A reputation among a person's associates or in the community concerning the person's character.

(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 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 admitted to prove any fact essential to the judgment; and **(D)** when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant. The pendency of an appeal may be shown but does not affect admissibility.
(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.	**(23)** ***Judgments Involving Personal, Family, or General History or a Boundary.*** A judgment that is admitted 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]	**(24)** **[Other exceptions.]** [Transferred to Rule 807]

1. Rule 803(2) — "the stress ~~or~~ of excitement"

Blacklined change, agreed to by the Committee at the last meeting.

Style Subcommittee determination:

The Style Subcommittee approved the change to Rule 803(2) previously approved by the Advisory Committee.

2. Rule 803(6)(D) --- correct the reference to Rule 902

This restyled subdivision---setting forth the procedural requirements for business records --- provides:

> 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.

The Magistrate Judges note that the reference to Rule 902 is inaccurate. At one time in the restyling process, Rule 902 had subdivisions (a) and (b). But that is no longer the case. So the "(b)" should be struck from the text of Rule 803(6)(D).

Style Subcommittee Determination:

The Style Subcommittee decided to delete "(b)" from the cross-reference. In other words, the Subcommittee agreed to change "902(b)(11) or (12)" to "902(11) or (12)".

3. Rule 803(6)(E) --- trustworthiness clause

At the last meeting, the Committee agreed to change the hanging paragraph in the restyled rule to a numbered subdivision. That is blacklined in the Rule as set forth above.

Style Subcommittee Determination:

The Style Subcommittee approved the change to the trustworthiness clause that was previously approved by the Advisory Committee.

4. Rule 803(7) --- trustworthiness clause

At the last meeting, the Committee agreed to change the hanging paragraph in the restyled rule to a numbered subdivision. That is blacklined in the Rule as set forth above.

5. Rule 803(8) --- deleting "statement"

The current Rule 803(8), the public records exception, covers "Records, reports, statements, or data compilations, in any form." The restyled version just covers "A record." "Record" is then defined in Rule 101 to "include[] a memorandum, report, or data compilation."

NACDL, in what is clearly a careful reading of the restyled rules, notes that the result is that "statements" got dropped from the coverage of the Rule.

Professor Kimble's response:

> NACDL notes that this rule, 803(10), and 901(b)(7) currently include *statement* in the string of items, but the term is omitted from the definition in 101(b)(4). But these strings vary quite a bit in the rules. Why does current 803(6) include *memorandum* and 803(7) *memoranda*, but neither includes *statement*? Why no *memorandum* in 803(8)? Why *memorandum or record* alone in 803(5)? And so on. We tried to pick three words that seemed to cover the possibilities. In the three rules NACDL cites, which are about public documents, wouldn't a court treat a public statement as falling under a public report? Presumably, we aren't talking about a public statement to the press. Even if *statement* is a discrete category, the definition in 101(b) uses the word *includes,* so the items that follow are not necessarily exhaustive. Finally, if we do have a problem, then the only fix I see is to keep the cross-reference in the first part of 101(b)(4) and then add others: *and in Rules 803(8), 803(10), and 901(b)(7) it includes a statement.* Very complicated.

Reporter's comment:

A public "statement" *could* be admissible under Rule 803(8) even though it is not in a report or record. For example, a press conference by a government official, reporting factual findings, should be admissible if not untrustworthy, whether or not it is in a record. (That can't be so with business records, by the way. They must be written. There are circuit court cases saying that oral business records are not admissible under the Rule. See, e.g., *United States v. Wells,* 262 F.3d 455 (5th Cir. 2001). So it makes sense that "statement" is not included in 803(6).)

Moreover, a government office might issue a *written* statement about a particular matter, but it would be a stretch to call it a record or report --- for example, a police department's statement about a public disturbance, or a FEMA statement about flooding.

So there is a problem with deleting "statements" from the coverage of Rule 803(8). One possible explanation is that "statement" is implicitly covered by the definition of record, because that definition is not comprehensive, but uses the word "includes." That is not a very comfortable resolution, though, because it takes a path of inferences to get to that result.

So it is probably prudent to re-insert "statement" to avoid confusion. Joe says a fix is complicated --- it would muck up Rule 101(b)(4) --- but wouldn't it work to just put the word

"statement" as an alternative to "record" in the rules on public records? In other words, there is no need to mess with the definition --- just reinsert "statement" in a few rules.

6. Rule 803(8) --- trustworthiness clause

As with Rule 803(6) and 803(7), the Committee resolved at the last meeting to change the hanging paragraph on trustworthiness to make them subdivisions along with the other admissibility requirements. With respect to Rule 803(8) there was a complication --- discussed in the minutes of the last meeting:

> The exceptions for business records, absence of business records, and public records each contain a clause providing that the court may exclude a proffered record if the source of information or the method or circumstances of preparation indicate lack of trustworthiness. Under the restyled versions issued for public comment, each of those Rules located the trustworthiness clause in a hanging paragraph at the end of each Rule. * * * Restylists try to avoid hanging paragraphs.
>
> Professor Saltzburg proposed that the hanging paragraph [in Rule 803(6)] be reconfigured as a new subdivision (E), which would provide as follows:
>
> > ***(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.***
>
> Professor Kimble agreed with this suggestion, and it was approved by the Style Subcommittee. At the meeting, the Committee voted unanimously in favor of the new subdivision (E).
>
> Discussion then turned to whether the same solution could be employed in Rule 803(7) and (8). The Committee determined that the subdivision would work in subdivision (7) because the introductory clause of that Rule was the same as that of Rule 803(6).
>
> The fix would *not* work for revised Rule 803(8) as currently conceived, however, because the introductory language to that Rule does not introduce admissibility requirements. Rather, it simply describes the records that are admissible under the Rule. Thus, starting the trustworthiness clause with a "neither" would make no sense.
>
> Professor Kimble agreed to work on a solution by which the hanging paragraph in Rule 803(8) could be recast as a new subdivision. It that could not work, the hanging paragraph would be retained. The Committee resolved to review the matter at the next meeting.

Professor Kimble's fix for the hanging paragraph in Rule 803(8):

A record of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

Reporter's comment:

This looks like a good solution. Based on the discussion above about statement, the lead-in could be "A record *or statement* of a public office if:"

Style Subcommittee determination on Rule 803(8):

The Style Subcommittee approved Professor Kimble's reworking of the trustworthiness clause, set out immediately above, with the addition of the word "statement" at the beginning of the rule. So the Style Subcommittees approved version reads as follows:

A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

7. Rule 803(10)(B) --- "even though"

Restyled Rule 803(10), the exception for absence of public records, provides that testimony or a certification is not barred by the hearsay rule "if admitted to prove" that:

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

Judge Hinkle asked Professor Kimble and the Reporter to think about an alternative to the words "even though." In an email exchange, Judge Hinkle stated that "it doesn't mesh very well with the introductory language 'admitted to prove.' The proponent just wants to prove the matter did not occur or exist; the evidence isn't admitted to prove both that the matter didn't occur or exist and that a record is regularly kept for a matter of that kind."

Professor Kimble came up with three options to "even though":

1. the rearranged (B): "on a matter for which a public office regularly keeps a record, the matter did not occur or exist." Or, "a matter for which a public office regularly keeps a record did not occur or exist"

2. "if" instead of "even though"

3. "when" instead of "even though"

Judge Hinkle preferred these options in descending order. So does the Reporter.

Professor Kimble's response:

I have offered some alternatives to *even though*. I don't think *if* works well logically. And I don't like two nonparallel *if*s in the same sentence. I think I'd go with *a matter for which a public office regularly keeps a public record did not occur or exist*. It's not great (because of the gap between the subject, *matter*, and the verbs at the end), but I think it's tolerable.

8. Rule 803(10) --- dropping "statement"

As with Rule 803(8), the original language --- "record, report, statement, or data compilation" --- has been reduced to "record," and "record" is defined in Rule 101 as including "report" and "data compiliation." Thus, "statement" is left out.

With regard to the *absence* of a public record, the word "statement" would be necessary to cover a situation in which a party wants to prove that something was never said by a public official --- for example, during a public hearing a statement was *not* made. In such a case, the parties might not contest that there is a record --- the dispute is over what statements the record contains.

So it would appear that dropping the word "statement" provides more limited coverage than under the existing rule --- it looks like a substantive change.

It seems relatively easy to fix: add "or statement" after "record" in the rule where appropriate. Here is what it would look like:

> Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record <u>or statement</u> if the testimony or certification is admitted to prove that:
>
> (A) the record <u>or statement</u> does not exist; or
>
> (B) a matter did not occur or exist, [even though] a public office regularly kept a record <u>or statement</u> for a matter of that kind.

Note: "even though" in (B) is in brackets, because the Committee is being asked to consider a revision to that language, immediately above. Note that "record" is used in (B), but there appears to be no need to add "statement" there. It makes no sense to say that a public office regularly keeps a statement. The office would keep a record with statements in it.

Style Subcommittee determination on Rule 803(10)

The Style Subcommittee decided to replace "even though" with "if" in 803(10)(B). The Subcommittee also decided to insert the words "or statement" after the word "record" in three places in 803(10). In other words, 803(10) will read as follows:

> "**(10) Absence of a Public Record.** Testimony -- or a certification under Rule 902 -- that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:
>
> (A) the record or statement does not exist; or
>
> (B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind."

Style Subcommittee Comment on Rules 803(8) and (10).

The Subcommittee noted that its insertion of "and statement" in 803(8) and in three places in 803(10) was done in deference to Prof. Capra's hypothetical involving an oral statement by a public official.

9. Rule 803(18)(A) --- deletion of "witness"

James Duane wants to delete "witness" --- which would make Rule 803(18)(A) look like this:

> "the statement is called to the attention of an expert ~~witness~~ on cross-examination or relied on by the expert on direct examination."

Professor Kimble agrees.

Reporter's comment:

It's difficult to understand all the firepower against the word "witness." In this case, the word provides emphasis that the expert must be testifying in order for a learned treatise to be admitted. That's a critical aspect of the exception. You can't just have a learned treatise read to the jury; the expert has to be on the stand to help explain it.

In this instance, it's not a big problem to exclude the word "witness" because the context of the rule is about testimony. But is it really so offensive to keep the word in as a point of emphasis?

Style Subcommittee determination on Rule 803(18):

The Style Subcommittee approved restyled Rule 803(18) as it was released for public comment.

10. Rule 803(22) --- Deleting "previous" from the title

James Duane's crusade against superfluous verbiage continues with the title to Rule 803(22), which he would modify as follows:

Judgment of a ~~Previous~~ Conviction

Because it must be "previous" to be a conviction. Professor Kimble agrees.

Reporter's comment:

Use of "previous" helps the reader, especially a novice, to know that the rule is not talking about a conviction in the existing case. It thus sets the context of the rule for the reader. Purity sometimes makes it harder to use the rules. If the restyling is trying to be user-friendly, it sometimes pays to be emphatic. Emphatic and superfluous are not the same thing.

This is not to say that the change would be substantive. But it is to say that it takes out a word that makes the provision easier to understand. Why do that?

Professor Kimble's comment:

We don't talk about a "previous conviction" in 609.

11. Rule 803(22) --- Deleting "Evidence of" and "Final"

Rule 803(22) starts as follows:

Evidence of a final judgment of conviction if:

Professor Duane says that both *Evidence of* and *final* are redundancies. He notes that *Evidence of* does not appear in any of the other Rule 803 exceptions and that *final* judgment does not appear anywhere else in the Federal Rules of Evidence or Criminal Procedure. So under his view, the rule would start as follows:

"A conviction if:"

Professor Kimble's response:

I'm happy to drop both terms, but since they appear in the current rule, I think it's a substantive call.

Reporter's comment:

Taking out the word "final" is definitely substantive. Here is the entry from Mueller and Kirkpatrick.

As framed in FRE 803(22), the exception contains a finality requirement that seems to turn on the formal entry of judgment. This requirement suggests that the exception does not apply if defendant in the other case has pled or been found guilty if judgment has not been entered.

The "final" requirement has been construed as important in a number of circuit cases, cited in Mueller and Kirkpatrick. So that is enough about that.

"Evidence of" is substantive as well. It indicates that the judgment of conviction does not *itself* have to be admitted. That would ordinarily be the case in practice, but it doesn't have to be. Proof might be made by testimony of a witness with personal knowledge of the conviction. That process would be made questionable by deleting "evidence of."

Moreover, it is jarring to start a long rule with "A conviction if" --- it's difficult to get oriented.

12. Rule 803(22)(B) --- the ~~judgment~~ conviction was for committing a crime punishable by death or by imprisonment for more than a year;

This is another in the long line of style improvements suggested by James Duane. Professor Kimble agrees. Hard to see the improvement --- it's an extra word, after all --- but it doesn't appear to be substantive.

Professor Kimble's response:

As Duane points out, citing Garner, we don't talk about a "judgment for a crime."

13. Style Subcommittee determination on Rule 803(22)

The Style Subcommittee approved the restyled Rule 803(22) as it was released for public comment, with two exceptions.

1. It decided to delete the word "previous" in the title:

Judgment of a ~~Previous~~ Conviction

2. It decided to change "judgment" to "conviction" in Rule 803(22)(B):

(B) the ~~judgment~~ conviction was for a crime punishable by death or by imprisonment for more than a year;

Special Note by Style Subcommittee:

The Style Subcommittee noted an inconsistency between the language used in 803(22) and the language used in 803(23). In restyled 803(23), neither the words "evidence of" nor "final" are present. In restyled 803(22), these words are present. But the same inconsistency exists in the current rules 803(22) and 803(23).

Reporter's response:

There is a reasoned explanation for providing proof through "evidence of" a judgment of conviction and prohibiting it for judgments of personal or family history or boundaries. Oral testimony of a conviction would be straightforward, whereas describing the issue involved in a judgment on boundaries and personal matters might be very complicated, and it would be better to prove these matters through the judgment itself.

There is also a possible explanation for using the word "final" in (22) and not in (23). With respect to convictions, which are obviously more serious, the rule requires finality, which has been determined as entry of the judgment. Entry may be thought to assure that the judgment would not be upset by, for example, withdrawal of a guilty plea, or a trial court's ruling setting aside a verdict. Such concerns are not as serious, arguably, when it comes to civil determinations of boundaries, etc.

This is not to say that the original drafters definitely had these distinctions in mind. But it is to say that referring to "evidence of" a "final judgment" in Rule 803(22) is not without some basis.

Rule 804. Hearsay Exceptions; Declarant Unavailable	Rule 804 — Exceptions to the Rule Against Hearsay — 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, in the case of a hearsay exception under Rule 804(b)(1) or (5); or **(B)** the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4). But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability 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 lawful deposition, whether given during the current proceeding or a different one; and **(B)** is now offered against a party who had — or, in a civil case, whose predecessor in interest 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 likely to be 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's unavailability in order to prevent the declarant from attending or testifying. **[Other exceptions.]** [Transferred to Rule 807]

1. Rule 804 --- deleting "as a witness" from the title and from the beginning clauses of subdivisions (a) and (b)

James Duane's war on "witness" extends to Rule 804 – he argues that it is enough to say "unavailable" and redundant to say "unavailable as a witness."

Professor Kimble's response:

> I'm neutral on Professor Duane's suggestion to delete *as a witness* from the title and from the text of (a) and (b). On the one hand, the word *unavailable* seems somewhat incomplete without more. Unavailable for what? On the other hand, the rest of the rule does make clear that we're talking about being unavailable to testify. So perhaps we can drop those words.

Reporter's comment:

It would be a mistake to take "as a witness" out of Rule 804, for the simple reason that being "unavailable as a witness" can be quite different from being "unavailable." We need to know what the person is unavailable to do. "Unavailable as a witness" is a term of art. For example, a witness may actually be available physically, as when they declare a privilege or testify that they cannot remember. But they will still be unavailable *as a witness* if their condition falls within one of the criteria in the rule. See *United States v. Owens*, 484 U.S. 554 (1988) (noting that unavailability as a witness is a term of art and is not the same as physical unavailability: "Rule 804(a) has for convenience of reference in Rule 804(b) chosen to describe the circumstances necessary in order to admit certain categories of hearsay testimony under the rubric 'Unavailability as a witness.'"). It would make the rule confusing and inaccurate to take out "as a witness."

2. Rule 804(a)(1) --- "having a privilege"

Existing Rule 804(a)(1) provides that a declarant is unavailable as a witness if "exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement."

The restyled provision states that a declarant is unavailable as a witness if "exempted by a court ruling on the ground of *having a privilege* to not testify about the subject matter of the declarant's statement."

James Duane concludes that this is a substantive change, because under the restyled rule the declarant has to be the *holder* of the privilege (has to *have* the privilege) to be unavailable as a witness --- whereas under current law, the declarant is unavailable as a witness even when another person holds the privilege that would prevent the declarant from testifying.

Reporter's comment:

Duane is right, this is a substantive change. Duane cites the example of a husband in a jurisdiction where he can invoke the adverse testimonial privilege to keep the wife off the stand. Under current law, that would render the wife unavailable but on the restyled version she would not be unavailable because she does not have a privilege. Another example would be an attorney called to the stand to give privileged information. As the attorney is not the holder, she would not be unavailable under the restyled rule.

So the Rule must be changed. Here is a possibility, blacklined from the restyled version:

A declarant is unavailable as a witness if

> "exempted by a court ruling on the ground of ~~having~~ a privilege ~~to not testify~~ <u>from testifying</u> about the subject matter of the declarant's statement."

Another alternative is to use the phrase "privilege against testifying" rather than "privilege from testifying." The fact situation to be covered is where the holder of the privilege exercises it in order to keep another person from testifying. With respect to the witness, it may be more accurate to describe the situation as one in which there is a privilege against testifying --- because presumably the witness wishes to testify and is prevented from doing so by the holder.

NOTE: I didn't think of changing "from" to "against" until after the Style Subcommittee met, so they have not voted on "against" rather than "from." But one member of the Subcommittee sent an email in which he stated that he preferred the change to "against."

3. Rule 804(a) last sentence--- "attending or testifying"

Rule 804(a)(5) provides for unavailability of a witness on the ground of absence. The conditions, as set forth in the restyled rule, are that the declarant:

> 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, in the case of a hearsay exception under Rule 804(b)(1) or (5); or
>
> **(B)** the declarant's *attendance or testimony*, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

James Duane argues that "attendance" is duplicative of "testimony" in subdivision (5)(B) and so should be deleted.

Reporter's comment:

"Attendance" is not duplicative of "testimony." The rule distinguishes attendance from testimony because it is saying that unavailability for these grounds is not only about physical presence (attendance), but rather about the ability to obtain testimony from the declarant. Thus, courts have held that a witness is not "absent" for purposes of (a)(5) if they can be deposed. Physical presence is one form of production, but obtaining testimony is another. Taking attendance out makes the rule confusing because it removes the helpful emphasis of the *two* forms of possible availability.

3. Rule 804(b)(5)--- "attending or testifying"

Restyled Rule 804(b)(5) provides for forfeiture if a party causes the declarant's unavailability "in order to prevent the declarant from attending or testifying." James Duane argues, again, that "attending" is unnecessary and should be deleted.

Reporter's comment:

The original Rule 804(b)(6) --- the forfeiture provision --- uses only the word "unavailability." Joe changed "unavailability as a witness" to "attending or testifying." But the language "attending or testifying" is unnecessary and confusing in the context of Rule 804(b)(5). The only question is "unavailability as a witness" under the grounds set forth in Rule 804(a) --- most likely refusal to testify, death or absence or professed lack of memory. It is enough to simply refer to the conclusion established under Rule 804(a) --- that the declarant was found "unavailable as a witness." Using different terminology risks the severing, or at least muddying, of the connection between Rule 804(a)(5) and the forfeiture provision.

Indeed the use of "attending or testifying" --- when used in the disjunctive in Rule 804(b)(5) --- could result in a substantive change. A party could be found to have forfeited simply by preventing a declarant from *attending* the trial (e.g., by threatening him not to appear) when the declarant might still be able to testify (without attending).

Ken Broun raises another possibility in which "attending or testifying" would not be equivalent to "unavailability as a witness" and so could change existing law:

> Under the present language ("unavailability of the declarant as a witness"), I think the forfeiture clause would kick in if the threats to the declarant were such as to cause him to have a failure of memory under 804(a)(3). In that instance, he would be testifying but would, within the language of the rule, be unavailable as a witness. [Because, as the Supreme Court states in *Owens*, unavailability as a witness is a term of art.] The situation would be rare, but not inconceivable. Thus, "attending or testifying" does not cover all of the situations covered by the present rule and may result in a substantive change. "Unavailability as a witness" covers any reason for unavailability under 804(a).

Duane thinks that "attending" is superfluous. On reflection, "attending or testifying" is more likely substantive and at least confusing.

The language of the rule should be changed. Returning to the exact original is difficult, because it refers to "procur[ing] the unavailability of the declarant as a witness." But using the words "unavailability as a witness" is critical because that is the term of art that ties back to Rule 804(a)(5).

Here is one possibility:

A statement offered against the party that wrongfully caused — or acquiesced in wrongfully causing — the declarant's unavailability as a witness ~~in order to prevent the declarant from attending or testifying~~. with the intent to do so.

Note: As seen below, the Style Subcommittee tentatively approved the above change.

4. Rule 804(b)(5) --- reference to the old residual exception

At the Spring 2009 meeting the Committee discussed what to do about the restyling proposal that current Rule 804(b)(6) be moved into the hole vacated by one of the original residual exceptions (that were merged into Rule 807 in 1997). The Committee discussion is set forth in the minutes of that meeting:

> In 1997 the original Rule 804(b)(5) — providing a residual exception to the hearsay rule — was consolidated with the identically-worded Rule 803 and transferred to Rule 807. In the official publication of the Federal Rules of Evidence, the following designation of Rule 804(b)(5) is indicated:
>
> (5) [Other exceptions.] [Transferred to Rule 807.]
>
> As with Rule 803(24), Professor Kimble suggested that, as part of the restyling project, this designation should be deleted. The difference in the argument is that there is another hearsay exception coming after Rule 804(b)(5), thus creating a gap in enumeration that, in Professor Kimble's view, should be remedied.
>
> But many Committee members argued that the existence of the hearsay exception in Rule 804(b)(6) was all the more reason to keep Rule 804(b)(5) as a placeholder. Changing what is now Rule 804(b)(6) to Rule 804(b)(5) would be very disruptive to searches. A person searching under Rule 804(b)(5) for cases on forfeiture would also collect all the pre-1997 cases on residual hearsay.
>
> After substantial discussion, the Committee recognized that the retention of Rule 804(b)(5) as a placeholder presented a question of style and not substance. It voted 7 to 2 to recommend to the Style Subcommittee that the existing enumeration of Rule 804(b) be retained. The Style Subcommittee agreed to retain the existing enumeration. Therefore, there is no proposal to change the designation of Rule 804(b)(5) in the official version of the Federal Rules of Evidence.

* * *

But somehow a change was made and in the restyled version as released for public comment, the original Rule 804(b)(6) has now become Rule 804(b)(5). Then, as seen above in the side-by-side, the historical reference to the original Rule 804(b)(5) is set forth in brackets at the end of the text of the forfeiture provision. What does that mean? Where will that go? At the end of the text of what would now be Rule 804(b)(5)?

At the meeting the Committee may wish to discuss what to do with the historical reference --- and whether to recommend, again, that the forfeiture provision be retained as Rule 804(b)(6).

Professor Kimble's comment:

I don't remember that we left a gap in the numbers in any of the other restylings. We should take the long view--on this and other questions.

5. Rule 804, Style Subcommittee determination

The Style Subcommittee approved restyled Rule 804 as it was released for public comment with the following exceptions.

1. The Style Subcommittee agreed to amend Rule 804(a)(1) as follows (blacklined from the rule as issued for public comment:

"(1) is exempted by a court ruling on the ground of ~~having~~ a privilege ~~to not testify~~ from testifying about the subject matter of the declarant's statement;"

2. The Style Subcommittee decided to change "unavailability in order to prevent the declarant from attending or testifying" to "unavailability as a witness, with the intent to do so." The Subcommittee agreed to this language subject to Prof. Kimble later proposing improved language that addresses Prof. Capra's substantive points.

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 declarant's inconsistent statement or conduct, 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.

1. Rule 806 --- "admitted in evidence"

James Duane thinks "in evidence" is unnecessary after "admitted" so his version of the beginning of the Rule would look like this:

> 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.

Professor Kimble's response:

> I disagree with Professor Duane on dropping *in evidence*. The word *admitted* alone creates a little miscue. Is someone admitting to what's in the hearsay statement? I'd like us to keep in mind that we're trying to make the rules clear to law students reading them for the first time. Every proposed shortening should meet that test.

Reporter's comment:

The caution against cutting words, only to make the rules more difficult to understand, should be applied to *almost every one* of Duane's suggestions.

2. Rule 806, Style Subcommittee determination

The Style Subcommittee approved Rule 806 as it was released for public comment.

<table>
<tr><th>Rule 807. Residual Exception</th><th>Rule 807 — Residual Exception</th></tr>
<tr><td>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.</td><td>(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;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes 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.</td></tr>
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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.** To authenticate or identify an item of evidence 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 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 Telephone Conversation.*** For a telephone 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 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.	**(7)** ***Evidence About Public Records.*** Evidence that: **(A)** a record is from the public office where items of this kind are kept; or **(B)** a document was lawfully recorded or filed in a public office.
(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, 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.
(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.

1. Rule 901(b)(7) --- dropping "statement"

As with Rules 803(8) and 803(10), the original language --- "record, report, statement, or data compilation" --- has been reduced to "record," and "record" is defined in Rule 101 as including "report" and "data compiliation." Thus, "statement" is left out.

It could be argued that no fix is needed here, because Rule 901(b) simply provides illustrative examples of authentication --- so if "statement" is dropped, it may not be a substantive change because statements can be authenticated anyway on the same principles provided in Rule 901(b)(7). It could also be argued that there would be no situation in which a party would have to authenticate a statement that is not in some kind of record.

It seems safer, however, to avoid any argument on the subject by adding "or statement" after record. This is especially the proper course if "statement" is added to Rules 803(8) and (10). Adding "statement" to those two rules but not to Rule 901(b)(7) would probably raise arguments about coverage, and confusion.

So the rule, if modified to add "statement," would look like this:

(7) Evidence About Public Records. Evidence that:

(A) a record <u>or statement</u> is from the public office where items of this kind are kept; or

(B) a document was lawfully recorded or filed in a public office.

2. Rule 901(b)(7)(B) --- "lawfully recorded or filed"

The State Bar of California is concerned that in this rule and in Rules 902(4) and 1005 it is unclear clear whether *lawfully recorded or filed* means *lawfully filed.* That is, it's not clear whether *lawfully* modifies both terms. The solution would apparently be as follows:

a document was lawfully recorded or <u>lawfully</u> filed in a public office.

Professor Kimble's response:

I'm pretty sensitive to syntactic ambiguity, but I don't see much chance of it here. In fact, if you added a second *lawfully* you might create ambiguity about whether *in a public office* modifies *recorded.* I'm not sure what logic or policy would support a reading that the document had to be lawfully recorded but not lawfully filed.

Reporter's comment:

It would be quite odd to read the rule to say that a party authenticating a document *recorded* in a public office would have to show it was done lawfully, but so long as it was *filed* in a public office the party would not have to show it was done lawfully. What's the difference between filing and recording anyway? The State Bar's reading does not appear to be plausible.

Moreover, whatever syntactic ambiguity exists in the restyled version can be found in the original as well. The original covers evidence of "a writing authorized by law to be recorded or filed." That seems no different from "a document lawfully recorded or filed." The State Bar appears to be raising a non-problem.

Style Subcommittee determination on Rule 901(b)(7)(B)

The Style Subcommittee agreed to insert "or statement" after "record" in subdivision (A)--- as seen in the blackline above. In all other respects, the Style Subcommittee approved restyled Rule 901(b)(7)(B) as it was issued for public comment.

Rule 902. Self-authentication	**Rule 902 — Evidence That Is 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.	The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted: **(1)** ***Domestic Public Documents That Are Signed and Sealed.*** A document that bears: **(A)** a signature purporting to be an execution or attestation; 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 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(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)** allow it to be evidenced by an attested summary with or without final certification.
(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or 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 — or a copy of a document that was lawfully recorded or filed in a public office — 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(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.
(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.

Rule 902(7)-(11)

(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.

(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(6), modified as follows: the conditions referred to in 803(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. Before the trial or hearing, the proponent must give an adverse party reasonable 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(11), modified as follows: the certification, 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 certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

1. Rule 902(4) --- "lawfully recorded or filed"

The State Bar of California states that "lawfully recorded or filed" raises an ambiguity about whether "lawfully" modifies "filed." See the discussion in Rule 901(b)(7), supra. The conclusions from the discussion under that rule are equally applicable here: 1) "lawfully" logically modifies both "recorded" and "filed", and adding another "lawfully" before "filed" would raise its own ambiguity; 2) whatever ambiguity exists is in the original, "authorized by law to be recorded or filed" --- and nobody has had a problem with it; and 3) it makes no sense to read the rule to require lawful recordation but not lawful filing.

2. Rule 902(11) --- "modified as follows"

The Magistrate Judges seek to change the language about certifying a business record. They state that the restyling "speaks in terms of meeting the requirements of Rule 803(6) 'as modified' when Rule 902(11) simply provides an alternative mechanism to 'satisfy' those requirements in lieu of the person's appearance to testify." The Magistrate Judges suggest the following change to the first sentence of Rule 902(11):

> The requirements of Rule 803(6)(D) for the introduction of an original or ~~a~~ copy of a domestic record are met if accompanied ~~that meets the requirements of Rule 803(6), modified as follows: the conditions referred to in 803(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.

Reporter's comment:

This proposal does not work, because it does not tie back to the introduction to Rule 902. The rule is descriptive: "The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:"

What follows this introduction is a list of descriptions --- domestic public documents, etc. What the Magistrate Judges have done is write a freestanding rule, not a description.

The question remains whether some fix to "modified as follows" is necessary. "Modified" is probably not the right word, because the idea of the rule is to allow a certification that the record complies with the requirements of Rule 803(6). That's not really a modification. The certificate does not "modify" the record.

On the other hand, it makes sense to avoid having to restate all the requirements of Rule 803(6) in Rule 902(11). That was the goal of using the "modified as follows" language. Perhaps this goal can be more accurately accomplished through Ken Broun's suggestion:

> The original or a copy of a domestic record that meets the requirements of Rule 803(6), ~~modified as follows: the conditions referred to must be~~ if [provided] the conditions referred to in Rule 803(6)(D) are 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.

Ken's version seems to work, because it stays within the descriptive context of the rule, and it avoids the possibly inaccurate term, "modified."

Note: Even if the rule is not to be amended to take out the word "modified" the Committee may wish to consider whether to add "Rule" before "803(6)(D)."

Professor Kimble's response:

> First, no provisos, please. Second, I think you are in fact modifying. It's not just an alternative; it's a requirement. You must have the certification, right? 803(6)(D) provides alternatives for showing the conditions. 902(11) changes that to say that, of those alternatives, certification is the one the party must use. That's at least a modification, it seems to me.

Reporter's response:

Contrary to Joe's assertion, the certification is not a *requirement.* Rather, it is an alternative way of establishing the foundations for a business record. The other alternative is the testimony of a qualified witness. So it is not a modification --- the use of "if" is more accurate. "If not" then you need an in-court witness.

Professor Kimble's proposal to fix the "modified" language:

The original or a copy of a domestic record that meets the [conditions] requirements of Rule 803(6)(A)-(C), ~~modified as follows: the conditions referred to in Rule 803(6)(D) must be~~ and those conditions are 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. * * *

Reporter's comment on Professor Kimble's proposal:

This seems to work, as it takes out the term "modified" and makes clear that the hearsay requirements must be met on their own, with self-authentication being one way to show those requirements. Moreover, the reference to Rule 803(A)-(C) is more accurate than the reference to Rule 803(6)(D) in the restyled rule. Rule 803(6)(D) simply states who can qualify the record. The better reference to "conditions" is to the first three subdivisions that set out the admissibility requirements for the business records exception.

2. Rule 902(12) --- "modified"

The Magistrate Judges suggest a change to Rule 902(12) similar to the suggestion for Rule 902(11). But like that suggestion, it does not fit within the context of the rule. It sets forth a requirement, not a description:

In a civil case, the requirements of Rule 803(6)(D) for the introduction of an ~~the~~ original or a copy of a foreign record of regularly conducted activity are met upon ~~that meets the requirements of Rule 902(11), modified as follows: the~~ certification~~, 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 certification is signed.

So the proposal will not work.

Reporter's Note:

The Magistrate Judges contended the term "modified" was used incorrectly in restyled Rule 902(11) because the certification standards did not modify the business record itself. But that criticism can't be applied to Rule 902(12) --- because the certification requirements in that rule actually *do* modify those of Rule 902(11). Joe was able, in this restyling, to avoid having to restate all the certification requirements of Rule 902(11) in Rule 902(12). Using the word "modified" looks like a good way to accomplish the objective.

Rule 903. Subscribing Witness' Testimony Unnecessary	**Rule 903 — Subscribing 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 witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

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ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions

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ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001 — Definitions That Apply to This Article

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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.

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In this article~~, the following definitions apply~~:

(a) ~~**Writing.**~~ A "writing" consists of letters, words, numbers, or their equivalent set down in any form.

(b) ~~**Recording.**~~ A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner.

(c) ~~**Photograph.**~~ "Photograph" means a photographic image or its equivalent stored 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 electronically stored information, "original" means any printout — or other output readable by sight — if it accurately reflects the information. 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.

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1. Rule 1001, changes to headings

Blacklined changes, approved by the Committee at the last meeting.

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— **(1) Originals lost or destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or **(2) Original not obtainable.** No original can be obtained by any available judicial process or procedure; or **(3) Original in possession of opponent.** At a time when an original was under the control of the party against whom offered, 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 **(4) Collateral matters.** The writing, recording, or photograph is not closely related to a controlling issue.	An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if: **(a)** all the originals are lost or destroyed, and not by the proponent acting in bad faith; **(b)** an original cannot be obtained by any available judicial process; **(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 **(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 — or of a document that was lawfully recorded or filed in a public office — if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(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.

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 in court.

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 prove the content of a writing, recording, or photograph by the testimony, deposition, or written admission of the party against whom the evidence is offered. The proponent need not account for the original.

1. Rule 1007 --- "admission"

The term "admission" of the party was used in the original to tie into Rule 801(d)(2). In the restyling, those statements are no longer call "admissions." They are now statements of the party. Accordingly, the restyled Rule should be amended to substitute "statement" for "admission."

So the Rule should look like this:

Rule 1007 --- Testimony or ~~Admission~~ Statement of a Party to Prove Content

> The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written ~~admission~~ statement of the party against whom the evidence is offered. The proponent need not account for the original.

Professor Kimble agrees with this change.

2. Rule 1007, Style Subcommittee determination

The Style Subcommittee decided to change "admission" to "statement" in both the title and the text.

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, 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 Cases and Proceedings.** These rules apply in: • civil cases and proceedings, including bankruptcy, 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), 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); 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.	(e) **Other Statutes and Rules.** A federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules.

1. Rule 1101(b), specific mention of bankruptcy proceedings; and "cases and" proceedings in the title

These are blacklined changes, approved by the Committee at the last meeting. The background on these determination is set forth in the minutes:

> Rule 1101 describes the cases and proceedings to which the Evidence Rules are applicable. Bankruptcy Judge Isgur provided a comment to the Committee in which he suggested that restyled Rule 1101 might make an inadvertent substantive change with respect to the applicability of the Evidence Rules in Bankruptcy Courts. He noted that the restyled Rule 1101 provides that the Evidence Rules are applicable to "cases and proceedings under 11 U.S.C." — but that not all proceedings before Bankruptcy Judges are brought under that Chapter.
>
> ***Committee Discussion:***
>
> Judge Wiznur, the liaison from the Bankruptcy Rules Committee, helpfully assisted the Committee in determining whether the restyled Rule 1101 changed the applicability of the Evidence Rules in any bankruptcy proceeding. She noted that the restyled language ("cases and proceedings under 11 U.S.C.") was not substantively different from the reference to Title 11 in the existing Rule. She recommended, however, that any question of coverage could be answered by simply adding "bankruptcy" to the civil cases and proceedings explicitly covered by the Rule. Thus, the first bullet point in Rule 1101(b) could provide as follows:
>
> These rules apply in:
>
> • civil cases and proceedings, including bankruptcy, admiralty, and maritime cases;
>
> When coupled with the later reference to "cases and proceedings under 11 U.S.C.," there should be no question about the Evidence Rules' applicability to all bankruptcy proceedings.
>
> The Committee unanimously agreed that the reference to bankruptcy should be added in the first bullet point. It also voted unanimously to change the heading of subdivision (b) from "Proceedings" to "Cases and Proceedings" — because the term "cases and proceedings" is used throughout the text of the Rule.

2. Rule 1101, Style Subcommittee determination

The Style Subcommittee decided to retain the language of the blacklined side-by-side before it. That is, the Subcommittee decided to retain the language of the restyled rule as published, plus any amendments made by the Advisory Committee since publication.

Rule 1102. Amendments	Rule 1102 — 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 1102 --- Possible savings clause

The Civil Rules Committee, in its restyling project, proposed an amendment to Rule 86, and it was adopted as part of restyling. It provides as follows:

> **(b) December 1, 2007 Amendments ---** If any provision in Rules 1-5.1, 6-73, or 77-86 conflicts with another law, priority in time for the purpose of 28 U.S.C.§2072(b) is not affected by the amendments taking effect on December 1, 2007.

A public comment suggests that a similar proviso should be added to the Evidence Rules. The logical place for it would be Rule 1102. If the Committee decides to include such a provision, the amendment would look something like this:

> **(a) In General.** These rules may be amended as provided in 28 U.S.C. § 2072.
>
> **(b) December 1, 2011 Amendments ---** If any provision in these rules conflicts with another law, priority in time for the purpose of 28 U.S.C.§2072(b) is not affected by the amendments taking effect on December 1, 2011.

> **Note: The Civil Rule lists specific rules because of a complication at the time with the enactment of Civil Rule 5.2. But there would not appear to be any reason to do that for the Evidence Rules.**

The question for the Committee is whether a savings provision is necessary.

Supersession is essentially determined by a "last in time" rule. The concern as applied to restyling is that a federal statute that currently has precedence over an Evidence Rule would lose that superiority when the Evidence Rule got restyled --- as the restyling amendment would then make the Evidence Rule last in time.

Ed Cooper did substantial research on the supersession question when the Civil Rules were being restyled. He found that the case law provides, essentially, that technical or stylistic amendments *do not count* for the last in time rule. See, e.g., *Local 38, Sheet Metal Workers v. Custom Air Systems, Inc.*, 333 F.3d 345 (2d Cir. 2003) (changes that are "not substantive" do not count for the last in time rule). But Professor Cooper nonetheless recommended to the Civil

Rules Committee that a supersession clause be added to the Civil Rules, because he found some case law that could be construed to the contrary. See *Callahan v. Schneider*, 178 F.3d 800 (6th Cir. 1999) (finding that an amendment made an Appellate Rule last in time, but not considering the fact that the amendment was only technical). Professor Cooper observed that "an explicit disclaimer of any supersession effect will be helpful" because it "should avoid misapplied supersession analyses that can occur because supersession is so rarely encountered and because it is easier to compare the dates a rule amendment and a statute took effect than to examine the nature and purpose of the rule amendment and to compare the dates when the substance of the conflicting rule provision and statute were first enacted."

But even if supersession were a possibility for restyling amendments, it is quite unlikely that it would affect a restyled Evidence Rule. As the Committee has discussed previously, the Evidence Rules themselves are deferent to statutory law *whenever enacted*: Rule 402 provides that evidence is relevant unless a statute provides otherwise; Rule 501 likewise defers to statute; Rule 802, the rule against hearsay, defers to statute; the authenticity rules are illustrative only and do not at all conflict with a statute that would govern authenticity. And so forth. So if the rules themselves do not take priority over statutes --- *no matter when enacted* --- it makes no difference that an Evidence Rule could become "last in time" by a style amendment.

It could be argued that adding a savings clause will do more harm than good. It might lead a reader to think that there is a possible problem when in fact there is not. It could lead a reader to think that, for example, Rule 402 doesn't mean what it says when it defers to statutes. Moreover, a savings clause could be looked at as an admission that *substantive* changes have been made. After all, if the changes are only style, there is under the case law little question of priority as no rule has been changed in a material way. Adding a savings clause could indicate that the Committee didn't trust its own work even *after* including a Committee Note to each rule that no substantive change was made.

Finally, it can be argued that the restyling of Rule 1101(e) has further lessened the need for a savings clause. That rule, as restyled, states that "[a] federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules." That rule indicates that deleting the laundry list of statutes contained in the original rule was not intended to indicate that those statutes would be abrogated by the restyling. Again, including a separate savings clause could cause the reader to think that the amended Rule 1101(e) doesn't mean what it says.

Whether to include a savings clause is the Committee's call. It is definitely not a style question in itself.

Rule 1103. Title	Rule 1103 — 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.

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Committee Notes to Restyled Rules
Date: April 1, 2010

At the Spring 2009 meeting, the Committee approved Committee Notes for each of the restyled rules. This memo sets forth those Committee Notes as approved by the Committee, and addresses whether any Notes need to be changed or added to those released for public comment.

The memo sets forth the Committee Notes as follows: 1. The "restyling project" Committee Note (to Rule 101); 2. The basic Committee Note for most of the Rules; 3. Rules with more detailed notes to cover specific issues in those rules; and 4. Issues the Committee may wish to consider for changes and additions.

A. The "Restyling Project" Committee Note — to Rule 101.

The opening Committee Note discusses the goals of the restyling project and the procedures that the Committee employed. It reads as follows:

Committee Note

The language of Rule 101 has been amended, and definitions have been added, 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 United 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 page x (Feb. 2005) (available at http://www.uscourts.gov/rules/Prelim_draft_proposed_pt1.pdf); *Joseph Kimble, Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 Scribes J. Legal Writing 25 (2008-2009). For specific commentary on the Evidence restyling project, see Joseph Kimble, *Drafting Examples from the Proposed New Federal Rules of Evidence*, 88 Mich. B.J. 52 (Aug. 2009); 88 Mich B.J. 46 (Sept. 2009); 88 Mich B.J. 54 (Oct. 2009); 88 Mich. B.J. 50 (Nov. 2009).

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. Rules 103, 404(b), 606(b), and 612 illustrate 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 by not switching between "accused" and "defendant" or between "party opponent" and "opposing party" or between the various formulations of civil and criminal action/case/proceeding.

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 104(c) (omitting "in all cases"); Rule 602 (omitting "but need not"); Rule 611(b) (omitting "in the exercise of its discretion").

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. [Rule 804(b)(6) has been renumbered to Rule 804(b)(5) so that the numbering within the rule is continuous.]

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, the amendment 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. The change would restructure a rule in a way that would alter the approach that courts and litigants have used to think about, and argue about, questions of admissibility (e.g., merging Rules 104(a) and 104(b) into a single subdivision); or

d. The amendment would change a "sacred phrase" — one that has become so familiar in practice that to alter it would be unduly disruptive to practice and expectations. Examples in the Evidence Rules include "unfair prejudice" and "truth of the matter asserted."

B. The "Basic" Committee Note

The basic Committee Note, contained in every restyled rule — except, as seen below, Rule 502 — is taken from the template used in the previous restyling projects. It states as follows:

> The language of Rule ___ has been amended, and definitions have been added, 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.

C. Statements Added to Specific Evidence Rules as Released for Public Comment

In preparing the restyled Evidence Rules for public comment, the Committee operated under the presumption that the basic template was a sufficient Committee Note for each of the Rules. Because no substantive change was intended, the Committee determined that it would ordinarily be enough to say just that.

The Committee recognized, however, that changes to certain rules were relatively extensive, and this might raise questions about possible inadvertent substantive consequences. The Committee therefore developed a working principle for providing additional comment in a Committee Note to a specific rule. The working principle was:

> *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 amended the basic template for the Committee Notes to the following Rules, as issued for public comment:

1. Rules 407, 408 and 411.

Explanation:

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. In the public comment period, the ABA Litigation

Section suggested that the change to these rules is substantive (though the Committee has taken a vote and found the changes to be stylistic only).

Addition to the Committee Note:

Rule ___ previously provided that evidence was not excluded if offered for a purpose not explicitly 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 502

Explanation:

Rule 502 was only recently enacted, and in the run-up to its acceptance by Congress, the Committee expended great effort to make sure that the style changes already made in the rule would be preserved. The Committee therefore determined that it would be imprudent to restyle the Rule *again* during the restyling project. The only changes made to Rule 502 were changes in capitalization. So the template Committee Note, which refers to the fact that a rule has been restyled, would not accurately describe the Committee's work on Rule 502.

Committee Note

Rule 502 has been amended by changing the initial letter of a few words from uppercase to lowercase as part of the restyling of the Evidence Rules to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

3. Rule 608(b)

Explanation:

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.)

Addition to the Committee Note:

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.

Explanation:

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 used by lawyers — especially with respect to experts — it might be anticipated that some could think that the change is more important than intended. (The ABA Litigation Section suggests that the deletion of "inference" could be considered a substantive change.)

Addition to the Committee Notes:

The Committee deleted all reference to an "inference" on the ground 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. Rule 801(d)(2).

Explanation: The restyling drops the term "admission" in favor of "statement of a party-opponent. That proposal has been well-received. But lawyers and judges often refer to Rule 801d2 as the hearsay exception for "admissions" — so the Committee thought that an explanation of this relatively dramatic change was appropriate.

Addition to the Committee Note:

Statements falling under the hearsay exclusion provided by Rule 801(d)(2) are no longer referred to as "admissions" in the title to the subdivision. The term "admissions" is confusing because not all statements covered by the exclusion are admissions in the colloquial sense — a statement can be within the exclusion even if it "admitted" nothing and was not against the party's interest when made. The term "admissions" also raises confusion in comparison with the Rule 804(b)(3) exception for declarations against interest. No change in application of the exclusion is intended.

5. Rule 804(b)(3).

Explanation:

If one were to compare the restyled package to the rules that exist today, they would find one change that is clearly substantive — Rule 804(b)(3) extends the corroborating circumstances requirement to declarations against penal interest offered by the prosecution.

But this substantive change was not made in the restyling project. By the time restyling takes effect, the restyled-and-substantively-changed Rule 804(b)(3) will already have been in effect for a year. In order to avoid confusion, the Committee decided to provide an explanation in the Committee Note to Rule 804(b)(3).

Addition to Committee Note:

The amendment to Rule 804(b)(3) 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 and scheduled to be enacted before the restyled rules — explicitly extends the corroborating circumstances requirement to statements offered by the government.

6. Rule 804(b)(6) — moving to Rule 804(b)(5).

Explanation:

The restyled rules as issued for public comment move Rule 804(b)(6) back to Rule 804(b)(5), to fill the gap left in 1996 — when the original Rule 804(b)(5) was merged with Rule 803(24) to

become Rule 807. In order to avoid confusion — and to retain some reference to the history of the residual exception — the Committee Note to Rule 804, as issued for public comment, explained the move.

Addition to Committee Note:

Rule 804(b)(6) has been renumbered, to fill a gap left when the original Rule 804(b)(5) was transferred to Rule 807.

D. Possible New Additions

The Committee may wish to consider two additions to the Committee Notes as they were issued for public comment.

1. Rule 101(b)(6) — Evidence stored in electronic form

Rule 101(b)(6) provides that "a reference to any kind of written material includes electronically stored information." [At the meeting the Committee will be considering an amendment to the text that would add "or any other medium" after "written material."] A public comment suggests that it would be useful for the Committee Note to provide a cross-reference to Civil Rule 34. It would seem that a cross-reference might be useful, because the language "electronically stored information" is taken from the discovery amendments to the Civil Rules.

If the Committee agrees that a cross-reference would be useful, the following language could be added to the Committee Note to Rule 101(b)(6):

The language of Rule 101(b)(6) is intended to track the same language used in Fed.R.Civ. P. 34.

2. Committee Note necessary if savings clause is added to Rule 1102.

The memorandum to the Committee on restyling in this agenda book addresses the possibility that a savings clause could be added to the Evidence Rules. The merits of such an addition are discussed in that memo. If the Committee does decide to add a savings clause to Rule 1102, then a Committee Note is also necessary. As the savings clause is derived from Civil Rule 86(b), it would make sense to track the Committee Note to that Rule as well.

The Committee Note to Rule 1102, new subdivision (b), could track the Rule 86(b) Note

and be modified, as follows:

Rule 1102(b) is added to clarify the relationship of amendments taking effect on December 1, 2011, to other laws for the purpose of applying the "supersession" clause in 28 U.S.C. § 2072(b). Section 2072(b) provides that a law in conflict with an Enabling Act Rule "shall be of no further force or effect after such rule ha[s] taken effect." The amendments that take effect on December 1, 2011, result from the general restyling of the Evidence Rules. None of these amendments is intended to affect resolution of any conflict that might arise between a rule and another law. Rule 1102(b) makes this intent explicit. Any conflict that arises should be resolved by looking to the date the specific conflicting rule provision first became effective.

2009 EVIDENCE RULES COMMENTS CHART

DOCKET NUMBER	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE	DATE RESP
09-EV-001	Professor Elliot B. Glicksman	08/14/09	Rule 606(a)	08/27/09
09-EV-002	Federal Rules of Evidence Committee of the American College of Trial Lawyers (Aronchick)	08/24/09	Evidence Rules 101 - 706	08/27/09
09-EV-003	Ken McKinney	11/02/09	Evidence Rules	11/06/09
09-EV-004	Alan Fredregill	11/03/09	Evidence Rules	11/06/09
09-EV-005	Maurice J. Baumgarten	11/11/09	Rule 1002	11/24/09
09-EV-006	Thomas E. McCutchen	11/09/09	Evidence Rules	11/24/09
09-EV-007	Honorable Robert E. Jones	11/09/09	Evidence Rules	11/24/09
09-EV-008	Clifford A. Rieders	11/19/09	Evidence Rules	11/30/09
09-EV-009	Roger C. Park	12/03/09	Evidence Rules	01/04/10
09-EV-010	Jeffrey Bellin	01/07/10	Rule 609	01/11/10
09-EV-011	The Federal Magistrate Judges Association (Honorable Thomas C. Mummert, III)	01/11/10	Rules 801, 803, 902	01/15/10
09-EV-012	Professor Roger Park	02/16/10	Rules 103, 104, and 401	02/22/10
09-EV-013	Richard D. Friedman	02/15/10	Rules 104, 105, 412, and 801	02/22/10
09-EV-014	American Bar Association's Section of Litigation (Landis Best)	02/16/10	Evidence Rules	02/22/10
09-EV-015	The State Bar of California Committee on Federal Courts (Joan Jacobs Levie)	02/16/10	Rules 104, 802, 901, 902, and 1005	02/22/10
09-EV-016	Professor John Scott	02/16/10	Rules 801, 405, and 410	02/22/10
09-EV-017	Katharine T. Schaffzin	02/16/10	Evidence Rules	02/22/10
09-EV-018	Professor James J. Duane	02/16/10	Evidence Rules	02/22/10
09-EV-019	National Association of Criminal Defense Lawyers (William J. Genego)	02/17/10	Evidence Rules	02/22/10

Comment Regarding Proposed Change to FRE
Katherine Fleming to: Rules_Comments 08/14/2009 02:50 PM

Public Comment Regarding Proposed Stylistic Change to FRE 606(a)

A juror may not testify before the jury on which they sit. If they do the court must give opposing counsel an opportunity to object.

This suggestion for change remains direct, removes all ambiguity and deletes unnecessary prepositional phrasing.

Thank you for the opportunity of public comment.

Sincerely,

Professor Elliot B. Glicksman
Thomas M. Cooley Law School
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09-EV-001

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Aronchick, Mark A. to: Rules_Comments 08/24/2009 02:37 PM

Attached are comments to Federal Rules of Evidence 101 through 706 submitted by the Federal Rules of Evidence Committee of the American College of Trial Lawyers. If you have any questions, please do not hesitate to contact me at 215-496-7002.

09-EV-002

Thank you.
Mark A. Aronchick
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From: Coulbourn, Debra A.
Sent: Monday, August 24, 2009 2:33 PM
To: Coulbourn, Debra A.
Subject: Scanned document <51 pages ~760 KB> -- 8/24/2009 2:32:43 PM

Rules 101 to 706.pdf

Comments of the Committee on the Federal Rules of Evidence of the
American College of Trial Lawyers

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers is comprised of 26 Fellows of the College appointed by the leadership of the College. The mission of this Committee includes monitoring the operation of the Federal Rules of Evidence. The Committee members are located across the United States and practice in many different jurisdictions.

The leadership of the College asked our Committee to review the work of the restyling sub-committee of the Committee on the Federal Rules of Evidence of the United States Supreme Court and provide comments. During the past five months our Committee reviewed the proposals concerning Rules 101 through 706. Attached are comments reflecting our review. In conducting this review, we had available the proposals from the restyling sub-committee, the procedures and guidelines that the sub-committee followed, and many comments that the sub-committee already received. The members of our Committee were asked not only to review specific proposed rule changes themselves, but to circulate their assigned Rules to colleagues or to other attorneys with whom they practice and assemble any comments as well.

Our Committee members commented, time and again, on the excellent work of the restyling sub-committee. In some instances, we offer what we consider to be useful or helpful suggestions. We tried to limit our comments to style but it may be that, even then, we came very close to substance on occasion. These suggestions are offered pursuant to one of the charges of the American College of Trial Lawyers, to assist in the improvement of the administration of justice. We thank the restyling sub-committee for the opportunity to participate in this phase of its work.

Respectfully submitted,

Mark Aronchick
Chairman, Federal Rules of Evidence Committee
August 17, 2009

COMMENTS OF THE COMMITTEE ON THE FEDERAL RULES OF EVIDENCE OF THE AMERICAN COLLEGE OF TRIAL LAWYERS CONCERNING PROPOSED RESTYLING OF THE FEDERAL RULES OF EVIDENCE

RULE 101

Agree with proposed restyling.

RULE 102

Agree with proposed restyling.

RULE 103

Although Rule 103 is not often the source of confusion, the proposed style changes are an improvement. The paragraph headings, in particular, are more precise and give a better indication of the purpose of the text. For example, Rule 103(a) changes "Effect of erroneous ruling" to the more descriptive "Preserving a Claim of Error." In several other cases, somewhat cryptic headings have been replaced with clearer headings. See, e.g., old (b) "record of offer and ruling" replaced by new (c) "Court's Statements About the rule; directing an Offer of Proof;" old (c) "Hearing of jury" replaced by new (d) "Preventing the Jury from hearing Inadmissible Evidence;" and old (d) "Plain error" replaced by new (e) "Taking Notice of Plain Error." The difference in lettering was necessitated by the addition of a heading ("(b) Not Needing to Renew an Objection or Offer of Proof") to what had been unlabeled, further adding to clarity.

It is better that the rule is stated in the affirmative rather than the negative (e.g., in 103(a) "Error may not be predicated upon a ruling that . . ." is replaced by "A party may claim error in a ruling to admit or exclude evidence only if . . ."). The entirety of 103(a) is reorganized as well, which makes the rule much more readable and thus understandable.

This readability manifests itself in a number of small ways. For example, the hyphenated clause in the last paragraph of 103(a) (now 103(b)) used to read "– either at or before trial –"now reads "– either before or at trial –". The change is a small one, but is stated in a more logical order in the new rule.

The new rule uses more precise language in a number of places, references to "a jury trial" in 103(d) in place of 103(c)'s "[i]n jury cases". Also the rule eliminates use of the archaic "thereon" in new 103(c) (old 103(b)).

RULE 104

Rule 104 also contains clearer headings. "Testimony by accused" in Rule 104(d) is replaced by "Testimony by a Defendant in a Criminal Case," which is freer from ambiguity. Similarly, "[q]uestions of admissibility generally" in 104(a) is replaced by the more accurate "[i]n General".

The Committee might consider adding some clarity to Rule 104(b), the rule of conditional relevancy. This is already a difficult rule to parse, and the revised rule does not help much. In particular, the phrase "fulfillment of a condition of fact" in the old rule is replaced by "fulfilling a factual condition," which is still opaque. Perhaps the phrase should instead be something simpler, like "whether one or more facts exist". Another suggestion is to change "evidence" the second time it appears in the paragraph to "proof" (to make clear that it is referring to the predicate facts not the contingent facts), change "it" to "evidence" to make the relation back clearer (particularly once the second "evidence" is changed to "proof"), and change "on" back to "upon" (as it was in the old rule) which is more precise. Thus changed, the rule would read:

> "When the relevancy of evidence depends on ~~fulfilling a factual condition~~whether one or more facts exist, the court may admit ~~it~~the evidence ~~on~~ upon, or subject to, the introduction of ~~evidence~~proof sufficient to support a finding that those ~~condition is fulfilled.~~facts exist."

RULE 105

Agree with proposed restyling.

RULE 106

Agree with proposed restyling.

RULE 201

We suggest rewriting subsection (a) as follows, attempting to remain within the spirit of the restyling rules: "This rule governs only judicial notice of adjudicative facts. It does not apply to judicial notice of legislative facts."

In subsection (b), perhaps change the word "because" to "if," i.e., "The court may judicially notice a fact that is not subject to reasonable dispute if it…" The rule does not intend to address the reasons ("becauses") for taking notice so much as the criteria for doing so (what has to be found or determined).

In subsection (c)(1), perhaps add some language – either that the court "may take judicial notice on its own initiative" or that the court "may take judicial notice on its own without a request from any party".

Another suggestion for subsection (d) is as follows: "If a timely request is made, a party is entitled to be heard on the propriety of taking judicial notice and on the nature of the fact to be noticed. If the court takes judicial notice of a fact before notifying a party that it will do so, the party is entitled to be heard on request after it is notified of the decision."

RULE 301

The following is a proposal that might get too close to changing the substance of the rules:

"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. This rule does not shift the burden of persuasion from the party who originally bears it."

OR

"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. This rule does not shift the risk of nonpersuasion from the party who originally bears it."

The problem here may be that the terms "burden of production" or "burden of going forward" on the one hand and "burden of persuasion" on the other as two separate aspects of the "burden of proof" is not really developed. On the other hand, these are important concepts which arise almost exclusively as to civil presumptions in Federal cases. Wyoming's version of the Federal rule, for example, actually imposes the entire burden of proof (production and persuasion) on the party against whom the presumption is directed, and thus the distinction in the Federal rule is an important one.

RULE 302

Agree with proposed restyling.

RULE 401

Agree with proposed restyling.

RULE 402

We considered whether the removal of the word "all" at the start of the existing rule was a substantive change but it seems to act only as an "intensifier" as the rule itself does not require admission of relevant evidence but provides that relevant evidence "is admissible" subject to certain exceptions. Removal of the word "all" thus appears to be stylistic only.

The exceptions include "other rules" prescribed by the Supreme Court "pursuant to statutory authority." This phrase has been removed in the proposed restyling. But see the comment under the heading "1974 Enactment" which suggests the phrase had been added to accommodate the view that Congress should not appear to acquiesce in the Court's judgment that it can promulgate Rules of Evidence under the existing Rules Enabling Act. We do not know whether this is still an issue but simply raise the question. Perhaps the phrase is no longer needed in light of subsequent statutes addressing rule making authority.

RULE 403

Agree with proposed restyling.

RULE 404

Agree with proposed restyling.

RULE 405

Agree with proposed restyling.

RULE 406

We recommend deleting the last sentence of the proposed Rule 406, as it seems superfluous. Corroboration or eyewitness testimony simply goes to the weight of the evidence, as would a number of other factors. The other changes made the rule much easier to understand, and we agree with them.

RULE 407

We would recommend inserting the word "subsequent" before the word "measures" in the first sentence, as it makes the sentence more easily understood. We agree with the other suggested changes to the Rule.

RULE 408

Agree with proposed restyling.

RULE 409

Agree with proposed restyling.

RULE 410

While we are attempting to focus on style, it may be that the following discussion gets too close to substance. But, in the spirit of trying to be helpful, please consider the following. The proposed rule uses three phrases subject to potential confusion: "Guilty plea," "[guilty plea] later withdrawn," and "about either of those pleas."

To understand the probable intent of those phrases, and the potential for confusion, it is important to understand the typical sequence of events in the criminal plea-bargaining process. Rule 410 applies only to negotiations with an attorney for the prosecuting authority, typically conducted by defendant's counsel. In the course of those negotiations, defense counsel may make arguments that the defendant did not commit certain of the offenses under investigation, or challenge the strength of the government's evidence on some aspects of the defendant's alleged conduct. Those negotiations may be a prelude to the defendant entering into a cooperation agreement, where the defendant agrees to testify on behalf of the government against others. Frequently criminal defendants may not admit the full scope of their criminal conduct to their own attorneys, and plea negotiations may take on a dynamic where defendant's counsel initially takes the position that his client did not commit certain conduct, but then is educated by the prosecutor about evidence supporting the government's theory of the case. Defendant's counsel may insist that his client will not cooperate unless certain conduct is not part of the plea agreement or charges to which the defendant agrees to plead guilty. As part of that cooperation, in government interviews the defendant may admit conduct that his counsel previously minimized or refused to admit during plea negotiations. At trial, the government attempts to portray cooperating witnesses as having "come clean" and admitted all of their criminal conduct. It would be very valuable for a criminal defendant's trial counsel to impeach a cooperator with evidence of his lawyer's arguments or statements in plea negotiations failing to acknowledge the full scope of the cooperator's criminal conduct. However, perhaps because they misunderstand Rule 410 as currently written, defense practitioners do not seek discovery of statements made by the cooperator's counsel during plea negotiations, and government prosecutors do not view statements by defense counsel during the course of plea negotiations as potential *Brady* material or *Giglio* inconsistent statements by the defendant/cooperating witness.

In many state systems, most plea agreements are oral, confirmed on the record before the trial court. In federal practice, most felony plea agreements are reduced to writing. Rule 410 apparently makes a policy choice that the defendant's oral agreement to plead guilty, or the defendant's signature on a plea agreement, is not sufficient to trigger admissibility against the defendant. Instead, the rule requires a" guilty plea" in order for the defendant's admission of guilty to be admissible against that defendant. Presumably, the rule contemplates that a "guilty plea" requires the defendant to appear in court and orally admit guilt to one or more counts in a pending charging document.

In federal practice, F.R.Crim.P. 11 provides a procedure where the defendant enters a guilty plea under oath, and the trial court conducts a hearing to determine whether to accept the plea as knowing and voluntary. F.R.Crim.P. 11(c)(3) provides that

the trial court may reject certain types of plea agreements, and may defer its decision about whether to reject the plea agreement. If the trial court later rejects a plea agreement, it must give the defendant the opportunity to withdraw the guilty plea. In federal practice, sentencing generally does not occur for months after the defendant enters a guilty plea, because the court must await the preparation of a presentence investigation in aid of sentencing. If the defendant is a cooperating witness, the delay between the entry of a guilty plea and sentencing can go on for years in extreme cases. State procedures require determinations that guilty pleas are knowing and voluntary, and often allow judges to reject plea agreements as well. State systems often proceed to sentencing the same day as the guilty plea in routine cases, but can also involve significant delays between entry of a guilty plea and sentencing. In both federal and state practice, defendants are allowed to withdraw their "guilty pleas" as a matter of right in some circumstances (such as when the judge rejects the proposed plea agreement, or before the judge "accepts" the plea). In a context where a defendant may enter a "guilty plea" in court pursuant to a plea agreement that a trial judge may later reject, the rule does not clarify whether a "conditional" guilty plea awaiting final acceptance by a judge satisfies the trigger for admissibility.

In addition, federal and state practice provide for "deferred prosecution" or "probation before judgment" arrangements, where a defendant may admit factual guilt, but may avoid a final entry of a guilty plea or conviction if the defendant satisfies certain conditions. Rule 410 does not clarify whether a "guilty plea" applies to deferred prosecutions or probation before judgment arrangements. From a policy point of view, when a defendant admits guilt as part of a negotiated deal in return for some benefit, either in the form of a plea agreement to be accepted by the trial court, or a deferred prosecution or probation before judgment, that admission of guilt should be just as admissible as a guilty plea accepted by the court as part of a judgment of conviction.

In the vast majority of criminal cases, defendants are judgment-proof against civil litigation brought by their victims. In the rare circumstances when a defendant has assets, the defendant's admission of guilt as part of the prosecution affords significant procedural advantages to the victims in subsequent civil litigation. In order to afford victims such procedural advantages, the rule should clarify that it applies to admissions of guilty in agreements with the prosecuting authority that do not result in guilty pleas, and should clarify that a defendant may not claim to have "withdrawn" a guilty plea except by right, by agreement with the prosecuting authority, or by court adjudication.

Accordingly, stylistic amendments to Rule 410 should consider clarifying what a "guilty plea" means.

Presumably to encourage plea negotiations and the resolution of criminal cases by compromise, Rule 410 makes a policy judgment that a guilty plea "later withdrawn" should not be admissible against the defendant. In federal practice, F.R.Crim.P. 11(d)(1) provides that a defendant may withdraw the guilty plea before the court accepts the plea "for any reason or no reason." State systems may also give defendants a "right" to withdraw guilty pleas. However, defendants often attempt to withdraw their guilty pleas even after the judge has accepted them as knowing and voluntary. Both federal and state practice allow defendants to withdraw already-accepted guilty pleas in limited

circumstances. For example, F.R.Crim.P. 11(d)(2) provides that after the court accepts the guilty plea, it can only be withdrawn "if the defendant can show a fair and just reason for requesting the withdrawal." Attempts by defendants to withdraw accepted guilty pleas can lead to protracted litigation, both in the trial court and on appeal. Rule 410 probably intends that a guilty plea "later withdrawn" means only a guilty plea withdrawn as a matter of right under the applicable procedure, or a guilty plea adjudicated as withdrawn by a court. However, the rule is not clear on this point.

Accordingly, stylistic amendments to Rule 410 should consider clarifying what a "[guilty plea] later withdrawn" means.

The proposed restyling to 410(a)(3) substitutes the phrase "about either of those pleas" for "any statement made in the course of any proceedings . . ." This stylistic change has the potential for substantively limiting the protection afforded by the rule. Even the old rule had a presumably unintended limitation, because it applied only to guilty plea hearings, such as a Rule 11 hearing in federal practice. From a policy point of view, there seems to be no basis for distinguishing between a Rule 11 proceeding and a statement by the defendant or his counsel in a scheduling conference that the defendant has reached a plea agreement and intends to plead guilty, when the defendant later withdraws that decision. In addition, a creative prosecutor could argue that a factual statement by a defendant during a plea colloquy with a judge was not "about" the plea agreement itself, and thus would be admissible even if the guilty plea was "later withdrawn." While it is understandable that the reporter might view the prior language referring to "any statement made in the course of any proceedings" as cumbersome, it had the benefit of being more comprehensive and clear.

Accordingly, the committee should consider rejecting the proposed restyling for 410(a)(3), and clarifying the scope of that section.

In the interest of attempting to clarify the rule, consider the following:

> **(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, or an agreement containing an admission of guilt to criminal conduct entered into with the prosecuting authority in order to resolve potential criminal charges without requiring entry of a guilty plea, if the guilty plea or written agreement was (a) withdrawn by right under relevant court procedure; (b) withdrawn by agreement with the prosecuting authority; or c) adjudicated as withdrawn;
> >
> > **(2)** a plea of nolo contendere;
> >
> > **(3)** any statement made during court proceedings regarding such pleas or agreements;

(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 an agreement containing an admission of guilt to criminal conduct entered into with the prosecuting authority in order to resolve potential criminal charges without requiring entry of a guilty plea, or if the discussions resulted in a guilty plea or such agreement that was (a) withdrawn by right under relevant court procedure; (b) withdrawn by agreement with the prosecuting authority; or c) adjudicated as withdrawn.

We have no proposed changes to the restyled section (b) of the rule.

RULE 411

Agree with proposed restyling.

RULE 412

412(b)(1)(B): ". . . if offered by the prosecutor or if offered by the defendant . . ."

Why not change to "if offered by the prosecutor or defendant . . ."

For that matter, since the prosecutor and defendant are the only parties, the Committee could reduce it to ". . . if offered . . ."

412(b)(2): ". . . danger of harm to <u>any</u> victim . . ."

This is not consistent with the earlier reference to "a victim's sexual behavior."

It would seem that even in a multi-victim case, it is only harm to the impeached victim that is to be considered. Thus, "<u>any</u> victim" should be changed to "<u>the</u> victim" or "<u>that</u> victim." This would be consistent with 412(c) reference to notice to "the victim."

RULE 413

The comments here may veer toward substance. However:

Rule 413(a) and 413(c). The problem is that neither (a) nor any other part of the rule gives any idea of what the evidence is relevant for. To prove predilection? If so, why not say so?

413(d)(1): This is obviously meant to include statutory sexual assault. However, the conduct covered by 109(A) requires "cross[ing] a state line." If the drafters intend to include state law violations – *i.e.* statutory rape and assault without crossing state lines – they might consider reviewing the language accordingly.

RULE 414-415

We agree with the restylings, with one exception. Subsection (a) of existing Rule 414 makes admissible "... evidence of the defendant's commission of ..." any other act of child molestation in a criminal case (Rule 414). That language makes plain that timing of the other act or offense is irrelevant – a court may admit it regardless of whether it predated the offense for which the defendant is on trial, or occurred after the offense that is the subject of the trial. The restyled subsection (a) changes the language quoted above to "... evidence that the defendant committed ..." any other act. We believe it possible that the new language may give rise to a defendant's argument that the language of the restyled rule, phrased in the past tense, limits the admissibility of "other acts" to those that occurred prior to the act for which the defendant is on trial. Accordingly, we suggest that the restyled Rule 414 should retain the language "defendant's commission of," instead of the restyled language "defendant committed."

RULE 501

We agree with the Comment that unless "civil case" is defined in the rules to mean "civil actions and proceedings" it is necessary to retain the phrase "civil actions and proceedings" in both Rules 501 and 601.

RULE 601

We agree with the Comment that unless "civil case" is defined in the rules to mean "civil actions and proceedings" it is necessary to retain the phrase "civil actions and proceedings" in both Rules 501 and 601.

We agree with the Comment to rule 601 that in line 4 "the witness's competency" should be changed to "the witness's testimony."

RULE 602

Agree with proposed restyling.

RULE 603

Agree with proposed restyling.

RULE 604

The competency/proficiency of the interpreter should be established, especially if the language interpreted is not mainstream. The change in the rule would allow that evaluation.

RULE 605

Agree with proposed restyling.

RULE 606

The changes succeed in making the rule clearer without changing the intended scope of the rule. As indicated by the commentary, there is a slight chance that the use of the word "incident" leaves open the possibility that it will be interpreted differently than the previous word "matter." We agree with the editor's decision that the gain in clarity is worth the small potential loss in consistent interpretation.

RULE 607

Agree with proposed restyling.

RULE 608

The following are proposals that might get too close to changing the substance of the rules:

1. Rule 608, the phrase "having a character for truthfulness or untruthfulness" seems somewhat awkward and confusing. Perhaps a portion of that phrase, namely "having a character for" could be deleted, and the sentence would read, "a witness's credibility may be attacked or supported by evidence in the form of an opinion about – or a reputation for – truthfulness or untruthfulness."

2. Rule 608(b) – as proposed, the rule would eliminate the current language that "in the discretion of the court," specific instances of conduct may be inquired into on cross-examination. Although the proposed change utilizes the language that the court "may" allow such cross-examination, there is some danger that by eliminating "in the discretion of the court" there may be some who will interpret that as a substantive change.

3. Rule 608(c) – We suggest that the rule's current reference to "an accused" should not be deleted. While "accused" is a subset of the term "witness", deleting reference to "an accused" from Rule 608(c) could be interpreted as a substantive change, i.e., that by eliminating reference to "an accused" then any criminal defendant who takes the stand may waive his rights against self-incrimination even if his testimony relates only to character for truthfulness or untruthfulness.

RULE 609

Rule 609(a)(1) – We agree with the view that the language "under the law under which the witness was convicted" should be retained and not deleted. Not only might its deletion be a substantive change, it does not seem "wildly improbable" that courts may disagree as to the application of the applicable state or federal law in the event that it is deleted.

Rule 610

Agree with proposed restyling.

Rule 611

With respect to Rule 611, we agree with the restyling of the title of the rule and the changes made to subsection (a). However, the restyling of subsection (b) may not result in increased clarity. The rule as previously drafted seems more direct and understandable than the restyled version. The specification that the court may exercise discretion to permit inquiry into additional matters on cross-examination is an appropriate comment from the rule makers. The same is true concerning the first sentence of subsection (c) of this rule. The restyling of the remainder of subsection (c) eliminates any potential confusion and is a proper restyling.

Rule 612

The following are proposals that might get too close to changing the substance of the rules:

(1) Given the goal of the Restyling Committee Note on Formatting Changes, which emphasizes clearer presentation and the breaking of rules down into their constituent parts, we tend to agree with one the previous comments to this proposal, which suggests that subdivision (b) should be broken down into two subdivisions: with subdivision (b) dealing exclusively with "Adverse Party's Options," and a new subdivision (c) dealing with "Deleting Unrelated Matter." There is a natural break (the sentence beginning with "If the producing party...") between these two discrete parts.

(2) We question whether the exception pertaining to 18 U.S.C. Sec. 3500 is out of place in the proposal. In the existing rule, the reference to Section 3500 is the first element of the rule, essentially signaling that if that Section applies, there's no need to read any further, as the rule is inapplicable. The proposal moves this reference to subdivision (b), which deals with "Adverse Party's Options; Deleting Unrelated Matter." But Section 3500 has little to do with an Adverse Party's Options (if Section 3500 applies, the adverse party has no options), and nothing to do with Deleting Unrelated Matter. Instead, it seems that the reference to Section 3500 best belongs in subdivision (a), which addresses the "General Application."

(3) We agree with the first comment, which proposes that lines 15-16 should retain the existing language regarding "matter unrelated to the testimony," as opposed to changing it to "unrelated matter," which could mean matter that is not related to the case (as opposed to matter that is not related to the narrower testimony). Professor Kimble indicates that the risk of this confusion is small. But the risk could be eliminated entirely by simply stating: "If the producing party claims that the writing includes matter unrelated to the testimony, the court must...." It adds a few more words, but leaves no room for confusion.

(4) We also see merit in the comment by Meyers that questions why the reference to "justice" is deleted in Line 21, but retained in Line 24. Professor Kimble explains the decision by indicating that the reference to "justice" in line 24 (and line 10) is more appropriate because "they deal with exceptions." But we are not clear why justice is more important when considering exceptions than it is in considering the norm. Why not apply a consistent rule, and either eliminate "justice" in Lines 24 and 10 (and replace it with some variation of "appropriate"), or leave the reference to "justice" in Line 21.

Rule 613

We question whether Lines 4 through 7 have made too many changes to the existing rule, without much (if any) improvement. For all of the changes, the proposed rule is almost as verbose as the existing rule (38 words versus 45 words), and while breaking the existing subdivision (a) into two sentences has some appeal, we are not convinced that it is an improvement. Here is an alternative proposal:

"(a) Showing or Disclosing the Statement. When questioning a witness about the witness's prior statement, the statement and its contents do not need to be shown or disclosed to the witness, but on request, the statement and its contents must be shown or disclosed to an adverse party."

Rule 614

Agree with proposed restyling.

Rule 615

Agree with proposed restyling.

Rule 701

Agree with proposed restyling.

Rule 702

The changes to Rule 702 are merely stylistic with one exception: the changes expressly require that the court determine the admissibility of the expert's opinion before the testimony is admissible, a requirement that is established beyond doubt in the case law.

Rule 703

Agree with proposed restyling.

Rule 704

Agree with proposed restyling.

Rule 705

Agree with proposed restyling.

Rule 706

Agree with proposed restyling.

General Comment

Some of the Rules use bullet points which are uncitable and unsearchable and, if one is dealing with page limits in briefs, add several lines to any quotation of the rule. Would the committee consider eliminating the use of bullet points in an effort to address these concerns?

Ken McKinney
to:
rules_comments
11/02/2009 01:45 PM

09-EV-003

Mr. McCabe:

The revisions of the Federal Rules of Evidence are useful and accomplish the purpose of the Conference in clarifying and simplifying the rules from a stylistic standpoint.

Thank you for your efforts,

Ken McKinney

Removal of the word "shall" from the federal rules of evidence
Alan Fredregill

09-EV-004

rules_comments
11/03/2009 06:02 PM
Cc:
"Alan Fredregill"

To: Administrative Office of the U.S. Courts, James C. Duff, Director, Peter G. McCabe, Secretary

Re: Deletion of the word "shall" from Preliminary Draft of Proposed Amendments to the Federal Rules of Practice and Procedure, Submitted for Public Comment, A Summary for Bench and Bar (August 2009).

Dear Committee:

Today I received the "Summary for Bench and Bar" of the "Preliminary Draft of Proposed Amendments to the Federal Rules of Practice and Procedure." I noted with interest the Committee's rationale for its removal of the word "shall" from the Proposed Amendments to the Federal Rules of Evidence.

I think that is a mistake. The Committee's explanation stated:

> The Committee made special efforts to reject any proposed style amendment that might result in a substantive change to the rule. The Committee considered a change substantive if: . . .(4) it changes a "sacred phrase" – a phrase that has become so familiar in practice that its alteration would be disruptive. . . . For example, the word "shall" is removed from the rules because it can mean "may, " "must," or "should", and it is not generally used in contemporary written English.

I submit to you that the word "shall" is a "sacred" word. In my home state of Iowa, and I suspect many others, it is defined in the *Iowa Code*.

> *Iowa Code* Section 4.1(30): *Shall, must and may.* Unless otherwise specifically provided by the general assembly, whenever the following words are used in a statute enacted after July 1, 1971, their meaning and application shall be:
>
> a. The word "shall" imposes a duty.
>
> b. The word "must" states a requirement.
>
> c. The word "may" confers a power.

I suspected that other states' usage was similar. To determine if the use of the word "shall" was so widespread and "familiar in practice that its alteration would be disruptive," I performed a very quick Westlaw search using the definition of "shall" found in the Iowa Code.

My search yielded 10,000 results, and that was the truncated result. Obviously, there are thousands more. In about 20 minutes of reviewing those results I made it through fewer than 200 citations, but those 200 citations alone revealed that 20 states and the federal government use the word "shall" extensively in laws and court rules.

From my very brief research I have no fear in predicting that perusal of the full Westlaw search result would have shown that **all 50 states use the word "shall"** so extensively that it is "sacred." I believe the omission of the word "shall" from the federal rules of evidence will produce the disruptive result the editors sought to avoid.

Here's the quick list I compiled:

Federal law

1 - Iowa

2 - Mississippi

3 - Georgia

4 - Massachusetts

5 - Pennsylvania

6 - California

7 - Colorado

8 - Texas

9 - New Jersey

10 - Florida

11 - Kentucky

12 - Nebraska

13 - New Hampshire

14 - Alaska

15 - Kansas

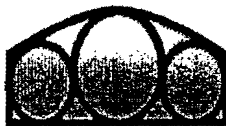
16 - Tennessee

17 - Maryland

18 - Montana

19 - Louisiana

20 - Hawaii



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Restyled Federal Rule of Evidence 1002
Maurice Baumgarten

Rules_Comments
11/11/2009 02:14 PM

09-EV-005

The proposed restyled Rule of Evidence 1002 would provide as follows:

"An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise."

Law students (and lawyers) are often confused by Rule 1002 and mistakenly believe that if you are trying to prove something, which happens to be contained in a document, you must produce the original document even if you are not actually trying to prove that the document has particular contents.

In order to eliminate this confusion, I propose that Rule 1002 be further amended to provide as follows:

"An original writing, recording, or photograph is required in order to prove **that it has certain content** unless these rules or a federal statute provides otherwise."

Similarly, Rule 1004 should also be changed to provide: "The original is not required, and other evidence that **a writing, recording, or photograph has certain contents** is admissible etc."

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OF COUNSEL:
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09-BK-005

November 2, 2009

09-CR-001

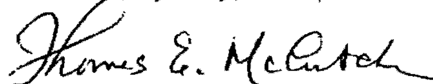
09-EV-006

Peter G. McCabe, Secretary
Administrative Office of the
United States Courts
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Dear Mr. McCabe:

I thank you for contacting me as a fellow member in the American College of Trial Lawyers with regard to the proposed amendments to the Federal Rules of Practice and Procedure. My comment really is this. I would like to see fewer amendments and changes made less often. In the area of rules, it is important to know them and it is not nearly as important that they be changed constantly. I think much would be gained if rules could only be changed every five (5) years. Stability is a great thing. Relearning the wheel every year is a negative.

Yours very truly,



Thomas E. McCutchen

TEM/jss

United States District Court
District of Oregon
1007 United States Courthouse
1000 S.W. Third Avenue
Portland, Oregon 97204-2902

Chambers of
ROBERT E. JONES
United States District Judge

November 3, 2009

09-EV-007

Rules Committee Support Office
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

I appreciate very much the hard work put into proposed amendments to the Federal Rules of Practice and Procedure.

There is one word in the federal rules that continues to trouble me and that is in the section on admissions by an agent. It provides that statements made by an agent or a *servant* and I doubt that we have many servants these days. I believe the word change should be "employee."

Sincerely,

ROBERT E. JONES
U.S. District Judge

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09-EV-008

E-MAIL TO: Rules_Comments@ao.uscourts.gov

FROM: Clifford A. Rieders, Esquire

DATE: November 19, 2009

RE: Preliminary Draft of Proposed Style Revision of the Federal Rules of Evidence

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I have reviewed the proposed style revision and I have a concern over the definition of "record", which "includes a memorandum, report, or data compilation." An argument could be made that this definition of "record" could have a limiting effect on admissible evidence by leaving out other possible written documents that are not a memorandum, report or data compilation.

For example, Black's Law Dictionary (Second Pocket Edition) defines "record" as "Information that is inscribed on a tangible medium or that, having been stored in an electronic or other medium, is retrievable in perceivable form." The Black's Law Dictionary definition of "record" appears to be more all encompassing than the definition used in the Proposed Rules of Evidence.

It is my purpose to bring to your attention the potential substantive effect that this definition may have. I realize that the committee has explicitly stated that the stylistic revisions are not to have any substantive change, but I do believe that the definition of "record" could be expanded.

CAR/srb
Cliff2009-corres

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW

09-EV-009

ROGER C. PARK
James Edgar Hervey
Chair of Litigation

December 3, 2009

to
Peter B. McGabe
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Mr. McGabe,

I would like to testify at the public hearing on the proposed style amendments to the Federal Rules of Evidence in San Francisco on January 29, 2010.

Best Wishes,

Roger C. Park

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SMU
DEDMAN SCHOOL OF LAW

09-EV-010

Public Comment on Proposed Federal Rule of Evidence 609

I recently chronicled the federal courts' longstanding misinterpretation of Rule 609, see *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L.R. 289 (2008), and submit this comment out of concern that Proposed Rule 609 will exacerbate this unfortunate situation by subtly altering the substance of the Rule.

Out of concern for the extreme prejudice that a defendant's criminal record can create in the eyes of the jurors, Rule 609 as originally enacted stated that the district court "shall" allow this type of impeachment "*but only if*" the court determined that the rigorous balancing test fashioned exclusively for criminal defendants who sought to testify was met. (See *Green v. Bock Laundry Mach. Co*, 490 U.S. 504, 519-520 (1989)). As the phrasing suggests, this provision was intended as a *limit* on the admissibility of such impeachment. (Prior to Rule 609's enactment, impeachment of criminal defendants had generally been allowed without restriction). Through the years, this language has been changed to the present – "shall . . . if the court determines" – but no alteration of the original meaning was intended.

The Proposed Rule, primarily through the replacement of "shall" with the term "must," but also by eliminating the "court determines" language and separating the modifying "if" from the rigorous balancing test that is the key limitation to prior conviction impeachment, reverses the rhetorical thrust of Rule 609. The Proposed Rule does not read like a limit on impeachment. Rather, the Proposed Rule suggests a primary intent to prod reluctant district courts to *allow* impeachment when the balancing test is met, and even leaves open the possibility that the courts may still permit impeachment when the balancing test is not met (something that is clearly not permitted under current law). A plausible reading of the Proposed Rule is that a district court "must" allow the impeachment if the balancing test is satisfied, and may allow the impeachment, in its discretion, if the test is not satisfied.

Due to the possibility that the restyled language will (inadvertently) push the courts further from Congress's intent, I urge that a revision incorporate the language of current Rule 609(a)(1) and, preferably, add "only" for further clarity as follows:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
 (A) shall be admitted, subject to Rule 403, if the witness is not a defendant in a criminal case; and
 (B) if the witness is a defendant in a criminal case, shall only be admitted if the probative value of admitting this evidence outweighs its prejudicial effect to the accused;

. . .

Sincerely,

Jeffrey Bellin (*jbellin@smu.edu*)
Assistant Professor of Law

Southern Methodist University PO Box 750116 Dallas TX 75275-0116

FEDERAL MAGISTRATE JUDGES ASSOCIATION

48TH ANNUAL CONVENTION - SANTA FE, NEW MEXICO
JULY 7 - JULY 9, 2010
www.fedjudge.org

09-CR-005

January 11, 2010

09-EV-011

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DIRECTOR AT LARGE

HON. SHON T. ERWIN
Lawton, OK

Peter G. McCabe, Secretary
Committee on Rules of Practice & Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Re: Comments on Proposed Amendments to Federal Rules of Criminal Procedure and Evidence

Dear Mr. McCabe:

The Federal Magistrate Judges Association submits the attached comments to the Rules Advisory Committee. The comments were first considered by the Standing Rules Committee of the FMJA, chaired by Judge Alexander. The committee members are:

Honorable S. Allan Alexander, Northern District of Mississippi, Chair
Honorable Hugh Warren Brenneman, Jr., Western District of Michigan
Honorable Geraldine Soat Brown, Northern District of Illinois
Honorable Joe B. Brown, Middle District of Tennessee
Honorable William E. Callahan, Jr., Eastern District of Wisconsin
Honorable Waugh B. Crigler, Western District of Virginia
Honorable Virginia M. Morgan, Eastern District of Michigan
Honorable Mary Pat Thynge, Delaware District Court
Honorable David A. Sanders, Northern District of Mississippi
Honorable Nita L. Stormes, Eastern District of Pennsylvania
Honorable Diane K. Vescovo, Western District of Tennessee
Honorable Andrew J. Wistrich, Central District of California

The committee members come from several kinds of districts and have varying types of duties. Many of them consulted with their colleagues in the course of preparing these comments. The comments were then reviewed and, unanimously approved by the Officers and Directors of the FMJA.

The comments reflect the considered position of magistrate judges as a whole. The FMJA has also encouraged individual magistrate judges to forward comments to you.

We are pleased to have t his opportunity to present written comments representing the view of the FMJA, and we welcome the opportunity to testify.

Sincerely,

Thomas C. Mummert, III
President, FMJA

COMMENTS OF FEDERAL MAGISTRATE JUDGES ASSOCIATION ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE (Class of 2011)

I. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE:

A. PROPOSED RULE 1 – Scope; Definitions

COMMENT: The proposed amendment expands the definitions of "telephone" and "telephonic" to address changes in technology. **The Federal Magistrate Judges Association endorses the proposed change.**

B. PROPOSED RULE 3 – The Complaint

COMMENT: Rule 3 authorizes consideration of complaints and issuance of arrest warrants and search warrants based on information submitted by reliable electronic means as provided for in proposed Rule 4.1. **The FMJA endorses the proposed changes subject to its reservations and proposed revisions to proposed new Rule 4.1.**

C. PROPOSED RULE 4 – Arrest Warrant or Summons on a Complaint

COMMENT: The proposed changes to Rule 4 authorize the issuance of arrest warrants and summonses based on information submitted by reliable electronic means as provided for in proposed new Rule 4.1,

the return of warrants by reliable electronic means, and the use of a duplicate original warrant to be shown to the defendant. **The FMJA endorses the proposed changes subject to its reservations and proposed revisions to proposed new Rule 4.1.**

D. PROPOSED RULE 4.1

COMMENT: Proposed Rule 4.1 incorporates provisions of Rule 41 that allow a warrant to be issued based on information submitted by reliable electronic means and extends those procedures to complaints, arrest warrants and summonses. **The FMJA endorses the principle underlying proposed Rule 4.1 but believes that the purpose of the proposed rule could best be achieved by revision to more accurately reflect the function of a magistrate judge and clarify procedures calculated to assure protection of constitutional rights.**

DISCUSSION: Proposed new Fed. R. Crim. P. 4.1 is based on current Fed. R.Crim. P. 41(d)(3), which authorizes a magistrate judge to issue a search warrant based on information and application transmitted by "telephone or other reliable electronic means" rather than by the agent's personal presence before the judge. Proposed Rule 4.1 is intended to simplify the procedure now set out in Rule 41(d)(3) and to apply the procedure both to search warrants and arrest warrants under the proposed amendment to Rule 4(d).

Although FMJA endorses the principle of proposed Rule 4.1, it has the following reservations and proposes the following revisions.

Current Rule 41(d)(3) is cumbersome to use in the most common situation: when the information communicated

by electronic means which forms the basis of probable cause is limited to the agent's affidavit. Under the current rule, the judge's "conversation" with the agent and government attorney must be recorded by a recording device, a court reporter or in writing; the recording or the court reporter's notes must be transcribed; and the transcription or written record must be filed, even if the agent is only swearing to the contents of an affidavit that has been faxed or e-mailed to the judge. That is more than is generally done when the agent appears before the judge in person and swears to the contents of a affidavit; generally, that exchange is not recorded. Proposed Rule 4.1 is intended to simplify the process by allowing a judge to simply prepare and file an order or summary if the information upon which the warrant is issued is limited to the affidavit, instead of recording the entire conversation. The objective – to make a clear and permanent record of the basis for the judge's probable cause determination in case of a motion to suppress – is still achieved.

The problem with the proposed Rule 4.1 is not the intent, but the drafting.

First, subparts 4.1(a) and (b)7 refer to a magistrate judge "deciding whether to approve a complaint." That is not correct. The magistrate judge does not *approve* a complaint; the magistrate judge decides whether there is probable cause for the charges in the complaint. Thus, the FJMA suggests that those subparts be revised to read as follows:

(a) ***In General***. A magistrate judge may consider information communicated by telephone or other reliable electronic means when deciding whether there is probable cause set forth in a complaint or

to issue a warrant or summons.

(b)(7) ***Signing***. If the judge decides that there is probable cause set forth in the complaint or to issue the warrant or summons, the judge must immediately: [etc]

The FMJA believes that this language would also assure the intent that the specified procedures apply whether the court is addressing pre-arrest situations or situations where the person has been taken into custody on a warrantless arrest.

Second, we found 4.1(b)(2) and (3) very confusing. For example, it is unclear whether the use of "verbatim recording" and "verbatim record" is intended to mean different things in subpart (b)(3).

In addition, current Rule 41(d)(3) has certain problems that are perpetuated rather than corrected in the proposed rule. Current Rule 41(d)(3) requires the judge to certify the accuracy of a transcription of any recording or court reporter's notes. Certification is the responsibility of the court reporter who prepares the transcript, not of the judge. Also, the FTR recording system used in many magistrate judge courtrooms is already certified, so there is no need for the judge to re-certify the accuracy of that recording. Similarly, the obligation to make arrangements for the recording of testimony should belong to the government attorney seeking the warrant, not the judge.

The FMJA suggests the following in lieu of proposed subparts (b)(2) and (3):

(b)(2). ***Recording and Certifying Testimony.*** If

the judge considers information in addition to the contents of a written affidavit submitted by reliable electronic means, the testimony must be recorded verbatim by an electronic recording device, a court reporter, or in writing. The judge must have any recording or court reporter's notes transcribed, have the transcription's accuracy certified, and file the transcript. The judge must sign any written record, certify its accuracy and file it.

(b)(3) ***Preparing a Summary or Order.*** If the testimony is limited to the affiant's attesting to the contents of a written affidavit submitted by reliable electronic means, the judge must simply prepare, sign and file a written summary or order.

In making these comments, the FMJA strongly endorses the recognition in Rule 4.1 that it is up to the magistrate judge to decide whether to consider a request for a warrant made by "telephone or other reliable electronic means," or instead to require the applicant and the attesting agent to present the application in person.

E. PROPOSED RULE 6 – The Grand Jury

COMMENT: The proposed amendment permits a grand jury return to be taken by video conference. **The FMJA endorses the proposed change**

F. PROPOSED RULE 9 – Arrest Warrant of Summons on an Indictment or Information

COMMENT: The proposed changes to Rule 9 authorizes the court to consider complaints and issuance of arrest warrants and summonses based on information submitted by reliable electronic means. **The FMJA endorses the proposed**

changes subject to its reservations and proposed revisions to proposed new Rule 4.1.

G. **PROPOSED RULE 32.1 – Revoking or Modifying Probation or Supervised Release**

COMMENT: The proposed change to Rule 32.1 would allow a defendant to participate, upon request, in proceedings involving revocation or modification of probation or supervised release by video teleconference. **The FMJA endorses the proposed change subject to its reservations and proposed revisions to proposed new Rule 4.1.**

H. **PROPOSED RULE 40 – Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District**

COMMENT: The proposed change would allow a defendant to consent to participate via video conference in a proceeding on arrest for failure to appear in another district. **The FMJA endorses the proposed change.**

I. **PROPOSED RULE 41 – Search and Seizure**

COMMENT: The proposed change deletes provisions now found in new Rule 4.1 and authorizes return of warrants by reliable electronic means. **The FMJA endorses the proposed changes subject to its reservations and proposed revisions to proposed new Rule 4.1.**

J. **PROPOSED RULE 43 – Defendant's Presence**

COMMENT: The proposed change allows a defendant who consents in writing to participate in arraignment, trial and sentencing in misdemeanor cases via video conference. **The FMJA endorses the proposed change.**

K. PROPOSED RULE 49 – Serving and Filing Papers

COMMENT: The proposed change authorizes local rules permitting papers to be filed, signed or verified by electronic means. **The FMJA endorses the proposed change.**

II. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

GENERAL COMMENT: As an initial matter, the FMJA doubts the value of restyling the Federal Rules of Evidence. Unlike the Civil Rules and the Criminal Rules which had undergone substantial evolution and amendment since they were first adopted, the Rules of Evidence are comparatively recent and were adopted as a complete body. There have been very few amendments. The definitions and phrasing have become part of the lexicon of the trial courts and trial bar. There seems to be little to gain and a risk of much confusion in restyling for restyling's sake, as shown in the discussion of Rule 801(c), below.

Secondly, the FMJA questions the use of "but" and "and" to begin sentences in the proposed revisions. Although the formal grammar that previously marked legal writing has been loosened, the drafting of rules calls for precision. In interpreting a rule, each word is construed to have a purpose. It is not clear what purpose is served by the words "but" and "and" in the revised rules. Take, for example, proposed Rule 611(c), which reads, in part:

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

What is the intention of the drafters in including the word "and" in the second sentence? Is it intended to suggest that the original modifier of the first sentence ["ordinarily"] also applies to the second sentence? If so, why wasn't the first sentence drafted to include that thought, as follows:

> Ordinarily, the court should allow leading questions on cross-examination or when a party calls a hostile witness, an adverse party or a witness

identified with an adverse party.

The FMJA recommends that the use of "but" and "and" be reviewed in each proposed rule in which they appear. Unless the words serve a purpose in the rule, they should be omitted, and each respective sentence should begin with the word following "but" and "and."

The FMJA does not address every change proposed by the Rules Advisory Committee and limits its comments below to those specific proposed amendments which it believes are unnecessary or may cause confusion.

A. PROPOSED RULE 801 – Definitions That Apply to This Article; Exclusions from Hearsay

RULE 801(c) Hearsay.

COMMENT: **The FMJA strongly opposes changing current Rule 801(c), which addresses the definition of hearsay. If the Rule is to be changed, however, the FJMA suggests revision of the proposed amendment.**

DISCUSSION: The definition of hearsay as currently written is clear; it has been used for years as written, it is engraved in the law, the courts and practicing Bar are comfortable with it, and there is no real reason for the change. Importantly, the Committee Note makes no comment about the change; the only comment found in the Note relates to Rule 801(d). The FMJA believes that any modification to this long-established definition will inevitably be interpreted as having some impact on the law, and the change will create more problems than it will resolve.

The proposed revision says, "'Hearsay'" means a prior statement – one the declarant does not make 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."

The last clause – "the matter asserted by the declarant" – is misleading. The limitation should be stated differently to eliminate redundancy and to conform to established law, *i.e.,* the matter asserted **in that statement**. Hearsay is not a statement offered to bolster the truth of **any statement** made by the declarant; it is a statement offered to prove the truth of the matter asserted **in that very statement.** To delete that limitation is to suggest that the hearsay rule applies to any statement used to bolster the truth of the declarant, which is not the law.

As noted, the reiteration of "by the declarant" is redundant. The use of the word "prior" suffers from the same flaw: if the statement was not made while testifying at the current trial or hearing, then it is necessarily a "prior" statement.

The FMJA thus opposes the proposed amendment in its entirety, but suggests the following revision if Rule 803(c) is to be changed:

(c) **Hearsay.** "Hearsay" means a ~~prior~~ statement – one the declarant does not make 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~~.

B. PROPOSED RULE 803(6) – Records of a Regularly Conducted Activity

COMMENT: Subsection (D) erroneously refers to 902(b)(11) or (12). The reference to "Rule 902 (b)(11) or (12)" should be amended to read "Rule 902(11) or (12) because there is no subparagraph (b) in Rule 902 in the proposed Rules of Evidence.

C. PROPOSED RULE 902(11) – Certified Domestic Records of a Regularly Conducted Activity.

COMMENT: This rule is designed to allow for the admission of a domestic record under Rule 803(6) upon certification in lieu of securing the presence of a custodian or "other qualified witness" to offer testimonial certification in compliance with the rule. **The FMJA suggests that minor change will more accurately reflect the Rule's effect and suggests limited revision.**

DISCUSSION: The draft language speaks in terms of meeting the requirements of Rule 803(6) "as modified," when Rule 902(11) simply provides an alternative mechanism to "satisfy" those requirements in lieu of the person's appearance to testify. The FMJA proposes the following language be substituted for the first sentence of Proposed Rule 902(11):

The requirements of Rule 803(6)(D) for the introduction of an original or copy of a domestic record are met if accompanied by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court.

D. PROPOSED RULE 902(12) – Certified Foreign Records of a Regularly Conducted Activity

COMMENT: This rule is designed to allow for the admission of foreign, as opposed to domestic, records of regularly conducted activities under Rule 803(6) upon a written certification in lieu of securing the presence of a custodian or "other qualified witness" to offer testimonial certification in compliance with the rule. **The FMJA suggests that minor change will more succinctly and accurately reflect the Rule's effect and suggests limited revision.**

DISCUSSION: The FMJA proposes the following language be substituted for the first sentence of Proposed Rule 902(12):

In a civil case, the requirements of Rule 803(6)(D) for the introduction of an original or copy of a foreign record of regularly conducted activity are met upon certification signed in a manner which, if falsely made, would subject the maker to criminal penalty in the country where the certification is signed.

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW

ROGER C. PARK
James Edgar Hervey
Distinguished Professor of Law

09-EV-012

February 4, 2010

Judicial Conference Advisory Committee on the
Federal Rules of Evidence
Rules Committee Support Office
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Members of the Advisory Committee on the Federal Rules of Evidence,

I'd like to start by congratulating the Committee on its work. The restyling will make it easier for students to learn the Federal Rules of Evidence. I wish the rules had been written that way in the first place.

In particular, I' like to compliment the Committee for taking the misleading word "admission" out of Rule 801(d)(2) and for changing Rule 609(a) to present its categories more clearly. I was also pleased to see the proposal at your November meeting to change Rule 405(a) so as to specify that its second sentence of the rule refers to the cross-examination of a character witness. Those changes will clarify language that has been problematic for students.

I'm amazed at how successful the Committee has been in avoiding substantive changes. The restyled rules obviously have been carefully vetted.

Two of the comments that I had intended to make were mooted by action at your November meeting. However, I still have comments about three rules. I think that restyled Rule 104(a) arguably makes a substantive change. Restyled Rules 103(c) and 401 do not make substantive changes, but I think that they shorten the existing rules in ways that make them less clear.

RULE 103(c)

Current rule 103(c) provides that:

"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."

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e-mail: parkr@uchastings.edu

The restyled version takes out the examples that follow the words "such as." I suggest that the examples be reinstated. Examples almost always help clarify a concept, and no one is likely to think that the list of examples is exhaustive.

RULE 104(b)

In the November 2009 meeting, the following version of Rule 104(b) was proposed:

"When the relevancy of evidence depends on whether a fact exists, the proponent must provide the court with evidence sufficient to support a finding that the fact does exist. The proponent's showing may be made at the time the evidence is offered or later in the trial."

In terms of clarity, this is quite an improvement over the current rule, which has dense language about "fulfillment of a condition of fact." Moreover, the Committee's action at the November 2009 meeting improves restyled Rule 104(a) and lessens the danger of unintended substantive change. However, as Professor Fred Moss has suggested on the evid-fac-l listserve, the November 2009 version does not specifically provide the judge with discretion over when the showing must be made. (The "may" in the final sentence seems to give the proponent an option without specifically providing that the judge can control the timing.) I suggest that the rule be revised to read as follows:

"When the relevancy of evidence depends on whether a fact exists, the proponent must provide the court with evidence sufficient to support a finding that the fact does exist. In the discretion of the judge, the proponent's showing may be made at the time the evidence is offered or later in the trial."

Also, I suggest that the Advisory Committee Note state that if a timely showing is made that the foundation fact is true, then the judge must admit the evidence unless it is excluded by a rule other than Rule 104(b).

RULE 401

The current rule provides:

"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."

The proposed restyling would bring a shorter rule:

"Rule 401. Test for Relevant 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."

I disagree with this change. I like the current rule's final words, "than it would be without the evidence." Those words encourage a comparison between the state of the proof with and without the proffered evidence. The restyled rule means the same thing, but making a sentence as short as logic permits does not always make the sentence more clear. The old version helps students remember that the evidence does not need to make the fact more probable than not, but only more probable than it would be without the evidence. In class, I find myself saying things like "it only has to be more probable than it would be without the evidence" or "it only has to move the needle a little bit."

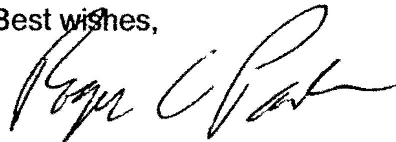
Professor Michael Avery of Suffolk was the first to make this point on the faculty evidence list. Several evidence professors responded "amen" or made comments agreeing with him.

I suggest that the body of the restyled rule be changed to read as follows:

"Evidence is relevant if it has any tendency to make a fact that is of consequence in determining the action more probable or less probable than it would be without the evidence."

Thank you for the opportunity to comment.

Best wishes,



Roger C. Park

09-EV-013

Comments on proposed restyling of Federal Rules of Evidence

Richard D. Friedman to Rules_Comments 02/15/2010 04:51 PM

I am a professor at the University of Michigan Law School, and have been engaged in Evidence scholarship since I first began teaching, in 1982. I am writing with some comments on the proposed restyling of the Federal Rules of Evidence.

Rule 104(a): It seems to me that the deletion of the reference to Rule 104(b) is a mistake. I think I understand the thinking that the "preliminary question" for purposes of Rule 104(a) when a Rule 104(b) question is presented is whether "evidence sufficient to support a finding that the condition is fulfilled" has been introduced, but I believe the reference in Rule 104(a) to Rule 104(b) helps emphasize how different the question before the court is depending on whether it is or is not presented in the Rule 104(b) context.

Rule 104(b): I believe that as long as the Rules are being restyled, it would be far preferable to eliminate the outmoded "relevancy" in favor of "relevance".

Rule 104(b): I think the change from "shall" to "may" requires further consideration. If evidence sufficient to support the finding *has* been introduced, then so far as the concerns raised by this Rule are involved, there is no reason not to admit the evidence.

Rule 105: I think the "one purpose" language of the current Rule is preferable -- less weird-sounding -- than "a purpose".

Rule 412(b)(1)(B): I think the term "sexual behavior toward the defendant" should be changed. I don't believe that, in most contexts, one person engages in sexual behavior *toward* another person. The best word may simply be "with".

Rule 801(b): I believe use of the indefinite article is preferable. Rule 801 has defined "statement", but it hasn't identified a particular statement for purposes of Rule 801(b). More substantively, there may be more than one declarant of a given statement.

Rule 801(c): I believe this rule, which is a critical one, should be changed in several respects. As I confirmed by giving an exam question based on it, it is potentially very confusing.

First, the last word should be changed from "declarant" to "Statement". The declarant may be making another statement while testifying, or perhaps the declarant made another pre-trial statement. If you don't pay attention to anything else I say here, I hope you change that word.

Second, the use of the term "prior statement" is very confusing. A witness may testify and then leave the witness stand and make a statement. That is hearsay if offfered to prove the truth of what it asserts. In other words, "prior statement" is not the same as "one the declarant does not

make while testifying at the current trial or hearing".

Third, the revamping of the appositive clause will suggest to some readers that this has something to do with what the declarant left unsaid ("one the declarant does not make")

At a minimum, I think you should address the second and third concerns by adding "that is," before "one the declarant" to try clarify that "prior statement" is a term of art defined by the appositive clause.

Fourth, while you are at it, you should change "the" matter asserted to "a" or "any". This will not do violence to the time-honored phrase. English statements of the rule use "any". A statement may assert many matters; if it is offered to prove one of them it is hearsay to that extent.

So you might consider redrafting this Rule to read something like: "'Hearsay' means a statement (1) other than one the declarant makes while testifying at the current trial or hearing, (2) that a party offers in evidence to prove the truth of a matter asserted by the statement."

Rule 801(d)(2): I appreciate the reasons for wanting to discard the term "admission". But at last "admission" was a term of art. The trouble is that the new heading of the Rule is *not* a term of art, and it is blatantly inaccurate in describing the contents of the Rule. One could perhaps argue that a statement made by a person authorized to do so by a party is the party's statement, though I think even this is dubious. But statements not authorized by the party but made on a matter within the scope of the relationship -- the only type of statement for which subdivision (D) matters -- are plainly *not* statements of the party. And neither are statements falling within subdivision (E), unless the party happens to have authorized the making of the statement. I suggest changing the heading to **A Statement by or Attributed to an Opposing Party.**

Rule 801(d)(2): I don't think you need the word "opposing" in the body of the rule -- it suffices to say that the statement is offered against the party.

Rule 801(d)(2): Given the energy that James Duane has poured into showing that "conspirator" rather than "co-conspirator" is the proper term, I think it would be better to follow his advice.

I should add that I am chair this year of the ABA's Committee on the Federal Rules of Criminal Procedure and Federal Rules of Evidence. I had hoped to generate comments of the Committee on the proposal, but the press of other matters prevented me from doing so. I did as a result of preliminary consideration of making such comments receive a set of comments from Mr. Joshua Camson, and I pass them on, without additional comment by me:

> I think these revisions will be a tremendous help for law students, lawyers, and judges in sorting out evidentiary issues. I looked them over, and wanted to share a few thoughts:
>
> The changes to rule 404 make it significantly easier to understand. However, the proposed rules get rid of the phrase "conformity therewith." In the introductory comments, the authors say that they do not want to get rid of any language that is

commonly used and understood in reference to certain rules. They give examples like "truth of the matter asserted." I think the phrase "conformity therewith" falls into that category, and it should come back into 404.
In the proposed rule 405(b), the authors add the word "relevant." Previously, the rule read to allow any specific instances of a person's conduct. Those instances of conduct would have to prove the trait of character in question. However, they need not necessarily be independently relevant to the case at hand. I think there is a risk of changing the rule by inserting the "relevant" qualifier. It could be read to mean that the specific conduct must be relevant to the case at hand. So if the rulemakers want to keep "relevant" in the new rule, perhaps it could read "...may also be proved by specific instances of the person's conduct, relevant to proving the character or trait."
In the new rule 412(a) and (b) the word "alleged" is removed, that previously qualified "victim." I was reading the entire rule and wrote out a long comment about how it needs to say "alleged victim" when i got to 412(d) which defines victim as including an alleged victim. I think this definition should go at the beginning of the rules with the rest of the definitions. That will make things clearer.
The restyling of rule 608 is particularly helpful
Removing the word "admissions" from the hearsay rules was also a very good decision. The committee's note explaining the confusion inherent in the word "admissions" is spot on. Thank you for your kind consideration.

Respectfully submitted,

Richard D. Friedman
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09-EV-014

VIA FIRST CLASS MAIL

March 3, 2010

To: Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure

Re: The Proposed Restyling of the Federal Rules of Evidence

The undersigned are Council members and other leaders of the American Bar Association's Section of Litigation.[1] The ABA's Litigation Section is comprised of over 65,000 members nationwide. We are the largest specialty section of the American Bar Association, itself the largest bar organization in the country. We are dedicated to helping attorneys be better advocates for their clients. One of our missions is to assist in the improvement of the administration of justice.

We have reviewed the proposed restyling of the Federal Rules of Evidence and appreciate the opportunity to provide comments during the ongoing public comment period. We commend the Advisory Committee on their excellent and careful work. The overwhelming majority of the proposed changes will lead to clearer rules that will be of great benefit to the practicing bar and the public. We respectfully submit the following comments to the proposed restyling in an effort to improve the rules even further and to highlight any suggested stylistic changes that may have unintended substantive import.

Respectfully submitted,

Lorna G. Schofield
Ronald L. Marmer
Jeffrey J. Greenbaum

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[1] Ms. Schofield and the other persons listed in the column following her name are officers and members of the Council of the Section of Litigation of the American Bar Association. Ms. Best serves as the Section's liaison to the Advisory Committee on Federal Evidence Rules and Mr. Wolfsohn serves as Co-Chair of the Section's Evidence Committee. We are submitting our comments in our individual capacities: they have not been approved by the ABA nor do they reflect ABA policy.

Lawrence J. Fox
Patricia Lee Refo
David C. Weiner
Kirk Ingebretsen
Deana S. Peck
Ralph A. Taylor, Jr.
Louis F. Burke
Koji F. Fukumura
Don Bivens
Ronald W. Breaux
Joanne A. Epps
Sheldon Finkelstein
Amy J. Longo
Ray Marshall
James A. Reeder, Jr.
Robert L. Rothman

Landis C. Best
David J. Wolfsohn

Rule 101

With respect to the phrase "electronically stored information," the reference is apparently to the use of that phrase in the Federal Rules of Civil Procedure. If that is indeed the case, perhaps that should be made explicit.

Rule 102

There are two "ends" in the latter part of this sentence: that of ascertaining the truth and that of securing a just determination. Accordingly, we suggest that the plural—"ends"—be used.

Rule 104

We generally agree with the proposed revisions, but suggest, as does the American College of Trial Lawyers ("ACTL"), that Rule 104(b) on conditional relevancy could be further clarified. Unless the committee considers the "existence of fact" and whether a "condition of fact is fulfilled" to be conceptually different, the ACTL proposal adds clarity, although we would propose a slight modification: "When the relevancy of evidence depends on whether one or more facts exist, the court may admit the evidence upon, or subject to, the introduction of ~~proof~~ evidence sufficient to support a finding that those facts <u>or that fact</u> exist". *Garner* recognizes a distinction, relevant here, between "evidence" and "proof."

Rule 201

With regard to section (a), we suggest that the word "of" be placed before "legislative," as follows: "This rule governs notice of an adjudicative fact only, not <u>of</u> a legislative fact."

Rule 402

While the bullet points make the rule clearer from a visual perspective, we propose that use of numbers or letters would be preferable. Use of numbers or letters facilitates citation, while still fulfilling the goal of visual clarity intended with use of the bullet points.

Rule 404

In (a)(1), the word "character" is retained as modifying "trait." Accordingly, to avoid questions and arguments over whether the omission of the word "character" in the second part of section (a)(1) is significant in a substantive sense, we propose that it be added as follows: "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 *character* trait. Likewise, we propose adding the word "character" in section (a)(2) as modifying "trait": "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 *character* 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 *character* trait."

Rule 406

We are concerned that the replacement of the strong language "is relevant" with "may be admitted" could result in an unintended substantive effect, even though we understand the reason for the change. The ACTL has recommended that the last sentence of this rule be deleted as superfluous, since corroboration or eyewitness testimony goes to the weight, not admissibility, of the evidence. We think, however, that if the committee retains the change from "is relevant" to "may be admitted," there is a need to retain the last sentence as well to underscore the relevance of this type of evidence.

Rule 407

While the bullet points make the rule clearer from a visual perspective, the addition of numbers or letters might be helpful for facilitating citation and case law, while still achieving the visual clarity provided by the bullet points.

We are seriously concerned that the use of the phrase "may admit" to replace "[t]his rule does not require" could very well have an effect on the decisional calculus. The new phrasing seems affirmatively to encourage the court to admit the evidence, whereas the existing phrasing merely says that Rule 407 does not affect admissibility when the evidence is offered for another purpose. We believe that this type of amendment could occasion litigation regarding the rule's substantive meaning, thereby potentially resulting in a substantive change.

We agree with the ACTL's recommendation that the word "subsequent" be added before "measures" in the first sentence. Although such an addition would technically be redundant in light of the word "earlier" that appears later in the sentence and therefore arguably violate one of the style guidelines, the use of "subsequent" meshes nicely with the title of the rule and makes the meaning clear at the very outset of the sentence.

Rule 408

The existing version of Rule 408(a)(1) excludes certain statements made "in compromising or *attempting* to compromise the claim" whereas the proposed restyled Rule omits the word "attempting" and instead refers to such statements made "in order to compromise the claim." We surmise that this was done because subsection (2) should be construed as covering all conduct or statements that are made in the compromise negotiations, which would include "attempts" to compromise. We are nonetheless concerned that lawyers may argue that 408(a)(1)'s prohibition extends only to statements made in the course of settlement discussions that have in fact succeeded and resulted in an agreed-upon settlement. This could undermine the purpose of the Rule, and be considered arguably substantive.

Rule 411

We are concerned that the substitution of the words "have liability insurance" for "insured against liability" could result in an unintended substantive change. One tends to consider someone who has liability insurance as someone who has a liability insurance policy. By con-

trast, the phrase "insured against liability" has a broader connotation, including, for example, indemnity agreements that are not often thought of as "liability insurance." Accordingly, we recommend retention of the original phrasing.

Rule 501

While the bullet points make the rule clearer from a visual perspective, we suggest that the use of numbers or letters might make specific citation easier while still achieving the visual clarity provided by the bullet points.

In the third bullet point, the use of the word "other" seems misplaced. Neither the United States Constitution nor federal statutes are rules prescribed by the Supreme Court.

We would recommend the use of commas rather than semicolons immediately preceding the first two bullet points. See, e.g., *Words Into Type* at 182: "The semicolon indicates a more definite break in thought or construction than a comma would mark, and calls for a longer pause in reading. It is used wherever a comma would not be sufficiently distinctive." We do not think a "longer pause" is called for here, so commas should suffice.

Rule 604

We think that the proposed revision could result in a substantive change. The existing Rule 604 provides that a translator is subject to the rules relating to the qualification of an expert, whereas the proposed restyled rule simply requires that a translator be qualified without cross-referencing the rules and case law related to qualification of an expert. Arguably, this change could lessen the requirements for qualifying an interpreter.

Rule 608

We agree with the comment of the ACTL that the phrase "having a character for truthfulness or untruthfulness" is somewhat awkward and confusing. One does not usually speak of "a" character in this context. The ACTL's proposed language is an improvement: "A witness's credibility may be attacked or supported by evidence in the form of an opinion about—or a reputation for—truthfulness or untruthfulness."

We also agree with the comment of the ACTL that the use of the word "accused" is so important in existing section (b) that it should be retained in new proposed section (c) lest its absence be interpreted as having some substantive import.

Rule 609

We propose that the meaning might be somewhat clearer if, instead of using the phrase "This subdivision (b) applies if more than 10 years have passed . . ," the subsection began as follows: "When more than 10 years have passed . . ." The period after "later" would then be replaced with a comma.

Rule 611

We agree with the comment of the ACTL that use of the words "in the exercise of discretion" in the existing rule provides meaning that is lacking in the proposed revision. We also suggest that the semicolons be replaced with commas.

Rule 612

The ACTL suggests that subdivision (b) should be broken down into two subdivisions: with subdivision (b) dealing exclusively with "Adverse Party's Options," and a new subdivision (c) dealing with "Deleting Unrelated Matter." We agree.

The ACTL also suggests that the exception pertaining to 18 U.S.C. § 3500 is out of place, since it has little to do with an Adverse Party's Options, and nothing to do with Deleting Unrelated Matter. Accordingly, the ACTL suggests that the reference to section 3500 appear in subdivision (a), regarding "General Application." We agree.

Professor Kimble and the ACTL propose that the words "unrelated matter" in lines 15-16 not be used, and that the existing "matter unrelated to the testimony" be retained, or that the sentence read: "If the producing party claims that the writing includes matter unrelated to the testimony, the court must . . . ." We agree.

Mr. Meyers and the ACTL question why the reference to "justice" is deleted in line 21 but retained in line 24. We would recommend either eliminating "justice" from both lines 24 and 10, or leaving it in line 21.

Rule 613

Everyone in the courtroom still uses the phrase "cross examination." No one calls it "cross questioning." For sure, we are talking about the same thing when using either word. But the word "examining," like "examination," is prevalent and accepted in the courtroom. We therefore do not see any benefit in substituting "examining" with "questioning."

Rule 701

We disagree with the deletion of the word "inference." The word "opinion" means a belief or conclusion that is not necessarily based on substantiated proof or evidence. On the other hand, an inference is the result of reasoning from factual knowledge or evidence. An inference may not rise to the level of a belief or conclusion. The words are therefore not synonymous. Accordingly, the deletion of the word "inference" could have a substantive effect on the interpretation of the rule.

Rule 703

We disagree with the deletion of the word "inference." The word "opinion" means a belief or conclusion that is not necessarily based on substantiated proof or evidence. On the other hand, an inference is the result of reasoning from factual knowledge or evidence. An inference may not rise to the level of a belief or conclusion. The words are therefore not synonymous. Accordingly, the deletion of the word "inference" could have a substantive effect on the interpretation of the rule.

Rule 704

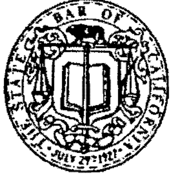
We disagree with the deletion of the word "inference." The word "opinion" means a belief or conclusion that is not necessarily based on substantiated proof or evidence. On the other hand, an inference is the result of reasoning from factual knowledge or evidence. An inference may not rise to the level of a belief or conclusion. The words are therefore not synonymous. Accordingly, the deletion of the word "inference" could have a substantive effect on the interpretation of the rule.

Rule 705

We disagree with the deletion of the word "inference." The word "opinion" means a belief or conclusion that is not necessarily based on substantiated proof or evidence. On the other hand, an inference is the result of reasoning from factual knowledge or evidence. An inference may not rise to the level of a belief or conclusion. The words are therefore not synonymous. Accordingly, the deletion of the word "inference" could have a substantive effect on the interpretation of the rule.

Rule 801

We believe the word "manifested" in Rule 801(d)(2)(B) should be retained instead of the proposed replacement "appeared." The phrase "a statement of which the party has manifested an adoption or believe in its truth," while admittedly somewhat awkward, does convey a much more active role on the part of the "party" than the word "appeared," which focuses entirely on the observer rather than the "party." Accordingly, the use of the word "appeared" instead of "has manifested an adoption . . ." could result in a substantive change.



THE STATE BAR OF CALIFORNIA

– COMMITTEE ON FEDERAL COURTS

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February 16, 2010

09-BK-133

Via E-mail

Rules_Comments@ao.uscourts.gov

09-CR-007

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

09-EV-015

Re: Proposed Amendments to the Federal Rules

Dear Mr. McCabe:

The State Bar of California's Committee on Federal Courts ("Committee") has reviewed the proposed amendments to the Federal Rules of Bankruptcy Procedure, Federal Rules of Criminal Procedure, and Federal Rules of Evidence. The Committee appreciates the opportunity to submit these comments. By way of background, the Committee is comprised of attorneys throughout the State of California who specialize in federal court practice and volunteer their time and expertise to analyze and comment upon matters that have an impact on federal court practice in California. The Committee consists of a broad range of federal practitioners, including members with civil, criminal, bankruptcy, and appellate experience.

I. Federal Rules of Bankruptcy Procedure

Rule 2019

The Committee endorses and adopts the comments submitted by the Insolvency Law Committee of the Business Law Section of the State Bar of California, by letter dated February 12, 2010. With regard to the proposed amendments to Rule 2019, the Committee submits the following additional comments.

The Committee believes that the rule should only apply to the extent that an entity, group or committee not only (a) consists of or represents more than one holder of debt or equity but also (b) participates in the bankruptcy case in that capacity, as opposed to a standing organization with purposes beyond the scope of the case that participates in other ways (such as by filing an amicus brief). For example, if a "League of Concrete Vendors" were a multi-purpose association

which had activities beyond the scope of the specific bankruptcy case at issue (such as the National Association of Manufacturers (NAM)), and if that League were to file an amicus brief and were not representing any holders of debt or equity in the case, then Rule 2019 should not apply to the League. In addition, even if such a League were to represent creditors or equity holders in the case, the Committee believes the League should only have to disclose information relative to such creditors, not all of its other members.

The Committee also urges that any revision of Rule 2019 include clarifying language that limits its application only to (a) an "entity, group or committee" when the purpose of such a grouping is to act in the name of an official or unofficial class or group of creditors or interest holders, as opposed to the use of a name of convenience to cover specific named parties, or (b) such other entity, group or committee as the court may direct, after notice and a hearing, provided that (i) such entity, group or committee is participating in the case by seeking or opposing the granting of relief, and (ii) any such disclosures are subject to the ordinary rules limiting discovery (such as requirements as to relevance, and protections of trade secrets and confidences). For example, the Committee believes that Rule 2019 should not normally apply if an appearance is made by "Company A, Company B and Person C, referred to herein as the 'Equipment Lessors.' " In such a circumstance, the group title of "Equipment Lessors" is purely a convenient shorthand reference term for the specific parties named once in each pleading or appearance, and does not denote authority to represent any other parties, other than those specifically named.

II. Federal Rules of Criminal Procedure

Proposed New Rule 4.1

The Committee is concerned that proposed Rule 4.1 would no longer require a recording or verbatim transcription of the magistrate and the affiant during the communication pertinent to obtaining warrants, complaints, and summons. Although the rule recommends that the judge record the testimony taken under oath, there is no requirement to do so. A written summary or order suffices where the testimony is limited to attesting to the contents of a written affidavit transmitted by reliable electronic means.

The Committee is concerned about the possibility of losing a complete and accurate record. In contested search and arrest warrants, it is important to have a transcript of the probable cause determination. While the probable cause statement is available to counsel, the background is not. For this reason, the Committee recommends that the requirement for transcription or recording stay intact, whether it means producing and maintaining voice recordings, email, or other recording methods necessary to maintain a clear and complete record.

III. Federal Rules of Evidence

As an initial matter, although all the Committee Notes to the revised rules indicate the changes are stylistic and not substantive, for consistency and clarity, we believe there should be a general rule (comparable to Federal Rule of Civil Procedure 86), expressly stating that the 2010

revisions are stylistic only. In addition, we note that the proposed amendments to several rules have added or changed the subpart headings, which could make legal research confusing. One example is Federal Rule of Evidence 608(b), which now has two paragraphs, but the substance of the second paragraph would be moved to Federal Rule of Evidence 608(c). For each rule that has a change in the subpart headings, we suggest that the Committee Notes mention the change so that legal research will not be hampered.

As for the specific rule changes, the Committee has the following comments:

Rule 104(b)

The Committee believes the proposed revisions make the rule less clear, and suggests that the language proposed by the American College of Trial Lawyers be adopted instead.

Rules 802 and 901(b)(10)

The current version of Federal Rule of Evidence 802 provides that hearsay is not admissible except as provided by the Federal Rules of Evidence or "by other rules prescribed by the Supreme Court *pursuant to statutory authority or by Act of Congress*" (emphasis added). This language suggests that rules prescribed by the Supreme Court cannot provide for admissible hearsay absent some specific statutory authority or Act of Congress. The proposed revision would delete the phrase "pursuant to statutory authority or by Act of Congress." If deletion of that phrase expands the authority of the Supreme Court, it would be a substantive change, and not simply stylistic.

The current version of Federal Rule of Evidence 901(b)(10) deals with the requirement of authentication or identification, and provides for any method of authentication or identification "provided by Act of Congress or by other rules prescribed by the Supreme Court *pursuant to statutory authority*" (emphasis added). Similar to the proposed amendment to Rule 802, the proposed amendment to Rule 901(b)(10) would delete "pursuant to statutory authority." If deletion of that phrase expands the authority of the Supreme Court, it would be a substantive change, and not simply stylistic.

Rules 901(b)(7)(B), 902(4) and 1005

In each of these three rules, the phrase "authorized to be recorded or filed . . . " would be changed to "lawfully recorded or filed." In the Committee's view, this leaves it ambiguous as to whether "lawfully" modifies both "recorded" and "filed," which we believe the original rule intended. Therefore, we suggest that the amendments to these three rules add the word "lawfully" in front of "filed," reading "lawfully recorded or lawfully filed."

Disclaimer

This position is only that of the State Bar of California's Committee on Federal Courts. This position has not been adopted by the State Bar's Board of Governors or

overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

Very truly yours,

Joan Jacobs Levie
Chair, 2009-2010
The State Bar of California
Committee on Federal Courts

09-EV-016

Restyled Federal Rules of Evidence
John Scott to: Rules_Comments 02/15/2010 12:56 PM
Cc: "Joe Kimble"

For starters, I have to say I am a huge fan of the restyled rules in general, and especially so of a few in particular. I was a trial lawyer for a few years before I entered academe in 1978, and I have taught an average of three sections of Evidence a year since 1987, so I know firsthand the difficulties that students and less experienced lawyers (and even a few judges) have understanding some of our current rules. I am a faculty colleague of Prof. Joe Kimble, the principal draftsman of the revisions, and no one is a bigger fan of Joe's work than I am.

My favorite restyled rule is 801(c). I applaud the Committee for retaining the added three words at the end of the timeless, sacred phrase so that it becomes a much more manageable "truth of the matter asserted by the declarant." The matter asserted has always been problematic for a lot of rule-readers, and now that it is plain that the matter asserted is simply the contents of the declarant's statement, I'm confident there will be less confusion.

In that same vein, I'd like to strongly encourage the Committee to add four words to the last provision of 405(a). I'd like it to read "on cross examination of the character witness," because, despite all the contextual "clues," that is absolutely not obvious to everyone. Many students and more than a few less experienced lawyers think the provisions of 405(a) are somehow severable, and that one can cross examine anyone about the defendant's (or victim's) relevant specific instances of conduct once the defendant has opened that door. They think one can cross the defendant about those instances of conduct if he elects to testify about the facts of the case. And the confusion all stems from the lack of my proposed additional four words tacked onto "cross examination." I have heard that this proposal has been preliminarily rejected as "too obvious," but if the standard is whether a lawyer without specific familiarity with the subject could be expected to get it mostly right after just reading the rules, then at present we fall short of the standard. It is NOT obvious to most that the cross examination of which the rule speaks is of the character witness. I know, it should be -- but it isn't. Four words will correct that condition.

I think the ACTL is right that the current revision of Rule 410(a)(3) seems to misunderstand the rule. The current "statement about either of these pleas" is not the equivalent of "statement made in the course of any proceedings."

My best wishes for passage of the revisions. I can't wait to see the difference in student understanding when I get to teach out of them.

Prof. John Norman Scott
Thomas M. Cooley Law School
Lansing, MI

09-EV-017

COMMENTS CONCERNING

THE PROPOSED RESTYLED FEDERAL RULES OF EVIDENCE

Katharine T. Schaffzin[1]

I. Introduction

The Proposed Restyling of the Federal Rules of Evidence represents a tremendous improvement to the current Rules. The Advisory Committee on Evidence Rules should be commended for its excellent work on such an overwhelming task with such far-reaching consequences. These Comments are intended to serve as a small contribution to this effort.

The stated goal of the restyling project undertaken by the Committee, like that of the projects to restyle the Rules of Appellate Procedure, the Rules of Criminal Procedure, and the Rules of Civil Procedure, is to amend the Rules of Evidence (the "Rules") to make them more easily understandable and to achieve consistency in style and terminology. The Committee endeavored to avoid any restyling that would result in a substantive change in the application of any rule.[2]

One type of alteration that the Committee deemed "substantive" was any amendment to a "sacred phrase." The Committee defined "sacred phrase" to mean any phrase that has "become so familiar in practice that to alter [it] would be unduly disruptive." Style improvements changing a "sacred phrase" were avoided.[3]

The Committee successfully restyled several clauses "familiar in practice." The restyled language of these not-so-sacred phrases is an improvement; they are more easily understandable and they more accurately reflect historic interpretations of the Rules.

The proposed amendments to the Rules do, however, maintain certain phrases the Committee implicitly deemed to be "sacred." Unfortunately, the preserved language of these "sacred phrases" is archaic and often unclear. In many cases, these phrases can be understood only through research of their meanings and experience in practice. The specific comments below suggest that the Committee should not maintain any phrase as "sacred" unless such a

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[1] Katharine Traylor Schaffzin is an Assistant Professor at the University of Memphis Cecil C. Humphreys School of Law in Memphis, Tennessee, where she teaches Evidence, Civil Procedure, and Trial Advocacy. She is indebted to Benjamin Crowe for his excellent research assistance in drafting these Comments.

[2] *Preliminary Draft of Proposed Amendments to the Federal Rules of Practice and Procedure, A Summary for Bench and Bar*, Administrative Office of the U.S. Courts (August 2009).

[3] Id.

change would truly disrupt legal practice. It should, instead, maintain only those phrases that are easily understandable and accurately reflect judicial application of the Rules.

II. Comments on Those Proposed Restyled Federal Rules of Evidence Affecting Sacred Phrases

The following comments address selected Rules concerning arguably "sacred phrases."

1. Rule 403: Unfair Prejudice

Proposed Rule 403 maintains the phrases "unfair prejudice" and "undue delay," although the remainder of Rule 403 has been restyled. Both phrases are "familiar in practice" and any change to this language would arguably disrupt legal practice, meeting the definition of a "sacred phrase" espoused by the Committee. Thus, no change to the language itself is appropriate.

2. Rules 404 & 406: Action in Conformity Therewith

In its draft, the Committee replaced the clause "for the purpose of proving action in conformity therewith on a particular occasion" in Federal Rules of Evidence 404 and 406 with "to prove that on a particular occasion the person acted in accordance with the character or trait." As currently written, "action in conformity therewith" is a phrase understood solely by those with experience in practice who have studied its application. To those studying the Federal Rules of Evidence for the first time, the phrase is nearly incomprehensible.

Few would disagree that the archaic phrase "action in conformity therewith" has, nonetheless, become "familiar in practice." In restyling Rules 404 and 406, however, the Committee successfully maintained the true meaning of the rules governing character and habit evidence. The proposed changes render Rules 404 and 406 more easily understandable, fulfilling the goals of this restyling effort.

3. Rule 603: Calculated to Awaken the Witness's Conscience

The proposed amendments replace the clause "a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so" with "a form designed to impress that duty [to testify truthfully] on the witness's conscience." The original language regarding the witness's "awakening" has certainly become "familiar in practice" and, in fact, dates back to at least 1969.[4] Nonetheless, the proposed change is an improvement. The new

[4] See United States v. Looper, 419 F.2d 1405, 1406–07 (4th Cir. 1969) (citing Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, March 1969, Rule 6-03 Oath or Affirmation).

language accurately reflects the law on the subject of a witness's oath,[5] while stating the Rule more succinctly and clearly than the current version of Federal Rule of Evidence 603.

4. Rule 606(b): Outside Influence Brought to Bear

In the proposed restyling of Rule 606(b), the Committee has maintained an archaic phrase "familiar in practice," which could be restyled without disrupting legal practice. Specifically, the Committee's proposal maintains the heart of the phrase "whether any outside influence was improperly brought to bear upon any juror[.]"[6] Like the reference to "awakening" a witness's conscience, which the Committee replaced in Proposed Rule 603, the phrase "brought to bear" is archaic and unnecessary. The Rule could be restyled to replace the phrase "brought to bear" with the word "imposed." Such a change is clear, succinct, and maintains the true meaning of the Rule.

5. Rule 609(b): Substantially Outweighs Its Prejudicial Effect

As restyled, Rule 609(b) maintains the phrase "substantially outweighs its prejudicial effect." The concept is "familiar in practice." The phrase "unfair prejudice," however, is often substituted for "prejudicial effect" in practice; federal courts have treated the two phrases as interchangeable since the time the Federal Rules of Evidence were first adopted.[7] Thus, replacing "prejudicial effect" with "unfair prejudice" could not disrupt an already existent legal practice. Because a stated goal of this restyling effort is to achieve consistency in style and terminology, the Committee should refer to "prejudicial effect" in Rule 609 as "unfair prejudice" as it does in Rules 403 and 412.

6. Rule 801(c): Truth of the Matter Asserted

In its restyling effort, the Committee boldly offered changes to the first half of the hearsay definition in Rule 801(c). Those changes enhance an extremely archaic and confusing Rule and constitute an improvement. However, the Committee maintained the latter half of the definition of hearsay in Rule 801(c), "to prove the truth of the matter asserted." Any attempt to change that definition which is so "familiar in practice" would no doubt lead to the outcry that a restyled Rule would "disrupt legal practice."

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[5] See United States v. Frazier, 469 F.3d 85, 92 (3d Cir. 2006) (stating that oaths are administered to remind witnesses of their obligation to testify truthfully); United States v. Saget, 991 F.2d 702, 710 (11th Cir. 1993) (holding that atheist's oath to God was permissible because he was cognizant of his solemn duty to tell the truth).

[6] Proposed Rule 606(b) alters the phrase slightly to "outside influence was improperly brought to bear on any juror" and renumbers the phrase as Rule 606(b)(2)(B).

[7] See e.g., United States v. Thomas, 914 F.2d 139, 143 (8th Cir. 1990); United States v. Sims, 588 F.2d 1145, 1149 (6th Cir. 1978); United States v. Mahler, 579 F.2d 730, 735 (2d Cir. 1978); United States v. Shapiro, 565 F.2d 479, 481 (7th Cir. 1977).

Nonetheless, those same members of the bench and bar who would argue to maintain the definition must necessarily admit that the definition is confusing and beyond the understanding of those lacking practical experience. While "the truth of the matter asserted" is perhaps the most sacred of phrases, I humbly propose the following change in an effort to bring an understanding of Rule 801(c) within the grasp of students of evidence: "to prove the truth of the statement made by the declarant" or "to prove the truth of the declarant's statement." Such a change does not affect the meaning of the Rule and, because it references the "statement" defined in the previous clause, this minor change should bring greater clarity to readers of the Rule.

7. Rule 801: Admission of a Party-Opponent

The Committee proposed replacing the phrase "admission of a party-opponent" with an "opposing party's statement" in Federal Rule of Evidence 801(d)(2), as well as in Rule 613. "Admission of a party-opponent" is undoubtedly a phrase that has become "familiar in practice," dating back to at least 1935.[8] Moreover, one should not be surprised if many a practitioner argued that a change to the phrase would be "unduly disruptive" to the practice of law. Nonetheless, the phrase has historically been a source of misunderstanding because, despite the plain language of the current Rule, it does not require that a statement admit anything[9] or that it be against the party's interest at the time it was made.[10] The change is a welcome one that removes the confusion by more accurately stating the applicability of the Rule.

8. Rule 901: Not Acquired for Purposes of the Litigation

The Committee also targeted Federal Rule 901(b)(2) governing a lay opinion on handwriting. Although the current language "based upon familiarity not acquired for purposes of the litigation" is "familiar in practice," the Committee proposed replacing it with the clause "based on a familiarity with [the handwriting] that was not acquired for the current litigation." The change is subtle, but nonetheless renders the Rule more accurate by specifying that the Rule

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[8] See WIGMORE, STUDENT TEXTBOOK ON EVIDENCE 199 (1935); Milton v. United States, 110 F.2d 556, 560 (D.C. Cir. 1940).

[9] United States v. Matlock, 415 U.S. 164, 172 (1974) (finding declaration of opposing-party admissible for any inference which trial court could reasonably draw from statement regarding any issue involved in case).

[10] See United States v. McDaniel, 398 F.3d 540, 545 n.2 (6th Cir. 2005) (noting that admissibility of statement under Rule 801(d)(2) does not hinge on whether or not statement is against party-declarant's interest); see also United States v. Turner, 995 F.2d 1357, 1363 (6th Cir. 1993); Marquis Theatre Corp. v. Condado Mini Cinema, 846 F.2d 86, 90 n.3 (1st Cir. 1988).

only refers to knowledge gained to advance the litigation currently before a court. This is both an accurate reflection[11] and a more concise statement of the Rule.

III. Conclusion

The Committee did an excellent job restyling several arguably "sacred phrases." Its proposed restyling of those sacred phrases is an improvement. Additional improvements could also be made by amending a few archaic and confusing sacred phrases to clarify language that historically has been misunderstood. Such changes can be achieved without altering their substance and without disrupting legal practice. The Committee should not let this rare opportunity to clarify the Federal Rules of Evidence pass by without addressing these sacred phrases.

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[11] See Strother v. Lucas, 31 U.S. 763, 766 (1832) (holding that evidence by comparison of hands is not admissible when witness has had no previous knowledge of handwriting, but is called upon to testify merely from comparison of hands); United States v. Samet, 466 F.3d 251, 254 (2d Cir. 2006) (holding that witness must have familiarity with handwriting which has not been acquired solely for purposes of litigation at hand).

Some Comments on the Proposed Style Revision of the Federal Rules of Evidence

Professor James J. Duane*

The Advisory Committee and its stylistic consultants on the Style Subcommittee of the Standing Committee – referred to in this comment for the sake of simplicity as the Revisers – must be commended for an excellent job in their work on the Preliminary Draft of the Proposed Style Revision of the Federal Rules of Evidence. In many important respects, the proposed revisions represent a significant improvement in the clarity, precision and elegance with which the original rules were drafted, most of them decades ago. But there is room for improvement, as the following comments illustrate. I have divided them into three sections, beginning roughly with the most important. Part I of this Comment describes some substantive changes that were unintentionally made by the revisers despite their best efforts to the contrary. Part II lists just some of the worst redundancies that were retained (or in some cases added) in the proposed revisions. And Part III describes some of the many archaic, awkward, and ungrammatical phrases and cross-references that were retained or added in the proposed revisions.

This list is, sadly, not complete. I have enjoyed working on this project as a courtesy to the Advisory Committee, but my unusually busy schedule in recent months has not allowed me enough time to review all of the Committee's proposed changes. (I am not getting paid for my work on this, after all.) I have not yet even taken the briefest glance, for example, at the proposed changes to Evidence Rules 901-1103. And I have not had enough time to list in this document all of the problems and imperfections that I have noticed, since I am working on this comment right up until the deadline for the submission of public comments. But I have detailed all of the most important suggestions that I have to share for possible improvement on the proposed revisions, and I sincerely hope that these contributions will be of some genuine assistance to the work of the Advisory Committee.

In return for my work on this project I ask one very small favor from the revisers and anyone else who reads this document on the United States Judicial Conference website. Please do not discount the value of these observations or think me guilty of hypocrisy merely because this document presumably contains a few typographical or grammatical errors or redundant clauses. I worked on this by myself, and this document – unlike the proposed Evidence Rules – is not intended for long-term nationwide use. So it would simply be unfair to hold this document to the same rigorous standards of linguistic precision to which I have justifiably subjected the proposed rules.

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I. Substantive Changes Inadvertently Made by the Stylistic Revisions

A. Rule 103(a)

Rule 103(a) presently says that a party may not seek reversal unless a timely objection "appears of record." This language, phrased in the passive tense, does not say who must have made the objection, or whether it must have been made by that same party. Consequently, the federal courts have held that an appellant need only show that an objection was made in the lower court by any party at the trial, reasoning as follows:

> The literal wording of Rule 103(a) does not require that the objection or the offer of proof be made by the party seeking to raise the point on appeal. Unless the identity of the objector somehow affects the admissibility of the evidence, no reason appears why a party should be required to join in the objection or offer of another litigant aligned with him, in order to be able to raise the issue on appeal. 21 Wright & Graham, Federal Practice and Procedure § 5035, n. 26 (West Supp.1981). Accordingly, when one party has made an objection or offer of proof, it should be presumed, unless the contrary appears, that co-parties aligned with him have joined in the objection or offer.

Howard v. Gonzalez, 658 F.2d 352, 355-56 (5th Cir. 1981); *see also United States v. Sanchez-Sotelo*, 8 F.3d 202, 210 (5th Cir. 1993); *United States v. Brown*, 562 F.2d 1144, 1147 n. 1 (9th Cir. 1977); *United States v. Bagby*, 451 F.2d 920, 927 (9th Cir. 1971); *United States v. Lefkowitz*, 284 F.2d 310, 313 n. 1 (2d Cir. 1960).

This rule, allowing a party to seek reversal based on the unsuccessful objection of a co-party, has been justified on the grounds that "in certain situations, it may be redundant and inefficient to require each defendant in a joint trial to stand up individually and make every objection to preserve each error for appeal." *United States v. Pardo*, 636 F.2d 535, 541 (D.C. Cir. 1980). After a defendant's objection is overruled, the failure of a codefendant "to move to suppress the evidence or to object to its introduction should be excused because such a motion or objection would have been a useless formality." *United States v. Love*, 472 F.2d 490, 496 (5th Cir. 1973); *see also Loose v. Offshore Navigation, Inc.*, 670 F.2d 493 (5th Cir. 1982) ("Indeed, it would seem both dilatory and fatuous for each of the parties to stand in turn and voice its 'me-too.'") Thoughtful scholarly commentary agrees that "[w]here one of several parties raises a timely and sufficient objection that the judge overrules, the better rule is that the ground for review is preserved as much for a party who did not object as for one who did." CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, EVIDENCE 7 (4th ed. 2009).

But that would obviously be changed by the proposed revision to Rule 103(a)(1) and (2), which would state, respectively, that "a party" may not seek reversal (in the absence of plain error) unless a timely objection or offer of proof was made at trial by "*the* party." The use of the definite article here can only be construed as a reference to the same party mentioned earlier in the same sentence who is seeking reversal on appeal. That change would make Rule 103 nearly identical to the former language of Federal Rule of Criminal Procedure 30, which stated (until its most recent stylistic revision) that no party may seek reversal based on an alleged error in a jury charge "unless *that party* objects thereto," *United States v. Harris*, 104 F.3d 1465, 1471 (5th Cir. 1997) (quoting former Rule 30; emphasis supplied by the court). This is the precise language that has persuaded the federal courts that an appellant claiming error in a jury instruction – unlike a party seeking reversal based upon an evidentiary ruling under Evidence Rule 103 – "can rely upon the objection of his codefendant only if he joins in the objection." *United States v. Harris*, 104 F.3d 1465, 1471 (5th Cir. 1997); *see also United States v. Ray*, 370 F.3d 1039, 1042-43 & n.3 (10th Cir. 2004), *vacated on other grounds*, 543 U.S. 1109 (2005); *Kenney v. Lewis Revels Rare Coins, Inc.*, 741 F.2d 378, 382 (11th Cir. 1984) (emphasizing the identical "language differences between Fed. R. Evid. 103 and Fed. R. Civ. P. 51, and [the] practical differences between evidentiary objections and exceptions to a jury charge").

The reasoning of these cases in construing the language of Civil Rule 51 and Criminal Rule 30 makes it virtually certain that the courts would construe the proposed revision to Evidence Rule 103 as overturning the well-settled body of law that presently relieves parties from the need to waste precious court time by joining in every unsuccessful objection or offer of proof by a co-party. That would be a significant substantive change in the law, and would exert an immediate and profound impact on the conduct of attorneys at trials of multi-party litigation.

B. Rule 804(a)(1)

Federal Evidence Rule 804(a)(1) presently declares a declarant to be unavailable if the declarant is exempted from testifying by a court ruling "on the ground of privilege." It is difficult to see what the Revisers did not like about that language, which they proposed to revise so that it will only apply to a witness who is exempted "on the ground of *having a* privilege." Those additional two words would narrow the scope of the exception and make a substantive change in the law.

Under well-settled law, a declarant can be unavailable under Rule 804(a)(1) as long as a successful objection to her testimony is made in one of three ways: [1] by that witness herself, or [2] by another party to the case, or [3] even by a nonparty, as long as the individual making the objection is the holder of the privilege or has standing to assert it on

someone else's behalf. The criterion of unavailability is satisfied "if the party against whom a statement is offered claims a privilege that blocks someone from testifying. Thus the offering party can satisfy the unavailability criterion if the other side invokes a privilege to prevent the speaker from testifying." CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, EVIDENCE 936 (4th ed. 2009) (citing cases).

The proposed revision to Rule 804(a)(1) would eliminate the last two of these categories of cases, by making a declarant unavailable only if "the declarant ... is exempted by a court ruling on the ground of *having* a privilege to not testify." There is no sensible way to read that verb as applying to anyone other than the declarant, the only person referred to in the same sentence. The proposed revision requires a showing that the *declarant* possessed – or "had" – the privilege that was asserted to make the declarant unavailable. To try to preserve the sense of the current rule, by reading the proposed revision as merely requiring a showing that *anyone* in the courtroom was "*having* a privilege," would be so ungrammatical as to be out of the question, and would render "*having*" redundant.

This will lead to a definite substantive change in the law. In one recent well-known case, the wife of the accused was deemed "unavailable," and her hearsay statements were therefore admitted against him, after he asserted *his* privilege to her testimony under "the state marital privilege, which generally bars a spouse from testifying without the other spouse's consent." *Crawford v. Washington*, 541 U.S. 36, 40 (2004) (citing Wash. Rev. Code § 5.60.060(1) (1994)).

The Washington state statutory privilege invoked by the husband in *Crawford* provides that "A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner." Wash. Rev. Code § 5.60.060(1). That statute, which also applies to civil cases, would of course not apply to a criminal prosecution tried in federal court, but it would be applicable to a civil diversity case based on identical facts if it were tried in a United States District Court in that state, or the other states that have similar privileges. *E.g.*, Michigan Comp. Laws § 600.2162(1) ("In a civil action or administrative proceeding, a husband shall not be examined as a witness for or against his wife without her consent or a wife for or against her husband without his consent, except as provided in subsection (3)."); *see* Fed. R. Evid. 501 (state law governs privilege questions where the federal court's subject matter jurisdiction is based on diversity of citizenship under 28 U.S.C. § 1332).

Imagine a civil diversity case pending in a state that has a marital privilege like the one on the books in Washington or Michigan, in which the plaintiff wishes to call the wife of the defendant to give testimony against her husband. If he asserts his privilege to keep her from testifying, as the defendant did in *Crawford*, she would clearly be "unavailable" under the current version of Evidence Rule 804, and any hearsay statements made by her out of

court could be used against him under one of the exceptions set forth in Rule 804(b). *United States v. Lilley*, 581 F.2d 182, 187-88 (8th Cir. 1978) (Government's witness was "unavailable as a witness during its case in chief due to [his wife's] invocation of the anti-marital facts privilege"). But that would not be true under the proposed revision to Rule 804(a), which would make a declarant unavailable only if she is exempted from testifying "on the ground of *having* a privilege." (Of course, the privilege asserted by the accused in *Lilley* could no longer be used in that way by the defendant in a criminal trial in federal court, since that privilege is now held only by the spouse of the accused after *Trammel v. United States*, 445 U.S. 40 (1980). But it could easily happen in any civil diversity case tried in any federal court that sits in a state with a statutory privilege like the one employed by the accused in *Crawford*.)

C. Rule 411

In August of 2009, I sent an email to a nationwide listserve of evidence law teachers, including Professor Daniel Capra, the Reporter to the Advisory Committee. In that letter, I pointed out a fairly conspicuous and incontrovertible substantive change that the Committee had unwittingly made in Rule 411. The first sentence of Rule 411 presently provides: "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 language made it clear that the Rule, by design, had two functions, described by the Rule's drafters (in the very first sentence of the Advisory Committee Notes) as rejecting "[1] evidence of liability insurance for the purpose of proving fault, and [2] *absence* of liability insurance as proof of *lack of fault*." The framers of the original rule were concerned to ensure that no party – neither a defendant nor a plaintiff defending himself from a charge of contributory negligence – could ever persuade a judge to let him use his lack of insurance as proof that he would have extra incentive to act carefully and therefore was *not* at fault. Of course, a party claiming a desire to use the evidence in that way would almost certainly be misrepresenting his true intentions, and would be much more likely to hope that such evidence would be misused by the jury for the transparently improper purpose of revising their verdict out of sympathy or pity for the uninsured party. But Rule 411 has always made it plain that such an argument would be categorically rejected regardless of the true intentions or motives of the offering party.

As I pointed out last August, however, the latter of those two purposes was accidentally lost in the proposed amendment to Rule 411, which reads: "Evidence that a person did *or did not* have liability insurance is not admissible to prove *that* the person acted negligently or otherwise wrongfully." By changing *whether* to *that*, this proposed amendment would no longer forbid a party from trying to use his lack of insurance as proof that he had extra incentive to act carefully and therefore was not at fault. There is no way this language

could be read to forbid a party from trying to prove that he did *not* act negligently or carelessly. (Some might mistakenly think me naïve for supposing that such evidence – if it were no longer forbidden by FRE 411 – would often get past an objection under Rule 403. I know that such evidence would rarely be admitted by any judge for that purpose. But it might be admitted on rare occasions if not for the prohibition in Rule 411, as the framers of this rule evidently assumed, and this is a substantive change in the scope of the rule.)

The Minutes of the November 2009 Meeting of the Advisory Committee on Evidence Rules indicate that the Committee had some skepticism toward the importance of the point that I brought to their attention, which they reportedly regarded as involving a "farfetched hypothetical." According to those minutes, the Committee, in order "to avoid any contention that a substantive change had been made," nonetheless "tentatively approved" my suggestion to reject this proposed change in the Rule and to restore it to its original language. If the Committee is indeed not yet certain about the importance or the wisdom of my suggestion, I respectfully submit that the consequences of this substantive change are by no means fanciful or insubstantial. Here, for example, are the first four sentences in the chapter on Rule 411 in one of the finest evidence treatises on the market:

> Evidence that a person carried ***or failed to carry*** liability insurance is not admissible on the issue of whether the person acted negligently or wrongfully on a particular occasion. This Rule bars the evidence, for example, when it is offered by a plaintiff against the defendant on the theory that because the defendant was insured the defendant was probably careless. ***Evidence is likewise excluded when offered by the defendant to show that the defendant lacked adequate insurance and therefore had every incentive to be careful.*** No matter who offers the evidence of the presence ***or absence*** of insurance, if it is offered on the issue of negligence it is excluded.

2 S. SALTZBURG, M. MARTIN, & D. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL 411-2 (9th ed. 2009). I have italicized the portions of this paragraph that will need to be deleted by Professor Capra and his co-authors in the next edition of their treatise if neither he nor I can persuade the Advisory Committee or the Judicial Conference to adopt my recommendation, which the Committee has as yet only tentatively approved.

In addition, the Advisory Committee should be apprised that my concern has in fact played out in the real world, where parties have indeed attempted to circumvent the rule by disclosing to the jury that they carried no liability insurance or less insurance than the jury would have been likely to suspect. *E.g.*, *Reed v. General Motors Corp.*, 773 F.2d 660 (5th Cir. 1985) (reversible error for defense to disclose that it had very limited insurance); *Williams v. Bell*, 606 S.E.2d 436 (N.C. App. 2005) (evidence that defendant had no personal insurance

covering liability for boating accident could only serve to induce the jury to decide the case on improper grounds); *Cook Inv. Co. v. Seven-Eleven Coffee Shop, Inc.*, 841 P.2d 333 (Colo. App. 1992) (statement that any judgment against hotel would come out of sole owner's pocket should not have been permitted in jury trial); *Sioux v. Powell*, 647 P.2d 861 (Mont. 1982) (admission of evidence that plaintiff was not insured was reversible error); *Scallon v. Hooper*, 293 S.E.2d 843 (N.C. App. 1982) (defendant's argument that he would be legally obligated to pay the verdict improperly revealed that defendant was not protected by liability insurance); *St. Louis Southwestern Ry. Co. v. Gregory*, 387 S.W.2d 27 (Tex. 1965) (statement during voir dire by defense counsel that "there is no insurance here" was inappropriate); *Rendo v. Schermerhorn*, 263 N.Y.S.2d 743, (N.Y. App.Div. 1965) (statement in defense summation that if plaintiffs recovered large sum defendants would be required to work for the rest of their lives was obvious reference to defendants' lack of insurance coverage and prejudicial error); *Miller v. Alvey*, 207 N.E.2d 633 (Ind. 1965) (defendant's failure to carry insurance is inadmissible as irrelevant and improperly tending to arouse sympathy for the defendant); *Miller v. Staton*, 394 P.2d 799 (Wash. 1964) (defense counsel's closing argument to jury that every dime of award, if any, would come out of pockets of defendant tavern owners was improper); *King v. Starr*, 260 P.2d 351 (Wash. 1953) (deliberate reference by defendants' counsel to the fact that defendants carried no insurance was improper). And even if the substantive change that I pointed out in Rule 411 is not the most significant substantive change made by the Committee (as I have shown, it is not), that is hardly a respectable defense for an amendment that was supposedly justified by nothing more than an intent to clarify and refine the stylistic elegance of the rule.

D. A Few Assorted Less Significant and Possible Substantive Changes

The three changes listed above are surely the most significant substantive changes that were unwittingly made by the proposed stylistic revisions, and they are all beyond any reasonable dispute. There are several other imperfections in the proposed rules that may or may not result in a substantive change in the law, because of ambiguous phrasing that could be interpreted in at least one fashion that would amount to a change in the law. Here are just a few examples.

- Rule 611(b) provides that a cross-examination should normally be limited to the subject matter of the direct examination and "matters affecting the credibility of *the* witness," in what is an obvious reference to the witness being cross-examined. The proposed revision would change that to "matters affecting *a* witness's credibility." This replacement of the definite article serves no obvious benefit, and would plainly broaden (at least very slightly) the scope of cross-examination, by giving the cross-examiner the right to ask questions that go beyond the scope of the direct examination as long as they relate to the credibility of *any* witness at the trial – for

example, by asking a witness questions that might be useful for the impeachment of someone else who has already testified.

- Rule 801(d)(2) grants a right to use otherwise inadmissible hearsay if it is offered "against a party," as long as it was made by that party or his agents. The proposed revision, for no apparent reason, would evidently narrow its scope to statements "offered against an *opposing* party." The word *opposing* in this context can be interpreted in one of two ways. If it means "any party in the case other than the party offering the hearsay," it is entirely redundant. On the other hand, if it is interpreted by the courts to mean only those parties whose names are listed on the other side of the *v.* in the caption of the case, then it would no longer allow (for example) a defendant to offer a statement against his co-defendant. That would be a substantive change in the rule, and not an unlikely interpretation – since it would evidently be the only way to read this word in a manner that would not make it redundant. Either way this word is a mistake.

- Rule 803(22) presently applies with perfect clarity to a judgment of conviction "*adjudging* a person guilty a crime punishable by death or imprisonment in excess of one year." That makes it clear that the rule only applies to a person who was *convicted* of a felony, and not to one who was merely *charged* with a felony but convicted of a lesser offense. But that clarity is mightily obscured in the awkward and unnatural language of the proposed revision to this rule, which would apply to a judgment of conviction if "the *judgment* was *for* [a felony.]" Proposed Rule 803(22)(B). What does that mean? In the fairly common cases in which a person is charged with a felony but is convicted of a misdemeanor following a plea bargain, we could fairly say that the judgment of conviction represented the disposition of the felony. Would it be more appropriate in such a case to say that it was a "judgment ... *for* a felony" or a judgment ... *for* a misdemeanor"? It is hard to say for sure, because nobody experienced in federal criminal practice would ever use *either* of those phrases to describe a judgment, but the former construction is much more consistent with the well-settled linguistic convention that "[a] person is *convicted of* a crime or *convicted for* the act of committing a crime." Bryan Garner, A Dictionary of Modern Legal Usage 222 (2d ed. 1995). That would also be a plausible construction of this rule in light of its well-known theoretical justification, since one could plausibly argue that any man charged with a felony has special incentive and procedural opportunities to defend himself vigorously regardless of whether he eventually resolves that felony charge by pleading to a misdemeanor. If any courts construe this proposed rule in that way, as seems quite likely, it would amount to a significant substantive change in the scope of this hearsay exception. To eliminate that risk, proposed rule 803(22)(B) must be reworded to make it closer to the

wording of the present version of the rule, ideally to say "the judgment was one adjudging a person guilty" of a felony.

II. Redundant Phrases Retained or Added in the Proposed Style Revisions

A. "Testifying *as a witness*."

Rules 605 and 606(a), respectively, define when a judge or a juror may "testify *as a witness*" at a trial. Proposed Rule 804(b)(1)(A) refers to "testimony that ... was given *as a witness* at a trial, hearing, or lawful deposition." Same problem. Proposed Rule 806 speaks of situations in which "the declarant had testified *as a witness*."

In the context of any reference to testimony and testifying, *as a witness* is always redundant. There is no other way to testify except as a witness, and "witnesses" are those who "bear testimony." *Crawford v. Washington*, 541 U.S. 36, 51 (2004). That is why proposed Rule 601 does not suffer from any lack of clarity even though it speaks only of when a person "is competent *to be* a witness," with no mention that such a role might entail testifying.

Worse yet, the phrase "testifying as a witness" is misleading, since it is not used in *many* other rules – for example, Rule 606(b), which defines when a juror or another individual may "testify" at a post-trial inquiry into a verdict. This omission misleadingly suggests that perhaps Rule 606(b), unlike 606(a), is somehow concerned with a different sort of testimony that jurors might give but *not* "as a witness." That is false.

The same redundancy, by the way, also infects proposed Rule 602, which refers to "testimony by an expert *witness*." Even if "expert witness" were not always redundant as the phrase is used in these rules, as I explain below, there is never a need to say *witness* when we are explicitly alluding to an expert who is giving testimony.

B. "Unavailable *as a witness*."

Evidence Rule 804(a) defines five situations in which a declarant is "unavailable *as a witness*," and Rule 804(b) then outlines five kinds of hearsay that are admissible if the declarant is "unavailable *as a witness*." Here as well, the words "as a witness" are useless surplusage and clarify nothing – which is why the original drafters of Rule 804 correctly understood that they could be safely omitted from the title of the rule. The proposed style revision unfortunately preserves the phrase in both rules, and then makes matters worse by adding this patent redundancy to the *title* of Rule 804. (At the same time, paradoxically,

the revisers wisely *deleted* that same phrase from the end of Rule 804(b)(6). It makes no sense to add it to the title of a rule at the same title it is deleted from the text.)

Rule 804(a) and (b) should be shortened simply to describe cases in which a declarant is "unavailable" for one of the five reasons set forth in Rule 804(a). The five reasons listed there – for example, privilege, refusal to testify, death – make it perfectly plain that the rule is concerned entirely with whether someone might be unavailable to testify. Nobody would ever be confused in any way by the deletion of the three words "as a witness" from both the text and title of proposed Rule 804. Try reading the rule aloud without those words and you will see.

C. "Expert *witnesses*."

The present evidence rules, in a pattern that can only be described as haphazard, refer many times to "experts" (for example, Rules 701, 702, 703, and 705), and just as often to "expert *witnesses*" (for example, Rules 602, 704(b), 706, and 803(18)), even though it is perfectly obvious that all of those rules are talking about the exact same people. Of course the experts under discussion in all of those rules are being proposed for use as *witnesses*; that is why they are being discussed in the Rules of Evidence. The redundancy is especially acute in a few rules where the context makes it especially explicit that there is nothing else that we could possibly be talking about but someone who is also a witness – for example, Rule 602's reference to "*testimony* by an expert witness," and Rule 704(b)'s provision as to when an "expert witness" may testify to "an opinion" on certain topics, and Rule 803(18)'s reference to learned treatises shown to "an expert witness *upon cross-examination*."

Unfortunately, the drafters of the proposed style revisions have made this pattern even more random. In a number of cases, they have sensibly shortened "expert witness" to "expert," as they did for example at many points in the text of Rule 706. But more often they left "expert witness" unchanged, as they did in Rules 602, 704(b), and 803(18), and the titles of Rules 703 and 705. And sometimes they changed "expert" to "expert witness" – for example, in the title of Rules 702 and 706, at the same time they made the reverse switch in most of the text of Rule 706!

I have a much better proposal. Every reference in the Evidence Rules to an "expert *witness*" should be shortened to "expert." Nothing will be lost in the translation. I promise.

D. The right to object *"at that time."*

When a judge calls or questions a witness, proposed rule 614(c) states that a party may object *"either at that time or* at the next opportunity when the jury is not present." We could really all get along quite nicely without the first five words of that clause. Of course

any party may *always* object to *any* development at trial "at that time." That always goes without saying. The entire point behind Rule 614(c) is to clarify the much less obvious and vastly more important point that the unhappy party may *also* object the next time the jury is absent. If the rule were amended, as it should be, to delete the words "*either at that time or*," not one lawyer or judge in a million would mistakenly infer that the rule was therefore intended to forbid a simultaneous objection (that would be unheard of), or to *require* the objecting party to wait until the jury has left to room. And even in the extremely unlikely event that a lawyer was confused enough to make that mistake, there would be no harm done and no prejudice to any party, since that lawyer would merely wait a little longer than he might have preferred before objecting – which would leave him less likely to alienate the judge and jurors, and still leave him in full compliance with the requirements of Rule 614 for preserving the point for appeal.

E. "*Both* statements ... *together*."

Proposed Rule 410(b)(1) describes a situation in which the court is presented with two statements and "in fairness *both* statements ought to be considered *together*." This redundancy is not found in the current version of the same rule. The phrase *both statements* here would be much better replaced with "*the statements*," because of course "both ... together" is always redundant. There is no way that only *one* of two statements could be "considered together." *See* BRYAN GARNER, A DICTIONARY OF MODERN LEGAL USAGE 115 (2d ed. 1995) ("Several wordings with *both* cause redundancies," such as "both ... each other" and "both concurrently").

F. "*Evidence of* a *final* judgment of conviction."

Proposed Rule 803(22) contains two redundancies in its first line. It provides a hearsay exception for "*evidence of* a *final* judgment of conviction."

The words "*evidence of*" are unhelpful and redundant – which is why they do not appear in the two dozen other exceptions in Rule 803. The very next section of the Rule, for example, contains a hearsay exception for "*A judgment* that is admitted to prove a matter of personal, family, or general history." There is no sensible reason why Rule 803 should contain two consecutive exceptions for "*Evidence of* a judgment" and "A judgment."

Also redundant is the phrase "*final* judgment of conviction," which does not appear anywhere else in the Federal Rules of Evidence or Criminal Procedure. (It is noteworthy that Proposed Evidence Rule 609 refers nine times to a "conviction" without once using the word *final*. As the Revisers have correctly observed, it is not ideal for the same thing to be described two different ways in the Evidence Rules, which could easily lead to the unintended implication that different meanings were intended.)

There is no such thing as a "final judgment of conviction," at least not the way the Advisory Committee means to use the phrase. Lawyers who specialize in civil litigation often refer to "final orders" and "final judgments," as a way of distinguishing them from the many interlocutory rulings of a similar nature in a civil case - for example, an order dismissing one of several claims in the case. See, e.g., Fed. R. Civ. P. 54(b) (defining when a court "may direct entry of a *final* judgment as to one or more, but fewer than all" of the claims in a case). But it is a bit silly to describe a judgment in a criminal case as a "*final* judgment of conviction." If by *final* one means (as Rule 803(22) does) the conviction entered at the end of the case, then *final* goes without saying, and no lawyer experienced in criminal work would use such a phrase. There are no interlocutory or provisional convictions in the American legal system or any other free society. This is why the phrase *final judgment* appears ten times in the Federal Rules of Civil Procedure, but not once in the Federal Rules of Criminal Procedure - even though the Criminal Rules speak more than ten times of a conviction, and four times of a "judgment of conviction." *See* Fed. R. Crim. P. 32(k)(1), 58(g)(1), 58(g)(2)(B), and 58(g)(3). Evidence Rule 609, which refers nearly a dozen times to criminal convictions, does not once call them "final." This is presumably also why Bryan Garner offers a definition of "final judgment" in his general treatise on legal terminology, *A Dictionary of Modern Legal Usage* (2d ed. 1995), but quite sensibly does not even mention the phrase in his more recent dictionary on criminal law terms, *A Handbook of Criminal Law Terms* (2000).

It is true that in the unrelated context of postconviction relief, the law sometimes refers to "the date on which [a] judgment of conviction becomes final," 28 U.S.C. § 2255(f)(1), which generally refers to the date when all direct appeals have been exhausted. *Clay v. United States*, 537 U.S. 522, 527 (2003) ("Here, the relevant context is postconviction relief, a context in which finality has a long-recognized, clear meaning: Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."). But that has nothing to do with the intentions of those who drafted Rule 803(22), which explicitly declares that "The pendency of an appeal [from the judgment of conviction] may be shown but does not affect admissibility." Since the rule plainly applies to judgments of conviction that have not yet become "final," as the Supreme Court sometimes uses that term in the context of postconviction relief, it is especially undesirable for Rule 803(22) to use that term.

G. "Judgment of a *Previous* Conviction."

Rule 803(22), the same rule that begins with a reference to a "*final* judgment of conviction," contains another equally obvious redundancy in its title: "Judgment of *a Previous* Conviction." The adjective *previous* here is meaningless and adds absolutely nothing to the rule. (The revisers instinctively seemed to have perceived this, because the word *previous*

is not used in the text of the rule, just as *final* does not appear in its title – and neither of those words is used anywhere in Rule 609, which also addresses the admissibility of a judgment of conviction. This clearly proves my point that neither adjective is helpful here, much less necessary.)

Lawyers are notoriously fond of using the words *prior* and *previous* as often as possible, almost always in contexts where the words are meaningless redundancies. It is true that the words are sometimes helpful; for example, when a man is charged as a felon in possession in a firearm, it makes sense for a prosecutor to tell the grand jury or the judge that the accused *had* (note the past tense!) several "prior convictions" at the time of his arrest. "This clarifies that those convictions, all of them necessarily dating from some point before today – that *always* goes without saying – also occurred before he was arrested with a gun." James J. Duane, *Prior Convictions and Tuna Fish*, THE SCRIBES JOURNAL OF LEGAL WRITING 160, 161 (1998-2000).

The word *previous* in the phrase "*previous* conviction" is meaningless redundancy when it is used, as it is in the title of Rule 803(22), to mean "a conviction that was entered at some point before the moment in time when it was later offered at some trial." And the phrase is not merely innocent harmless fun. When the jurors at a criminal trial hear the prosecutor and the judge talk about the admission under Rule 803(22) of the fact that the accused had something called "a *previous* conviction," the unmistakable implication will seem to be that they are talking about a conviction other than the one we are expecting or hoping the jury will be returning at this trial.

H. "*Prior* Statements"

As I pointed out above, the words *previous* and *prior* are always unhelpful and unnecessary when they are used merely to mean "at some point before *today*." That always goes without saying, because the Evidence Rules are of course never concerned with evidence of events from the future.

The Evidence Rules use the word *prior* about a half dozen times with respect to statements by a witness. The proposed rules continue that tradition, and indeed have multiplied the number of times that word appears in the rules, and every time the word is redundant.

For example, proposed rules 408(a) and 613(b) continue the tradition of referring to something widely known in the profession as impeachment of a witness with evidence of the witness's "*prior* inconsistent statement." Of course those are *prior* statements; no witness this side of the Looking-Glass has ever been impeached with his statements from the future. The title of proposed Rule 613 also talks about a "Witness's *Prior* Statement,"

and Rule 613(a) describes the questioning of a witness "about the witness's *prior* statement."

I will be the first to concede that this sort of talk is extremely common among members of the legal profession. Indeed, I would understand why some might think I am proposing here a change in what the Advisory Committee has called a "sacred phrase." But it bears emphasis just the same that the word *prior* is unnecessary in all these contexts.

As radical as this statement may sound, especially to those of us who have spent decades reading and writing about the Federal Rules of Evidence, I can prove that it is true to any reader with an open mind: *Just take a few moments and read Federal Rule of Criminal Procedure 26.2!* This rule, which was very skillfully drafted, is titled "Producing a Witness's *Statement.*" It is concerned, just as Evidence Rule 613(b) is, with the discoverability and admissibility of statements that were made by a witness before trial and that might arguably conflict with the testimony of the witness at trial. Rule 26.2 refers twenty times to them as "statements," without once using the words *prior* or *previous*. And yet the rule is perfectly easy to read and follow, without any trace of ambiguity or complexity. There is no reason why Rule 408 and 613 cannot be written with the same elegance and simplicity.

The Advisory Committee, instead of deleting these gratuitous uses of *prior*, actually used it in a few extra places. The definition of hearsay (talk about a sacred phrase) in Proposed Rule 801(c) would now define hearsay as "a *prior* statement – one that the declarant does not make while testifying at the current trial or hearing" offered to prove its truth. Assuming that this represents an improvement on the former version of the definition, which seems dubious, the word *prior* here is again redundant and slightly misleading, because it may seem to suggest to some readers that we are talking about "the *first* statement, the one that was *prior to* the current statement being made on the witness stand by someone who is telling us about the first one." And that is not always true. The hearsay rule is frequently violated by the offer of an exhibit that consists of a written statement, in which case it seems particularly incongruous and awkward to describe that statement as a *prior* statement. (And if *prior* were really helpful or necessary in proposed Rule 801(c), then why does the word appear in proposed Rule 801(d)(1) but not proposed Rule 801(d)(2)?) My recommendation: This committee should follow the very sensible lead of those who drafted Criminal Rule 26.2, and should replace every mention of "prior statements" with "statements."

I. "*Subsequent* measures"

Rule 407 is titled "*Subsequent* Remedial Measures." The first word of this title is redundant – indeed, it is as redundant as "*Prior Preventative* Measures" would be – because you cannot *remedy* anything, by definition, until after the fact.

I could understand that the Advisory Committee might not be willing to tamper with the title of such a well-settled and venerable legal concept, which could fairly be described as a "sacred phrase." But even if *subsequent* must be preserved in the title of this rule, it surely is not necessary in the text of proposed Rule 407, which reads:

> 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 [among other matters].

The use of the word *earlier* here makes it explicit that the remedial measures are taken after some injury or harm; calling the measures *subsequent* is overkill. Rearranging the order of these words only slightly, we see that it is discussing "measures ... *subsequent* [to] ... an *earlier* injury or harm."

J. "*Furnishing*, promising to pay, or offering to pay."

Proposed Rule 409 discusses evidence of "*furnishing, promising* to pay, or offering to pay" medical or similar expenses. Promising and offering are redundant, for a promise is simply one way to make an offer. *Furnish* is sometimes useful as a synonym for *give* or *deliver* (as it is used, for example, in Rule 408(a)(1), which speaks about the "furnishing of valuable consideration"). Bryan Garner, A DICTIONARY OF MODERN LEGAL USAGE 378 (2d ed. 1995). But *furnish* is not being used that way in Rule 409, and is in fact archaic and terribly clumsy as a synonym for *paying*. Nobody still alive today – not even a lawyer – says "I will furnish your medical bills" when they mean that they are willing to *pay* them.

This Rule would be simpler, clearer, and would sound far more up-to-date if it were shortened to refer simply to evidence of "*paying or offering to pay*" medical or hospital bills.

K. Preventing a Witness "From *Attending or* Testifying."

Both proposed Rules 804(a) (in its final sentence) and 804(b)(5) describe a situation in which a person makes some declarant unavailable "in order to prevent the declarant from *attending or* testifying." The good news is that revisers did not add "as a witness" at the end of these clauses (which confirms my point that this phrase is not really necessary in the title of Rule 804.) But the revisers unfortunately preserved the rule's redundant reference to a party who tries to prevent a witness from either *attending* or testifying at a trial – and the former possibility adds nothing to the meaning of the rule. Read literally, this language plainly suggests that a criminal defendant might be guilty of "Forfeiture by Wrongdoing" – and thereby open the door to the admission against him of statements made out of court by some witness – even if he knew that she was neither scheduled to nor planning on

testifying at his trial and was merely planning to attend and watch it in silence, as long as he injured or threatened or bribed her to stay away because he did not even want her to *attend* the hearing. That would be absurd, of course, and would almost never happen. But that is precisely why the language of this clause is absurd, and why Rules 804(a) and 804(b)(5) should both be shortened to refer instead to a party who prevents a witness "from testifying." That would be shorter, simpler, and would make it clear that those Rules apply regardless of whether he tried to prevent the witness from *attending*, which is not really relevant in this context in any event.

L. Assorted Redundant Intensifiers

The Revisers sensibly eliminated many redundant intensifiers, "expressions that attempt to add emphasis but instead state the obvious and create negative implications for other rules." But the revisers did not go nearly far enough.

For example, Rule 609(d) presently limits the admissibility of juvenile adjudications to situations in which "*the court is satisfied that admission in evidence*" is necessary for a fair trial. In a major improvement, the proposed version of rule 609(d)(4) would shorten that simply to "admitting the evidence." That is much better. For there is never any need to explicitly recite that the standard required by some rule applies only when "the court is satisfied that" the test is met, a phrase that could have been inserted just as unhelpfully in every sentence in the rules.

But the Committee should have gone a little further here, and also deleted the word *admitting*, and opted instead for a rule that applies as long as the "the evidence" is necessary for a fair trial. If a piece of evidence is necessary for a fair trial, it goes without saying that we are contemplating its *admission*.

And similar examples of useless intensifiers abound throughout the Evidence Rules, many of which have not yet been deleted in the proposed revisions. Here are just a few examples:

- Proposed Rule 615(b) describes an officer or a party who has been "designated as the party's representative *by its attorney*." Those last three words go without saying. Who else would do it? It is understood that every rule in the book identifies things we expect parties to do through their attorneys if they are represented by counsel. The rule should just say "designated by the party as its representative."

- Proposed Rule 615(c) describes a witness "whose presence *a party shows to be* essential" to its case. Much better would be simply: "whose presence *is* essential."

Every rule in the book is understood as specifying requirements that are to be satisfied by the parties.

- Rule 615 also specifies when the court "must *order* witnesses *excluded*." Better and simpler would be: "must *exclude* witnesses" (or "the witnesses," if you prefer). Nobody who has ever spent any time in a courtroom would ever be confused by such a simplification into suspecting that the rule required the judge to leave the bench and physically escort the witnesses from the room herself.

- Rule 706(d) says that a court "may *authorize* disclosure" to the jury that an expert was appointed by the court. It would be simpler and more direct – and much more accurate – to simply say that the court "*may disclose*" those facts to the jury. Anyone who has spent a significant amount of time in federal courthouses knows that every judge, when given a choice between telling the jury about such a fact and letting the lawyers do it, will always choose to do it herself. (Besides, what is lost in the translation? The change I propose here would not deceive anyone into thinking that a district judge had therefore been stripped of the power to let the lawyers make the disclosure.)

- The Evidence Rules contain countless references to "evidence of" some fact. Rule 412(a), perhaps reflecting its origin as a piece of Congressional legislation, is the only rule in the book that speaks of instead about "evidence *offered to prove*" some fact. Even in its revised version, proposed Rule 412(a) and (c) refer to "evidence *offered to prove* that a victim engaged in other sexual behavior," "evidence *offered to prove* a victim's sexual predisposition," and "evidence *offered to prove* a victim's sexual behavior or sexual predisposition." This gratuitous phrase, which appears in no other evidence rule, is unhelpful. Much better would simply be "evidence that a victim" engaged in certain conduct, or "evidence of a victim's sexual predisposition."

- Proposed Rule 415 applies "[i]n a civil case involving a claim *for relief* based on a party's *alleged* sexual assault or child molestation." That is a major improvement on the current rule (there is no need to say "a claim for damages of other relief), but it could be better and even shorter: "In a civil case involving a claim of sexual assault or child molestation by a party, ..."

- The first sentence of Rule 602 ends with a reference to evidence "that the witness has personal knowledge of the matter." That is fine. But those words are followed immediately by a sentence that begins with a reference to "[e]vidence to prove personal knowledge." It is awkward and unnecessary to use that phrase in two consecutive clauses; the second sentence of the rule would read more clearly if it simply began "*Such evidence* may consist of the witness's own testimony."

- Proposed Rule 412 has been sensibly simplified by replacing all references to "alleged victim" with "victim," and then adding a new section 412(d) which defines victim to mean an alleged victim. That is a nice touch. But curiously, Proposed Rule 404(a)(2)(B) still refers to "an *alleged crime* victim's" character trait, just as proposed Rule 404(a)(2)(C) still speaks about an "*alleged* victim." *Crime* is redundant here, since the reference appears in a section titled "Exceptions in a criminal case," and *alleged* is also not helpful. Here is a better idea: shorten Rule 404(a)(2) to refer merely to the character of the "*victim*," and then move the definitional section of Proposed Rule 412(d) to Proposed Rule 101(b), where it will more naturally fit alongside the other definitions set forth there. This will clarify that the word *victim* in every Federal Rule of Evidence includes an alleged victim.

- The phrase "in evidence" appears only three times in the Proposed Rules, and in each context those two words are meaningless. Rule 612(b) refers to a statement that a party desires "to introduce *in evidence*," 801(c) speaks of a statement "that a party offers *in evidence*," and Rule 806 refers to a statement "admitted *in evidence*." There are countless other occasions when the proposed rules refer to evidence that is offered or introduced or admitted without any mention of the gratuitous "in evidence."

M. *Co*-conspirator.

Proposed FRE 801(d)(2)(E) refers to statements offered against a party and made "by the party's *co*-conspirator." That should say instead "conspirator," which means the same thing. My reasons for this suggestion consist of the following simple and compelling considerations, all of them indisputable:

- You cannot conspire with yourself, just as you cannot be a partner by yourself.
- That is why, as Bryan Garner has correctly observed, you would never say that someone is a (or my) "copartner." A DICTIONARY OF MODERN LEGAL USAGE 223 (2d ed. 1995). It is as silly as "fellow classmate" or "co-brother."
- *Conspirator* is just another way of saying "partner in crime."
- *A priori*, there is obviously no inherent reason (other than perhaps the arbitrary dogmatism of convention) why one can refer to another as "his partner" or "his partner in crime," but never "his conspirator," which means the same thing.

Despite all these indisputable points, *co-conspirator* was once regarded as serving a necessary function by suggesting a point of comparison, because "[I]t is used only where we would otherwise say *fellow conspirator*, as in *his co-conspirator* (where we would not, indeed could not, say *his conspirator*)." Bryan Garner, A DICTIONARY OF MODERN LEGAL USAGE

164 (2d ed. 1995). But even if one concedes for the sake of argument, as I shall gladly do, that this was an accurate description of linguistic convention in 1995, this *ipse dixit* is simply no longer true. Consider this compelling data. The phrase "*his [or her]* conspirator," (or alleged conspirator), has now appeared:

- ***1,207 times in American newspapers and periodicals*** (this is the total number of documents you generate in the Westlaw database ALLNEWS on today's date when you run the following search: <"defendant's conspirator" "defendant's alleged conspirator" "his conspirator" "their conspirator" "her conspirator" "his alleged conspirator" "her alleged conspirator" "their alleged conspirator">. The quotations ensure that you are not picking up any cases which used a phrase such as *his co-conspirator.*)

- ***In 303 published judicial opinions*** by some state or federal court (run the same search in the Westlaw database ALLCASES)

- ***In 88 opinions by the United States Court of Appeals,*** which are among the best written and most carefully edited opinions in the American legal system (run the same search in the Westlaw database CTA)

Here are just three examples from three particularly renowned masters of legal writing:

- **Chief Judge Alex Kozinski:** "Though Lococo's plea agreement admits he joined a conspiracy to distribute crack, Lococo also struck language from that agreement that would have admitted knowledge that ***his conspirators*** converted the powder he sold them into crack." *United States v. Lococo*, 514 F.3d 860, 863 n.1 (9th Cir. 2008).

- **Judge Richard Posner:** "By communicating his withdrawal to the other members of the conspiracy, a conspirator might so weaken the conspiracy, or so frighten ***his conspirators*** with the prospect that he might go to the authorities in an effort to reduce his own liability, as to undermine the conspiracy." *United States v. Paladino*, 401 F.3d 471, 479-80 (7th Cir. 2005).

- **Judge Frank Easterbrook:** "Montano contends that the district court erred by attributing to him three kilograms of cocaine from the uncompleted transaction with the undercover officer, because -given his lack of prior drug dealing and his limited relationship with ***his conspirators*** - the completion of the deal was not reasonably foreseeable to him." *United States v. Vega-Montano*, 341 F.3d 615, 618 (7th Cir. 2003).

On the basis of this data -perhaps especially the usage among the U.S. Court of Appeals – I respectfully contend that settled and sophisticated modern American usage now allows us to speak naturally and correctly of a defendant and *"his conspirator."* Can we really say with confidence that over 300 judges could be wrong about such a thing?

(Don't bother checking to see if "his conspirator" has now become as common as "his co-conspirator." I didn't check and am sure that it hasn't, and probably never will until the Advisory Committee leads the way. "His *co*-conspirator" is the way lawyers have been training each other to speak and write for a very long time, and old habits die hard. But that doesn't mean it is correct, much less necessary, to speak that way.)

III. Archaic and Awkward Phrases Retained or Added in the Proposed Style Revisions

A. *Relevancy.*

Rule 104(a) refers to situations in which the *"relevancy"* of evidence is conditioned on some fact, a word that has been retained in the proposed style revisions. That archaic word is rarely used by modern writers of note, and has become a useless variant of *relevance.* The latter version is a shorter three-syllable version and is now "preferred" in both American and British English. Bryan Garner, A DICTIONARY OF MODERN LEGAL USAGE 750 (2d ed. 1995). Garner correctly points out that *"Relevancy* was the predominant form in American and British writings on evidence of the 19th century, but now *relevance* is more common except in Scotland." *Id.* The admitted popularity of relevancy 100 years ago is scarce warrant for its continued use today.

The justices of the Supreme Court agree. In the past decade since the dawn of the new millennium in January 2000, the justices of the Supreme Court of the United States have only used the word *relevancy* only once in a judicial opinion, and that was a hastily drawn order by a single justice on an expedited application. *Associated Press v. Dist. Ct.*, 542 U.S. 1301, 1303 (2004) (opinion in chambers by Breyer, J.) (During that same ten-year period, the word *relevancy* appeared only four other times in an opinion by any justice of the Supreme Court, but only when the Court was quoting someone else who had used that word, usually long before the year 2000.) During that same ten-year period, a computerized search reveals that the justices used the word *relevance* literally hundreds of times in a total of 160 different cases. Indeed, even when citing and paraphrasing what the Evidence Rules Advisory Committee has written about "relevancy," the Supreme Court of the United States – in a unanimous opinion – recently took the liberty of replacing that word with its more contemporary variant:

> ***Relevance*** and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad *per se* rules. See Advisory Committee's Notes on Fed. Rule Evid. 401, 28 U.S.C.App., p. 864 ("***Relevancy*** is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case").

Sprint/United Management Co. v. Mendelsohn, 128 S.Ct. 1140, 1147 (2008) (emphasis added). This Committee should take the sensible lead of that unanimous Court and replace *relevancy* in Rule 104(a) with *relevance.*

B. Witnesses *Take* Oaths; They Do Not *Give* Them.

Proposed Rule 603 would provide that "Before testifying, a witness must *give* an oath or affirmation to testify truthfully." Proposed Rule 604 likewise would require an interpreter to "*give* an oath or affirmation to make a true translation." Both rules should be changed to say "*take* an oath."

By extremely well-settled linguistic convention, witnesses and others who voluntarily undertake a solemn public obligation are always said to "*take* an oath or affirmation," not to *give* it. The point is so clearly established that it is hard to imagine where the Revisers got any contrary impression. That is the view of Bryan Garner, who correctly notes that "A courtroom witness typically *takes* [an assertory] oath," and that a judicial oath is "an oath *taken* in the course of a judicial proceeding, esp. in open court." BLACK'S LAW DICTIONARY 1101 (8th ed. 2004). It is also the usage that is consistently adopted by the Supreme Court of the United States; a Westlaw search turns up over 400 Supreme Court cases that refer to an oath *taken* by a judge or a witness or a juror. *E.g.*, *Smith v. Spevack*, 130 S.Ct. 676, 685 (2010) (describing the oath that "the jurors had taken to uphold the law"); *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252, 2267 (2009) (all judges "take an oath" to uphold the Constitution) (Roberts, C.J., dissenting). It is the language consistently adopted in the Federal Rules of Criminal and Appellate Procedure, *e.g.* FED. R. CRIM. P. 6(a)(2) (an alternate juror "*takes* the same oath" as other jurors); FED. R. APP. P. 45(a)(1) (the clerk of the court must "*take* the oath and post any bond required by law"); at no point in any of the other federal rules is any witness said to *give* an oath. Finally, this is the usage that is most consistent with the equally well-settled convention that the party who places the witness under oath is said to "administer" – or to *give* – the oath. *E.g.*, FED. R. CIV. P. 28(a)(1)(A) (depositions must be taken before an official who is authorized to "administer oaths"). It makes no sense to say that a court clerk *administers* an oath to a witness who at the same time *gives* the oath – unless perhaps the witnesses is giving it right back?

C. "You Are *Entitled* to Whatever I Decide to Give You."

In *Alice's Adventures in Wonderland*, at the trial of Alice, the Mad Hatter and the King share the following exchange:

> "I believe that I am entitled to something for my time," mumbled the Hatter as he began to rise from the witness stand.
> "You are *entitled*," said the King with rising anger, "to whatever *I* shall choose to give you, and not one shilling more or less!"

The passage is so delightfully absurd because it reveals that the King truly has no idea what it means to be *entitled* – or to have a *right* – to something. A "right" to whatever someone else unilaterally chooses to give you is, in truth, no right at all.

Unfortunately, the same phrasing is found in proposed Rule 706(c), which says that a court-appointed expert "is *entitled* to whatever reasonable compensation the court allows." That is not a rule of law; it is a punch line. An expert who will receive only what the court chooses to give him is obviously not "entitled" to anything at all.

It would be much more accurate to state that "The expert *shall receive* whatever reasonable compensation the court allows." But even that is a little misleading, of course, because proposed Rule 706(a) states "the court may only appoint someone who consents to act." So no expert will be forced to settle for less compensation than he or she desires.

So an even better improvement would be to replace the opening line of Rule 706(c) with: "The expert *shall receive* whatever reasonable compensation *is agreed upon between the court and the expert*." And then the line in proposed Rule 706(a) can be deleted as superfluous.

By the way, the lines quoted above from *Alice's Adventures in Wonderland* were made up by me. But be honest: didn't you think for a moment that they were really from that book (at least until you noticed how similar they were to Rule 706)? That proves my point.

D. 28 U.S.C. § 3500.

Rule 612(a), which describes a party's right to insist upon production of writings used to refresh recollection, begins with the archaic cross-reference: "[u]nless *18 U.S.C. § 3500* provides otherwise in a criminal case." This reference has not been changed in the proposed stylistic revision.

18 U.S.C. § 3500, the so-called *Jencks* statute, was enacted in 1957 and has not been amended since 1970, during the Nixon administration. For all practical purposes it has been a dead letter since it was intentionally superseded in 1979 – just a few years after the adoption of the Federal Rules of Evidence – by the adoption of Federal Rule of Criminal Procedure 26.2, which was specifically enacted in order to:

> ... place in the criminal rules the substance of what is now 18 U.S.C. § 3500 (the *Jencks* Act). Underlying this and certain other additions to the rules contemplated by S. 1437 [95th Cong., 1st Sess. (1977)], is the notion that provisions which are purely procedural in nature should appear in the Federal Rules of Criminal Procedure rather than in Title 18.

1979 Advisory Committee Note to Federal Rule of Criminal Procedure 26.2.

From the moment it was enacted more than three decades ago, Criminal Rule 26.2 has always been more up-to-date than § 3500. For example, Rule 26.2 was written partially in response to, and represented a codification of, the holding in *United States v. Nobles*, 422 U.S. 225 (1975), governing the discovery of statements prepared by *defense* witnesses, a subject which to this day is still not even mentioned in § 3500. Indeed, in the three decades since Rule 26.2 was enacted, that rule has been amended *four* times to keep it current with the law – while § 3500 has not been amended once.

Evidence Rule 612 should be amended to delete the embarrassingly archaic and obsolete cross-reference to § 3500, and should instead read: "[u]nless *Federal Rule of Criminal Procedure 26.2* provides otherwise in a criminal case..."

In one sense, it must be conceded that this change could be described as something analogous to a substantive change, since Criminal Rule 26.2 is not identical to provisions of § 3500 (because, for example, only the former applies to defense witnesses). But that is not quite correct, since Rule 26.2 has actually governed the production of witness statements in criminal cases for more than thirty years and shall continue to do so regardless of whether Evidence Rule 612 says so or not.

This change in Rule 613 will serve two equally compelling functions. It will immediately bring up-to-date Rule 613's cross-reference for criminal cases by citing to the Rule that much more accurately summarizes the current law with respect to the *Jencks* doctrine (which § 3500 has not done since the *Nobles* case was decided in 1975). And it will also allow Rule 613 to effectively incorporate by reference all future changes and amendments in Criminal Rule 26.2.

E. "A *Natural* Person."

The Advisory Committee has unfortunately preserved the reference in Rule 615 to "a *natural* person." That phrase does not appear anywhere else in the Rules of Evidence – and does not appear even once in the current Federal Rules of Civil, Criminal, and Appellate Procedure. That is a fairly sure sign we are discussing what is surely the most archaic word in the book.

There are very rare cases where "natural person" is necessary to distinguish human beings from juristic persons, but Rule 615 is not one of them. Presently that Rule forbids the exclusion from the courtroom of (among others):

(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;

These two clauses could be very greatly improved and easily combined into a single clause as follows:

> (a) a party, or – in the case of a party that is not a human being – an officer or employee designated as its representative;

F. "*On* the introduction."

Rule 104(b) allows a judge to admit certain "evidence ... *upon*, or subject to, the introduction of evidence" sufficient to demonstrate its relevance to the case. The revisers propose to replace *upon* with *on*, so that the rule will instead allow a judge to admit "evidence ... *on* ... the introduction" of certain facts. This proposed change makes the sentence *less* grammatical. It is true, as the revisers obviously realize, that *upon* is a formal word that is "usually unnecessary in place of *on*," Bryan Garner, A DICTIONARY OF MODERN LEGAL USAGE 904 (2d ed. 1995). But not always. As Bryan Garner correctly points out, "*upon* is quite justifiable," and sometimes necessary, "when it introduces a condition or event." *Id.* That is exactly what it does in Rule 104(b). It would be simply ungrammatical (not to mention confusing) for a judge to say, as proposed Rule 104(b) does, that "I will admit this evidence *on* the introduction of evidence sufficient to support a finding."

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February 16, 2010

COMMENTS OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS on proposed stylistic changes to Federal Rules of Evidence

ARTICLE IV. RELEVANCY AND ITS LIMITS Rule 401. Definition of "Relevant Evidence"	ARTICLE IV. RELEVANCY AND ITS LIMITS Rule 401. Test for 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.

Committee Note

The language of Rule 401 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. There is no intent to change any result in any ruling on evidence admissibility.

NACDL Comment

The existing rule defines relevancy by asking whether evidence makes the existence of a fact more or less probable "than it would be without the evidence." The proposed stylistic change eliminates the phrase "than it would be without the evidence."

Evidence that may make a fact more or less probable in the abstract, may not do so if it is merely cumulative of existing evidence. The existing rule, in effect, imposes a cumulative limitation in the definition of relevant evidence. Evidence that might be deemed not relevant under the existing rule because it does not make a fact more or less probable "than it would be without the evidence," (because it is merely cumulative), and which would consequently be inadmissible under Rule 402, could be deemed relevant under the rule as it is proposed to be amended and thus admissible under Rule 402. Thus, the proposed stylistic change could affect the result in a ruling on evidence admissibility.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes	Rule 404. Character Evidence; Crimes or Other Acts
(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; Notice.*** This evidence may be admissible 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.

Committee Note

The language of Rule 404 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. There is no intent to change any result in any ruling on evidence admissibility.

NACDL Comment

The existing rule expressly conditions the admission of Rule 404(b) evidence on the prosecution providing notice of the evidence upon request of the accused, as it states that such evidence "may . . . admissible for other purposes, provided that upon request by the accused," the prosecution provides reasonable notice of the general nature of any such evidence. (Emphasis added.)

The proposed stylistic change eliminates the phrase "provided that" and thus removes the express and automatic condition of reasonable notice for the admission of such evidence. The proposed stylistic change could affect the result

in a ruling on evidence admissibility. To retain the prior meaning, a subsection could be added stating that "(C) Failure of the prosecutor to give the notice required by subsection (A), or to provide good cause for that failure under subsection (B), requires exclusion of that evidence in a criminal case."

Rule 407

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.

Committee Note

The language of Rule 407 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.

Rule 407 previously provided that evidence was not excluded if offered for a purpose not explicitly 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.

NACDL Comment

The proposed stylistic change replaces "if controverted" with "if disputed." Requiring that a claimed purpose for which evidence is offered be "controverted" could be read as requiring the opposing party to have offered some affirmative evidence contesting the point, whereas requiring that the purpose be "disputed"

could be read as only requiring that the opposing party argue against the point, or perhaps even not concede it. See, *e.g.*, *Patterson v. Indiana Newspapers, Inc.*, 589 F.3d 357, 359 (7th Cir. 2009) ("The district judge determined that Coffey and Patterson had failed to comply with Local Rule 56.1(b), which requires a [party] opposing a motion for summary judgment to identify the material facts in dispute and cite to admissible evidence controverting the [moving party's] evidence. . . . Because of this noncompliance with the local rules, the judge enforced Local Rule 56.1(e) and for the most part accepted the Star's factual assertions as undisputed.")

Evidence that would not be admissible under the existing rule because the purpose for which it is offered was not controverted (with some evidence) by the opposing party, could be admissible under the proposed amended rule because the purpose for which it is offered is disputed, even if it has not been controverted. Thus, to the extent that the word "disputed" could be interpreted to mean something different than "controverted," the proposed stylistic change could affect the result in a ruling on evidence admissibility. A change of wording seems inadvisable here, where no change of meaning is intended.

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 a witness's bias or prejudice or — if disputed — proving agency, ownership, or control.

Committee Note

The language of Rule 411 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.

Rule 411 previously provided that evidence was not excluded if offered for a purpose not explicitly 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.

NACDL Comment

The proposed stylistic change may affect the result in a ruling on evidence admissibility because it conditions the admission of such evidence for a non-prohibited purpose on the purpose being "disputed," a condition not found in the existing rule. We see no justification for adding this new condition in a restyling that is intended to effect no change of meaning.

ARTICLE VIII. HEARSAY Rule 801. Definitions	ARTICLE VIII. HEARSAY Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay
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 the declarant does not make 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.

Committee Note

The language of Rule 801 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.

Statements falling under the hearsay exclusion provided by Rule 801(d)(2) are no longer referred to as "admissions" in the title to the subdivision. The term "admissions" is confusing because not all statements covered by the exclusion are admissions in the colloquial sense — a statement can be within the exclusion even if it "admitted" nothing and was not against the party's interest when made. The term "admissions" also raises confusion in comparison with the Rule 804(b)(3) exception for declarations against interest. No change in application of the exclusion is intended.

NACDL Comment

The proposed stylistic change adds a requirement that only an "oral or written assertion" by a "person" is a statement for purposes of Article VIII; the present rule applies to oral or written assertion without any reference to "persons." This proposed alteration in wording may affect the result in a ruling on evidence admissibility because assertions by government agencies or other non-person entities that are offered for the truth of the matter asserted would not be subject to exclusion on hearsay grounds, whereas such assertions are inadmissible hearsay under the current rule unless an exception applies. See, *e.g., Bridgeway Corp. v. Citibank*, 201 F.3d 134, 143 (2d Cir. 2000) (recognizing that Country Report issued by State Department is hearsay when assertions it contains are offered for the truth, but finding that they are not excludable as hearsay because they come within Fed. R. Evid. 803(8)(C), which allows the admission of '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.' See Fed.R.Evid. 803(8)(C)."). Adding the word "person's" does not clarify the meaning in any way, and may lead to confusion (or worse) in applying the new rule.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial	Rule 803. Exceptions to the Rule Against Hearsay — 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:	The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
(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 setting out: (A) the office's activities; (B) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or (C) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation. But this exception does not apply if the source of information or other circumstances indicate a lack of trustworthiness.
(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.** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record if the testimony or certification is admitted to prove that: (A) the record does not exist; or (B) a matter did not occur or exist, even though a public office regularly kept a record for a matter of that kind.

Committee Note

The language of Rule 803 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. There is no intent to change any result in any ruling on evidence admissibility.

NACDL Comment

The proposed stylistic change substitutes "record" in place of "[r]ecords, reports, statements, or data compilations" in both subparagraphs (8) and (10). A "record" for purposes of Rules 803, 901, 902 and 1005 is defined by the proposed stylistic change to Fed. R. Evid. 101(b)(4) as follows: "'record' [in Rules 803, 901, 902, and 1005] includes a memorandum, report, or data compilation . . ." (brackets in the original). Under the proposed stylistic change, the hearsay exceptions in subparagraphs (8) and (10) would not necessarily encompass "statements," and thus to the extent a "statement" was not considered to be a memorandum, report or data compilation, the proposed stylistic change could affect the result in a ruling on evidence admissibility. Even recognizing that a definition that says "includes" rather than "means" is not exclusive, the omission of "statements" from Rule 101(b)(4) introduces a degree of unnecessary potential for confusion.

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.** To authenticate or identify an item of evidence 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:
(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.*** Evidence that: **(A)** a record is from the public office where items of this kind are kept; or **(B)** a document was lawfully recorded or filed in a public office.

Committee Note

The language of Rule 901 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. There is no intent to change any result in any ruling on evidence admissibility.

NACDL Comment

As with the proposed stylistic changes to Fed. R. Evid. 803 (8) & (10), the proposed stylistic change to Rule 901(b)(7) substitutes "record" in place of a list of items that includes a "statement," and because the definition of "record" in the

proposed stylistic change to Fed. R. Evid. 101(b)(4) does not include a "statement," a statement would not necessarily be included in the authentication example provided by Rule 901(b)(7). Because these are only examples, it is unlikely this proposed stylistic would affect the result in a ruling on evidence admissibility, and is noted here only because it presents another instance in which the proposed definition of "record" does not expressly encompass all of the items it presumably is intended to replace.

ARTICLE XI. MISCELLANEOUS RULES **Rule 1101. Applicability of Rules**	ARTICLE XI. MISCELLANEOUS RULES **Rule 1101. Applicability of the Rules**
(a) Courts and judges.	**(a) To Courts and Judges.** ....
(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), 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.

Committee Note

The language of Rule 1101 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. There is no intent to change any result in any ruling on evidence admissibility.

NACDL Comment

The proposed stylistic change makes the list of "miscellaneous proceedings" to which the Rules do not apply exemplary rather than limiting, by adding the phrase "such as." This proposed stylistic change could affect the result in a ruling on evidence admissibility in any proceeding that is not among those listed in existing Rule 1101(d)(3) which a judge deems to be "miscellaneous" in the same sense and thus encompassed by Rule 1101(d)(3) as it is proposed to be amended. Whether the Rules of Evidence should be applied in other proceedings, whether their application should be discretionary, or whether they should be applied in fewer types of proceedings are complex issues not suited for resolution through a stylistic project. To retain the original meaning, the new rule should say, "that is:" rather than "such as:".

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Respectfully submitted,

THE NATIONAL ASS'N OF CRIMINAL DEFENSE LAWYERS

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TAB 3

September 2010							November 2010							December 2010						
S	M	T	W	T	F	S	S	M	T	W	T	F	S	S	M	T	W	T	F	S
			1	2	3	4		1	2	3	4	5	6				1	2	3	4
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12	13	14	15	16	17	18	14	15	16	17	18	19	20	12	13	14	15	16	17	18
19	20	21	22	23	24	25	21	22	23	24	25	26	27	19	20	21	22	23	24	25
26	27	28	29	30			28	29	30					26	27	28	29	30	31	

October 2010

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
					1	2
3	4	5	6	7	8	9
10	11 Columbus Day Thanksgiving (Canada)	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31 Halloween						U.S. Federal Holidays are in Red.