ADVISORY COMMITTEE
ON
EVIDENCE RULES

Rancho Santa Fe, CA
October 12, 2010

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

Ranch Santa Fe, California

October 12, 2010

I. Opening Business

Opening business includes approval of the minutes of the Spring, 2010 meeting; a report on the June 2010 meeting of the Standing Committee; introduction of new Committee members; and tributes to departing members.

II. Restyled Evidence Rules Submitted to Judicial Conference

The restyled Evidence Rules have been approved by the Standing Committee and sent to the Judicial Conference — where they were placed on the consent calendar. The restyled rules were changed in a number of respects after the Advisory Committee approved them at the last meeting. These changes were in response to suggestions from members of the Standing Committee made after the Advisory Committee meeting. The agenda book contains a memorandum discussing the changes that were made. The restyled rules as submitted to the Judicial Conference are included behind the memorandum.

III. Possible Amendments to the Evidence Rules in Response to Melendez-Diaz v. Massachusetts

The Supreme Court's decision in *Melendez-Diaz v. Massachusetts* — holding that certificates of forensic testing prepared for trial are testimonial under the Confrontation Clause — raises questions about some of the Federal Rules hearsay exceptions and authentication provisions that are related to records. The agenda book contains a memorandum from the Reporter discussing the implications of *Melendez-Diaz* and analyzing possible amendments to the Evidence Rules in light of that decision.

IV. Crawford Outline

The updated outline on federal cases on confrontation after *Crawford v. Washington* is included in the agenda book. The Reporter will take the Committee through the major developments.

V. Proposal to Amend Rule 410

During the restyling process, the Advisory Committee received a public comment from the American College of Trial Lawyers, which proposed certain substantive changes to Rule 410 — particularly with regard to its application to the admissibility of plea discussions of cooperating witnesses. The agenda book includes a memorandum from Professor Broun and the Reporter, which describes and evaluates the proposal.

VI. Possible Amendment of Rules 803(6), (7), (8)

The restyling effort uncovered an ambiguity in the hearsay exceptions for business and public records. Those exceptions provide for admissibility of qualifying records "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The ambiguity is about which party has the burden of proof: must the opponent show lack of trustworthiness or must the proponent prove trustworthiness? The agenda book contains a memorandum from the Reporter on the relevant case law and on the possibility of amending these rules to clarify which party has the burden of proof.

VII. Changing the "Not Hearsay" Designation of Rule 801(d).

The Committee has received a public comment from Professor Sam Stonefield, proposing an amendment that would among other things change the designation of Rule 801(d) from "not hearsay" to "hearsay exceptions." The agenda book contains a memorandum from the Reporter that reviews the proposal and suggests a number of drafting alternatives if the Committee is interested in considering an amendment. Professor Stonefield's article on the subject is included behind the memorandum.

VIII. Circuit Court Split on Rule 804(b)(1)

The agenda book includes a memorandum from the Reporter analyzing a split in the circuits on the admissibility — under the hearsay exception for prior testimony — of grand jury testimony that is favorable to the accused. The memorandum provides drafting alternatives should the Committee decide to consider an amendment to Rule 804(b)(1)

IX. Next Meeting

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

CHAIRS and REPORTERS

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 Eugene R. Wedoff United States Bankruptcy Court Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street Chicago, IL 60604	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 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 Sidney A. Fitzwater United States District Court Earle Cabell Federal Building and United States Courthouse 1100 Commerce Street, Room 1528 Dallas, TX 75242-1310	Professor Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023

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ADVISORY COMMITTEE ON EVIDENCE RULES

Chair:	**Reporter:**
Honorable Sidney A. Fitzwater United States District Court Earle Cabell Federal Building and United States Courthouse 1100 Commerce Street, Room 1528 Dallas, TX 75242-1310	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 Brent R. Appel Justice Iowa Supreme Court Iowa Judicial Branch Building 1111 East Court Avenue Des Moines, IA 50319
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 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	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	Paul Shechtman Stillman, Friedman & Shechtman 425 Park Avenue New York, NY 10022
	Liaison Members:
Elizabeth J. Shapiro AD, Federal Programs Branch Civil Division U.S. Department of Justice 20 Massachusetts Ave., N.W., Room 7152 Washington, DC 20530	Honorable Marilyn L. Huff United States District Court Edward J. Schwartz U. S. Courthouse Suite 5135 940 Front Street San Diego, CA 92101

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ADVISORY COMMITTEE ON EVIDENCE RULES (CONT'D.)

Liaison Members: Honorable John F. Keenan United States District Court 1930 Daniel Patrick Moynihan United States Courthouse 500 Pearl Street New York, NY 10007-1312	 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
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:	
Dean C. Colson	(Standing Committee)
Bankruptcy:	
Judge James A. Teilborg	(Standing Committee)
Civil:	
	(Bankruptcy Rules Committee)
Judge Diane P. Wood	(Standing Committee)
Criminal:	
Judge Reena Raggi	(Standing Committee)
Evidence:	
Judge Judith H. Wizmur	(Bankruptcy Rules Committee)
Judge Paul S. Diamond	(Civil Rules Committee)
Judge John F. Keenan	(Criminal Committee)
Judge Marilyn Huff	(Standing Committee)

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

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Laural L. Hooper (Criminal Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Tim Reagan (Evidence Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003

TAB 1A

Advisory Committee on Evidence Rules

Minutes of the Meeting of April 22-23

New York, New York

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 22nd and 23rd, 2010.

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.,
Elizabeth J. Shapiro, 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
Hon. John F. Keenan, Liaison from the Criminal Rules Committee
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
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
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

I. Opening Business

The Committee approved the Minutes of the Fall 2009 meeting. Judge Hinkle then reported on the January 2010 Standing Committee meeting. The Evidence Rules Committee had no action items at that meeting.

II. Restyling of the Evidence Rules

A. Introduction

At its Spring 2007 meeting, the Committee voted unanimously to begin a project to restyle the Evidence Rules. 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. The restyled rules were approved for publication by the Standing Committee and submitted for public comment. The public comment period ended on February 15, 2010.

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.

At its Fall 2009 meeting, the Committee considered comments that it had received to that point on the restyled rules issued for public comment. The Committee tentatively approved some minor changes to the Restyled Rules. Then, after all the public comments were received, the Reporter reviewed them and provided recommendations to the Committee. The Style Subcommittee also reviewed the public comments and adopted certain changes.

At its Spring 2010 meeting, the Advisory Committee considered the public comments and the changes made by the Style Subcommittee. Each member also conducted a final, independent review of all the Restyled Rules. The goal of the Committee at the meeting was to prepare a final package of Restyled Rules, with the recommendation that they be approved by the Standing Committee and referred to the Judicial Conference.

The Advisory Committee approved a final package of Restyled Rules, and the Committee unanimously recommended that the restyling amendments be approved by the Standing Committee and referred to the Judicial Conference.

These minutes chronicle the Advisory Committee's review of the Restyled Rules as issued for public comment, the public comment received, and the determinations and suggestions of the Style Subcommittee and Professor Kimble. (The Style Subcommittee met by conference call after the

Advisory Committee's meeting to review changes. The Style Subcommittee's review and determination will be included in these minutes under the discussion of individual rules.)

Given the scope of the project, the number of issues, and the fact that much work on the restyled rules had been done before the meeting, the Committee adopted the following protocol for its Spring 2010 meeting:

1) a public comment suggesting a style change that had been rejected by the Style Subcommittee would not be discussed at the meeting unless a Committee member affirmatively raised it;

2) if the Reporter determined, in his memo to the Committee, that a public comment called for a substantive change, it would not be discussed at the meeting unless a Committee member affirmatively raised it;

3) all changes adopted by the Style Subcommittee to the rules as issued for public comment (most of them being changes proposed by members of the public) would be considered and voted upon at the meeting;

4) any new change proposed by a Committee member to the rules as issued for public comment would require discussion and a vote at the meeting;

5) any change that had been tentatively approved by the Committee at the Fall 2009 meeting would be deemed finally adopted unless an objection was raised by a Committee member;

6) any public comment received after the Fall 2009 meeting that raised an issue already considered and voted upon by the Committee would not be discussed at the meeting unless a Committee member affirmatively raised it; and

7) any rule issued for public comment that received no public comment was deemed approved (as it had been approved in order to be so issued) unless a Committee member raised a concern about that rule at the meeting.

II. Consideration of Individual Rules

These minutes will set out, in side-by-side form, the original rule and the rule as issued for public comment, with the changes tentatively approved at the Fall 2009 Committee meeting in blackline. The Committee Notes to the respective rules will be set forth at the end of these minutes as they were separately considered by the Advisory Committee.

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" 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.

Committee Discussion:

1. Rule 101(a), proceedings before courts: A Committee member suggested that the phrase "these rules apply to proceedings *before* United States courts" would be more accurately stated as "these rules apply to proceedings *in* United States courts." The Committee unanimously agreed with this suggestion. The Committee referred the matter to the Style Subcommittee. **(The Style Subcommittee approved the change).**

2. Rule 101(b)(6) "any medium": Professor Kimble suggested that the definition of written material in (b)(6) should refer to "*any* other medium." The Committee unanimously approved this suggestion. The Committee referred the matter to the Style Subcommittee. **(The Style Subcommittee approved the change).**

Committee Determination: Restyled Rule 101 approved as issued for public comment, with changes to subdivisions (a) and (b)(6).

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.

Committee Determination: Restyled Rule 102 approved 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.

Committee Discussion:

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1. Rule 103(a): 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." The restyling changed it to the active voice: "the party, on the record, timely moves * * *."

A public comment noted that the change to active voice created an inadvertent substantive change, because the rule as issued for public comment 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.*

After discussion, the Committee determined that changing "the party" to "a party" in all appropriate places in Rule 103(a) would solve the substantive problem because it would not require every party to make an object and offer of proof if one party had done so. Accordingly, the Committee unanimously approved the following change to restyled Rule 103(a):

> 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.

(That change was also approved by the Style Subcommittee.)

2. Rule 103(d), examples: The restyled Rule 103(d) deletes the examples provided in the original rule of situations in which a judge is to use all practicable efforts to prevent inadmissible evidence from being suggested to the jury. A public comment suggested that these examples were helpful and should be restored. One Committee member agreed, finding the examples useful. But other members noted that the examples were underinclusive and so could be misinterpreted. Others noted that the Evidence Rules rarely give specific examples.

As no motion was made to change the restyled Rule 103(d) as issued for public comment, the examples were not restored to the rule.

Committee Determination: Restyled Rule 103 as issued for public comment approved, with changes to subdivision (a).

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.

Committee Discussion:

1. Rule 104(b): The Committee recognized that restyling Rule 104(b) raised many challenges. The Rule had to provide: a) the standard of proof for conditional relevance (evidence sufficient to support a finding; b) an emphasis that if that standard is met, the judge must find the evidence conditionally relevant, but also could find the evidence excluded on other grounds; c) a provision, consistent with current law, that the conditional relevance determination could be made at the time of

the proffer or at a later time; d) a distinction in the text between two kinds of evidence: the proffered evidence subject to the conditional fact and the evidence offered to prove that conditional fact; e) an indication that the evidence offered to prove the conditional fact would itself have to meet standards of admissibility (because the ultimate determination of the factual condition is for the jury); and f) a statement that the evidence offered to prove the conditional fact need not always be produced by the party who proffers the underlying evidence --- the review for conditional relevance can consider all the evidence presented in the case.

At its Fall 2009 meeting, the Committee determined that the rule released for public comment did not capture all the prerequisites of Rule 104(b), and therefore made a substantive change. For one thing, the rule did not specify that when the court finds evidence sufficient to support a finding of the conditional fact, it must find Rule 104(b) satisfied.

After discussing a number of drafts before the Spring 2010 meeting, the Committee reviewed the following revision (blacklined from the rule as issued for public comment):

> When the relevance ~~relevancy~~ of evidence depends on ~~fulfilling a factual condition, the court may admit it on, or subject to, the introduction of evidence~~ whether a fact exists, proof must be introduced sufficient to support a finding that the ~~condition is fulfilled~~ fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

In discussion, one Committee raised a question about the word "proof" and suggested the word "evidence" as an alternative. But other members pointed out that using the word "evidence" at that point would raise the confusion that the restyling has sought to avoid --- i.e., the confusion between the evidence the party wishes to introduce and the evidence of the conditional fact.

After further discussion, the Committee unanimously approved the proposed change to Rule 104(b). (The change had already been approved by the Style Subcommittee.)

2. Rule 104(c), hearings: This rule provides for certain "hearings" to be conducted outside the "hearing" of the jury. From a style standpoint, the challenge is the different usages of the word "hearing." Professor Kimble sought to remedy some of that awkwardness by referring to a hearing where the jury is not "present"--- but Committee members, at the Fall 2009 meeting, noted that this would be a substantive change because a hearing could be held with the jury present but unable to hear the proceedings.

Professor Kimble proposed the following version of restyled Rule 104(c) at the Spring 2010 meeting. It had been approved by the Style Subcommittee before the meeting.

Conducting a Hearing So That the Jury Cannot ~~Must Not~~ 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.

Some Committee members suggested that the caption to the rule was awkward, but all recognized that any change would be a question of style --- and the Style Subcommittee had already approved the proposal. The Committee voted unanimously to approve the above change to the restyled version of Rule 104(c).

Committee Determination: Restyled Rule 104 approved with changes to subdivisions (b) and (c), and technical change previously approved at the Fall 2009 meeting.

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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.

Committee Determination: Restyled Rule 105 approved as 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.

Committee Discussion:

Members discussed the caption and agreed that it sounded awkward. A Committee member suggested the following change:

Rule 106 — ~~Rest~~ Remainder of or Related Writings or Recorded Statements

This was a suggestion for a return to the caption in the original rule. After discussion, the Committee unanimously approved a recommendation to the Style Subcommittee to consider a return to the caption of the original rule.

Committee Determination: Restyled Rule 106 approved with the suggestion to the Style Subcommittee to return to the caption of the original rule.

(The Style Subcommittee subsequently approved the suggested change).

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.

Committee Discussion:

Rule 201(d), "the noticed fact": At the Fall 2009 meeting, the Committee agreed to change "the noticed fact" to "the fact to be noticed" in Restyled Rule 201(d). The reason for the change was that at the time of the hearing the fact will ordinarily not have been noticed --- the hearing is usually conducted to determine whether the court should take judicial notice. A member pointed out that it may occur that a court would take notice and *then* hold a hearing. After discussion, however, the Committee concluded that the term "the fact to be noticed" was sufficiently broad to include facts noticed before and after the hearing. No motion was made to reverse the change approved at the Fall 2009 meeting. So under the protocol adopted for the Spring 2010 meeting, the Committee approved the restyled Rule 201(d), with the change of "the noticed fact" to "the fact to be noticed" in Rule 201(d).

Committee Determination:

Restyled Rule 201 approved with the change to subdivision (d) as previously approved by the Committee.

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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.

Committee Discussion:

At the Fall 2009 meeting, the Committee considered a public comment suggesting that the language "the burden of proof in the sense of the risk of nonpersuasion" was awkward and that Rule 301 could be clarified by distinguishing the various burdens that are referred to in the rule. Committee members noted that the two sentences in the restyled Rule as issued for public comment address different questions. The first allocates a burden of *production* while the second allocates a burden of *persuasion.* The restyled Rule uses the term "burden of going forward" for the former concept and "burden of proof in the sense of the risk 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 --- as seen in the above blackline. Subsequently the Style Subcommittee approved those changes.

At the Spring 2010 meeting, the Committee considered a suggestion that "burden of persuasion" in the last sentence should be changed to "burden of proof." The Committee determined that burden of "proof" 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. Accordingly, the Committee determined unanimously that no change should be made to the changes that had been tentatively adopted at the Fall 2009 meeting.

Committee Determination:

Restyled Rule 301 approved with changes previously approved (as indicated in the blackline).

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.

Committee Determination: Restyled Rule 302 approved as issued for public comment.

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 Discussion:

1. "than it would be without the evidence": The restyled version of Rule 401 as issued for public comment dropped the language "than it would be without the evidence." Some public comments disagreed with this change, arguing 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."

In response to the public comment, Professor Kimble suggested that Rule 401 should be restructured in a way that would include the language "than it would be without the evidence." That proposal was as follows (blacklined from the restyled rule as issued for public comment):

> Evidence is relevant if:
>
> (a) it has any tendency to make a fact more or less probable ~~the existence of a fact that is of consequence in determining the action~~ than it would be without the evidence; and
>
> (b) the fact is of consequence in determining the action.

The Style Subcommittee approved Professor Kimble's proposal. After discussion, the Advisory Committee unanimously approved the changes proposed by Professor Kimble. Members noted that the subdivisions are not freestanding. Subdivision (b), in referring to a "the fact," is referring to subdivision (a). Professor Kimble noted that the restyling frequently "build" one subdivision on another within a rule.

Committee Determination: Restyled Rule 402 approved, with changes from the Rule as issued for public comment — adding "than it would be without the evidence" and restructuring the Rule.

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.

Committee Discussion:

Bullet points: The Committee reviewed once again its decision to use bullet points --- on a limited basis --- as part of the restyling. Committee members noted that previous restylings used bullet points as a way to organize lists and concepts, and to make a rule more user-friendly. Some have criticized the use of bullet points because they cannot be cited conveniently. But Committee members noted that the listed sources for excluding relevant evidence in Rule 402 cannot be individually cited at all in the current rule. So a citation to "the second bullet point" is an improvement under current law.

The alternative to bullet points is numbered subdivisions, but Committee members concluded that subdivisions would not work in Rule 402. For one thing, it would be odd to have subdivisions that are simply a list of phrases or words --- no verbs. For another, the use of subdivisions would make it difficult to deal with what would amount to a hanging paragraph at the end of the rule.

Members also noted that bullet points were being used only rarely in the restyled rules --- only where listed factors could not be set forth efficiently in numbered subdivisions. Finally, members noted that the use of bullet points was obviously a question of style and not substance --- and that the Style Subcommittee of the Standing Committee (which has the final word on questions of style), approved the use of bullet points in Rule 402 as well as in a few other rules.

Committee members unanimously approved the restyled Rule 402 as it was approved for public comment.

Committee Determination: Restyled Rule 402 approved as issued for public comment.

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.

Committee Determination: Restyled Rule 403 approved as issued for public comment.

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.

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(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 in a Criminal Case.*** 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 Discussion:

1. Rule 404(a)(2) caption.

At the Fall 2009 meeting the Committee agreed with Professor Kimble's suggestion to clarify the caption to Rule 404(a)(2) --- the clarification being that the exceptions set forth in that subdivision were with respect to "a defendant or a victim" in a criminal case. At the Spring 2010 meeting, Professor Kimble suggested that the "a" before victim should be dropped. The Committee agreed. The caption, as finally approved by the Committee, reads as follows:

Exceptions for a Defendant or a Victim in a Criminal Case.

(The Style Subcommittee subsequently approved this change).

2. Rule 404(b) --- Notice Provision.

A public comment suggested that the restyled notice provision no longer conditioned admissibility of evidence on giving proper notice. The original rule states that uncharged misconduct may be admissible for a non-character purpose, "provided that" the prosecution properly notifies the defendant. The restyled provision sets the notice requirement in a separate sentence and says the prosecutor "must" give proper notice, without saying what happens if notice is not given.

Some Committee members noted that other notice provisions in the Rules had been set forth as mandatory requirements, without stating that evidence would be excluded for failure to comply --- and courts have read those provisions as precluding admissibility if notice is not given. Examples include Rules 412-415. That is a sensible reading of a notice requirement because the rules of evidence do not deal with sanctions --- they are all about admissibility, and so it should be assumed that failing to meet a requirement in a rule would render it inadmissible under that rule. Other Committee members noted that the restyled Rule 404(b) notice provision had been made consistent with the other notice provisions, and consistency is an important goal of the restyling project.

Two Committee members suggested that starting the sentence on notice with the word "But" would help to tie the notice requirement into admissibility. Other members responded that use of the word "But" would not be very clarifying in this instance, and it would mean that the Rule 404(b) notice provision would be different from all others. A motion to add "But" to the beginning of the notice sentence was made and seconded. Two members voted in favor, three against, and one abstained.

Committee Determination: Rule 404 approved with technical changes made at Fall 2009 meeting, and a minor change to the caption of Rule 404(a)(2).

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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.

Committee Determination: Restyled Rule 405 approved as issued for public comment, with the blacklined change approved at the Fall 2009 meeting.

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.

Committee Discussion:

"Is relevant": A public comment expressed concern that replacing "is relevant" with "may be admitted" could result in an unintended substantive change---because "may be admitted" seems more conditional than "is relevant." The Committee discussed the matter and determined that no substantive change was made. The statement "is relevant" is itself conditional because relevant evidence is not always admitted --- it can be excluded under Rule 403, the hearsay rule, etc. Committee members concluded that "may be admitted" is in fact more helpful to the reader than "is relevant" because the reader might wonder why habit evidence --- which is obviously relevant to whether a person acted in accordance with the habit --- needs to be characterized as "relevant" under the rule.

Committee Determination: Restyled Rule 406 approved as issued for public comment.

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 Discussion:

1. Bullet points: The Committee reviewed the use of bullet points in Rule 407 and found that they were helpful for understanding the permissible purposes under the Rule --- and also to avoid the anomaly of a hanging paragraph after any numbered subdivision. The Committee also noted that the use of bullet points presented a question of style not substance, and the Style Subcommittee had already approved restyled Rule 407.

2. Change from "controverted" to "disputed": A public comment contended that the word "controverted" in the original rule means that the defendant must put in some affirmative evidence contesting the point before the plaintiff can respond with subsequent remedial measure evidence. The comment suggested that the change from "controverted" to "disputed" was substantive on the ground that "disputed" was a less rigorous standard. But the Committee noted that the word "disputed" is an accurate description of the case law, and concluded that there is no substantive difference between "controverted" and "disputed." Case law does not require a defendant in all cases to introduce affirmative evidence contesting a point for subsequent remedial measures to be admissible. Committee members observed that as a matter of style, the word "disputed" is plainer and more common than "controverted" --- and the change was approved by the Style Subcommittee. No Committee member moved to change the language of the restyled Rule 407 as it was issued for public comment.

Committee Determination: Restyled Rule 407 approved as 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.

Committee Discussion:

A public comment suggested that the restyled language "in order to compromise the claim" would not cover statements and offers in settlement that were unsuccessful. The Committee considered whether to change the language to "in an effort to compromise the claim." But ultimately the Committee decided not to adopt any change to the Restyled Rule. Committee members noted that the Rule covers offers and promises without regard to whether the settlement actually occurs --- and the term "in order to compromise the claim" focuses on the intent of the offeror, not on whether any settlement is actually reached.

Committee Determination: Restyled Rule 408 approved as issued for public comment.

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.

Committee Determination: Restyled Rule 409 approved as issued for public comment.

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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.

Committee Discussion:

1. Rule 410(a)(3) — "a statement about either of those pleas"

At the last Committee meeting, the DOJ representative explained how the restyled language in Rule 410(a)(3) creates a substantive change: the restyling unintentionally narrows the class of statements that are inadmissible to those only "about the pleas." As restyled, the phrase "regarding either of the foregoing pleas" modifies 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.

For the Spring 2010 meeting, Professor Kimble prepared the following change to Rule 410(a)(3):

> (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;

The DOJ reviewed the proposal before the meeting and concluded that it solved the substantive concern that it had raised. The Style Subcommittee also approved the change.

At the meeting, the Committee unanimously approved the change, agreeing that the revision avoided any substantive change from the original rule.

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

A member of the public suggested the following change to Rule 410(b)(1) as issued for public comment:

> (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

The Style Subcommittee agreed with this suggestion and the Advisory Committee approved it unanimously.

Committee Determination: Restyled Rule 410 approved as issued for public comment, with change to (a)(3) and technical change to (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.

Committee Discussion:

1. "did or did not have liability insurance": A public comment argued that the restyled language "have liability insurance" is not as comprehensive as the original language "insured against liability." It explained 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 indemnity agreements that are not often thought of as liability insurance.

The Committee agreed with the public comment, and so approved the following change to the restyled rule as it was issued for public comment:

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

(This change was also approved by the Style Subcommittee).

2. Addition of "if disputed": A public comment argued that adding the condition "if disputed" to the proper purposes set forth in the rule was a substantive change --- because there is no such requirement in the original rule.

Professor Kimble added "if disputed" to provide a parallel to Rule 407. But in discussion, the Committee determined that the two rules were not necessarily parallel. Given the dearth of case law on Rule 411, the Committee was unable to determine, with sufficient confidence, whether the addition of an "in dispute" requirement would mean a substantive change in Rule 411. The Committee unanimously determined that the prudent course would be to delete the "if disputed" language that had been added to the Rule. The language was therefore dropped from the restyled Rule 411. That change was also approved by the Style Subcommittee.

Committee Determination: Restyled Rule 411 approved with a change to the language on liability insurance; deletion of "if disputed"; and adoption of change approved at previous meeting, to prohibit proof of insurance when offered to show lack of negligence.

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.

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(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.

Committee Discussion:

1. Rule 412(b)(1)(B): "sexual behavior toward the defendant"

A public comment suggested that the phrase "sexual behavior toward the defendant" w as incorrect. The Committee considered this comment and determined that the language was a substantive change, because the exception has been construed to allow evidence of a victim's sexual behavior even though it was not necessarily directed "toward" the defendant. The Committee discussed alternative language --- including "concerning the defendant," which was language proposed by the Style Subcommittee. In the end the Committee determined that the safest approach (i.e., the approach that could not lead to a substantive change) was to use the language from the original rule. The Committee therefore unanimously approved the following change to the restyled Rule 412(b)(2)(B) as released for public comment:

> evidence of specific instances of a victim's sexual behavior ~~toward~~ with respect to the defendant, if offered by the prosecutor or if offered by the defendant to prove consent; and

(That change was subsequently approved by the Style Subcommittee).

2. Rule 412(b)(1)(B): Change from "the person accused of sexual misconduct" to "the defendant"

After the meeting, while implementing the above-discussed change to Rule 412(b)(1)(B), the Reporter noticed another substantive change in that subdivision. The original rule provides an exception for "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." The restyled rule as issued for public comment reads "evidence of specific instances of a victim's sexual behavior with respect to *the defendant*, if offered by the prosecutor or if offered by the defendant to prove consent." This change provides a more limited exception because it does not permit evidence of sexual behavior of the victim with respect to a *third party*, when offered to prove the victim's consent. An example would be a case in which the defendant was charged with aiding and abetting a sexual assault, and the defendant offers prior sexual behavior between the victim and the alleged perpetrator to prove consent with the alleged abuser.

In an email exchange after the meeting, the Committee agreed that the change was substantive, and approved a return to the wording of the original rule. Together with the already approved change to this subdivision, the restyled rule as approved by the Committee reads as follows:

> evidence of specific instances of a victim's sexual behavior ~~toward the defendant~~ with respect to the person accused of the sexual misconduct if offered by the prosecutor or if offered by the defendant to prove consent; and

(That change was subsequently approved by the Style Subcommittee).

Committee Determination: Rule 412 approved as issued for public comment, with changes to (b)(1)(B) as noted above.

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).

Committee Determination: Restyled Rule 413 approved as issued for public comment, with the addition of the blacklined change to the heading of subdivision (b) previously approved.

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 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, ''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

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	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).

Committee Determination: Restyled Rule 414 approved as issued for public comment, with the addition of the blacklined change to the heading of subdivision (b) previously approved.

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.

Committee Discussion:

Heading of Rule 415(b), notice provision: Professor Kimble noted that while the headings to the notice provisions of Rules 413 and 414 had been changed at the previous meeting to make them more descriptive, the heading to Rule 415(b) had not. Professor Kimble proposed the following change to the heading, for parallelism with Rules 413(b) and 414(b):

Disclosure <u>to the Opponent</u>

The Advisory Committee unanimously approved this suggestion. It had been previously approved by the Style Subcommittee.

Committee Determination: Restyled Rule 415 approved as issued for public comment, with a change to the heading of Rule 415(b).

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.

Committee Discussion:

1. Bullet points: As with Rule 402 and 407, the Committee unanimously determined that the use of bullet points was appropriate for the list set forth in 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. And as with those other Rules, the Committee noted that the use bullet points was a question of style, and the Style Subcommittee to the Standing Committee had already approved the restyled Rule 501.

2. "other rules prescribed by the Supreme Court": A public comment suggested that the word "other" might be "misplaced." "Other" could not 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 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 agreed that the word "other" should be deleted, as did the Style Subcommittee. The Committee voted unanimously to delete the word "other" from the third bullet point.

Committee Determination: Restyled Rule 501 approved as issued for public comment, with the deletion of the word "other."

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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.

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Committee Discussion:

Rule 502 was drafted and revised in accordance with style guidelines during the process of its enactment in 2008. As it was approved by Congress and the styling of the rule was hard-fought, the Committee resolved not to propose any style changes to Rule 502 as enacted --- with the exception of a few capitalization changes.

Committee Determination: Rule 502 approved as issued for public comment.

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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.

Committee Determination: Restyled Rule 601 approved as issued for public comment.

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.

Committee Discussion:

Last sentence: After discussion, the Committee voted unanimously to change the last sentence as follows

> **This rule does not apply to an expert's testimony ~~by an expert witness~~ under Rule 703.**

This revision deletes the word "witness" on the ground that the expert has to be a witness when she gives "testimony." It also helps to clarify that the exception to personal knowledge applies only when a witness is testifying as an expert. If an expert also testifies as a lay witness, she must have personal knowledge.

(The Style Subcommittee approved this change).

Committee Determination: Rule 602 approved as issued for public comment, with a change to the last 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.

Committee Discussion:

"give an oath": A public comment suggested that "give an oath" should be changed to "take an oath." But the Style Subcommittee rejected this change and the Advisory Committee deferred to --- and agreed with --- that determination.

Committee Determination: Restyled Rule 603 approved as 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.

Committee Determination: Restyled Rule 604 approved as issued for public comment.

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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.

Committee Determination: Restyled Rule 605 approved as issued for public comment.

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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.

Committee Discussion:

Rule 606(a), "as a witness": At the Fall 2010 meeting, the Committee agreed to the deletion of "as a witness" from Rule 606(a) as it was released for public comment. This was done 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. Before the Spring 2010 meeting, the Reporter reviewed every use of the word "witness" in the Restyled Rules, in response to a public comment that broadly declared that every use of "witness" in the context of "testifying" was superfluous.

With respect to Rule 606(a), the Reporter suggested that there may be situations 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 could be read to prohibit a practice that is currently permitted.

Committee members unanimously agreed with this assessment, citing as examples voir dire and polling the jury. It therefore determined that the deletion of "as a witness" was substantive and voted to restore that language to the Restyled Rule. (The Style Subcommittee agreed with this change).

Committee Determination: Rule 606 approved as issued for public comment.

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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.

Committee Determination: Restyled Rule 607 approved as issued for public comment.

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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.

Committee Discussion:

Rule 608(c): At the Fall 2010 meeting, the Committee determined that Rule 608(c), as issued for public comment, effected a substantive change. The second paragraph of the original Rule 608(b) allows a witness who testifies at trial to invoke the privilege when asked about bad acts that pertain only to the witness's character for truthfulness. As restyled, Rule 608(c) provides that if a witness testifies only to a character for truthfulness, that witness does not waive the privilege. This is incorrect because the original rule does not cover witnesses who testify to a character for truthfulness at all --- if it did, it would be included in Rule 608(a), not 608(b).

After discussion, the Committee voted unanimously that Rule 608(c) would have to be changed and that it would have to be placed --- as it was in the original --- as part of Rule 608(b). The language about the privilege modifies Rule 608(b) not Rule 608(a), as it is intended to protect a witness who testifies to factual issues and then is impeached with bad acts.

The Committee unanimously approved the following change to Restyled Rule 608(b)/(c):

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

(1) the witness; or

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

~~**(c) Privilege Against Self-Incrimination.**~~

By testifying on another matter, a ~~A~~ witness does not waive ~~the~~ any privilege against self-incrimination ~~when being examined about a matter~~ for testimony that relates only to the witness's character for truthfulness.

(The Style Subcommittee agreed with this change).

Committee Resolution: Restyled Rule 608 approved, with change to the text of Rule 608(c), and return of that changed text to the end of Rule 608(b).

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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.

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(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.

Committee Discussion:

Rule 609(a)(1): references to the defendant in a criminal case: Before the meeting, the Reporter and the DOJ representative raised separate concerns about possible substantive changes to the Restyled Rule 609(a)(1). The Reporter noted that the balancing test for criminal defendants in Restyled Rule 609(a)(1)(B) referred only to "prejudicial effect" while the original Rule limits the consideration of prejudicial effect to the defendant who testifies. Under the Restyled Rule, a defendant could complain about prejudice he would suffer when *another* defendant is impeached with a prior conviction. That is not possible under the existing Rule.

The DOJ representative noted another problem with the Restyled Rule. The more protective balancing test applies to "the defendant in a criminal case" --- but under the restyled language it need not be the defendant in the criminal case in which the impeachment evidence is offered. Thus an argument could be made that a witness in one case who is a defendant in another criminal case would be subject to the more protective balancing test of Rule 609(a)(1)(B). That is not the current law and as a policy matter it makes no sense.

After extensive discussion at the meeting, the Committee voted unanimously that the Restyled Rule 609(a)(1) made two substantive changes, and unanimously approved an amendment to the rule as issued for public comment. The amendment, blacklined from the rule issued for public comment, is as follows:

> **(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, in a civil case or in a criminal case in which ~~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 in which the witness is a defendant, if ~~and~~ the probative value of the evidence outweighs its prejudicial effect ~~on the witness~~ to that defendant; 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.

(The Style Subcommittee approved these changes).

2. Rule 609(d)(4)—"admitting the evidence"

A public comment suggested that Restyled Rule 609(d)(4) should be changed as follows:

> ~~admitting~~ the evidence is necessary to fairly determine guilt or innocence.

The Advisory Committee voted unanimously against this change. The Committee reasoned that it is *admitting* the evidence it that is the important event that will affect the determination of determine guilt or innocence.

(The Style Subcommittee agreed to keep "admitting" in Rule 609(d)(4).

Committee Determination: Restyled Rule 609 approved, with changes to Rule 609a, and technical changes approved by the Committee at its Fall 2009 meeting.

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.

Committee Determination: Rule 610 approved as issued for public comment.

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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.

Committee Discussion:

1. Rule 611(a), "mode and order of questioning witnesses": The Committee noted that the use of the word "questioning" was substantively inaccurate, because 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 Committee voted unanimously to change "questioning" to "examining." The Committee noted that "question" is used throughout Rule 611(c), but those references should not be changed because that subdivision is in fact directed only toward questions --- leading questions.

2. Rule 611(b), "a witness's credibility": A public comment suggested that "a witness's credibility" should be changed to "the witness's credibility" as it is only one witness referred to in the Rule. The Style Committee agreed with this suggestion and the Advisory Committee unanimously approved the change.

3. Rule 611(b), restoring "in the exercise of discretion": A public comment suggested that the language in the original rule --- allowing the judge "in the exercise of discretion" to expand the scope of cross-examination --- be retained in the restyled Rule 611(b). Professor Kimble opposed this suggestion on the ground that it would raise the question of what the unadorned use of *may* means everywhere else in the rule. "In the exercise of discretion" is considered a redundant intensifier. The Advisory Committee voted unanimously to reject the suggestion that "in the exercise of the discretion" be added to the Rule as issued for public comment.

4. Rule 611(c) --- "And the court should allow leading questions . . .": The Magistrate Judges' Association opined that the use of "And" to start the last sentence of Restyled Rule 611(c) did not establish a clear enough relationship between the two sentences of the Rule. Before the meeting, Professor Kimble restructured Ruled 611(c) to accord with the Magistrate Judges' suggestion. What follows is the proposed change from the Restyled Rule 611(c) as issued for public comment:

> 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.

This proposal was approved by the Style Subcommittee. The Advisory Committee reviewed the proposal and approved it unanimously. It noted that the word "ordinarily" now modifies the use of leading questions on cross-examination and when a party calls a hostile witness or an adverse party. But the Committee also noted that the restructuring accurately captured the case law: leading questions are ordinarily allowed in all the situations referred to in the Rule.

Committee Determination: Restyled Rule 611 approved with changes to all three subdivisions.

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

Committee Discussion:

1. Rule 612(a)(2) — "a party": Professor Kimble suggested a change from "a" party to "the" party, in order to properly connect to the reference to "an adverse party" in the first line of Rule 612(a). The Style Subcommittee agreed. The Advisory Committee unanimously approved the change.

2. Rule 612(b) — two subdivisions? Two public comments suggested that Rule 612(b) be split into two subdivisions, because as written it covers two separate (but related) topics. The Committee unanimously rejected this suggestion. Members noted that dividing Rule 612(b) would require the duplication of a number of principles in two separate subdivisions.

3. Rule 612(c) — "justice" requires: The current rule provides for various remedies when a party fails to produce or deliver the writing used to refresh recollection; it refers to "justice" twice --- first in the reference to an order of the court, second in a reference to an order for a mistrial if the prosecution refuses to comply. The restyled version refers to "justice" only with respect to the order for

a mistrial. Two public comments suggested that "justice requires" should be restored to the provision governing court orders. Professor Kimble opposed this change. He stated that the other restylings generally refer to "any appropriate order" without intensifiers like "any order that justice requires" or "any order appropriate under the circumstances." But there is no comparable short form in the second sentence of Rule 612(c).

The Advisory Committee unanimously agreed with Professor Kimble's view. Several members noted that the restyled Rule 612(c) accurately describes the judge's options and obligations under the current practice.

Committee Determination: Restyled Rule 612 approved as issued for public comment, with blacklined change approved at Fall 2009 meeting, and with change from "a party" to "the party" in subdivision (a)(2).

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).

Committee Discussion:

Question/Examine: The Restyled Rule uses "questioning" in subdivision (a) and "question" in subdivision (b). A public comment suggested that "examine" would be a better word because people use the term "cross-examine" (not cross-question) and "examination" is an appropriately broader term than "questioning." The Style Subcommittee agreed with this suggestion and changed "questioning" to "examining" in (a) and "question" to "examine" in (b). The Advisory Committee unanimously agreed with this change.

Committee Determination: Restyled Rule 613 approved as issued for public comment, with technical change (blacklined) previously approved by the Advisory Committee, and changes from "question" to "examine" in the caption and in both subdivisions.

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.

Committee Discussion:

1. Questioning/Examining: As in Rules 611 and 613, the Style Subcommittee agreed with the suggestion from public comment that "examine" was a broader and more accurate word than "question." Thus a change was made to the title to Rule 614, the caption and text of subdivision (b), and the text of subdivision (c). The Style Subcommittee agreed with this change.

2. Rule 614(c), "when the jury is not present": The Style Subcommittee decided to change 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." The Advisory Committee determined that this was a substantive change because it would mean that an objection that could be made under the current rule might be lost under the amended rule. It might require a party to request, or to object at, a sidebar right after the objectionable questioning --- and this could raise the negative inference that the Rule 614(c) timing rule is intended to avoid. The Advisory Committee recognized the rationale for the change --- to create parallelism with Rule 104. But that rule covers a different objection in a different context, and while "hearing" works there it does not work in Rule 614(c).

The Advisory Committee voted unanimously to restore the language of the Restyled Rule 614(c) as issued for public comment: "at the next opportunity when the jury is not present."

(In a subsequent telephone conference, the Style Subcommittee approved the language adopted by the Advisory Committee).

Committee Determination: Restyled Rule 614 approved as issued for public comment, with change to subdivision (a), as blacklined, previously approved, and with changes from "question" to "examine" throughout the Rule. The Rule as finally approved is blacklined from the public comment 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.

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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.

Committee Discussion

"a person whose presence a party shows to be essential": A public comment suggested that the words "a party shows to be" is superfluous and that the phrase should just be "a person whose presence is essential." The Style Subcommittee implemented this change, but the Advisory Committee voted unanimously that this was a substantive change. It shifted the focus from the party, whose burden it is (under the current rule) to show the witness is necessary, to the court. It implies that the court must make a sua sponte determination and refuse to exclude a person whose presence is essential even if a party never makes an argument on the subject. Committee members noted that the other grounds for exception against exclusion are in essence self-authenticating, whereas the exception in (c) is dependent on a factual condition --- it makes sense to impose on the party the burden of showing that the factual condition is met.

The Committee voted unanimously to restore "a party shows to be" to the Restyled Rule. It also voted unanimously that the change suggested in public comment was substantive.

(In a subsequent telephone conference the Style Subcommittee approved the reinsertion of "a party shows to be").

Committee Determination: Restyled Rule 615 approved as issued for public comment.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY **Rule 701. Opinion Testimony by Lay Witnesses**	ARTICLE VII. OPINIONS AND EXPERT TESTIMONY **Rule 701 — Opinion Testimony by Lay Witnesses**
If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.	If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: **(a)** rationally based on the witness's perception; **(b)** helpful to clearly understanding the witness's testimony or to determining a fact in issue; and **(c)** not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Committee Determination: Restyled Rule 701 approved as issued for public comment.

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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.

Committee Determination: Restyled Rule 702 approved as issued 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.

Committee Determination: Restyled Rule 703 approved as issued for public comment.

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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.

Committee Determination: Restyled Rule 704 approved as issued for public comment.

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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.

Committee Determination: Rule 705 approved as issued for public comment.

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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.

Committee Discussion:

1. Deletion of "witness/witnesses" in subdivision (a): A public comment suggested broadly that the word "witness" should be deleted whenever combined with "expert" because the expert would by definition have to be a witness. But that broad statement is inaccurate. The Committee determined that deleting the word "witness" in Restyled Rule 706 would be a substantive change because it could lead to an interpretation that Rule 706 governs all court-appointed experts, when in fact it applies only to the appointment by the court of expert *witnesses.*

The Style Subcommittee agreed with the assessment that taking the word "witness" completely out of Rule 706(a) would be a substantive change. But it decided to delete that word from the second sentence of Rule 706(a), because the context will have been made clear by keeping the word in the first sentence. The Advisory Committee unanimously approved the deletion of the word "witness" from the second sentence.

2. Rule 706(c), change by Style Subcommittee: 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." After a short discussion, the Advisory Committee determined that the change was not substantive and approved it unanimously.

Committee Determination: Restyled Rule 706 approved as issued for public comment, with deletion of "witness" in second sentence of subdivision (a), a change to the opening sentence of subdivision (c), and a previously approved change to the caption of subdivision (d).

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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.

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(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).

Committee Discussion:

1. Rule 801(a), intent requirement for implied assertions: The existing rule is unclear on whether an intent to communicate an assertion is a requirement when it is made orally or in writing, but the assertion is implied rather than express. The classic example is a letter written to a testator about the writer's travel plans, offered to prove that the testator is competent. The communication of competence is implied, not express. Under the common law, implied assertions, when offered for the truth of the matter impliedly asserted, were hearsay. In contrast, most (though not all) federal courts have held that in order to be hearsay, the declarant must *intend* to communicate the implied assertion.

The Restyled Rule 801(a) as issued for public comment provides that the intent requirement is only applicable to conduct, and not to oral or written assertions. That is a substantive change in most federal courts. After extensive discussion, the Committee voted unanimously that the Restyled Rule 801(a) makes a substantive change. The Committee then discussed a remedy. Committee members concluded that the best solution was the one that would hew closest to the text of the original rule.

Committee members unanimously proposed the following change to Restyled Rule 801(a) (blacklined from the Rule as issued for public comment):

> **(a) Statement.** "Statement" means~~:~~
>
> ~~(1) a person's~~ an oral or written assertion~~;~~ or
>
> ~~(2) a person's~~ nonverbal conduct of a person, if ~~the person intended it~~ it is intended by the person as an assertion.

The clean version reads 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 suggested a slightly different version:

> "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

The Committee noted that Professor Kimble's version was also acceptable as a substantive matter, but it expressed a preference for the above version, because it is closest to the original.

In a telephone conference after the meeting, the Style Subcommittee adopted Professor Kimble's proposal. As the Advisory Committee agreed that the choice between the two options was one of style, Professor Kimble's proposed language will be recommended to the Standing Committee.

2. Rule 801(c), "prior" statement: The restyled definition of hearsay describes it as "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." A public comment argued that the addition of the word "prior" constituted a substantive change, because a witness could make a statement *after* testifying at a trial that, when offered for truth, would be hearsay under existing law. The Committee agreed with this assessment, and voted unanimously to delete the word "prior" from the definition, on the ground that it constituted a substantive change. The Style Subcommittee reviewed and approved this change.

3. Rule 801(c), "truth of the matter asserted by the declarant": Several public comments argued that the phrase "by the declarant" was incorrect --- a substantive change --- because the declarant may

have made a number of statements. The question is not whether the declarant is telling the truth in general, but whether the statement is true. In response to these comments, Professor Kimble and the Reporter proposed a revision, defining hearsay as an out-of-court statement

> "that a party offers in evidence to prove the truth of the matter asserted ~~by the declarant~~ in the statement."

After discussion, the Committee voted unanimously in favor of this change. The change was also approved by the Style Subcommittee.

4. Rule 801(c), Style Subcommittee restructuring: The Style Subcommittee suggested that the hearsay definition be broken up into subdivisions in order to make the several requirements easier to understand. Including the substantive changes discussed above, the Style Subcommittee's approved version looks 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."**

The Advisory Committee unanimously approved the Style Subcommittee's changes to Rule 801(c).

5. Rule 801(d)(1), use of the word "prior": Professor Kimble suggested that because the word "prior" was deleted from the definition of hearsay in Rule 801(c), it should also be deleted from Rule 801(d)(1). But the Committee unanimously rejected this suggestion. Unlike hearsay itself, which could be uttered after a witness testifies, Rule 801(d)(1) can only apply to statements made prior to the witness's testimony. Deleting "prior" would be confusing in these circumstances. Given the difficulty of mastering the hearsay rule, the Committee believed it made no sense to delete words that help to describe the rule's application.

Professor Kimble noted that if the word "prior" is kept, a minor change was necessary to Rule 801(d)(1) in light of the fact that "prior" was deleted from Rule 801(c). Now there is no syntactic connection between the subdivisions, and so the following stylistic change was necessary:

(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~~ a prior statement, and the statement: . . .

The Committee unanimously approved this technical change. The Style Subcommittee approved it as well.

*6. **Rule 801(d)(1)(B), suggested style change:*** A Committee member suggested a slight style change to Rule 801(d)(1)(B), the hearsay exemption for certain prior consistent statements:

. . . the statement:

. . .

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

After discussion, the Committee voted unanimously to recommend the style change for the consideration of the Style Subcommittee.

(In a telephone conference after the meeting, the Style Subcommittee rejected the suggested change to Rule 801(d)(1)(B). As the suggestion was a style change, that change will not be made).

*7. **Rule 801(d)(2)(A), caption:*** A public comment suggested that the caption to restyled Rule 801(d)(2) was underinclusive because it referred to "An Opposing Party's Statement" when the exemption also covers statements of a party's agent and statements of a coconspirator. In response to that comment, the Style Subcommittee approved the following change to the heading:

"**An Opposing Party's Statement -- or One Attributable to the Party**".

After discussion, the Advisory Committee concluded that the change to the heading was substantive because it misdescribed the statements covered by the Rule. A Committee member contended that co-conspirator statements, for example, are not "attributable" to the party. The Committee determined that the heading as originally restyled was in fact an accurate statement of the statements covered by this subdivision. The Committee voted unanimously to restore the caption to the version issued for public comment.

(In a telephone conference after the meeting, the Style Subcommittee agreed with the decision to restore the heading to the version released for public comment --- deleting "or One Attributable to the Party").

8. Rule 801(d)(2)(B) – "manifested": At the Fall 2009 meeting, the Committee determined that the Restyled Rule 801(d)(2)(B) made a substantive change because it could signal that adoption of a statement could be found on a lesser showing than under current law. The problem for restyling is that the current rule requires the party to have "manifested" an adoption or belief in the truth of the statement, but courts have found silence in certain circumstances to be an adoption. So there is a disconnect between the case law and the language of the rule, and any attempt to change the text to less vigorous language --- such as "appeared" in the restyled version --- risks further dilution of the standards for adoption. At the previous meeting, the Committee unanimously determined that the word "manifested" must be retained in the restyling.

For the Committee meeting, Professor Kimble drafted two versions of Rule 801(d)(2)(B) that used "manifested":

"is one the party manifested that it adopted or believed to be true;"

"is one that the party manifested an adoption of or a belief in its truth;"

Before the meeting, the Style Subcommittee had approved the first alternative.

After discussion at the meeting, the Advisory Committee concluded unanimously that both options were substantively correct. The Committee preferred the latter alternative, however, because it was closer to the original rule.

(In a telephone conference after the meeting, the Style Subcommittee adhered to its decision to use the language: "is one the party manifested that it adopted or believed to be true;". As the decision between the two alternatives is a question of style, the language approved by the Style Subcommittee will be recommended to the Standing Committee).

9. Rule 801(d)(2)(E), co-conspirator: Professor Kimble consulted Bryan Garner --- who wrote the book on style --- and Bryan stated that the proper usage was "coconspirator." The Style Committee therefore decided to take the hyphen out of "co-conspirator" and the Advisory Committee unanimously approved the change.

Committee Determination: Restyled Rule 801 approved with changes from the rule as issued for public comment as set forth above.

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.

Committee Determination: Rule 802 approved as issued for public comment.

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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~~ of 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.

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(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.

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(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.

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(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.

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(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.

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(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.

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(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]

Committee Discussion:

1. Rule 803(2) — stress of excitement: The Restyled Rule 803(2) changed the language to "stress or excitement" but at the Fall 2009 meeting the Committee voted unanimously to return to "the stress of excitement" --- because that language was derived from earlier codifications and had been construed in hundreds of cases. At the Spring 2010 meeting, Professor Kimble suggested that the phrase might be changed to "the stress of *the* excitement" but the Committee once again determined that the language was well-ensconced and should not be changed. Professor Kimble dropped the suggestion.

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2. Rule 803(6) — clerical change: The Magistrate Judges' Association pointed out a typo in Rule 803(6)'s cross-reference to the certification provisions of Rule 902. The reference in the Restyled Rules is to "Rule 902(b)(11) or (12)" --- which tied to a previous draft in which Rule 902 had lettered subdivisions. But those lettered subdivisions were dropped in the Restyled Rule as issued for public comment. The Style Committee therefore deleted the "(b)" and the Advisory Committee unanimously agreed with this change.

3. Rule 803(8), "statement" and "trustworthiness clause" — The definition of "record" in Rule 101 was intended to streamline the records-based rules --- especially Rules 803(6)-(8), so that the related words "memorandum", "data compilation" etc. need not be repeated. But a public comment noted that Rules 803(8), 803(10) and 901(b)(7) also cover a *statement*. And "statement" is not part of the definition of "record." This meant that the restyling drops the word "statement" from those rules. The Committee determined that dropping the word "statement" effected a substantive change because some statements covered by these rules are not in records --- such as a statement of a public official at a press conference.

In addition, at the Fall 2009 meeting, the Committee resolved to find a way to include the trustworthiness clause of Rule 803(8) as a lettered subdivision, to avoid the use of a hanging paragraph.

In response to these two concerns, Professor Kimble drafted and the Style Subcommittee approved the following version of Restyled Rule 803(8), blacklined from the rule as issued for public comment:

(8) ***Public Records.*** A record or statement of a public office ~~setting out~~ if:

(A) it sets out:

(i) the office's activities;

~~**(B)**~~ **(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

~~**(C)**~~ **(iii)** in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation~~.~~ and

(B) ~~But this exception does not apply if~~ neither the source of information ~~or~~ nor other circumstances indicate a lack of trustworthiness.

Clean version:

A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

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(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.

After discussion, the Committee unanimously approved the changes to Restyled Rule 803(8).

4. Rule 803(10), addition of statement, and consideration of "even though": Restyled Rule 803(10)(B) as issued for public comment covers the absence of a public record to prove that "a matter did not occur or exist, *even though* a public office regularly kept a record for a matter of that kind." Before the meeting, Judge Hinkle suggested that the words "even though" did not connect well with the introductory language of the Rule. In addition, as with Rule 803(8) and as raised in public comment, the definition of "record" does not cover a statement, and so the word "statement" had to be reintroduced into the Restyled Rule.

In response to these concerns, the Style Subcommittee approved changes to Rule 803(10) as it was issued for public comment. The blacklined version is 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, ~~even though~~ if a public office regularly kept a record or statement for a matter of that kind."

The Advisory Committee unanimously approved these changes to Restyled Rule 803(10).

5. Rule 803(22), caption, " Judgment of a Previous Conviction": A public comment suggested that the word "Previous" in the caption was superfluous because the conviction would have to be "previous" to be admissible in the case. The Style Subcommittee agreed with this suggestion and deleted the word.

In discussion, Advisory Committee members were unanimously in favor of returning the word "Previous" to the caption. One of the goals of the restyling project is to make headings more, not less, helpful. Use of "Previous" helps the reader, especially a novice, to know that the rule is not talking about the possible conviction in the existing case. It thus sets the context of the rule for the reader. There is a difference between superfluity and emphasis. Committee members also noted that use of the word "Previous" would probably make it easier to search for the applicable rule.

The Committee voted unanimously to request the Style Committee to retain the word "Previous" in the caption to Rule 803(22).

(In a telephone conference after the meeting, the Style Subcommittee agreed to return "Previous" to the caption of Rule 803(22)).

6. Rule 803(22)(B), "judgment for a crime": A public comment suggested that the term "judgment for a crime" in Rule 803(22)(B) should be changed to "*conviction* for a crime," meaning that the subdivision would be changed as follows:

> **(B)** the ~~judgment~~ conviction was for a crime punishable by death or by imprisonment for more than a year;

The Style Subcommittee agreed with the public comment and made the change. The Advisory Committee unanimously approved the change.

Committee Determination: Restyled Rule 803 approved, with changes to the rule as issued for public comment in Rules 803(2), (6), (8), (10) and (22).

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.

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(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

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	(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.

Rule 804(b)

(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]

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Committee Discussion:

1. Rule 804(a)(1), "having a privilege": A public comment noted that characterizing the unavailability condition as the declarant "having a privilege" is narrower than the existing rule, in which a declarant is exempted "on the ground of privilege." The public comment observed that a declarant might be exempted on ground of privilege even though the declarant is not the holder of the privilege --- i.e., does not "have" the privilege. For example, an attorney would be unavailable to testify to the client's confidential communication, but the attorney doesn't "have" the privilege, the client does.

The Advisory Committee accordingly determined that Restyled Rule 804(a)(1), as issued for public comment, effected a substantive change. After discussion, the Committee unanimously approved an amendment. The language of the proposed amendment was subsequently reviewed and revised slightly by the Style Subcommittee. Blacklined from the public comment version, the amendment reads as follows:

(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~~ from testifying about the subject matter of the declarant's statement <u>because the court rules that a privilege applies</u>;

2. Rule 804(a), hanging paragraph, "unavailability <u>as a witness</u>":

Professor Kimble suggested the following change to the last (hanging) paragraph of Rule 804(a):

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

The Advisory Committee found it unnecessary as a matter of substance. Professor Kimble wished to include it to parallel the language of Rule 804(b)(6) (see discussion below), even though that is unnecessary as a substantive matter because the two provisions cover different situations and are construed differently. The Style Subcommittee reviewed Professor Kimble's suggestion after the meeting and approved it, so "as a witness" will be included in Rule 804(a) as recommended to the Standing Committee.

3. Rule 804(b)(5), attending or testifying: The Restyled Rule as issued for public comment would allow a finding of forfeiture if a party wrongfully prevented the declarant from "attending or testifying." The Reporter expressed concern that "attending or testifying" --- when used in the disjunctive in Rule 804(b)(5) --- could result in a substantive change, because a party could be found to have forfeited a hearsay objection 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).

The Committee unanimously agreed that "attending or testifying" was a substantive change. After discussion, the Committee determined that the best solution would be to continue to use the term of art used in the original rule --- "unavailability as a witness." That term covered all the possible forms of unavailability --- including asserted failure of memory --- that could give rise to a finding of forfeiture. The Committee unanimously approved the following change to Rule 804(b)(5) as issued for public comment:

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 as a witness, ~~with the intent to do so~~ and did so intending that result.

(After the meeting, Judge Hinkle found another glitch in the Restyled Rule --- the reference to "the" party should be "a" party, as it is in the caption. The Style Subcommittee approved the Advisory Committee's change together with the change from "the" to "a").

4. Rule 804(b)(5)/(6), placement: 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) [Transferred to Rule 807.]

Professor Kimble suggested that, as part of the restyling project, this designation should be deleted and what is now Rule 804(b)(6) be renumbered to (b)(5) to fill the gap.

But many Committee members argued that making that change would 1) deprive the reader important knowledge about the history of the rules; 2) disrupt electronic searches; and 3) lead to search results for "Rule 804(b)(5)" that would cover two separate hearsay exceptions. The Committee noted that while subdivisions have been renumbered in the restyling, no rule has been renumbered --- and the hearsay exceptions, while technically subdivisions, are as a matter of practice more like freestanding rules.

The Advisory Committee unanimously resolved to request the Style Subcommittee to restore the original numbering to Rule 804(b)(6), and to return the historical reference to Rule 804(b)(5). The Committee was very concerned that renumbering Rule 804(b)(6) would lead to confusion and perhaps to a failure by some parties to make proper objections and arguments in court. Members noted that Evidence Rules are often applied on the fly, and the Committee believed that it is important to have constancy in their numbering. So while the renumbering may be a question of style, the change could have real-world negative consequences.

(In a telephone conference after the meeting, the Style Subcommittee agreed to move the forfeiture exception back to Rule 804(b)(6), and to preserve the historical reference in Rule 804(b)(5).)

Committee Determination: Restyled Rule 804(b) approved, with changes to the rule as issued for public comment in Rules 804(a)(1), and 804(b)(5), and (with Style Subcommittee approval) Rule 804)(b)(5) renumbered as Rule 804(b)(6).

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.

Committee Determination: Rule 805 approved as issued for public comment.

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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.

Committee Determination: Rule 806 approved as issued for public comment.

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Rule 807. Residual Exception	Rule 807 — Residual Exception
A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.	**(a) In General.** Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804: **(1)** the statement has equivalent circumstantial guarantees of trustworthiness; **(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.

Committee Determination: Rule 807 approved as issued for public comment.

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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.

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(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.

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Committee Discussion:

1. Rule 901(b)(7), "statement": Restyled Rule 901(b)(7), an authentication provision for public records, raises the same problem as previously discussed with Rule 803(8), the hearsay exception for public records. The definition of "record" in Rule 101 includes all the references in current Rule 901(b)(7) except "statement." The Committee unanimously determined that "statement" must be added to the Restyled Rule 901(b)(7).

2. Rule 901(b)(7), "lawfully recorded or filed": The current Rule provides a ground for authenticity for public records "authorized by law to be recorded or filed and in fact recorded or filed in a public office." The language of the Rule was restyled to "lawfully recorded or filed in a public office." The Committee determined that this was a substantive change: the restyled language focuses on the *act* of recording and requires it to be lawful. The existing language focuses on whether recording is authorized. There could be a situation in which a document was legally authorized to be recorded yet there might be a dispute over whether the recording was actually lawful. Where that dispute arises, proof of the document itself may be necessary, and the current rule would provide for authentication but the restyled rule would not.

To account for the deletion of "statement" and the substantive change concerning lawful recording, the Committee unanimously approved the following changes to Restyled Rule 901(b)(7) (blacklined from the rule as issued for public comment):

(7) ***Evidence About Public Records.*** Evidence that:

(A) a document was recorded or filed in a public office, as authorized by law ~~reco rd or statement is from the public office where items of this kind are kept~~; or

(B) a purported public record or statement is from the office where items of this kind are kept ~~document was lawfully recorded or filed in a public office~~.

(In a telephone conference after the meeting, the Style Subcommittee approved the changes to Rule 901(b)(7).

Committee Determination: Restyled Rule 901 approved, with changes to the Rule as issued for public comment in Rule 901(b)(7).

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.

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(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).

Committee Discussion:

1. Rule 902(4), lawfully recorded: As with Rule 901(b)(7), the Restyled Rule 902(4) was found to have made a substantive change by using "lawfully" recorded in place of "authorized by law." The Committee unanimously approved the following change to Rule 902(4):

> **(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, as authorized by law — 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.

(In a telephone conference after the meeting, the Style Subcommittee approved the change to Restyled Rule 904).

2. Rule 902(11), "modified as follows": The Magistrate Judges' Association raised a concern about the use of the term "modified as follows" in Restyled Rule 902(11) as it was issued for public comment. Rule 902(11) is a certification provision for business records. It does not "modify" the admissibility requirements of Rule 803(6). After discussion, the Committee determined that the use of the term "modified" was substantively incorrect. The Committee unanimously approved the following change to Rule 902(11):

> (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)(A)-(C), ~~modified as follows: the conditions referred to in 803(6)(D) must be~~ as 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.

(In a telephone conference after the meeting, the Style Subcommittee approved the change to restyled Rule 902(11)).

Committee Determination: Restyled Rule 902 approved, with changes to the Rule as issued for public comment in Rules 902(4) and (11).

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.

Committee Determination: Restyled Rule 903 approved as issued for public comment.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS Rule 1001. Definitions	ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS Rule 1001 — Definitions That Apply to This Article
For purposes of this article the following definitions are applicable: **(1) Writings and recordings.** ''Writings'' and ''recordings'' consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation. **(2) Photographs.** ''Photographs'' include still photographs, X-ray films, video tapes, and motion pictures. **(3) Original.** An ''original'' of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An ''original'' of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an ''original''. **(4) Duplicate.** A ''duplicate'' is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.	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.

Committee Determination: Restyled Rule 1001 approved as issued for public comment, with minor style changes that were approved at the Fall 2009 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.

Committee Determination: Rule 1002 approved as issued for public comment.

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.

Committee Determination: Restyled Rule 1003 approved as issued for public comment.

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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.

Committee Determination: Restyled Rule 1004 approved as issued for public comment.

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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.

Committee Determination: Restyled Rule 1005 approved as issued for public comment.

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.

Committee Determination: Rule 1006 approved as issued for public comment.

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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.

Committee Discussion:

Admission of a party: Both the heading and the text of Restyled Rule 1007 refer to an "Admission of a Party." This is a reference to Rule 801(d)(2). The Reporter noted, however, that Restyled Rule 801(d)(2) no longer refers to "admissions" --- rather they are now called "statements" of a party. The Committee unanimously approved the change to the heading and as follows:

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.

This change was also approved by the Style Subcommittee.

Committee Determination: Rule 1007 approved as issued for public comment, with the substitution of "statement" for "admission" in the heading and 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.

Committee Determination: Rule 1008 approved as issued for public comment.

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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.

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(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.

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(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.

Committee Discussion:

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Bankruptcy Cases: At the Fall 2009 meeting the Committee added bankruptcy cases to the list of cases to which the Evidence Rules are applicable, in subdivision (b). This was out of concern that the reference to 11 U.S.C. in the existing rule did not cover all the bankruptcy cases in which the Evidence Rules apply. At the Spring 2010 meeting, the liaison from the Bankruptcy Rules Committee observed that because bankruptcy cases are now specifically mentioned, the reference to 11 U.S.C. has become superfluous. The Committee therefore voted unanimously to delete the bullet point for 11 U.S.C.

Committee Determination: Rule 1101 approved as issued for public comment, with technical changes approved at Fall 2009 and Spring 2010 meetings.

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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.

Committee Discussion:

Provision concerning supersession: The Civil Rules restyling project included an amendment to Rule 86, providing that if any restyling amendment conflicts with another law, "priority in time for the purpose of 28 U.S.C.§2072(b) is not affected" by the amendment. The Evidence Rules Committee discussed whether a similar provision should be added to Rule 1102.

The Committee relied heavily on an excellent memorandum from Professor Cooper, Reporter to the Civil Rules Committee, prepared during the Civil Rules restyling project. In that memo, Professor Cooper noted that it was very unlikely (though not impossible) for a court to find that a style amendment would supersede a pre-existing statute. But even if a court would so find, the Committee determined that it was essentially impossible for an Evidence Rule to supersede any prior legislation. This is because the Evidence Rules are written to accommodate statutory law whenever enacted. For example, 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. So if the rules themselves do not take priority over statutes --- no matter when enacted --- there is no reason to draft against the already remote possibility that a court would find that an Evidence Rule could become "last in time" by a style amendment.

The Committee determined that in the context of the Evidence Rules, a supersession provision could do more harm than good. It might lead a reader to think that there is a possible problem when in fact there is not. A reader might think, for example, that Rule 402 doesn't mean what it says when it defers to statutes. The Committee also noted that Rule 1101(e) as restyled has further lessened the need for a supersession clause because it states that a statute "may provide for admitting or excluding evidence independently from these rules." Including a separate supersession provision could cause the reader to think that the amended Rule 1101(e) does not mean what it says.

After this discussion, the Committee unanimously rejected any amendment to the Restyled Rules that would add a supersession provision.

Committee Determination: Rule 1102 approved as issued for public comment.

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.

Committee Determination: Rule 1103 approved as issued for public comment.

III. Committee Notes to the Restyled Evidence Rules

The Committee approved the following Committee Notes to the Restyled Rules of Evidence: 1) a Note to Rule 101 that described the goals and methodology of the restyling project; 2) a template for each of the amended rules, indicating that the amendments are stylistic only; and 3) additional language for particular rules to explain questions about a rule that might be raised by the bench or bar.

A. Rule 101 Note

The Committee approved the following Note to Rule 101:

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. Template for Basic Note

The Committee approved the following basic Committee Note for all the Restyled Rules, except Rule 502:

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. Additional Notes for Specific Rules

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 may be added to Rules where a change has been made that might cause a reasonable reader to wonder about the Committee's intent or meaning.

Under that working principle, the Committee amended the basic template for the Committee Notes to the following Rules

1. Rule 101(b)(6) — Evidence stored in electronic form

Rule 101(b)(6) provides that "a reference to any kind of written material or any other medium includes electronically stored information." A public comment suggested that it would be useful for the Committee Note to provide a cross-reference to Civil Rule 34. The Committee concluded that a cross-referencing Note would assist the reader in determining the meaning of the term "electronically stored information." The Committee therefore approved the following addition to the basic Note:

> The reference to electronically stored information is intended to track the language of Fed.R.Civ.P. 34.

2. 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 had voted and found the changes to be stylistic only). The Committee therefore determined that an explanatory Note would be useful to clarify the limited effect of the amendment.

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.

3. 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. The Committee therefore approved the following Note to 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.

4. 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 Committee therefore approved the following addition to the basic Committee Note to Rule 608:

The Committee is aware that the Rule's limitation of bad act impeachment to "cross-examination" is trumped by Rule 607, which allows a party to impeach witnesses on direct examination. Courts have not relied on the term "on cross-examination" to limit impeachment that would otherwise be permissible under Rules 607 and 608. The Committee therefore concluded that no change to the language of the Rule was necessary in the context of a restyling project.

5. 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 Committee therefore approved the following addition to the basic Committee Notes to Rules 701, 703, 704 and 705:

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.

6. 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 801(d)(2) as the hearsay exception for "admissions" — so the Committee thought that an additional explanation of this change was appropriate. The Committee approved the following language to be added to the basic Committee Note to Rule 801(d)(2):

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.

7. Rule 804(b)(3).

Explanation:

One amendment in the restyled package to the rules is clearly a substantive change to the current rule — 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).

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.

IV. Closing Matters

Judge Hinkle, the Committee, and Judge Rosenthal all expressed deep gratitude to Professor Kimble for his outstanding and incredibly dedicated efforts in the restyling project.

Judge Hinkle noted with regret that Justice Hurwitz and Bill Taylor were going off the Committee. Both were outstanding members and will be sorely missed. The Reporter expressed his gratitude to Justice Hurwitz for his stellar work on Rule 502.

Finally, Judge Hinkle noted that this was his last meeting as Committee Chair. Committee members and the Reporter expressed their deep gratitude for Judge Hinkle's fine work and outstanding leadership as Chair. Without his guidance and commitment, the restyling could never have been done.

The meeting was adjourned on April 23, 2010

Respectfully submitted
Daniel J. Capra
Reporter

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TAB 1B

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 14-15, 2010
Washington, DC
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C., on Monday and Tuesday, June 14 and 15, 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
Chief Justice Wallace Jefferson
John G. Kester, Esquire
Dean David F. Levi
William J. Maledon, Esquire
Judge Reena Raggi
Judge James A. Teilborg
Judge Diane P. Wood

The Department of Justice was represented on the committee by Lisa O. Monaco, Principal Associate Deputy Attorney General. Other attendees from the Department included Karyn Temple Claggett, Elizabeth Shapiro, Kathleen Felton, J. Christopher Kohn, and Ted Hirt.

Professor R. Joseph Kimble, the committee's style consultant, participated throughout the meeting, and Judge Barbara Jacobs Rothstein, director of the Federal Judicial Center, participated in part of the meeting.

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
Henry Wigglesworth	Senior attorney, Administrative Office
Joe Cecil	Research Division, Federal Judicial Center
Emery G. Lee III	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
Professor Richard L. Marcus, Associate Reporter
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Advisory Committee on Evidence Rules —
Judge Robert L. Hinkle, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Rosenthal reported that the Supreme Court had transmitted to Congress all the rule amendments approved by the Judicial Conference in September 2009, except the proposed amendment to FED. R. CRIM. P. 15 (depositions). That proposal would have authorized taking the deposition of a witness in a foreign country outside the presence of the defendant if the presiding judge were to make several special findings of fact. The Court remitted the amendment to the committee without comment, but some further explanation of the action is anticipated. She noted that the advisory committee had crafted the rule carefully to deal with delicate Confrontation Clause issues, and it appears that it may have further work to do.

Judge Rosenthal reflected that the rules committees had accomplished an enormous amount of work since the last Standing Committee meeting in January 2010. First, she said, the Advisory Committee on Evidence Rules had completed the restyling of the entire Federal Rules of Evidence and was now presenting them for final approval. The evidence rules, she noted, are the fourth set of federal rules to be restyled, and the final product is truly impressive.

Second, she said, final approval was being sought for important changes in the appellate and bankruptcy rules and for a package of amendments to the criminal rules that would allow courts and law enforcement authorities to take greater advantage of technological developments. Third, she pointed to the recent work of the sealing and privacy subcommittees and the Federal Judicial Center's major report on sealed cases in the federal courts.

Finally, she emphasized that the civil rules conference held at Duke Law School in May 2010 had been an unqualified success. She noted that the conference proceedings and the many studies and articles produced for the event should be viewed as just the beginning of a major rules project that will continue for years. All in all, she said, it had been a truly productive year for the rules committees, and the year was still not half over.

Judge Rosenthal introduced the committee's newest member, Chief Justice Wallace Jefferson of Texas. She noted that he is extremely well regarded across the entire legal community and recently received more votes that any other candidate for state office in Texas. She described some of his many accomplishments and honors, and she noted that he will be the next presiding officer of the Conference of Chief Justices.

With regret, she reported that several rules committee chairs and members were attending their last Standing Committee meeting because their terms would expire on October 1, 2010. She thanked Judge Swain and Judge Hinkle for their leadership and enormous contributions as advisory committee chairs for the past three years.

She pointed out that Judge Swain, as chair of the Advisory Committee on Bankruptcy Rules, had embarked on new projects to modernize the official bankruptcy forms and update the bankruptcy appellate rules, and had guided the committee through controversial rules amendments that were necessary to respond to economic developments. She emphasized that the work had been extremely complicated, timely, and meticulous.

Judge Hinkle's many accomplishments as chair of the Advisory Committee on Evidence Rules, she said, included the major, and very difficult, project of restyling the Federal Rules of Evidence. The new rules, she said, are outstanding and are an appropriate monument to his leadership as chair.

Judge Rosenthal said that the terms of two members of the Standing Committee were also about to end – Judge Hartz and Mr. Kester. She noted that Judge Hartz had come perfectly prepared to serve on the committee, having been a private practitioner, a prosecutor, a law professor, and a state judge. She thanked him for his incisive work as chair of the sealing subcommittee, for his amazing attention to detail, and for his willingness to do more than his share of hard preparatory work.

She said that Mr. Kester had been a wonderful member, bringing to the committee invaluable insights and wisdom as a distinguished lawyer. She detailed some of his background as a partner at a major Washington law firm, a law clerk to Justice Hugo Black, a former president of Harvard Law Review, a former high-level official at the Department of Defense, and a member of many public and civic bodies. She noted that he always shows great respect and appreciation for the work of judges and has written articles on law clerks and how they affect the work of judges.

Judge Rosenthal pointed out that two of the committee's consultants – Professor Geoffrey C. Hazard, Jr. and Joseph F. Spaniol, Jr. – had been unable to attend the meeting and would be greatly missed. She noted that Mr. Spaniol had been part of the federal rules process for more than 50 years.

Judge Rosenthal reported that Tom Willging was about to retire from his senior position with the Research Division of the Federal Judicial Center. She noted that Dr. Willging had worked closely with the Advisory Committee on Civil Rules for more than 20 years and had directed many of the most important research projects for that committee. She thanked him for his many valuable contributions to the rules committees and emphasized his hard work, innovative approach, and completely honest assessments.

Judge Rosenthal also thanked the staff of the Administrative Office for their uniformly excellent work in supporting the rules committees, noting in particular that they coped successfully with the recent upsurge in rules committee activities and contributed mightily to the success of the May 2010 civil rules conference at Duke Law School.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on January 7-8, 2010.

LEGISLATIVE REPORT

Civil Pleading

Judge Rosenthal reported that legislation had been introduced in 2009 in each house of Congress attempting 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). Three hearings had been held on the bills, but none since January 2010.

In May 2010, she said, a discussion draft had been circulated of new legislation that would take a somewhat different approach from the two earlier bills. She added that Congressional markup of some sort of pleading legislation had been anticipated by May, but had been postponed indefinitely. Another markup session, she said, may be scheduled before the summer Congressional recess, but there is still a good deal of uncertainty over what action the legislature will take.

Judge Rosenthal pointed out that the judiciary's primary emphasis has been to promote the integrity of the rulemaking process and to urge Congress to use that process, rather than legislation, to address pleading issues. She noted that the rules committees have been: (1) monitoring pleading developments since *Twombly* and *Iqbal;* (2) memorializing the extensive case law developed since those decisions; and (3) drawing on the Administrative Office and the Federal Judicial Center to gather statistics and other empirical information on civil cases before and after *Twombly* and *Iqbal.* That information, she said, had been given to Congress and posted on the judiciary's website. In addition, she, Judge Kravitz, and Administrative Office Director Duff had written letters to Congress emphasizing the importance of respecting and deferring to the Rules Enabling Act process, especially in such a delicate and technical legal area as pleading standards.

Sunshine in Litigation

Judge Rosenthal reported that the committee was continuing to monitor proposed "sunshine in litigation" legislation that would impose restrictions on judges issuing protective orders during discovery in cases where the information to be protected by the order might affect public health or safety. She noted that a new bill had recently been introduced by Representative Nadler that is narrower than earlier legislation. But, she

said, it too would require a judge to make specific findings of fact regarding any potential danger to public health and safety before issuing a protective order. As a practical matter, she explained, the legislation would be disruptive to the civil discovery process and require a judge to make important findings of fact without the assistance of counsel and before any discovery has taken place in a case.

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 May 28, 2010 (Agenda Item 11).

Amendments for Final Approval

FED. R. APP. P. 4(a)(1) and 40(a)
and
PROPOSED STATUTORY AMENDMENT TO 28 U.S.C. § 2107

Judge Sutton reported that the proposed changes to Rule 4 (time to appeal) and Rule 40 (petition for panel rehearing) had been published for comment in 2007. The current rules, he explained, provide additional time to all parties to file a notice of appeal under Rule 4 (60 days, rather than 30) or to seek a panel rehearing under Rule 40 (45 days, rather than 14) in civil cases in which one of the parties in the case is a federal government officer or employee sued in an *official* capacity. The proposed amendments, he said, would clarify the law by specifying that additional time is also provided in cases where one of the parties is a federal government officer or employee sued in an *individual* capacity for an act or omission occurring in connection with duties performed on the government's behalf.

He noted, by way of analogy, that both FED. R. CIV. P. 4(i)(3) (serving a summons) and FED. R. CIV. P. 12(a)(3) (serving a responsive pleading) refer to a government officer or employee sued "in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf." The same concept was being imported from the civil rules to the appellate rules.

Judge Sutton pointed out that the advisory committee had encountered a complication when the Supreme Court held in *Bowles v. Russell*, 551 U.S. 205 (2007), that an appeal time period reflected in a statute is jurisdictional in nature. In light of that opinion, the advisory committee questioned the advisability of making the change in Rule 4 without also securing a similar statutory amendment to 28 U.S.C. § 2107.

The advisory committee, he said, had considered dropping the proposed amendment to Rule 4 and proceeding with just the amendment to Rule 40 – which has no statutory counterpart. But the committee was uncomfortable with making the change in one rule but not the other because the two deal with similar issues and use identical language. Accordingly, after further discussion, the committee decided to pursue both the Rule 4 and Rule 40 amendments, together with a proposed statutory change to 28 U.S.C. § 2107. Amending all three will bring uniformity and clarity in all civil cases in which a federal officer or employee is a party.

Judge Sutton reported that the advisory committee had made a change in the proposed amendments following publication to specify that the rules apply to both current and former government employees.

He also explained that the advisory committee had debated whether to set forth specific safe harbors in the text of the rule to ensure that the longer time periods apply in certain situations. All committee members, he said, agreed to include two safe harbors in the rule. They would cover cases where the United States: (1) represents the officer or employee at the time the relevant judgment is entered; or (2) files the appeal or rehearing petition for the officer or employee.

Judge Sutton explained that two committee members had wanted to add a third safe harbor, to cover cases where the United States pays for private representation for the government officer or employee. There was no opposition to the third safe harbor on the merits, but a seven-member majority of the committee pointed to practical problems that cautioned against its inclusion. For example, neither the clerk's office nor other parties in a case will know whether additional time is provided because they will not be able to tell from the pleadings and the record whether the United States is in fact financing private counsel. The rule, moreover, had proven quite complicated to draft, and adding another safe harbor would make it more difficult to read.

In short, he said, the advisory committee concluded that the third safe harbor was simply not appropriate for inclusion in the text of the rule. He suggested, though, that some language addressing it could be included in the committee note, even though it would be unusual to specify a safe harbor in the note that is not set forth in the rule itself.

A participant inquired as to how often the situation arises where the government funds an appeal but does not provide the representation directly. Judge Sutton responded that the advisory committee had been informed that it arises rather infrequently, in about 30 to 50 cases a year.

A member suggested that the committee either add the third safe harbor to the text of the rules or not include any safe harbors in the rules at all. For example, the text of the two rules could be made simpler and a non-exclusive list added to the committee notes.

Judge Sutton explained that the advisory committee had originally drafted the rule using the words, "including, but not limited to . . . ." The style subcommittee, however, did not accept that formulation because it was not consistent with general usage elsewhere in the rules. He suggested, therefore, that two options appeared appropriate: (1) returning to the original language proposed by the advisory committee, *i.e.*, "including but not limited to . . ."; or (2) retaining the current language of the rule with two safe harbors, but adding language to the note referring to the third safe harbor as part of a non-exclusive list. Professor Struve offered to draft note language to accomplish the latter result.

A member moved to adopt the second option, using the language drafted by Professor Struve, with a minor modification.

The committee without objection by voice vote approved the proposed amendments to Rules 4 and 40, including the additional language for the committee notes. Without objection by voice vote, it also approved the proposed corresponding statutory amendment to 28 U.S.C. § 2107.

Informational Items

Judge Sutton reported that the advisory committee was considering proposals to amend FED. R. APP. P. 13 (review of Tax Court decisions) and FED. R. APP. P 14 (applicability of other rules to review of Tax Court decisions) to address interlocutory appeals from the Tax Court. He noted that the committee would probably ask the Standing Committee to authorize publication of the proposed amendments at its January 2011 meeting.

He reported that the advisory committee was continuing to study whether federally recognized Indian tribes should be given the same status as states under FED. R. APP. P. 29 (amicus briefs), thereby allowing them to file amicus briefs without party consent or court permission. He said that he would consult on the matter with the chief judges of the Eighth, Ninth, and Tenth Circuits, where most tribal amicus filings occur. One possibility, he suggested, would be for those circuits to amend their local rules to take care of any practical problems. This course might avoid the need to amend the national rules. Otherwise, he said, the advisory committee would consider amending Rule 29. In addition, he noted that the Supreme Court does not give tribes the right to file amicus briefs without permission, but it does allow municipalities to do so.

He also reported that the advisory committee was considering some long-term projects, including possible rule amendments in light of the recent Supreme Court decision in *Mohawk Industries, Inc. v. Carpenter,* 130 S. Ct. 599 (2009), which held that a ruling by a district court on attorney-client privilege did not qualify for an immediate appeal under the "collateral order" doctrine. Another long-term project, he said, involved studying the case law on premature notices of appeal. He noted that there are splits

among the circuits regarding the status of appeals filed prior to the entry of an appealable final judgment.

Finally, Judge Sutton noted that the advisory committee was considering whether to modify the requirements in FED. R. APP. P. 28(a)(6) and (7) (briefs) that briefs contain separate statements of the case and of the facts. He suggested that the requirements prevent lawyers from telling their side of the case in chronological order. Several members agreed with that assessment and encouraged the advisory committee to proceed.

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 May 27, 2010 (Agenda Item 10).

Amendments for Final Approval

FED. R. BANKR. P. 1004.2

Judge Swain reported that proposed new Rule 1004.2 (chapter 15 petition) would require a chapter 15 petition – which seeks recognition of a foreign proceeding – to designate the country in which the debtor has "its center of main interests." The proposal, originally published in 2008, had been criticized in the public comments for allowing too much time for a party to file a motion challenging the designation. As a result, the advisory committee republished the rule in 2009 to reduce the time for filing an objection from 60 days after notice of the petition is given to 7 days before the date set for the hearing on the petition.

She noted that no comments had been submitted on the revised proposal, and only stylistic changes had been made after publication.

The committee without objection by voice vote approved the proposed new rule for approval by the Judicial Conference.

FED. R. BANKR. P. 2003

Professor Gibson explained that under current law the officer presiding at the first meeting of creditors or equity security holders, normally the trustee, may defer completion of the meeting to a later date without further notice. The proposed amendment to Rule 2003 (meeting of creditors or equity security holders) would require the officer to file a statement specifying the date and time to which the meeting is

adjourned. This procedure will make it clear on the record for those parties not attending whether the meeting was actually concluded or adjourned to another day.

She noted that § 1308 of the Bankruptcy Code requires chapter 13 debtors to file their tax returns for the last four taxable periods before the scheduled date of the meeting. If, however, a debtor has not filed the returns by that date, § 1308(b)(1) permits the trustee to "hold open" the meeting for up to 120 days to allow the debtor additional time to file.

Under FED. R. BANKR. P. 3002(c) (filing a proof of claim or interest), taxing authorities have 60 days to file their proofs of claim after the debtor files the returns. If the debtor fails to file them within the time period provided by § 1308, the failure is a basis under § 1307 of the Code for mandatory dismissal of the case or conversion to chapter 7.

Professor Gibson pointed out that the purpose of the proposed amendment to Rule 2003 was to give clear notice to all parties as to whether a meeting of creditors has been concluded or adjourned and, if adjourned, for how long. It will let them know whether the trustee has extended the debtor's time to file tax returns as required for continuation of a chapter 13 case, since adjourning the meeting functions as "holding open" the meeting for purposes of the tax return filing provision.

She noted that eight of the nine public comments on the rule had been favorable. The Internal Revenue Service, however, recommended that the rule be revised to require the presiding officer to specify whether the meeting of creditors is being: (1) "held open" explicitly under § 1308 of the Code to give a taxpayer additional time to file returns; or (2) adjourned for some other purpose.

She reported that the advisory committee had debated the matter, and the majority voted to approve the rule as published for three reasons. First, no court has required a presiding officer to state specifically that the meeting is being "held open" or to cite § 1308. Rather, courts distinguish only between whether the meeting is concluded or continued. Second, the advisory committee believed that "holding open" and "adjourning" are truly equivalent terms, even though Congress used the inartful term "hold open" in § 1308. Third, the advisory committee was persuaded that the consequences of a presiding officer not specifically using the term "hold open" would be sufficiently severe for the debtor – conversion or dismissal of the case – that use of the exact words should not be required. Moreover, the taxing authorities are not prejudiced because they still have 60 days to file their proofs of claim.

Professor Gibson reported that the only change made since publication was the addition of a sentence to the committee note stating that adjourning is the same as holding

open. The modification was made to address the concerns expressed by the Internal Revenue Service.

Ms. Claggett and Mr. Kohn stated that the Department of Justice appreciated the advisory committee's concerns for the Internal Revenue Service's position, but wanted to reiterate the position for the record. Mr. Kohn explained that making a distinction in the rule between adjourning a meeting for any possible reason and holding it open for the narrow purpose of § 1308 is fully consistent with § 1308. The meeting, he said, can be "held open" for only one purpose. Congress, he said, had used the term deliberately, and it should be carried over to the rule.

The Department, he said, agreed that § 1308 had been designed to help taxing authorities prod debtors into filing returns and promptly providing information early in a case. The Department, he said, was concerned that there will be confusion if the distinction between holding open and adjourning a meeting is blurred. Moreover, the sanctions that may be imposed for failing to file in a timely fashion may be compromised.

The committee by voice vote with one objection (the Department of Justice) approved the proposed amendment for approval by the Judicial Conference.

FED. R. BANKR. P. 2019

Judge Swain reported that the advisory committee was recommending a substantial revision of Rule 2019 (disclosure of interests) to expand both the coverage of the rule and the content of its disclosure requirements. The rule, she said, provides the courts and parties with needed insight into the interests and potentially competing motivations of groups participating in a case. It attracted little attention over the years until buyers of distressed debt began to participate actively in chapter 11 cases.

The revised rule would require official and unofficial committees, groups, or entities that consist of, or represent, more than one creditor or equity security holder to disclose their "disclosable economic interests." That term is defined broadly in the revised rule to include not only a claim, but any other economic right or interest that could be affected by the treatment of a claim or interest in the case.

Among other things, she said, there has been strategic use of the current rule, especially to force hedge funds and other distressed-debt investors to reveal their holdings when they act as ad hoc committees of creditors or equity security holders. As a result, a hedge fund association suggested that the rule be repealed in its entirety. Other groups, however, including the National Bankruptcy Conference and the American Bar Association, recommended that the rule be retained and broadened.

Judge Swain pointed out that the proposal had drawn considerable attention, including 14 written comments and testimony from seven witnesses at the advisory committee's public hearing. In the end, she said, all but one commentator acknowledged the need for disclosure and supported expansion of the current rule.

Three sets of objections were voiced to the proposal as published. First, distressed-debt buyers objected to the proposed requirement to divulge the date that each disclosable economic interest was acquired and the amount paid for it. That information, the industry said, would compromise critical business secrets, such as trading strategies, seriously damage their operations, and undercut the bankruptcy process. Second, objections were raised to applying the disclosure requirements to entities acting in certain institutional roles, such as entities acting in a purely fiduciary capacity. Third, there were objections to applying the rule to "groups" that are really composed of a single affiliated set of actors, or to law firms or other entities that are only passively involved in a case.

On the other hand, she said, there had been many public comments in support of the rule. The supporters, however, agreed that the rule would still be effective even if narrowed to address some of the objections. Accordingly, after publication, the committee made a number of changes to narrow the disclosure requirements and the sanctions provision.

She said that republication would not be necessary because all the subject matter included in the revised rule had been included in the broader published rule, and the advisory committee had added no new restrictions or requirements. Republication, moreover, would delay the rule by a year, and it is important to have it take effect as soon as possible to avoid further litigation over the scope and meaning of the current rule and strategic invocation of the current rule to gain leverage in disputes.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

FED. R. BANKR. P. 3001

Professor Gibson reported that the proposed amendments to Rule 3001 (proof of claim) and new Rule 3002.1 (notice of fees, charges and payment amount changes imposed during the life of a chapter 13 case in connection with claims secured by a security interest in the debtor's principal residence) were designed to address problems encountered in the bankruptcy courts with inadequate claims documentation in consumer cases. First, she said, proofs of claims are frequently filed without the documentation currently required by the rules and Official Form 10, especially by bulk purchasers of consumer claims. Second, problems arise in chapter 13 cases as a result of inadequate notice of various fees and penalties assessed on home mortgages. Debtors who

successfully complete their plan payments may be faced with deficiency or foreclosure notices soon after they emerge from bankruptcy with a discharge.

Professor Gibson explained that current Rule 3001(c) lays down the basic requirement that whenever a claim is based on a writing, the original or a duplicate of the writing must be filed with the proof of claim. The published amendments to Rule 3001(c)(1) would have added a requirement that a copy of the debtor's last account statement be attached to open-end or revolving credit-card account claims. The statement would let the debtor and trustee know who the most recent holder of the claim was, how old the claim is and whether it may be barred by the statute of limitations. Because accounting mistakes occur and creditors change periodically, it would also help debtors to match up the claim with the specific debt.

She reported that the two rules had attracted a good deal of attention, including more than a hundred written comments and several witnesses at the advisory committee's public hearing. Comments from buyers of consumer debt objected because the last account statements, they said, are often no longer available. Federal law, for example, requires that they be kept for only two years. In addition, industry representatives stated that some of the loan information required by the amendments is not readily available to current creditors and cannot be broken out as specified in the proposed rules. Some commentators also argued that a copy of the last statement would unnecessarily reveal private information as to the nature and specifics of the credit card purchases of the debtor.

Professor Gibson reported that as a result of the public comments and testimony, the advisory committee had decided to withdraw the proposed revolving and open-end credit related amendments, redraft them, and republish them for further comment as a proposed new paragraph (c)(3). See *infra*, page 18.

The advisory committee, therefore, was seeking final approval at this point of only the proposed changes in Rule 3001(c)(2). They would require that additional information be filed with a proof of claim in cases in which the debtor is an individual, including: (1) itemized interest charges and fees; and (2) a statement of the amount necessary to cure any pre-petition default and bring the debt current. In addition, a home mortgage creditor with an escrow account would have to file an escrow statement in the form normally required outside bankruptcy.

To standardize the new requirements of paragraph (c)(2) and supersede the many local forms already imposing similar requirements, the advisory committee was also seeking approval to publish for comment a proposed new standard national form – Official Form 10, Attachment A. See *infra*, page 20. The form would take effect on December 1, 2011, the same date as the proposed amendments to Rule 3001(c)(2).

Professor Gibson added that some public comments had recommended requiring a creditor to provide additional information on fees and calculations, while others argued for less information. The advisory committee, she said, had tried to strike the correct balance between obtaining additional disclosures needed for the debtor and trustee to understand the claim amounts and avoiding imposing undue burdens on creditors.

Professor Gibson pointed out that proposed new subparagraph (c)(2)(D) sets forth sanctions that a court may impose if a creditor fails to provide any of the information specified in Rule 3001(c). Modeled after FED. R. CIV. P. 37(c)(1), it specifies that if the holder of a claim fails to provide the required information, the court may preclude its use as evidence or award other appropriate relief.

She reported that the provision had attracted several comments. After publication, the advisory committee revised the rule and committee note to emphasize that: (1) a court has flexibility to decide what sanction to apply and whether to apply a sanction at all; (2) the rule does not create a new ground to disallow a claim, beyond the grounds specified in § 502 of the Code; and (3) a court has discretion to allow a holder of the claim to file amendments to the claim. The proposed rule, she said, is a clear rejection of the concept that creditors may routinely ignore the documentation requirements of the rule and force debtors to go to the court to obtain necessary information.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

FED. R. BANKR. P. 3002.1

Professor Gibson explained that proposed new rule 3002.1 (notice related to post-petition changes in payment amounts, and fees and charges, during a chapter 13 case in connection with claims secured by a security interest in the debtor's principal residence) implements § 1322(b)(5) of the Bankruptcy Code. It would provide a procedure for debtors to cure any pre-petition default, maintain payments, and emerge current on their home mortgage at the conclusion of their chapter 13 plan. For the option to work, she explained, the chapter 13 trustee needs to know the required payment amounts, and the debtor should face no surprises at the end of the case.

She noted that subdivision (b) of the new rule would require the secured creditor to provide notice to the debtor, debtor's counsel, and the trustee of any post-petition changes in the monthly mortgage payment amount, including changes in the interest rate or escrow account adjustments. As published, the rule would have required a creditor to provide the notice 30 days in advance of a change. Public comments pointed out, though, that only 25 days is sometimes required by non-bankruptcy law. Accordingly, the advisory committee modified the rule after publication to require 21 days' advance notice of changes.

She added that the advisory committee had drafted a new form to implement subdivision (b) (Official Form 10, Supplement 1, Notice of Mortgage Payment Change). It would be published for comment in August 2010 and take effect on December 1, 2011, the same time as the proposed new rule. See *infra,* page 20.

Professor Gibson reported that subdivision (c) would require the creditor to provide notice to the debtor, debtor's counsel, and the trustee of any post-petition fees, expenses, and charges within 180 days after they are imposed. She explained that debtors are often unaware of the different kinds of charges that creditors assess, some of which may not be warranted or appropriate under the mortgage agreement or applicable non-bankruptcy law. The proposed amendments would give the debtor or trustee the chance to object to any claimed fee, expense, or charge within one year of service of the notice. She added that the advisory committee had worked hard to strike the right balance between providing fair notice to debtors and avoiding imposing unnecessary burdens on creditors.

She noted that the advisory committee had drafted a new form to implement subdivision (c) (Official Form 10, Supplement 2, Notice of Postpetition Mortgage Fees, Expenses, and Charges). It would be published for comment in August 2010 and take effect on December 1, 2011, the same time as the proposed new rule. See *infra,* page 20.

Professor Gibson explained that subdivisions (f) through (h) deal with final-cure payments and end-of-case proceedings. They will permit debtors to obtain a determination as to whether they are emerging from bankruptcy current on their mortgage. The amendments recognize that in some districts, debtors make mortgage payments directly, and in others they are paid by the chapter 13 trustee. In all districts, the trustee makes the default payments.

Within 30 days of the debtor's completion of all payments under the plan, the trustee would be required by the rule to provide notice to the debtor, debtor's counsel, and the holder of the mortgage claim that the debtor has cured any default. The holder of the claim would be required to file a response indicating whether it agrees that the debtor has cured any default and also indicating whether the debtor is current on all payments.

She pointed out that subdivision (i) contains a sanction provision for failure to provide the information required under the rule, similar to the sanction provision proposed in Rule 3001, *supra* page 14.

The committee without objection by voice vote approved the proposed new rule for approval by the Judicial Conference.

FED. R. BANKR. P. 4004

Professor Gibson explained that the proposed amendments to Rule 4004 (grant or denial of discharge) would resolve a problem identified by the 7th Circuit in *Zedan v. Habash,* 529 F.3d 398 (2008). They would permit a party in specific, limited circumstances to seek an extension of the time to object to the debtor's discharge after the time for objecting has expired. The proposal would address the unusual situation in which there is a significant gap in time between the deadline in Rule 4004(a) for a party to object to the discharge (60 days after the first date set for the meeting of creditors) and the date that the court actually enters the discharge order.

During such a gap, a party – normally a creditor or the trustee – may learn of facts that may provide grounds to revoke the debtor's discharge under § 727(a) of the Code, such as fraud committed by the debtor. But it is too late at that point to file an objection. The party, moreover, cannot seek revocation because § 727(d) of the Code specifies that revocation is not permitted if a party learns of fraud *before* the discharge is granted. The party, therefore, may be left without appropriate recourse.

The proposed amendments would allow a party to file a motion to extend the time to object to discharge after the objection deadline has expired and before the discharge is granted. The motion must show that: (1) the objection is based on facts that, if learned after the discharge was entered, would provide a basis for revocation under § 727(d); and (2) the party did not know of those facts in time to file an objection to discharge. The motion, moreover, must be filed promptly upon discovery of the facts.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

FED. R. BANKR. P. 6003

Judge Swain reported that Rule 6003 (relief immediately after commencement of a chapter 11 case) generally prohibits a court from issuing certain orders during the first 21 days of a chapter 11 case, such as approving the employment of counsel, the sale of property, or the assumption of an executory contract or unexpired lease. The proposed rule amendment would make it clear that the waiting period does not prevent a court from later issuing an order with retroactive effect, relating back, for example, to the date that the application or motion was filed. Thus, professionals can be paid for work undertaken while their application is pending.

The amendment would also clarify that the court is only prevented from granting the relief specifically identified in the rule. A court, for example, could approve the procedures for a sale during the 21-day waiting period, but not the actual sale of estate property itself.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

OFFICIAL FORMS 22A, 22B, and 22C

Judge Swain reported that the proposed amendments to the "means-test" forms, Official Forms 22A (chapter 7), 22B (chapter 11), and 22C (chapter 13), would replace in several instances the terms "household" and "household size" with "number of persons" or "family size." The revised terminology more closely reflects § 707(b) of the Code and IRS standards. Section 707(b)(2)(A)(ii)(I) of the Code specifies that the debtor's means-test deductions for various monthly expenses may be taken in the amounts specified in the IRS National and Local Standards. The national standards, she said, are based on numbers of persons, rather than household size. The local standards are based on family size, rather than household size.

In addition, she said, an instruction would be added to each form explaining that only one joint filer should report household expenses regularly paid by a third person. Instructions would also be added directing debtors to file separate forms if only one joint debtor is entitled to an exemption under Part I (report of income) and they believe that filing separate forms is required by § 707(b)(2)(C) of the Code. The statutory provisions, she said, are ambiguous on means-testing exclusions. Therefore, the form does not impose a particular interpretation, and the instructions allow debtors to take positions consistent with their interpretations of the ambiguous exemption provisions.

The revisions, she said, would become effective on December 1, 2010.

The committee without objection by voice vote approved the proposed amendments to the forms for approval by the Judicial Conference.

Amendments for Final Approval, Without Publication

OFFICIAL FORMS 20A AND 20B

Judge Swain reported that the proposed changes to Official Forms 20A (notice of motion or objection) and 20B (notice of objection to claim) were technical in nature and did not require publication. They would conform the forms to: (1) the 2005 amendment to § 727(a)(8) of the Code, which extends the time during which a debtor is barred from receiving successive discharges from 6 years to 8 years; and (2) the 2007 addition of FED. R. BANKR. R. 9037, which directs filers to provide only the last four digits of any social security number or individual taxpayer-identification number.

The revisions, she said, would become effective on December 1, 2010.

The committee without objection by voice vote approved the proposed amendments to the forms for approval by the Judicial Conference without publication.

Amendments for Publication

FED. R. BANKR. P. 3001

As noted above on pages 12-14, the proposed amendments to Rule 3001(c)(1) (proof of claim) published in August 2009 would have required a creditor with a proof of claim based on an open-end or revolving consumer credit agreement to file the debtor's last account statement with the proof of claim. The main problem that the rule was designed to address is that credit-card debt purchased in bulk claims may be stale.

Professor Gibson explained that the advisory committee had withdrawn the published proposal in light of many comments from creditors that they could not effectively produce the account statements, especially since claims for credit-card debt may be sold one or more times before the debtor's bankruptcy. Some recommended that pertinent information be required instead.

Professor Gibson explained that the advisory committee would replace the proposal with a substitute new paragraph 3001(c)(3). In lieu of requiring that a copy of the debtor's last account statement be attached, the revised proposal would require the holder of a claim to file with the proof of claim a statement that sets forth several specific names and dates relevant to a consumer-credit account. Those details, she said, are important for a debtor or trustee to be able to associate the claim with a known account and to determine whether the claim is timely or stale.

Although the creditor would not have to attach the underlying writing on which the claim is based, a party, on written request, could require the creditor to provide the writing. In certain cases, the debtor needs the information to assert an objection.

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

FED. R. BANKR. P. 7054

Judge Swain reported that the proposed amendment to Rule 7054 (judgment and costs) would conform the rule to FED. R. CIV. P. 54 and increase the time for a party to respond to the prevailing party's bill of costs from one day to 14 days. The current period, she said, is an unrealistically short amount of time for a party to prepare a response. In addition, the time for serving a motion for court review of the clerk's action

in taxing costs would be extended from 5 to 7 days, consistent with the 2009 time-computation rules that changed most 5-day deadlines to 7 days.

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

FED. R. BANKR. P. 7056

Judge Swain explained that Rule 7056 (summary judgment) incorporates FED. R. CIV. P. 56 in adversary proceedings. Rule 56 is also incorporated in contested matters through FED. R. BANKR. P. 9014(c).

She reported that the proposed amendment to Rule 7056 would alter the rule's default deadline for filing a summary judgment motion in bankruptcy cases. She explained that the deadline in civil cases – 30 days after the close of discovery – may not work well in fast-moving bankruptcy contested matters, where hearings often occur shortly after the close of discovery. Therefore, the advisory committee decided to set the deadline for filing a summary judgment motion in bankruptcy at 30 days before the initial date set for an evidentiary hearing on the issue for which summary judgment is sought. As with FED. R. CIV. P. 56(c)(1), she noted, the deadline may be altered by local rule or court order.

A member suggested that the proposed language of the amendment was a bit awkward and recommended moving the authorization for local rule variation to the end of the sentence. Judge Swain agreed to make the change.

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

OFFICIAL FORM 10
and
ATTACHMENT A, SUPPLEMENT 1, AND SUPPLEMENT 2

Judge Swain reported that the advisory committee was recommending several changes in Official Form 10 (proof of claim). The holder of a secured claim would be required to specify the annual interest rate on the debt at the time of filing and whether the rate is fixed or variable. In addition, an ambiguity on the current form would be eliminated to make it clear that the holder of a claim must attach the documents that support a claim, and not just a summary of the documents.

To emphasize the duty of accuracy imposed on a party filing a proof of claim, the signature box would be amended to include a certification that the information submitted on the form meets the requirements of FED. R. BANKR. P. 9011(b) (representations to the

court), *i.e.*, that the claim is "true and correct to the best of the signer's knowledge, information, and reasonable belief." This is particularly important, she said, because a proof of claim is prima facie evidence of the validity of a claim. In addition, a new space would be provided on the form for optional use of a "uniform claim identifier," a system implemented by some creditors and chapter 13 trustees to facilitate making and crediting plan payments by electronic funds transfer

Professor Gibson reported that three new claim-attachment forms had been drafted to implement the mortgage claims provisions of proposed Rules 3001(c)(2) and 3002.1. They would prescribe a uniform format for providing additional information on claims involving a security interest in a debtor's principal residence.

Attachment A to Official Form 10 would implement proposed Rule 3001(c)(2) and provide a uniform format for the required itemization of pre-petition interest, fees, expenses, and charges included in the home-mortgage claim amount. It would also require a statement of the amount needed to cure any default as of the petition date. If the mortgage installment payments include an escrow deposit, an escrow account statement would have to be attached, as required by proposed Rule 3001(c)(2)(C).

Supplement 1 to Official Form 10 would implement proposed Rule 3002.1(b) and require the home-mortgage creditor in a chapter 13 case to provide notice of changes in the mortgage installment payment amounts.

Supplement 2 to Official Form 10 would implement proposed Rule 3002.1(c) and provide a uniform format for the home-mortgage creditor to list post-petition fees, expenses, and charges incurred during the course of a chapter 13 case.

Judge Swain noted that, following publication, the proposed form changes would become effective on December 1, 2011.

The committee without objection by voice vote approved the proposed amendments to Form 10 and the new Attachment A and Supplements 1 and 2 to the form for publication.

OFFICIAL FORM 25A

Judge Swain reported that Official Form 25A is a model plan of reorganization for a small business. It would be amended to reflect the recent increase of the appeal period in bankruptcy from 10 to 14 days in the 2009 time-computation rule amendments. The effective date of the plan would become the first business day following 14 days after entry of the court's order of confirmation.

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

Informational Items

Professor Gibson reported that the advisory committee was continuing to make progress on its two major ongoing projects – revising the bankruptcy appellate rules and modernizing the bankruptcy forms. She noted that the committee would begin considering a draft of a completely revised Part VIII of the Bankruptcy Rules at its fall 2010 meeting. In addition, it would try to hold its spring 2011 meeting in conjunction with the meeting of the Advisory Committee on Appellate Rules in order to have the two committees consider the proposed revisions together.

Judge Swain reported that the forms modernization project, under the leadership of Judge Elizabeth L. Perris, had made significant progress in reformatting and rephrasing the many forms filed at the outset of a individual bankruptcy case. She noted that the project had obtained invaluable support from Carolyn Bagin, a nationally renowned forms-design expert, and it was continuing to reach out to users of the forms to solicit their feedback through surveys and questionnaires. In addition, the project was working closely with the groups designing the next generation replacement for CM/ECF to make sure that the new system includes the ability to extract and store data from the forms and to retrieve the data for user-specified reports.

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 May 17, 2010 (Agenda Item 5). The advisory committee had no action items to present.

Informational Items

FED. R. CIV. P. 45

Judge Kravitz reported that the advisory committee, aided by a subcommittee chaired by Judge David G. Campbell, was exploring potential improvements to Rule 45 (subpoenas). Professor Marcus, he noted, was serving as the subcommittee's reporter.

Judge Kravitz said that substantial progress had been made in addressing some of the problems most often cited with the current rule. The subcommittee's efforts have included: (1) reworking the division of responsibility between the court where the main action is pending and the ancillary discovery court; (2) enhancing notice to all parties before serving document subpoenas; and (3) simplifying the overly complex rule. The

subcommittee, he noted, had drafted three models to illustrate different approaches to simplification, including one that would separate discovery subpoenas from trial subpoenas.

Judge Kravitz reported that the committee would convene a Rule 45 mini-conference with members of the bench and bar in Dallas in October 2010. The conference, he said, should be helpful in informing the advisory committee on what approach to take at its fall 2010 and spring 2011 meetings. Rule amendments might be presented to the Standing Committee in June 2011.

PLEADING

Judge Kravitz reported that the advisory committee was continuing to monitor dismissal-motion statistics and case-law developments in light of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal,* 129 S. Ct. 1937 (2009). The committee, he said, was focusing in particular on whether the decisions have had an impact on motions to dismiss and rates of dismissal.

Dr. Cecil explained that the Federal Judicial Center was collecting and coding court orders disposing of Rule 12(b)(6) motions in about 20 district courts and comparing outcomes in 2006 with those in 2010 to see whether there are any differences. In addition, the Center was examining court records to determine whether judges in granting dismissal motions allow leave to amend and whether the plaintiffs in fact file amended complaints.

Judge Kravitz noted that a division of opinion had been voiced at the May 2010 Duke conference on the practical impact of *Twombly* and *Iqbal*. One prominent judge, for example, urged the participants to focus on the actual holdings in the two cases, and not on the language of the opinions. Other judges concurred and argued that the two cases had not changed the law materially and were being implemented very sensibly by the lower courts. On the other hand, two prominent professors argued that the two Supreme Court decisions would cause great harm, were cause for alarm, and would effectively diminish access to justice.

Judge Kravitz emphasized that stability matters. He suggested that the advisory committee's intense research efforts demonstrated that the law of pleading in the federal courts was clearly settling down, and the evolutionary process of common-law development was working well. For that reason, he said, it would make no sense to enact legislation or change pleading standards at this point. He noted that the advisory committee's reporters were considering different ways to respond to the cases by rule, but they were awaiting the outcome of further research efforts by the Federal Judicial Center.

He pointed out that the advisory committee was looking carefully at the frequently cited problem of "information asymmetry." To that end, it was considering permitting some pre-dismissal, focused discovery to elicit information needed specifically for pleading. Another approach, he said, might be to amend FED. R. CIV. P. 9 (pleading special matters) to enlarge the types of claims that require more specific pleading. In addition, there may be a need for more detailed pleading requirements regarding affirmative defenses.

In short, he said, the advisory committee was looking at several different approaches and focusing on special, limited discovery for pleading purposes. He added that true "notice pleading" is actually quite rare in the federal courts. To the contrary, he said, when plaintiffs know the facts, they usually set them forth in the pleadings. The problem seems to be that some plaintiffs at the time of filing simply lack access to certain information that they need in order to plead adequately.

Judge Kravitz added that pleading issues should occupy a good deal of the advisory committee's time at its November 2010 meeting. The committee, he said, should have a report available in January 2011, but it may not have concrete proposals ready until later.

MAY 2010 CIVIL LITIGATION REVIEW CONFERENCE

Judge Kravitz thanked Dean Levi for making the facilities at Duke Law School available for the May 2010 conference. He said that the event had been a resounding success, thanks largely to the efforts of the conference organizer, Judge John G. Koeltl. He pointed out that Judge Koeltl had done an extraordinary job in creating an excellent substantive agenda, assembling an impressive array of speakers, and soliciting a wealth of valuable articles and empirical data.

Several members who had attended the conference agreed that the program had been outstanding. They described the panel discussions as extremely substantive and valuable.

Specific Suggestions Made at the Conference

Judge Kravitz noted that a few recommendations had been made at the conference for major rule changes, such as: (1) moving away from "trans-substantivity" towards different rules for different kinds of cases; (2) abandoning notice pleading; (3) limiting discovery; and (4) recasting the basic goals enunciated in Rule 1. Nevertheless, he emphasized, most of the speakers and participants at the conference did not advocate radical changes in the structure of the rules. Essentially, the consensus at the conference was that the civil process should continue to operate within the broad 1938 outline.

Judge Kravitz noted that the topics discussed at the conference were largely matters that the advisory committee has been considering in one form or another for years. He added that much of the discussion and many of the papers presented dealt with discovery issues, and he proceeded to describe some of the suggestions.

The initial disclosures required by Rule 26(a), he said, came under attack from two sides. Some speakers recommended eliminating them entirely, while others urged that they be expanded and revitalized.

Some support was voiced for imposing presumptive limits on discovery. In particular, it was suggested that the current presumptive ceiling on the number of depositions and the length of depositions might be reduced.

Judge Kravitz reported that strong support was voiced by many participants for increased judicial involvement at the pretrial stage of civil cases. Lawyers at the conference all cited a need for more actual face-to-face time with judges in the discovery process. Judges, they said, need to be personally available to provide direction to the litigants and resolve disputes quickly. Nevertheless, he suggested, it would be difficult to mandate appropriate judicial attention through a national rule change. Other approaches, such as judicial education, may be more effective in achieving this objective.

Support was offered for developing form interrogatories and form document requests specifically tailored to different categories of cases, such as employment discrimination or securities cases. The models could be drafted collectively by lawyers for all sides and established as the discovery norm for various kinds of cases.

A concept voiced repeatedly was the need for greater cooperation among lawyers. Judge Kravitz pointed out that data from the recent Federal Judicial Center's discovery study had demonstrated a direct correlation between lawyer cooperation and reduced discovery requests and costs. He noted that a panelist at the conference emphasized that the discovery process is considerably more coordinated and disciplined in criminal cases (where the defendant's freedom is at stake) than in civil cases (where money is normally the issue). He observed that lawyers in criminal cases focus on the eventual trial and outcome, while civil lawyers focus mostly on the discovery phase itself. There are, moreover, more guidelines and limits in criminal discovery, due to the specific language of FED. R. CRIM. P. 16 and the Jencks Act. In addition, there are no economic incentives for the attorneys to prolong the discovery phase in criminal cases.

Judge Kravitz reported that many participants who represent defendants in civil cases complained about discovery costs. Among other things, they stated that the costs of reviewing discovery documents before turning them over to the other side continue to be huge, despite the recent enactment of FED. R. EVID. 502 (limitations on waiver of attorney-client privilege and work product). He observed that lawyers are naturally

reluctant to let their opponents see their clients' documents, even if the rule now gives them adequate legal protection.

Professor Cooper noted that plaintiffs' lawyers, on the other hand, argued that the emphasis that defendants place on their discovery burdens and costs is misplaced. They suggested, to the contrary, that the greatest problem with discovery is stonewalling on the part of defendants.

Judge Kravitz noted that support was also voiced at the conference for adopting simplified procedures, improving the Rule 16 and Rule 26 conferences, fashioning sensible discovery plans, and providing for greater cost shifting.

He reported that electronic discovery was a major topic at the conference. The lawyers, he said, were in agreement on two points. First, they recommended amending the civil rules to specify with greater precision what materials must be preserved at the outset of a case, and even before a federal case is filed. Second, they urged revision of the current sanctions regime in Rule 37(e) and argued that the rule's safe harbor is too shallow and ineffective.

Judge Kravitz said that current law provides clear triggers for the obligation to preserve potential litigation materials, but they are not specified in the federal rules. Preservation obligations, moreover, vary among the states and among the federal circuits. He said that the advisory committee was examining potential rule amendments to address both the preservation and sanctions problems. But, he cautioned, it will be very difficult to accomplish the changes that the bar clearly wants through the national rules.

He pointed out that the Rules Enabling Act limits the rules committees to matters of procedure, not substance. That statutory limitation is a serious impediment to regulating pre-lawsuit preservation obligations. Yet, once a case is actually filed in a federal court, the rules may address preservation and sanctions issues. Thus, despite the difficulty of drafting a rule to accomplish what the participants recommend, the advisory committee will move forward on the matter.

Professor Cooper agreed that the bar was promoting the laudatory goal of having clear and precise rules on what they must preserve and how they must preserve it. But the task of crafting a national preservation rule will involve complex drafting problems, as well as jurisdictional problems, and it just may not be possible.

Professor Coquillette added that state attorney-conduct rules addressing spoliation have been incorporated in a number of federal district-court rules. He explained that the Standing Committee had considered adopting national rules on attorney conduct a few years ago, but it eventually backed away from doing so because it involved many competing interests and difficult state-law issues.

Judge Kravitz reported that an excellent presentation was made at the conference on a promising pilot project in the Northern District of Illinois that focuses on electronic discovery. It emphasizes educating the bar about electronic discovery, promoting cooperation among the lawyers, and having the parties name information liaisons for discovery.

Judge Kravitz observed that, overall, the bar sees the 2006 electronic-discovery rule amendments as a success. They have worked well despite continuing concerns about preservation and sanctions. He suggested that the rules may well need further refining, but they were, in retrospect, both timely and effective.

Judge Kravitz referred to a panel discussion at the conference that focused on trials and settlement. He noted that substantial angst was expressed by some participants over diminution in the number of trials generally. Nevertheless, no changes to that phenomenon appear in sight. One professor, he noted, argued that since all civil cases are eventually bound for settlement, the rules should focus on settlement, rather than trial. On the other hand, an attorney panelist countered that maintaining the current focus of the rules on the trial facilitates good results before trial.

Perceptions of the Current System

Judge Kravitz reported that several written proposals had been submitted to the conference by bar groups, and a good deal of survey data had been gathered. One clear conclusion to be drawn from the conference, he said, is that a large gap exists between the perceptions of plaintiffs' lawyers and those of defendants' lawyers. Those differences, he said, will be difficult to reconcile. Nevertheless, the advisory committee may be able to take some meaningful steps toward achieving workable consensus.

The general consensus, he said, is that the civil rules are generally working well. At the same time, though, frustration experienced by certain litigants leads them to believe that the system is not in fact working. The two competing perceptions, he said, are reconcilable. The reality appears to be that the process works well in most cases, but not in certain kinds of cases, particularly complex cases with high stakes. The various empirical studies, he said, show that the stakes in cases clearly matter, and complex cases with more money at stake tend to have more discovery problems and greater discovery costs. The goal in each federal civil case, he suggested, should be to agree on a sensible and proportionate discovery plan that relates to the stakes of the litigation.

Dr. Lee described and compared the various studies presented at the conference. He said that two different kinds of surveys had been conducted – those that asked lawyers for their general perceptions and those that were empirically based on actual experiences in specific cases.

The two approaches, he said, produce different results. For example, the responses from lawyers in a perception study showed that they believe that about 70% of litigation costs are associated with discovery. The empirical studies, on the other hand, demonstrate that discovery costs were actually much lower, ranging between 20% and 40%. By way of further example, a recent perception-study showed that 80% or 90% of lawyers agree that litigation is too expensive. Yet the Federal Judicial Center studies demonstrate empirically that costs in the average federal case were only about $15,000 to $20,000.

The difference between the two results, he suggested, is due to cognitive biases. Respondents focus naturally on extreme cases and cases that stand out in their memory, and not on all their other cases. Perceptions, understandably, are not always accurate.

Judge Kravitz added that the empirical studies show that the vast majority of civil cases in the federal courts actually have little discovery. Nevertheless, discovery in complex civil cases can be enormous and extremely costly. Lawyers at the conference, he said, emphasized that it is the complex cases that judges should spend their time on.

Dr. Lee added that the empirical studies show that discovery costs clearly increase in complex cases. The stakes in litigation, he said, are the best predictor of costs, and they alone explain about 40-50% of the variations in costs shown in the studies. The economics of law practice, he said, also affects costs. Large firms, for example, have higher costs, and hourly billing increases costs for plaintiffs. He concluded that most of the factors shown in the studies to affect costs – such as complexity, litigation stakes, and law practice economics – are not driven by the rules themselves, but by other causes. Therefore, changing the rules alone may only have a marginal impact on the problems.

Future Committee Action

Judge Kravitz suggested that a handful of common themes had emerged at the conference. (1) There was universal agreement that cooperation among the attorneys in a case has a beneficial impact on limiting cost and delay. (2) There was universal agreement that active judicial involvement in a case, especially a case that has potential discovery problems, is essential. (3) There was little enthusiasm for retaining the Rule 26(a) mandatory disclosures in their current format. (4) Discovery costs in some cases are very high, and they may drive parties to settlement in some cases. (5) Certain types of cases are more prone to high discovery costs than others.

He noted that the advisory committee would address each of these issues, and it may also form a subcommittee to explore how judicial education and pilot projects might contribute to improvements, especially if the pilots are carefully crafted and channeled through the Federal Judicial Center to assure that they generate useful data to inform

future policy choices. The bottom line, he said, is that the advisory committee will be digesting and working on these issues for a long time.

A member suggested that the conference discussions on electronic discovery were particularly meaningful and asked the advisory committee to place its greatest priority on addressing the electronic discovery issues – preservation and sanctions. He said that most of the other problems referred to at the conference can be resolved by lawyers working cooperatively, but rules changes will be needed to address the electronic discovery problems.

Other members agreed, but they questioned whether changes in the electronic discovery rules to address preservation obligations can be promulgated under the Rules Enabling Act. Judge Kravitz pointed out that the advisory committee was very sensitive to the limits on its authority. He said that the committee might be able to rework the sanction provisions, make them clearer, and specify the applicable conduct standards more precisely. On the other hand, preservation obligations are normally addressed in state laws and ethics rules. There are also federal laws on the subject, such as Sarbanes-Oxley. He said that the advisory committee would explore preservation issues closely, and it might be able to make the preservation triggers clearer. Ultimately, though, legislation may be required, as with the 2008 enactment of FED. R. EVID. 502 (attorney-client privilege and work product; limitations on waiver).

A member pointed out that general counsels from several corporations participated actively in the conference. He noted that they did not generally criticize the way that the rules are working and recommended only minor tweaks in the rules. On the other hand, they argued unanimously and strongly for greater judicial involvement in the discovery process, especially early in cases. They tended to be critical of their own lawyers for contributing to increased costs and saw the courts as the best way to drive down costs. He acknowledged that mandating effective early judicial involvement is hard to accomplish formally by a rule, but it should be underscored as an essential ingredient of the civil process.

A judge added that many suggestions raised at the conference are not easily addressed in rules, but might be promoted through best-practices initiatives, handbooks, websites, workshops, and other educational efforts. She added that controlled pilot projects could also be helpful to ascertain what practices work well and produce positive results.

A member noted that he had heard a good deal of criticism of judges at the conference, especially about their lack of sufficient focus on resolving discovery matters. He noted that magistrate judges handle discovery extremely well and can provide the intense focus on discovery that is needed, especially with regard to electronic discovery. The system, though, may not be working effectively in some districts because the

magistrate judges have been assigned by the courts to other types of duties and do not focus on discovery.

A participant cautioned, though, that for every theme raised at the conference, there was a counter theme. Several lawyers suggested, for example, that there should be a single judge in a case. Yet every court has its own culture and different available resources. Essentially, each believes that its own way of doing things is the best approach.

Judge Rosenthal pointed out that a report of the conference and an executive summary would be prepared. She added that the advisory committee and the Standing Committee were resolved to take full advantage of what had transpired at the conference, and the proceedings will be the subject of considerable committee work in the future.

RULE 26(C) PROTECTIVE ORDERS

Judge Kravitz reported that the advisory committee had brought Rule 26(c) (protective orders) back to its agenda for further study in light of continuing legislative efforts to impose restrictions on the use of protective orders. He noted that the chair and reporter had worked on a possible revision of Rule 26(c), working from Ms. Kuperman's thorough analysis of the case law on protective orders in every circuit.

He noted that draft amendments to Rule 26(c) had been circulated at the advisory committee's spring 2010 meeting. They would incorporate into the rule a number of well-established court practices not currently explicit in the rule itself and add a provision on protecting personal privacy.

The committee, he said, was of the view that the federal courts are doing well in applying the protective-order rule in its current form. Nevertheless, it decided to keep the proposed revisions on its agenda for additional consideration. He noted, too, that none of the participants at the May 2010 conference had cited protective orders as a matter of concern to them. That fact, he suggested, was an implicit indication that the current rule is working well.

OTHER MATTERS

Judge Kravitz referred briefly to a number of other matters pending on the advisory committee's agenda, including the future of the illustrative forms issued under Rule 84 and the committee's interplay with the appellate rules committee on a number of issues that intersect both sets of rules.

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 attachments of May 19, 2010 (Agenda Item 6).

Amendments for Final Approval

TECHNOLOGY AMENDMENTS

Judge Tallman reported that the package of proposed technology changes would make it easier and more efficient for law enforcement officers to obtain process, typically early in a criminal case. It includes the following rules:

FED. R. CRIM. P. 1	Scope and definitions
FED. R. CRIM. P. 3	Complaint
FED. R. CRIM. P. 4	Arrest warrant or summons
FED. R. CRIM. P. 4.1 (new)	Issuing process by telephone or other reliable electronic means
FED. R. CRIM. P. 6	Grand jury
FED. R. CRIM. P. 9	Arrest warrant or summons on an indictment or information
FED. R. CRIM. P. 40	Arrest for failing to appear or violating release conditions in another district
FED. R. CRIM. P. 41	Search and seizure
FED. R. CRIM. P. 43	Defendant's presence
FED. R. CRIM. P. 49	Serving and filing papers

Judge Tallman commended the leadership of Judge Anthony Battaglia of the Southern District of California, who chaired the subcommittee that produced the technology package. The project, he said, was a major effort that had required substantial consultation, analysis, and drafting. He also thanked Professors Beale and King, the committee's hard-working reporters, for their contributions to the project.

He noted that the proposed amendments are intended to authorize all forms of reliable technology for communicating information for a judge to consider in reviewing a complaint and affidavits or deciding whether to issue a warrant or summons. Among other things, the term "telephone" would be redefined to include any form of technology for transmitting live electronic voice communications, including cell phones and new technologies that cannot yet be foreseen.

The amendments retain and emphasize the central constitutional safeguard that issuance of process must be made at the direction of a neutral and detached magistrate. They are designed to reduce the number of occasions when law enforcement officers must act without obtaining prior judicial authorization. Since a magistrate judge will normally be available to handle emergencies electronically, the amendments should eliminate most situations where an officer cannot appear before a federal judge for prompt process.

The heart of the technology package, he said, is new Rule 4.1. It prescribes in one place how information is presented electronically to a judge. It requires a live conversation between the applicant and the judge for the purpose of swearing the officer, who serves as the affiant. A record must be made of that affirmation process.

Rule 4.1 also reinforces and expands the concept of a "duplicate original warrant" now found in Rule 41 and extends it to other kinds of documents. In the normal course, he said, the signed warrant will be transmitted back to the applicant, but there will also be occasions in which the judge will authorize the applicant to make changes on the spot to a duplicate original.

He noted that new Rule 4.1 preserves the procedures of current Rule 41 and adds improvements. Like Rule 41, Rule 4.1 permits only a federal judge, not a state judge, to handle electronic proceedings.

Judge Tallman pointed out that the proposed amendments carry the strong endorsement of the Federal Magistrate Judges Association. Helpful comments were also received from individual magistrate judges, federal defenders, and the California state bar. The advisory committee, he said, had amended the published rules in light of those comments.

The advisory committee, he explained, had withdrawn a proposed amendment to FED. R. CRIM. P. 32.1 (revoking or modifying probation or supervised release) that would have allowed video teleconferencing to be used in revocation proceedings. He noted that there is strong societal value in having defendants appear face-to-face before a judge, and many observers fear that embracing technology may diminish the use of courtrooms and undercut the dignity of the court. Revocation proceedings, he said, are in the nature of a sentencing, and they clearly may affect the determination of innocence or guilt. For that reason, the advisory committee concluded that while video teleconferencing is appropriate for certain criminal proceedings, it should not be used for revocation proceedings.

FED. R. CRIM. P. 1

Judge Tallman reported that the proposed amendment to Rule 1 (scope and definition) would expand the term "telephone," now found in Rule 41 to allow new kinds of technology.

A member asked whether the term "electronic" is appropriate since other kinds of non-electronic communications may become common in the future. Judge Rosenthal explained that the same issue had arisen with the 2006 "electronic discovery" amendments to the Federal Rules of Civil Procedure. She said that after considerable consultation with many experts, the civil advisory committee chose to adopt the term "electronically stored information." She added that if new, non-electronic means of communication are developed, it may well be necessary to amend the rules in the future to include those alternatives, but at this point "electronic" appears to be the best term to use in the rule.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. CRIM. P. 3

Judge Tallman explained that the proposed amendment to Rule 3 (complaint) refers to new Rule 4.1 and authorizes using the protocol of that rule in submitting complaints and supporting materials to a judge by telephone or other reliable electronic means.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. CRIM. P. 4

Judge Tallman reported that the proposed amendments to Rule 4 (arrest warrant or summons on a complaint) also refers to new Rule 4.1 and authorizes using that rule to issue an arrest warrant or summons.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

FED. R. CRIM. P. 4.1

Judge Tallman pointed out that proposed new rule 4.1 (complaint, warrant, or summons by telephone or other reliable electronic means) is the heart of the technology amendments. He emphasized that a judge's use of the rule is purely discretionary. A judge does not have to permit the use of technology and may insist that paper process be issued in the traditional manner through written documents and personal appearances.

He noted that if the protocol of Rule 4.1 is used, the supporting documents will normally be submitted electronically to the judge in advance. A phone call will then be made, the applicant law enforcement officer will be placed under oath, and a record will be made of the conversation. If the applicant does no more than attest to the contents of the

written affidavit submitted electronically, the record will be limited to the officer's swearing to the accuracy of the documents before the judge. The judge will normally acknowledge the jurat on the face of the warrant. If, however, the judge takes additional testimony or exhibits, the testimony must be recorded verbatim, transcribed, and filed.

The judge may authorize the applicant to prepare a duplicate original of the complaint, warrant, or summons. The duplicate will not be needed, though, if the judge transmits the process back to the applicant.

The judge may modify the complaint, warrant, or summons. If modifications are required, the judge must either transmit the modified version of the document back to the applicant or file the modified original document and direct the applicant to modify the duplicate original document. In addition, Rule 4.1(a) adopts the language in existing Rule 41(d) specifying that, absent a finding of bad faith, evidence obtained from a warrant issued under the rule is not subject to suppression on the grounds that issuing the warrant under the protocol of the rule was unreasonable under the circumstances.

A member noted that the proposed rule expands the requirement in current Rule 41(d) that testimony be recorded and filed. Yet, he said, there is no requirement in either the current or revised rule that the warrant and affidavits themselves be filed. He pointed out that record-keeping processes among the courts are inconsistent, and the advisory committee should explore how documents are being filed and preserved in the courts, especially in the current electronic environment.

Judge Tallman agreed and noted that the advisory committee was aware of the inconsistencies. Some districts, for example, assign a magistrate-judge docket number to warrant applications and file the written documents in a sealed file without converting them to electronic form. Other courts digitize the documents and transfer them to the district court's criminal case file when an indictment is returned and a criminal case number assigned. He said that preserving a record of warrant proceedings is very important to defense lawyers, and the advisory committee will look further into the matter.

Mr. Rabiej reported that one of the working groups designing the next generation CM/ECF system is addressing how best to handle criminal process and other court documents that generally do not appear in the official public case file. Dr. Reagan explained that as part of the Federal Judicial Center's recent study of sealed cases, he had looked at all cases filed in the federal courts in 2006. Typically, he said, a warrant application is assigned a magistrate-judge electronic docket number. Although the records may still be retained in paper form in the magistrate judge's chambers in one or more districts, most courts incorporate them into the files of the clerk's office.

A member suggested that Rule 4.1 may be mandating more requirements than necessary. Judge Tallman pointed out, though, that the requirements had largely been

carried over from the current Rule 41. He said that the rule needs to be broadly drafted because there are so many different situations that may arise in the federal courts. An officer, he said, may be on the telephone speaking with the magistrate judge, writing out the application, and taking down what the judge is saying. More typically, though, an officer will call the U.S. attorney's office and have a prosecutor draft the application.

A member said that the rule assumes that the applicant will wind up with an official piece of paper in hand. Yet in the current age of rapid technological development, perhaps an electronic version of the document should suffice. By way of example, electronic boarding passes are now accepted at airports, and police officers use laptop computers and hand-held devices in their patrol cars.

Judge Tallman explained, though, that Rule 41(f) requires the officer to leave a copy of a search warrant and a receipt for the property taken with the person whose property is being searched. Professor Beale added that Rule 4.1 may need to be changed in the future to take account of electronic substitutes for paper documents. Nevertheless, the rule as currently proposed will help a great deal now because it will make electronic process more widely available and reduce the number of situations where officers act without prior judicial authorization. Ms. Monaco added that the Department of Justice believes that the new rule will be of great help to its personnel, and it plans to provide the U.S. attorneys with guidance on how to implement it.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

FED. R. CRIM. P. 6

Judge Tallman reported that the proposed amendment to Rule 6 (grand jury) would allow a judge to take a grand jury return by video teleconference. He noted that there are places in the federal system where the nearest judge is located a substantial distance from the courthouse in which the grand jury sits. The rule states explicitly that it is designed to avoid unnecessary cost and delay. The rule would also preserve the judge's time and safety.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. CRIM. P. 9

Judge Tallman reported that the proposed amendment would authorize the protocol of Rule 4.1 in considering an arrest warrant or summons on an indictment or information.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. CRIM. P. 40

Judge Tallman reported that the proposed amendment to Rule 40 (arrest for failing to appear or violating conditions of release in another district) would allow using video teleconferencing for an initial appearance, with the defendant's consent. It will be helpful to some defendants, as, for example, when a defendant faces a long transfer to another district and hopes that the judge might quash the warrant or order release if he or she is able to present a good reason for not having appeared in the other district.

Professor Beale added that Rule 40 currently states that a magistrate judge should proceed with an initial appearance under Rule 5(c)(3), as applicable. The advisory committee, she said, had some concern whether current Rule 5(f), allowing video teleconferencing of initial appearances on consent, would clearly be applicable to Rule 40 situations. So, as a matter of caution, it recommended adding a specific provision in Rule 40 to make the matter clear.

A member cautioned that the committee should not encourage a reduction in the use of courtrooms, and he asked where the participants will be located physically for the Rule 40 video teleconferencing. Judge Tallman suggested that the judge and the defendant normally will both be in a courtroom for the proceedings.

He added that the potential benefits accruing to a defendant who consents to video conferencing under Rule 40 outweigh the general policy concerns about diminishing the use of courtrooms. Professor Beale pointed out that Rule 5 already authorizes video teleconferencing in all initial appearances if the defendant consents. Moreover, the role of lawyers and the use of court interpreters will not change. The proposed amendment merely extends the current provision to the Rule 40 subset of initial appearances.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. CRIM. P. 41

Judge Tallman said that the proposed amendments to Rule 41 (search and seizure) are largely conforming in nature. Most of the current text in Rule 41 governing the protocol for using reliable electronic means for process would be moved to the new Rule 4.1. In addition, revised Rule 41(f) would explicitly authorize the return of search warrants and warrants for tracking devices to be made by reliable electronic means.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

FED. R. CRIM. P. 43

Judge Tallman reported that, after considering the public comments, the advisory committee withdrew a proposed amendment to Rule 32.1 (revoking or modifying probation or supervised release) and a proposed conforming cross-reference to Rule 32.1 in Rule 43(a) (defendant's presence). The withdrawn provisions would have authorized a defendant, on consent, to participate in a revocation proceeding by video teleconference.

The remaining Rule 43 amendment would authorize video teleconferencing in misdemeanor or petty offense proceedings with the defendant's written consent. He noted that Rule 43 currently permits arraignment, plea, trial, and sentencing in misdemeanor or petty offense cases in the absence of the defendant. The procedure, he noted, is used mainly in minor offenses occurring on government reservations such as national parks because requiring a defendant to return to the park for court proceedings may impose personal hardship. He emphasized, though, that the presiding judge may always require the defendant's presence and does not have to permit either video teleconferencing or trial in absentia.

A member agreed that there are practical problems with misdemeanors in national parks, but lamented the trend away from courtroom proceedings. The dignity of the courtroom and the courthouse, he said, are very important and have positive societal value. The physical courtroom, moreover, affects personal conduct. In essence, steps that reduce the need for courtroom proceedings should only be taken with the utmost caution and concern.

Judge Tallman agreed and explained that the advisory committee had withdrawn the proposed amendment to Rule 32.1 for just that reason. Several members concurred that substitutes to a physical courtroom should be the exception and never become routine. One member noted, though, that courts are being driven to using video teleconferencing by the convenience demands of others, including law enforcement personnel, lawyers, and parties. A member added that the only practical alternative to video teleconferencing for a defendant in a misdemeanor case now is for the defendant not to show up and to pay a fine.

Members suggested that language be added to the committee note to emphasize that the use of video teleconferencing for misdemeanor or petty offense proceedings should be the exception, not the rule, and that judges should think carefully before allowing video trials or sentencing. They suggested that the advisory committee draft appropriate language to that effect for the committee note. Judge Tallman pointed out that the committee note to the current Rule 5 contains appropriate language that could be

adapted for the Rule 43 note. After a break, the additional language was presented to the committee and approved.

The committee without objection by voice vote approved the proposed amendment, including the additional note language, for approval by the Judicial Conference.

FED. R. CRIM. P. 49

Judge Tallman reported that the proposed amendment to Rule 49 (serving and filing papers) would bring the criminal rules into conformity with the civil rules on electronic filing. Based on FED. R. CIV. P. 5(d)(3), it would authorize the courts by local rule to allow papers to be filed, signed, or verified by reliable electronic means, consistent with any technical standards of the Judicial Conference.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

Technical Amendments for Final Approval without Publication

FED. R. CRIM. P. 32

Judge Tallman reported that the proposed amendments to Rule 32(d)(2)(F) and (G) (sentencing and judgment) had been recommended by the committee's style consultant. They would remedy two technical drafting problems created by the recent package of criminal forfeiture rules.

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

FED. R. CRIM. P. 41

Judge Tallman reported that the proposed amendments to Rule 41 (search and seizure) were also technical and conforming in nature. The rule currently gives a law enforcement officer 10 "calendar" days after use of a tracking device has ended to return the warrant to the judge and serve a copy on the person tracked. The proposed amendments would delete the unnecessary word "calendar" from the rule because all days are now counted the same under the 2009 time computation amendments' "days are days" approach.

Judge Rosenthal suggested that when the rule is sent to the Judicial Conference for approval, the committee's communication should explain why as a matter of policy it

chose the shorter period of 10 days, rather than 14 days, since the 10-day periods in most other rules had been changed to 14 days as part of the time computation project.

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

Amendments for Publication

FED. R. CRIM. P. 37

Judge Tallman reported that the proposed new Rule 37 (indicative rulings) would authorize indicative rulings in criminal cases, in conformance with the new civil and appellate rules that formalize a procedure for such rulings – FED. R. CIV. P. 62.1 and FED. R. APP. P. 12.1. Professor Beale pointed out that the criminal advisory committee had benefitted greatly from the work of the civil and appellate committees in this matter. She added that the advisory committee would also delete the first sentence of the second paragraph of the proposed committee note.

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

FED. R. CRIM. P. 5 and 58

Judge Tallman reported that the proposed amendments to Rule 5 (initial appearance) and Rule 58 (petty offenses and other misdemeanors) had been suggested by the Department of Justice and would implement the government's notice obligations under applicable statutes and treaties.

He noted that the proposed amendment to Rule 5(c)(4) would require that the initial appearance of an extradited foreign defendant take place in the district where the defendant is charged, rather than in the district where the defendant first arrives in the United States. The intent of the amendment is to eliminate logistical delays. A member voiced concern, though, over potential delay of the initial appearance if the defendant no longer receives an initial appearance as soon as he or she arrives in the United States.

A member suggested adding language to the rule requiring that the initial appearance be held promptly. Professor Beale and Judge Tallman pointed out that Rule 5(a)(1)(B) already states explicitly that the initial appearance must be held "without unnecessary delay." The member suggested that it would be helpful to include a reference in the committee note to the language of Rule 5(a)(1)(B). After a break, Judge Tallman presented note language to accomplish that result.

Judge Tallman explained that the other proposed amendments to Rule 5 and 58 would carry out treaty obligations of the United States to notify a consular officer from the defendant's country of nationality that the defendant has been arrested, if the defendant requests. A member recommended removing the first sentence of the committee note for each rule, which refers to the government's concerns. Professor Beale agreed that the sentences could be removed, but she noted that the rule and note had been carefully negotiated with the Department of Justice. Judge Tallman suggested rephrasing the first sentence of each note to state simply that the proposed rule facilitates compliance with treaty obligations, without specifically mentioning the government's motivation.

The committee without objection by voice vote approved the proposed amendments, including the additional note language, for publication.

Informational Items

FED. R. CRIM. P. 16

Judge Tallman noted that at the January 2010 Standing Committee meeting, he had presented a report on the advisory committee's study of proposals to broaden FED. R. CRIM. P. 16 (discovery and inspection) and incorporate the government's obligation to provide exculpatory evidence to the defendant under *Brady v. Maryland,* 373 U.S. 83 (1963) and later cases. He noted that the advisory committee had convened a productive meeting on the subject in February with judges, prosecutors, law enforcement authorities, defense attorneys, and law professors. The participants, he said, had been very candid and non-confrontational, and the meeting provided the committee with important input on the advisability of broadening discovery in criminal cases.

He reported that the Federal Judicial Center had just sent a survey to judges, prosecutors, and defense lawyers on the matter, and the responses have been prompt and massive, with comments received already from 260 judges and nearly 2,000 lawyers. He added that the records of the Department of Justice's Office of Professional Responsibility showed that over the last nine years an average of only two complaints a year had been sustained against prosecutors for misconduct. But, he added, lawyers may be reluctant to file formal complaints with the Department. The current survey, he noted, was intended in part to identify any types of situations that have not been reported.

FED. R. CRIM. P. 12

Judge Tallman noted that in June 2009 the Standing Committee recommitted to the advisory committee a proposed amendment to Rule 12 (pleadings and pretrial motions) that would have required a defendant to raise before trial any claims that an indictment fails to state an offense. The advisory committee was also asked to explore the advisability of using the term "forfeiture," rather than "waiver," in the proposed rule.

He reported that the pertinent Rule 12 issues are complex. Therefore, the committee was considering a more fundamental, broader revision of the rule that might clarify which motions and claims must be raised before trial, distinguish forfeited claims from waived claims, and clarify the relationship between these claims and FED. R. CRIM. P.52 (harmless and plain error).

FED. R. CRIM. P. 11

Judge Tallman reported that the recent Supreme Court decision in *Padilla v. Kentucky,* 130 S. Ct. 1473 (March 31, 2010) had demonstrated the importance of informing an alien defendant of the immigration consequences of a guilty plea. As a result, he said, the advisory committee had appointed a subcommittee to examine whether immigration and citizenship consequences should be added to the list of matters that a judge must include in the courtroom colloquy with a defendant in taking a guilty plea under FED. R. CRIM. P. 11 (pleas).

CRIME VICTIMS' RIGHTS

Judge Tallman reported that the advisory committee was continuing to monitor implementation of the Crime Victims' Rights Act. Among other things, he said, the committee had discovered an instance of an unintended barrier to court access by crime victims. An attorney representing victims had been unable to file a motion asserting the victim's rights because the district court's electronic filing system only authorized motions to be filed by parties in the case. On behalf of the advisory committee, he said, he had brought the matter to the attention of the chair of the Judicial Conference committee having jurisdiction over development of the CM/ECF electronic system.

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 attachments of May 10, 2010 (Agenda Item 7).

Amendments for Final Approval

RESTYLED EVIDENCE RULES 101-1103

Judge Hinkle reported that the restyling of the Federal Rules of Evidence was the only action matter on the agenda. He noted that the project had been a joint undertaking on the part of the advisory committee and the Standing Committee's Style Subcommittee, comprised of Judge Teilborg (chair), Judge Huff, and Mr. Maledon.

He noted that the project to restyle the federal rules had originated in the early 1990s under the sponsorship of the Standing Committee chair at the time, Judge Robert Keeton, who set out to bring greater consistency and readability to the rules. Judge Keeton had appointed Professor Charles Alan Wright as the first chair of the Standing Committee's new Style Subcommittee and Bryan Garner as the committee's first style consultant. Judge Hinkle pointed out that Mr. Garner had authored the pamphlet setting out the style conventions followed by the subcommittee – *Guidelines for Drafting and Editing Court Rules.*

Judge Hinkle explained that the restyled appellate rules took effect in 1998, the restyled criminal rules in 2002, and the restyled civil rules in 2007. With each restyling effort, he said, there had been doubters who said that restyling was not worth the effort and that the potential disruption would outweigh the benefits. Each time, he said, the doubters had been proven wrong. He pointed out, for example, that a professor who had opposed restyling changes later wrote an article proclaiming that they were indeed an improvement.

He added that whatever disruption there may be initially will evaporate rather quickly because the committee worked intensively to avoid any changes in substance. He pointed out, though, that there are indeed differences between the evidence rules and the other sets of federal rules because the evidence rules are used in courtrooms every day, and lawyers need to know them intimately and instinctively.

Judge Hinkle reported that Professor Kimble had assumed the duties of style consultant near the end of the criminal rules restyling project and had been an indispensable part of both the civil and evidence restyling efforts. He pointed out that the restyled civil rules had proven so successful that they had been awarded the Burton Award for Reform in Law, probably the nation's most prestigious prize for excellence in legal writing.

Judge Hinkle explained that the process used by the advisory committee to restyle the rules had involved several steps. It started with Professor Kimble drafting a first cut of the restyled rules. That product was reviewed by Professor Capra, the committee's reporter, who examined the revisions carefully to make sure that they were technically correct and did not affect substance. Then the rules were reviewed again by the two professors and by members of the advisory committee. They were next sent to the Style Subcommittee for comment. After the subcommittee's input, they were reviewed by the full advisory committee.

The advisory committee members reviewed the revised rules in advance of the committee meeting and again at the meeting. He added that the committee had also been assisted throughout the project by Professor Kenneth S. Broun, consultant and former member of the committee, by Professor Stephen A. Saltzburg, representing the American Bar Association (and former reporter to the criminal advisory committee), and by several other prominent advisors. He explained that the rules were all published for comment at

the same time, even though they had been reviewed and approved for publication by the Standing Committee in three batches at three different meetings.

Judge Hinkle reported that if the advisory committee decided that any change in the language of a rule impacted substance, it made the final call on the revised language. If, however, a change was seen as purely stylistic, the advisory committee noted that it was not a matter of substance, and the Style Subcommittee made the final decision on language.

Judge Hinkle reported that the public comments had been very positive. The American College of Trial Lawyers, for example, assigned the rules to a special committee, which commented favorably many times on the product. The Litigation Section of the American Bar Association also praised the revised rules and stated that they are clearly better written than the current rules. The only doubt raised in the comments was whether the restyling was worth the potential disruption. Nevertheless, only one negative written public comment to that effect had been received.

At its last meeting, the advisory committee considered the comments and took a fresh look at the rules. In addition, Professors Capra and Kimble completed another top-to-bottom review of the rules. The Style Subcommittee also reviewed them carefully and conducted many meetings by conference call.

Finally, the advisory committee received helpful comments from members of the Standing Committee in advance of the current meeting. The comments of Judges Raggi and Hartz were reviewed carefully and described in a recent memorandum from Professor Capra. Dean Levi also suggested changes just before the meeting that Judge Hinkle presented orally to the committee.

A motion was made to approve the package of restyled evidence rules, including the recent changes incorporated in Professor Capra's memo and those described by Judge Hinkle.

A member stated that she would vote for the restyled rules, but expressed ambivalence about the project. She applauded the extraordinary efforts of the committee in producing the restyled rules, but questioned whether they represent a sufficient improvement over the existing rules to justify the transactional costs of the changes.

She also expressed concern over the need to revise the language of all the rules since the evidence rules are so familiar to lawyers as to make them practically iconic. They are cited and relied on everyday in courtroom proceedings. Any changes in language, she said, will inevitably be used by lawyers in future arguments that changes in substance were in fact made.

She noted that some of the changes clearly improve the rules, such as adding headings, breakouts, numbers, and letters that judges and lawyers will find very helpful. Nevertheless, every single federal rule of evidence was changed in the effort, and some of the changes were not improvements. She asked whether it was really necessary to change each rule of evidence, especially because the rules were drafted carefully over the years, and many of them have been interpreted extensively in the case law.

She recited examples of specific restyled rules that may not have been improved and suggested that some of them were actually made worse solely for the sake of stylistic consistency. In short, she concluded, the new rules represent a solution in search of a problem. Nevertheless, despite those reservations, she stated that she would not cast the only negative vote against the revised rules and would vote to approve the package, but with serious doubts.

A member suggested that those comments were the most thoughtful and intelligent criticisms he had ever heard about the restyling project. Yet, he had simply not been persuaded.

Another member also expressed great appreciation for those well-reasoned views, but pointed out that the great bulk of lawyers and organizations having reviewed the revised rules support them enthusiastically. She explained that the new rules eliminate wordiness and outdated terms in the existing rules. They also improve consistency within the body of evidence rules and with the other federal rules. Moreover, the restyling retains the familiar structure and numbering of the existing evidence rules, even though the style conventions might have called for renumbering or other reformatting. In the final analysis, she suggested, the restyled evidence rules are significantly better and lawyers will easily adapt to the changes.

A member agreed and said that, as a practicing lawyer, he had been skeptical when the project had first started. He pointed out, though, that the committee had made extraordinary efforts to avoid any changes in substance or numbering that could potentially disrupt lawyers. This attempt to preserve continuity, he said, had been a cardinal principle of the effort and had been followed meticulously.

On behalf of the Style Subcommittee, Judge Teilborg offered a special tribute to Judge Hinkle for his outstanding leadership of the project, as well as his great scholarship and technical knowledge. The end product, he said, was superlative and could only have been achieved through an enormous amount of work and cooperation. He also thanked Judge Huff and Mr. Maledon for their time and devotion to the Style Subcommittee's efforts, especially for giving up so many of their lunch hours for conference calls.

Judge Teilborg added that it had been a joy to observe the intense interplay between Professors Capra and Kimble, truly experts in their respective fields. He pointed out that Professor Kimble had left his hospital bed after surgery to return quickly to the

project. He also thanked Jeffrey Barr of the Administrative Office for his great work as scribe in keeping the minutes and preparing the drafts. Finally, he thanked Dean Levi and Judges Raggi and Hartz for offering helpful changes in the final days of the project.

A member suggested that one of the great benefits of the restyling process is that the reviewers uncover unintended ambiguities in the rules. He pointed out that Professor Capra was keeping track of all the ambiguities in the evidence rules, so they may be addressed in due course as matters of substance on a separate track. He also remarked that the committee's style conventions are not well known to the public and suggested that they be made available to bench and bar to help them understand the process.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

REPORT OF THE SEALING SUBCOMMITTEE

Judge Hartz, chair of the Sealing Subcommittee, reported that the subcommittee had been charged with examining the sealing of entire cases in the federal courts. The assignment had been generated by a request to the Judicial Conference from the chief judge of the Seventh Circuit.

Judge Hartz noted that the bulk of the subcommittee's work in examining current court practices had been assigned to the Federal Judicial Center. Dr. Reagan of the Center, he said, had reviewed every sealed case filed in the federal courts in 2006.

He pointed out that there are very good reasons for courts to seal cases – such as matters involving juveniles, grand juries, fugitives, and unexecuted warrants. The study, he added, revealed that many of the sealed "cases" docketed by the courts were not entire cases, but miscellaneous proceedings that carry miscellaneous docket numbers.

He noted that the Center's report had been exhaustive, and the subcommittee felt comfortable that virtually all the sealing decisions made by the courts had been supported by appropriate justification. On the other hand, it was also apparent from the study that court sealing processes could be improved. In some cases, for example, lesser measures than sealing an entire case might have sufficed, such as sealing particular documents. Moreover, the study found that in practice many sealed matters are not timely unsealed after the reason for sealing has expired.

In the end, the subcommittee decided that there is no need for new federal rules on sealing. The standards for sealing, he said, are quite clear in the case law of every circuit, and the courts appear to be acting properly in sealing matters. Nevertheless, there does appear to be a need for Judicial Conference guidelines and some practical education on sealing.

Professor Marcus said that it is worth emphasizing that when the matter was first assigned to the rules committee, the focus was on whether new national rules are needed. He added that there is a general misperception that many cases are sealed in the courts. The Federal Judicial Center study, though, showed that there are in fact very few sealed cases, and many of those are sealed in light of a specific statute or rule, such as in qui tam cases and grand jury proceedings. As for dealing with public perceptions, he said, the committee should emphasize that the standards for sealing are clear and that judges are acting appropriately. Nevertheless, some practical steps should be taken to improve sealing practices in the courts.

He noted that the subcommittee's report does not recommend any changes in the national rules. Its recommendations, rather, are addressed to the Judicial Conference's Court Administration and Case Management Committee. The report recommends consideration of a national policy statement on sealing that includes three criteria.

> First, an entire case should be sealed only when authorized by statute or rule or justified by a showing of exceptional circumstances and when there is no lesser alternative to sealing the whole case, such as sealing only certain documents.
>
> Second, the decision to seal should be made only by a judge. Instances arise when another person, such as the clerk of court, may seal initially, but that decision should be reviewed promptly by a judge.
>
> Third, once the reason for sealing has passed, the sealing should be lifted. He noted that the most common problem identified during the study was that courts often neglect to unseal documents promptly.

Professor Marcus explained that the subcommittee was also recommending that the Court Administration and Case Management Committee consider exploring the following steps to promote compliance with the proposed national policy statement:

(1) judicial education to make sure that judges are aware of the proper criteria for sealing, including the lesser alternatives;
(2) education for judges and clerks to ensure that sealing is ordered only by a judge or reviewed promptly by a judge;
(3) a study to identify when a clerk may seal a matter temporarily and to establish procedures to ensure prompt review by a judge;
(4) judicial education to ensure that judges know of the need to unseal matters promptly and to set expiration dates for sealing;
(5) programming CM/ECF to generate notices to courts and parties that a sealing order must be reviewed after a certain time period;
(6) programming CM/ECF to generate periodic reports of sealed cases to facilitate more effective and efficient review of them; and

(7) administrative measures that the courts might take to improve handling requests for sealing.

The committee endorsed the subcommittee report and recommendations and voted to refer them to the Court Administration and Case Management Committee for appropriate action.

REPORT OF THE PRIVACY SUBCOMMITTEE

Judge Raggi, chair of the Privacy Subcommittee, reported that the subcommittee's assignment was to consider whether the current privacy rules are adequate to protect privacy interests. At the same time, she noted, it is also important to emphasize the need to protect the core value of providing maximum public access to court proceedings.

She noted that the subcommittee included three representatives from the Court Administration and Case Management Committee, whose contributions have been invaluable. In addition, she said, Judge John R. Tunheim, former chair of the Court Administration and Case Management Committee, and Judge Hinkle were serving as advisors to the subcommittee.

In short, the subcommittee was reviewing: (1) whether the new rules are being followed; and (2) whether they are adequate. To address those questions, she explained, the subcommittee had started its efforts with extensive surveys by the Administrative Office and the Federal Judicial Center. It then conducted a major program at Fordham Law School, organized by Professor Capra, to which more than 30 knowledgeable individuals with particular interests in privacy matters were invited. The invitees included judges, members of the press, representatives from non-government organizations, an historian, government lawyers, criminal defense lawyers, and lawyers active in civil, commercial, and immigration cases. With the benefit of all the information and views accumulated at the conference, the subcommittee will spend the summer drafting its report for the January 2011 Standing Committee meeting.

Judge Raggi noted that, like the sealing subcommittee, her subcommittee's report will likely not include any recommendations for changes in the federal rules. Rather, it will provide relevant information on current practices in the courts and on the effectiveness of the new privacy rules. Professor Capra added that the Federal Judicial Center had prepared an excellent report on the use of social security numbers in case filings that will be a part of the subcommittee report.

LONG RANGE PLANNING

It was noted that the April 2010 version of the proposed *Draft Strategic Plan for the Federal Judiciary* had been included in the committee's agenda materials, and several of the plan's strategies and goals relate to the work of the rules committees. It was also pointed out that a separate chart had been included in the materials setting out the specific matters in the proposed plan that have potential rules implications.

NEXT MEETING

The members agreed to hold the next committee meeting on January 6-7, 2011, in San Francisco.

Respectfully submitted,

Peter G. McCabe,
Secretary

TAB 2A

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Changes Made to Restyled Rules of Evidence after Advisory Committee's Spring 2010 Meeting.
Date: September 16, 2010

The Restyled Evidence Rules were approved by the Standing Committee in June, and by the time of the Evidence Committee's fall meeting those Rules will likely have been approved by the Judicial Conference (they were placed on the consent calendar).

The Restyled Rules were changed in some respects from the rules as approved by the Evidence Rules Committee at its Spring meeting. These changes resulted from careful review by three members of the Standing Committee --- Judge Raggi, Judge Hartz, and Dean Levi. These three provided altogether more than 20 suggestions for change. All of these suggestions were evaluated by the Chair and Reporter of the Evidence Committee, Professor Kimble, and the members of the Style Subcommittee of the Standing Committee. Some suggestions were about style. Others pointed out possible substantive changes undetected to that point.

This memorandum sets forth and explains the proposed changes that were eventually approved by the Standing Committee. The changes are set forth purely for informational purposes, and with the recognition that the members of the Evidence Rules Committee, who worked so hard on restyling, should be informed of the reasoning behind each of the changes.

A full copy of the Restyled Rules as submitted to the Judicial Conference is included in this agenda book.

Rule 104. Preliminary Questions

(c) **Conducting a Hearing So That the Jury Cannot Hear It.** The court must conduct ~~a~~ any hearing on a preliminary question 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; or

(3) justice so requires.

Explanation for change from "a" to "any": The original rule provides that hearings on the admissibility of confessions "shall in all cases be conducted out of the hearing of the jury." It doesn't mandate that a hearing be conducted. Dean Levi suggested that the change to "must" raised an inference that the court actually must conduct a hearing. This is especially so because "must" appears so early in the rule. It looks like a mandatory hearing rule when in fact the mandatory part is that if a hearing is to be conducted, it must be outside the jury's hearing. The change from "any" to "a" indicates that the Rule does not apply unless the court decides to hold a hearing.

The Chair and Reporter agreed that the revision was necessary to prevent a substantive change. The revision was approved by the Style Subcommittee and the Standing Committee.

Rule 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes
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 timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

Explanation for addition of "timely": Rule 105. The original rule states that "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." By starting with "when" the evidence is admitted, it implies that if the request is not made at the time the evidence is admitted, the judge is not required to so instruct. And there is case law supporting that point.

Dean Levi noted that the restyled rule's use of "if the court admits" "the court, on request, must instruct" appears to indicate that the court is required on request *at any time* to so instruct the jury. Thus the restyled rule appears to delete the implication of timeliness that existed in the original rule.

The Chair and Reporter agreed that a reference to timeliness should be added to avoid any risk of a substantive change. The Style Subcommittee approved the change, as did the Standing Committee.

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 trial 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~~ 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) **Timing.** The court may take judicial notice at any stage of the proceeding.
(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.	~~(d)~~ (e) **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 fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(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)~~ (f) **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.

Explanation for addition of "trial" in (b)(1): The original rule refers to information "generally known within the territorial jurisdiction of the *trial* court. Professor Kimble changed it to "court" with the thinking that "trial" was redundant. But as Judge Levi noted, appellate courts can take judicial notice under Rule 201 --- and the territorial jurisdiction of the appellate court is usually broader than the trial court. The original Rule requires the appellate court to refer to and be limited by the territorial jurisdiction of the trial court --- the restyled rule did not. That is a substantive change --- a very narrow one, but a substantive change nonetheless. ***It was therefore agreed that "trial" should be restored to (b)(1) and that change was approved by the Standing Committee.***

Explanation for changes to (c) and (d): The restyling combined original subdivisions (c), (d) and (f), in an effort to collect in one place the basic rules on a court's taking judicial notice. But this appears to have resulted in an inadvertent substantive change. Judge Raggi noted that under the restyled rule, a court would be *required* to take judicial notice at any stage of the proceeding if the party requests it and supplies the court with the necessary information --- see restyled (c)(2). This would mean that, for example, if a party presents the necessary information while the jury is deliberating, the court would have to accept the noticed fact and instruct the jury accordingly. The original rule, by providing in a separate subdivision that judicial notice "may" be taken at any stage of the proceeding, gave the court the discretion to refuse to take notice if the request from the party is untimely --- and case law has so held.

Accordingly, the Chair and Reporter recommended that the restyled rule be revised to restore the provision on time for taking notice to a separate subdivision. The basic rules on whether a court may or must take notice remain as combined in a single rule.

The Style Subcommittee approved the change to Rule 201, as blacklined above. The Standing Committee adopted the change.

Rule 302. ~~Effect~~ Applying ~~of~~ State Law ~~on~~ to Presumptions in ~~a~~ Civil Cases
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.

Explanation: Judge Raggi suggested that because the rule is speaking about the "effect of a presumption," the existing caption was confusing because it appears to say "Effect of State Law on the Effect of a Presumption." She also questioned why "Presumptions" was plural and "Civil Case" was singular.

Professor Kimble agreed with Judge Raggi's suggested changes to the heading. **He noted, for consistency, that the heading to Rule 301 should also be changed:**

Rule 301. Presumptions in ~~a~~ Civil Cases Generally

The Chair and the Reporter noted that the suggested changes were stylistic only. They agreed with the suggested changes to the headings of Rules 301 and 302.

The Style Subcommittee approved the proposed changes to the headings of Rules 301 and 302. The Standing Committee approved the changes as well.

Rule 404(b)

(b) **Crimes, Wrongs, or Other Acts.**

(1) ***Prohibited Uses.*** Evidence of a crime, wrong, 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 in a Criminal Case.*** 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.

Explanation for change to (b)(1) and rule caption: The original Rule 404(b) covers evidence of "other crimes, wrongs or acts." The word "wrongs" was deleted from restyling on the ground that it was unnecessary, because a "wrong" would either be a crime or an act, or both. After discussion with Judge Raggi, the Chair and the Reporter agreed that the deletion of "wrongs" might work an inadvertent substantive change. Specifically, a proponent may want to introduce evidence that the opponent *failed to act* and that the failure was wrongful (but not necessarily a crime). Examples include failure to register a gun, failure to attend to a child, failure to obtain a license to practice medicine or law, etc. Under existing law, this evidence would be covered by Rule 404(b), but a coverage question might arise under the restyled Rule. While all of these examples could be shoehorned into the term "act," and most would probably be "crimes," it seemed prudent, given the importance of Rule 404(b), to hew as closely to the original as possible. As a matter of style, it adds only one word. ***Therefore, the Chair and Reporter recommended that the word "wrong" be added to the text and caption of Restyled Rule 404(b). The Style Subcommittee and the Standing Committee approved the change.***

Rule 412(b)(1)(B) **(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 with respect to the person accused of the sexual misconduct, if offered by the ~~prosecutor~~ defendant to prove consent or if offered by the ~~defendant to prove consent~~ prosecutor; 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.

Explanation for change to (b)(1)(B): Judge Raggi noted that it would be possible to read the restyled rule as limiting the prosecutor's use of the victim's prior sexual behavior. It could be read to mean that the evidence is admissible only if offered by the prosecutor "to prove consent." She suggested that the rule should be changed to make clear that "to prove consent" is a qualifier only for defense-offered evidence. (That is clear under the existing rule given the sequencing).

Professor Kimble argued that the restyled rule is clear because it starts over again with "if offered by." But Professor Kimble found the change acceptable.

The Chair and the Reporter agreed with Judge Raggi. They concluded that there was a risk that the restyled rule could be misconstrued to have made a substantive change.

The Style Subcommittee approved the change to Rule 412(b)(1)(B) as blacklined above, on the ground that it clarifies the rule. The Standing Committee approved the change as well.

Rule 602. Need for Personal Knowledge
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 ~~an expert's~~ a witness's expert testimony under Rule 703.

Explanation for change to last sentence: This change was suggested by Judge Hartz. It helps to clarify that if a person is testifying as both a lay and expert witness, the personal knowledge requirement still applies to the lay testimony.

The Chair and the Reporter of the Evidence Rules Committee supported the change, as did Professor Kimble.

The Style Subcommittee approved the proposed change to Rule 602, on the ground that it clarifies the rule. The Standing Committee approved the change as well.

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~~ a party an opportunity to object outside the jury's presence.

Explanation for deletion of "adverse": Judge Raggi noted that the restyled rule changes "opposing party" to "adverse party" and wondered if the terms mean the same thing in multi-party cases.

The case law generally uses the term "opposing" or "opponent" to refer to a party on the other side of the "v." In contrast, the term "adverse" is used more broadly in multiparty cases to refer to anyone who would be negatively affected by a ruling on evidence. The original rules used these terms inconsistently, and one of the goals of the restyling effort was to provide consistent terminology. In the case of Rule 606, the term "adverse" is appropriate because in a multiparty case, a juror's testimony may negatively affect parties on either side of the "v."

That said, there is really no need to refer to *either* adverse or opposing in this instance. ***After discussion with Judge Raggi, the Chair and Reporter proposed that "a party" be substituted for "an adverse party."*** Professor Kimble agreed with this change.

The Style Subcommittee approved the proposed change to Rule 606(a) as did the Standing Committee.

Rule 704(b)

(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. Those matters are for the trier of fact alone.

Explanation for restoring the last sentence of the original rule: Judge Raggi observed that in her experience, the last sentence of the original rule provided helpful reinforcement for a ruling excluding expert testimony that a defendant did or did not have a requisite mental state.

The sentence was dropped from the restyling on the ground that it was superfluous. Throughout the restyling, the question of what in an original rule was superfluous, and what was helpful emphasis, has been a judgment call. The last sentence to Rule 704(b) presents a close question. The Chair and the Reporter did not believe it necessary to restore the sentence, but did not object to its inclusion in the restyled rule --- especially considering the fact that Rule 704(b) was directly enacted by Congress and so, in close cases, it would be prudent to retain as much of the original language as stylistically possible.

The Style Subcommittee agreed with Judge Raggi that the last sentence to the original Rule 704(b) provided a useful emphasis. The Subcommittee voted to approve the change to restyled Rule 704(b) as shown in the blackline above. The Standing Committee approved the change.

Rule 706(b) and (c)

(b) **Expert's Role.** The court must inform the expert ~~in writing~~ of the expert's duties. The court may do so in writing and have a copy filed with the clerk. ~~Or the court may so inform the expert~~ or may do so orally 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.

Explanation for the change to (b): Judge Raggi noted that the use of the word "must" in Rule 706(b) raises a problem because it provides that a court "must inform the expert in writing," and then provides that the court has the option of providing such notice at a conference. This problem of inconsistency arises because the restyling combines the court's obligation to inform the expert of her duties with the options of how to so inform.

The Chair, Reporter and Professor Kimble all agreed that Rule 706(b) could be clarified by requiring the court to inform the expert of her duties, and then providing options on how to do so. They suggested that the blacklined changes to Rule 706(b) above be approved. **The Style Subcommittee approved the proposed change to Rule 706(b), and the Standing Committee agreed.**

Rule 901(a)

(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 satisfy the requirement of authenticateing or identifying 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:

Explanation for change to (a): Judge Raggi observed that the restyled Rule 901(a) omits the former rule's reference to the "requirement of authentication" and suggested that the reference to the "requirement" in Rule 901(b) is therefore not as clear as it should be.

The Chair and Reporter noted that the original rule did not directly state that evidence had to be authenticated; it referred indirectly to the fact that authentication is a requirement. Thus the language in the restyled rule --- "in order to have it admitted" --- states an admissibility requirement as accurately as the original. As a matter of style, the Chair and Reporter were not opposed to the change in the blackline above, however, because there is some utility and clarity in referring to a "requirement" in both (b) and (a).

The Style Subcommittee approved the proposed change to Rule 901(a), as indicated in the blackline above, as did the Standing Committee.

Rule 902(1)

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 and Signed.*** A document that bears: ~~(B)~~(A) 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~~.~~; and ~~(A)~~(B) a signature purporting to be an execution or attestation~~; and~~.
(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 But Are Signed and Certified.*** 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)~~ (A); 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.

Explanation for flipping the sequence of 902(1): Judge Raggi noted that the sequencing of the original Rule 902(1) had been flipped --- signature before seal rather than seal before signature. She suggested that the original order should be restored because the sealing is the first and most important event leading to authentication --- as opposed to Rule 902(2) where the document is first signed and then certified in some way that might include a seal.

Professor Kimble explained that placing signing before sealing accords with the restyling principle of putting a short item before a very long item. He recognized, however, that the principle is flexible when the two items are divided into separate subdivisions. He noted that if the flip was to be made in 902(1), it was necessary to change the caption to Rule 902(2) in order to preserve parallelism; and a change to the internal citation in Rule 902(2) would also be required. Both those changes are indicated in the above blackline.

The Chair and the Reporter noted that the suggested changes are stylistic only. Beyond a general concern about extensive changes at such a late date on rules that received no negative public comment, they were agnostic about the suggested changes to Rules 902(1) and (2).

The Style Subcommittee approved the proposed changes to Rules 902(1) and (2), as indicated in the blackline above, and the Standing Committee approved as well.

Rule 902(8)

(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~~ executed by a notary public or another officer who is authorized to take acknowledgments.

Explanation for change: The Restyling changed "executed in the manner provided by law" to "lawfully signed." Judge Raggi was concerned that "lawfully signed" might foreclose the possibility that, now or in the future, notary authentication may be permitted by means other than signing.

The Chair and the Reporter, in reviewing Judge Raggi's comment, concluded that the change from "executed" to "signed" was a substantive change. It is not only that a law might allow a certificate of acknowledgement by means other than signing. It is also that most states require *more* than a signature for a certificate of acknowledgment to be valid --- so the restyled rule's reference to a lawful signing would be insufficient in most cases to satisfy the law. It is possible to construe the entire process of sealing, stamping, etc. as a "signing." But it would of course be preferable to avoid any speculation on the meaning of "lawfully signed." ***Therefore, the Chair and the Reporter recommended that "lawfully signed" be changed to "lawfully executed" in Restyled Rule 902(8).***

The Style Subcommittee agreed with the proposed change from "signed" to "executed" in restyled Rule 902(8), and the Standing Committee approved as well.

TAB 2B

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

Agenda E-19 (Appendix D)
Rules
September 2010

MEMORANDUM

TO: **Honorable Lee H. Rosenthal, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Judge Robert L. Hinkle, Chair**
Advisory Committee on Evidence Rules

RE: **Report of the Advisory Committee on Evidence Rules**

DATE: **May 10, 2010**

Introduction

The Advisory Committee on Evidence Rules met on April 22-23 at Fordham Law School in New York. The meeting produced one action item for the Standing Committee to consider at the June 2010 meeting.

As the Standing Committee knows, the Advisory Committee has been restyling the Evidence Rules. At the June 2009 meeting, the Standing Committee approved publishing the entire set of restyled rules for public comment. The Advisory Committee and the Standing Committee's Style Subcommittee have considered the public comments in detail. Most were favorable, and some resulted in changes that have improved the product. The Advisory Committee now asks the Standing Committee to approve the entire set of restyled rules for submission to the Judicial Conference. The Style Subcommittee has approved the rules.

Appendix A sets out the restyled rules as proposed for submission to the Judicial Conference, side by side with the existing rules.

* * * * *

Action Item — Restyled Evidence Rules 101–1103

Background: the History of Restyling the Rules. Beginning in the early 1990s, Judge Robert Keeton, who was chair of the Standing Committee, and a committee member, University of Texas Professor Charles Alan Wright, led an effort to adopt clear and consistent style conventions for all of the rules. Without consistent style conventions, there were differences from one set of rules to another, and even from one rule to another within the same set. Style varied because a committee seeking to amend a rule did not always consider how another rule expressed the same concept. Style varied based on the membership of a particular advisory committee. Style varied as the membership of a particular advisory committee changed over time. And style varied as the membership of the Standing Committee changed over time. Different rules expressed the same thought in different ways, leading to a risk that they would be interpreted differently. Different rules sometimes used the same word or phrase to mean different things, again leading to a risk of misinterpretation. And in other respects, too, rules drafters who were experts in the relevant substantive and procedural areas sometimes did not express themselves as clearly as they might have.

Judge Keeton appointed Professor Wright to chair a newly formed Style Subcommittee of the Standing Committee. At Professor Wright's suggestion, the Standing Committee retained a legal-writing authority, Bryan Garner, as its style consultant. Mr. Garner is the author of such books as *The Elements of Legal Style* and *A Dictionary of Modern Legal Usage*. These are generally regarded as the leading authorities on these subjects. Mr. Garner also is the current editor of *Black's Law Dictionary* and the co-author, with Justice Scalia, of *Making Your Case: The Art of Persuading Judges*.

In conjunction with his work for the Standing Committee, Mr. Garner wrote *Guidelines for Drafting and Editing Court Rules*. First published in 1996, the *Guidelines* manual is now in its fifth printing. It has guided all rules amendments since it was written—whether or not they related to a restyling project. And the *Guidelines* manual has guided successful restylings of the Federal Rules of Appellate, Criminal, and Civil Rules, which took effect in 1998, 2002, and 2007. For matters not addressed in the *Guidelines*, the restylings have followed Garner's *A Dictionary of Modern Legal Usage*. Professor Daniel R. Coquillette has been the Standing Committee's reporter through all of these projects.

Mr. Garner was himself the style consultant for the restyled Appellate and Criminal Rules. Professor Joseph Kimble took over near the end of the Criminal Rules restyling project and was the style consultant as the Civil Rules project went forward. Professor Kimble is the editor in chief of

The Scribes Journal of Legal Writing and the author of *Lifting the Fog of Legalese*, a book that compiles some of his many essays. He and Mr. Garner are co-authors of a forthcoming book, *The Elements of Legal Drafting*, which West Publishing Company will publish. Professor Kimble has taught legal writing at Thomas Cooley Law School for 26 years.

Despite some initial opposition, each of the restyling projects has proved enormously successful. Indeed, in recognition of their work in restyling the Civil Rules, Professor Kimble, the Standing Committee, and the Civil Rules Advisory Committee each received a Burton Award for Reform in Law. The Burton is probably the nation's most prestigious legal-writing award. Judge Rosenthal, Judge Thrash (of the Style Subcommittee), and Professor Kimble accepted the awards at a black-tie dinner at the Library of Congress on June 4, 2007.

The Division of Responsibility: Substance or Style. The division of responsibility on the restyling projects has conformed generally to the protocol the Standing Committee has adopted for addressing style issues for a proposed amendment to a rule outside the restyling process. For an amendment outside a restyling project, the relevant Advisory Committee must submit its proposed language to the Style Subcommittee. On style issues, the Style Subcommittee, not the Advisory Committee, has the last word. Thus when an Advisory Committee submits a proposed amendment to any rule to the full Standing Committee, the amendment already has gone through a style review, and style issues have been determined by the Style Subcommittee. The Standing Committee chairs have kept the Style Subcommittee small in order to promote consistency. Although the Standing Committee retains the ultimate authority, through the years it has followed the style decisions of the Style Subcommittee, thus ensuring a high level of consistency across all sets of rules.

Preparing the Restyled Evidence Rules as Issued for Public Comment. With this background, the Advisory Committee on Evidence Rules undertook its restyling project beginning in the Fall of 2007. The Committee established a step-by-step process for restyling that was substantially the same as that employed in the earlier restyling projects. Those steps were: 1) draft by Professor Kimble; 2) comments by the Reporter, Professor Daniel J. Capra; 3) response by Professor Kimble and changes to the draft where necessary; 4) expedited review by Advisory Committee members and redraft by Professor Kimble if necessary; 5) review by the Style Subcommittee of the Standing Committee; 6) review by the Advisory Committee; and 7) review by the Standing Committee to determine whether to release the restyled rules for public comment.

The Advisory Committee divided the Evidence Rules into three parts. The process described above thus was conducted in three stages. The Committee also agreed that the entire package of restyled rules should be submitted for public comment at one time.

The Advisory Committee established a working principle for whether a proposed change is one of "style" (in which event the decision is made by the Style Subcommittee) or one of "substance" (in which event the decision is for the Advisory Committee). A proposed change is "substantive" if:

1. Under the existing practice in any circuit, it could lead to a different result on a question of admissibility; or

2. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made; or

3. It changes the structure of a rule or method of analysis in a manner that fundamentally changes how courts and litigants have thought about, or argued about, the rule; or

4. It changes what Professor Kimble has referred to as a "sacred phrase"—"phrases that have become so familiar as to be fixed in cement."

At its Spring 2008 meeting the Advisory Committee approved the restyling of the first third of the rules (Rules 101–415). The Standing Committee, at its June 2008 meeting, approved these rules for release for public comment, with the understanding that there could be further changes and that publication would occur after the Standing Committee approved all of the rules.

At its Fall 2008 meeting, the Advisory Committee approved the restyling of the second third of the rules (Rules 501–706). The Standing Committee, at its January 2009 meeting, approved these rules for release for public comment, again with the understanding that there could be further changes and that publication would occur after the Standing Committee approved all of the rules.

At its Spring 2009 meeting, the Advisory Committee approved the restyling of the final third of the rules (Rules 801–1103). The Standing Committee, at its June 2009 meeting, approved these rules and the entire set for release for public comment.

The Public Comments. We received 19 public comments, some brief, some running to many pages. In general, they were strongly favorable, with a number of helpful specific suggestions. The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers said:

> Our Committee members commented, time and again, on the excellent work of the restyling sub-committee.

Comment 09-EV-002, second page.

The American Bar Association Section of Litigation said:

> 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.

Comment 09-EV-014, at 1.

A law professor said:

> 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.

Letter from Roger C. Park, Comment 09-EV-012, at 1. Several other professors made similar comments.

There was a single dissent: the Federal Magistrate Judges Association said it "doubts the value of restyling the Federal Rules of Evidence." Comment 09-EV-011 at 7. The earlier restyling projects drew much more extensive opposition, but even some of the opponents later came to recognize that the restyled rules were better. That restyling the evidence rules drew only a single negative comment is perhaps a testament to the success of the earlier restyling projects.

Considering the Public Comments. The Evidence Reporter (Professor Capra) and the Style Consultant (Professor Kimble) considered the public comments in detail. They also reviewed all of the rules yet again. They provided their input to the Style Subcommittee (consisting of three Standing Committee members: Judge James A. Teilborg, Judge Marilyn L. Huff, and William J. Maledon). The Style Subcommittee considered the public comments and the input during conference calls that consumed many hours spread over many days. They did this in time for their decisions to be reported to the Advisory Committee in advance of the April 2010 meeting. The Style Subcommittee's prompt work was of enormous assistance to the Advisory Committee.

The Reporter prepared a memorandum to the Advisory Committee that analyzed in detail the public comments, the Style Subcommittee's decisions, and every issue that had been raised by anyone. At the April 2010 meeting, the Advisory Committee considered the public comments and addressed every issue. The draft minutes—which summarize but are by no means a transcript of the two-day meeting—run to 127 pages and are attached to this report. I have not attempted to summarize in this report the extensive discussions and many decisions recounted in the minutes.

The Advisory Committee approved the entire set of restyled rules, thus indicating its belief that the restyled rules are substantively identical to the existing rules. The conclusion is underscored by the committee note to each restyled rule. The note to Rule 101 explains the restyling project. The note for each other rule reiterates that the changes have been made as part of the restyling project, that the changes are stylistic only, and that there is no intent to change any ruling on evidence admissibility. In a few instances, a note includes a further explanation of a specific drafting decision. The notes follow the pattern of earlier restyling projects.

The Advisory Committee also made several recommendations to the Style Subcommittee for changes on matters of style. On those matters, the final decision of course rests with the Style Subcommittee, not with the Advisory Committee. The Style Subcommittee took up the recommendations at an additional conference call. The Style Subcommittee acted on the suggestions and gave its final approval to the entire set of restyled rules. For ease of reference, the Style Subcommittee's decisions have been noted in the minutes of the Advisory Committee meeting, even though they of course came after that meeting.

In sum, the rules and the committee notes come to the Standing Committee with the approval of the Advisory Committee (on matters of substance) and the Style Subcommittee (on matters of style). The degree of cooperation among the Reporter, the Style Consultant, the Advisory Committee, and the Style Subcommittee has been extraordinary.

Recommendation: The Advisory Committee on Evidence Rules recommends that the Standing Committee approve the proposed restyled Evidence Rules 101–1103 and the proposed Committee Notes for submission to the Judicial Conference.

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ARTICLE I. GENERAL PROVISIONS[1] 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 in 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" 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 any other medium includes electronically stored information.

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 reference to electronically stored information is intended to track the language of Fed. R. Civ. P. 34.

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] Rules in effect on December 1, 2010 (including amendments to Rule 804(b)(3) scheduled to take effect on that date).

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 rules 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 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.

5. No Substantive Change

The Committee made special efforts to reject any purported style improvement that might result in a substantive change in the application of a rule. The Committee considered a change to be "substantive" if any of the following conditions were met:

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

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

c. 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."

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.

Committee Note

The language of Rule 102 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.

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, 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, a 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.

Committee Note

The language of Rule 103 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.

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) **Relevance That Depends on a Fact.** 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.
(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) **Conducting a Hearing So That the Jury Cannot Hear It.** The court must conduct any hearing on a preliminary question 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; 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) **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.

Committee Note

The language of Rule 104 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.

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 timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

Committee Note

The language of Rule 105 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.

Rule 106. Remainder of or Related Writings or Recorded Statements	Rule 106. Remainder 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.

Committee Note

The language of Rule 106 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.

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 trial 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.** 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) Timing.** The court may take judicial notice at any stage of the proceeding.
(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.	**(e) 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 fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.
(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.	**(f) 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.

Committee Note

The language of Rule 201 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.

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 Civil Cases 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 producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

Committee Note

The language of Rule 301 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.

Rule 302. Applicability of State Law in Civil Actions and Proceedings	Rule 302. Applying State Law to Presumptions in Civil Cases
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.

Committee Note

The language of Rule 302 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.

ARTICLE IV. RELEVANCY AND ITS LIMITS **Rule 401. Definition of "Relevant Evidence"**	ARTICLE IV. RELEVANCE 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: **(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.

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.

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.

Committee Note

The language of Rule 402 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.

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.

Committee Note

The language of Rule 403 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.

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 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 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, Wrongs, or Other Acts.** **(1)** ***Prohibited Uses.*** Evidence of a crime, wrong, 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 in a Criminal Case.*** 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.

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.

Committee Note

The language of Rule 405 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.

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.

Committee Note

The language of Rule 406 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.

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.

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.

Committee Note

The language of Rule 408 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 408 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.

The Committee deleted the reference to "liability" on the ground that the deletion makes the Rule flow better and easier to read, and because "liability" is covered by the broader term "validity." Courts have not made substantive decisions on the basis of any distinction between validity and liability. No change in current practice or in the coverage of the Rule is intended.

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.

Committee Note

The language of Rule 409 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.

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 made during a proceeding on either of those pleas 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 the 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 with counsel present.

Committee Note

The language of Rule 410 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.

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 was or was not insured against liability is not admissible to prove 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 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.

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 with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; 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.

Committee Note

The language of Rule 412 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.

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 subparagraphs (1)–(4).

Committee Note

The language of Rule 413 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.

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 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 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, ''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 subparagraphs (A)–(E).

Committee Note

The language of Rule 414 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.

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 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 to the Opponent.** 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.

Committee Note

The language of Rule 415 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.

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 • 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.

Committee Note

The language of Rule 501 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.

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 occurred.	**(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.

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.

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.

Committee Note

The language of Rule 601 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.

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 a witness's expert testimony under Rule 703.

Committee Note

The language of Rule 602 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.

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.

Committee Note

The language of Rule 603 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.

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.

Committee Note

The language of Rule 604 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.

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.

Committee Note

The language of Rule 605 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.

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 a 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.

Committee Note

The language of Rule 606 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.

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.

Committee Note

The language of Rule 607 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.

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. By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

Committee Note

The language of Rule 608 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The 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.

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, in a civil case or in a criminal case in which the witness is not a defendant; and **(B)** must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; 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 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)** 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.

Committee Note

The language of Rule 609 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.

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.

Committee Note

The language of Rule 610 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.

Rule 611. Mode and Order of Interrogation and Presentation	Rule 611. Mode and Order of Examining 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 examining 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 the 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: **(1)** on cross-examination; and **(2)** when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Committee Note

The language of Rule 611 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.

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

Committee Note

The language of Rule 612 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.

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 Examination.** When examining a witness about the witness's prior statement, 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 examine 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).

Committee Note

The language of Rule 613 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.

Rule 614. Calling and Interrogation of Witnesses by Court	Rule 614. Court's Calling or Examining 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 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) **Examining.** The court may examine 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 examining a witness either at that time or at the next opportunity when the jury is not present.

Committee Note

The language of Rule 614 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.

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.

Committee Note

The language of Rule 615 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.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY **Rule 701. Opinion Testimony by Lay Witnesses**	ARTICLE VII. OPINIONS AND EXPERT TESTIMONY **Rule 701. Opinion Testimony by Lay Witnesses**
If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.	If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: **(a)** rationally based on the witness's perception; **(b)** helpful to clearly understanding the witness's testimony or to determining a fact in issue; and **(c)** not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Committee Note

The language of Rule 701 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The 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.

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.

Committee Note

The language of Rule 702 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.

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.

Committee Note

The language of Rule 703 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The 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.

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. Those matters are for the trier of fact alone.

Committee Note

The language of Rule 704 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The 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.

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.

Committee Note

The language of Rule 705 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The 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.

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 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 of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally 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 a reasonable compensation, as set by the court. 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.

Committee Note

The language of Rule 706 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.

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 a person's oral assertion, written assertion, or 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 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.
(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 a 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.

(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 the party manifested that it adopted or believed to be 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 coconspirator 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).

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.

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.

Committee Note

The language of Rule 802 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.

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 of 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; **(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(11) or (12) or with a statute permitting certification; and **(E)** neither the source of information 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; **(B)** a record was regularly kept for a matter of that kind; and **(C)** neither the possible source of the information 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 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.
(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 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.
(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 conviction 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.]

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.

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 from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies; **(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 as a witness 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 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.	(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]	**(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.	**(6)** ***Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.*** A statement offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the declarant's unavailability as a witness, and did so intending that result.

Committee Note

The language of Rule 804 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.

No style changes were made to Rule 804(b)(3), because it was already restyled in conjunction with a substantive amendment, effective December 1, 2010.

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.

Committee Note

The language of Rule 805 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.

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.

Committee Note

The language of Rule 806 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.

Rule 807. Residual Exception	Rule 807. Residual Exception
A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.	(a) **In General.** Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804: (1) the statement has equivalent circumstantial guarantees of trustworthiness; (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.

Committee Note

The language of Rule 807 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.

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 satisfy the requirement of authenticating or identifying an item of evidence, 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 document was recorded or filed in a public office as authorized by law; or **(B)** a purported public record or statement is from the office where items of this kind are kept.
(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.	(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.

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.

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:	The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:
(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.	(1) ***Domestic Public Documents That Are Sealed and Signed.*** A document that bears: **(A)** 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; and **(B)** a signature purporting to be an execution or attestation.
(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 Not Sealed but Are Signed and Certified.*** 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)(A); 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 recorded or filed in a public office as authorized by law — 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.

(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 executed by a notary public or another officer who is authorized to take acknowledgments.
(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)(A)-(C), as 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).

Committee Note

The language of Rule 902 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.

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.

Committee Note

The language of Rule 903 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.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS Rule 1001. Definitions	ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS Rule 1001. Definitions That Apply to This Article
For purposes of this article the following definitions are applicable: **(1) Writings and recordings.** ''Writings'' and ''recordings'' consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation. **(2) Photographs.** ''Photographs'' include still photographs, X-ray films, video tapes, and motion pictures. **(3) Original.** An ''original'' of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An ''original'' of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an ''original''. **(4) Duplicate.** A ''duplicate'' is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.	In this article: **(a)** A "writing" consists of letters, words, numbers, or their equivalent set down in any form. **(b)** A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner. **(c)** A "photograph" means a photographic image or its equivalent stored in any form. **(d)** 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)** A "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Committee Note

The language of Rule 1001 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.

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.

Committee Note

The language of Rule 1002 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.

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.

Committee Note

The language of Rule 1003 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.

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.

Committee Note

The language of Rule 1004 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.

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 recorded or filed in a public office as authorized by law — 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.

Committee Note

The language of Rule 1005 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.

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.

Committee Note

The language of Rule 1006 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.

Rule 1007. Testimony or Written Admission of Party	Rule 1007. Testimony or Statement 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 statement of the party against whom the evidence is offered. The proponent need not account for the original.

Committee Note

The language of Rule 1007 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.

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.

Committee Note

The language of Rule 1008 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.

ARTICLE XI. MISCELLANEOUS RULES Rule 1101. Applicability of Rules	ARTICLE 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; and • contempt proceedings, except those in which the court may act summarily.
(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.

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.

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.

Committee Note

The language of Rule 1102 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.

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.

Committee Note

The language of Rule 1103 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.

TAB 3

FORDHAM

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Daniel J. Capra
Philip Reed Professor of Law

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Effect of *Melendez-Diaz* on Federal Rules Hearsay Exceptions
Date: September 16, 2010

This memorandum discusses the Supreme Court's opinion in *Melendez-Diaz v. Massachusetts,* 129 S.Ct. 2527 (2009), and its effect on some of the hearsay exceptions in the Federal Rules of Evidence. The memo specifically considers whether amendments to any of the hearsay exceptions are necessary in light of *Melendez-Diaz.*

The memo concludes that the Committee may wish to consider an amendment to Rule 803(10), and possibly an amendment to Rule 902(11) — because *Melendez-Diaz* has rendered Rule 803(10) unconstitutional in its current form, and raises some question about the constitutionality of Rule 902(11).

There are some arguments in favor of waiting. *Melendez-Diaz* is relatively new. The case law is still developing, at least as to its effect on some Rules. Also, Congress might be interested in some legislative remediation of the burdens on the government imposed by *Melendez-Diaz*, especially in illegal re-entry cases. But on the other hand, the three-year length of the rulemaking process could be used to draft an amendment and accommodate any possible developments either with Congress or in the case law.

This memo is in two parts. Part One describes the *Melendez-Diaz* opinion and its implications for the records-based hearsay exceptions of the Federal Rules of Evidence. Part Two analyzes each of the major records-based exceptions to determine whether an amendment might be justified in light of *Melendez-Diaz.*

I. The Melendez-Diaz Opinion:[1]

In *Melendez-Diaz,* a drug case, the trial court admitted three "certificates of analysis" showing the results of forensic tests performed on substances seized from the police car in which the defendant was riding. The certificates stated that "the substance was found to contain: Cocaine." The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health. The Court, in a highly contested 5-4 decision, held that these certificates were "testimonial" under *Crawford* and therefore admitting them without a live witness violated the defendant's right to confrontation. The majority stated that affidavits prepared solely for litigation are within the core definition of "testimonial" statements. And the documents at issue, "while denominated by Massachusetts law 'certificates,' are quite plainly affidavits: declarations of facts written down and sworn to by the declarant before an officer authorized to administer oaths." The majority also noted that the *only* reason the certificates were prepared was for use in litigation. It stated that "[w]e can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose — as stated in the relevant state-law provision — was reprinted on the affidavits themselves."

The basic holding of *Melendez-Diaz* is that a live witness must testify to the results of forensic tests conducted primarily for litigation — admitting a certificate of such results under a hearsay exception will violate the defendant's right to confrontation.

Other implications for the Federal hearsay exceptions are found in the parts of the majority's opinion that address the dissent's arguments that the decision will lead to substantial practical difficulties. These implications are discussed in turn:

1. In a footnote, the majority declared in dictum that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records." Apparently these are more like traditional business records than records prepared primarily for litigation, though the question is close — the reason these records are maintained, with respect to forensic testing equipment, is so that the resulting tests conducted can be admitted as reliable. At any rate, the footnote shows some flexibility, in that not *every* record involved in the forensic testing process will necessarily be found testimonial. And the footnote indicates that the Court is adhering to the standard for testimoniality employed in the previous case of *Davis v. Washington:* hearsay is not testimonial simply because the declarant could *anticipate* that it would be used in a criminal prosecution. Rather, the *primary motivation* for making the statement must be to use it in a criminal prosecution.

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[1] This account can also be found in the *Crawford* outline. I replicate it here for the Committee's convenience.

2. The majority approves the basic analysis of Federal courts after *Crawford* with respect to business and public records: if the record is admissible under FRE 803(6) or 803(8) it is, for that reason, non-testimonial under *Crawford.* For business records, this is because, to be admissible under Rule 803(6), it cannot be prepared for purposes of litigation. For public records, this is because law enforcement reports prepared for a specific litigation are not admissible under Rule 803(8)(B) or (C).

3. In response to an argument of the dissent, the majority seems to state, at least in dictum, that certificates that *merely authenticate proffered documents* are not testimonial.

4. As a counterpoint to the dissent's argument about prior practice having allowed certificates authenticating records, the *Melendez-Diaz* majority cited a line of cases about affidavits offered to prove the *absence* of a public record. The majority declared as follows:

> Far more probative here are those cases in which the prosecution sought to admit into evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk's statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk's certificate would qualify as an official record under respondent's definition — it was prepared by a public officer in the regular course of his official duties — and although the clerk was certainly not a "conventional witness" under the dissent's approach, the clerk was nonetheless subject to confrontation. See People v. Bromwich, 200 N. Y. 385, 388-389, 93 N. E. 933, 934 (1911).

This passage should probably be read to mean that ***any use of Rule 803(10) in a criminal case — to prove the absence of a public record by way of an affidavit of the official who checked for the record — is prohibited.*** As shown in the *Crawford* outline in this agenda book, lower courts before *Melendez-Diaz* held that it did not offend the Confrontation Clause to prove the absence of a public record by introducing an affidavit of the official who searched for the record. The rationales behind these decisions were: 1) the underlying records are not testimonial, and so it would stand the Confrontation Clause on its head to hold the affidavit about the records to be testimonial; and 2) the affidavits are essentially ministerial and are not the kind of ex parte testimony used in the Raleigh case. But the first rationale is rejected by the passage quoted above — it does not matter that the underlying records are nontestimonial, because the affidavit is a substitute for in-court testimony and is prepared solely for litigation. And the second argument is rejected by the majority's emphasis in *Melendez-Diaz* that the Confrontation Clause prohibits *all* testimony, not just the paradigmatic confrontation violation. As seen below, the lower courts after *Melendez-Diaz* have held that certificates of the absence of public records, though admissible under Rule 803(10) are testimonial — meaning that Rule 803(10) is unconstitutional as applied.

5. In an attempt to underplay the burdens on the government imposed by having to produce a witness to prove up a forensic test, the Court stated that the government could constitutionally require the defendant to comply with a "notice-and-demand" procedure — meaning that a court could find a waiver of the right to confrontation if the defendant fails to give pretrial notice in accordance with the procedure.

II. Effect of Melendez-Diaz on the Federal Records-Based Exceptions:[2]

1. Rule 803(5) — Past Recollection Recorded.

Nothing in *Melendez-Diaz* or *Crawford* requires any change to Rule 803(5). That Rule does not raise a confrontation problem because by definition the person who prepared (or adopted) the record must testify at trial. *Crawford* makes clear that the confrontation problem is solved if the declarant is produced to testify — even if that testimony is nothing more than "I can't remember." *See, e.g., Cookson v. Schwartz,* 556 F.3d 647 (7th Cir. 2009) (production of the declarant satisfies *Crawford* even though the declarant had no memory of the underlying events).

2. Rule 803(6) — Business Records

Generally speaking, the business records exception should present no confrontation issues under *Melendez-Diaz.* That is because the definition of a testimonial record, employed by the majority in *Melendez-Diaz,* is that it was prepared with the *primary purpose* of using it in a criminal prosecution. Under Rule 803(6), a record prepared primarily for purposes of litigation is not admissible if it is offered by the party who prepared it — it is excluded under the untrustworthiness

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[2] The following discussion concerns the records-based exceptions that are most likely to be invoked in a criminal trial. Other records-based exceptions include vital statistics (Rule 803(9)); records of religious organizations (Rule 803(11); marriage, baptismal, and similar certificates (Rule 803(12); family records (Rule 803(13); records of documents affecting an interest in property (Rule 803(14); statements in documents affecting an interest in property (Rule 803(15); ancient documents (Rule 803(16); market reports and commercial publications (Rule 803(17); and learned treatises (803(18). These exceptions are not discussed individually because it is extremely unlikely that any hearsay falling within any of these exceptions would trigger the two requirements for testimoniality under *Crawford* and *Melendez-Diaz.* Those cases provide that a record is testimonial only if: 1) the *primary motivation* for preparing the record is to use it in a criminal prosecution, and 2) the record was prepared by or with the participation of the government.

clause. See, e.g., *United States v. McPartlin,* 595 F.2d 1321 (5th Cir. 1979) (record prepared in anticipation of litigation not admissible under Rule 803(6)); *United States v. Bohrer,* 807 F.2d 159 (10th Cir. 1986) (contact card of interview, prepared by government investigator in anticipation of use in a prosecution, was not admissible under Rule 803(6): "Admission under the business records exception is not available for documents prepared for ultimate purposes of litigation, when offered by the party maintaining the documents.").

It follows that if *the government* prepares a record for purposes of a criminal prosecution, as in *Melendez-Diaz*, Rule 803(6) will comport with the constitution, as it will exclude a testimonial record. The majority in *Melendez-Diaz* specifically stated that the analyst's certificate would not have been admissible under Rule 803(6) because it was prepared for purposes of litigation and was favorable to the preparing party — the government (citing *Palmer v. Hoffman*, 318 U.S. 109 (1943)).

But what if the record is prepared by a *private institution* in anticipation of a prosecution, and offered by the government against an accused? In that case — assuming the private institution is not operating under the auspices or at the direction of the government — the record is not offered in favor of the *preparing* party, and so there is no suspect motivation (no untrustworthiness) arising from the fact that it is prepared for litigation. A good example is a tox-screen by a hospital laboratory, indicating that the defendant was under the influence of narcotics. See *United States v. Ellis,* 460 F.3d 920 (7th Cir. 2006) — a pre-*Melendez-Diaz* case — in which a drug test conducted by a hospital employee, at the request of the police department, was offered against the defendant. It was prepared with the awareness that it would be used in a prosecution, but it was nonetheless admissible under Rule 803(6) — because the test was conducted as part of the ordinary course of routine testing, and the "anticipation of litigation" factor did not disqualify it as it was not offered in favor of the preparing party (i.e., the hospital).

Is a private record like that in *Ellis* testimonial? The *Ellis* court held that it was not, relying on language in *Crawford* listing business records as a prime example of hearsay that is not testimonial. But that assessment might change after *Melendez-Diaz.* Notably, *Ellis* is cited by the *dissent* in *Melendez-Diaz* as an example of how the majority rule would change existing practice. And the circumstances of preparing the toxic screen in *Ellis* are similar to those in *Melendez-Diaz* — in the former case the test was conducted by a hospital technician, and in the latter it was conducted by technicians in the Department of Public Health.

That said, toxicology tests conducted by *private* organizations (as opposed to the government) are likely to be found non-testimonial if it can be shown that law enforcement was not involved in, directing, or managing the testing. Federal courts after *Crawford* have held virtually uniformly that police officers must be involved in the preparation of the statement for it to be testimonial. That is, even if a person *knows* that their statement could be used in a criminal prosecution, it will not be testimonial unless the government is somehow involved in its preparation (e.g., through interrogation, preparation of an affidavit, etc.). See, e.g., *United States v. Burden,* 600 F.3d 204 (2nd Cir. 2010) (holding that a statement to be testimonial must also be "formalized" in the

nature of the "core class" of statements identified by the court in *Crawford* and *Davis*).

At this point, the most can be said is that it is possible that, under some circumstances, a privately prepared business record *might* be testimonial if there is a sufficient showing of a motive to prepare it for a prosecution *and* a sufficient indication of prosecutorial involvement in generating the record. But this rather slender and amorphous possibility does not seem to establish a justification for amending Rule 803(6) to accommodate *Melendez-Diaz* — especially because, after *Melendez-Diaz*, law enforcement will probably be making efforts to provide some separation between private testing labs and the prosecution.

Early indications in the lower courts post-*Melendez-Diaz* have confirmed the above assessment that if law enforcement is not involved in the preparation of private business records, the records will be considered non-testimonial. *See, e.g., United States v. Masher*, 606 F.3d 922 (8th Cir. 2010) (logbooks from local pharmacies offered to prove that the defendant made frequent purchases of pseudoephedrine were not testimonial).

General Disclaimer?

One option for change in response to *Melendez-Diaz* would be to add some general language to the exception, e.g., "the record is not admissible against a criminal defendant if it is testimonial and the declarant is not available for cross-examination." But there are at least two reasons to reject such general language:

- It states the obvious. By now, everyone should know the general point that testimonial statements violate the Confrontation Clause if the declarant cannot be produced for cross-examination. In the past, the Committee was rightly concerned about the possibility that a lawyer could mistakenly think that a statement fitting a hearsay exception would thereby satisfy the Confrontation Clause — and should be warned when that is not the case. But *Crawford* has been around long enough for competent lawyers to be aware of the possibility that a statement may fit a hearsay exception and yet be subject to exclusion under the Confrontation Clause. If there is a trap, it's not for the unwary — it's for the comatose.

- If this kind of general disclaimer is necessary, it should not be placed in Rule 803(6). Rather, it raises a *general* concern and should be placed at the beginning of Rules 803, 804 and 807. But to do that would be very awkward and balky, because *Crawford* does not bar all testimonial hearsay — it bars testimonial hearsay only when the declarant 1) has not been cross-examined previously and 2) is not produced for cross-examination at the trial.

A general disclaimer on the bar imposed by *Crawford* and *Melendez-Diaz* does not fit neatly at the outset of the exceptions. Take Rule 803. A general disclaimer might look like this:

Rule 803:

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness — unless [the following is?] testimonial and the declarant has not been previously cross-examined [on the subject matter of the statement?] and the proponent does not produce the declarant to testify at the trial :

It seems apparent that any marginal benefit in notifying unaware lawyers about the confrontation problem is outweighed by the awkwardness of any amendment to Rules 803, 804, and 807.

Another alternative is to provide a "confrontation disclaimer" in Rule 802, rather than in the exceptions. That alternative would look something like this:

Rule 802:

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; ~~or~~
- other rules prescribed by the Supreme Court; or
- the United States Constitution [the constitutional right to confrontation?]

This change seems harmless and appears relatively easy to execute. But query the benefit. If the goal is to protect the unwary, how many unwary lawyers are going to be looking at Rule 802? Notably, in *United States v. Owens,* Justice Scalia mentioned that the parties before the Supreme Court — government and defendant — overlooked the applicability of Rule 802 to the case. [The parties argued over the "admissibility under Rule 801(d)(1)(C)" of a statement of prior identification, and Justice Scalia pointed out that if the statement was admissible, it would be so under Rule 802.] If parties before the Supreme Court ignore Rule 802, what hope is there for an unwary lawyer?

In the end, if the Committee believes that a general disclaimer is useful or necessary, the change if any should be made to Rule 802. As to Rule 803(6), there is no specific change that can be made at this point with any assurance that it will correctly describe which statements (if any) would be admissible under the rule and yet would be excluded by the Confrontation Clause. Iterations such as "so long as, in a criminal case, law enforcement is not substantially involved in the preparation of the record" are likely to confuse without sufficient benefit.

Finally, note that the above discussion concerned whether a business record is testimonial under *Melendez-Diaz.* A separate question is whether a non-testimonial business record raises a confrontation problem when it is entered in court by way of a certificate rather than through a testifying custodian. The effect of *Melendez-Diaz* on proof of records through a certificate is discussed later in this memo.

3. Rule 803(8) — Public Records:

The Court in *Melendez-Diaz* held that a certificate of test results prepared by the Department of Public Health — under the direction of law enforcement — was testimonial because the only reason for making the record was to have it admitted in a prosecution. If that record had been offered in a federal prosecution, it would not have been admitted under Rule 803(8). This is because Rule 803(8) has language specifically tailored to prevent its use by law enforcement in criminal cases. See Rule 803(8)(B) (excluding, in criminal cases, "matters observed by police officers and other law enforcement personnel"); Rule 803(8)(C) (admitting factual findings in a government report, but only in civil actions and proceedings *against* the government).

It's true that most federal courts have not construed the exclusionary language in Rule 803(8) as a complete bar on all law enforcement reports in criminal cases. The case law is described in the Federal Rules of Evidence Manual, §803.02[9][d]:

> Under the predominant view, the exclusionary language covers only those law enforcement-generated reports that are prepared under adversarial circumstances in preparation for the defendant's prosecution — and so are subject to manipulation by authorities bent on convicting a particula r criminal defendant. [3] Where the risk of manipulation and untrustworthiness is minimal — in particular where the report contains unambiguous factual matter prepared under non-adversarial circumstances — courts have held that the public report should be admitted despite the apparently absolute language of the Rule.[4] But while a report that is ministerial in nature and made without contemplation of specific litigation is ordinarily held admissible, those law enforcement reports that *are* adversarial and evaluative in nature are ordinarily excluded, consistent with the exclusionary intent of Rule 803(8)(B) and (C). [5]

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[3]See, e.g., United States v. Enterline, 894 F.2d 287 (8th Cir. 1990) ("It is clear that the exclusion concerns matters observed by the police at the scene of the crime. Such observations are potentially unreliable since they are made in an adversary setting, and are often subjective evaluations of whether a crime was committed.").

[4]See, e.g., United States v. Dancy, 861 F.2d 77 (5th Cir. 1988) (a fingerprint card in a penitentiary packet, offered to show that the defendant was a convicted felon, was properly admitted under Rule 803(8)(B) because the preparation of the card was unrelated to a criminal investigation; the Rule excludes only records that report the observation or investigation of crimes).

[5] See, e.g., United States v. Pena-Gutierrez, 222 F.3d 1080 (9th Cir. 2000) (Trial Court erred in admitting into evidence "the on-the-scene investigative report of a crime by an INS official whose perceptions might be clouded and untrustworthy").

The case law therefore tracks the *Crawford/Melendez-Diaz* definition of what records are testimonial: a record that is prepared by or at the behest of law enforcement, with the primary motive that it will be used against the accused in a prosecution, is inadmissible under the Rule. In contrast, a record that is not prepared with a specific litigation motive (such as a routine tabulation of neutral data) is admissible under the Rule — and does not violate the Confrontation Clause because it is not testimonial. Thus the scope of the hearsay exception appears to be contiguous with the protection of the Confrontation Clause.

In sum, there appears to be no reason to amend Rule 803(8) in response to *Melendez-Diaz*, because the rule as written and as applied probably does not allow the admission of any public record that would be testimonial under *Melendez-Diaz.* This conclusion is supported by language in the majority opinion in *Melendez-Diaz,* where the Court stated that the analyst's certificate, found testimonial, could not have been admitted under Federal Rule 803(8):

> Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. See Fed. Rule Evid. 803(6). But that is not the case if the regularly conducted business activity is the production of evidence for use at trial. Our decision in Palmer v. Hoffman, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943), made that distinction clear. There we held that an accident report provided by an employee of a railroad company did not qualify as a business record because, although kept in the regular course of the railroad's operations, it was "calculated for use essentially in the court, not in the business." The analysts' certificates -- like police reports generated by law enforcement officials -- do not qualify as business or public records for precisely the same reason. See Rule 803(8) (defining public records as "excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel").

Notably, the federal case law after *Melendez-Diaz* has not wavered in the basic holding that if a report is admissible under the public records exception it is not testimonial — because in order to be admissible under the hearsay exception it can't be prepared for the primary or sole purpose of use in a criminal trial. *See, e.g., United States v. Orozco-Acosta,* 607 F.3d 1156 (9th Cir. 2010), where the court adhered to its pre-*Melendez-Diaz* holdings that a warrant of deportation is not testimonial. It reasoned that "neither a warrant of removal's sole purpose nor even its primary purpose is use at trial" and concluded that "*Melendez-Diaz* cannot be read to establish that the mere possibility that a warrant of removal — or, for that matter, any business or public record — could be used in a later criminal prosecution renders it testimonial under *Crawford.*" *See also United States v. Caraballo,* 595 F.3d 1214 (11th Cir. 2010) (I-213 forms providing basic biographical information were used at trial to prove that the persons were aliens and not admittable; because the documents were routine and nonadversarial, they were admissible under Rule 803(8) and were not testimonial, even after *Melendez-Diaz*).

Authenticating a Public Record:

Unlike authenticating business records — discussed infra — public records do not appear to raise the confrontation problem of preparing a testimonial certificate for trial. Public records are ordinarily authenticated under Rule 902(1) (if under seal), 902(2) (if not under seal), 902(3) (if a foreign public document), or 902(4) (if a copy). If the document is under seal, all that is required is a "signature purporting to be an attestation or execution." Presumably this signature is entered at the time the report is prepared, and therefore it is, by definition, not prepared for purposes of litigation if the report itself is admissible under Rule 803(8).

For unsealed reports, Rule 902(2) requires a signature under seal that the signer has official capacity and that the signature is genuine. Similar attestations are required for foreign public documents under Rule 902(3). For copies, under Rule 902(4), a qualified person certifies the copy as correct. These attestations are usually made for purposes of litigation in order to qualify the record for admissibility. But even if the certification is done for purposes of litigation, the majority in *Melendez-Diaz* differentiates a certificate that does nothing more than authenticate a document from a certificate that purports to establish a fact.

Here is the relevant passage, which addresses an argument in the dissent that the common law permitted the use of certificates in criminal cases:

> The dissent identifies a single class of evidence which, though prepared for use at trial, was traditionally admissible: a clerk's certificate authenticating an official record — or a copy thereof — for use as evidence. But a clerk's authority in that regard was narrowly circumscribed. He was permitted "to certify to the correctness of a copy of a record kept in his office," but had "no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect." *State v. Wilson,* 141 La. 404, 409, 75 So. 95, 97 (1917). The dissent suggests that the fact that this exception was narrowly circumscribed makes no difference. To the contrary, it makes all the difference in the world. It shows that even the line of cases establishing the one narrow exception the dissent has been able to identify simultaneously vindicates the general rule applicable to the present case. A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant.

Authentication under Rules 902(1)-(4) seems to fall comfortably within the certificates that the majority recognizes as non-testimonial. The certifications do nothing more than attest to the genuineness of the document. Thus, there appears to be no need to amend Rules 902(1)-(4). And there appears to be no constitutional concern eithere with the admissibility of public records under Rule 803(8) or with the process of their authentication.

4. Rule 803(10) — Absence of Public Record:

As discussed above, the analysis in *Melendez-Diaz* — as well as specific language in the opinion — indicates that admitting a certificate to prove the absence of a public record violates the accused's right to confrontation. The certificate is testimonial because its only purpose is to be used for litigation — typically, a search of pertinent records is conducted after litigation is brought, and its sole purpose is to obtain proof that a record pertinent to the litigation does not exist (e.g., that there is no record of permitted entry in an illegal re-entry case).

Notably, the government has been conceding that the admission of a certificate to prove the absence of a public record case is in violation of the Confrontation Clause after *Melendez-Diaz.* See Letter Brief of the Government, United States v. Martinez-Rios, Appeal No. 08-40809 (CNR in an illegal reentry case). *See also United States v. Norwood,* 603 F.3d 1063 (9th Cir. 2010) (government concedes that it was error under *Melendez-Diaz* to admit affidavit of official in the office of employment security stating that a search failed to disclose any record of wages for the defendant in a three-month period); *United States v. Orozco-Acosta,* 607 F.3d 1156 (9th Cir. 2010) (court agrees with the government's concession that a CNR is testimonial, stating that its previous cases holding to the contrary were "clearly inconsistent with *Melendez-Diaz*" because like the certificates in that case, a CNR is prepared solely for purposes of litigation).

It would appear that there is a substantial practical reason to consider an amendment to Rule 803(10). The rationale is not only grounded in protecting the unwary or some theoretical need to make the hearsay exceptions contiguous with the Confrontation Clause. Besides these interests, an amendment could be found useful to provide a means, consistent with *Melendez-Diaz*, for certificates of the absence of public records to be admitted in criminal trials. The alternative is to require the government to call officials to testify to their searches of records — which could be a substantial cost to the government and to the courts, especially in districts that hear a large number of illegal re-entry cases. Judges in border districts are expressing concern that the need to call witnesses in lieu of presenting a CNR has increased the already substantial burdens of processing illegal re-entry cases.[6]

The majority in *Melendez-Diaz* specifically states that a testimonial certificate *can* be admitted if the state provides a notice-and-demand procedure. The Court elaborated as follows:

> In their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial. See, e.g., Ga.Code Ann. § 35-3-154.1 (2006); Tex.Code Crim. Proc. Ann., Art. 38.41, § 4

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[6] Another alternative is to present circumstantial evidence indicating lack of permission to re-enter, e.g., the defendant was found in circumstances inconsistent with permitted reentry. The point, however, is the same — burdens are added to the processing of illegal reentry cases.

(Vernon 2005); Ohio Rev.Code Ann. § 2925.51(C) (West 2006). Contrary to the dissent's perception, these statutes shift no burden whatever. The defendant always has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the time within which he must do so. States are free to adopt procedural rules governing objections. It is common to require a defendant to exercise his rights under the Compulsory Process Clause in advance of trial, announcing his intent to present certain witnesses. See Fed. Rules Crim. Proc. 12.1(a), (e), 16(b)(1)(C); Taylor v. Illinois, 484 U.S. 400, 411 (1988); Williams v. Florida, 399 U.S. 78 (1970). There is no conceivable reason why he cannot similarly be compelled to exercise his Confrontation Clause rights before trial. See Hinojos-Mendoza v. People, 169 P.3d 662, 670 (Colo.2007) (discussing and approving Colorado's notice-and-demand provision). Today's decision will not disrupt criminal prosecutions in the many large States whose practice is already in accord with the Confrontation Clause.

The *Melendez-Diaz* majority noted that some state statutes go further and allow certificates to be introduced so long as the defendant has the opportunity to call the official to the stand *in the defendant's case*. Justice Scalia stated that: "We have no occasion today to pass on the constitutionality of every variety of statute commonly given the notice-and-demand label. It suffices to say that what we have referred to as the simplest form of notice-and-demand statutes is constitutional * * * ."

If the Committee wishes to tread on the firmest constitutional ground, it might consider an amendment that would track the notice-and-demand procedures that were specifically validated by the majority in *Melendez-Diaz*. Of the three notice-and-demand provisions cited favorably by the *Melendez-Diaz* majority, the Texas provision is the most succinct.

If a notice-and-demand provision were added to Rule 803(10) — along the lines of the Texas statute — it might look something like this:

(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 testimony or certification is admitted to prove that

(~~A~~ i) the record or statement does not exist; or

(~~B~~ ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case if the prosecutor intends to offer a certification, the prosecutor provides written notice of that intent at least [multiple of 7] days before trial, and the defendant does not object in writing at least [multiple of 7] days before trial. [7]

The Committee Note might look like this:

Rule 803(10) has been amended in response to *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), in which the Court held that certificates prepared by the government for the sole purpose of use in a criminal prosecution are testimonial and violate the accused's right to confrontation. The *Melendez-Diaz* Court declared, however, that a testimonial certificate could be admitted if the accused is given advance notice and an opportunity to demand the presence of the official who prepared the certificate. The amendment incorporates a "notice-and-demand" procedure that was approved by the *Melendez-Diaz* Court.

As noted above, some states provide that the certificate is admissible so long as the defendant is given the right to subpoena the official who prepared it and to call the official as a witness in the defendant's case. The Supreme Court took a case that appeared to raise the issue of the constitutionality of the "subpoena" alternative. The case name was *Briscoe v. Virginia*. If the Court adhered to its analysis in *Melendez-Diaz*, it should strike down any statute requiring the defendant to subpoena the government witness — because the *Melendez-Diaz* Court emphasized that the right to confrontation could not be satisfied by giving the defendant the right to call the declarant. Eventually the Court dismissed the grant of certiorari for want of a substantial federal question. It appears that the reason for the dismissal is that the Court agreed with Virginia's argument that while the statute appeared to require a subpoena, in fact it operated like the notice-and-demand provisions upheld by the Court in *Melendez-Diaz*, i.e., it required the government to produce the witness in its case if the defendant, once notified, demanded that production. It could also have been that the change in Court membership led to the dismissal. The Court was sharply divided in *Melendez-Diaz* and Justice Souter, who was a member of the majority, has been replaced by Justice Sotomayor, whose published opinions show a much more moderate approach to the *Crawford* line of cases.

If the Committee were to add a subpoena alternative, rather than a notice-and-demand procedure, then amended Rule 803(10) could look like this:

The subpoena alternative:

(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

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[7]Thanks to Professor Kimble for restyling the reporter's hackneyed attempt.

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.

In a criminal case, the defendant may call the person who conducted the search and examine that person as if on cross-examination. The process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.

[The last sentence is taken from Criminal Rule 17(b).]

The notice-and-demand provision is clearly constitutional, and if the Committee wishes to adopt that approach, then an amendment can be proposed for Standing Committee consideration as early as the Spring 2011 meeting. The subpoena alternative is not-as-clearly constitutional; if the Committee would prefer the subpoena alternative, it might make sense to wait for further developments. The Supreme Court has paid special attention to rule amendments that raise questions under the Confrontation Clause, as seen in its rejection of the proposed amendment to Criminal Rule 15.

The choice of notice -and-demand vs. subpoena — assuming both are constitutional — is one of policy. The subpoena alternative has the advantage of saving the government from having to call, in hundreds of cases, witnesses who will do little more than testify to undisputed facts. But it imposes a number of costs on the defendant. Under the subpoena alternative:

- the defendant assumes the risk that the official will be unavailable to testify.

- the defendant runs the risk of confusing the jury by having to call the official in his own case.

- the defendant ends up refreshing the jury's recollection about the prosecution's evidence.

A final factor bearing on the advisability of an amendment is whether DOJ might be interested in pursuing a statutory response to *Melendez-Diza*, as opposed to going through the rulemaking process. Any effort to amend Rule 803(10) will need to monitor statutory developments. The Reporter has, over the past year, sought information from the Department on three separate occasions, and has not to date received any indication that the Department is near to proposing any statutory fix to *Melendez-Diaz.*

5. Rule 902(11) — Authenticating Domestic Business Records

Rule 902(11) provides a procedure for admitting domestic business records without live testimony. (18 U.S.C. § 3505 provides the same procedure for foreign business records). This certification procedure would seem to raise problems under *Melendez-Diaz* because the certificate is prepared solely for litigation. But there are at least two reasons to think that an amendment to Rule 902(11) might be unnecessary, or at least should await case law development on the subject.

First, as discussed above, the majority in *Melendez-Diaz* seemed to distinguish a certificate which does nothing more than authenticate a document from a certificate that purports to establish a fact.

Here again is the relevant passage, which addresses an argument in the dissent that the common law permitted the use of certificates in criminal cases:

> The dissent identifies a single class of evidence which, though prepared for use at trial, was traditionally admissible: a clerk's certificate authenticating an official record — or a copy thereof — for use as evidence. But a clerk's authority in that regard was narrowly circumscribed. He was permitted "to certify to the correctness of a copy of a record kept in his office," but had "no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect." *State v. Wilson,* 141 La. 404, 409, 75 So. 95, 97 (1917). The dissent suggests that the fact that this exception was narrowly circumscribed makes no difference. To the contrary, it makes all the difference in the world. It shows that even the line of cases establishing the one narrow exception the dissent has been able to identify simultaneously vindicates the general rule applicable to the present case. A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant.

This passage could be read to mean that certificates authenticating business records under Rule 902(11) — and, for foreign business records, under 18 U.S.C. § 3505 — are not testimonial, because such certificates authenticate pre-existing records rather than create a new record. The constitutional viability of a 902(11)-type certificate is somewhat clouded, however, because that certificate *does more* than simply certify the authenticity of the record. It also certifies that the record was made at or near the time of the occurrence recorded, and was kept in the regular course of regularly conducted activity. It might be notable that Justice Kennedy, in dissent, questioned whether Rule 902(11) could continue to be used in criminal cases — though he raised the issue as a "sky is falling" rhetorical device, and the majority spent a lot of time emphasizing the narrowness of its opinion. The bottom line is that certification of business records in criminal cases is in some doubt after *Melendez-Diaz*. But strong arguments can be made that Rule 902(11) and 18 U.S.C. § 3505 remain constitutionally sound.

A second argument in favor of taking a "wait and see" attitude toward amending Rule 902(11) is that certificates of business records are prepared by private parties, not by the government. That distinguishes them from the certificates found objectionable in *Melendez-Diaz*. Since *Crawford*, the lower courts have consistently held that a statement cannot be testimonial unless it was generated with some government participation. (See the many cases collected under "Informal Circumstances" in the *Crawford* outline in the agenda book.) As applied to certificates qualifying domestic business records, the degree of government participation will depend on the facts — and it might make sense to see how the case law develops with respect to records prepared by private parties and used by the government in a criminal case.

Let's assume, arguendo, that Rule 902(11) is unconstitutional under *Melendez-Diaz*. If that were so, then the fix would be the same as that applied to Rule 803(10) — either a notice and demand procedure, or the more aggressive and less constitutionally sound subpoena alternative.

As to a notice-and-demand procedure, Rule 902(11) is already halfway there — it contains a requirement that the adversary be notified of the intent to offer a certificate. So all that would be needed would be to add a demand requirement.

Rule 902(11) with a demand requirement:

> **(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)(A)-(C), as 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~~ At least [multiple of 7] days 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. In a criminal case the record is not admissible under this Rule if the defendant objects in writing to the certification at least [multiple of 7] days before trial.

The problem with a notice-and-demand procedure is that it returns to the practice that existed before the rule was enacted. Parties could stipulate that a record could be entered without the need to produce a records custodian. But the Advisory Committee found that the stipulation procedure, in many cases, did not work, and parties would be forced to call records custodians for no legitimate purpose. It would therefore seem prudent to wait to add a notice-and-demand procedure until 1) there is a definitive indication that a Rule 902(11) certification is in fact testimonial; and 2) there is a definitive indication that a subpoena alternative is unconstitutional.

If the Committee wishes to pursue a subpoena alternative, it might look like this:

Rule 902(11) with a subpoena alternative:

(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~~ At least [multiple of 7] days before the trial or hearing, the proponent must give an adverse party ~~reasonable~~ written notice of the intent to offer the record. In a criminal case the defendant may call the person who prepared a certification, and examine that person as if on cross-examination. The process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.

(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)(A)-(C), as 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~~ At least [multiple of 7] days 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. In a criminal case the defendant may call the person who prepared a certification, and examine that person as if on cross-examination. The process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.

6. Rule 902(12) — Authenticating Foreign Business Records

In criminal cases, 18 U.S.C. § 3505 allows foreign business records to be authenticated through a certificate. Rule 902(12) provides the same process for civil cases. Because Rule 902(12) only applies to civil cases, it presents no issues for amendment in response to *Melendez-Diaz*.[8]

III. Conclusion

The result in *Melendez-Diaz* does not require or justify an amendment to Rules 803(5), (6) or (8). Nor is any amendment necessary to the process for authenticating public documents.

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[8] Of course, section 3505 presents the same constitutional issues as Rule 902(11) — but any fix is obviously beyond the Rules Committee's jurisdiction. If the Committee does decide to proceed with an amendment to Rule 902(11), it should probably seek to coordinate with a possible legislative effort to amend section 3505.

It would appear, however, that *Melendez-Diaz* does invalidate the process of proving the absence of public records that has been undertaken in hundreds of criminal cases. If the burden of calling officials to prove the absence of public records is considered too great, then procedural requirements can be added to Rule 803(10). If the chosen procedure is for notice-and-demand, then an amendment can be proposed for the next meeting. If the chosen procedure is for the defendant to subpoena the official, then the amendment should probably await further developments in the case law.

Finally, the procedure for authenticating business records in Rule 902(11) may remain valid after *Melendez-Diaz.* The Committee may wish to await further case law developments before proposing an amendment to Rule 902(11).

TAB 4

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Federal Case Law Development After *Crawford v. Washington*
Date: September 20, 2010

The Committee has directed the Reporter to keep it apprised of case law developments after *Crawford v. Washington.* This memo is intended to fulfill that function. The memo describes the Supreme Court and federal circuit case law that discusses the impact of *Crawford* on the Federal Rules of Evidence. The cases are grouped by subject matter, and sequentially by circuit within a particular topic.

Summary

A quick summary of results on what has been held "testimonial" and what has not, so far, might be useful:

Hearsay Found Testimonial:

1. Confession of an accomplice made to a police officer.

2. Grand jury testimony.

3. Plea allocutions of accomplices, even if specific references to the defendant are redacted.

4. Statement of an incarcerated person, made to a police officer, identifying the defendant

as taking part in a crime.

5. Report by a confidential informant to a police officer, identifying the defendant as involved in criminal activity.

6. Accusations made to officers responding to a 911 call, after the emergency has subsided.

7. Statements by a child-victim to a forensic investigator, when the statements are referred as a matter of course by the investigator to law enforcement.

8. Statements made by an accomplice while placed under arrest, but before formal interrogation.

9. False alibi statements made by accomplices to the police (though while testimonial, they do not violate the defendant's right to confrontation because they are not offered for their truth).

10. A police officer's count of the number of marijuana plants found during the search of the defendant's premises.

11. Certificates of nonexistence of a record, prepared solely for litigation (after *Melendez-Diaz v. Massachusetts*).

Hearsay Found Not Testimonial:

1. Statement admissible under the state of mind exception, made to friends.

2. Autopsy reports.

3. Declaration against penal interest implicating both the declarant and the defendant, made in informal circumstances to a friend or loved one (i.e., statements admissible under the Court's interpretation of Rule 804(b)(3) in *Williamson v. United States*).

4. Letter written to a friend admitting criminal activity by the writer and the defendant.

5. Statements by coconspirators during the course and in furtherance of the conspiracy, when not made to the police or during a litigation.

6. Warrants of deportation.

7. Entries into a regulatory database.

8. Statements made for purpose of medical treatment.

9. 911 calls reporting crimes or emergencies.

10. Statements to law enforcement officers responding to the declarant's 911 call reporting a crime.

11. Accusatory statements in a private diary.

12. Odometer statements prepared before any crime of odometer-tampering occurred.

13. A present sense impression describing an event that took place months before a crime occurred.

14. Business records — though certificates of authenticity of business records prepared for trial are questionable after *Melendez-Diaz*.

15. Statements made by an accomplice to his lawyer, implicating the accomplice as well as the defendant.

16. Judicial findings and orders entered in one case and offered in a different case.

17. Informal statements made with no law enforcement officers present.

Suggestions for Rulemaking:

It is clear that some types of hearsay will always be testimonial, such as grand jury statements, plea allocutions, etc. It is also clear that some types of statements will never be testimonial, such as personal diaries, statements made before a crime takes place, and informal statements to friends without any contemplation that the statements will be used in a criminal prosecution.

Between these two poles there is some uncertainty, though the Supreme Court's decision in *Davis* as well as dicta in *Giles* (both discussed below) has been applied by the circuit courts to narrow the definition of "testimonial" and thus to resolve much of that uncertainty. Questions remain about whether statements to a person who is not a law enforcement official can ever be testimonial; whether and when statements made to law enforcement officials responding to an emergency become testimonial; and whether testimonial statements violate the Confrontation Clause when they are offered only as part of the basis of an expert opinion.

The Court's latest decision in *Melendez-Diaz* has answered a few questions but raised many more. The Court, reviewing a state conviction, decided that forensic test results could not be introduced without the testimony of a live witness — though the federal courts have generally held that a live witness was required by Federal Rule 803(8)(B) and (C) in any case. What is less clear is whether other kinds of certificates will be considered testimonial — particularly certificates qualifying business records under Rule 902(11) and the statutory counterpart for foreign records. In dictum in *Melendez-Diaz,* the majority seemed to indicate that a certificate that simply authenticated a record would not be considered testimonial. In contrast, another dictum in *Melendez-Diaz* indicates that a certificate proving the absence of a public record, otherwise admissible under Rule 803(10), *would* be testimonial. As seen below, federal courts have followed this later dictum — excluding certificates offered under Rule 803(10), but have refused to exclude regularly prepared and nonadversarial law enforcement reports, such as warrants of deportation, offered under Rule 803(8)

There is now no question about the viability of *Roberts*. It is dead. The Court unanimously held in *Bockting, infra,* that the Confrontation Clause imposes no limitation on the admissibility of hearsay that is not testimonial. It could be argued, then, that rulemaking has become critical after *Bockting,* because rulemaking is the only way to regulate the reliability of hearsay if it is not testimonial. So for example, the amendment to Rule 804(b)(3), which will go into effect on December 1, 2010, has renewed relevance after *Bockting,* as it requires an important showing of reliability that is no longer mandated by the Confrontation Clause.

The Committee has in the past proposed amendments when an Evidence Rule is subject to an application that would violate the Constitution. But many of the hearsay exceptions seem sound given the case law after *Davis*. For example, the cases have essentially held that if a statement fits the declaration against interest exception, it is for that reason non-testimonial after *Davis* — because to be admissible it will have to be made in informal circumstances with no law enforcement involvement. Courts have reached similar conclusions with respect to business records, public records, co-conspirator statements, state of mind statements, and others: the factors that make hearsay statements admissible under these exceptions by definition mean that the statements cannot be testimonial.

A sweeping integration of *Crawford* standards into the Federal Rules is therefore probably unwarranted. Moreover, the Supreme Court does not appear finished in developing its *Crawford* jurisprudence. It has taken another state case involving excited utterances, and the case bears watching because of the change in personnel since the Court's last visit to the Confrontation Clause in *Melendez-Diaz*. Justices Stevens and Souter were two of the strongest supporters of *Crawford.* One of the replacements, Justice Sotomayor, wrote an opinion on the Second Circuit that called for a limited application of *Crawford* — specifically a limited definition of testimoniality. And of course, Justice Kagan's views are unknown. Given the possible change or at least development in the case law, a wide-ranging revision of the hearsay exceptions would be problematic.

That said, unless *Melendez-Diaz* is overruled, Rule 803(10) is in fact unconstitutional as applied, and the certification process for qualifying a business record is also in some question.

Possible amendments to rectify these particularized problems are discussed in a separate memorandum in this agenda book.

Cases Defining "Testimonial" Hearsay After Crawford, Arranged By Subject Matter

"Admissions" — Hearsay Statements by the Defendant

Defendant's own hearsay statement was not testimonial: *United States v. Lopez,* 380 F.3d 538 (1st Cir. 2004): The defendant blurted out an incriminating statement to police officers after they found drugs in his residence. The court held that this statement was not testimonial under *Crawford.* The court declared that "for reasons similar to our conclusion that appellant's statements were not the product of custodial interrogation, the statements were also not testimonial." That is, the statement was spontaneous and not in response to police interrogation.

Note: The *Lopez* court probably had an easier way to dispose of the case. Both before and after *Crawford,* an accused has no right to confront *himself.* If the solution to confrontation is cross-examination, as the Court in *Crawford* states, then it is silly to argue that a defendant has the right to have his own statements excluded because he had no opportunity to cross-examine himself. ***See also United States v. Hansen,*** 434 F.3d 92 (1st Cir. 2006) (admission of defendant's own statements does not violate *Crawford*).

Defendant's own statements, reporting statements of another defendant, are not testimonial under the circumstances: *United States v. Gibson,* 409 F.3d 325 (6th Cir. 2005): In a case involving fraud and false statements arising from a mining operation, the trial court admitted testimony from a witness that Gibson told him that another defendant was planning on doing something that would violate regulations applicable to mining. The court recognized that the testimony encompassed double hearsay, but held that each level of hearsay was admissible as a statement by a party-opponent. Gibson also argued that the testimony violated *Crawford.* But the court held that Gibson's statement and the underlying statement of the other defendant were both casual remarks made to an acquaintance, and therefore were not testimonial.

Bruton — Testimonial Statements of Co-Defendants

Bruton* line of cases not altered by *Crawford*: *United States v. Lung Fong Chen, 393 F.3d 139, 150 (2d Cir. 2004): The court held that a confession of a co-defendant, when offered only

against the co-defendant, is regulated by *Bruton,* not *Crawford*: so that the question of a Confrontation violation is dependent on whether the confession is powerfully incriminating against the non-confessing defendant. If the confession does not directly implicate the defendant, then there will be no violation if the judge gives an effective limiting instruction to the jury. *Crawford* does not apply because if the instruction is effective, the co-defendant is not a witness "against" the defendant within the meaning of the Confrontation Clause.

The defendant's own statements are not covered by *Crawford,* but *Bruton* remains in place to protect against admission against a non-confessing co-defendant: *United States v. Ramos-Cardenas,* 524 F.3d 600 (5th Cir. 2008): In a multiple-defendant case, the trial court admitted a post-arrest statement by one of the defendants, which indirectly implicated the others. The court found that the confession could not be admitted against the other defendants, because the confession was testimonial under *Crawford.* But the court found that *Crawford* did not change the analysis with respect to the admissibility of a confession against the confessing defendant; nor did it displace the case law under *Bruton.* The court elaborated as follows:

> [W]hile *Crawford* certainly prohibits the introduction of a codefendant's out-of-court testimonial statement against the other defendants in a multiple-defendant trial, it does not signal a departure from the rules governing the admittance of such a statement against the speaker-defendant himself, which continue to be provided by *Bruton, Richardson* and *Gray.*

In this case, the court found no error in admitting the confession against the codefendant who made it. As to the other defendants, the court found that the reference to them in the confession was vague, and therefore a limiting instruction was sufficient to assure that the confession would not be used against them. Thus, the *Bruton* problem was resolved by a limiting instruction.

Bruton* and its progeny survive *Crawford* — co-defendant's testimonial statements were not admitted "against" the defendant in light of limiting instruction: *United States v. Harper, 527 F.3d 396 (5th Cir. 2008): Harper's co-defendant made a confession, but it did not directly implicate Harper. At trial the confession was admitted against the co-defendant and the jury was instructed not to use it against Harper. The court recognized that the confession was testimonial, but held that it did not violate Harper's right to confrontation because the co-defendant was not a witness "against" him. The court relied on the post-*Bruton* case of *Richardson v. Marsh,* and held that the limiting instruction was sufficient to protect Harper's right to confrontation because the co-defendant's confession did not directly implicate Harper and so was not as "powerfully incriminating" as the confession in *Bruton.* The court concluded that because "the Supreme Court has so far taken a 'pragmatic' approach to resolving whether jury instructions preclude a Sixth Amendment violation in various categories of cases, and because *Richardson* has not been expressly overruled, we will apply *Richardson* and its pragmatic approach, as well as the teachings in *Bruton.*"

Statement admitted against co-defendant only does not implicate *Crawford: Mason v. Yarborough,* 447 F.3d 693 (9th Cir. 2006): A non-testifying codefendant confessed during police interrogation. At the trial of both defendants, the government introduced only the fact that the codefendant confessed, not the content of the statement. The court first found that there was no *Bruton* violation, because the defendant's name was never mentioned — *Bruton* does not prohibit the admission of hearsay statements of a non-testifying codefendant if the statements implicate the defendant only by inference and the jury is instructed that the evidence is not admissible against the defendant. For similar reasons, the court found no *Crawford* violation, because the codefendant was not a "witness against" the defendant. "Because Fenton's words were never admitted into evidence, he could not 'bear testimony' against Mason."

Co-Conspirator Statements

Co-conspirator statement not testimonial: *United States v. Felton,* 417 F.3d 97 (1st Cir. 2005): The court held that a statement by the defendant's coconspirator, made during the course and in furtherance of the conspiracy, was not testimonial under *Crawford.* **Accord *United States v. Sanchez-Berrios,*** 424 F.3d 65 (1st Cir. 2005) (noting that *Crawford* "explicitly recognized that statements made in furtherance of a conspiracy by their nature are not testimonial."). ***See also United States v. Turner,*** 501 F.3d 59 (1st Cir. 2007) (conspirator's statement made during a private conversation were not testimonial).

Surreptitiously recorded statements of coconspirators are not testimonial: *United States v. Hendricks,* 395 F.3d 173 (3d Cir. 2005): The court found that surreptitiously recorded statements of an ongoing criminal conspiracy were not testimonial within the meaning of *Crawford.* Such statements were not within the examples of statements found testimonial by the Court in *Crawford*—they were not grand jury testimony, prior testimony, plea allocutions or statements made during interrogations. Even under the broadest definition of "testimonial" discussed in *Crawford*—reasonable anticipation of use in a criminal trial or investigation — these statements were not testimonial, as they were informal statements among coconspirators. **Accord *United States v. Bobb,*** 471 F.3d 491 (3d Cir. 2006) (noting that the holding in *Hendricks* was not limited to cases in which the declarant was a confidential informant).

Statement admissible as coconspirator hearsay is not testimonial: *United States v. Robinson*, 367 F.3d 278 (5th Cir. 2004): The Court affirmed a drug trafficker's murder convictions and death sentence. It held that coconspirator statements are not "testimonial" under *Crawford* as they are made under informal circumstances and not for the purpose of creating evidence. ***Accord United States v. Delgado,*** 401 F.3d 290 (5th Cir. 2005). ***See also United States v. King,*** 541 F.3d 1143 (5th Cir. 2008) ("Because the statements at issue here were made by co-conspirators in the furtherance of a conspiracy, they do not fall within the ambit of *Crawford's* protection"). Note that the court in *King* rejected the defendant's argument that the co-conspirator statements were

testimonial because they were "presented by the government for their testimonial value." Accepting that argument would mean that all hearsay is testimonial. The court observed that *"Crawford's* emphasis clearly is on whether the statement was 'testimonial' at the time it was made."

Statement by an anonymous coconspirator is not testimonial: *United States v. Martinez,* 430 F.3d 317 (6th Cir. 2005). The court held that a letter written by an anonymous coconspirator during the course and in furtherance of a conspiracy was not testimonial under *Crawford.* The court stated that "a reasonable person in the position of a coconspirator making a statement in the course and furtherance of a conspiracy would not anticipate his statements being used against the accused in investigating and prosecuting the crime." ***See also United States v. Mooneyham,*** 473 F.3d 280 (6th Cir. 2007) (statements made by coconspirator in furtherance of the conspiracy are not testimonial because the one making them "has no awareness or expectation that his or her statements may later be used at a trial"; the fact that the statements were made to a law enforcement officer was irrelevant because the officer was undercover and the declarant did not know he was speaking to a police officer); ***United States v. Stover,*** 474 F.3d 904 (6th Cir. 2007) (holding that under *Crawford* and *Davis,* "co-conspirators' statements made in pendency and furtherance of a conspiracy are not testimonial" and therefore that the defendant's right to confrontation was not violated when a statement was properly admitted under Rule 801(d)(2)(E)).

Coconspirator statements made to an undercover informant are not testimonial: *United States v. Hargrove,* 508 F.3d 445 (7th Cir. 2007): The defendant, a police officer, was charged with taking part in a conspiracy to rob drug dealers. One of his coconspirators had a discussion with a potential member of the conspiracy (in fact an undercover informant) about future robberies. The defendant argued that the coconspirator's statements were testimonial, but the court disagreed. It held that *"Crawford* did not affect the admissibility of coconspirator statements." The court specifically rejected the defendant's argument that *Crawford* somehow undermined *Bourjaily,* noting that in both *Crawford* and *Davis,* "the Supreme Court specifically cited *Bourjaily* — which as here involved a coconspirator's statement made to a government informant — to illustrate a category of nontestimonial statements that falls outside the requirements of the Confrontation Clause."

Statements by a coconspirator during the course and in furtherance of the conspiracy are not testimonial: *United States v. Lee,* 374 F.3d 637 (8th Cir. 2004): The court held that statements admissible under the coconspirator exemption from the hearsay rule are by definition not testimonial. As those statements must be made during the course and in furtherance of the conspiracy, they are not the kind of formalized, litigation-oriented statements that the Court found to be testimonial in *Crawford.* The court reached the same result on co-conspirator hearsay in ***United States v. Reyes,*** 362 F.3d 536 (8th Cir. 2004); ***United States v. Singh,*** 494 F.3d 653 (8th Cir. 2007); and ***United States v. Hyles,*** 521 F.3d 946 (8th Cir. 2008) (noting that the statements were not elicited in response to a government investigation and were casual remarks to co-conspirators).

Statements in furtherance of a conspiracy are not testimonial: ***United States v. Allen,*** 425 F.3d 1231 (9th Cir. 2005): The court held that "co-conspirator statements are not testimonial and therefore beyond the compass of *Crawford's* holding." ***See also United States v. Larson,*** 460 F.3d 1200 (9th Cir. 2006) (statement from one conspirator to another identifying the defendants as the source of some drugs was made in furtherance of the conspiracy; conspiratorial statements were not testimonial as there was no expectation that the statements would later be used at trial).

Statements admissible under the co-conspirator exemption are not testimonial: ***United States v. Townley,*** 472 F.3d 1267 (10th Cir. 2007): The court rejected the defendant's argument that hearsay is testimonial under *Crawford* whenever "confrontation would have been required at common law as it existed in 1791." It specifically noted that *Crawford* did not alter the rule from *Bourjaily* that a hearsay statement admitted under Federal Rule 801(d)(2)(E) does not violate the Confrontation Clause. ***Accord United States v. Ramirez,*** 479 F.3d 1229 (10th Cir. 2007) (statements admissible under Rule 801(d)(2)(E) are not testimonial under *Crawford*).

Statements made during the course and in furtherance of the conspiracy are not testimonial: ***United States v. Underwood,*** 446 F.3d 1340 (11th Cir. 2006): In a drug case, the defendant argued that the admission of an intercepted conversation between his brother Darryl and an undercover informant violated *Crawford.* But the court found no error and affirmed. The court noted that the statements "clearly were not made under circumstances which would have led [Daryl] reasonably to believe that his statement would be available for use at a later trial. Had Darryl known that Hopps was a confidential informant, it is clear that he never would have spoken to her in the first place." The court concluded as follows:

> Although the foregoing discussion would probably support a holding that the evidence challenged here is not "testimonial," two additional aspects of the *Crawford* opinion seal our conclusion that Darryl's statements to the government informant were not "testimonial" evidence. First, the Court stated: "most of the hearsay exceptions covered statements that by their nature were not testimonial -- for example, business records or statements in furtherance of a conspiracy." Also, the Court cited *Bourjaily v. United States*, 483 U.S. 171 (1987) approvingly, indicating that it "hew[ed] closely to the traditional line" of cases that *Crawford* deemed to reflect the correct view of the Confrontation Clause. In approving *Bourjaily*, the *Crawford* opinion expressly noted that it involved statements unwittingly made to an FBI informant. * * * The co-conspirator statement in *Bourjaily* is indistinguishable from the challenged evidence in the instant case.

Declarations Against Penal Interest (Including Accomplice Statements to Law Enforcement)

Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: *United States v. Saget,* 377 F.3d 223 (2d Cir. 2004) (Sotomayor, J.): The defendant's accomplice spoke to an undercover officer, trying to enlist him in the defendant's criminal scheme. The accomplice's statements were admitted at trial as declarations against penal interest under Rule 804(b)(3), as they tended to implicate the accomplice in a conspiracy. After *Williamson v. United States,* hearsay statements made by an accomplice to a law enforcement officer while in custody are not admissible under Rule 804(b)(3) when they implicate the defendant, because the accomplice may be currying favor with law enforcement. But in the instant case, the accomplice's statement was not barred by *Williamson,* because it was made to an undercover officer—the accomplice didn't know he was talking to a law enforcement officer and therefore had no reason to curry favor by implicating the defendant. For similar reasons, the statement was not testimonial under *Crawford*—it was not the kind of formalized statement to law enforcement, prepared for trial, such as a "witness" would provide. ***See also United States v. Williams***, 506 F.3d 151 (2d Cir. 2007): Statement of accomplice implicating himself and defendant in a murder was admissible under Rule 804(b)(3) where it was made to a friend in informal circumstances; for the same reason the statement was not testimonial. The defendant's argument about insufficient indicia of reliability was misplaced because the Confrontation Clause no longer imposes a reliability requirement. ***Accord United States v. Wexler,*** 522 F.3d 194 (2nd Cir. 2008) (inculpatory statement made to friends admissible under Rule 804(b)(3) and not testimonial).

Accomplice statement made to a friend, admitting complicity in a crime, was admissible as a declaration against interest and was not testimonial: *United States v. Jordan,* 509 F.3d 191 (4th Cir. 2007): The defendant was convicted of murder while engaged in a drug-trafficking offense. He contended that the admission of a statement of an accomplice was error under the Confrontation Clause and the hearsay rule. The accomplice confessed her part in the crime in a statement to her roommate. The court found no error in the admission of the accomplice's statement. It was not testimonial because it was made to a friend, not to law enforcement. The court stated: "To our knowledge, no court has extended *Crawford* to statements made by a declarant to friends or associates." The court also found the accomplice's statement properly admitted as a declaration against interest. The court elaborated as follows:

> Here, although Brown's statements to Adams inculpated Jordan, they also subject *her* to criminal liability for a drug conspiracy and, be extension, for Tabon's murder. Brown made the statements to a friend in an effort to relieve herself of guilt, not to law enforcement in an effort to minimize culpability or criminal exposure.

Accomplice's statements to the victim, in conversations taped by the victim, were not testimonial: ***United States v. Udeozor,*** 515 F.3d 260 (4th Cir.2008): The defendant was convicted for conspiracy to hold another in involuntary servitude. The evidence showed that the defendant and her husband brought a teenager from Nigeria into the United States and forced her to work without compensation. The victim also testified at trial that the defendant's husband raped her on a number of occasions. On appeal the defendant argued that the trial court erroneously admitted two taped conversations between the victim and the defendant. The victim taped the conversations surreptitiously in order to refer them to law enforcement. The court found no error in admitting the tapes. The conversations were hearsay, but the husband's statements were admissible as declarations against penal interest, as they admitted wrongdoing and showed an attempt to evade prosecution. The defendant argued that even if admissible under Rule 804(b)(3), the conversations were testimonial under *Crawford*. He argued specifically that under *Davis,* a statement is te stimonial if the *government's* primary motivation is to prepare the statement for use in a criminal prosecution — and that in this case, the victim was essentially acting as a government agent in obtaining statements to be used for trial. But the court found that the conversation was not testimonial because the husband did not know he was talking to anyone affiliated with law enforcement, and the *husband's* primary motivation was not to prepare a statement for any criminal trial. The court observed that the "intent of the police officers or investigators is relevant to the determination of whether a statement is 'testimonial' only if it is first the case that a person in the position of the declarant reasonably would have expected that his statements would be used prosecutorially."

Accomplice's confessions to law enforcement agents were testimonial: ***United States v. Harper,*** 514 F.3d 456 (5th Cir. 2008): The court held that confessions made by the codefendant to law enforcement were testimonial, even though the codefendant did not mention the defendant as being involved in the crime. The statements were introduced to show that the codefendant owned some of the firearms and narcotics at issue in the case, and these facts implicated the defendant as well. The court did not consider whether the confessions were admissible under a hearsay exception — but they would not have been admissible as a declaration against interest, because *Williamson* bars confessions of cohorts made to law enforcement.

Accomplice's statements to a friend, implicating both the accomplice and the defendant in the crime, are not testimonial: ***Ramirez v. Dretke,*** 398 F.3d 691 (5th Cir. 2005): The defendant was convicted of murder. Hearsay statements of his accomplice were admitted against him. The accomplice made statements both before and after the murder that directly implicated the defendant. These statements were made to the accomplice's roommate. The court found that these statements were not testimonial under *Crawford*: "There is nothing in *Crawford* to suggest that 'testimonial evidence' includes spontaneous out-of-court statements made outside any arguably judicial or investigatorial context."

Declaration against penal interest, made to a friend, is not testimonial: *United States v. Franklin,* 415 F.3d 537 (6th Cir. 2005): The defendant was charged with bank robbery. One of the defendant's accomplices (Clarke), was speaking to a friend (Wright) some time after the robbery. Wright told Clarke that he looked "stressed out." Clarke responded that he was indeed stressed out, because he and the defendant had robbed a bank and he thought the authorities were on their trail. The court found no error in admitting Clarke's hearsay statement against the defendant as a declaration against penal interest, as it disserved Clark's interest and was not made to law enforcement officers in any attempt to curry favor with the authorities. On the constitutional question, the court found that Clarke's statement was not testimonial under *Crawford:*

> Clarke made the statements to his friend by happenstance; Wright was not a police officer or a government informant seeking to elicit statements to further a prosecution against Clarke or Franklin. To the contrary, Wright was privy to Clarke's statements only as his friend and confidant.

The court distinguished other cases in which an informant's statement to police officers was found testimonial, on the ground that those other cases involved accomplice statements knowingly made to police officers, so that "the informant's statements were akin to statements elicited during police interrogation, i.e., the informant could reasonably anticipate that the statements would be used to prosecute the defendant."

See also United States v. Gibson, 409 F.3d 325 (6th Cir. 2005) (describing statements as nontestimonial where "the statements were not made to the police or in the course of an official investigation, nor in an attempt to curry favor or shift the blame."); ***United States v. Johnson,*** 440 F.3d 832 (6th Cir. 2006) (statements by accomplice to an undercover informant he thought to be a cohort were properly admitted against the defendant; the statements were not testimonial because the declarant didn't know he was speaking to law enforcement, and so a person in his position "would not have anticipated that his statements would be used in a criminal investigation or prosecution of Johnson.").

Statement admissible as a declaration against penal interest is not testimonial: *United States v. Johnson,* 581 F.3d 320 (6th Cir. 2009): The Court held that the tape-recorded confession of a coconspirator describing the details of an armed robbery, including his and the defendant's roles, was properly admitted as a declaration against penal interest. The Court found that the statements tended to disserve the declarant's interest because "they admitted his participation in an unsolved murder and bank robbery." And the statements were trustworthy because they were made to a person the declarant thought to be his friend, at a time when the declarant did not know he was being recorded "and therefore could not have made his statement in order to obtain a benefit from law enforcement." Moreover, the hearsay was not testimonial, because the declarant did not know he was being recorded or that the statement would be used in a criminal proceeding against the defendant. The defendant argued that the inquiry into testimoniality should focus on the questioner — in this

case an informant encouraged by the government to obtain a statement from the declarant. But the Court stated that "our precedent makes clear that the intent of O'Reilly, the declarant, determines whether the statements on the tape-recording are testimonial."

Accomplice confession to law enforcement is testimonial, even if redacted: ***United States v. Jones,*** 371 F.3d 363 (7th Cir. 2004): An accomplice's statement to law enforcement was offered against the defendant, though it was redacted to take out any direct reference to the defendant. The court found that even if the confession, as redacted, was admissible as a declaration against interest, its admission would violate the Confrontation Clause after *Crawford.* The court noted that even though redacted, the confession was testimonial, as it was made during interrogation by law enforcement. And since the defendant never had a chance to cross-examine the accomplice, "under *Crawford,* no part of Rock's confession should have been allowed into evidence."

Declaration against interest made to an accomplice who was secretly recording the conversation for law enforcement was not testimonial: ***United States v. Watson,*** , 525 F.3d 583 (7th Cir. 2008): After a bank robbery, one of the perpetrators was arrested and agreed to cooperate with the FBI. She surreptitiously recorded a conversation with Anthony, in which Anthony implicated himself and Watson in the robbery. The court found that Anthony's statement was against his own interest, and rejected Watson's contention that it was testimonial. The court noted that Anthony could not have anticipated that the statement would be used at a trial, because he did not know that the FBI was secretly recording the conversation. It concluded: "A statement unwittingly made to a confidential informant and recorded by the government is not testimonial for Confrontation Clause purposes."

Statement admissible as a declaration against penal interest, after ***Williamson,*** **is not testimonial:** ***United States v. Manfre,*** 368 F.3d 832 (8th Cir. 2004): An accomplice made a statement to his fiancee that he was going to burn down a nightclub for the defendant. The court held that this statement was properly admitted as a declaration against penal interest, as it was not a statement made to law enforcement to curry favor. Rather, it was a statement made informally to a trusted person. For the same reason, the statement was not testimonial under *Crawford*; it was a statement made to a loved one and was "not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks."

Accomplice statements to cellmate are not testimonial: ***United States v. Johnson,*** 495 F.3d 951 (8th Cir. 2007): The defendant's accomplice made statements to a cellmate, implicating himself and the defendant in a number of murders. The court found that these hearsay statements were not testimonial, as they were made under informal circumstances and there was no involvement with law enforcement.

Jailhouse confession implicating defendant was admissible as a declaration against penal interest and was not testimonial: ***United States v. Smalls,*** 605 F.3d 765 (10th Cir. 2010): The court found no error in admitting a jailhouse confession that implicated a defendant in the murder of a government informant. The statements were not testimonial because they were not made with "the primary purpose * * * of establishing or proving some fact potentially relevant to a criminal prosecution." The fact that the statements were made in a conversation with a government informant did not make them testimonial because the declarant did not know he was being interrogated, and the statement was not made under the formalities required for a statement to be testimonial. Finally, the statements were properly admitted under Rule 804(b)(3), because they implicated the declarant in a serious crime committed with another person, there was no attempt to shift blame to the defendant, and the declarant did not know he was talking to a government informant and therefore was not currying favor with law enforcement.

Declaration against interest is not testimonial: ***United States v. U.S. Infrastructure, Inc.,*** 576 F.3d 1195 (11th Cir. 2009): The declarant, McNair, made a hearsay statement that he was accepting bribes from one of the defendants. The statement was made in private to a friend. The court found that the statement was properly admitted as a declaration against McNair's penal interest, as it showed that he accepted bribes from an identified person. The court also held that the hearsay was not testimonial, because it was "part of a private conversation" and no law enforcement personnel were involved.

Excited Utterances, 911 Calls, Etc.

911 calls and statements to responding officers may be testimonial, but only if the primary purpose is to establish or prove past events in a criminal prosecution: ***Davis v. Washington*** **and** ***Hammon v. Indiana,*** 547 U.S. 813 (2006): In companion cases, the Court decided whether reports of crime by victims of domestic abuse were testimonial under *Crawford.* In *Davis,* the victim's statements were made to a 911 operator while and shortly after the victim was being assaulted by the defendant. In *Hammon,* the statements were made to police, who were conducting an interview of the victim after being called to the scene. The Court held that the statements in *Davis* were not testimonial, but came to the opposite result with respect to the statements in *Hammon.* The Court set the dividing line for such statements as follows:

> Without attempting to produce an exhaustive classification of all conceivable statements – or even all conceivable statements in response to police interrogation – as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances

> objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The Court emphasized the limited nature of its holding. It noted that it was not providing an "exhaustive classification of all conceivable statements-or even all conceivable statements in response to police interrogation, but rather a resolution of the cases before us and those like them." Among other things, the Court stated that "our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are testimonial." Nor did the Court hold that statements made to 911 operators could never be testimonial; statements made to 911 after an emergency has ended might be testimonial under some circumstances. Finally, the Court refused to hold that statements to responding police officers would always be testimonial:

> Although we necessarily reject the Indiana Supreme Court's implication that virtually any "initial inquiries" at the crime scene will not be testimonial, we do not hold the opposite – that *no* questions at the scene will yield nontestimonial answers. We have already observed of domestic disputes that "[o]fficers called to investigate ... need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." Such exigencies may *often* mean that "initial inquiries" produce nontestimonial statements.

The Court defined testimoniality by whether the *primary motivation* in making the statements was for use in a criminal investigation or prosecution.

911 call reporting drunk person with an unloaded gun was not testimonial: *United States v. Cadieux,* 500 F.3d 37 (1st Cir. 2007): In a felon-firearm prosecution, the trial court admitted a tape of a 911 call, made by the daughter of the defendant's girlfriend, reporting that the defendant was drunk and walking around with an unloaded shotgun. The court held that "under the *Davis* guideposts" the 911 call was not testimonial. It relied on the following factors: 1) the daughter spoke about events "in real time, as she witnessed them transpire"; 2) she specifically requested police assistance; 3) the dispatcher's questions were tailored to identify "the location of the emergency, its nature, and the perpetrator"; and 4) the daughter was "hysterical as she speaks to the dispatcher, in an environment that is neither tranquil nor, as far as the dispatcher could reasonably tell, safe." The defendant argued that the call was testimonial because the daughter was aware that her statements to the police could be used in a prosecution. But the court found that after *Davis*, awareness of possible use in a prosecution is not enough for a statement to be testimonial. A statement is testimonial only if the "primary motivation" for making it is for use in a criminal prosecution.

911 call was not testimonial under the circumstances: ***United States v. Brito,*** 427 F.3d 53 (1st Cir. 2005): The court affirmed a conviction of firearm possession by an illegal alien. It held that statements made in a 911 call, indicating that the defendant was carrying and had fired a gun, were properly admitted as excited utterances, and that the admission of the 911 statements did not violate the defendant's right to confrontation. The statements were not "testimonial" within the meaning of *Crawford v. Washington.* The court declared that the relevant question is whether the statement was made with an eye toward "legal ramifications." The court noted that under this test, statements to police made while the declarant or others are still in personal danger are ordinarily not testimonial, because the declarant in these circumstances "usually speaks out of urgency and a desire to obtain a prompt response." Once the initial danger has dissipated, however, "a person who speaks while still under the stress of a startling event is more likely able to comprehend the larger significance of her words. If the record fairly supports a finding of comprehension, the fact that the statement also qualifies as an excited utterance will not alter its testimonial nature." In this case the 911 call was properly admitted because the caller stated that she had "just" heard gunshots and seen a man with a gun, that the man had pointed the gun at her, and that the man was still in her line of sight. Thus the declarant was in "imminent personal peril" when the call was made and therefore it was not testimonial. The court also found that the 911 operator's questioning of the caller did not make the answers testimonial, because "it would blink reality to place under the rubric of interrogation the single off-handed question asked by the dispatcher — a question that only momentarily interrupted an otherwise continuous stream of consciousness."

> **Note: While the *Brito* decision preceded the Supreme Court's decision in *Davis/Hammon,* the result appears to be completely consistent with the Supreme Court's application of *Crawford* to 911 calls. When the statement is in response to an emergency, it is not testimonial.**

911 call — including statements about the defendant's felony status—are not testimonial: ***United States v. Proctor,*** 505 F.3d 366 (5th Cir. 2007): In a firearms prosecution, the court admitted a 911 call from the defendant's brother (Yogi), in which the brother stated that the defendant had stolen a gun and shot it into the ground twice. Included in the call were statements about the defendant's felony status and that he was probably on cocaine. The court held that the entire call was nontestimonial. It applied the *Davis* "primary purpose" test and evaluated the call in the following passage:

> Viewing the facts of this case in light of *Davis*, Yogi's statements to the 911 operator were nontestimonial. Yogi's call to 911 was made immediately after Proctor grabbed the gun and fired it twice. During the course of the call, he recounts what just happened, gives a description of his brother, indicates his brother's previous criminal history, and the fact that his brother may be under the influence of drugs. All of these statements enabled the police to deal appropriately with the situation that was unfolding. The statements about Proctor's possession of a gun indicated Yogi's understanding that Proctor was armed and possibly

dangerous. The information about Proctor's criminal history and possible drug use necessary for the police to respond appropriately to the emergency, as it allowed the police to determine whether they would be encountering a violent felon. Proctor argues that the emergency had already passed, because he had run away with the weapon at the time of the 911 call and, therefore, the 911 conversation was testimonial. It is hard to reconcile this argument with the facts. During the 911 call, Yogi reported that he witnessed his brother, a felon possibly high on cocaine, run off with a loaded weapon into a nightclub. This was an ongoing emergency — not one that had passed. Proctor's retreat into the nightclub provided no assurances that he would not momentarily return to confront Yogi * * *. Further, Yogi could have reasonably feared that the people inside the nightclub were in danger. Overall, a reasonable viewing of the 911 call is that Yogi and the 911 operator were dealing with an ongoing emergency involving a dangerous felon, and that the 911 operator's questions were related to the resolution of that emergency.

911 call, and statements made by the victim after police arrived, are excited utterances and not testimonial: ***United States v. Arnold,*** 486 F.3d 177 (6th Cir. 2007) (en banc): In a felon-firearm prosecution, the court admitted three sets of hearsay statements made by the daughter of the defendant's girlfriend, after an argument between the daughter (Tamica) and the defendant. The first set were statements made in a 911 call, in which Tamica stated that Arnold pulled a pistol on her and is "fixing to shoot me." The call was made after Tamica got in her car and went around the corner from her house. The second set of statements occurred when the police arrived within minutes; Tamica was hysterical, and without prompting said that Arnold had pulled a gun and was trying to kill her. The police asked what the gun looked like and she said "a black handgun." At the time of this second set of statements, Arnold had left the scene. The third set of statements was made when Arnold returned to the scene in a car a few minutes later. Tamica identified Arnold by name and stated "that's the guy that pulled the gun on me." A search of the vehicle turned up a black handgun underneath Arnold's seat.

The court first found that all three sets of statements were properly admitted as excited utterances. For each set of statements, Tamica was clearly upset, she was properly concerned about her safety, and the statements were made shortly after or right at the time of the two startling events (the gun threat for the first two sets of statements and Arnold's return for the third set of statements).

The court then concluded that none of Tamica's statements fell within the definition of "testimonial" as developed by the Court in *Davis*. Essentially the court found that the statements were not testimonial for the very reason that they were excited utterances — Tamica was upset, she was responding to an emergency and concerned about her safety, and her statements were largely spontaneous and not the product of an extensive interrogation.

911 call is non-testimonial under *Davis/Hammon: United States v. Thomas,* 453 F.3d 838 (7th Cir. 2006): The court held that statements made in a 911 call were non-testimonial under the analysis provided by the Supreme Court in *Davis/Hammon*. The anonymous caller reported a shooting, and the perpetrator was still at large. The court analyzed the statements in light of

Davis/Hammon as follows:

> When viewing the facts in light of *Davis*, we find that the anonymous caller's statement to the 911 operator was nontestimonial. In *Davis*, the caller contacted the police after being attacked, but while the defendant was fleeing the scene. There the Supreme Court stressed that, despite the immediate attack being over, the caller "was speaking about events as they were actually happening, rather than 'describ[ing] past events.'" Similarly, the caller here described an emergency as it happened. First, she directed the operator's attention to Brown's condition, stating "[t]here's a dude that just got shot . . .", and ". . . the guy who shot him is still out there." Later in the call, she reiterated her concern that ". . . [t]here is somebody shot outside, somebody needs to be sent over here, and there's somebody runnin' around with a gun, somewhere." Any reasonable listener would know from this exchange that the operator and caller were dealing with an ongoing emergency, the resolution of which was paramount in the operator's interrogation. This fact is evidenced by the operator's repeatedly questioning the caller to determine who had the gun and where Brown lay injured. Further, the caller ended the conversation immediately upon the arrival of the police, indicating a level of interrogation that was significantly less formal than the testimonial statement in *Crawford.* Because the tape-recording of the call is nontestimonial, it does not implicate Thomas's right to confrontation.

See also United States v. Dodds, 569 F.3d 336 (7th Cir. 2009) (unidentified person's identification of a person with a gun was not testimonial: "In this case, the police were responding to a 911 call reporting shots fired and had an urgent need to identify the person with the gun and to stop the shooting. The witness's description of the man with a gun was given in that context, and we believe it falls within the scope of *Davis*.").

911 calls and statements made to officers responding to the calls are not testimonial: ***United States v. Brun,*** 416 F.3d 703 (8th Cir. 2005): The defendant was charged with assault with a deadly weapon. The police received two 911 calls from the defendant's home. One was from the defendant's 12-year-old nephew, indicating that the defendant and his girlfriend were arguing, and requesting assistance. The other call came 20 minutes later, from the defendant's girlfriend, indicating that the defendant was drunk and had a rifle, which he had fired in the house and then left. When officers responded to the calls, they found the girlfriend in the kitchen crying; she told the responding officers that the defendant had been drunk, and shot his rifle in the bathroom while she was in it. All three statements (the two 911 calls and the girlfriend's statement to the police) were admitted as excited utterances, and the defendant was convicted. The court affirmed. The court had little problem in finding that all three statements were properly admitted as excited utterances, and addressed whether the admission of the statements violated the defendant's right to confrontation after *Crawford v. Washington.* The court first found that the nephew's 911 call was not "testimonial" within the meaning of *Crawford*, as it was not the kind of statement that was equivalent to courtroom testimony. It had "no doubt that the statements of an adolescent boy who has called 911 while witnessing an argument between his aunt and her partner escalate to an assault would be emotional and spontaneous rather than deliberate and calculated." The court used similar reasoning to find that

the girlfriend's 911 call was not testimonial. The court also found that the girlfriend's statement to the police was not testimonial. It reasoned that the girlfriend's conversation with the officers "was unstructured, and not the product of police interrogation."

> **Note: The court's decision in *Brun* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon*, but the analysis appears consistent with that of the Supreme Court. It is true that in *Hammon* the Court found statements by the victim to responding police officers to be testimonial, but that was largely because the police officers engaged in a structured interview about past criminal activity; in *Brun* the victim spoke spontaneously in response to an emergency. And the Court in *Davis/Hammon* acknowledged that statements to responding officers are non-testimonial if they were directed more toward dealing with an emergency than toward investigating or prosecuting a crime.**

Excited utterance not testimonial under the circumstances, even though made to law enforcement: *Leavitt v. Arave,* 371 F.3d 663 (9th Cir. 2004): In a murder case, the government introduced the fact that the victim had called the police the night before her murder and stated that she had seen a prowler who she thought was the defendant. The court found that the victim's statement was admissible as an excited utterance, as the victim was clearly upset and made the statement just after an attempted break-in. The court held that the statement was not testimonial under *Crawford.* The court explained as follows:

> Although the question is close, we do not believe that Elg's statements are of the kind with which *Crawford* was concerned, namely, testimonial statements. * * * Elg, not the police, initiated their interaction. She was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home. Thus, we do not believe that the admission of her hearsay statements against Leavitt implicate the principal evil at which the Confrontation Clause was directed: the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.

> **Note: The court's decision in *Leavitt* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon*, but the analysis appears consistent with that of the Supreme Court. The Court in *Davis/Hammon* acknowledged that statements to responding officers are non-testimonial if they are directed toward dealing with an emergency rather than prosecuting a crime.**

Expert Witnesses

Expert's reliance on testimonial hearsay does not violate the Confrontation Clause: *United States v. Henry,* 472 F.3d 910 (D.C. Cir. 2007): The court declared that *Crawford* "did not involve expert witness testimony and thus did not alter an expert witness's ability to rely on (without repeating to the jury) otherwise inadmissible evidence in formulating his opinion under Federal Rule of Evidence 703. In other words, while the Supreme Court in *Crawford* altered Confrontation Clause precedent, it said nothing about the Clause's relation to Federal Rule of Evidence 703." ***See also United States v. Law,*** 528 F.3d 888 (D.C. Cir. 2008): Expert's testimony about the typical practices of narcotics dealers did not violate *Crawford.* While the testimony was based on interviews with informants, "Thomas testified based on his experience as a narcotics investigator; he did not related statements by out-of-court declarants to the jury."

Expert's reliance on out-of-court accusations does not violate *Crawford*, unless the accusations are directly related to the jury*: United States v. Lombardozzi,* 491 F.3d 61 (2nd Cir. 2007): In an extortion case, the government called a criminal investigator who testified as an expert about the structure of La Cosa Nostra and the defendant's affiliation with organized crime. The expert based his opinion as to the defendant in part on testimony from cooperating witnesses and confidential informants. The defendant argued that the introduction of the expert's testimony violated *Crawford* because it was based in part on testimonial hearsay. The court observed that *Crawford* is inapplicable if testimonial statements are not used for their truth, and noted the circuit's previous determination "that it is permissible for an expert witness to form an opinion by applying her expertise because, in that limited instance, the evidence is not being presented for the truth of the matter asserted." The court concluded that the expert's testimony would violate the Confrontation Clause "only if he communicated out-of-court testimonial statements . . . directly to the jury in the guise of an expert opinion." The court found any error in introducing the hearsay statements directly to be harmless. ***See also United States v. Mejia,*** 545 F.3d 179 (2nd Cir. 2008) (violation of Confrontation Clause where expert directly relates statements made by drug dealers during an interrogation).

Expert reliance on confidential informants in interpreting coded conversation does not violate the *Crawford: United States v. Johnson,* 587 F.3d 625 (4th Cir. 2009): The court found no error in admitting expert testimony that decoded terms used by the defendants and coconspirators during recorded telephone conversations. The defendant argued that the experts relied on hearsay statements by cooperators to help them reach a conclusion about the meaning of particular conversations. The defendant asserted that the experts were therefore relying on testimonial hearsay. The Court noted that experts are allowed to consider inadmissible hearsay as long as it is of a type reasonably relied on by other experts — as it was in this case. It stated that "[w]ere we to push *Crawford* as far as [the defendant] proposes, we would disqualify broad swaths of expert testimony, depriving juries of valuable assistance in a great many cases." The Court recognized that it is "appropriate to recognize the risk that a particular expert might become nothing more than a

transmitter of testimonial hearsay." But in this case, the experts never made reference to their interviews, and the jury heard no testimonial hearsay. "Instead, each expert presented his independent judgment and specialized understanding to the jury." Because the experts "did not become mere conduits" for the testimonial hearsay, their consideration of that hearsay "poses no *Crawford* problem." ***Accord United States v. Ayala,*** 601 F.3d 256 (4th Cir. 2010): *Crawford* "does not prevent expert witnesses from offering their independent judgments merely because those judgments were in some part informed by their exposure to otherwise inadmissible evidence." In this case, the court found that the experts "did not act as mere transmitters and in fact did not repeat statements of particular declarants to the jury."

Expert reliance on printout from machine and another expert's lab notes does not violate *Crawford*: *United States v. Moon,* 512 F.3d 359 (7th Cir. 2008): The court held that an expert's testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because "data is not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone." Moreover, the expert's reliance on another expert's lab notes did not violate *Crawford* because an expert is permitted to rely on hearsay (including testimonial hearsay) in reaching his conclusion. The court noted that the defendant could "insist that the data underlying an expert's testimony be admitted, see Fed.R.Evid. 705, but by offering the evidence themselves defendants would waive any objection under the Confrontation Clause." The court observed that the notes of the chemist, evaluating the data from the machine, were testimonial and should not have been independently admitted, but it found no plain error in the admission of these notes.

Expert reliance on drug test conducted by another does not violate *Melendez-Diaz*: *United States v. Turner,* 591 F.3d 928 (7th Cir. 2010): At the defendant's drug trial, the government called a chemist to testify about the tests conducted on the substance seized from the defendant — the tests indicating that it was cocaine. The defendant objected that the witness did not conduct the tests and was relying on testimonial statements from other chemists, in violation of *Crawford.* The court found no error, holding that "the government's expert witness was properly allowed to rely on the information gathered and produced by a lab employee who did not testify at trial." The court emphasized that no statements of the official who actually tested the substance were admitted at trial, and that the witness unequivocally established that his opinions about the test reports were his own. It concluded that "the Sixth Amendment does not demand that a chemist or other testifying expert have done the lab work himself." The defendant argued that the Supreme Court's opinion in *Melendez-Diaz v. Massachusetts,* 129 S.Ct. 2527 (2009), requires that any official involved in forensic testimony must be produced for cross-examination. But the court rejected that broad reading of *Melendez-Diaz*, reading the case as only prohibiting the introduction of *certificates* of forensic testimony, without any supporting testimony. The court observed that "*Melendez-Diaz* did not do away with Federal Rule of Evidence 703."

Forfeiture

Constitutional standard for forfeiture — like Rule 804(b)(6) — requires a showing that the defendant acted wrongfully with the intent to keep the witness from testifying: *Giles v. California,* 128 S.Ct. 2678 (2008): The Court held that a defendant does not forfeit his constitutional right to confront testimonial hearsay unless the government shows that the defendant engaged in wrongdoing *designed to keep the witness from testifying at trial.* Giles was charged with the murder of his former girlfriend. A short time before the murder, Giles had assaulted the victim, and she made statements to the police implicating Giles in that assault. The victim's hearsay statements were admitted against the defendant on the ground that he had forfeited his right to rely on the Confrontation Clause, by murdering the victim. The government made no showing that Giles murdered the victim with the intent to keep her from testifying. The Court found an intent-to-procure requirement in the common law, and therefore, under the historical analysis mandated by *Crawford*, there is necessarily an intent-to-procure requirement for forfeiture of confrontation rights. Also, at one point in the opinion, the Court in dictum stated that "statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment," are not testimonial — presumably because the primary motivation for making such statements is for something other than use at trial.

Murder of witness by co-conspirators as a sanction to protect the conspiracy against testimony constitutes forfeiture of both hearsay and Confrontation Clause objections: *United States v. Martinez,* 476 F.3d 961 (D.C. Cir. 2007): Affirming drug and conspiracy convictions, the court found no error in the admission of hearsay statements made to the DEA by an informant involved with the defendant's drug conspiracy. The trial court found by a preponderance of the evidence that the informant was murdered by members of the defendant's conspiracy, in part to procure his unavailability as a witness. The court of appeals affirmed this finding — rejecting the defendant's argument that forfeiture could not be found because his co-conspirators would have murdered the informant anyway, due to his role in the loss of a drug shipment. The court stated that it is "surely reasonable to conclude that anyone who murders an informant does so intending *both* to exact revenge *and* to prevent the informant from disclosing further information and testifying." It concluded that the defendant's argument would have the "perverse consequence" of allowing criminals to avoid forfeiture if they could articulate more than one motivation for disposing of a witness. Finally, the court held that forfeiture under Rule 804(b)(6) by definition constituted forfeiture of the Confrontation Clause objection. It stated that *Crawford* and *Davis* "foreclose" the possibility that the admission of evidence under Rule 804(b)(6) could nonetheless violate the Confrontation Clause.

Grand Jury, Plea Allocutions, Etc.

Grand jury testimony and plea allocution statement are both testimonial: *United States v. Bruno*, 383 F.3d 65 (2d Cir. 2004): The court held that a plea allocution statement of an accomplice was testimonial, even though it was redacted to take out any direct reference to the defendant. It noted that the Court in *Crawford* had taken exception to previous cases decided by the Circuit that had admitted such statements as sufficiently reliable under *Roberts*. Those prior cases have been overruled by *Crawford.* The court also noted that the admission of grand jury testimony was error as it was clearly testimonial after *Crawford.* **See *also United States v. Becker,*** 502 F.3d 122 (2d Cir. 2007) (plea allocution is testimonial even though redacted to take out direct reference to the defendant: "any argument regarding the purposes for which the jury might or might not have actually considered the allocutions necessarily goes to whether such error was harmless, not whether it existed at all"); ***United States v. Snype,*** 441 F.3d 119 (2d Cir. 2006) (plea allocution of the defendant's accomplice was testimonial even though all direct references to the defendant were redacted); ***United States v. Gotti,*** 459 F.3d 296 (2d Cir. 2006) (redacted guilty pleas of accomplices, offered to show that a bookmaking business employed five or more people, were testimonial under *Crawford*); ***United States v. Al-Sadawi,*** 432 F.3d 419 (2d Cir. 2005) (*Crawford* violation where the trial court admitted portions of a cohort's plea allocution against the defendant, even though the statement was redacted to take out any direct reference to the defendant).

Grand jury testimony is testimonial: *United States v. Wilmore,* 381 F.3d 868 (9th Cir. 2004): The court held, unsurprisingly, that grand jury testimony is testimonial under *Crawford.* It could hardly have held otherwise, because even under the narrowest definition of "testimonial" (i.e., the specific types of hearsay mentioned by the *Crawford* Court) grand jury testimony is covered within the definition.

Informal Circumstances, Private Statements, etc.

Private conversations and casual remarks are not testimonial: *United States v. Malpica-Garcia,* 489 F.3d 393 (1st Cir. 2007): In a drug prosecution, the defendant argued that testimony of his former co-conspirators violated *Crawford* because some of their assertions were not based on personal knowledge but rather were implicitly derived from conversations with other people (e.g., that the defendant ran a protection racket). The court found that if the witnesses were in fact relying on accounts from others, those accounts were not testimonial. The court noted that the information was obtained from people "in the course of private conversations or in casual remarks that no one expected would be preserved or later used at trial." There was no indication that the statements were

made "to police, in an investigative context, or in a courtroom setting."

Informal letter found reliable under the residual exception is not testimonial: *United States v. Morgan,* 385 F.3d 196 (2d Cir. 2004): In a drug trial, a letter written by the co-defendant was admitted against the defendant. The letter was written to a boyfriend and implicated both the defendant and the co-defendant in a conspiracy to smuggle drugs. The court found that the letter was properly admitted under Rule 807, and that it was not testimonial under *Crawford.* The court noted the following circumstances indicating that the letter was not testimonial: 1) it was not written in a coercive atmosphere; 2) it was not addressed to law enforcement authorities; 3) it was written to an intimate acquaintance; 4) it was written in the privacy of the co-defendant's hotel room; 4) the co-defendant had no reason to expect that the letter would ever find its way into the hands of the police; and 5) it was not written to curry favor with the authorities or with anyone else. These were the same factors that rendered the hearsay statement sufficiently reliable to qualify under Rule 807.

Informal conversation between defendant and undercover informant was not testimonial under *Davis: United States v. Burden,* 600 F.3d 204 (2nd Cir. 2010): Appealing RICO and drug convictions, the defendant argued that the trial court erred in admitting a recording of a drug transaction between the defendant and a cooperating witness. The defendant argued that the statements on the recording were testimonial, but the court disagreed and affirmed. The court noted that under *Davis*, a statement is not testimonial unless it was made with the awareness of its possible use at trial. Therefore, the defendant's part of the conversation was not testimonial because he was not aware at the time that the statement was being recorded or would be potentially used at his trial. As to the informant, the court reasoned that under *Davis* it is not enough that the declarant might anticipate that his statement could be used at trial — that is only one component of the definition of "testimonial." The court declared that a statement to be testimonial must also be "formalized" in the nature of the "core class" of statements identified by the court in *Crawford* and *Davis.* In this case, the informant's statements were not made under formal circumstances, and "anything he said was meant not as an accusation in its own right but as bait."

Note: Other courts, as seen in the "Not Hearsay" section below, have come to the same result as the Second Circuit in *Burden,* but using a different analysis: 1) admitting the defendant's statement does not violate the confrontation clause because it is his own statement and he doesn't have a right to confront himself; 2) the informant's statement, while testimonial, is not offered for its truth but only to put the defendant's statements in context — therefore it does not violate the right to confrontation because it is not offered as an accusation

Statements made by victim to her friends and family are not testimonial: *Doan v. Carter,* 548 F.3d 449 (6th Cir. 2008): The defendant challenged a conviction for murder of his girlfriend. The trial court admitted a number of statements from the victim concerning physical abuse that the defendant had perpetrated on her. The defendant argued that these statements were

testimonial but the court disagreed. The defendant contended that under *Davis* a statement is nontestimonial only if it is in response to an emergency, but the court rejected the defendant's "narrow characterization of nontestimonial statements." The court relied on the statement in *Giles v. California* that "statements to friends and neighbors about abuse and intimidation * * * would be excluded, if at all, only by hearsay rules."

Suicide note implicating the declarant and defendant in a crime was testimonial under the circumstances: *Miller v. Stovall,* 608 F.3d 913 (6th Cir. 2010): A former police officer involved in a murder wrote a suicide note to his parents, indicating he was going to kill himself so as not go to jail for the crime that he and the defendant committed. The note was admitted against the defendant. The Court found that the note was testimonial and its admission against the defendant violated his right to confrontation, because the declarant could "reasonably anticipate" that the note would be passed on to law enforcement — especially because the declarant was a former police officer.

> **Note: The court's "reasonable anticipation" test appears to be a broader definition of testimoniality than that applied by the Supreme Court in *Davis*. The Court in *Davis* looked to the "primary motivation" of the speaker. In this case, the "primary motivation" of the declarant was probably to explain to his parents why he was going to kill himself, rather than to prepare a case against the defendant.**

Statements made by an accomplice to a jailhouse informant are not testimonial: *United States v. Honken,* 541 F.3d 1146 (8th Cir. 2008): When the defendant's murder prosecution was pending, the defendant's accomplice (Johnson) was persuaded by a fellow inmate (McNeese) that Johnson could escape responsibility for the crime by getting another inmate to falsely confess to the crime — but that in order to make the false confession believable, Johnson would have to disclose where the bodies were buried. Johnson prepared maps and notes describing where the bodies were buried, and gave it to McNeese with the intent that it be delivered to the other inmate who would falsely confess. In fact this was all a ruse concocted by McNeese and the authorities to get Johnson to confess, in which event McNeese would get a benefit from the government. The notes and maps were admitted at the defendant's trial, over the defendant's objection that they were testimonial. The defendant argued that Johnson had been subjected to the equivalent of a police interrogation. But the court held that the evidence was not testimonial, because Johnson didn't know that she was speaking to a government agent. It explained as follows:

> McNeese was acting as a government agent when he received the maps from Johnson. McNeese most likely anticipated Johnson's maps would be used at a later trial. However, we conclude that the proper focus is on Johnson's expectations as the declarant, not on McNeese's expectations as the recipient of the information. Johnson did not draw the maps with the expectation that they would be used against Honken at trial * * * . Further, the maps were not a "solemn declaration" or a "formal statement." Rather, Johnson was more likely making a casual remark to an acquaintance. We simply cannot conclude Johnson made a

"testimonial" statement against Honken without the faintest notion that she was doing so.

See also United States v. Spotted Elk, 548 F.3d 641 (8th Cir. 2008) (private conversation between inmates about a future course of action is not testimonial).

Statement from one friend to another in private circumstances is not testimonial: ***United States v. Wright,*** 536 F.3d 819 (8th Cir. 2008): The defendant was charged with shooting two people in the course of a drug deal. One victim died and one survived. The survivor testified at trial to a conversation he had on the night of the shooting with the other victim. This was a private conversation before the shootings occurred. The court held that the statements of the victim who died were not testimonial. The statements were made under informal circumstances to a friend. The court relied on the Supreme Court's statement in *Giles v. California* that "statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment," are not testimonial.

Accusatory statements in a victim's diary are not testimonial: ***Parle v. Runnels,*** 387 F.3d 1030 (9th Cir. 2004): In a murder case, the government offered statements of the victim that she had entered in her diary. The statements recounted physical abuse that the victim received at the hand of the defendant. The court held that the victim's diary was not testimonial, as it was a private diary of daily events. There was no indication that it was prepared for use at a trial.

Private conversation between mother and son is not testimonial: ***United States v. Brown,*** 441 F.3d 1330 (11th Cir. 2006): In a murder prosecution, the court admitted testimony that the defendant's mother received a phone call, apparently from the defendant; the mother asked the caller whether he had killed the victim, and then the mother started crying. The mother's reaction was admitted at trial as an excited utterance. The court found no violation of *Crawford.* The court reasoned as follows:

> We need not divine any additional definition of "testimonial" evidence to conclude that the private conversation between mother and son, which occurred while Sadie Brown was sitting at her dining room table with only her family members present, was not testimonial. The phone conversation Davis overheard obviously was not made under examination, was not transcribed in a formal document, and was not made under circumstances leading an objective person to reasonably believe the statement would be available for use at a later trial. Thus, it is not testimonial and its admission is not barred by *Crawford.* (Citations omitted).

Interrogations, Etc.

Formal statement to police officer is testimonial: ***United States v. Rodriguez-Marrero,*** 390 F.3d 1 (1st Cir. 2004): The defendant's accomplice gave a signed confession under oath to a prosecutor in Puerto Rico. The court held that any information in that confession that incriminated the defendant, directly or indirectly, could not be admitted against him after *Crawford.* Whatever the limits of the term "testimonial", it clearly covers sworn statements by accomplices to police officers.

Accomplice's statements during police interrogation are testimonial: ***United States v. Alvarado-Valdez,*** 521 F.3d 337 (5th Cir. 2008): The trial court admitted the statements of the defendant's accomplice that were made during a police interrogation. The statements were offered for their truth — to prove that the accomplice and the defendant conspired with others to transport cocaine. Because the accomplice had absconded and could not be produced for trial, admission of his testimonial statements violated the defendant's right to confrontation.

Identification of a defendant, made to police by an incarcerated person, is testimonial: ***United States v. Pugh,*** 405 F.3d 390 (6th Cir. 2005): In a bank robbery prosecution, the court found a *Crawford* violation when the trial court admitted testimony from a police officer that he had brought a surveillance photo down to a person who was incarcerated, and that person identified the defendant as the man in the surveillance photo. This statement was testimonial under *Crawford* for the following reasons:

> First, the statement was given during a police interrogation, which meets the requirement set forth in *Crawford* where the Court indicated that the term "testimonial" at a minimum applies to "police interrogations." Second, the statement is also considered testimony under *Crawford's* reasoning that a person who "makes a formal statement to government officers bears testimony." Third, we find that Shellee's statement is testimonial under our broader analysis in *United States v. Cromer,* 389 F.3d 662 (6th Cir. 2004). . . We think that any reasonable person would assume that a statement that positively identified possible suspects in the picture of a crime scene would be used against those suspects in either investigating or prosecuting the offense.

Reporter's Note: In *Cromer,* discussed in *Pugh*, the court held that a statement of a confidential informant to police officers, identifying the defendant as being a drug dealer, was testimonial, because it was made to the authorities with the intent that it would be used against the defendant. ***See also United States v. McGee,*** 529 F.3d 691 (6th Cir. 2008) (confidential informant's statement identifying the defendant as the source of drugs was testimonial).

Accomplice statement to law enforcement is testimonial: ***United States v. Nielsen,*** 371 F.3d 574 (9th Cir. 2004): Nielsen resided in a house with Volz. Police officers searched the house for drugs. Drugs were found in a floor safe. An officer asked Volz who had access to the floor safe. Volz said that she did not but that Nielsen did. This hearsay statement was admitted against Nielsen at trial The court found this to be error, as the statement was testimonial under *Crawford,* because it was made to police officers during interrogation. The court noted that even the first part of Volz's statement — that she did not have access to the floor safe — violated *Crawford* because it provided circumstantial evidence that Nielsen did have access.

Statement made by an accomplice after arrest, but before formal interrogation, is testimonial: ***United States v. Summers,*** 414 F.3d 1287 (10th Cir. 2005): The defendant's accomplice in a bank robbery was arrested by police officers. As he was walked over to the patrol car, he said to the officer, "How did you guys find us?" The court found that the admission of this statement against the defendant violated his right to confrontation under *Crawford.* The court explained as follows:

> Although Mohammed had not been read his *Miranda* rights and was not subject to formal interrogation, he had nevertheless been taken into physical custody by police officers. His question was directed at a law enforcement official. Moreover, Mohammed's statement * * * implicated himself and thus was loosely akin to a confession. Under these circumstances, we find that a reasonable person in Mohammed's position would objectively foresee that an inculpatory statement implicating himself and others might be used in a subsequent investigation or prosecution.

Statements made by accomplice to police officers during a search are testimonial: ***United States v. Arbolaez,*** 450 F.3d 1283 (11th Cir. 2006): In a marijuana prosecution, the court found error in the admission of statements made by one of the defendant's accomplices to law enforcement officers during a search. The government argued that the statements were offered not for truth but to explain the officers' reactions to the statements. But the court found that "testimony as to the details of statements received by a government agent . . . even when purportedly admitted not for the truthfulness of what the informant said but to show why the agent did what he did after he received that information constituted inadmissible hearsay." The court also found that the accomplice's statements were testimonial under *Crawford,* because they were made in response to questions from police officers.

Joined Defendants

Testimonial hearsay offered by another defendant violates *Crawford* where the

statement can be used against the defendant: ***United States v. Nguyen,*** 565 F.3d 668 (9th Cir. 2009): In a trial of multiple defendants in a fraud conspiracy, one of the defendants offered statements he made to a police investigator. These statements implicated the defendant. The court found that the admission of the codefendant's statements violated the defendant's right to confrontation. The statements were clearly testimonial because they were made to a police officer during an interrogation. The court noted that the confrontation analysis "does not change because a co-defendant, as opposed to the prosecutor, elicited the hearsay statement. The Confrontation Clause gives the accused the right to be confronted with the witnesses against him. The fact that Nguyen's co-counsel elicited the hearsay has no bearing on her right to confront her accusers."

Judicial Findings and Judgments

Judicial findings and an order of judicial contempt are not testimonial: ***United States v. Sine,*** 493 F.3d 1021 (9th Cir. 2007): The court held that the admission of a judge's findings and order of criminal contempt, offered to prove the defendant's lack of good faith in a tangentially related fraud case, did not violate the defendant's right to confrontation. The court found "no reason to believe that Judge Carr wrote the order in anticipation of Sine's prosecution for fraud, so his order was not testimonial."

See also United States v. Ballesteros-Selinger, 454 F.3d 973 (9th Cir. 2006) (holding that an immigration judge's deportation order was nontestimonial because it "was not made in anticipation of future litigation").

Law Enforcement Involvement

Police officer's count of marijuana plants found in a search is testimonial: ***United States v. Taylor,*** 471 F.3d 832 (7th Cir. 2006): The court found plain error in the admission of testimony by a police officer as to the number of marijuana plants found in the search of the defendant's premises. The officer did not himself count all of the plants; part of his total count was based on a hearsay statement of another officer who assisted in the count. The court held that the officer's hearsay statement about the amount of plants counted was clearly testimonial as it was an evaluation prepared for purposes of criminal prosecution.

Social worker's interview of child-victim, with police officers present, was the functional equivalent of interrogation and therefore testimonial: ***Bobadilla v. Carlson,*** 575 F.3d

785 (8th Cir. 2009): The court affirmed the grant of a writ of habeas after a finding that the defendant's state conviction was tainted by the admission of a testimonial statement by the child-victim. A police officer arranged to have the victim interviewed at the police station five days after the alleged abuse. The officer sought the assistance of a social worker, who conducted the interview using a forensic interrogation technique designed to detect sexual abuse. The Court found that "this interview was no different than any other police interrogation: it was initiated by a police officer a significant time after the incident occurred for the purpose of gathering evidence during a criminal investigation." The court found that the only difference between the questioning in this case and that in *Crawford* was that "instead of a police officer asking questions about a suspected criminal violation, he sat silent while a social worker did the same." But the court found that this was "a distinction without a difference" because the interview took place at the police station, it was recorded for use at trial, and the social worker utilized a structured, forensic method of interrogation at the behest of the police. Under the circumstances, the social worker "was simply acting as a surrogate interviewer for the police."

Statements made by a child-victim to a forensic investigator are testimonial: *United States v. Bordeaux,* 400 F.3d 548 (8th Cir. 2005): In a child sex abuse prosecution, the trial court admitted hearsay statements made by the victim to a forensic investigator. The court reversed the conviction, finding among other things that the hearsay statements were testimonial under *Crawford.* The court likened the exchange between the victim and the investigator to a police interrogation. It elaborated as follows:

> The formality of the questioning and the government involvement are undisputed in this case. The purpose of the interview (and by extension, the purpose of the statements) is disputed, but the evidence requires the conclusion that the purpose was to collect information for law enforcement. First, as a matter of course, the center made one copy of the videotape of this kind of interview for use by law enforcement. Second, at trial, the prosecutor repeatedly referred to the interview as a 'forensic' interview . . . That [the victim's] statements may have also had a medical purpose does not change the fact that they were testimonial, because *Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial.

Note: The court's statement that multi-purpose statements might be testimonial is surely correct, but it must be narrowed in light of the Supreme Court's subsequent decision in *Davis.* There, the Court declared that it would find an excited utterance to be testimonial only if the *primary* purpose was to prepare a statement for law enforcement rather than to respond to an emergency.

See also United States v. Eagle, 515 F.3d 794 (8th Cir. 2008) (statements from a child concerning sex abuse, made to a forensic investigator, are testimonial). ***Compare United States v. Peneaux,*** 432 F.3d 882 (8th Cir. 2005) (distinguishing *Bordeaux* where the child's statement was made to a treating physician rather than a forensic investigator, and there was no evidence that the interview

resulted in any referral to law enforcement: "Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial.").

Machines

Printout from machine is not hearsay and therefore does not violate *Crawford*: *United States v. Washington,* 498 F.3d 225 (4th Cir. 2007): The defendant was convicted of operating a motor vehicle under the influence of drugs and alcohol. At trial, an expert testified on the basis of a printout from a gas chromatograph machine. The machine issued the printout after testing the defendant's blood sample. The expert testified to his interpretation of the data issued by the machine — that the defendant's blood sample contained PCP and alcohol. The defendant argued that *Crawford* was violated because the expert had no personal knowledge of whether the defendant's blood contained PCP or alcohol. He read *Crawford* to require the production of the lab personnel who conducted the test. But the court rejected this argument, finding that the machine printout was not hearsay, and therefore its use at trial by the expert could not violate *Crawford* even though it was prepared for use at trial. The court reasoned as follows:

> The technicians could neither have affirmed or denied independently that the blood contained PCP and alchohol, because all the technicians could do was to refer to the raw data printed out by the machine. Thus, the statements to which Dr. Levine testified in court . . . did not come from the out-of-court technicians [but rather from the machine] and so there was no violation of the Confrontation Clause. . . . The raw data generated by the diagnostic machines are the "statements" of the machines themselves, not their operators. But "statements" made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause.

The court noted that the technicians might have needed to be produced to provide a chain of custody, but observed that the defendant made no objection to the authenticity of the machine's report.

Printout from machine is not hearsay and therefore does not violate *Crawford*: *United States v. Moon,* 512 F.3d 359 (7th Cir. 2008): The court held that an expert's testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because "data is not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone."

Electronic tabulation of phone calls is not a statement and therefore cannot be testimonial hearsay: *United States v. Lamons,* 532 F.3d 1251 (11th Cir. 2008): Bomb threats were

called into an airline, resulting in the disruption of a flight. The defendant was a flight attendant accused of sending the threats. The trial court admitted a cd of data collected from telephone calls made to the airline; the data indicated that calls came from the defendant's cell phone at the time the threats were made. The defendant argued that the information on the cd was testimonial hearsay, but the court disagreed, because the information was entirely machine-generated. The court stated that "the witnesses with whom the Confrontation Clause is concerned are *human* witnesses" and that the purposes of the Confrontation Clause "are ill-served through confrontation of the machine's human operator. To say that a wholly machine-generated statement is unreliable is to speak of mechanical error, not mendacity. The best way to advance the truth-seeking process * * * is through the process of authentication as provided in Federal Rule of Evidence 901(b)(9)." The court concluded that there was no hearsay statement at issue and therefore the Confrontation Clause was inapplicable.

Medical Statements

United States v. Peneaux, 432 F.3d 882 (8th Cir. 2005): "Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial."

Miscellaneous

Statement of an accomplice made to his attorney is not testimonial: *Jensen v. Pliler,* 439 F.3d 1086 (9th Cir. 2006): Taylor was in custody for the murder of Kevin James. He confessed the murder to his attorney, and implicated others, including Jensen. After Taylor was released from jail, Jensen and others murdered him because they thought he talked to the authorities. Jensen was tried for the murder of both James and Taylor, and the trial court admitted the statements made by Taylor to his attorney (Taylor's next of kin having waived the privilege). The court found that the statements made by Taylor to his attorney were not testimonial, as they "were not made to a government officer with an eye toward trial, the primary abuse at which the Confrontation Clause was directed." Even under a broader definition of "testimonial", Taylor could not have reasonably expected that his statements would be used in a later trial, as they were made under a promise of confidentiality. Finally, while Taylor's statements amounted to a confession, they were not given to a police officer in the course of interrogation.

Not Offered for Truth

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford*, as they were admitted to provide context for the defendant's own statements: *United States v. Hansen*, 434 F.3d 92 (1st Cir. 2006): After a crime and as part of cooperation with the authorities, the father of an accomplice surreptitiously recorded his conversation with the defendant, in which the defendant admitted criminal activity. The court found that the father's statements during the conversation were testimonial under *Crawford* – as they were made specifically for use in a criminal prosecution. But their admission did not violate the defendant's right to confrontation. The defendant's own side of the conversation was admissible as a statement of a party-opponent, and the father's side of the conversation was admitted not for its truth but to provide context for the defendant's statements. *Crawford* does not bar the admission of statements not offered for their truth. ***Accord United States v. Walter,*** 434 F.3d 30 (1st Cir. 2006) (*Crawford* "does not call into question this court's precedents holding that statements introduced solely to place a defendant's admissions into context are not hearsay and, as such, do not run afoul of the Confrontation Clause."). ***See also Furr v. Brady,*** 440 F.3d 34 (1st Cir. 2006) (the defendant was charged with firearms offenses and intimidation of a government witness; an accomplice's confession to law enforcement did not implicate *Crawford* because it was not admitted for its truth; rather, it was admitted to show that the defendant knew about the confession and, in contacting the accomplice thereafter, intended to intimidate him).

Statements by informant to police officers, offered to prove the "context" of the police investigation, probably violate *Crawford*, but admission is not plain error: *United States v. Maher,* 454 F.3d 13 (1st Cir. 2006): At the defendant's drug trial, several accusatory statements from an informant (Johnson) were admitted ostensibly to explain why the police focused on the defendant as a possible drug dealer. The court found that these statements were testimonial under *Crawford*, because "the statements were made while the police were interrogating Johnson after Johnson's arrest for drugs; Johnson agreed to cooperate and he then identified Maher as the source of drugs. . . . In this context, it is clear that an objectively reasonable person in Johnson's shoes would understand that the statement would be used in prosecuting Maher at trial." The court then addressed the government's argument that the informant's statements were not admitted for their truth, but to explain the context of the police investigation:

> The government's articulated justification — that any statement by an informant to police which sets context for the police investigation is not offered for the truth of the statements and thus not within *Crawford* — is impossibly overbroad [and] may be used not just to get around hearsay law, but to circumvent *Crawford's* constitutional rule. . . . Here, Officer MacVane testified that the confidential informant had said Maher was a drug dealer, even though the prosecution easily could have structured its narrative to avoid such testimony. The . . . officer, for example, could merely say that he had acted upon "information received," or

words to that effect. It appears the testimony was primarily given exactly for the truth of the assertion that Maher was a drug dealer and should not have been admitted given the adequate alternative approach.

The court noted, however, that the defendant had not objected to the admission of the informant's statements. It found no plain error, noting among other things, the strength of the evidence and the fact that the testimony "was followed immediately by a sua sponte instruction to the effect that any statements of the confidential informant should not be taken as standing for the truth of the matter asserted, i.e., that Maher was a drug dealer who supplied Johnson with drugs."

Accomplice statements purportedly offered for "context" were actually admitted for their truth, resulting in a Confrontation Clause violation: *United States v. Cabrera-Rivera,* 583 F.3d 26 (1st Cir. 2009): In a robbery prosecution, the government offered hearsay statements that accomplices made to police officers. The government argued that the statements were not offered for their truth, but rather to explain how the government was able to find other evidence in the case. But the court found that the accusations were not properly admitted to provide context. The government at trial emphasized the details of the accusations that had nothing to do with leading the government to other evidence; and the government did not contend that one of the accomplice's confessions led to any other evidence. Because the statements were testimonial, and because they were in fact offered for their truth, admission of the statements violated *Crawford.*

Statements offered to provide context for the defendant's part of a conversation were not hearsay and therefore could not violate the Confrontation Clause: *United States v. Hicks,* 575 F.3d 130 (1st Cir. 2009): The court found no error in admitting a telephone call that the defendant placed from jail in which he instructed his girlfriend how to package and sell cocaine. The defendant argued that admission of the girlfriend's statements in the telephone call violated *Crawford.* But the court found that the girlfriend's part of the conversation was not hearsay and therefore did not violate the defendant's right to confrontation. The court reasoned that the girlfriend's statements were admissible not for their truth but to provide the context for understanding the defendant's incriminating statements. The court noted that the girlfriend's statements were "little more than brief responses to Hicks's much more detailed statements."

Accomplice's confession, when offered to explain why police did not investigate other suspects and leads, is not hearsay and therefore its admission does not violate *Crawford: United States v. Cruz-Diaz,* 550 F.3d 169 (1st Cir. 2008): In a bank robbery prosecution, defense counsel cross-examined a police officer about the decision not to pursue certain investigatory opportunities after apprehending the defendants. Defense counsel identified "eleven missed opportunities" for tying the defendants to the getaway car, including potential fingerprint and DNA evidence. In response, the officer testified that the defendant's co-defendant had given a detailed confession. The defendant argued that introducing the cohort's confession violated his right to confrontation, because it was testimonial under *Crawford.* But the court found the confession to be not hearsay — as it was offered for the not-for-truth purpose of explaining why the police conducted the investigation the

way they did. Accordingly admission of the statement did not violate *Crawford.*

The defendant argued that the government's true motive was to introduce the confession for its truth, and that the not-for-truth purpose was only a pretext. But the court disagreed, noting that the government never tried to admit the confession until defense counsel attacked the thoroughness of the police investigation. Thus, introducing the confession for a not-for-truth purpose was proper rebuttal. The defendant suggested that "if the government merely wanted to explain why the FBI and police failed to conduct a more thorough it could have had the agent testify in a manner that entirely avoided referencing Cruz's confession" — for example, by stating that the police chose to truncate the investigation "because of information the agent had." But the court held that this kind of sanitization of the evidence was not required, because it "would have come at an unjustified cost to the government." Such generalized testimony, without any context, "would not have sufficiently rebutted Ayala's line of questioning" because it would have looked like one more cover-up. The court concluded that "[w]hile there can be circumstances under which Confrontation Clause concerns prevent the admission of the substance of a declarant's out-of-court statement where a less prejudicial narrative would suffice in its place, this is not such a case."

False alibi statements made to police officers by accomplices are testimonial, but admission does not violate the Confrontation Clause because they are not offered for their truth: *United States v. Logan,* 419 F.3d 172 (2nd Cir. 2005): The defendant was convicted of conspiracy to commit arson. The trial court admitted statements made by his coconspirators to the police. These statements asserted an alibi, and the government presented other evidence indicating that the alibi was false. The court found no Confrontation Clause violation in admitting the alibi statements. The court relied on *Crawford* for the proposition that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than proving the truth of the matter asserted." The statements were not offered to prove that the alibi was true, but rather to corroborate the defendant's own account that the accomplices planned to use the alibi. Thus "the fact that Logan was aware of this alibi, and that [the accomplices] actually used it, was evidence of conspiracy among [the accomplices] and Logan."

Note: The *Logan* court reviewed the defendant's Confrontation Clause argument under the plain error standard. This was because defense counsel at trial objected on grounds of hearsay, but did not make a specific Confrontation Clause objection.

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford,* as they were admitted to provide context for the defendant's statements: *United States v. Paulino,* 445 F.3d 211 (2nd Cir. 2006): The court stated: "It has long been the rule that so long as statements are not presented for the truth of the matter asserted, but only to establish a context, the defendant's Sixth Amendment rights are not transgressed. Nothing in *Crawford v. Washington* is to the contrary."

Co-conspirator statements made to government officials to cover-up a crime (whether true or false) do not implicate *Crawford* because they were not offered for their truth: *United States v. Stewart*, 433 F.3d 273 (2nd Cir. 2006): In the prosecution of Martha Stewart, the government introduced statements made by each of the defendants during interviews with government investigators. Each defendant's statement was offered against the other, to prove that the story told to the investigators was a cover-up. The court held that the admission of these statements did not violate *Crawford,* even though they were "provided in a testimonial setting." It noted first that to the extent the statements were false, they did not violate *Crawford* because "*Crawford* expressly confirmed that the categorical exclusion of out-of-court statements that were not subject to contemporaneous cross-examination does not extend to evidence offered for purposes other than to establish the truth of the matter asserted." The defendants argued, however, that some of the statements made during the course of the obstruction were actually true, and as they were made to government investigators, they were testimonial. The court observed that there is some tension in *Crawford* between its treatment of co-conspirator statements (by definition not testimonial) and statements made to government investigators (by their nature testimonial), where truthful statements are made as part of a conspiracy to obstruct justice. It found, however, that admitting the truthful statements did not violate *Crawford* because they were admitted not for their truth, but rather to provide context for the false statements. The court explained as follows:

> It defies logic, human experience and even imagination to believe that a conspirator bent on impeding an investigation by providing false information to investigators would lace the totality of that presentation with falsehoods on every subject of inquiry. To do so would be to alert the investigators immediately that the conspirator is not to be believed, and the effort to obstruct would fail from the outset. * * * The truthful portions of statements in furtherance of the conspiracy, albeit spoken in a testimonial setting, are intended to make the false portions believable and the obstruction effective. Thus, the truthful portions are offered, not for the narrow purpose of proving merely the truth of those portions, but for the far more significant purpose of showing each conspirator's attempt to lend credence to the entire testimonial presentation and thereby obstruct justice.

Accomplice statements to police officer were testimonial, but did not violate the Confrontation Clause because they were admitted to show they were false: *United States v. Trala,* 386 F.3d 536 (3d Cir. 2004): An accomplice made statements to a police officer that misrepresented her identity and the source of the money in the defendant's car. While these were accomplice statements to law enforcement, and thus testimonial, their admission did not violate *Crawford,* as they were not admitted for their truth. In fact the statements were admitted because they were false. Under these circumstances, cross-examination of the accomplice would serve no purpose. ***See also United States v. Lore,*** 430 F.3d 190 (3d Cir. 2005) (relying on *Trala,* the court held that grand jury testimony was testimonial, but that its admission did not violate the Confrontation Clause because the self-exculpatory statements denying all wrongdoing "were admitted because they were so obviously false.").

Statements made in a civil deposition might be testimonial, but admission does not violate the Confrontation Clause if they are offered to prove they are false: *United States v. Holmes,* 406 F.3d 337 (5th Cir. 2005): The defendant was convicted of mail fraud and conspiracy, stemming from a scheme with a court clerk to file a backdated document in a civil action. The defendant argued that admitting the deposition testimony of the court clerk, given in the underlying civil action, violated his right to confrontation after *Crawford.* The clerk testified that the clerk's office was prone to error and thus someone in that office could have mistakenly backdated the document at issue. The court considered the possibility that the clerk's testimony was a statement in furtherance of a conspiracy, and noted that coconspirator statements ordinarily are not testimonial under *Crawford.* It also noted, however, that the clerk's statement "is not the run-of-the-mill co-conspirator's statement made unwittingly to a government informant or made casually to a partner in crime; rather, we have a co-conspirator's statement that is derived from a formalized testimonial source — recorded and sworn civil deposition testimony." Ultimately the court found it unnecessary to determine whether the deposition testimony was "testimonial" within the meaning of *Crawford* because it was not offered for its truth. Rather, the government offered the testimony "to establish its *falsity* through independent evidence." Statements that are offered for a non-hearsay purpose pose no Confrontation Clause concerns, whether or not they are testimonial, as the Court recognized in *Crawford. See also United States v. Acosta,* 475 F.3d 677 (5th Cir. 2007) (accomplice's statement offered to impeach him as a witness — by showing it was inconsistent with the accomplice's refusal to answer certain questions concerning the defendant's involvement with the crime — did not violate *Crawford* because the statement was not admitted for its truth and the jury received a limiting instruction to that effect).

Informant's accusation, offered to explain why police acted as they did, was testimonial but it was not hearsay, and so its admission did not violate the Confrontation Clause: *United States v. Deitz,* 577 F.3d 672 (6th Cir. 2009): The court found no error in allowing an FBI agent to testify about why agents tailed the defendant to what turned out to be a drug transaction. The agent testified that a confidential informant had reported to them about Deitz's drug activity. The court found that the informant's statement was testimonial — because it was an accusation made to a police officer — but it was not hearsay and therefore its admission did not violate Deitz's right to confrontation. The court found that the testimony "explaining why authorities were following Deitz to and from Dayton was not plain error as it provided mere background information, not facts going to the very heart of the prosecutor's case." The court also observed that "had defense counsel objected to the testimony at trial, the court could have easily restricted its scope." ***See also United States v. Davis***, 577 F.3d 660 (6th Cir. 2009): A woman's statement to police that she had recently seen the defendant with a gun in a car that she described along with the license plate was not hearsay — and so even though testimonial did not violate the defendant's right to confrontation — because it was offered only to explain the police investigation that led to the defendant and the defendant's conduct when he learned the police were looking for him.

Informant's statements were not properly offered for "context," so their admission violated *Crawford*: *United States v. Powers,* 500 F.3d 500 (6th Cir. 2007): In a drug prosecution, a law enforcement officer testified that he had received information about the defendant's prior criminal activity from a confidential informant. The government argued on appeal that even though the informant's statements were testimonial, they did not violate *Crawford*, because they were offered "to show why the police conducted a sting operation" against the defendant. But the court disagreed and found a *Crawford* violation. It reasoned that "details about Defendant's alleged prior criminal behavior were not necessary to set the context of the sting operation for the jury. The prosecution could have established context simply by stating that the police set up a sting operation." ***See also United States v. Hearn***, 500 F.3d 479 (6th Cir.2007) (confidential informant's accusation was not properly admitted for background where the witness testified with unnecessary detail and "[t]he excessive detail occurred twice, was apparently anticipated, and was explicitly relied upon by the prosecutor in closing arguments").

Admitting informant's statement to police officer for purposes of "background" did not violate the Confrontation Clause: *United States v. Gibbs,* 506 F.3d 479 (6th Cir. 2007): In a trial for felon-firearm possession, the trial court admitted a statement from an informant to a police officer; the informant accused the defendant of having firearms hidden in his bedroom. Those firearms were not part of the possession charge. While this accusation was testimonial, its admission did not violate the Confrontation Clause, "because the testimony did not bear on Gibbs's alleged possession of the .380 Llama pistol with which he was charged." Rather, it was admitted "solely as background evidence to show why Gibbs's bedroom was searched."

Admission of the defendant's conversation with an undercover informant does not violate the Confrontation Clause, where the undercover informant's part of the conversation is offered only for "context": *United States v. Nettles,* 476 F.3d 508 (7th Cir. 2007): The defendant made plans to blow up a government building, and the government arranged to put him in contact with an undercover informant who purported to help him obtain materials. At trial, the court admitted a recorded conversation between the defendant and the informant. Because the informant was not produced for trial, the defendant argued that his right to confrontation was violated. But the court found no error, because the admission of the defendant's part of the conversation was not barred by the Confrontation Clause, and the informant's part of the conversation was admitted only to place the defendant's part in "context." Because the informant's statements were not offered for their truth, they did not implicate the Confrontation Clause.

The *Nettles* court did express some concern about the breadth of the "context" doctrine: "We note that there is a concern that the government may, in future cases, seek to submit based on 'context' statements that are, in fact, being offered for their truth." But the court found no such danger in this case, noting the following: 1) the informant presented himself as not being proficient in English, so most of his side of the conversation involved asking the defendant to better explain himself; and 2) the informant did not "put words in Nettles's mouth or try to persuade Nettles to

commit more crimes in addition to those that Nettles had already decided to commit." ***See also United States v. Tolliver,*** 454 F.3d 660 (7th Cir. 2006) (statements of one party to a conversation with a conspirator were offered not for their truth but to provide context to the conspirator's statements: "*Crawford* only covers testimonial statements proffered to establish the truth of the matter asserted. In this case, . . . Shye's statements were admissible to put Dunklin's admissions on the tapes into context, making the admissions intelligible for the jury. Statements providing context for other admissible statements are not hearsay because they are not offered for their truth. As a result, the admission of such context evidence does not offend the Confrontation Clause because the declarant is not a witness against the accused."); ***United States v. Bermea-Boone***, 563 F.3d 621 (7th Cir. 2009): A conversation between the defendant and a coconspirator was properly admitted; the defendant's side of the conversation was a statement of a party-opponent, and the accomplice's side was properly admitted to provide context for the defendant's statements: "Where there is no hearsay, the concerns addressed in *Crawford* do not come in to play. That is, the declarant, Garcia, did not function as a witness against the accused."; ***United States v. York,*** 572 F.3d 415 (7th Cir. 2009) (informant's recorded statements in a conversation with the defendant were admitted for context and therefore did not violate the Confrontation Clause: "we see no indication that Mitchell tried to put words in York's mouth").

Police report offered for a purpose other than proving the truth of its contents is properly admitted even if it is testimonial: *United States v. Price,* 418 F.3d 771 (7th Cir. 2005): In a drug conspiracy trial, the government offered a report prepared by the Gary Police Department. The report was an "intelligence alert"identifying some of the defendants as members of a street gang dealing drugs. The report was found in the home of one of the conspirators. The government offered the report at trial to prove that the conspirators were engaging in counter-surveillance, and the jury was instructed not to consider the accusations in the report as true, but only for the fact that the report had been intercepted and kept by one of the conspirators. The court found that even if the report was testimonial, there was no error in admitting the report as proof of awareness and counter-surveillance. It relied on *Crawford* for the proposition that the Confrontation Clause does not bar the use of out-of-court statements "for purposes other than proving the truth of the matter asserted."

Accusation offered not for truth, but to explain police conduct, was not hearsay and did not violate the defendant's right to confrontation: *United States v. Dodds,* 569 F.3d 336 (7th Cir. 2009): Appealing a firearms conviction, the defendant argued that his right to confrontation was violated when the trial court admitted a statement from an unidentified witness to a police officer. The witness told the officer that a black man in a black jacket and black cap was pointing a gun at people two blocks away. The court found no confrontation violation because "the problem that *Crawford* addresses is the admission of hearsay" and the witness's statement was not hearsay. It was not admitted for its truth — that the witness saw the man he described pointing a gun at people — but rather "to explain why the police proceeded to the intersection of 35th and Galena and focused their attention on Dodds, who matched the description they had been given." The court noted that

the trial judge did not provide a limiting instruction, but also noted that the defendant never asked the court to do so and that the lack of an instruction was not raised on appeal. ***See also United States v. Taylor,*** 569 F.3d 742 (7th Cir. 2009): An accusation from a bystander to a police officer that the defendant had just taken a gun across the street was not hearsay because it was offered to explain the officers' actions in the course of their investigation — "for example, why they looked across the street * * * and why they handcuffed Taylor when he approached." The court noted that absent "complicating circumstances, such as a prosecutor who exploits nonhearsay statements for their truth, nonhearsay testimony does not present a confrontation problem." The court found no "complicating circumstances" in this case.

Accusatory statements offered to explain why an officer conducted an investigation in a certain way are not hearsay and therefore admission does not violate *Crawford: United States v. Brown,* 560 F.3d 754 (8th Cir. 2009): Challenging drug conspiracy convictions, one defendant argued that it was error for the trial court to admit an out-of-court statement from a shooting victim to a police officer. The victim accused a person named "Clean" who was accompanied by a man named Charmar. The officer who took this statement testified that he entered "Charmar" into a database to help identify "Clean" and the database search led him to the defendant. The court found no error in admitting the victim's statement, stating that "it is not hearsay when offered to explain why an officer conducted an investigation in a certain way." The defendant argued that the purported nonhearsay purpose for admitting the evidence "was only a subterfuge to get Williams' statement about Brown before the jury." But the court responded that the defendant "did not argue at trial that the prejudicial effect of the evidence outweighed its nonhearsay value." The court also observed that the trial court twice instructed the jury that the statement was admitted for the limited purpose of understanding why the officer searched the database for Charmar. Finally, the court held that because the statement was not offered for its truth, "it does not implicate the confrontation clause."

Statement offered as foundation for good faith basis for asking question on cross-examination does not implicate *Crawford: United States v. Spears,* 533 F.3d 715 (8th Cir. 2008): In a bank robbery case, the defendant testified and was cross-examined and asked about her knowledge of prior bank robberies. In order to inquire about these bad acts, the government was required to establish to the court a good-faith basis for believing that the acts occurred. The government's good-faith basis was the confession of the defendant's associate to having taken part in the prior robberies. The defendant argued that the associate's statements, made to police officers, were testimonial. But the court held that *Crawford* was inapplicable because the associate's statements were not admitted for their truth — indeed they were not admitted at all. The court noted that there was "no authority for the proposition that use of an out-of-court testimonial statement merely as the good faith factual basis for relevant cross-examination of the defendant at trial implicates the Confrontation Clause."

Admitting testimonial statements that were part of a conversation with the defendant did not violate the Confrontation Clause because they were not offered for their truth: ***United States v. Spencer,*** 592 F.3d 866 (8th Cir. 2010): Affirming drug convictions, the court found no error in admitting tape recordings of a conversation between the defendant and a government informant. The defendant's statements were "admissions by a party-opponent" and admitting the defendant's own statements cannot violate the Confrontation Clause. The informant's statements were not hearsay because they were admitted only to put the defendant's statements in context.

Statements not offered for truth do not violate the Confrontation Clause even if testimonial: ***United States v. Faulkner,*** 439 F.3d 1221 (10th Cir. 2006): The court stated that "it is clear from *Crawford* that the [Confrontation] Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement." ***See also United States v. Mitchell,*** 502 F.3d 931 (9th Cir. 2007) (information given by an eyewitness to a police officer was not offered for its truth but rather "as a basis" for the officer's action, and therefore its admission did not violate the Confrontation Clause).

Accomplice's confession, offered to explain a police officer's subsequent conduct, was not hearsay and therefore did not violate the Confrontation Clause: ***United States v. Jiminez,*** 564 F.3d 1280 (11th Cir. 2009): The court found no plain error in the admission of an accomplice's confession in the defendant's drug conspiracy trial. The police officer who had taken the accomplice's confession was cross-examined extensively about why he had repeatedly interviewed the defendant and about his decision not to obtain a written and signed confession from him. This cross-examination was designed to impeach the officer's credibility and suggest that he was lying about the circumstances of the interviews and about the defendant's confession. In explanation, the officer stated that he approached the defendant the way he did because the accomplice had given a detailed confession that was in conflict with what the defendant had said in prior interviews. The court held that in these circumstances, the accomplice's confession was properly admitted to explain the officer's motivations, and not for its truth. Accordingly its admission did not violate the Confrontation Clause, even though the statement was testimonial.

Note: The court assumed that the accomplice's confession was admitted for a proper, not-for-truth purpose, even though there was no such finding on the record, and the trial court never gave a limiting instruction. Part of the reason for this deference is that the court was operating under a plain error standard. The defendant at trial objected only on hearsay grounds, and this did not preserve any claim of error on confrontation clause grounds. The concurring judge noted, however, "that the better practice in this case would have been for the district court to have given an instruction as to the limited purpose of Detective Wharton's testimony" because "there is no assurance, and much doubt, that a typical jury, on its own, would recognize the limited nature of the evidence."

Present Sense Impression

Present sense impression, describing an event that occurred months before a crime, is not testimonial: ***United States v. Danford,*** 435 F.3d 682 (7th Cir. 2005): The defendant was convicted of insurance fraud after staging a fake robbery of his jewelry store. At trial, one of the employees testified to a statement made by the store manager, indicating that the defendant had asked the manager how to disarm the store alarm. The defendant argued that the store manager's statement was testimonial under *Crawford,* but the court disagreed. The court stated that "the conversation between [the witness] and the store manager is more akin to a casual remark than it is to testimony in the *Crawford*-sense. Accordingly, we hold that the district court did not err in admitting this testimony under Fed.R.Evid. 803(1), the present-sense impression exception to the hearsay rule."

Records, Certificates, Etc.

Reports on forensic testing by law enforcement are testimonial: ***Melendez-Diaz v. Massachusetts,*** 129 S.Ct. 2527 (2009): In a drug case, the trial court admitted three "certificates of analysis" showing the results of the forensic tests performed on the seized substances. The certificates stated that "the substance was found to contain: Cocaine." The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health. The Court, in a highly contentious 5-4 case, held that these certificates were "testimonial" under *Crawford* and therefore admitting them without a live witness violated the defendant's right to confrontation. The majority noted that affidavits prepared for litigation are within the core definition of "testimonial" statements. The majority also noted that the only reason the certificates were prepared was for use in litigation. It stated that "[w]e can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose — as stated in the relevant state-law provision — was reprinted on the affidavits themselves."

The implications of *Melendez-Diaz* — beyond requiring a live witness to testify to the results of forensic tests conducted primarily for litigation — are found in the parts of the majority opinion that address the dissent's arguments that the decision will lead to substantial practical difficulties. These implications are discussed in turn:

1. In a footnote, the majority declared in dictum that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records." Apparently these are more like traditional business records than records prepared primarily for litigation, though the question is close — the reason these records are maintained, with respect to forensic testing equipment, is so that the tests conducted can be admitted as reliable. At any rate, the footnote shows some flexibility, in that not every record involved

in the forensic testing process will necessarily be found testimonial.

2. The dissent argued that forensic testers are not "accusatory" witnesses in the sense of preparing factual affidavits about the crime itself. But the majority rejected this distinction, declaring that the text of the Sixth Amendment "contemplates two classes of witnesses — those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. Contrary to respondent's assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." This statement raises questions about the reasoning of some lower courts that have admitted autopsy reports and other certificates after *Crawford* — these cases are discussed below.

3. Relatedly, the defendant argued that the affidavits at issue were nothing like the affidavits found problematic in the case of Sir Walter Raleigh. The Raleigh affidavits were a substitute for a witness testifying to critical historical facts about the crime. But the majority responded that while the ex parte affidavits in the Raleigh case were the paradigmatic confrontation concern, "the paradigmatic case identifies the core of the right to confrontation, not its limits. The right to confrontation was not invented in response to the use of the ex parte examinations in Raleigh's Case." Again, some lower courts after *Crawford* have distinguished between ministerial affidavits on collateral matters from Raleigh-type ex parte affidavits; this reasoning is in conflict with *Melendez-Diaz.*

4. The majority noted that cross-examining a forensic analyst may be necessary because "[a]t least some of that methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination." This implies that if the evidence is nothing but a machine print-out, it will not run afoul of the Confrontation Clause. As discussed earlier in this Outline, a number of courts have held that machine printouts are not hearsay at all — because a machine can't make a "statement" — and have also held that a machine's output is not "testimony" within the meaning of the Confrontation Clause. This case law appears to survive the Court's analysis in *Melendez-Diaz.*

5. The majority does approve the basic analysis of Federal courts after *Crawford* with respect to business and public records, i.e., that if the record is admissible under FRE 803(6) or 803(8) it is, for that reason, non-testimonial under *Crawford.* For business records, this is because, to be admissible under Rule 803(6), it cannot be prepared primarily for litigation. For public records, this is because law enforcement reports prepared for a specific litigation are excluded under Rule 803(8)(B) and (C).

6. In response to an argument of the dissent, the majority seems to state, at least in dictum, that certificates that merely authenticate proffered documents are not testimonial.

7. As counterpoint to the argument about prior practice allowing certificates

authenticating records, the *Melendez-Diaz* majority cited a line of cases about affidavits offered to prove the absence of a public record.

> Far more probative here are those cases in which the prosecution sought to admit into evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk's statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk's certificate would qualify as an official record under respondent's definition — it was prepared by a public officer in the regular course of his official duties — and although the clerk was certainly not a "conventional witness" under the dissent's approach, the clerk was nonetheless subject to confrontation. See People v. Bromwich, 200 N. Y. 385, 388-389, 93 N. E. 933, 934 (1911).

This passage should probably be read to mean that any use of Rule 803(10) in a criminal case is prohibited.

Lower Court Cases on Records and Certificates Decided Before Melendez-Diaz

Certification of business records under Rule 902(11) is not testimonial: *United States v. Adefehinti,* 519 F.3d 319 (D.C. Cir. 2007): The Court held that a certification of business records under Rule 902(11) was not testimonial even though it was prepared for purposes of litigation. The court reasoned that because the underlying business records were not testimonial, it would make no sense to find the authenticating certificate testimonial. It also noted that Rule 902(11) provided a procedural device for challenging the trustworthiness of the underlying records: the proponent must give advance notice that it plans to offer evidence under Rule 902(11), in order to provide the opponent with a fair opportunity to challenge the certification and the underlying records. The court stated that in an appropriate case, "the challenge could presumably take the form of calling a certificate's signatory to the stand. So hedged, the Rule 902(11) process seems a far cry from the threat of *ex parte* testimony that *Crawford* saw as underlying, and in part defining, the Confrontation Clause." In this case, the Rule 902(11) certificates were used only to admit documents that were acceptable as business records under Rule 803(6), so there was no error in the certificate process.

Note: While 902(11) may still be viable after *Melendez-Diaz*, some of the rationales used by the *Adefehinti* court are now suspect. First, the *Melendez-Diaz* Court seems to reject the argument that the certificate is not testimonial just because the underlying records are nontestimonial. Second, the argument that the defendant can challenge the affidavit by calling the signatory is questionable because the *Melendez-Diaz* majority

rejected the government's argument that any confrontation problem was solved by allowing the defendant to call the analyst. In response to that argument, Justice Scalia stated that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses."

On the other hand, the *Melendez-Diaz* Court held that the Confrontation Clause would not bar the government from imposing a basic notice-and-demand requirement on the defendant. That is, the state could require the defendant to give a pretrial notice of an intent to challenge the evidence, and only then would the government have to produce the witness. But while Rule 902(11) does have a notice and procedure, but there is no provision for a demand for production of government production of a witness.

It can also be argued that 902(11) is simply an authentication provision, and that the *Melendez-Diaz* majority stated, albeit in dicta, that certificates of authenticity are not testimonial. But the problem with that argument is that the certificate does more than establish the genuineness of the business record.

For a further discussion of the possibilities of amending Rule 902(11) in light of *Melendez-Diaz*, see the memo in the agenda book.

Warrant of deportation is not testimonial: ***United States v. Garcia,*** 452 F.3d 36 (1st Cir. 2006): In an illegal reentry case, the defendant argued that his confrontation rights were violated by the admission of a warrant of deportation. The court disagreed, finding that the warrant was not testimonial under *Crawford*. The court noted that every circuit considering the matter has held "that defendants have no right to confront and cross-examine the agents who routinely record warrants of deportation" because such officers have no motivation to do anything other than "mechanically register an unambiguous factual matter."

Other circuits have reached the same result on warrants of deportation. See, e.g., United States v. Valdez-Matos, 443 F.3d 910 (5th Cir. 2006) (warrant of deportation is non-testimonial because "the official preparing the warrant had no motivation other than mechanically register an unambiguous factual matter"); ***United States v. Torres-Villalobos,*** 487 F.3d 607 (8th Cir. 2007) (noting that warrants of deportation "are produced under circumstances objectively indicating that their primary purpose is to maintain records concerning the movements of aliens and to ensure compliance with orders of deportation, not to prove facts for use in future criminal prosecutions."); ***United States v. Bahena-Cardenas,*** 411 F.3d 1067 (9th Cir. 2005) (a warrant of deportation is non-

testimonial "because it was not made in anticipation of litigation, and because it is simply a routine, objective, cataloging of an unambiguous factual matter."); ***United States v. Cantellano,*** 430 F.3d 1142 (11th Cir. 2005) (noting that a warrant of deportation s recorded routinely and not in preparation for a criminal trial").

Note: Warrants of deportation probably still satisfy the Confrontation Clause after *Melendez-Diaz*. Unlike the forensic analysis in that case, a warrant of deportation is prepared for regulatory purposes and is clearly not prepared for the illegal reentry litigation, because by definition the crime has not been committed at the time it's prepared. Warrants of deportation are more akin to certificates of maintenance of forensic equipment, which the Court found to be nontestimonial in *Melendez-Diaz*. As seen below, post-*Melendez-Diaz* courts have found warrants of deportation to be non-testimonial.

Proof of absence of business records is not testimonial: *United States v. Munoz-Franco,* 487 F.3d 25 (1st Cir. 2007): In a prosecution for bank fraud and conspiracy, the trial court admitted the minutes of the Board and Executive Committee of the Bank. The defendants did not challenge the admissibility of the minutes as business records, but argued that it was constitutional error to allow the government to rely on the absence of certain information in the minutes to prove that the Board was not informed about such matters. The court rejected the defendants' confrontation argument in the following passage:

> Although the Court has yet to articulate a precise definition of "testimonial," it is beyond debate that the Board minutes are nontestimonial in character and, consequently, outside the class of statements prohibited by the Confrontation Clause. The Court in *Crawford* plainly characterizes business records as "statements that by their nature [are] not testimonial." 541 U.S. at 56. If business records are nontestimonial, it follows that the absence of information from those records must also be nontestimonial.

Note: This analysis appears unaffected by *Melendez-Diaz*, as no certificate or affidavit is involved.

Autopsy reports are not testimonial: *United States v. Feliz,* 467 F.3d 227 (2d Cir. 2006): Affirming racketeering convictions, the court found no error in the admission of autopsy reports offered to prove the manner and the cause of death of nine victims. The court held that the autopsy reports were properly admitted as both business records under Rule 803(6) and as public records under Rule 803(8)(B). The court concluded that to be admissible under either of these exceptions, the record could not be testimonial within the meaning of *Crawford*. Put another way, the court declared that if a record were testimonial, it could not by definition meet the admissibility requirements of either exception. With respect to business records, the court noted that Rule 803(6)

cannot be used to admit a record that is prepared primarily for purposes of litigation. So by definition to be admissible under Rule 803(6) the record cannot be testimonial within the meaning of *Crawford* and *Davis*. The court recognized that a medical examiner may anticipate that an autopsy report might later on be used in a criminal case. But the court stated that mere anticipation of use in litigation was not enough to make the record testimonial. It noted that the Supreme Court had not embraced such a broad definition of "testimonial." With respect to Rule 803(8)(B), the court observed that the rule "excludes documents prepared for the ultimate purpose of litigation, just as does Rule 803(6)." The court also reasoned that an extreme application of the term "testimonial" would impose unnecessary burdens on the government without a corresponding gain in the truth-seeking process. The court noted the "practical difficulties" of proving cause and manner of death if the report is found inadmissible:

> Years may pass between the performance of the autopsy and the apprehension of the perpetrator. This passage of time can easily lead to the unavailability of the examiner who prepared the report. Moreover, medical examiners who regularly perform hundreds of autopsies are unlikely to have any independent recollection of the autopsy at issue in a particular case and in testifying invariably rely entirely on the autopsy report. Unlike other forensic tests, an autopsy cannot be replicated by another pathologist. Certainly it would be against society's interest to permit the unavailability of the medical examiner who prepared the report to preclude the prosecution of a homicide case.

Note: The court's emphasis on a practical result is problematic under the majority's analysis in *Melendez-Diaz*. The dissenters in *Melendez-Diaz* argued vehemently that requiring live testimony of the analyst would be impractical and would impose substantial and sometimes insurmountable obligations on the government. The majority's response was that it had no authority to consider burdens, because the certificate was testimonial and admission of testimonial hearsay in the absence of cross-examination violates the Confrontation Clause.

This does not mean, however, that autopsy reports are necessarily testimonial after *Melendez-Diaz*. The forensic report in *Melendez-Diaz* was prepared *solely* for litigation and so fit squarely within the Court's definition of "testimonial." Under *Davis*, it is not enough that a report might foreseeably be used in a litigation — use in litigation has to be the *primary purpose* of the report. Under that test, a good argument can still be made that autopsy reports are not testimonial. And notably, the *Melendez-Diaz* Court agreed with the argument that if a report is admissible under Rule 803(6) or (8), it is by that fact non-testimonial — because in order to be admissible under those exceptions, it can't be prepared primarily for purposes of litigation.

Certificate of the non-existence of a public record found not testimonial: ***United States v. Rueda-Rivera,*** 396 F.3d 678 (5th Cir. 2005): The defendant was charged with being found in the United States after deportation, without having obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security. To prove the lack of approval, the government offered a Certificate of Nonexistence of Record (CNR). The CNR was prepared by a government official specifically for this litigation. The court found that the record was not "testimonial" under *Crawford*, declaring as follows:

> The CNR admitted into evidence in this case, reflecting the absence of a record that Rueda-Rivera had received consent to re-enter the United States, does not fall into the specific categories of testimonial statements referred to in *Crawford.* We decline to extend *Crawford* to reach such a document.

Other courts have found that certificates proving the absence of public records are not testimonial. See, e.g.: United States v. Urqhart, 469 F.3d 745 (8th Cir. 2006) (arguing that a CNR "is similar enough to a business record that it is nontestimonial under *Crawford.*"); ***United States v. Cervantes-Flores,*** 421 F.3d 825 (9th Cir. 2005) (noting that while the *certificate* was prepared for litigation, the underlying records were not — though this misses the point that while the underlying records are not testimonial, the certificate as to their existence or non-existence would still be so because the certificate is prepared solely for purposes of litigation).

> **Note: For reasons discussed in the analysis of *Melendez-Diaz, supra,* it is likely that CNR's are testimonial, and that the above cases are no longer good law. Certificates offered to prove the absence of a public record are prepared solely for purposes of litigation. Nor is it relevant under *Melendez-Diaz* that the records are not about contested historical facts like the *ex parte* testimony in the Raleigh case. *See United States v. Norwood,* 595 F.3d 1025 (9th Cir. 2010) (after *Melendez-Diaz,* government concedes that certificate of the absence of a public record, prepared for trial, was testimonial).**
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> **For a discussion about a possible amendment to Rule 803(10), see the memo in the agenda book.**

Business records are not testimonial: ***United States v. Jamieson,*** 427 F.3d 394 (6th Cir. 2005): In a prosecution involving fraudulent sale of insurance policies, the government admitted summary evidence under Rule 1006. The underlying records were essentially business records. The court found that admitting the summaries did not violate the defendant's right to confrontation. The underlying records were not testimonial under *Crawford* because they did not "resemble the formal statement or solemn declaration identified as testimony by the Supreme Court." ***See also United States v. Baker,*** 458 F.3d 513 (6th Cir. 2006) ("The government correctly points out that business

records are not testimonial and therefore do not implicate the Confrontation Clause concerns of *Crawford*.").

Note: The court's analysis of business records appears unaffected by *Melendez-Diaz*, because the records were not prepared for litigation and no certificate or affidavit was prepared for use in the litigation.

Post office box records are not testimonial: *United States v. Vasilakos*, 508 F.3d 401 (6th Cir. 2007): The defendants were convicted of defrauding their employer, an insurance company, by setting up fictitious accounts into which they directed unearned commissions. The checks for the commissions were sent to post office boxes maintained by the defendants. The defendants argued that admitting the post office box records at trial violated their right to confrontation. But the court held that the government established proper foundation for the records through the testimony of a postal inspector, and that the records were therefore admissible as business records; the court noted that "the Supreme Court specifically characterizes business records as non-testimonial."

Note: The court's analysis of business records is unaffected by *Melendez-Diaz*.

Drug test prepared by a hospital with knowledge of possible use in litigation is not testimonial; certification of that business record under Rule 902(11) is not testimonial: *United States v. Ellis*, 460 F.3d 920 (7th Cir. 2006): In a trial for felon gun possession, the trial court admitted the results of a drug test conducted on the defendant's blood and urine after he was arrested. The test was conducted by a hospital employee named Kristy, and indicated a positive result for methamphetamine. At trial, the hospital record was admitted without a qualifying witness; instead, a qualified witness prepared a certification of authenticity under Rule 902(11). The court held that neither the hospital record nor the certification were testimonial within the meaning of *Crawford* and *Davis* — despite the fact that both records were prepared with the knowledge that they were going to be used in a prosecution.

As to the medical reports, the *Ellis* court concluded as follows:

> While the medical professionals in this case might have thought their observations would end up as evidence in a criminal prosecution, the objective circumstances of this case indicate that their observations and statements introduced at trial were made in nothing else but the ordinary course of business. Therefore, when these professionals made those observations, they--like the declarant reporting an emergency in *Davis*--were "not acting as . . . witness[es];" and were "not testifying." See *Davis*, 126 S. Ct. at 2277. They were employees simply recording observations which, because they were made in the ordinary course of business, are "statements that by their nature were not testimonial." *Crawford*, 541 U.S. at 56.

Note: *Ellis* is cited by the dissent in *Melendez-Diaz* (not a good thing for its continued

viability), and the circumstances of preparing the toxic screen in *Ellis* are certainly similar to those in *Melendez-Diaz*. That said, toxicology tests conducted by private organizations may be found nontestimonial if it can be shown that law enforcement was not involved in or managing the testing. The *Melendez-Diaz* majority emphasized that the forensic analyst knew that the test was being done for a prosecution, as that information was right on the form. Essentially, after *Melendez-Diaz*, the less the tester knows about the use of the test, and the less involvement by the government, the better for admissibility.

As to the certification of business record, prepared under Rule 902(11) specifically to qualify the medical records in this prosecution, the *Ellis* court similarly found that it was not testimonial because the records that were certified were prepared in the ordinary course, and the certifications were essentially ministerial. The court explained as follows:

> As should be clear, we do not find as controlling the fact that a certification of authenticity under 902(11) is made in anticipation of litigation. What is compelling is that *Crawford* expressly identified business records as nontestimonial evidence. Given the records themselves do not fall within the constitutional guarantee provided by the Confrontation Clause, it would be odd to hold that the foundational evidence authenticating the records do. We also find support in the decisions holding that a CNR is nontestimonial. A CNR is quite like a certification under 902(11); it is a signed affidavit attesting that the signatory had performed a diligent records search for any evidence that the defendant had been granted permission to enter the United States after deportation.
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> The certification at issue in this case is nothing more than the custodian of records at the local hospital attesting that the submitted documents are actually records kept in the ordinary course of business at the hospital. The statements do not purport to convey information about Ellis, but merely establish the existence of the procedures necessary to create a business record. They are made by the custodian of records, an employee of the business, as part of her job. As such, we hold that written certification entered into evidence pursuant to Rule 902(11) is nontestimonial just as the underlying business records are. Both of these pieces of evidence are too far removed from the "principal evil at which the Confrontation Clause was directed" to be considered testimonial.
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> **Note: As discussed in the treatment of *Melendez-Diaz* earlier in this outline, the fact that the certificate conveys no personal information about Ellis is not dispositive, because the information imparted is being used against Ellis. Moreover, the certificate is prepared exclusively for use in litigation. See the separate memo in the agenda book on the advisability of amending Rule 902(11) and other Federal Rules in light of *Melendez-Diaz*.**

Odometer statements, prepared before any crime of odometer-tampering occurred, are not testimonial: *United States v. Gilbertson*, 435 F.3d 790 (7th Cir. 2006): In a prosecution for odometer-tampering, the government proved its case by introducing the odometer statements prepared when the cars were sold to the defendant, and then calling the buyers to testify that the mileage on the odometers when they bought their cars was substantially less than the mileage set forth on the odometer statements. The defendant argued that introducing the odometer statements violated *Crawford.* He contended that the odometer statements were essentially formal affidavits, the very kind of evidence that most concerned the Court in *Crawford.* But the court held that the concern in *Crawford* was limited to affidavits prepared for trial as a testimonial substitute. This concern did not apply to the odometer statements. The court explained as follows:

> The odometer statements in the instant case are not testimonial because they were not made with the respective declarants having an eye towards criminal prosecution. The statements were not initiated by the government in the hope of later using them against Gilbertson (or anyone else), nor could the declarants (or any reasonable person) have had such a belief. The reason is simple: each declaration was made *prior* to Gilbertson even engaging in the crime. Therefore, there is no way for the sellers to anticipate that their statements regarding the mileage on the individual cars would be used as evidence against Gilbertson for a crime he commits in the future.

Note: this result is unaffected by *Melendez-Diaz* as the records clearly were not prepared for purposes of litigation.

Tax returns are business records and so not testimonial: *United States v. Garth*, 540 F.3d 766 (8th Cir. 2008): The defendant was accused of assisting tax filers to file false claims. The defendant argued that the her right to confrontation was violated when the trial court admitted some tax returns of the filers. But the court found no error. The tax returns were business records, and the defendant made no argument that they were prepared for litigation, "as is expected of testimonial evidence."

Note: this result is unaffected by *Melendez-Diaz.*

Certificate of a record of a conviction found not testimonial: *United States v. Weiland,* 420 F.3d 1062 (9th Cir. 2006): The court held that a certificate of a record of conviction prepared by a public official was not testimonial under *Crawford*: "Not only are such certifications a 'routine cataloguing of an unambiguous factual matter,' but requiring the records custodians and other officials from the various states and municipalities to make themselves available for cross-examination in the countless criminal cases heard each day in our country would present a serious logistical challenge without any apparent gain in the truth-seeking process. We decline to so extend *Crawford*, or to interpret it to apply so broadly."

Note: **The reliance on burdens in countless criminal cases is precisely the argument that was rejected in *Melendez-Diaz.* Nonetheless, certificates of conviction may still be found non-testimonial, because the *Melendez-Diaz* majority states, albeit in dicta, that a certificate is not testimonial if it does nothing more than authenticate another document.**

Absence of records in database is not testimonial; and drug ledger is not testimonial: ***United States v. Mendez,*** 514 F.3d 1035 (10th Cir. 2008): In an illegal entry case, an agent testified that he searched the ICE database for information indicating that the defendant entered the country legally, and found no such information. The ICE database is "a nation-wide database of information which archives records of entry documents, such as permanent resident cards, border crossing cards, or certificates of naturalization." The defendant argued that the entries into the database (or the asserted lack of entries in this case) were testimonial. But the court disagreed, because the records "are not prepared for litigation or prosecution, but rather administrative and regulatory purposes." The court also observed that Rule 803(8) tracked *Crawford* exactly: a public record is admissible under Rule 803(8) unless it is prepared with an eye toward litigation or prosecution; and under *Crawford,* "the very same characteristics that preclude a statement from being classified as a public record are likely to render the statement testimonial."

Mendez also involved drug charges, and the defendant argued that admitting a drug ledger with his name on it violated his right to confrontation under *Crawford.* The court also rejected this argument. It stated first that the entries in the ledger were not hearsay at all, because they were offered to show that the book was a drug ledger and thus a "tool of the trade." As the entries were not offered for truth, their admission could not violate the Confrontation Clause. But the court further held that even if the entries were offered for truth, they were not testimonial, because "[a]t no point did the author keep the drug ledger for the *primary purpose* of aiding police in a criminal investigation, the focus of the *Davis* inquiry." (emphasis the court's). The court noted that it was not enough that the statements were relevant to a criminal prosecution, otherwise "any piece of evidence which aids the prosecution would be testimonial."

Note: Both holdings in the above case survive *Melendez-Diaz.* The first holding is only about the absence of public records — records that were not prepared in testimonial circumstances. If that absence had been proved by a *certificate,* then the Confrontation Clause, after *Melendez-Diaz,* would have been violated. But the absence was proved by a testifying agent. The second holding states the accepted proposition that business records admissible under Rule 803(6) are, for that reason, non-testimonial.

Lower Court Cases on Records and Certificates After Melendez-Diaz

Records of sales at a pharmacy are business records and not testimonial under *Melendez-Diaz: United States v. Masher,* 606 F.3d 922 (8th Cir. 2010): The defendant was convicted of attempt to manufacture methamphetamine. At trial the court admitted logbooks from local pharmacies to prove that the defendant made frequent purchases of pseudoephedrine. The defendant argued that the logbooks were testimonial under *Melendez-Diaz,* but the court disagreed and affirmed his conviction. The court first noted that the defendant probably waived his confrontation argument because at trial he objected only on the evidentiary grounds of hearsay and Rule 403. But even assuming the defendant preserved his confrontation argument, "*Melendez-Diaz* does not provide him any relief. The pseudoephedrine logs were kept in the ordinary course of business pursuant to Iowa law and are business records under Federal Rule of Evidence 803(6). Business records under Rule 803(6) are not testimonial statements; *see Melendez-Diaz,* 129 S.Ct. At 2539-40 (explaining that business records are typically not testimonial))."

> **Note that the court in *Masher* makes the broad statement that business records are not testimonial, and then cites *Melendez-Diaz* for the proposition that business records are *typically* not testimonial.**

Government concedes a *Melendez-Diaz* error in admitting affidavit on the absence of a public record: *United States v. Norwood,* 603 F.3d 1063 (9th Cir. 2010): In a drug case, the government sought to prove that the defendant had no legal source for the large amounts of cash found in his car. The trial court admitted an affidavit of an employee of the Washington Department of Employment Security, which certified that a diligent search failed to disclose any record of wages reported for the defendant in a three-month period before the crime. On appeal, the government conceded that the affidavit was erroneously admitted in light of the intervening decision in *Melendez-Diaz.* (The court found the error to be harmless).

CNR is testimonial but a warrant of deportation is not: *United States v. Orozco-Acosta,* 607 F.3d 1156 (9th Cir. 2010): In an illegal reentry case, the government proved removal by introducing a warrant of deportation under Rule 803(8), and it proved unpermitted reentry by introducing a certificate of non-existence of permission to reenter (CNR) under Rule 803(10). The trial was conducted and the defendant convicted before *Melendez-Diaz.* On appeal, the government conceded that introducing the CNR violated the defendant's right to confrontation because under *Melendez-Diaz* the record is testimonial. The court in a footnote agreed with the government's concession, stating that its previous cases holding that CNRs were not testimonial were "clearly inconsistent with *Melendez-Diaz*" because like the certificates in that case, a CNR is prepared solely for purposes of litigation. In contrast, however, the court found that the warrant of deportation was properly admitted even under *Melendez-Diaz.* The court reasoned that "neither a warrant of

removal's sole purpose nor even its primary purpose is use at trial." It explained that a warrant of removal must be prepared in every case resulting in a final order of removal, and only a "small fraction of these warrants are used in immigration prosecutions." The court concluded that "*Melendez-Diaz* cannot be read to establish that the mere possibility that a warrant of removal — or, for that matter, any business or public record — could be used in a later criminal prosecution renders it testimonial under *Crawford*." The court found that the error in admitting the CNR was harmless and affirmed the conviction.

Immigration forms containing biographical data, country of origin, etc. are not testimonial: *United States v. Caraballo,* 595 F.3d 1214 (11th Cir. 2010): In an alien smuggling case, the trial court admitted I-213 forms prepared by an officer who found aliens crammed into a small room in a boat near the shore of the United States. The forms contained basic biographical information, and were used at trial to prove that the persons were aliens and not admittable. The defendant argued that the forms were inadmissible hearsay and also testimonial. The court of appeals found no error. On the hearsay question, the court held that the forms were properly admitted as public records — the exclusion of law enforcement records in Rule 803(8) did not apply because the forms were routine and nonadversarial documents requested from every alien entering the United States. Nor were the forms testimonial, even after *Melendez-Diaz.* The court distinguished *Melendez-Diaz* in the following passage:

> Like a Warrant of Deportation * * * (and unlike the certificates of analysis in Melendez-Diaz), the basic biographical information recorded on the I-213 form is routinely requested from every alien entering the United States, and the form itself is filled out for anyone entering the Untied States without proper immigration papers. * * * Rose gathered that biographical information from the aliens in the normal course of administrative processing at the Pembroke Pines Border Patrol Station in Pembroke Pines, Florida. * * *
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> The I-213 form is primarily used as a record by the INS for the purpose of tracking the entry of aliens into the United States. This routine, objective cataloging of unambiguous biographical matters becomes a permanent part of every deportable/inadmissible alien's A-File. It is of little moment that an incidental or secondary use of the interviews underlying the I-213 forms actually furthered a prosecution. The Supreme Court has instructed us to look only at the *primary* purpose of the law enforcement officer's questioning in determining whether the information elicited is testimonial. See *Davis*, 547 U.S. at 828, 830 (focusing on the primary purpose of the 911 operator's interrogation in determining whether the answers elicited were testimonial). The district court properly ruled that the primary purpose of Rose's questioning of the aliens was to elicit routine biographical information that is required of every foreign entrant for the proper administration of our immigration laws and policies. The district court did not violate Caraballo's constitutional rights in admitting the smuggled aliens's redacted I-213 forms.

State of Mind Statements

Statement admissible under the state of mind exception is not testimonial: *Horton v. Allen,* 370 F.3d 75 (1st Cir. 2004): Horton was convicted of drug-related murders. At his state trial, the government offered hearsay statements from Christian, Horton's accomplice. Christian had told a friend that he was broke; that he had asked a drug supplier to front him some drugs; that the drug supplier declined; and that he thought the drug supplier had a large amount of cash on him. These statements were offered under the state of mind exception to show the intent to murder and the motivation for murdering the drug supplier. The court held that Christian's statements were not "testimonial" within the meaning of *Crawford.* The court explained that the statements "were not ex parte in-court testimony or its equivalent; were not contained in formalized documents such as affidavits, depositions, or prior testimony transcripts; and were not made as part of a confession resulting from custodial examination. . . .In short, Christian did not make the statements under circumstances in which an objective person would reasonably believe that the statement would be available for use at a later trial."

Testifying Declarant

Cross-examination sufficient to admit prior statements of the witness that were testimonial: *United States v. Acosta,* 475 F.3d 677 (5th Cir. 2007): The defendant's accomplice testified at his trial, after informing the court that he did not want to testify, apparently because of threats from the defendant. After answering questions about his own involvement in the crime, he refused on direct examination to answer several questions about the defendant's direct participation in the crime. At that point the government referenced statements made by the accomplice in his guilty plea. On cross-examination, the accomplice answered all questions; the questioning was designed to impeach the accomplice by showing that he had a motive to lie so that he could receive a more lenient sentence. The government then moved to admit the accomplice's statements made to qualify for a safety valve sentence reduction — those statements directly implicated the defendant in the crime. The court found that statements made pursuant to a guilty plea and to obtain a safety valve reduction were clearly testimonial. However, the court found no error in admitting these statements, because the accomplice was at trial subject to cross-examination. The court noted that the accomplice admitted making the prior statements, and answered every question he was asked on cross-examination. While the cross-examination did not probe into the underlying facts of the crime or the accomplice's previous statements implicating the defendant, the court noted that "Acosta could have probed either of these subjects on cross-examination." The accomplice was therefore found sufficiently subject to cross-examination to satisfy the Confrontation Clause.

Crawford* inapplicable where hearsay statements are made by a declarant who testifies at trial: *United States v. Kappell, 418 F.3d 550 (6th Cir. 2005): In a child sex abuse prosecution, the victims testified and the trial court admitted a number of hearsay statements the victims made to social workers and others. The defendant claimed that the admission of hearsay violated his right to confrontation under *Crawford.* But the court held that *Crawford* by its terms is inapplicable if the hearsay declarant is subject to cross-examination at trial. The defendant complained that the victims were unresponsive or inarticulate at some points in their testimony, and therefore they were not subject to effective cross-examination. But the court found this claim foreclosed by *United States v. Owens,* 484 U.S. 554 (1988). Under *Owens*, the Constitution requires only an opportunity for cross-examination, not cross-examination in whatever way the defendant might wish. The defendant's complaint was that his cross-examination would have been more effective if the victims had been older. "Under *Owens,* however, that is not enough to establish a Confrontation Clause violation."

Admission of testimonial statements does not violate the Confrontation Clause because declarant testified at trial — even though the declarant did not recall making the statements: *Cookson v. Schwartz,* 556 F.3d 647 (7th Cir. 2009): In a child sex abuse prosecution, the trial court admitted the victim's hearsay statements accusing the defendant. These statements were testimonial. The victim then testified at trial, describing some incidents perpetrated by the defendant. But the victim could not remember making any of the hearsay statements that had previously been admitted. The court found no error in admitting the victim's testimonial hearsay, because the victim had been subjected to cross-examination at trial. The defendant argued that the victim was in effect unavailable because she lacked memory. But the court found this argument was foreclosed by *United States v. Owens,* 484 U.S. 554 (1988). The court noted that the defendant in this case was better off than the defendant in *Owens* because the victim in this case "could remember the underlying events described in the hearsay statements."

Statements to police officers implicating the defendant in the conspiracy are testimonial, but no confrontation violation because the declarant testified: *United States v. Allen,* 425 F.3d 1231 (9th Cir. 2005): The court held that a statement made by a former coconspirator to a police officer, after he was arrested, identifying the defendant as a person recruited for the conspiracy, was testimonial. There was no error in admitting this statement, however, because the declarant testified at trial and was cross-examined.

Admitting hearsay accusation did not violate the right to confrontation where the declarant testified and was subject to cross-examination about the statement: *United States v. Pursley,* 577 F.3d 1204 (10th Cir. 2009): A victim of a beating identified the defendant as his assailant to a federal marshal. That accusation was admitted at trial as an excited utterance. The victim testified at trial to the underlying event, and he also testified that he made the accusation, but

he did not testify on either direct or cross-examination *about* the statement. The defendant argued that admitting the hearsay statement violated his right to confrontation. The court assumed arguendo that the accusation was testimonial — even though it had been admitted as an excited utterance. But even if it was testimonial hearsay, the defendant's confrontation rights were not violated because he had a full opportunity to cross-examine the victim about the statement. The court stated that the defendant's "failure to seize this opportunity demolishes his Sixth Amendment claim." The court observed that the defendant had a better opportunity to confront the victim "than defendants have had when testifying declarants have indicated that they cannot remember their out-of-court statements. Yet, courts have found no Confrontation Clause violation in that situation." The Court also stated that "an excited utterance is not per se excluded from the Confrontation Clause."

Statement to Police Admissible as Past Recollection Recorded is Testimonial But Admission Does Not Violate the Right to Confrontation: *United States v. Jones*, 601 F.3d 1247 (11th Cir. 2010): Affirming firearms convictions, the court held that the trial judge did not abuse discretion in admitting as past recollection recorded a videotaped police interview of a 16-year-old witness who sold a gun to the defendant and rode with him to an area out of town where she witnessed the defendant shoot a man. The court also rejected a Confrontation Clause challenge. Even though the videotaped statement was testimonial, the declarant testified at trial and was subject to unrestricted cross-examination.

Cases Discussing the Impact of the Confrontation Clause on Non-Testimonial Hearsay After Crawford

Supreme Court

Clear statement and holding that *Crawford* overruled *Roberts* even with respect to non-testimonial hearsay: *Whorton v. Bockting*, 549 U.S. 406 (2007): The habeas petitioner argued that testimonial hearsay was admitted against him in violation of *Crawford.* His trial was conducted ten years before *Crawford*, however, and so the question was whether *Crawford* applies retroactively to benefit habeas petitioners. Under Supreme Court jurisprudence, a new rule is applicable on habeas only if it is a "watershed" rule that is critical to the truthseeking function of a trial. The Court found that *Crawford* was a new rule because it overruled *Roberts.* It further held that *Crawford* was not essential to the truthseeking function; its analysis on this point is pertinent to whether *Roberts* retains any vitality with respect to non-testimonial hearsay. The Court declared as follows:

> *Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the Confrontation Clause, not because the Court reached the conclusion that the overall effect of the *Crawford* rule would be to improve the accuracy of fact finding in criminal trials. Indeed, in *Crawford* we recognized that even under the *Roberts* rule, this Court had never specifically approved the introduction of testimonial hearsay statements. Accordingly, it is not surprising that the overall effect of *Crawford* with regard to the accuracy of fact-finding in criminal cases is not easy to assess.
>
> With respect to *testimonial* out-of-court statements, *Crawford* is more restrictive than was *Roberts*, and this may improve the accuracy of fact-finding in some criminal cases. Specifically, under *Roberts* , there may have been cases in which courts erroneously determined that testimonial statements were reliable. But see 418 F.3d at 1058 (O'Scannlain, J., dissenting from denial of rehearing en banc) (observing that it is unlikely that this occurred "in anything but the exceptional case"). *But whatever improvement in reliability Crawford produced in this respect must be considered together with Crawford's elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under Roberts, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under Crawford, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.* (Emphasis added).

One of the main reasons that *Crawford* in not retroactive (the holding) is that it is not essential to the accuracy of a verdict. And one of the reasons *Crawford* is not essential to accuracy is that, with respect to non-testimonial statements, *Crawford* conflicts with accurate factfinding because it lifts all constitutional reliability requirements imposed by *Roberts.* Thus, if hearsay is non-testimonial, there is no constitutional limit on its admission.

See also United States v. Barraza, 576 F.3d 798 (8th Cir. 2009) (defendant could not rely on *Roberts* test to exclude non-testimonial hearsay admissible under Rule 803(3) as a statement of the victim's state of mind).

TAB 5

MEMORANDUM

To: Advisory Committee on Evidence Rules

From: Ken Broun, Consultant, and Dan Capra, Reporter

Re: Rule 410

Date: September 15, 2010

The American College of Trial Lawyers provided a detailed public comment suggesting changes to proposed Restyled Rule 410. The Evidence Rules Committee reviewed the comment and determined that most of the suggestions for change were substantive --- a point recognized by the College itself. The Evidence Rules Committee suggested that it review the suggestions after the Restyling Project was concluded. This memorandum is a preliminary attempt to deal with the College's concerns.

The ACTL's Concerns

The College's statement is, like many things involving Rule 410, difficult to fathom. We have included the entire statement at the end of this memorandum, but it is probably useful for the Committee for us to summarize their major concerns.

Most of the College's statement goes to the problems that may occur when a *cooperating witness*, rather than the defendant, testifies. The College believes that Rule 410 has been interpreted by some lawyers and courts to limit the ability to impeach a cooperator with statements made in plea negotiations that did not result in a final plea of guilty. Statements made by the cooperator under these circumstances may be useful to the defense in impeachment. The College suggests that defense lawyers do not ask for such statements and that government counsel do not disclose them under *Brady* or *Giglio* because of the supposed protections under Rule 410 that would render them inadmissible.

The College is also concerned that the Rule is unclear about pleas that are deferred, conditional or later rejected by the court as opposed to "withdrawn" by the defendant. Again, this problem is most likely to be raised with regard to a cooperating witness as opposed to the defendant.

We conclude that most of the College's substantive concerns are answered if Rule 410 does not apply to witnesses as opposed to the defendant in a criminal case or party in a civil case. Therefore most of this memorandum focuses on that question. The College's statement also seems to express some

doubt as to whether the Rule protects statements made by defense counsel as opposed to the defendant himself. We will also address that issue --- but only briefly because the existing Rule clearly *does* apply to defense counsel's statements.

Matters Previously Before the Committee

The Committee considered amending Rule 410 in 2003 and 2004. Dan Capra prepared a memorandum, dated April 2, 2004, dealing with the possibility of particular amendments to the Rule and recounting the history of the Committee's deliberations up to that point. Dan's memorandum is attached.

Dan's memorandum dealt primarily with two issues: 1) should the rule be amended to provide specifically that statements by a prosecutor would be excluded under the same circumstances as statements by the defendant? 2) should the rule be amended to provide specifically that rejected or vacated pleas be given the same status as withdrawn pleas? (This second question is identical to one raised by the College, as discussed above).

Dan thoroughly reviewed the existing case law on both of these issues and drafted a possible amendment to the rule that would protect government statements and include rejected or vacated claims. There is not much new case law on these issues since 2004, but we will briefly note some newer authority at the end of this memorandum.

At its Spring, 2004, meeting, the Committee decided not to amend Rule 410. The basis for the decision with regard to the specific mention of government statements was that no reported case had failed to protect government statements, although the reasoning of some of the cases was questionable. The Committee also had concerns that the amendment might have some problematic results in some cases. For example, the rule might limit the ability of a defendant to show he was a victim of prosecutorial misconduct or selective prosecution.

The Committee had already decided that there was no need to add provisions dealing with rejected or vacated pleas unless the Rule was otherwise being amended.

A copy of the minutes of the Spring 2004 meeting --- recounting the Committee's decision not to proceed with an amendment to Rule 410 --- is attached.

The Applicability of Rule 410 to Cooperating Witnesses

As indicated above, the College's concerns largely depend upon an interpretation of the Rule 410 that protects withdrawn pleas or related statements made by cooperating prosecution witnesses rather than simply protecting the defendant in a subsequent action.

At least arguably, the language of the Rule is ambiguous and could be construed to protect non-party witnesses: As restyled, the Rule provides that in "a civil or criminal case" certain plea information is not admissible "against the defendant who made the plea or was a participant in the plea discussions." "Defendant" could refer to the person's status at the time when the statements were made or plea entered, and not at the time the evidence is offered at trial. Under this theory the use of the information to impeach that person as a non-party witness could be construed as use "against" that person. The argument could further be bolstered by the fact that the rule refers to both civil and criminal cases and yet mentions only the "defendant." There would be no good reason why a plaintiff in a civil case would not be protected by the rule --- thus lending credence to the view that "defendant" refers to the point in time at which the original statement or plea is made, and not to the time at which the evidence is offered.

However, we could not find any reported case that interprets the Rule to protect non-party witnesses from statements or withdrawn pleas that they made in a previous case. The scant authority on the issue is to the contrary, as is the legal commentary. Perhaps most importantly, the Advisory Committee Note to the original rule addressed the question and limits the rule to use against the party on trial. The Note states:

> Limiting the exclusionary rule to use against the accused is consistent with the purpose of the rule, since the possibility of use for or against other persons will not impair the effectiveness of withdrawing pleas or the freedom of discussion which the rule is designed to foster. See A.B.A. Standards Relating to Pleas of Guilty § 2.2 (1968). See the narrower provisions of New Jersey Evidence Rule 52(2) and the unlimited exclusion provided in California Evidence Code § 1153.

Wright and Miller, *Federal Practice & Procedure*, § 5348 rely on the Advisory Committee comment to reach the conclusion that the protection of the rule is limited to the defendant on trial. Those authors seem to back off that statement later in the same section stating, "Most of the writers assume that the rule applies when the evidence is offered against the person who made the plea or offer, irrespective of whether the proceeding is against him." But they cite only an offhand statement in a 1973 work by Paul Rothstein, and note that he makes a contrary statement in a later commentary.

Other legal writers in fact support the notion that the rule does not apply to persons other than the defendant on trial. Mueller & Kirkpatrick, *Evidence*, §4.29, p. 257 (4th ed. 2009) state: "By its terms

FRE 410 excludes plea bargaining statements only when offered against the defendant." Saltzburg, Martin & Capra, *Federal Rules of Evidence Manual,* § 410.02[1], p. 410-5, states:

> The Rule protects only those who are, at the time the evidence is proffered, parties to a criminal or civil case. Thus, nonparty witnesses can be impeached with evidence of an attempted plea, an offer to plead, or statements made during plea bargaining, unless the impeachment evidence would be offered in the case of a coparticipant in plea negotiations, whom the Rule protects.

There is little to no case law on the subject. Perhaps the best statement of the issue is contained in a Florida case in which both the Florida rule comparable to Rule 410 and Federal Rule 410 are discussed, *Cruz v. State,* 435 So.2d 692 (Fla. App. 1983). In that case, the court considered the admissibility of statements made by a State witness in connection with the possibility of a guilty plea. The court interpreted Florida Evidence §90.410 as precluding evidence of thwarted plea negotiations "only if such evidence is introduced at a later proceeding *against* the person who withdrew the plea or refused to accept the offer, provided he is a party to the proceeding. . . . We are convinced that §90.410 was never intended to bar evidence of plea negotiations for the purpose of impeaching a witness who appears at trial to offer testimony against an accused."

Later in the opinion, the court refers to Federal Rule 410 and cites the Advisory Committee language quoted above as indicative of the intended limitation of both the Florida and the Federal Rule to situations in which the person who made the plea or statement is the party against whom the evidence is offered.

The court in *Cruz* cites *United States v. Mathis,* 550 F.2d 180, 182 (4th Cir. 1976) in support of its interpretation of Federal Rule 410. The Saltzburg, Martin and Capra text cited above also relies on the *Mathis* case. The facts in *Mathis* involve a situation where the statements were made in connection with a guilty plea that was not withdrawn and thus not within Rule 410. However, the court's language is supportive of the proposition that the rule applies only in instances where the earlier statements are used against the person now on trial:

> We see no error in the use of a statement of a witness made when he pleaded guilty to impeach his testimony in this trial. Federal Rule of Evidence 410 and Rule 11(e)(6), F.R.Crim.P., only prohibit statements made in conjunction with a guilty plea from being used (1) against the person who made the plea, and (2) when that person has withdrawn the guilty plea. In the instant case, neither condition was met. The witness had not withdrawn his guilty plea and the statement was not used against him, but was used collaterally for purposes of impeachment.

There would seem to be no basis for the College's fear that there would be limitations placed by Rule 410 on the impeachment of a cooperating witness regardless of the circumstances of the statements.[1] Whether Rule 403 might preclude the introduction of those statements would, of course, depend upon the facts of each case.

Statements by Defense Counsel

There does not seem to be any doubt that Rule 410 protects statements by defense counsel in the same way that it protects statements of the defendant himself. *See, e.g., United States v. Bridges*, 46 F. Supp. 2d 462 (E.D.Va. 1999). The court in *Bridges* relies on the Advisory Committee notes to the 1979 Amendment to Rule 11(e)(6) of the Federal Rules of Criminal Procedure, which was substantially identical to Rule 410:

> The applicability [of the section] is not limited to statements by the defendant himself, and thus would cover statements by defense counsel regarding defendant's incriminating admissions to him.

See also Wright & Miller, *Federal Practice & Procedure*, § 5345; Saltzburg, Martin & Capra, *Federal Rules of Evidence Manual*, § 410.02[1] ("The Rule clearly covers both extrajudicial and in-court statements by defendants and their counsel.").

We found no case authority holding that counsel's statements are unprotected under Rule 410, and the College's statement cites none. This is unsurprising because the Rule protects "a statement made during plea negotiations with an attorney for the prosecuting authority * * *." It does not limit the protection to a statement made "by the defendant." Moreover, it makes eminent sense to protect statements of defense counsel as well as those by the defendant, given the fact that defense counsel is likely to be the predominant source of statements in plea negotiations, and protecting such statements

[1] Regarding the concern that prosecutors are not turning over such information under *Brady*, the College does not provide any factual support for that assertion. It should be noted that the Criminal Rules Committee has been working on a possible amendment to Criminal Rule 16, and any attempt to amend an Evidence Rule to take account of a *Brady* concern would necessarily have to be coordinated with the Criminal Rules Committee.

furthers the goal of open discussions during plea bargaining. Accordingly, there is no case for amending Rule 410 to provide protection for defense counsel's statements.

Additional Authority on Issues of Protection of Government Statements Under Rule 410.

We looked for cases decided since Dan Capra's 2004 memorandum with regard to protection of government statements under Rule 410. The only case of any significance we could find was *United States v. Geisen,* 2010 WL 2774237, which cites the *Verdoorn* and *Biaggi* cases discussed in Dan's memorandum. Applying rule 403 rather than either Rule 408 or 410, the court refused to reverse the exclusion of evidence of a deferred prosecution agreement.

Additional Authority on the Applicability of Rule 410 to Rejected or Vacated Pleas

The only new authority with regard to the applicability of Rule 410 to rejected pleas is a military case: *United States v. Grijalva*, 55 M.J. 223 (U.S. Armed Forces 2001), where the court stated: "If a plea of guilty is rejected, any statement made by an accused during the plea inquiry is inadmissible." The court cites another military case, *United States v. Shackelford*, 2 M.J. 17,20 (CMA 1976) for the language: "It would violate the spirit, if not the letter, of Article 45 (a) . . . to utilize evidence procured during a guilty plea inquiry to later convict or impeach an accused whose plea was rejected."

Possible Amended Rule

If the Committee were to follow its usual practice of not recommending substantive amendments to rules unless there are reported problems with existing language, no amendment to Rule 410 would seem to be called for. That is so for the following reasons: 1) the College's concern that the Rule will be used improperly to protect cooperating witnesses appears unfounded; 2) the Committee determined in 2004 that any ambiguity regarding rejected or vacated pleas is not a sufficient reason to amend the Rule; and 3) as in 2004, there is no need to amend the Rule to protect prosecutors' statements as the case law already provides uniform protection.

However, if experienced trial lawyers such as the member of the American College of Trial Lawyers have doubts as to the applicability of the Rule to non-party witnesses, the Committee may conclude that an amendment would be useful. If so, the question is what that amendment would look like. There would seem to be no legal or policy basis for amending Rule 410 to have it *cover* nonparty witnesses. The goal of an amendment would be to clarify the contrary principle --- that Rule 410 applies only to a person on trial and not to non-party witnesses. If such an amendment were adopted, the Committee could then reconsider the language contained in Dan's 2004 memorandum with regard to government statements and rejected or vacated pleas.[2]

[2] In 2004, the Committee also considered --- and rejected --- the possibility of amending Rule 410 to provide that its protection does not apply if a plea agreement is *breached*. The discussion of that proposal is set forth in Dan Capra's memo reproduced below. Given the Committee's concerns about such an amendment, it is not going to be revived here.

The following suggestion combines Dan's 2004 draft with new clarifying language limiting the Rule's protection to parties, and incorporates these suggestions into the Rule as restyled:

Rule 410. Pleas, Plea Discussions and Related Statements*

(a) Prohibited Uses Against a Party. In a civil or criminal case, evidence of the following is not admissible against a party ~~the defendant~~ who made the plea or was a participant in the plea discussions:

(1) a plea of guilty that was later withdrawn, rejected or vacated;

(2) a nolo contendere plea;

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

(4) a statement made during plea discussions with an attorney for the prosecuting authority for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn, rejected or vacated guilty plea.

* New matter is underlined and matter to be omitted is lined through.

(b) Against the government. – A statement or offer made in the course of plea discussions by an attorney for the prosecuting authority is not admissible against the government in the proceeding in which the statement or offer was made, except as proof of bias or prejudice of a witness.

(c) Exceptions. The court may admit a statement described in this rule:

(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.

Possible Committee Note

The Rule has been amended to provide the following:

1. The protections of the Rule do not apply to non-party witnesses. When a person's plea-related information is offered to impeach that person in a case in which they are not a party, that information is not offered "against" them in any meaningful sense. In such a circumstance, the policy of the Rule --- to encourage open communications during plea bargaining by protecting against adverse consequences --- is not operative.

2. The protections of the Rule apply to statements and offers related to guilty pleas that are rejected by the court or vacated on appeal or collateral attack. Given the policy of the Rule to promote plea discussions and negotiations, there is no reason to distinguish between guilty pleas that are withdrawn and those that are either rejected by the court or vacated on direct or collateral review.

3. The government, as well as the defendant, is entitled to invoke the protections of the Rule. Courts have held that statements and offers made by prosecutors during guilty plea negotiations are inadmissible, using a variety of theories. See, e.g., *United States v. Verdoorn,* 528 F.2d 103, 107 (8th Cir. 1976) (relying on the "principles" of Rule 408 even though that Rule, by its terms, only governs attempts to compromise a civil claim); *United States v. Delgado,* 903 F.2d 1495 (11th Cir. 1990) (government offer properly excluded under Rule 403 because it would have confused the jury); *Brooks v. State,* 763 So. 2d 859 (Miss. 2000) (relying on the "spirit" of state version of Rule 410 substantively identical to the

Federal Rule). The amendment endorses the results of this case law, but provides a unitary source of authority for excluding statements and offers made by prosecutors during guilty plea negotiations. Protecting those statements and offers will encourage the unrestrained candor from both sides that produces effective plea discussions. The amendment is not intended to cover the admissibility of the defendant's rejection of an offer of immunity from prosecution, when that rejection is probative of the defendant's consciousness of innocence. *See generally United States v. Biaggi,* 909 F.2d 662 (2d Cir. 1990) ("a jury is entitled to believe that most people would jump at the chance to obtain an assurance of immunity from prosecution and to infer from rejection of the offer that the accused lacks knowledge of wrongdoing").[3]

[3] The Committee Note proposed in 2004 contained a paragraph on waiver of Rule 410 protections. It observed that nothing in the Rule was intended to affect the Supreme Court's decision in *United States v. Mezzanatto* and its progeny. The arguments for and against including that paragraph are discussed in Dan Capra's memo below.

Given the Standing Committee's strict and rigid new policy limiting the length of Committee Notes, we decided not to include that paragraph here. If the Committee wants to buck the trend and actually provide helpful information in a Committee Note, then a paragraph on waiver can be included should the Committee decide to proceed with an amendment to Rule 410.

American College of Trial Lawyers Suggestions

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 guilt 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.

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.

Dan Capra's 2004 memorandum to the Committee on Rule 410

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Memorandum To: Advisory Committee on Evidence Rules

From: Dan Capra, Reporter

Re: Proposed Amendment to Rule 410

Date: April 2, 2004

At its Fall 2002 meeting the Evidence Rules Committee directed the Reporter to prepare a report on Rule 410—the Rule protecting statements and offered made by and on behalf of the accused during guilty plea negotiations—so that the Committee could determine the necessity of an amendment to that Rule. At subsequent meetings the Committee reviewed the Rule and suggestions were made for improvement and for further research into various questions involving the Rule. A final draft of the amendment was approved in principle at the Fall 2003 meeting.

The possible need for amendment of Rule 410 arises most importantly from the fact that the Rule provides only a one-way protection for statements and offers made during plea negotiations. The Rule specifically states that such evidence is not admissible against "the defendant." This is unlike Rule 408, which provides protection for all parties who make statements and offers during compromise negotiations. The one-way protection provided by Rule 410 has created two practical problems: 1) it arguably constrains the process of guilty plea negotiations, contrary to the very policy supporting the Rule; 2) it has led courts to misapply Rule 408 to protect prosecution statements and offers in plea negotiations, even though Rule 408 does not apply to an attempt to compromise a criminal case.

A less serious reason for amending Rule 410 is that the current Rule does not provide for protection of statements and offers when the guilty plea is vacated or rejected, as opposed to withdrawn. The policy of the Rule provides no reason for a distinction between statements and offers made when the guilty plea is vacated or rejected, as opposed to withdrawn. In all these cases, the absence of evidentiary protection may provide an impediment to plea negotiations.

This report is divided into three parts. Part One describes the current rule and the Committee's consideration of a possible amendment up to this point. Part Two discusses the case law on Rule 410 and the problem areas discussed above. Part Three sets forth the proposed amendment and Committee Note as tentatively approved by the Committee.

I. Rule 410 and the Committee's Determinations Up To This Point

The Rule

Rule 410 currently provides as follows:

Rule 410. Inadmissibility of 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 to 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.

Committee Consideration and Resolution Concerning the Proposed Amendment to Rule 410

In the course of investigating a possible amendment to Rule 408, the Committee reviewed the case law holding that Rule 408 protects against admission of statements made by the government during plea negotiations in a *criminal* case. Rule 410 applies to plea negotiations, but it does not by its terms protect statements and offers made by the government: It provides that statements and offers in plea negotiations are not admissible "against the defendant." The inapplicability of Rule 410 to government statements and offers in plea negotiations has led some courts to hold that such evidence is excluded under Rule 408. The Committee noted, however, that Rule 408, by its terms, does not apply to negotiations in criminal cases—Rule 408 refers to efforts to compromise a "claim," as distinct from criminal charges. Moreover, the proposed amendment to Rule 408 makes it absolutely clear that it will not protect statements and offers made by prosecutors, as the new language would provide that statements and offers covered by that Rule are not admissible in "a civil case."

As a policy matter, the Committee determined at its Fall 2002 meeting that government statements and offers in plea negotiations should be excluded from a criminal trial, in the same way that a defendant's statements are excluded. A mutual rule of exclusion would encourage a free flow of discussion that is necessary to efficient guilty plea negotiations; there is no good reason to protect only the statements of a defendant in a guilty plea negotiation. The Committee also determined, however, that if an amendment is required to protect government statements and offers in guilty plea negotiations, that amendment should be placed in Rule 410, not Rule 408, which, by its terms, covers statements and offers of compromise made in the course of attempting to settle a *civil* claim. Rule 410, which governs efforts to settle criminal charges, is the appropriate place for any amendment that would exclude statements and offers in guilty plea negotiations.

The Committee directed the Reporter to prepare a draft of an amendment to Rule 410 that would exclude statements and offers made by the government during guilty plea negotiations. That draft was reviewed and considered at the Spring 2003 meeting.

"Not Admissible Against the Government"

At the Spring 2003 meeting the Committee considered an amendment that would simply add the language "not admissible against the government" to the language of Rule 410, at the same place where the Rule provides that the covered evidence is not admissible against the defendant. While the Committee adhered unanimously to the position that statements made by prosecutors in guilty plea

negotiations should be protected, some concerns were expressed about the consequences of an amendment providing that offers and statements in guilty plea negotiations are not admissible "against the government." That amendment, while simple, might provide too broad an exclusion. It would exclude, for example, statements made *by the defendant* during plea negotiations that could be offered against the government, for example, to prove that the defendant had made a prior consistent statement, or to prove that the defendant believed in his own innocence, or was not trying to obstruct an investigation. Thus, the Committee resolved that any change to Rule 410 should specify that the government's protection would be limited to statements and offers *made by prosecutors* during guilty plea negotiations.

The Committee also considered two other possible problems with Rule 410 that might be clarified if an amendment were to be proposed on other grounds. Those questions are: 1) whether the Rule's protection should cover guilty pleas that are either rejected by the court or vacated on review–currently the Rule specifically covers only guilty pleas that are "withdrawn"; 2) whether the Rule should specify that its protections are inapplicable if the defendant breaches the plea agreement.

Vacated or Rejected Guilty Pleas

As to the applicability of the Rule to rejected and vacated pleas, the Committee determined that that the question has not arisen often enough in the courts to justify an amendment on its own. However, if the Rule is to be amended on other grounds, the Committee agreed that it would be useful to clarify that the protections of the Rule are applicable to rejected and vacated pleas as well as to withdrawn pleas. Committee members noted that as a policy matter of furthering plea negotiations, there was no basis for distinguishing a withdrawn plea from a plea that is rejected or vacated.

Breached Plea Agreements

As to treatment of pleas that have been breached, the Committee was in general agreement that any attempt to clarify the Rule would be likely to cause more problems than it solved. For one thing, it would be difficult to write a rule that would determine with any clarity whether an agreement was breached or not. Should the exception be limited to material breaches, for example? What kind of breach would be "material"? Committee members resolved that the question of admissibility of plea negotiations after an asserted breach could be handled by agreement between the parties and by a reviewing court.

Other Questions of Rule Coverage

The Committee also considered a recent Second Circuit case holding that the protections of Rule 410 do not apply to statements made in plea negotiations with a foreign government. The Committee considered whether an amendment to Rule 410 to protect prosecution statements might also usefully include language providing that negotiations with foreign prosecutors are (or are not) protected. The Committee resolved that the question of the extraterritorial effect of Rule 410 had not been vetted sufficiently in the courts to justify an amendment at this point.

Finally, the Committee agreed that the question of whether the protections of Rule 410 can be waived should be addressed, if at all, in the Committee Note and not in the Rule. The Supreme Court has decided that the defendant can agree to the use of statements made in plea negotiations to impeach him should he testify at trial, but courts are still working out whether the power to waive the protections of Rule 410 extends to other situations. Thus, it would be counterproductive to codify a waiver rule in the text. But it would be important to acknowledge the waiver rule in the Committee Note, to prevent speculation that any amendment was rejecting Supreme Court precedent on the subject.

Plea Negotiations With Other Defendants

At its Fall 2003 meeting the Committee considered a draft of an amendment to Rule 410 that was intended to implement the consensus of the Committee. Committee members discussed whether the government should be protected from statements and offers made by the prosecutor in plea negotiations even where the evidence is offered by a different defendant. All Committee members, including the DOJ representative, recognized that a defendant should be able to inquire into a deal struck or to be struck with a former codefendant who is a cooperating witness at the time of the trial. Such an inquiry may be pertinent to the bias or prejudice of the cooperating witness even if a deal has not been formally reached or even offered. On the other hand, most Committee members agreed that statements of fact made by a prosecutor in negotiations with one defendant should not be offered as any kind of party-admission by another defendant or in another proceeding. To allow such broad admissibility could tend to chill the open discussions that Rule 410 seeks to promote.

Final Draft; Restructuring the Rule

After substantial discussion, a straw vote was taken and the Committee tentatively agreed on language for a proposed amendment to Rule 410 providing that statements and offers by prosecutors in the course of plea discussions are not admissible except to prove the bias or prejudice of a witness. The

vote was unanimous. The Committee then discussed whether the Rule should be broken down into subdivisions. All agreed that the addition of protection of prosecution statements and offers made it necessary to subdivide the Rule. The alternative (working within the existing Rule) would be a Rule with internal subparts– (1) through (4) – setting forth the evidence that is not admissible against the defendant, followed by a freestanding paragraph providing for exclusion of prosecution statements and offers, followed by another freestanding paragraph setting forth exceptions in which statements otherwise covered by the rule can be admitted against a defendant. The use of two consecutive hanging paragraphs would make the rule difficult to read and is certainly contrary to the working standards of the Style Subcommittee of the Standing Committee. The Evidence Rules Committee therefore agreed unanimously to set forth three subdivisions in its proposed amendment to Rule 410.

II. Case Law and Commentary Bearing On Proposed Textual Changes To Rule 410

1. Case Law And Commentary On Protection Of Prosecution Statements And Offers

Case Law

There are only a handful of cases discussing the admissibility of statements and offers by prosecutors in guilty plea negotiations. They are not in conflict, in the sense that some hold that prosecution statements and offers during plea negotiations are protected and some do not. But there is a substantial conflict in reasoning and analysis that can arguably result in significant confusion. What follows is a description of the pertinent cases:

1. *United States v. Verdoorn*, 528 F.2d 103, 107 (8th Cir. 1976): In this case, the defendant wanted to introduce offers and statements made by the government during plea negotiations; the government had apparently offered a deal to every living soul other than the defendant, and the defendant wanted to use that evidence to show something improper about governmental motivation. The problem for the government was that statements and offers by the prosecution are not protected under Rule 410. So the government relied on Rule 408. The court agreed with the government, reasoning that the "principles" of Rule 408 warranted exclusion of the government's offers in a criminal case.

Comment: While the result may be correct on the merits, the analysis is faulty. It is clear that Rule 408 does not cover anything that happens in guilty plea negotiations. It only covers efforts to settle a civil claim.

2. *United States v. Delgado,* 903 F.2d 1495 (11th Cir. 1990): The defendants argued that the government's agreement to drop conspiracy charges against a cooperating accomplice should have been

admitted as a government admission that no conspiracy existed. The Court found no error in excluding the agreement. The Court noted that "by holding that the government admits innocence when it dismisses charges under a plea agreement, we would effectively put an end to the use of plea agreements to obtain the assistance of defendants as witnesses against alleged co-conspirators."

The *Delgado* Court did not rely on, or even mention, Rules 408 or 410. Rather, it concluded that the government's agreement to drop charges was properly excluded under Rule 403:

> Even if such evidence is relevant, it would not be admissible under Rule 403. If the evidence were admitted, the government's counsel likely would take the stand and testify that the charges were dropped for reasons unrelated to the guilt of the defendant. The reasons expressed by the government's counsel could be highly incriminating with regard to the defendant who is seeking to have the evidence admitted. Thus, the district court should probably hold the technically admissible opinion evidence inadmissible because it would open the door to evidence on collateral issues that would likely confuse the jury.

Comment: The *Delgado* Court's analysis seems sound, and it raises a question: If government statements and offers are to be excluded under Rule 403, is it really necessary to amend Rule 410 to provide for such exclusion?

The problem with relying on Rule 403 to exclude prosecution statements and offers is that Rule 403 involves a case by case approach rather than a bright line rule. It may be that some court, in its discretion, would find such evidence admissible under Rule 403, and under the abuse of discretion standard an appellate court would be unlikely to reverse. Also, because Rule 403 is a case by case approach, it has a degree of unpredictability. Therefore the prosecutor, uncertain about whether a statement or proffer would be admissible at trial, might be deterred from negotiating freely. In other words, a bright line rule would probably do more to encourage free and open negotiations than would a case by case balancing approach.

3. *United States v. Greene,* 995 F.2d 793, 798 (8th Cir.1993): This is a case, like *Verdoorn,* in which the defendant sought to admit statements by the government during plea negotiations. The court followed the circuit precedent of *Verdoorn* and concluded that "[u]nder the rationale of Fed.R.Evid. 408, which relates to the general admissibility of compromises and offers to compromise, government proposals concerning pleas should be excludable."

4. *United States v. Biaggi,* 909 F.2d 662 (2d Cir. 1990): One of the defendants wanted to admit the fact that he had rejected an immunity deal offered by the government. His theory was that the rejection of immunity was evidence of "consciousness of innocence." The Court held that it was error to

exclude the evidence. The government relied on Rule 410 as a source of exclusion. The Court analyzed the applicability of Rule 410 to the rejection of immunity agreements in the following passage:

> The Government also contends that evidence of immunity negotiations should be excluded because of the same considerations that bar evidence of plea negotiations. Preliminarily, we note that plea negotiations are inadmissible "against the defendant," Fed. R. Evid. 410, and it does not necessarily follow that the Government is entitled to a similar shield. More fundamentally, the two types of negotiations differ markedly in their probative effect when they are sought to be offered against the Government. When a defendant rejects an offer of immunity on the ground that he is unaware of any wrongdoing about which he could testify, his action is probative of a state of mind devoid of guilty knowledge. Though there may be reasons for rejecting the offer that are consistent with guilty knowledge, such as fear of reprisal from those who would be inculpated, a jury is entitled to believe that most people would jump at the chance to obtain an assurance of immunity from prosecution and to infer from rejection of the offer that the accused lacks knowledge of wrongdoing. That the jury might not draw the inference urged by the defendant does not strip the evidence of probative force.
>
> Rejection of an offer to plead guilty to reduced charges could also evidence an innocent state of mind, but the inference is not nearly so strong as rejection of an opportunity to preclude all exposure to a conviction and its consequences. A plea rejection might simply mean that the defendant prefers to take his chances on an acquittal by the jury, rather than accept the certainty of punishment after a guilty plea. We need not decide whether a defendant is entitled to have admitted a rejected plea bargain. *Cf.* United States v. Verdoorn, 528 F.2d 103 (8th Cir. 1976) (approving exclusion of a rejected plea bargain offered by a defendant to prove prosecutor's zeal, rather than defendant's innocent state of mind). The probative force of a rejected immunity offer is clearly strong enough to render it relevant.

The Court found that under the circumstances the probative value of rejection of complete immunity was not substantially outweighed by any prejudicial effect or confusion. Therefore it should have been admitted under Rule 403.

Comment: *Biaggi* does not deal directly with the question of whether statements and offers by the government are excluded by Rule 410 or any other Evidence Rule. The question in *Biaggi* was whether the defendant's *rejection* of a prosecutor's offer of immunity should be admitted. Moreover, the Court takes pains to distinguish rejection of immunity from rejection of an offer to plead guilty, so the case doesn't say much at all about the admissibility of statements and offers to plead guilty that are made by prosecutors. Nonetheless, the Court goes out of its way to point out that Rule 410, as written, is not a two-way street, so the case is somewhat in tension with the proposition that government statements and offers made in guilty plea negotiations should be excluded.

5. Brooks v. State, 763 So. 2d 859 (Miss. 2000): This is an interesting state case construing Mississippi Evidence Rule 410, which is virtually identical to the Federal Rule. The defendant contended that it was error for the prosecutor to argue in closing argument that the government offered the defendant a plea bargain and the defendant rejected it. The prosecutor contrasted the defendant's actions with those of a codefendant who did accept a plea bargain; thus the inference sought was that the defendant was guilty and was just wasting everyone's time by going to trial. The Court agreed with the defendant that the prosecution violated Rule 410. It recognized that evidence of a plea offer made by the prosecution and rejected by the defendant "does not fall squarely under" any of the exclusionary language in Rule 410. It declared, however, that "the prosecutor's statement violates the spirit of Rule 410."

Comment: The Court is not completely correct that the evidence did not fall squarely under the language of the Rule. Part of the evidence did. The defendant's rejection of a plea bargain, when offered by the government, is clearly covered by the Rule, which excludes all statements made in the course of plea discussions that do not result in a guilty plea. The defendant's rejection of the government's offer in *Brooks* is certainly a "statement" covered by the Rule. But the prosecution's offer is not itself covered by the Rule, which is undoubtedly why the Court got somewhat confused.

Commentary

Most commentators conclude that prosecutor statements and offers in plea negotiations should receive the same protection as those of defendants. This is because the policy of Rule 410 is to promote two-way communications. Representative is Mueller & Kirkpatrick, Evidence: Practice Under the Rules at 362, which states: "When a plea bargaining statement is offered against the government (such as an offer by the prosecutor to allow the defendant to plead to a lesser charge), it is also properly subject to exclusion in order to carry out the underlying policy of FRE 410."

But commentators also recognize that Rule 410 by its terms does not encompass this policy, as its protections run only to the defendant. See Weinstein's Federal Evidence, §410.05 (noting that nothing in the Rule bars the defendant from offering prosecution statements and offers in plea negotiations, but suggesting that a court should exclude this evidence as irrelevant if offered to prove that the prosecutor had personal doubts about the defendant's guilt).

2. Commentary on Rejected Pleas:

Criminal Rule 11(c)(5) allows the trial judge to reject certain plea agreements reached between the defendant and the prosecution. Does Rule 410 exclude evidence of such an agreement, and the statements related to that agreement, in a subsequent criminal trial?

The text of the Rule does not, by its terms, protect statements and offers when the plea is rejected. It refers to "withdrawn" guilty pleas, and related statements, as being protected. But there is a difference between a plea that is "withdrawn" and one that is "rejected" by the court.

Wright and Graham, Federal Practice and Procedure sec. 5341, provide this analysis of the question:

> Does Rule 410 apply to a guilty plea that is tendered but not accepted by the trial judge * * * ? The common law apparently excluded evidence of unaccepted guilty pleas and many state rules, including one that was cited by the Advisory Committee on Criminal Rules in its Note to Criminal Rule 11(e)(6), cover both withdrawn and unaccepted pleas. Since the reasons that justify refusal to accept a plea are similar to those that support withdrawal, it would seem that the same policy should apply to the evidentiary use of unaccepted pleas as is applicable to withdrawn pleas. Although the language of Rule 410 is not completely apt, it would seem that an unaccepted plea could be brought within the rule either as a form of withdrawn plea or as an offer to plead guilty.

See also Mueller and Kirkpatrick, Evidence: Practice Under the Rules, § 4.28, n. 1 (arguing that Rule 410 should apply to guilty pleas that are tendered but not accepted by the court).

I could not find any case in which statements and offers made pursuant to a plea agreement rejected by the court were later offered against the defendant at trial. Thus, the applicability of Rule 410 to rejected plea agreements may be a practical non-problem. But the Committee determined that if the Rule is to be amended on other grounds it would make good sense to cover statements and offers made concerning pleas that are subsequently rejected. There seems no reason to distinguish between plea agreements that are later withdrawn and those that are rejected by the court.

3. Commentary On Vacated Guilty Pleas

There is a similar gap in the Rule with respect to guilty pleas that are vacated by a court. Wright and Graham explain as follows:

> A closely related question concerns a guilty plea that is set aside as invalid on direct or collateral attack. Here again, the policy that supports exclusion of withdrawn guilty pleas would seem to be equally applicable when the guilty plea is set aside by an appellate court; i.e., the decision to set aside the plea would be almost a meaningless gesture if the plea could be used against the defendant as an admission in the ensuing trial. Some state rules cover both withdrawn pleas and those that are invalidated on appeal. The draftsman of the Vermont version of Rule 410 suggests that a guilty plea that is subsequently set aside should be treated as a withdrawn plea under the rule. If rejected pleas are found to be within the scope of Rule 410, the language need only be stretched a few inches more to encompass pleas that are invalidated on appeal; the policy of the rule will probably lead most courts to so hold.

See also Mueller and Kirkpatrick, Evidence: Practice Under the Rules, § 4.28, n. 1 (arguing that Rule 410 should apply to guilty pleas set aside on appeal or on collateral attack).

Again, I could find no case in which statements and offers made pursuant to a plea agreement vacated by a court were later offered against the defendant at trial. Thus, the applicability of Rule 410 to vacated plea agreements may be a practical non-problem. The Committee has determined, however, that if the Rule is to be amended on other grounds–especially if it is amended to cover rejected plea agreements–the amendment should include coverage of vacated pleas. There seems no reason to distinguish between plea agreements that are later withdrawn and those that are vacated on appeal or collateral attack.

Conclusion on Case Law, Commentary, and the Need for an Amendment to Rule 410

It bears noting that the proposed amendment to Rule 410 is different from the other amendments in the Advisory Committee's proposed "package" in one important respect—all of the other amendments resolve longstanding conflicts in the case law. In contrast, there is no true conflict in the case law over the admissibility of prosecution statements and offers made during guilty plea negotiations. In each reported case in which the defendant offered a prosecution statement or offer made in plea negotiations, the proffer was rebuffed. So it could be argued that the uniformity of result in the few cases on the point indicate that there is no real problem in the application of the Rule, and that the proposed amendment to Rule 410 does not fit the same standard of "necessity" as the other proposed amendments. One could argue similarly that in light of the sparse case law, it would make sense to delay an amendment until more courts have weighed in on the subject.

On the other hand, while the *results* in the cases are uniform, the analysis is all over the place. This is arguably particularly unfortunate in an area in which predictability is crucial. If the prosecutor can't predict with certainty whether her statements or offers will be protected from disclosure at trial, then this uncertainty will deter the plea negotiations that Rule 410 intends to further.

III. Proposed Amendment and Committee Note

The proposed amendment to Rule 410 and the Committee Note are set forth beginning on the next page. The proposal is formatted in accordance with Administrative Office guidelines.

Advisory Committee on Evidence Rules

Proposed Amendment: Rule 410

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements*

(a) Against the defendant. – 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~~ that was later withdrawn, rejected or vacated;

(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

* New matter is underlined and matter to be omitted is lined through.

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority ~~which~~ that do not result in a plea of guilty or ~~which~~ that result in a plea of guilty later withdrawn, rejected or vacated.

(b) Against the government. – A statement or offer made in the course of plea discussions by an attorney for the prosecuting authority is not admissible against the government in the proceeding in which the statement or offer was made, except as proof of bias or prejudice of a witness.

(c) Exceptions. – ~~However, such a statement~~ A statement described in this rule 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 to 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.

Proposed Committee Note

Rule 410 has been amended to make the following changes:

1. The government, as well as the defendant, is entitled to invoke the protections of the Rule. Courts have held that statements and offers by prosecutors during guilty plea negotiations are inadmissible, using a variety of theories. See, e.g., *United States v. Verdoorn,* 528 F.2d 103, 107 (8th Cir. 1976) (relying on the "principles" of Rule 408 even though that Rule, by its terms, only governs attempts to compromise a civil claim); *United States v. Delgado,* 903 F.2d 1495 (11th Cir. 1990) (government offer properly excluded under Rule 403 because it would have confused the jury) . The amendment endorses the results of this case law, but provides a unitary source of authority for excluding statements and offers by prosecutors that are made during guilty plea negotiations. Protecting those statements and offers will encourage the unrestrained candor from both sides that produces effective plea discussions. Statements and offers by the prosecution are not excluded by the rule, however, if they are offered by a defendant to prove the bias or prejudice of a witness who may be cooperating with the government as the result of, or in order to obtain, leniency from the government.

2. The protections provided to defendants are extended to statements and offers made pursuant to guilty pleas that are rejected by the court or vacated on appeal or collateral attack. Given

the policy of the rule to promote plea negotiations, there is no reason to distinguish between guilty pleas that are withdrawn and those that are either rejected by the court or vacated on direct or collateral review.

Nothing in the amendment is intended to affect the rule and analysis set forth in *United States v. Mezzanatto*, 513 U.S. 196 (1995), and its progeny. The Court in *Mezzanatto* upheld an agreement in which the defendant knowingly and voluntarily agreed that his statements made in plea negotiations could be used to impeach him at trial. See also *United States v. Burch,* 156 F.3d 1315 (D.C. Cir. 1998) (reasoning that the holding in *Mezzanatto* logically extends to enforcing an agreement that the defendant's statements could be admitted during the prosecution's case-in-chief); *United States v. Rebbe,* 314 F.3d 402 (9th Cir. 2002) (reasoning that the rationale in *Mezzanatto* applies equally to waivers permitting use of the defendant's statements in rebuttal). Nor is the amendment intended to cover the admissibility of the defendant's rejection of an offer of immunity from prosecution, when that rejection is probative of the defendant's consciousness of innocence. In such a case, the important evidence is the defendant's rejection, not the government's offer. *See generally United States v. Biaggi,* 909 F.2d 662, 690 (2d Cir. 1990) ("a jury is entitled to believe that most people would jump at the chance to obtain an assurance of immunity from prosecution and to infer from rejection of the offer that the accused lacks knowledge of wrongdoing").

[SPRING 2004 MINUTES OF ADVISORY COMMITTEE MEETING]

3. Rule 410

At the Spring 2004 meeting the Committee continued its review of a possible amendment to Rule 410 that would protect statements and offers made by prosecuting attorneys, to the same extent as the Rule currently protects statements and offers made by defendants and their counsel. The policy behind such an amendment would be to encourage a free flow of discussion during guilty plea negotiations.

A draft proposal was prepared by the Reporter for the April 2003 meeting that added "against the government" to the opening sentence of the Rule, at the same place in which the Rule provides that offers and statements in plea negotiations are not admissible "against the defendant." At that meeting the Committee determined that this would not be a satisfactory drafting solution. If the Rule were amended only to provide that offers and statements in guilty plea negotiations were not admissible "against the government," this might provide too broad an exclusion. It would exclude, for example, statements made *by the defendant* during plea negotiations that could be offered "against the government," for example, to prove that the defendant had made a prior consistent statement, or to prove that the defendant believed in his own innocence, or was not trying to obstruct an investigation. Thus, the Committee resolved that any change to Rule 410 should specify that the government's protection would be limited to statements and offers *made by prosecutors* during guilty plea negotiations.

At its Fall 2003 meeting the Committee considered a draft of an amendment to Rule 410 that would protect statements and offers made by prosecutors during guilty plea negotiations. Committee members discussed whether the government should be protected from statements and offers made by the prosecutor in plea negotiations even where the evidence is offered by a different defendant. All Committee members, including the DOJ representative, recognized that a defendant should be able to inquire into a deal struck or to be struck with a former codefendant who is a cooperating witness at the time of the trial–and such inquiry may be pertinent to the bias or prejudice of the cooperating witness even if a deal has not been formally reached or even offered. The working draft of the amendment was revised to provide that statements and offers of prosecutors would not be barred if offered to show the bias or prejudice of a government witness.

At the Spring 2004 meeting, a number of questions and concerns were raised about the merits of the draft amendment to Rule 410. The most important objection was that the amendment did not appear necessary, because no reported case has ever held that a statement or offer made by a prosecutor in a plea negotiation can be admitted against the government as an admission of the weakness of the government's case. Indeed, every reported case has held such evidence inadmissible when offered as a government-admission. It is true that some courts have used questionable authority to reach this result; for example, some courts have held that statements and offers made by prosecutors in guilty plea negotiations are excluded under Rule 408, even though that Rule applies only to statements and offers made to compromise a civil claim. Yet notwithstanding the questionable reasoning, the fact remains that there is no reported case that has failed to protect against admission of prosecution statements and offers in guilty plea negotiations. Accordingly, there is no conflict among the courts that would be rectified by an amendment; and a conflict in the courts has always been considered by the Committee to be a highly desirable justification for an amendment to the Evidence Rules.

Committee members also observed that the draft amendment could lead to some problematic results. For example, what if a defendant contended that he was a victim of prosecutorial misconduct or selective prosecution, and the prosecutor's statements during a plea negotiation provided relevant evidence of bad intent? Under the draft amendment, this important evidence would be excluded. And yet to provide an exception for such circumstances might result in an exception that would swallow the protective rule. That is, there would be a danger of the exception's applying whenever the defendant made a contention of "misconduct" on the part of the government.

Another problem case is where the defendant wants to testify that he rejected a guilty plea because he is innocent. This testimony would appear to be excluded by the proposed amendment because it would constitute evidence of the government's offer. It could be argued that the relevant evidence would be the defendant's rejection of the offer and not the offer itself, but that would seem to be an insubstantial distinction.

Given the problems involved in applying a rule that explicitly protects prosecution statements and offers, and the fact that the courts are reaching fair and uniform results under the current rules, including Rule 403, members of the Committee questioned whether the

benefits of an amendment to Rule 410 would outweigh the costs. The Committee ultimately concluded that Rule 410 was not "broken," and therefore that the costs of a "fix" are not justified.

A motion was made and seconded to defer any proposed amendment to Rule 410. This motion was passed by a unanimous vote.

TAB 6

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Possible Amendment to the Trustworthiness Clauses of Rules 803(6)-(8)
Date: September 16, 2010

Evidence Rule 803(6) currently provides a hearsay exception for records of regularly conducted activity "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Rules 803(7) and 803(8) contain the same lack of trustworthiness proviso for absence of business records and public records respectively.

When these Rules were being restyled, Professor Kimble proposed a change to the lack-of-trustworthiness clauses. Using 803(6) as an example, and blacklined from the original rule, the first draft of the Restyled Rule provided as follows:

> ***(6) Records of a Regularly Conducted Activity.*** A ~~memorandum, report,~~ record~~, or data compilation, in any form,~~ of an acts, events, conditions, opinions, or diagnoseis~~;~~ if:
>
> > (A) the record was made at or near the time by~~;~~ – or from information transmitted by~~;~~ – ~~a person~~ someone with knowledge~~;~~ ;
> >
> > (B) the record was ~~if~~ kept in the course of a regularly conducted business activity~~;~~ ~~and~~ ;
> >
> > (C) making the record ~~if it~~ was ~~the~~ a regular practice of that business activity ~~to make the memorandum, report, record or data compilation,~~ ;
> >
> > (D) all ~~as~~ these conditions are shown by the testimony of the custodian or ~~other~~ another qualified witness, or by a certification that complies with Rule 902(b)(11)~~;~~ ~~Rule 902~~ or (12)~~;~~ or with a statute permitting certification~~;~~ ; and

(E) ~~unless~~ the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

The blacklined change to the trustworthiness clause clarified that the burden of showing untrustworthiness is on the *opponent* of the evidence. That is, once the proponent showed that the record was regularly kept, contemporanously made, etc., the record would be admitted unless the opponent showed untrustworthy circumstances by a preponderance of the evidence under the terms of Rule 104(a). The restyling was a clarification because the original rule does not explicitly allocate the burden of proof on the issue of trustworthiness.

The Reporter determined that the proposed change to the lack-of-trustworthiness clause was substantive because a few courts had held that the *proponent* has the burden of showing that a business record is trustworthy.[1] Therefore the amendment would change the evidentiary result in at [2] least one federal court — and under the protocol developed for the restyling project it could not be proposed as part of the style package. The Restyled Rule 803(6) as adopted by the Advisory Committee and the Standing Committee therefore 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;
> >
> > (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(11) or (12) or with a statute permitting certification; and
> >
> > **(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.**

[1] That case law is discussed infra.

That same basic language is used in Rule 803(7) and (8).[2] The language returns to the passive, ambiguous position of the original rule.

When the restyling project began, the Advisory Committee noted that one of its benefits could be that it might uncover some substantive problems with the Evidence Rules that could be rectified in amendments proposed after restyling was finished. That notion was also expressed at the recent Standing Committee meeting by Judge Hartz, who stated that one of the virtues of the restyling project was to uncover substantive problems, and who asked specifically that the Evidence Rules Committee take up the possibility of rectifying the ambiguity on burden of proof regarding the trustworthiness clauses of Rules 803(6)-(8).

This memo considers the possibility of amending the trustworthiness clauses of Rules 803(6), (7) and (8) to clarify the allocation of the burden of proof. The memorandum is divided into three parts. Part One discusses the pertinent case law. It concludes that while most courts impose the burden of proving untrustworthiness on the opponent, there is contradictory case law for both Rules 803(6) and (8) (and no case law at all for Rule 803(7)). Part Two analyzes policy, textual and historical arguments regarding allocation of the burden, and concludes that the burden of proving untrustworthiness should be on the opponent. Part Three provides drafting alternatives.

I. Case Law on Allocating Burden of Proving Trustworthiness

A. Cases Imposing Burden on the Opponent.

Almost all of the reported cases impose the burden of proving "lack of trustworthiness" on the opponent of the evidence.

For business records, see, e.g.,

In re Japanese Electronics Products Antitrust Litigation, 723 F.2d 238, 289 (3d Cir. 1983), *rev'd in part on other grounds*, 475 U.S. 574 (1986);

Dunn ex rel. Albery v. State Farm Mut. Auto. Ins. Co., 264 F.R.D. 266, 274 (E.D. Mich. 2009) ("The proponent of the evidence bears the initial burden of establishing that it meets the requirements of Fed.R.Evid. 803(6); if the proponent satisfies its burden, the opponent bears the burden of demonstrating a reason to exclude the evidence. 2 McCormick on Evidence § 88.");

United States v. Fujii, 301 F.3d 535, 539 (7th Cir. 2002) ("Consequently, because [the opponent] fails to establish that 'the source of information or the method or circumstances of

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[2] The difference is that Rule 803(6) refers to "the method or circumstances of preparation" while the other Rules refer "other circumstances." That difference is found in the original Rules.

preparation indicate lack of trustworthiness,' see FED. R. EVID. 803(6), we conclude that the district court did not abuse its discretion in admitting check-in and reservation records under Rule 803(6).");

Shelton v. Consumer Products Safety Com'n, 277 F.3d 998, 1010 (8th Cir. 2002) ("The language of Fed.R.Evid. 803(6) parallels the principles we articulated in *Kehm v. Proctor & Gamble Mfg. Co.*, 724 F.2d 613 (8th Cir.1983) , where we held that the public records exception assumes admissibility in the first instance and provides that the party opposing admission has the burden of proving inadmissibility. We therefore apply the same principles to admission of business records that we articulated for admission of public records in *Kehm*, and hold that once the offering party has met its burden of establishing the foundational requirements of the business records exception, the burden shifts to the party opposing admission to prove inadmissibility by establishing sufficient indicia of untrustworthiness.");

Freitag v. Ayers, 468 F.3d 528, 541, n.5 (9th Cir. 2006) ("The district court did not err in admitting the IG's report into evidence at trial. Under the hearsay exceptions for business records, FED. R. EVID. 803(6), and public records, id. 803(8), the report was afforded a presumption of reliability and trustworthiness that the defendants failed to rebut."); and

Barry v. Trustees of the International Ass'n, 467 F. Supp. 2d 91, 106 (D.D.C. 2006) ("The structure of [Rule 803(6)] places the initial burden on the proponent of the document's admission to show that it meets the basic requirements of the rule, and the 'unless' clause then gives the opponent the opportunity to challenge admissibility, albeit now bearing the burden of showing a reason for exclusion.").

For public records, see, e.g.,

Bridgeway Corp. v. Citibank, 201 F.3d 134, 143 (2d Cir. 2000) ("Once a party has shown that a set of factual findings satisfies the minimum requirements of Rule 803(8)(C), the admissibility of such factual findings is presumed. The burden to show 'a lack of trustworthiness' then shifts to the party opposing admission.");

In re Complaint of Nautilus Motor Tanker Co., Ltd, 85 F.3d 105, 113 n.9 (3d Cir. 1996) ("Moreover, we note that public reports are presumed admissible in the first instance and the party opposing their introduction bears the burden of coming forward with enough 'negative factors' to persuade a court that a report should not be admitted.");

Kennedy v. Joy Technologies, Inc., 269 Fed. Appx. 302, 310 (4th Cir. 2008) ("As we recognized in *Zeus Enterprises, Inc. v. Alphin Aircraft, Inc.*, '[t]he admissibility of a public record specified in the rule is assumed as a matter of course, unless there are sufficient negative factors to indicate a lack of trustworthiness.' 190 F.3d 238, 241 (4th Cir.1999) (internal citations omitted). Furthermore, the party opposing the admission of such a report bears the burden of establishing its unreliability. *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984).");

Moss v. Ole South Real Estate, Inc., 933 F.2d 1300, 1305 (5th Cir. 1991) ("In light of the presumption of admissibility, the party opposing the admission of the report must prove the report's untrustworthiness.");

Reynolds v. Green, 184 F.3d 589, 596 (6th Cir. 1999) ("Because records prepared by public officials are presumed to be trustworthy, the burden is on the party opposing admission to show that a report is inadmissible because its sources of information or other circumstances indicated a lack of trustworthiness.");

Klein v. Vanek, 86 F. Supp. 2d 812, 820 (N.D. Ill. 2000) ("If a public officer's finding meets the Rule's threshold requirement that it be a factual finding resulting from an investigation made pursuant to authority granted by law — as is the case here — the burden is on the party opposing admission to show that the finding lacks trustworthiness.");

Boerner v. Brown & Williamson Tobacco Co., 394 F.3d 594, 600-1 (8th Cir. 2005) ("Once the evaluative report is shown to have been required by law and to have included factual findings, the burden is on the party opposing admission to demonstrate untrustworthiness.");

Johnson v. City of Pleasanton, 982 F.2d 350, 352 (9th Cir.1992) ("The trial court is entitled to presume that the tendered public records are trustworthy. If the Johnsons seriously think the documents are untrustworthy, they can challenge them on that ground. When public records are presumed authentic and trustworthy, the burden of establishing a basis for exclusion falls on the opponent of the evidence."); and

In re Korean Air Lines Disaster of Sept. 1, 1983, 932 F.2d 1475, 1482 (D.C. Cir. 1991) ("Rule 803(8)(C) 'assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present.' FED.R.EVID. 803 advisory committee note. The burden is on the party disputing admissibility to prove the factual finding to be untrustworthy.").

Rationale:

These cases generally rely on four arguments for imposing the burden on the opponent:

1) Language in the Advisory Committee Note to Rule 803(8) seems to allocate the burden of proving untrustworthiness to the opponent. The Note states that "the rule, *as in Exception (6), assumes admissibility in the first instance* but with ample provision for escape if sufficient negative factors are present." This sentence is most logically read to mean that if the other admissibility

factors are met, the record is *presumed* admissible and the trustworthiness clause is included as a safety valve for opponents to use to overcome that presumption.

2) The language of the existing rule points toward imposing the burden on the opponent. It says that statements fitting the other requirements are within the rule *"unless* the source of information or the method of circumstances indicate *lack* of trustworthiness." First, the use of "unless" indicates that the requirement is an exception to the basic rule. Second, the use of "lack" indicates that it is an *absence* of trustworthiness that must be shown — certainly the *absence* of trustworthiness is something that the opponent, not the proponent, would want and need to show. Given the way the language is pitched, imposing the burden on the proponent would mean that he would be expected to show the *absence of a lack of trustworthiness* — which is an odd way to state a burden, to say the least.

3) The case law relies on statements of treatise-writers, all of whom state that it is the opponent's burden to show lack of trustworthiness. *See, e.g.,* Weinstein's Federal Evidence § 803.10[2] (Because public records are presumed to be trustworthy, "[t]he burden of proof concerning the admissibility of public records is on the party opposing their introduction."); Mueller and Kirkpatrick, §450 ("Sound policy suggest that if the offering party shows a business record satisfies the basic requirements, the exception applies and the record is considered trustworthy unless the other side shows it is not."); Saltzburg, Martin and Capra, Federal Rules of Evidence Manual at 803-53 ("[I]f the proponent of the record has shown that the admissibility requirements of the Rule are met, the proponent need not make an independent showing of trustworthiness. It is up to the objecting party to show that particular circumstances render the records unreliable.").

4. Policy arguments support allocating the burden of showing lack of trustworthiness to the opponent. In the context of business records, the admissibility requirements in the Rule are more than enough to establish a presumption of reliability; requiring an extra and independent showing of trustworthiness would improperly limit the scope of the exception. As Mueller and Kirkpatrick put it:

> The basic requirements (regular business with regularly kept record; source with personal knowledge; record made timely; foundation testimony) are enough in the run of cases to justify the conclusion that the record is trustworthy.

Similarly, public records are properly presumed trustworthy because it is the job of the government to maintain trustworthy records. As the court put it in *Ellis v. International Playtex, Inc.,* 745 F.2d 292, 301 (4th Cir. 1984):

> Placing the burden on the opposing party makes considerable practical sense. Most government-sponsored investigations employ well-accepted methodological means of gathering and analyzing data. It is unfair to put the party seeking admission to the test of "re-inventing the wheel" each time a report is offered. * * * It is far more equitable to place that

burden on the party seeking to demonstrate why a time-tested and carefully considered presumption is not appropriate.

B. Cases Imposing Burden of Showing Trustworthiness on the Proponent

Some cases either by holding or by dicta state that the proponent has the burden of showing that business and/or public records are trustworthy.

For business records, see, e.g.,

Byrd v. Hunt Tool Shipyards, Inc., 650 F.2d 44, 46 (5th Cir. 1981) ("Under Rule 803(6), the business records exception, it is the duty of the proponent to establish circumstantial guarantees of trustworthiness.") **Note:** There is conflicting case law in this circuit. See *Graef v. Chemical Leaman Corp.*, 106 F.3d 112, 118 (5th Cir. 1997) (stating that the burden of establishing the untrustworthiness of business and public records "is on the opponent of the evidence.").

Equity Lifestyle Properties v. Florida Mowing & Landscape, 556 F.3d 1232, 1244 n.19 (11th Cir. 2009) ("Under Fed.R.Evid. 104(a), in determining that the invoices were admissible [as business records], the district court first had to find as fact that they were trustworthy. See *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 565 (11th Cir.1998).").

For public records, see, .e.g,

United States v. Dowdell, 595 F.3d 50, 72 n.18 (1st Cir. 2010) ("We have not yet considered who should bear the burden in this context, although our default position seems to be that it would be the party seeking admission, *United States v. Bartelho,* 129 F.3d 663, 670 (1st Cir.1997), which in this case is the government.").

Rationale:

The rationale for allocating the burden on the proponent is syllogistic: 1) The Supreme Court held in both *Bourjaily* and *Daubert* that the proponent of evidence — under Rule 104(a) — has the burden of proving all admissibility requirements by a preponderance of the evidence; 2) lack of

trustworthiness clearly affects admissibility under Rules 803(6) and (8) and so is an admissibility requirement; therefore 3) the trustworthiness admissibility requirement is imposed on the proponent.

It should also be noted that the Supreme Court's language in *Beech Aircraft v. Rainey*, 488 U.S. 153, 169 (1988), could be read in support of imposing the burden on the proponent to prove trustworthiness under Rule 803(8) (and therefore under the substantially identically worded Rule 803(6)). The Court in *Rainey* stated that "the trustworthiness provision requires the court to make a determination as to whether the report, or any portion thereof, *is sufficiently trustworthy to be admitted*." Further, in rejecting the proposition that opinions in public reports were never admissible, the Court declared that "[a]s long as the conclusion is based on a factual investigation *and satisfies the Rule's trustworthiness requirement*, it should be admissible along with other portions of the report." Finally the Court concluded that "[a]s the trial judge in this action determined that certain of the JAG Report's conclusions *were trustworthy*, he rightly allowed them to be admitted into evidence." All of these statements seem to describe the Rule as having a positive trustworthiness requirement. If the Court is reading it that way, it would appear that trustworthiness would be a positive admissibility requirement and thus would be allocated to the proponent.

II. How Should the Burden Be Allocated?

Assuming the Committee were to propose a clarification to Rules 803(6)-(8), what should the result be? There seems little doubt that the burden of showing lack of trustworthiness should be on the opponent. This is so for at least five reasons:

1. It is the less radical proposal, because it is the current position of a strong majority of courts.

2. It is the proposal most in line with the language of the existing rule, which refers to lack of trustworthiness rather than trustworthiness as a positive admissibility requirement.

3. It is supported, as stated above, by the original Advisory Committee Note to Rule 803.

4. Requiring the proponent to show trustworthiness as well as all the other admissibility requirements would unduly narrow the exceptions and would establish more strenuous admissibility requirements for these exceptions than for any other exceptions in Rule 803.

5. Requiring "trustworthiness-plus" would imposes a more stringent admissibility requirement for these exceptions than that applied to Rule 807, the residual exception. Rule 807 only requires a showing of circumstantial guarantees of trustworthiness. Requiring more for these

records-based exceptions would also generate confusion in applying the residual exception — because courts are instructed to find circumstantial guarantees of trustworthiness that are "equivalent" to those in Rules 803 and 804. But how can it be "equivalent" if the Rule 803(6)-(8) require more than circumstantial guarantees of trustworthiness?

It should also be noted that however the burden is allocated, that allocation should be the same for all three exceptions. There is no good reason articulated anywhere for differentiating among the exceptions, and certainly nothing in the language of the rules that would support any such distinction. It could perhaps be argued that public records carry a stronger presumption of reliability than business records, because of the public duty to accurately enter and record data. But it could just as easily be argued that the requirements of routine and regularity that support the business records exception justify a stronger presumption of reliability than that afforded to public recording. In the end, no convincing case can be made for differentiation one way or the other.

III. Drafting Alternatives

There are essentially two drafting alternatives, one allocating the burden to the opponent and one to the proponent. The blacklined changes are to the rules as restyled and submitted to the Judicial Conference.

Alternative #1 — Burden on Opponent

> **(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;
>
> (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(11) or (12) or with a statute permitting certification; and
>
> (E) ~~neither~~ the opponent does not show that the source of information ~~nor~~ or the method or circumstances of preparation indicate a lack of trustworthiness.

Identical changes would be made to Rules 803(7) and (8).

Possible Committee Note to Rule 803(6) and 803(7)

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification — then the burden is on the opponent to show a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose the burden of proving untrustworthiness on the opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable. *See* Mueller and Kirkpatrick, Federal Evidence, §450 ("The basic requirements (regular business with regularly kept record; source with personal knowledge; record made timely;

foundation testimony) are enough in the run of cases to justify the conclusion that the record is trustworthy.")

Possible Committee Note to Rule 803(8)

The Rule has been amended to clarify that if the proponent has established that the record meets the stated requirements of the exception — prepared by a public office and setting out information as specified in the Rule — then the burden is on the opponent to show a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. Public records have justifiably carried a presumption of reliability and it should be up to the proponent to "demonstrate why a time-tested and carefully considered presumption is not appropriate." *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984):

Alternative #2: Burden on Proponent

(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;

(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(11) or (12) or with a statute permitting certification; and

(E) ~~neither~~ the proponent shows that the source of information ~~nor~~ and the method or circumstances of preparation indicate ~~a lack of~~ trustworthiness.

Possible Committee Note for Rules 803(6)-(8)

The amendment clarifies that trustworthiness is a positive admissibility requirement and therefore the proponent has the burden of proving it under Rule 104(a). An affirmative showing of trustworthiness is appropriate given concerns that the other admissibility requirements are not sufficient to screen unreliable records from admissibility under the exception.

[Obviously this is a pretty poor pass at a Committee Note, and hopefully that is not because of the Reporter's lack of skills, but rather because the policy justification for this alternative is weak.]

TAB 7A

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Suggestion to Change Rule 801(d) "Not Hearsay" Designation
Date: September 16, 2010

Attached is an interesting article[1] from Professor Sam Stonefield, which he submitted to me as a formal proposal to amend the Federal Rules of Evidence. Professor Stonefield raises an anomaly in the treatment of hearsay: Rule 801(d) treats two categories of statements as "not hearsay" when in fact statements fitting under that Rule definitely fit within the definition of hearsay. Essentially the Rule says that statements that are clearly hearsay are "not hearsay" in the same manner as someone saying that an elephant is "not an elephant." Professor Stonefield analyzes, in painstaking detail, the reasons for the anomaly of the Rule 801(d) categories of hearsay statements. The basic explanation is as follows:

Subdivision (d) technically provides an exemption from, rather than an exception to, the hearsay rule. The Advisory Committee determined that the statements covered by subdivision (d) should be categorized as "not hearsay"' rather than as "hearsay subject to an exception" because the basis for admitting these statements is different from that supporting the other standard hearsay exceptions, such as excited utterances and dying declarations, which are found in Rules 803, 804, and 807. Statements falling within these latter exceptions are admitted because they are made pursuant to circumstantial guarantees of reliability that substitute for the in-court guarantees of oath, cross-examination, etc.[2] For example, excited utterances are made while the declarant is under the

[1] At least for Evidence professors.

[2] The exceptions to the circumstantial guarantee of reliability-basis for admission are: 1) Rule 803(5), past recollections recorded, which are admissible because the witness who prepared the record must be produced and subject to cross-examination; and 2) Rule 804(b)(6), where admission is the result of misconduct by the party against whom the hearsay statement is offered. (As to the latter exception, it should be noted that it was added years after the decision was made

influence of a startling event and for that reason is less likely to be able to lie.

In contrast, prior statements of testifying witnesses (Rule 801(d)(1)) are admitted not because they were reliable when made, but because the person who made them is testifying at the trial or hearing under oath and subject to cross-examination. And statements of party-opponents (Rule (d)(2)) are allowed not because they are reliable, but because the adversary or his agents made them — if a party happens to make an unreliable statement, it is not up to the Judge to protect him from use of the statement by the adversary; it is up to the party to try to explain the statement or to diminish its importance. The drafters of the Federal Rules thought that it would be confusing to lump prior statements of testifying witnesses and statements of party-opponents together with reliability-based exceptions under a single label of "hearsay exceptions." As Professor Stonefield describes the original Advisory Committee's rationale, the hearsay statements in Rule 801(d) presented a "poor fit" with the standard hearsay exceptions.

Professor Stonefield does not dispute the validity of the reason for breaking out the Rule 801(d) statements from the other hearsay exceptions. He agrees that they are a poor fit with Rules 803 and 804. He objects, however to the "not hearsay" designation, because it is simply confusing. Statements that clearly fit the definition of hearsay are labeled, *ipse dixit*, "not hearsay." His further objection is that it makes no sense to group prior statements of testifying witnesses with statements of party-opponents because the reason for admitting the former set of statements (the ability to cross-examine the declarant) is completely different from the reason for admitting the latter (the adversary theory).

Professor Stonefield proposes that Rule 801(d) statements be redesignated as hearsay but subject to an exception. He concedes that his proposal will not change any evidentiary result as a practical matter, because there is no practical difference between an exception to the hearsay rule and an exemption from that rule. If a statement fits either an exemption or an exception, it is not excluded by the hearsay rule, and it can be considered as substantive evidence if it is not excluded by any other Rule (e.g. Rule 403). Professor Stonefield also concedes that courts have had no problem with the anomalous designation of Rule 801(d) statements as not hearsay — they know it makes no difference and so don't get hung up on any distinction between "not hearsay" and "hearsay subject to an exception."[3]

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to create the "not hearsay" categories of Rule 801(d)).

[3] One example of courts coping with the anomaly is in the application of Rule 805 — hearsay upon hearsay. That rule says that there is hearsay upon hearsay, each part of the combined statements must conform "with an exception to the rule." Technically, conforming with one of the Rule 801(d) provisions would not satisfy Rule 805 because these are not an "exception" to the hearsay rule. But courts have had no problem finding, for example, that statements of party-opponents satisfy one of the steps in a multiple hearsay problem. See, e.g., *United States v. Dotson,* 821 F.2d 1034, 1035 (5th Cir. 1987) ("For the purposes of the hearsay-within-hearsay principle expressed in Rule 805, nonhearsay statements under Rule 801(d) * * *

The question for the Committee is whether the costs of an amendment — disruption of settled expectations, necessary adjustment, possible inadvertent changes, etc. — is outweighed by the benefit of a more logical approach to the hearsay rule and its exceptions. In the end, the major argument against the proposal is that the existing Rule 801(d), however logically flawed and perhaps confusing to novices, has not appeared to result in any practical problems of application.

Assuming the Committee were to decide to more fully consider an amendment to designate Rule 801(d) statements as hearsay exceptions, the question remains how that could be done. Professor Stonefield essentially provides two alternatives, which he refers to as "minimalist" and "thorough-going." The minimalist approach includes moving the exception for past recollection recorded into the exception for prior statements — which is more than minimalist. So really there are three alternates, all set forth below. Generally speaking, the less drastic the approach, the less cost of disruption, but also the less benefit provided:

1. Minimalist Alternative — Simply Redesignating Rule 801(d) Statements, No Change to Past Recollection Recorded..

> ***(d) ~~Statements That Are Not Hearsay~~ Exceptions to the Rule Against Hearsay [– Prior Statements of Testifying Witnesses and Statements of Party-Opponents].*** A statement that meets the following conditions is not excluded by the rule against hearsay:
>
> > ***(1) A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a 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.
>
> ***(2) An Opposing Party's Statement.*** The statement is offered against an opposing party and:

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should be considered in analyzing a multiple hearsay statement as the equivalent of a level of the combined statements that conforms with an exception to the hearsay rule.").

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be 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 coconspirator 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).

Reporter's Comments:

1. This proposal is obviously simple and accomplishes the limited objective of calling something what it really is. These really are hearsay exceptions and they are so designated.

2. It could be thought somewhat odd to have a separate rule for "hearsay exceptions" when there are already other rules providing hearsay exceptions, specifically 803, 804 and 807. Perhaps it would be useful to elaborate in the heading, as in the bracketed material: "Hearsay Exceptions for Prior Statements of Testifying Witnesses and Statements of Party-Opponents."

3. The alternative of moving these exceptions into Rules 803 and 804 is not viable for at least two reasons. First, prior statements of testifying witnesses don't fit under either rule: they are not admissible regardless of whether the declarant is unavailable, because the declarant's testifying is the major requirement for admissibility; and of course the declarant is not unavailable so they don't fit under Rule 804. Party-opponent statements could technically fit under Rule 803, but including them there would have a negative impact on the residual exception. Rule 807 requires a statement to have circumstantial guarantees of trustworthiness that are equivalent to those found in the exceptions in Rules 803 and 804. Party-opponent statements are not admitted because they are reliable. Adding party-opponent statements to Rule 803 would thus result in a lowering of the equivalency standard for reliability of Rule 807 statements. More fundamentally, statements of party-opponents are simply a poor fit for Rule 803, which is based on circumstantial guarantees of reliability.

3. What remains from this proposal is the illogic of lumping together two separate exceptions under a single designation. The exceptions really have nothing to do with each other, as one is based

on reliability (cross-examining the declarant) while the other has nothing to do with reliability but is rather based on the consequences of the adversary system (if you or your agents say it, it is your problem, not the court's). But perhaps the lack of logical connection in the grouping of exceptions is a tolerable cost — because any other change will result in disruption to electronic searches and settled expectations.

4. An alternative that would uncouple the two exceptions would be to create separate subdivisions, as follows:

> ***(d)*** ~~***Statements That Are Not Hearsay***~~ ***Exceptions to the Rule Against Hearsay — A Declarant-Witness's Prior Statement.*** A statement that meets the following conditions is not excluded by the rule against hearsay:
>
> > ***(1)*** ~~***A Declarant-Witness's Prior Statement.***~~ The declarant testifies and is subject to cross-examination about a prior statement~~,~~; and ~~the statement:~~
> >
> > ***(2)*** 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.
>
> ~~***(2)***~~***(e) Exceptions to the Rule Against Hearsay — An Opposing Party's Statement.*** ~~The~~ A statement is not excluded by the rule against hearsay if it is offered against an opposing party and:
>
> > (~~A~~ 1) was made by the party in an individual or representative capacity;
> >
> > (~~B~~ 2) is one the party manifested that it adopted or believed to be true;
> >
> > (~~C~~ 3) was made by a person whom the party authorized to make a statement on the subject;
> >
> > (~~D~~ 4) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
> >
> > (~~E~~ 5) was made by the party's coconspirator 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).

The problem with the alternative is obvious — it alters numeration and upsets electronic searches. The Committee would have to determine whether the benefits in promoting the internal logic of the hearsay exception outweigh the disruption that would be caused by the change.

5. Any change in designation — either the simple approach or the renumeration set forth above — ***would require a conforming change to Rule 806***. Rule 806, providing for the impeachment of hearsay declarants, provides as follows:

Rule 806. Attacking and Supporting the Declarant's Credibility

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.

The reason for the special designation of Rule 801(d)(2) is that under current practice statements falling within that rule are not technically hearsay statements — so without the specification, an agent-declarant's credibility could not be attacked by the opponent. If an amendment is adopted that makes Rule 801(d) statements exceptions to, rather than exclusions from, the hearsay rule, that would of course mean that a statement falling within the hearsay rule is then a "hearsay statement" within the meaning of Rule 806. Thus, the special designation under Rule 805 needs to be struck as unnecessary (and confusing). As follows:

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.

Note that any change to Rule 801(d)(1) raises an anomaly in relation to Rule 806. An amendment that makes all Rule 801(d) statements hearsay means that all statements thereunder are covered by the term "hearsay statement" in Rule 806. But Rule 806 does not mesh with all of the statements that are admissible under Rule 801(d) — which is why Rule 806 only specifies statements that fall under Rule 801(d)(2)(C)-(E), i.e., statements of agents of party-opponents. Rule 801(d)(1) statements are not included because it is not necessary to do so — the declarant is by definition testifying and so of course his credibility can be attacked like any other witness. Rule 801(d)(2)(A) and (B) statements are not included because those statements are made by the party himself, who obviously has no incentive to attack his own credibility.

The result of amending Rule 801(d) to designate *all* statements covered therein as hearsay statements is to make Rule 806 a redundancy for some of those statements (those within Rule 801(d)(1)) and a useless device for others (party statements and adoptive statements). Thus, it could be a bit problematic if an amendment designed to bring logical coherence to the hearsay rule ends up resulting in some incoherence.

2. Minimalist Plus — Redesignation and Moving Past Recollection Recorded.

Professor Stonefield recommends moving the exception for past recollection recorded to the exception that will be created for prior statements of testifying witnesses. He notes that logically, past recollection recorded belongs there because it is an exception dependent on the in-court testimony of the declarant who prepared the record.[4]

The current location for the past recollection recorded exception makes little sense. It's located in Rule 803, where availability of the declarant is supposed to be irrelevant, but in fact a statement cannot be admitted as a past recollection recorded unless the declarant who prepared the record *testifies at trial*. Under the terms of the Rule, the record must be on a matter that "the *witness* once knew about but cannot recall well enough to testify fully and accurately." So past recollection recorded is to say the least a poor fit for Rule 803. Notably, it is a bad fit for Rule 804 as well. A witness doesn't have to be unavailable within the meaning of Rule 804 for a past recollection recorded to be admissible. While lack of memory is a ground for unavailability, the past recollection recorded declarant need not have an absolute lack of memory of the underlying event. It is enough that the declarant "cannot recall well enough to testify fully and accurately."

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[4] As his article notes, the Hawaii Rules of Evidence have a separate exception for prior statements of testifying witnesses, and past recollection recorded is included in that exception.

The historical record indicates that the original Advisory Committee was not sure about where to put the past recollection recorded exception — so it decided to put it in the grouping of records exceptions in Rule 803. While that grouping is useful, the fact remains that past recollection recorded does not belong in a rule in which the availability of the declarant is irrelevant.

If the exception for past recollection recorded is included in a "minimalist" amendment to Rule 801(d), it might look like this:

(d) ~~Statements That Are Not Hearsay~~ Exceptions to the Rule Against Hearsay [– Prior Statements of Testifying Witnesses and Statements of Party-Opponents]. A statement that meets the following conditions is not excluded by the rule against hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a 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; or

(D) is in a record that:

(1) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(2) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(3) 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.

(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 the party manifested that it adopted or believed to be 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 coconspirator 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).

Of course, a conforming amendment would be required in Rule 803 — striking Rule 803(5). Also, the above changes could be broken out into two separately numbered subdivisions (i.e., 801(d) and 801(e)) as shown in one of the alternatives above.

Reporter's Comment:

1. Moving past recollection recorded out of Rule 803(5) resolves an anomaly, but it comes with the cost of disruption of electronic searches. The change would be disruptive and carries no real practical benefits, as the exception works just fine now despite its misplacement.

2. There is also some tension in the new grouping of Rule 803(5) with the other prior statements of testifying witnesses. The statements currently in Rule 801(d)(1) are considered reliable because the witness is subject to cross-examination. Rule 803(5) is considered reliable because the proponent must show that the record was accurate when made; one of the ways to prove that is through testimony of the declarant who prepared the record, *but that is not the only way*. See, e.g., *United States v. Porter,* 986 F.2d 1014 (6th Cir. 1993) (past recollection recorded admissible even though the declarant who made the statement denies its accuracy; the government established circumstantial guarantees that indicated the trustworthiness of the statement). Thus, the fit is not perfect — though it's significantly better logically than Rule 803.

3. "Thorough-going" alternative: Renumeration.

The more aggressive proposal is to house each category of hearsay exception under a separate rule number. The Federal Rules on hearsay would be renumbered from Rule 803 to the end, as follows:

Rule 803: Exceptions to the Rule Against Hearsay — Prior Statements of Testifying Witnesses.

(a) Inconsistent Statement

(b) Consistent Statement

(c) Statement of Identification

(d) Past Recollection Recorded

[The language of the rule would be the same as alternative 2, above]

Rule 804: Exceptions to the Rule Against Hearsay — Statements of Party-Opponents.

(a) Party Statement

(b) Adopted Statement

(c) Statement of Authorized Agent

(d) Statement of Agent About a Matter Within Scope of Authority

(e) Statement of a Coconspirator

Rule 805: Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness.

(a)[5] Present Sense Impression.

(b) Excited Utterance.

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[5] It would be possible to make this a number, e.g., Rule 805(1). But as the Rule itself is being renumbered — thus already disrupting electronic searches — it can be argued that you might as well go the whole way and use the style convention of letters after numbers. Substituting letters for numbers could be argued to be a collateral benefit of the proposed change. On the other hand, it could be argued that the numbers should be retained so that the change is not so jarring. Those who know the 803 exceptions think of business records as Exception 6, and will probably continue to do so even if the Rule itself is renumbered.

(c) Then-Existing Metal, Emotional, or Physical Condition.

(d) Statement Made for Medical Diagnosis or Treatment.

(e) [Transferred to Rule 803(d)][6]

(f) Records of a Regularly Conducted Activity.

[The reference in Rules 902(11) and 902(12) to Rule 803(6) would have to be changed.]

And so forth.

Rule 806. Exceptions to the Rule Against Hearsay — When the Declarant Is Unavailable as a Witness.

(a) Criteria for Being Unavailable.

And so forth— note that internal citations in subdivision 5 would have to be renumbered.

(b) The Exceptions.

And so forth.

Rule 807. Residual Exception.

[The reference in the residual exception to "Rule 803 or 804" would have to be changed to "Rule 805 or 806"]

Note: You could move all the remaining rules up in the same order they are now. So existing 805 would become Rule 807, etc. But it is clearly better to keep Rule 807 where it is and move current 805 and 806 to the end of the line. First, the residual exception is best placed in a grouping with all the other exceptions. The only reason it isn't currently so placed is because it was added well after the original Rules were adopted — the Advisory Committee wanted to avoid the disruption that would have

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[6] This will be an argument, much like the fight in restyling over retaining the gap created when Rule 804(b)(5) was moved. It makes sense to retain the gap here — it will help users in figuring out where the past recollection recorded exception went, for one thing. It also avoids the disruption of changing the renumbering (or relettering) of al the subsequent exceptions.

been caused by making the residual exception Rule 805 and moving all the other rules up one number. Given that the proposed amendment would already be renumbering, it would make sense to now group all the hearsay exceptions together. It also makes sense to retain the residual exception as Rule 807 so as to avoid disrupting electronic searches of residual hearsay cases.

Rule 808. Hearsay Within Hearsay.

Rule 809. Attacking and Supporting the Declarant's Credibility.

Reporter's Comment:

This is a disruptive change. And after the dust settles, it won't change any evidentiary result or fix any practical problem. But it does have some virtues, including: 1. Treating hearsay exceptions as what they are — exceptions — and thus avoiding any possible confusion; 2. Grouping all hearsay exceptions together numerically; 3. Separating prior statements of testifying witnesses and statements of party-opponents into their own exceptions, thus fixing the illogical grouping that currently exists; and 4. Putting the exception for past recollection recorded in the most logical, if not perfect, place.

Of course it is for the Committee to determine whether the benefits in propounding a logical and coherent system are worth the disruption. If the Committee decides to more fully consider any of the above options, a proposed amendment and Committee Note will be drafted for the next meeting.

TAB 7B

Classifying Admissions and Prior Statements: Alternatives to Rule 801(d)'s Confusing and Misguided Use of The Term "Not Hearsay"

 9/9/2010

Admissions of a party and prior statements of a witness -- two of the most frequently used types of evidence – are different from all other types of hearsay. They are distinctive, each in its own way, because of the status of the declarant,[1] the person who made the out-of-court admission or prior statement and the person on whom the factfinder will rely in evaluating that statement. With an admission, the declarant is *a party* to the action.[2] With a prior statement, the declarant is a *witness* in the case. In none of the myriad other types of hearsay is the declarant a party or a witness.

This status as a party or a witness has a direct impact on the central feature of hearsay policy, the opportunity to cross-examine the declarant concerning the out-of-court statement.[3] Admissions and prior statements are different from every other type of hearsay in this respect. With prior statements, the witness who made the out-of-court statement is in the courtroom, testifying under oath and subject to cross-examination and observation in the current trial. With admissions, the declarant is a party to the case, the evidence is offered against him or her, and, as Wigmore noted, "he does not need to cross-examine himself."[4]

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[1] Fed. R. Evid. 801(a) defines declarant as "a person who makes a statement."

[2] This article uses the phrase "admission of a party" or "party admission" because it is the most commonly used phrase. However, a more accurate wording, one recommended by the Advisory Committee on Evidence Rules as part of its restyling effort, is "Statement of party-opponent." Memorandum from Robert L. Hinkle, Chair, Advisory Committee on Evidence Rules to the Hon. Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States app. A at 63 (May 10, 2010), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/EV05-2010.pdf. That phrase is more accurate than "admission of a party" in two respects. First, any statement will qualify; it does not have to be an "admission" or a "confession" or a statement against interest. Second, it can not be offered by the party making the statement; it must be offered against the party and thus be a statement of a party-opponent.

[3] The Advisory Committee observed that "the basis of the hearsay rule today tends to center upon the condition of cross-examination . . . a 'vital feature' of the Anglo-American system . . . [t]he belief, or perhaps hope, that cross-examination is effective in exposing imperfections of perception, memory, and narration is fundamental." Fed. R. Evid., Introductory Note on Hearsay advisory committee's note. In addition to its importance in hearsay law and policy, cross-examination is also central to a criminal defendant's constitutional confrontation right under the Sixth Amendment. *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 51 (2004). This article will not discuss Confrontation Clause matters, however, because the classification issues addressed here are neutral with respect to admissibility and thus confrontation.

[4] 2 John Henry Wigmore, A Treatise on the System of Evidence in Trials at Common Law: The Statutes and Judicial Decisions of All Jurisdictions of The United States and Canada §1048, 505 (2d ed.1923). This observation about not needing to cross-examine oneself certainly applies to personal admissions. With some vicarious admissions, such as the statement of an employee of a corporation that is offered against the corporation (or of a co-conspirator offered against a criminal defendant), the corporation (or criminal defendant) may want and need to cross-examine the out-of-court declarant. However, Fed R. Evid. 801(d)(2) treats vicarious admissions under Fed. R. Evid. 801(d)(2)(d) and (e) identically to personal admissions under Fed. R. Evid. Rule 801(d)(2)(a), and accordingly this article does so as well.

Their distinctiveness has been the source of longstanding debates about their treatment under hearsay law. For prior statements, the main issue has been *whether* they should be admitted as substantive evidence or, as under the orthodox rule that prevailed until the adoption of the Federal Rules of Evidence, only for impeachment.[5] For admissions, which have long been received as evidence and without the requirements (such as compliance with the personal knowledge, competence and opinion rules) imposed on other testimony,[6] the issue has been *why* such statements are allowed without the standard safeguards.[7]

Rather than reprise these well-rehearsed topics, this article explores a different question, what might be called the *how* question. It accepts the policy decision -- policy makers have decided to admit admissions and prior statements as substantive evidence[8] -- and then asks: when we admit these statements, how should we do it -- as hearsay exceptions, or as something else? Under the Federal Rules of Evidence and in thirty-three states that follow them in this respect, the answer to the question is: as something else. Admissions and prior statements, when offered to prove their truth, are hearsay under the hearsay definition in Rule 801(c)[9] but then classified as "not hearsay" in Rule 801(d).[10]

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[5] For impeachment, the prior statement is offered simply for the fact that it was made and is inconsistent with the declarant's trial testimony, and not for its truth. Therefore, under the standard definition, it is not hearsay. However, when offered as substantive evidence to prove the truth of the matter asserted in the statement, the prior statement is hearsay. The orthodox rule allowed the impeachment use but not the substantive, hearsay use. Arguing that the purposes of the hearsay rule had been met since the declarant was in court and subject to cross-examination and observation, reformers long sough the admissibility of prior statements for their substantive use. *See* Fed. R. Evid. 801 (d) (1) advisory committee notes; Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 218-19 (1948); Charles T. McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 Tex. L. Rev. 573, 575 (1947).

[6] The absence of these foundational requirements has led one commentator to call admissions "among the least trustworthy of all proof admissible at trial." Freida F. Bein, *Parties' Admissions, Agents' Admissions: Hearsay Wolves in Sheep's Clothing,* 12 Hofstra L. Rev. 393, 401 (1984). *See also* James L. Hetland, *Admissions in the Uniform Rules: Are They Necessary*, 46 Iowa L. Rev. 307, 315 (1961) While that remark overstates the point -- in most instances the statement is reliable, because in most cases it will be against interest and will be based on the personal knowledge of a party, who almost always will be in court; Roger C.Park, *The Rationale of Personal Admissions*, 21 Ind. L. Rev. 509, 516-17 (1988)-- it does emphasize this first corollary for admissions: the lack of doctrinally-required prerequisites of reliability.

[7] Scholars have advanced a variety of reasons for receiving admissions as evidence, including the adversary system of litigation, a sense of party responsibility for one's own words and actions, estoppel, basic fairness and emotion. After reviewing the literature and cases, Professor Park concluded any single reason is reductionist and incomplete and that their favorable treatment is best justified by a series of interlocking reasons. Park, *supra.* note 6. *See also* Roger C. Park, *A Subject Matter Approach to the Hearsay Rule*, 85 Mich. L. Rev. 51, 77-81 (1987).

[8] As a shorthand convenience, when this article uses "admitted" or "admissible," it means "not barred by the hearsay exclusionary rule." The evidence could still be inadmissible if barred by another exclusionary rule, such as the character evidence rules or privilege rules.

[9] Rule 801(c) provides that an out-of-court statement is hearsay if it is "offered to prove the truth of the matter asserted in the statement."

[10] Rule 801(d) is titled "Statements which are not hearsay" and provides:

A statement is not hearsay if-

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, or (B)

This something else/"not hearsay" answer is "awkward" (*per* Judge Henry Friendly in 1973),[11] "unnecessarily confusing" (*per* Judge Edward Becker in 1992),[12] and "wrong" (*per* Professor Faust Rossi in 1993)."[13] Oxymoronically, it refers to this admittedly hearsay evidence as something it is not -- "not hearsay."[14] Further, although not appearing in the text of the federal rules, a traditional, analytically important meaning for the term not hearsay (without quotation marks) already exists, to describe evidence that is truly not hearsay under the hearsay definition.[15] The threshold issue in hearsay analysis is whether the evidence is hearsay, and, as every law student learns, many out-of-court statements are not hearsay, typically because they are not offered to prove the truth of the matter asserted in the statement.[16] The meaning of "not hearsay" under Rule 801(d) is inconsistent with this traditional meaning of not hearsay. A rule that has two different meanings for the same term violates what has been called the "Golden Rule for

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consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or

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

Fed. R. Evid. 801 advissory committee's note begins by stating that "[s]everal types of statements which would otherwise literally fall within the definition of hearsay are expressly excluded from it." *Id.*

[11] Rules of Evidence (Supplement): Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary, 93rd Cong. 97 (1973) (correspondence of Henry J. Friendly, Judge, U.S. Court of Appeals for the Second Circuit), *reprinted in* JAMES F. BAILEY, III & OSCAR M. TRELLES, II, THE FEDERAL RULES OF EVIDENCE: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS (1980).

[12] *See* Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years --The Effect of "Plain Meaning" Jurisprudence, The Need For an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 Geo. Wash. L. Rev. 857, 902 (1992). *See also* Steven H. Saltzburg, Michael M. Martin & Daniel J. Capra, 4 Federal Rules of Evidence Manual (9th ed. 2006) ("... Federal Rules regime is . . . confusing in the end because statements that clearly fit the definition of hearsay are labeled, *ipse dixit*, 'not hearsay.'").

[13] *See* Faust F. Rossi, *Symposium - - Twenty Years of Change*, 20 Litig. 24, 24 (Fall 1993) ("Treating party admissions as non-hearsay rather than as a traditional exception is wrong and has been roundly condemned."). *See also* Richard O. Lempert, Samuel R. Gross and James S. Liebman, A Modern Approach to Evidence 538, n.52 (4th ed., 2000) (the classification is a "practical mistake") and George Fisher, Evidence 393 (2d ed. 2002)("Orwellian labeling").

[14] Graham C. Lilly, Steven H. Saltzburg & Daniel J. Capra, Principle of Evidence, 160, n.1 (2009)("This oxymoron is unlikely to make life easier for trial lawyers, students and judges.")

[15] This article will regularly refer to the two different uses of the term not hearsay. To distinguish between them, it will follow the example of 4 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence 35 (3rd ed. 2007) and will place "not hearsay" in quotations when referring to Rule 801(d) "not hearsay" (where the statement is hearsay under Rule 801(c) but is excluded from the hearsay rule by Rule 801(d)) and will not use quotations when referring to the traditional meaning of not hearsay (where the statement is not hearsay under Rule 801(c)).

[16] The categories of these non-hearsay statements are well-known and include: 1) statements that are offered to prove their effect on the listener; 2) words that have an independent legal significance; 3) statements offered as circumstantial evidence of the declarant's state of mind; and 4) prior statements offered to impeach or rehabilitate. *See, e.g.*, 30B Michael Graham, Federal Practice and Procedure 41-118 (Interim Edition 2006).

Drafting"[17] – that the same term should be used consistently and with the same meaning throughout a document.[18] As we near the end of a two-decades-long project to revise all federal court rules for clarity and consistency using the Guidelines for Drafting and Editing the Federal Rules,[19] it is anomalous to have a rule that fails to meet the prevailing drafting standards and yet remains thus far untouched by the amending and restyling efforts.[20]

We can and should do better. This article presents several alternatives to Rule 801(d) and endorses an approach that classifies admissions and prior statements as hearsay, treats them as hearsay exceptions and places each in a new, separate, appropriately-labeled category. I call this the "four categories" approach, because it uses four distinct categories for the hearsay exceptions, each organized around the status of the declarant.[21] By eliminating the "not hearsay" term in Rule 801(d), it removes a source of

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[17] Reed Dickerson, The Fundamentals of Drafting 16 (2d ed. 1986) (*quoting* E. Piesse, The Elements of Drafting 43 (5th ed. 1976)) "the competent draftsman makes sure that each recurring word or term has been used consistently. He carefully avoids using the same word or term in more than one sense . . . In brief, he always expresses the same idea in the same way and always expresses different ideas differently . . .Consistency of expression has appropriately become the "Golden Rule" of drafting." *Id.*

The drafters intended the term not hearsay to have a different meaning in each context. If an unsuspecting reader were to give the term the same meaning at all times, she would commit the fallacy of the transplanted category, the tendency to give one word or concept a similar meaning in different contexts. Hancock, *The Fallacy of the Transplanted. Category*, 37 Can. B. Rev. 535 (1959); Review, 70 Yale L.J. 1404, 1406 (1961). The norms of clarity and consistency in drafting are designed in part to protect readers from committing that fallacy. Interestingly, in the second edition of his Handbook on Illinois Evidence, Professor Edward Cleary, who soon thereafter became the Reporter for the Federal Rules of Evidence and the draftsperson of Fed. R. Evid. Rule 801(d), used the phrase "the fallacy of the transplanted category" to describe the misapplication of the term presumption in "nonpresumption situations." Edward W. Cleary, Handbook on Illinois Evidence 60 (2d ed. 1962).

[18] Technically, the Federal Rules of Evidence contain only one meaning for the term not hearsay, as Fed. R. Evid. Rule 801(d) is the only place where it appears. However, the antonym of hearsay is not hearsay, and this antonymic use (particularly when it is the well-established, widely known and analytically important) should surely be considered a part of the rule.

[19] Byron Garner, Guidelines for Drafting and Editing the Federal Rules (5th ed. 2009). Rule 1.1 is titled "Be Clear." *See* Section V, *infra* for discussion of the restyling project, its procedures and standards.

[20] As discussed in Section V, the current restyling project for the Federal Rules of Evidence will not address the 'not hearsay" term in Rule 801(d).

[21] The four categories cover statements when: 1) the declarant is a party (for admissions), 2) the declarant is a witness (for prior statements), 3) the availability of the declarant is immaterial (the current Rule 803); and 4) the declarant must be unavailable (the current Rule 804). There is of course a fifth category, the residual exception currently represented by Rule 807. While I have no strong feelings, I have not included Rule 807 in the counting of categories because it is analytically distinct, focusing on the nature and circumstances of the out-of-court statement and not on the status of the declarant. If the residual category were included in the count, the recommendation would be for a "five categories" approach.

Several scholars have suggested modifications to Fed R. Evid. Rule 801(d) over the years. In 1974, Professor Tribe made what I would call a "four categories" recommendation, stating that such a treatment would be "more likely to keep attention riveted on the underlying reasons for such exceptions and, thereby, on their appropriate limits." Lawrence Tribe, *Triangulating Hearsay*, 87 Harv. L. Rev. 957, 973 (1974). *See also* Paul R. Rice, *The Evidence Project: Proposed Revisions to the Federal Rules of Evidence with Supporting Commentary*, 171 F.R.D. 330, (1997) (suggesting a "three categories" approach to hearsay); Paul R. Rice & Neals-Erik William Delker, *Federal Rules of Evidence Advisory Committee: A Short History of Too Little Consequence*, 191 F.R.D. 678 (2000); Freda F. Bein, *Parties'Admissions, Agents' Admissions: Hearsay Wolves in Sheep's Clothing*, 12 Hofstra L. Rev. 393, 400 (1984) (stating that party

confusion. By placing admissions and prior statements in clearly identified separate exceptions, it reinforces their distinctiveness and reminds users of the separate rationales for their admissibility.

However, before presenting and evaluating the various alternatives and the recommended new approach, it is necessary first to understand how and why the drafters created this "ungainly category."[22] Rule 801(d) was proposed by a distinguished Advisory Committee, enacted by Congress, and has been adopted by thirty-four states. It has been the law for over thirty-five years. Further, it has substantial historical and intellectual roots, and no change in the rule will be possible until those roots are uncovered and their weaknesses and inadequacies revealed. Accordingly, the article begins in Section I-A by discussing the treatment of admissions and prior statements in the years leading up to the Federal Rules. Two giants of evidence scholarship, John Henry Wigmore of Northwestern and Edmund Morgan of Harvard, debated their classification for much of the first half of the twentieth century. After some initial reservations,[23] Wigmore decided that admissions and prior statements could be offered as substantive evidence but, instead of classifying them as hearsay exceptions, he placed them in his newly invented category called "hearsay rule satisfied," the intellectual forerunner of Rule 801(d). Morgan on the other hand treated admissions and prior statements as hearsay that should be admitted under a specific hearsay exception

Section I-B then discusses the three predecessor evidence codes that were adopted in each of the three decades prior to the Federal Rules of Evidence and that strongly influenced the drafters of the federal rules -- the A.L.I. Model Code of Evidence in 1942, the first Uniform Rules of Evidence in 1954 and the California Rules of Evidence in 1964. Each of these codes followed Morgan's lead and classified admissions and prior statements as hearsay, admissible under a hearsay exception. If asked in 1965 to predict how the forthcoming Federal Rules of Evidence would classify admissions and prior statements, a prognosticator would almost surely have said, "As hearsay, and then admissible under a hearsay exception." But that prognosticator would have been wrong.

While the drafters of the Federal Rules relied on Morgan and the three predecessor codes in many areas, they rejected this guidance as to the classification of admissions and prior statements and instead largely followed Wigmore's lead. Section II examines in detail the drafting process that led to Rule 801(d) and the reasons for the drafting choices, drawing on records of the Advisory Committee's internal processes that

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admissions should be reclassified as an exception to the hearsay rule); Roger C. Park, *The Rationale of Personal Admissions*, 21 Ind. L. Rev. 509, 509 (1988) ("because admissions are not required to be trustworthy . . . they should not be considered an exception to the hearsay rule, but should be placed in a special category of their own.").

[22] Park, *supra.* note 21 at 509.

[23] In the first edition of his treatise, Wigmore said that admissions and prior statements were admissible only for impeachment purposes, as "self-contradiction," and thus were not hearsay (his term was "hearsay rule inapplicable"). *See* 2 John Henry Wigmore, A Treatise on the System of Evidence in Trials at Common Law §§ 1018, 1048 (1st ed. 1904)

have not previously been used in the evaluation of Rule 801(d).[24] The Reporter's reasons, rooted in the classification debates discussed in Section I, were different for admissions and prior statements but focused on why it was important to treat both types of evidence differently than the other hearsay exceptions. But the Reporter never adequately addressed the how question – how should they be classified.

Section III examines the use and treatment of Rule 801(d) in case law, evidence treatises and law school casebooks. It shows that, while Rule 801(d) is awkward and confusing, it has not caused a crisis in the thirty-five years that it has been the law. Indeed, it has not even created serious practical problems on a day-to-day basis, for two main reasons. First, the "not hearsay" terminology affects only the classification of the evidence, not its admissibility.[25] A particular prior statement or admission will be admitted whether classified as "not hearsay" under Rule 801(d) or, as recommended later and as currently done in 16 states, as a hearsay exception. Second, lawyers and judges soon developed practical ways to "work around" the confusing language, largely by ignoring Rule 801(d)'s "not hearsay" terminology and referring to admissions and prior statements as hearsay exceptions, exclusions, or exemptions.[26] These "work-arounds" are no substitute for clear, consistent drafting in the first place, but they have prevented the trial system from stumbling over Rule 801(d)'s confusing and inapt language.

Section IV looks at Rule 801(d) and the second "not hearsay" category from the perspective of state evidence law and finds both conformity with the federal law and creative non-conformity. Thirty-four of the forty-three states that have adopted the federal rules have also accepted Rule 801(d) and the "not hearsay" category. These conforming jurisdictions have simply "followed the leader," with no record of considering alternatives to Rule 801(d) or independently evaluating the wisdom of introducing a second meaning of "not hearsay" into their evidence lexicon. Sixteen states have not adopted Rule 801(d), and several of these non-conforming states provide important examples of innovative alternative approaches, fresh ideas from our "laboratories of democracy."[27]

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[24] These materials include internal memoranda, minutes, and letters. The memoranda and letters are available in a microform collection. Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-1988. The minutes are now posted online. http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Minutes.aspx.

[25] "There is no practical difference between an exception to the hearsay rule and an exemption from that rule. If a statement fits either an exemption or an exception, it is not excluded by the hearsay rule, and it can be considered as substantive evidence if it is not excluded by any other rule (e.g. Rule 403)." 4 Steven H. Saltzburg, Michael M. Martin & Daniel J. Capra, 801-27Federal Rules of Evidence Manual (9th ed. 2006).

[26] For example, if opposing counsel makes a hearsay objection to evidence of the out-of-court statement of a party, the proponent will more likely respond by saying, "Yes, it is hearsay, Your Honor, but it comes in under the admissions exception [or exclusion or exemption] under Fed R Evid. Rule 801(d)(2)(A)" than by saying, "Your Honor, it is not hearsay under Fed R. Evid. Rule 801(d)(2)(A)."

[27] *Cf.* New State Ice Co., v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) Nine states have adopted the Federal Rules but rejected the Rule 801(d) terminology. Seven other states – two (California and Kansas) that have their own evidence codes and the five states that have not yet adopted the Federal Rules – treat these statements as hearsay exceptions. *See* Section IV, *infra*.

In Section V, the article identifies and then evaluates six alternative approaches to classifying admissions and prior statements. This evaluation finds that Rule 801(d) is neither practically, doctrinally nor theoretically sound. It fails the tests of clarity and consistency required by the norms of good drafting and remains a source of awkwardness and potential confusion for busy practitioners and judges, not to mention for law students learning the law of hearsay for the first time. The evaluation also finds that the "four categories" approach best serves the goals of the evidence code. The article concludes by discussing the prospects for adopting some version of this "four categories" approach as an amendment to the Federal Rules of Evidence, using the standards developed by the Advisory Committee on Rules of Evidence, first for evaluating amendments generally and then for making stylistic changes under the restyling process currently underway.

I. Prelude to the Drafting of the Federal Rules

A. Wigmore, Morgan and the Debate over the Classification of Admissions and Prior Statements and the Organization of the Hearsay Exceptions

Dean John Henry Wigmore (1863-1943) and Professor Edmund Morgan (1878-1966) were two giants of American evidence scholarship during the first half of the twentieth century. Wigmore has been called the "greatest legal writer in our history"[28] and his famous treatise, first published in 1904 and with a second edition in 1923 and a third edition in 1940, established the framework for the discussion of most major evidence issues during the first six decades of the twentieth century. [29]

The first edition of Wigmore's famous treatise was to be "the most complete and exhaustive treatise on a single branch of our law that has ever been written,"[30] and the second and third editions were similarly praised.[31] But that first reviewer also noted that Wigmore's work was in some respects "new and strange...[and used] extravagantly novel terms."[32] After praising the second edition, another reviewer observed that: "[Wigmore] has an instinct for vocabulary and an instinct for classification; -- but these

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[28] Charles T. McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 Tex. L. Rev. 574, 583 (1947).

[29] John Henry Wigmore, A Treatise on the System of Evidence in Trials at Common Law: including the statutes and judicial decisions of all jurisdictions of the United States (1st ed. 1904)[hereinafter, Wigmore, (1st ed. 1904)].

[30] Joseph H. Beale, *Book Reviews*, 18 Harv. L. Rev. 478, 479, 480 (1905)(reviewing the first edition).

[31] John M. Maguire, *Book Review*, 22 Ill L Rev. 688, 692 (1928) Referring to the second edition, Professor John Maguire said that, when it comes to evidence treatises, "Wigmore is still first, and there is no second." .Reviewing the third edition, Morgan wrote, "Not only is it the best, by far the best, treatise on the Law of Evidence, it is also the best work ever produced on any comparable division of Anglo-American law." Edmund M. Morgan, *Book Review*, 20 B.U.L.Rev. 776, 793 (1940).

[32] Joseph H. Beale, *Book Reviews*, 18 Harv. L. Rev. 478, 479, 480 (1905). Professor Beale was relentlessly critical of Wigmore's "novel' nomenclature. "In place of well-known terms to which we are all accustomed, Professor Wigmore presents us with such marvels as restrospectant evidence, prophylactic rules, vitriol privilege, integration of legal acts, atopic preference and other no less striking inventions. It is safe to say that no man, however great, could introduce three such extravagantly novel terms, and Professor Wigmore proposes a dozen." *Id.*

instincts, unfortunately, are not always under control. If the law calls a thing by one name, he is ever on the alert for another; the inevitable result is a classification that, even after all these years, seems not only new but queer."[33] As we will see, this observation about his "vocabulary and instinct for classification...not always under control" applies all too well to the Wigmore classification that was the intellectual forerunner of Rule 801(d), his "hearsay rule satisfied" category.

Morgan's numerous articles and extensive professional service made him "one of the greats."[34] Morgan and Wigmore both served on the two major blue ribbon evidence committees of their time,[35] as well as on the first important attempt to draft a modern evidence code, A.L.I. Model Code of Evidence.[36] Their competing views on the proper classification of admissions helped to shape the drafting of both the three predecessor codes and the Federal Rules of Evidence.

1. Wigmore and His Distinctive "Hearsay Rule Satisfied" Category

In contrast to the traditional two-step approach to hearsay analysis, which asked two questions (is the evidence hearsay; if so, is there an exception) and involved three categories (not hearsay, hearsay-not-within-an-exception, and hearsay-within-an-exception), Wigmore created a third step and a fourth hearsay category, an approach which the Reporter adopted for the Federal Rules of Evidence. He developed his distinctive approach in 1899, when he served as editor and revisor of the 16th edition of what had long been the leading American treatise on evidence, Greenleaf on Evidence.[37] To the traditional two hearsay questions, Wigmore added a third, writing in 1899 that:

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[33] Ralph Clifford, *Book Review*, 24 Col. L Rev. 440, 441 (1924). A more recent reviewer wrote: "I am newly aware that Wigmore in massive does is frequently irritating [and] his personally coined language is as often obscuring as illuminating." Ronan Degnan, *Book Review*, 87 Harv. L. Rev. 1590, 1594 (1970) (reviewing Revised Edition of Volume III of the Third Edition, by James H. Chadbourne).

[34] *See generally* Mason Ladd, *In Memoriam Edmund M.Morgan*, 79 Harv. L. Rev. 1546 (1966). The citation that accompanied the award of The American Bar Association awarded him a distinguished service medal in 1965, with a citation that read: "...your name, with that of Wigmore, is synonymous with the law of evidence." Professor Edmund M. Morgan Is Awarded the American Bar Association Medal, 51 A.B.A. J. 844 (1965) (1965).

[35] These were the the Commonwealth Fund Committee in the late 1920s, chaired by Morgan, Edmund M. Morgan, Law of Evidence: Some Proposals for Reform (1927), and the ABA Committee on Improvements in the Law of Evidence (the "Wigmore Committee") in 1938, chaired by Wigmore. Report of the Committee on Improvements in the Law of Evidence, 63 A.B.A. Rep 570 (1938).

[36] Morgan served as Reporter and Wigmore as Chief Consultant, and there was tension both in the selection of Morgan (as opposed to Wigmore) as Reporter and in their competing views on many issues. Professor Twining suggests that the conflicts between Wigmore and Morgan over the Model Code were similar to the clash between Williston and Llewellyon over the Uniform Commercial Code a decade later. "In each case the leading scholar of an earlier generation resisted changes in form and substance in his area of expertise and justified this opposition partly in terms of the established ways of thought of the practicing profession. In each case the older scholar was vulnerable to charges of having a vested interest in the status quo, as both Wigmore and Williston were well aware." William Twining, *Theories of Evidence: Bentham and Wigmore* 163 (1985).

[37] First published in 1842 by Professor Simon Greenleaf, Royall Professor of Law at Harvard, the book was the leading evidence treatise of the 19th century. Wigmore's work on the 16th edition was described as

"...three distinct groups of questions present themselves in connection with the Hearsay rule, viz.: A. Is the Hearsay rule applicable to the case at hand, i.e., is the evidence offered as a testimonial assertion? B. Is there any exception to the Hearsay rule to be made for the evidence offered? C. If the Hearsay rule is applicable, and if no recognized exception covers the case in hand, is the Hearsay rule satisfied, i.e., has there been, in fact, an oath and cross-examination?"[38]

These three questions (and the accompanying four categories) formed the analytic structure of Wigmore's approach to the hearsay rule. While his treatment of the first two questions was largely traditional, the third question – and his creation of the fourth "hearsay rule satisfied" category – exemplified both his originality and his "instinct for classification...[that was] not always under control."[39] The importance of the new question and the new category has never before been clearly identified, probably because his own treatise never articulated the third question or developed the fourth category with the clarity and focus of the 1899 Greenleaf book.[40] Nevertheless, they were central to his approach to hearsay and the hearsay exceptions and were the intellectual forerunner of Rule 801(d).[41]

The Hearsay Rule and the Hearsay Exceptions

While Wigmore never offered a precise definition of hearsay, his description of the rule showed his approach: "the Hearsay rule, as accepted in our law, signifies *a rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of Cross-examination.*"[42] For Wigmore, "[t]he theory of the hearsay rule is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath

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"more than a reediting of the book; it is a remolding of it." J.P.C., *Book Review*, 13 Harv. L Rev. 228 (1899).

[38] 1 Simon Greenleaf, Greenleaf on Evidence 185 (16th ed. 1899).

[39] Clifford, *Book Review*, 24 Col. L Rev. 440, 441 (1924).

[40] Instead of the three questions and three-part classification of the Greenleaf book, he wrote in his own treatise that: "An exposition of the Hearsay rule embraces four general topics: I. The Hearsay rule's requirements and their satisfaction . . . II. The kinds of assertions admitted as Exceptions to the Hearsay rule; III. Utterances, not being testimonial assertions, to which the Hearsay rule is not applicable; and IV. Sundry statements to which the Hearsay rule is applicable." 1 Wigmore (1st ed. 1904), *supra.* note 29, at §1366 p. 1696. However, these "four general topics" are discursive and descriptive, not analytical. They fit into the original three categories as follows: 1) is the Hearsay rule applicable -- included as parts of his topics I, III and IV; 2) is there an exception – covered in topic II; and 3) is the Hearsay rule satisfied – discussed in I. As we will see, while Wigmore placed admissions and prior statements in the "hearsay rule satisfied" category, he discussed them in the impeachment, not the hearsay, section of his treatise.

[41] See, e.g., Roger C. Park, David P. Leonard & Stephen H. Goldberg, *Evidence Law: A Student's Guide to the Law of Evidence as Applied in American Trials* 287-288 (2d. ed 2004)(posing what essentially are Wigmore's three questions in the context of analyzing the federal rules).

[42] 2 Wigmore (1st ed. 1904), *supra.* note 29 at §1362, p. 1675 (emphasis in original). Twenty pages later, he penned his famous praise of cross-examination as "beyond any doubt the greatest legal engine ever invented for the discovery of truth." *Id.* at §1427 p. 1697.

the bare untested assertion of a witness can be brought to light and exposed...by the test of cross-examination."[43]

However, the hearsay rule did not exclude all untested assertions. Noting that "[t]he purpose and reason of the Hearsay rule [to test assertions through cross-examination] is the key to the exceptions to it,"[44] Wigmore then recognized that "the test...may in a given instance be superfluous... [where] the statement offered is free from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation."[45] Furthermore, "the test may be impossible of employment [for example, if the declarant dies] so that, if his testimony is to be used at all, there is a necessity for taking it in the untested shape."[46]

Wigmore generalized from these observations to find that two principles, Necessity and Trustworthiness, were "responsible for most of the Hearsay exceptions."[47] While they are "only imperfectly carried out,...they play a fundamental part. It is impossible without them to understand the exceptions. In these principles is contained whatever of reason underlies the exceptions. What does not present itself as an application of them is the result of mere precedent, or tradition, or arbitrariness."[48] In applying these principles in all three editions of his treatise, Wigmore listed the exceptions in the following order, starting with the most unavailable:

> "1. Dying Declarations; 2. Statements against Interest; 3. Declarations about family history; 4. Attestation of a Subscribing Witness; 5. Regular Entries in the course of Business; 6. Sundry Statements of Deceased Persons; 7. Reputation; 8. Official Statements; 9. Learned Treatises; 10. Sundry Commercial Documents; 11. Affidavits; 12. Statements by a Voter; 13. Declarations of Mental Condition; 14. Spontaneous Exclamations."[49]

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[43] *Id.* at §1420, p. 1791. Testimonial assertions also had to satisfy a second test, which he called Confrontation. While this article will not discuss his views on non-constitutional and constitutional confrontation, it must be noted that they are idiosyncratic, dated and conflated the Confrontation Clause and hearsay exceptions." *Id.* at §1397, p. 1757.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id* at 1792 Wigmore stated that "Mr. Starkie (Evidence, I, 45) in 1824 was the first to state plainly the Philosophy of the Exceptions." *Id.* at 1793, n.2.

[48] *Id.* at 1794. Wigmore's view of Necessity was broader and more flexible than the current understanding of unavailability as expressed in Fed R. Evid. Rule 804(a) and covered not only situations where the declarant was "dead, or out of the jurisdiction, or insane, or otherwise unavailable for the purpose of testing," what he called "the commoner and more palpable reason," but also situations where where "[t]he assertion may be such that we cannot expect, again or at this time, to get evidence of the same value from the same or other sources . . . [as] in the exception for Spontaneous Declarations, for Reputation, and in part elsewhere." *Id.* at 1793.

[49] *Id.* In the first edition, Wigmore ended his introduction to the hearsay exceptions with the above listing of the fourteen exceptions. In the second and third editions, Wigmore included another section on "The Future of the Exceptions." He began the new section by writing that "[t]he needless obstruction to investigation of truth caused by the Hearsay rule is due mainly to the inflexibility of its exceptions and to the rigidly technical construction of those exceptions by the Courts." 3 John Henry Wigmore, A Treatise

Besides showing that there were far fewer hearsay exceptions in Wigmore's time, his list reveals two other interesting points. First, there was the crude beginning of the modern division of the hearsay exceptions into two categories, one based on necessity (the Rule 804 category) and the other based on reliability (the Rule 803 category). Second, former testimony, admissions and prior statements are missing from his list of hearsay exceptions. As discussed in the next sub-section, Wigmore placed these statements in the "hearsay rule satisfied" category, not with the hearsay exceptions.

Morgan was critical both of Wigmore's view that "the hearsay rule and its exceptions in outline, though not in detail, form a logically coherent whole"[50] and of Wigmore's claim that the two principles in fact explained the many different and varied hearsay exceptions. Morgan had a very different perspective. Far from a "logically coherent whole," in his view, "the hearsay rule with its exceptions . . . resemble[s] an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists . . . "[51] Writing at a time when the Federal Rules of Civil Procedure were in the process of being adopted and hoping for a similar modernization of the evidence rules, Morgan believed that the solution lay not in judicial refinement or further scholarly classifications but rather in a codification governed by "practical considerations."[52] While Wigmore also favored legislation,[53] Morgan thought that Wigmore's stated belief in the overall rationality of the common law of evidence undermined the support for the urgency of the needed codification.

The "Hearsay Rule Satisfied" Category

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on the System of Evidence in Trials at Common Law: The Statutes and Judicial Decisions of All Jurisdictions of The United States and Canada §1427, 158 (2d ed.1923)[hereinafter, Wigmore (2d ed. 1923)]. He urged the adoption of a general exception for all statements of deceased persons and, in the third edition, also supported the formation of a committee to codify the exceptions to the hearsay rule. 3 John Henry Wigmore, A Treatise on the System of Evidence in Trials at Common Law: The Statutes and Judicial Decisions of All Jurisdictions of The United States and Canada §1427, 209 (3rd ed. 1943)[hereinafter, Wigmore (3rd ed. 1940)]. The third edition also supported a liberalization of the hearsay rule to grant the trial judge flexibility and discretion in applying the hearsay rule in individual cases. *Id.* at 215. Then-Professor Jack Weinstein elaborated and extended Wigmore's suggestion in his famous article, Jack Weinstein, *The Probative Force of Hearsay*, 46 Iowa L. Rev. 331 (1961).

[50] Edmund M Morgan, John MacArthur Maguire, *Looking Backward and Forward at Evidence*, 50 Harv. L. Rev. 909, 920 (1937).

[51] *Id.* at 921. He and his colleague Professor Maguire further explained:

> "There is in truth no one theory which will account for the decisions. Sometimes an historical accident is the explanation; in some instances sheer need for the evidence overrides the court's distrust for the jury; in others only the adversary notion of litigation can account for the reception; and in still others either the absence of a motive to falsify, or a positive urge to tell the truth as the declarant believes it to be, can be found to justify admissibility. Within a single exception are found refinements and qualifications inconsistent with the reason upon which the exception itself is built."

Id.

[52] *Id.* Morgan was a member of the Advisory Committee on Civil Procedure.

[53] As referenced by his work on the ABA's Wigmore Committee, 63 A.B.A. Rep 570 (1938, and as expressed in the 3rd edition of his treatise, 3 Wigmore (3rd ed. 1940), *supra.* note 49, at § 1427.

Wigmore invented the "hearsay rule satisfied" category, the forerunner of Rule 801(d)'s "not hearsay" category, as he was preparing the 16th edition of Greenleaf on Evidence. Wigmore was considering how to classify evidence of two types of out-of-court statements: the former testimony of an unavailable witness and a deposition of either an available or unavailable witness.[54] The common law and previous treatise writers had long treated both former testimony and depositions as hearsay and admitted them as hearsay exceptions, but Wigmore was not satisfied with this traditional treatment. Examining the issue "in more detail,"[55] he found a 1892 Minnesota case with *dicta* stating that:

> "...former testimony is frequently inaccurately spoken of as an exception to the [Hearsay] rule... The chief objections to Hearsay Evidence are the want of the sanction of an oath and of any opportunity to cross-examine; neither of which applies to testimony given in a former trial."[56]

Using the Minnesota case as his authority, he created the new third category and presented it in a newly titled chapter: Hearsay Rule Satisfied; Testimony by Deposition and Testimony at a Former Trial. With depositions and former testimony, the declarant was under oath and subject to cross-examination (or at least the opportunity for cross-examination) at the time of making the out-of-court statement. Because a major purpose of the hearsay rule had already been accomplished, Wigmore decided to change the classification of former testimony and depositions from their traditional category as hearsay exceptions to "hearsay rule satisfied."

All three editions of Wigmore's own treatise had a section entitled "Hearsay Rule Satisfied," containing several sub-sections and hundreds of pages of general discussion, with many examples of the importance of cross-examination and the value of confrontation. But the actual sub-section applying the category was, in each edition, less than one page and was entitled "Cross-examined Statements not an Exception to the Hearsay Rule."[57] Pointing out that, in the case of former testimony and depositions, there has been prior cross-examination, Wigmore wrote that the evidence "has satisfied the rule and needs no exception in its favor. This is worth clear appreciation, because it involves the whole theory of the rule."[58]

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[54] In the paradigm case of former testimony, witness W has testified under oath and has been cross-examined in Trial 1. After the case is reversed on appeal and remanded for a new trial, Trial 2, the witness W becomes unavailable and the proponent offers the transcript of the former testimony from Trial 1. In a deposition, the witness testifies under oath and subject to cross-examination at the out-of-court deposition, and then is either available or unavailable at trial.

[55] 1 Greenleaf on Evidence, 264 (16th ed. 1899).

[56] *Minneap. Mill Co. v. R. Co*, 51 Minn. 304, 315 (1892). The quoted language is dicta because the hearsay issue in the case was the scope of unavailability under the former testimony exception and whether the declarant had to be dead or could be unavailable in some other manner. The court required only that the declarant be unavailable. *Id.*

[57] 2 Wigmore (1st ed. 1904), *supra.* note 29, at §1370 p. 1709-10.

[58] *Id.*

The "hearsay rule satisfied" category is characteristic of Wigmore's "instinct for classification" It highlighted an important feature of former testimony and depositions – oath and cross-examination at the time of the making of the out-of-court statement -- and therefore was analytically interesting. However, it was also problematic in one minor and one more serious way.[59] As a minor point, it is descriptively inaccurate. Since the factfinder in the current trial still does not have the opportunity to view the declarant's demeanor, not all of the concerns of the hearsay rule have been satisfied. For this reason, one of Wigmore's disciples, Professor Strahorn, renamed the category as "hearsay rule partially satisfied."[60] More importantly, the new category abandoned a well-accepted approach (treating these statements as hearsay exceptions) and introduced a new approach – with a new legal category and legal term -- without assessing their costs and benefits or evaluating alternatives. Such unexamined innovation is not a virtue even in an author's individual treatise. It becomes a serious vice when followed in an evidence code, especially if the new term conflicts with a well-established one.

2. Wigmore and Morgan On Admissions

Wigmore and Morgan had competing positions on the classification of admissions. While Wigmore changed his initial views as a result of Morgan's 1921 article, his changed position was still different than Morgan's, just in a narrower way. In the 1899 edition of Greenleaf's Treatise, Wigmore treated admissions as an example of self-contradicting impeachment evidence, not as substantive evidence.[61] Since he thought that admissions were used only to contradict and to impeach, they were not testimonial and the hearsay rule was "inapplicable" (i.e., they were not hearsay).

In the first edition of his own treatise in 1904, Wigmore continued to regard admissions as admissible only as impeachment evidence, viewing them as another form of self-contradiction, "when it appears that on some other occasion he has made a statement inconsistent with his present claim."[62] He located his discussion of admissions

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[59] As an observation and not a criticism, it should also be noted that this category is Wigmore's invention, with very modest case support. In addition to the dictum from the Minnesota case previously described in note 56, supra. Wigmore used a quotation from an early opinion in the famous *Wright v. Tatum* case. The opinion from which Wigmore quote was from the first round of appeals and concerned the former testimony of a deceased attesting witness to the will (and not from Baron Parke's opinion in a later appeal that addressed the admissibility of letters for their "implied assertions" and used the ship captain's hypothetical. Wright v. Tatham, 7 A & E 313, 113 Eng. Rep. 488 (1837)). Wigmore quoted Chief Judge Tindall for the point that "[t]he evidence resulting from the written examination of the deceased witness, in the former suit between the same parties, is of as high a nature, and as direct and immediate, as the viva voce examination of one of the witnesses remaining alive and actually examined in the cause." Wright v. Tatham, 1 A & E 3, 22, 110 Eng. Rep. 1108, 1116 (1834)[Note: the citation is Wigmore's treatise, 3 A & E 3, 22 (1834), is incorrect.]. This statement established that such former testimony should be received as evidence but had absolutely no bearing on whether it should be admitted as a hearsay exception or under the "hearsay rule satisfied" category.

[60] John S Strahorn, A *Reconsideration of the Hearsay Rule and Admissions*, 85 U. Penn. L. Rev. 484 (1937).

[61] 1 Greenleaf on Evidence, 292 (16th ed. 1899).

[62] 2 Wigmore (1st ed. 1904), *supra.* note 29, at §1048 p. 1218.

in the treatise section on Testimonial Impeachment, immediately following the chapter on Prior Statements, not in his 673-page treatment of the hearsay rule. He wrote that:

> "The use of admissions is on principle not obnoxious to the hearsay rule; because that rule affects such statements only as are offered for their independent assertive value after the manner of ordinary testimony, which admissions are receivable primarily because of their inconsistency with the party's present claim and irrespective of their credit as assertions; the offeror of the admissions, in other words, does not necessarily predicate their truth, but uses them merely to overthrow a contrary position now asserted. Just as the hearsay rule is not applicable to the use of a witness' prior self-contradiction, so it is not applicable to the use of an opponent's admissions."[63]

While he recognized that admissions might also have "an additional and testimonial value, independent of the contradiction and similar to that which justifies the Hearsay exception for declarations against interest,"[64] he believed that this second, substantive use was permitted only if the statement satisfied the requirements of the declaration against interest exception.[65] For Wigmore in 1904, there was no permissible substantive use for admissions *qua* admissions.

In 1921, Morgan wrote an influential law review article that attacked Wigmore's view that admissions were not hearsay. Entitled "Admissions as an Exception to the Hearsay Rule,"[66] Morgan reviewed the history of admissions and demonstrated that Wigmore's position was unsound in theory and unsupported by case law. Summarizing his argument, he wrote:

> Certain it is that extra-judicial admissions are received in evidence. Equally certain is it that they are received for proving the truth of the matter admitted. It is likewise certain that they do not fall within the exception to the rule against hearsay which admits declarations against interest. These are the facts, and from them the conclusion is inevitable that they are received as an exception to the rule against hearsay, and not that they are received on any theory that they are not hearsay.[67]

Morgan ended his article by posing and then providing an affirmative answer to his question: "Is there a justification in principle for such an exception?" He noted that, in creating hearsay exceptions, courts "have appeared to require only some guaranty of

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[63] *Id.*

[64] *Id.*

[65] *Id.* The statement would have to be against interest at the time it was made, and the declarant would have to be unavailable.

[66] Edmund M. Morgan, *Admissions as an Exception to the Hearsay Rule*, 20 Yale L. J. 355 (1921).

[67] *Id.* at 360. Notice that, in the last sentence of the quotation, Morgan uses the phrase not hearsay. He is referring to Wigmore's original position that admissions were not offered for their substantive use, but only as self-contradiction. Thus, since they were not used for the truth of the matter asserted, admissions – in Wigmore's original view – were not hearsay in the traditional sense.

truth ...and some measure of necessity."[68] And he posited that the reason for these requirements was "chiefly the protection of the party against whom the evidence is to be used, rather than ... eliminat[ing] the possibility of false testimony."[69] He supported this view by noting that courts regularly receive hearsay (as well as other) evidence if the opponent does not object to it.

Morgan then stated, as "too obvious for comment," that in the case of an admission, "the party whose declarations are offered against him is in no position to object on the score of lack of confrontation or lack of opportunity for cross-examination" and that "[a]ll the substantial reasons for excluding hearsay are therefore wanting."[70] He concluded by asserting that the party against whom the admission is offered "cannot object to it being received as prima facie truthworthy, particularly when he is given every opportunity to qualify and explain it."[71]

In the second edition of his treatise, published in 1923, Wigmore stated that Morgan's "astute criticism" had led him to revise his views on admissions and to recognize that admissions can be admitted for two purposes: for impeachment, as self-contradiction, and substantively, to prove the truth of the matter asserted.[72] He wrote that, as substantive evidence, they are hearsay but "pass the gauntlet [of the hearsay rule] when offered *against* him as opponent, because he himself is in that case the only one to invoke the Hearsay rule and because he *does not need to cross-examine himself.*"[73] Elaborating further, Wigmore wrote:

> "The theory of the Hearsay rule is that an extrajudicial assertion is excluded unless there has been sufficient opportunity to test the assertion by the cross-examination by the party against whom it is offered...; e.g. if Jones had said out of court, 'The party opponent Smith borrowed this fifty dollars,' Smith is entitled to an opportunity to cross-examine Jones upon that assertion. But if it is Smith himself who said out-of-court, 'I borrowed this fifty dollars,' certainly Smith cannot complain of lack of opportunity to cross-examine himself before his assertion is admitted against him. Such a request would be absurd. Hence the objection of the Hearsay rule falls away because the very basis of the rule is lacking, viz., the need and prudence of affording an opportunity of cross-examination. In other words, **the hearsay rule is satisfied**; Smith has already had an opportunity to cross-examine himself or, to put it another

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[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.* In a footnote, Morgan also mentioned a quasi-estoppel argument made in a 1911 treatise that argued: "The competency of an admission is not so much an exception to the rule exluding hearsay as based upon a quasi-estoppel which controls the right of a party to disclaim responsibility for any of his statements. 2 Chamberlayne, Evidence sec. 1292 (1911)." Morgan then stated: "The so-called "quai-estoppel" may furnish one of the reasons for making an exception to the hearsay rule, but it cannot prevent its being an exception." Id.
[72] 2 Wigmore (2d ed. 1923), *supra.* note 49, at §1048 p. 504 n. 1.
[73] *Id.* at 505.

> way, he now as opponent has the full opportunity to put himself on the stand and explain his former assertion."[74]

While Wigmore accepted the substantive use of admissions, he rejected Morgan's view that admissions should be treated as an exception to the hearsay rule. But he never fully elaborated the reasons for his rejection. His only discussion of the classification issue was in a single footnote, which reads in its entirety:

> "In the following article is found an acute criticism of the theory of admissions originally here expounded, and in light of that article the text has been revised. Professor Edmund M. Morgan, "Admissions as an Exception to the Hearsay Rule," Yale L. Journal, 1921, XXX, 355. It is believed that the reasoning now set forth in §§1048, 1049, places the theory of admissions on a sounder basis."[75]

There are several interesting yet disappointing aspects to Wigmore's treatment of admissions in the 1923 treatise (which continued unchanged in the 1940 edition). First, although he used the phrase "the hearsay rule is satisfied" in his discussion, he kept his treatment of admissions in the in the Testimonial Impeachment section of the treatise, where he had discussed admissions (as not hearsay) in the first edition, not in the "hearsay rule satisfied" section, §1370. Furthermore, §1370 of the treatise remained unchanged and still discussed only former testimony and depositions (and did not mention admissions).

Second, Wigmore did not make any attempt to compare admissions to former testimony and depositions, the two types of evidence for which he had originally created the "hearsay rule satisfied" category. Had he done so, he would have noted that, in the case of former testimony and depositions, evidence law imposes a requirement of cross-examination at the time of the making of the out-of-court statement, whereas there is no such cross-examination requirement for admissions. For former testimony and depositions, there is actual cross-examination (or, at the least, an actual opportunity to cross-examine); with admissions, there is only the fact that the party "cannot complain of the lack of opportunity to cross-examine"[76] and will ordinarily have the opportunity to take the stand and explain the prior statement. One can argue that, for practical and policy reasons, the fact that the party "cannot complain" and has an opportunity to explain should satisfy the concerns of the hearsay rule. But the way in which admissions *might* or *should* satisfy the hearsay rule would be quite different from the way that former testimony and depositions unquestionably *do* satisfy the cross-examination aspects of the rule. The actual cross-examination in the case of former testimony goes to traditional hearsay concerns like reliability, whereas the favorable treatment of admissions stems instead from notions of party responsibility for their own statements and the adversary theory of trials. One can reasonably expect a treatise writer to acknowledge and discuss such differences.

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[74] *Id.*

[75] *Id.* at 504, n.1. The third edition of the Treatise was unmodified on this point.

[76] *Id.* at 505.

Third, although aware of Morgan's article advocating the treatment of admissions as a hearsay exception, Wigmore did not discuss the comparative advantages and disadvantages of placing admissions into the "hearsay rule satisfied" as opposed to the "hearsay exception" category. Instead, he simply placed it in that category and announced that it was "on a sounder basis." Finally, and related to the third aspect, he did not cite any case law or scholarly writing in support of his decision. In the grand manner of a respected oracle that he was, he simply announced the classification on his own authority.[77]

Morgan continued to advance his argument that admissions should be treated as a hearsay exception and to attack Wigmore's placement of admissions into the "hearsay rule satisfied" category. He also argued that Wigmore classified admissions and former testimony as he did for an ulterior motive, to support his broader project of rationalizing the hearsay exceptions. Morgan wrote:

> "So long as Mr. Wigmore agrees with the courts and other commentators that admissions, confessions and former testimony, when received in evidence, are properly used as tending to prove the truth of the matter asserted in them, why argue about classification? Only for this reason, -- by excluding these from the hearsay class, Mr. Wigmore is able to give to this whole subject an apparent coherence and rationality which it totally lacks. By this device of classification he purports to show that in each recognized exception to the hearsay rule some necessity for using the hearsay evidence in place of the declarant's testimony is present, and some guaranty of trustworthiness is to be found which distinguishes the admissible utterance from hearsay in general and serves, however feebly, as a substitute for cross-examination. This enables him to champion the rules and direct his fulminations against foolish refinements in their application. It permits him to slur the fact that the law governing hearsay today is a conglomeration of inconsistencies developed as a result of conflicting theories."[78]

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[77] In his book on Bentham and Wigmore, William Twining observed that " . . . one of the difficulties of debating with Wigmore was that, so great was his influence, once he had perpetrated a doctrine on the basis of little or no authority, precedents would soon follow to fill the gap. Great treatise writers are among those who can pull themselves up by their own bootstraps." William Twining, *Theories of Evidence: Bentham and Wigmore* 163 (1985).

[78] Edmund S. Morgan, *Book Review*, 20 B.U.L.Rev. 776, 790-791(1940)[hereinafter, Morgan, *Book Review*].

> By classifying admissions, confessions, and admissible reported testimony as nonhearsay, he made the other exceptions appear to have a consistency and rationality which I believe non-existent. In each exception he found a necessity for the use of secondary evidence and a guaranty of trustworthiness in the admitted hearsay which is lacking in ordinary hearsay. In s6 doing he furnished ammunition for that large segment of the profession which asserts, and sometimes seems to believe, that the accepted rules represent the 'crystallized wisdom of the ages,' and which, therefore, opposes changes that Wigmore would ardently champion.

Edmund S. Morgan, *The Future of the Law of Evidence*, 29 Tex. L. Rev. 587, 593-594 (1951).

Morgan thus suspected that Wigmore placed admissions (and former testimony) in the "hearsay rule satisfied" category not primarily for the affirmative reason that they belonged there but for the negative reason that he wanted to exclude them from the roster of hearsay exceptions, in order to maintain the rationality (and to Morgan, the false rationality[79]) of his organizational plan for the hearsay exceptions. As we will see, rationalizing the hearsay exceptions was precisely the reason that the Reporter gave for placing admissions in the Rule 801(d) "not hearsay" category

The debate between Wigmore and Morgan was never fully joined, primarily because Wigmore never again addressed the classification issue after announcing his amended position in the 1923 edition of his treatise. Reviewing the third edition in 1940, Morgan mildly criticized Wigmore for not engaging this and other issues,[80] but with no response. Wigmore died in 1943.

3. Wigmore and Morgan on Prior Statements

The extensive pre-Federal Rules scholarship and case law on prior statements focused almost exclusively on the issue of admissibility – whether prior statements should be admitted as substantive evidence or used only for impeachment – and not on their classification. The orthodox rule permitting prior statements to be used only for impeachment was the prevailing law up to the time of the enactment of the federal rules in 1975, and the writers and judges discussed whether, and to what extent, to overturn the orthodox rule. There was very little writing – by Wigmore, Morgan, or anyone else – on the *how* issue and classification.

Under the orthodox rule, the classification of prior statements was easy. Prior statements offered only to impeach were not hearsay, because they were not offered for their truth. Prior statements offered substantively, to prove their truth, were hearsay and were excluded by the hearsay rule. To admit them substantively, most writers advocated creating a hearsay exception for all or some prior statements.

In the first edition of his treatise, Wigmore endorsed the orthodox position on prior statements: they were admissible for impeachment purposes, but not for the truth of the matter asserted in the statements. Wigmore placed his discussion of prior statements in the treatise section entitled Testimonial Impeachment, in a chapter called Self-

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[79] Edmund S. Morgan, *Defining and Classifying Hearsay*, 86 U.Pa.L.Rev.258, 273 (1938) "[it] seems not only futile but positively harmful to make a classification of utterances which appears to give to the decisions an element of cohesive reasonableness which they lack." Another writer observed, "Rather than embarrass the symmetry of his logical generalizations, he simply expelled admissions from the realm of hearsay exceptions." Carl H. Harper, *Admissions of Party-Opponents*, 8 Mercer L. Rev. 252, 253 (1953). (Mr. Harper was the co-author of the Georgia Rules of Evidence with Professor Thomas Green, who went on to become a member of the Advisory Committee.)

[80] "It may . . . be ungrateful and unreasonable to wish that after his second edition he had given a major portion of his limitless energy and extraordinary talent to a reexamination of the entire subject, including his analysis and classification, paying particular attention to those topics in which he had theretofore accepted the conclusions of other scholars." Morgan, *Book Review,s upra.* note 78, at 778.

Contradiction. He wrote that, "the *prior statement is not hearsay* because it is not offered assertively, i.e., not testimonially."[81]

In the second edition, Wigmore changed his position slightly, becoming the first major writer to endorse the substantive use of prior statements. He amended his earlier statement to say that: "the *prior statement is not* ***primarily*** *hearsay...*"[82] He then added a new sub-section, in which he said:

> It does not follow, however, that Prior Self-Contradictions, when admitted, are to be treated as having no affirmative testimonial value, and that any such credit is to be strictly denied them in the mind of the tribunal. The only ground for doing so would be the Hearsay rule. But the theory of the Hearsay rule is that an extrajudicial statement is rejected because it was made out of Court by an absent person not subject to cross-examination. Here, however, by hypothesis the witness is present and subject to cross-examination. There is ample opportunity to test him as to the basis for his former statement. *The whole purpose of the Hearsay rule* ***has been already satisfied.*** Hence there is nothing to prevent the tribunal from giving such testimonial credit to the extrajudicial statement as it may seem to deserve.[83]

In a footnote explaining the reason for his changed view, he stated only that "the reasoning is similar to that for admissions."[84] This is the extent of Wigmore's discussion of the substantive use of prior statements. He was an early supporter, but his writing on this point was very sparse.

Morgan's writing on the classification of prior statements was less developed than his work on admissions and showed some ambiguous and perhaps inconsistent use of language and concepts. Writing in 1938, discussing prior recorded recollections and comparing them to prior statements, he wrote that "...it is universally agreed that prior statements [when used as substantive evidence] are hearsay."[85] Ten years later, however, Morgan posed the question: "Should we not exclude from the hearsay rule prior statements of a witness subject to oath and cross-examination, since in fact these assertions do not involve the traditional hearsay dangers?" His answer: "there is no real reason for classifying the evidence (of prior statements) as hearsay."[86]

It is unclear if Morgan was answering the *whether* question -- should prior statements be received as substantive evidence or excluded by the hearsay rule – or the *how* question: if received, how should they be classified. The fact that the witness is in-court, under oath and subject to cross-examination and observation meant, for Morgan,

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[81] 2 Wigmore (1st ed. 1904), *supra.* note 29, at §1018, p. 1179 (emphasis in original).
[82] 2 Wigmore (2d ed. 1923), *supra.* note 49, at §1018, p. 459 (added word in boldface)
[83] *Id.* at 460 (emphasis supplied). The text was identical in the 1940 edition.
[84] *Id.* at 461 n 3.
[85] Edmund S Morgan, *Defining and Classifying Hearsay,* 86 U.Pa.L.Rev. 258, 268 (1938).
[86] Edmund S Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 196, 218-19 (1948).

that there were no significant "hearsay dangers" and, for Wigmore, that the purposes of the hearsay rule had been "satisfied." We shall see that the Reporter used this very reason both to admit prior statements as substantive evidence and to classify them as "not hearsay" in the federal rules. Notwithstanding his answer to his own question, as Reporter for the Model Code of Evidence, Morgan drafted a code which treated prior statements as hearsay and then placed them in a separate hearsay exception.

B. The Three Predecessor Codes

A major evidence code was drafted in each of the three decades prior to the enactment of the Federal Rules of Evidence. The first of these was the Model Code of Evidence, approved by the American Law Institute in 1942. It was followed by the Uniform Rules of Evidence in 1954 and then the California Evidence Rules in 1964. Each code influenced its successor, and all of them strongly influenced the shape and content of the Federal Rules of Evidence. The Model Code contributed the "code" framework used by the Federal Rules of Evidence, using general rules of broad applicability on a selected number of topics, as opposed to a detailed "catalog" of very detailed rules covering all topics or a "creed" announcing general principles.[87] The Uniform Rules of Evidence provided the outline of code sections – nine articles, each on a different topic – that the Federal Rules of Evidence followed with only few changes.[88]

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[87] The issue of the level of generality or specificity of the rules of evidence was very controversial at the time and occasioned a sharp public disagreement between Wigmore and Morgan. The question was: should the model code be "a catalog, a creed or a code[?]" Edmund Morgan, Foreword to the Model Code of Evidence 12 (1942). Wigmore wanted a "catalog," a detailed set of concrete rules, rather than a set of general principles. He had drafted such a "catalog" in his own Code of Evidence, first published in 1910 and updated in 1935 and 1942. He also explained his preferred approach in a speech (and later an article) setting forth his "six Postulates of method and style," *See* Edmund Morgan, 17 Proc. Am. Law Inst. 66, 87 (1940). Reiterated in his ABA Journal article criticizing the Model Code, John H. Wigmore, *The American Law Institute Code of Evidence Rules: A Dissent*, 28 A.B.A.J. 23 (1942). Judge Charles Clark preferred a "creed," consisting of several statements of general principles. Foreward, at xiv-xv. The A.L.I. held a debate on this topic at its 1941 meeting, with Wigmore, Clark and Morgan each presenting his approach to the members. After hearing the presentations, the Institute voted for the "code" framework, and every evidence codification since that vote has used that framework and its intermediate level of generality. Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 Iowa L. Rev. 413, 431-436 (1988). *See generally,* Michael Ariens, *Progress is Our Only Product: Legal Reform and the Codification of Evidence Law*, 17 Law & Soc. Inq. 213 (1992).

[88] The Federal Rules of Evidence follow the topics and headings of the Uniform Rules of Evidence for seven of the nine sections: Articles I, II, III, V, VII, VIII and IX. Article IX of the Uniform Rules incorporates both authentication and contents of writings, while the Federal Rules split those topics into two Articles, Article IX for authentication and Article X for contents. The two codes differ only on the coverage in Articles IV and VI. Instead of relevance, Article IV of the Uniform Rules deals with witnesses (covered in Article VI of the Federal Rules). And Article VI of the Uniform Rules covers "extrinsic policies" (found in Article IV, Rules 404-415 of the Federal Rules).

While both codes are similar in their use of these Articles, they use different numbering systems within each article and throughout the rules. The Uniform Rules proceed from Rule 1 to Rule 72, with no separate numbering within each Article as is the case with the Federal Rules. Thus, while the hearsay rules of the Uniform Rules are located in Article VIII, the hearsay rules are numbered Rules 62-66. Under the Federal Rules, the hearsay rules, also located in Article VIII, were numbered Rules 801-806 (and now, Rule 807).

The following paragraphs summarize each code's treatment of admissions and prior statements. For purposes of the Rule 801(d) story, these codes teach several important lessons. First, each of the codes classified admissions and prior statements as hearsay and then provided a specific hearsay exception to assure their admissibility. Second, two of the codes simply listed the hearsay exceptions *seriatim* and did not attempt to classify or organize them; California made a modest attempt at organization, with a separate grouping for prior statements and admissions, but did not use Wigmore's trustworthiness/necessity template. Finally, although each code had extensive commentary on many code sections, none of them discussed the reason for treating admissions and prior statements as hearsay exceptions and rejecting Wigmore's "hearsay rule satisfied" classification. They simply did what they did.

Admissions

The Model Code defined hearsay in Rule 501; Rule 502 excluded it subject to exceptions; and Rules 503-529 listed all the exceptions, with four exceptions for different categories of admissions.[89] The commentary, written by Morgan as Reporter, noted that "some commentators (such as Wigmore) insist that admissions and confessions fall without the reason for the hearsay rule . . . ." but concluded that "there is general agreement that such evidence is received as tending to prove the truth of the matter stated [and therefore is hearsay]."[90]

The Uniform Rules had Rule 63 as an all-purpose hearsay rule, both defining hearsay and the hearsay exclusionary rule and then setting forth 31 exceptions:

> Rule 63. *Hearsay Evidence Excluded* – Exceptions. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except: (1)... ... ; (2)... ...; (3)... ...

Exceptions 6), (7), (8) and (9) covered admissions. The only comment to the admissions exceptions of the Uniform Rule is that "[t]hey adopt the policy of Model Rules 506, 507 and 508." The California Evidence Code treated admissions as hearsay and provided a basic exception with several specific exceptions covering more detailed categories.[91]

Prior Statements

The Model Code made prior statements admissible under an exception, Rule 503(b), which provided simply:

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[89] The four separate exceptions for admissions were: Rule 505 for confessions, Rule 506 for party admissions, Rule 507 for authorized and adoptive admissions, and Rule 508 for vicarious admissions.
[90] *Id.* The Comment also noted that "Hearsay within the definition includes admissions, confessions and former testimony." Model Code of Evidence Rule 501, Comment 227.
[91] Cal. Evid. Code §1220-1227 (West 1967).

"Evidence of a hearsay declaration is admissible if the judge finds that the declarant ... (b) is present and subject to cross-examination." [92]

The Uniform Rules used similar language in Rule 63(1), providing an exception for a "statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by the declarant while testifying as a witness."[93]

The exceptions created by both the Model Code and the Uniform Rule applied to *all* prior statements and required only that the declarant be "present" and available for cross-examination, not actually testify. The California Evidence Code – in a decision followed by the federal rules – changed both these aspects. It created exceptions only for some prior statements: prior inconsistent and prior consistent statements, past recollection recorded and statements of personal identification. And it required that the declarant actually testify as a witness, and not simply be present and available.[94]

The main story of the treatment of prior statements is consistent: the predecessor codes classified them as hearsay and then created specific exceptions. However, certain aspects of the Model Code and Uniform Rules illustrate the difficulty of thinking clearly about the classification issue and also foreshadow the problems with the drafting of Rule 801(d). With the Model Code, it was the decision to treat depositions differently than other types of prior statements. Instead of classifying them as a hearsay exception, it "excepted" them from its hearsay definition:

A hearsay statement is a statement of which evidence is offered as tending to prove the truth of the matter intended to be asserted...*except a statement...contained in a deposition or other record of testimony taken and recorded pursuant to law for use at the present trial.*"[95]

But more interesting than this rule was its explanation. The Model Code comment stated that the "definition...distinguishes between testimony given in another trial, making it hearsay (see Rule 511 [the exception for former testimony]), and a deposition taken for use at the trial at which it is offered, classifying it as *non-hearsay.* Some writers insist that no such distinction is justifiable."[96] This comment to Rule 501 is the first recorded use of

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[92] This Model Code language requiring the witness to be "present and subject to cross-examination" was used in the first draft of the Federal Rules of Evidence and changed in the second and subsequent drafts to require actual testimony, not just a presence in court. *See* Section II-A infra.

[93] *See* Uniform Rules of Evidence § 63(1) (repealed).

[94] Cal. Evid. Code §1235-1237 (West 1967) The California exception for prior inconsistent statements was broad ("if the statement is inconsistent with his testimony at the hearing . . . ."). This exception became very well-known after the 1970 Supreme Court decision in California v Green, 399 U.S. 149 (1970) an important early case discussing the Confrontation Clause boundaries on hearsay exceptions.

[95] Model Code of Evidence §501(2)(emphasis added). The rule also "excepted" a statement "made by a witness in the process of testifying at the present trial." As we will see in Section II-A, the first draft of the Federal Rules of Evidence included both of these "exceptions." The deposition part was dropped in the second draft; the "made by a witness" part in the third draft.

[96] Model Code of Evidence §501 Comments. at 229.

the term "not hearsay" in the Rule 801(d) sense, to describe evidence that is offered to prove the truth of the matter asserted and is thus hearsay according to the traditional definition but that is then treated as "non-hearsay" for a policy reason.[97] The Model Code made depositions non-hearsay by "excepting" them from the definition of hearsay, which was precisely the approach used for both admissions and prior statements in the first two drafts of the Federal Rules of Evidence. And this comment – the first-ever "not hearsay" comment -- was written by Morgan, the strong advocate of treating admissions and prior statements as hearsay exceptions

The Uniform Rules wrinkle is similarly instructive. It appeared in the Comment to Rule 63(1), the rule that created a hearsay exception for prior statements. The Comment read:

> "[Rule 63(1)] has the support of modern decisions which have held that evidence of prior consistent statements is not hearsay because the rights of cross-examination and confrontation are not impaired."[98]

Note the anomaly: the drafters of the Uniform Rule had just created a new hearsay exception for prior statements in Rule 63(1). Then, in the comment to this exception, they wrote that "evidence of prior consistent statements is not hearsay." The drafters of the Federal Rules were not the only ones who were confused and inconsistent.

II. The Drafting of Rule 801(d)

Led by Chairperson Albert Jenner and Reporter Edward Cleary, the members of Advisory Committee on Rules of Evidence[99] worked for six years (from June, 1965 through November, 1971) and produced at least three internal drafts and then three separate published versions of the Federal Rules of Evidence in 1969, 1971 and 1973.[100]

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[97] Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 218-19 (1948). As mentioned in Section I-A, Morgan suggested in 1948 that "there is no real reason for classifying the evidence of prior statements as hearsay." *Id.* However, in no other place did he use the term "non-hearsay" in this sense.

[98] The drafters concluded the Comment with a bit of cheerleading: "When sentiment is laid aside, there is little basis for objection to these enlightened modifications of the rule against hearsay."

[99] A contemporary account described the membership of the Advisory Committee as follows: "The committee chairman was the well-known Illinois trial attorney and Warren Commission counsel Albert Jenner, who had participated in drafting the Uniform Rules of Evidence as a longtime Commissioner on Uniform State Laws. The panel also included Judges Simon Sobeloff, Joe Estes, and Robert Van Pelt; Professors (now federal judges) Jack Weinstein and Charles Joiner; Professor Thomas Green; Herman Selvin, father of the pioneering California Evidence Code; former chief of the Justice Department's Criminal Appeals Division, Robert Erdahl; and famed litigators David Berger, Egbert Haywood, Frank Raichle, Craig Spangenberg, Edward Bennett Williams, and the late Hicks Epton. The reporter was Professor Edward Cleary [of the University of Illinois and then Arizona State]. Paul Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 Geo. L. J. 125 n.3 (1973)..

[100] *See* Standing Committee on Rules of Practice and Procedure, *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates* 46 F.R.D. 161 (1969); Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Revised Draft Of Proposed Rules*

At the first Advisory Committee meeting on June 18, 1965, after general introductions,[101] the Reporter gave the committee an overview of the materials that he would be using in drafting the rules: "Wigmore, McCormick, an AALS collection of articles on evidence, the Model Code, the Uniform Rules, and the report from the drafting of the California code."[102] He handed out the table of contents of the three predecessor codes and said that he would distribute a copy of the Kansas Evidence Code (a state adoption of the Uniform Rules of Evidence) prior to the next meeting.[103] He also asked committee member Herman Selvin, a member of the California Law Revision Commission, to speak briefly about the California experience.[104] He then led a discussion of federal-state issues that would necessarily arise in a federal evidence code.[105]

The Committee discussed the Reporter's draft rules for the first time at the second meeting in October, 1965. The minutes reflect that the Reporter made several basic points about his approach to drafting the federal rules, before turning to a discussion of the specific rules on the agenda for that meeting.[106] He said that in preparing the drafts, he had consulted the Uniform Rules and the California Code.[107] He then made three points about style and approach, the second and third of which he overlooked when drafting Rule 801(d): 1) definitions should be avoided whenever possible; 2) words should be used in their ordinary meaning whenever possible; and 3) he was drafting the rules to be as usable and accessible as possible.

In the next sub-sections, I describe in some detail the three drafts that led to the creation of Rule 801(d) and the "not hearsay" category. I then present the reasons that the Reporter gave for the drafting choices and criticize both those reasons and the failure

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Of Evidence For The United States Courts And Magistrates, 51 F.R.D. 315 (1971); Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183 (1973).

[101] In addition to the members of the Advisory Committee, several members of the Standing Committee on Federal Rules, including Professors William James Moore of Yale and Charles K. Wright of Texas and Judge Alfred Maris, attended many of the committee's meetings.

[102] Minutes of June 18, 1965 meeting, 1, 5 United States Courts, Minutes of Rules Committee Meetings, Aug. 10, 2010 available at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Minutes.aspx

[103] *Id.* at 5.

[104] *Id* at 6.

[105] The Reporter had addressed these issues in his Memorandum No. 1, as had Professor Green's study study of the advisability and feasibility of promulgating federal rules of evidence. *See* Albert B. Maris, *A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts*, 30 F.R.D. 73 (1962).

[106] *See* United States Courts, Minutes of Rules Committee Meetings, Aug. 10, 2010 available at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Minutes.aspx The first topics addressed were authentication (discussed in the Reporter's Memorandum No. 2), contents of writings (Memorandum No. 3), and expert testimony (Memorandum No. 4). The Chairperson and Reporter set the agenda for the Advisory Committee's work and decided to address less controversial topics in their early meetings and to leave the discussion of the hearsay rules and presumptions until the end. Prior to a meeting on a topic, the Reporter prepared and circulated a memorandum on the topics for discussion at the meetings, usually accompanied by a first draft of particular rules. See, e.g., Thomas F. Green, Jr., *Highlights of the Proposed Federal Rules of Evidence*, 4 Ga. L. Rev. 1, 3-4 (1969).

[107] Edward W. Cleary, 25 Record of NYCBA 142, 145-46 (1970). While not reflected in the minutes, his drafting followed the general approach of the Model Code and the structure of the Uniform Rules. *Id.*

of the Reporter and the Advisory Committee to consider alternative approaches to the classification of admissions and prior statements.

A. The Hearsay Rules: The First Three Drafts

The Advisory Committee discussed the hearsay rules over the course of four meetings, beginning in October, 1967. Prior to the first hearsay meeting, the Reporter presented the Advisory Committee with his first draft of Rules 801-804, accompanied by Memorandum No. 19, a 185-page memorandum that presented his suggested approach to hearsay and included his reasons for not treating admissions and prior statements as hearsay exceptions.[108] After discussing the first draft in several meetings, the Advisory Committee made changes and in December, 1968 approved a second draft, which was published as the Preliminary Draft in February, 1969, the first published work of the Advisory Committee.[109] The third draft was prepared after the review of public comments on the Preliminary Draft and was published in 1971 as the Revised Draft.[110] This third draft created Rule 801(d) and the "not hearsay" classification.

There are two important storylines in these three drafts, one involving the classification of admissions and prior statements, the other the treatment of the hearsay exceptions generally. With admissions and prior statements, the form of the classification changed from Draft #1 to Draft #3, but not the content. From the beginning, the Reporter recognized that, when offered to prove their truth, these statements were hearsay under the traditional definition. In thinking about how to classify them, he had two goals: first, to assure that they would be received into evidence and not be excluded by the hearsay rule; and second, to make sure that they were not classified as hearsay exceptions. He accomplished the first goal by excluding them from the definition of hearsay, using two different techniques. In Drafts ##1 and 2, in the definition section, Rule 8-01(c), he explicitly excluded admissions and prior statements from the definition of hearsay. In Draft #3, he created the new "not hearsay" category in Rule 801(d) and placed them there. However, the goal, the result, and his reasons were the same for all three drafts – to assure that these statements would be received into evidence. With respect to the second goal, he could and did keep them from being treated as hearsay exception, but he still needed some other category in which to place them. In the first two drafts, the category was only implied: if they were expressly

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[108] See generally Memorandum No. 19: Article VIII, Hearsay (Oct. 9, 1967-March 9, 1968), microformed on Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-1988, Nos. EV-120-05 to EV-127-03 (Cong. Info. Serv.)[hereinafter Memorandum No. 19]. Parts of Memorandum No. 19 became, in considerably reduced form, the Introductory Note on Hearsay and the Advisory Committee Notes that accompanied the published drafts of the rules. The Reporter did not include any of Memorandum No. 19's discussion of the reasons for classifying admissions and prior statements as "not hearsay" in the Advisory Committee Notes.

[109] 46 F.R.D. 161 (1969).

[110] Revised Draft, 51 F.R.D. 315 (1971). The Advisory Committee and the Standing Committee submitted the third draft to the Supreme Court in October, 1970, with the expectation that the Court would promulgate it as the proposed rules. However, in order to give the public the opportunity to comment on the many changes between the second and third drafts, the Court decided instead to publish them as a Revised Draft.

excluded from the hearsay definition, they must be "not hearsay." In the third draft, Rule 801(d) made the "not hearsay" category explicit.

With the hearsay exceptions, there was a dramatic change from the second to the third draft. The first two drafts followed an innovative approach favored by the Reporter. Instead of the traditional list of categorical exceptions, these drafts had only two hearsay exceptions, each expressed in very general terms:

> "A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness."[111]

The purpose of these two general exceptions was to introduce flexibility into what was seen as a "rigid rule [marked] by numerous rigid exceptions."[112] However, after receiving a barrage of critical responses during the public comment phase, the Reporter abandoned the innovative approach and returned to the traditional categorical exceptions.

The Drafts: Admissions and Prior Statement

In the first draft, Rule 8-01(c)[113] both defined hearsay and then listed several types of evidence (including admissions and prior statements) specifically excluded from that definition.

> 8-01(c) Hearsay. "Hearsay" is a statement, offered in evidence to prove the truth of the matter intended to be asserted, unless
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> (1) Testimony at hearing. The statement is one made by a witness while testifying at the hearing;[114] or
>
> (2) Declarant present at hearing. The declarant is present at the hearing and subject to cross-examination concerning the statement; or
>
> (3) Deposition. The statement was made by a deponent in the course of a deposition taken and offered in the proceeding in compliance with applicable Rules of Civil or Criminal Procedure; or
>
> (4) Admission by party-opponent. As against a party, the statement is (i) his own statement, in either his individual or a representative capacity, or

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[111] Rule 8-03(a), first and second draft. Rule 8-04(a) provided: "A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer strong assurances of accuracy and the declarant is unavailable as a witness." Professor Wellborn described these as "nonformal" exceptions. Olin Guy Wellborn III, *Article VIII: Hearsay*, 20 Hous. L. Rev. 477, 481 (1983).

[112] Charles T. McCormick, *The Borderland of Hearsay*, 30 Yale L. J. 489, 504 (1930). The first two drafts used the traditional hearsay exceptions, not as categorical exceptions as in the common law and the prior codes, but as examples to illustrate the nature and scope of the two general categories.

[113] The numbering system in the first two drafts was 8-01, 8-02, 8-03, etc. Not until the third draft did the Reporter propose the numbering system, 801, 802, 803, etc., used in the current rules.

[114] This awkward approach – explicitly excluding an in-court witness's testimony from the definition of hearsay – was pioneered by the Model Code. *See* Section I-B, *infra.* The third draft rejected this language, replacing it with the "other than by a witness..." language from Uniform Rule 63.

(ii) a statement by a person authorized by him to make a statement concerning the subject, or (iii) a statement of which he has manifested his adoption or belief in its truth, or (iv) a statement concerning a matter within the scope of an agency or employment of the declarant for the party, made before the termination of the relationship, or (v) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy, or (vi) a statement tending to establish the legal liability of the declarant when that liability is in issue.

The second draft continued the same approach but tightened the requirements for prior statements, both to specify that the declarant must testify (and not merely be present) and to exclude from the definition of hearsay only certain specified prior statements, not all as in the first draft. It also deleted the treatment of depositions, on the grounds that the Federal Rules of Civil Procedure already addressed the topic.[115]

Language new in the Second Draft is highlighted in a light grey; language stricken from the First Draft is marked by a single ~~strikethrough.~~

8-01(c) Hearsay. "Hearsay" is a statement, offered in evidence to prove the truth of the matter intended to be asserted, unless

(1) Testimony at hearing. The statement is one made by a witness while testifying at the hearing; or

(2) ~~Declarant present at hearing~~. Prior Statement By Witness The declarant ~~is present at the hearing~~ testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with his testimony, or (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (iii) one of identification of a person made soon after perceiving him, or (iv) a transcript of testimony given under oath at a trial or hearing or before a grand jury;

~~(3) Deposition. The statement was made by a deponent in the course of a deposition taken and offered in the proceeding in compliance with applicable Rules of Civil or Criminal Procedure;~~ or

(4 3) Admission by party-opponent. The statement is offered ~~As~~ against a party, the statement is (i) his own statement, in either his individual or a representative capacity, or (ii)[116] a statement of which he has manifested his adoption or belief in its truth, (iii) a statement by a person authorized by him to make a statement concerning the subject, or (iv) a statement concerning a matter within the scope of an agency or employment of the declarant for the party, made before the termination of the relationship, or (v) a statement by a co-conspirator of a party during the course and in

[115] Minutes of October, 1967 meeting, 53, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV10-1967-min.pdf

[116] The second draft switched the order of the placement of adoptive admissions and authorized admissions.

furtherance of the conspiracy, ~~or (vi) a statement tending to establish the legal liability of the declarant when that liability is in issue.~~

The big change came in the third draft, with the creation of Rule 801(d) and the "not hearsay category." Once created, this classification portion of Rule 801(d) remained untouched and unchanged, notwithstanding the numerous revisions and amendments to other rules. The admissions and prior statements sections were transferred from Rule 8-01(c)(2) and (3) into the newly created Rule 801(d)(1) and (2). With the transfer out of those sub-sections and the addition of the "out-of-court" language ("other than one made by the declarant while testifying at the trial or hearing"), Rule 801(c) assumed its current form as the now-familiar hearsay definition.

Language new to the third draft is highlighted in a dark grey. Language stricken from the second draft is marked by a ~~double-strikethrough.~~

801(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 intended to be asserted. ~~, unless~~

~~(1) Testimony at hearing.~~
(2) ~~Declarant present at hearing~~ [moved to Rule 801(d)(1)
~~(3) Admissions by party opponent~~ [moved to Rule 801(d)(2)]

(d) Statements Which Are Not Hearsay. A statement is not hearsay if

(1) *Prior Statement by Witness.* [content of rule transferred from the former 801(c)(2)]

(2) *Admission By Party-Opponent* [content of rule transferred from the former 801(c)(3)]

The Drafts: The Hearsay Exceptions

Using the Reporter's innovative approach to the hearsay exceptions, the first two drafts had only two general hearsay exceptions, followed by list of specific exceptions "by way of illustration."

8-03 Hearsay Exceptions. Declarant Not Unavailable

(a) GENERAL PROVISIONS. A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though he is available.

(b) ILLUSTRATION. By way of illustration only, and not by way of limitation, the following are examples of statements conforming with the requirements of this rule: (1) present sense impression, (2),...(23)

8-04 Hearsay Exceptions. Declarant Unavailable

(a) GENERAL PROVISIONS A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer strong assurances of accuracy and the declarant is unavailable as a witness.

(b) ILLUSTRATION. By way of illustration only, and not by way of limitation, the following are examples of statements conforming with the requirements of this rule: (1) dying declaration; (2)...

There were only two minor changes from the first to the second draft. The title of Rule 8-03 was changed to "Availability of Declarant Immaterial," and the illustrative exception of Past Recorded Recollection was changed from 8-03(21) to 8-03-(5).

There was a major change in the third draft, which was prepared after the review of public comments on the Preliminary Draft and published in 1971 as the Revised Draft.[117] In response to strong objections from the bar, the third draft abandoned the innovative approach of using two general exceptions, with the traditional hearsay exceptions only as illustrative guides, and returned to the common law approach of categorical hearsay exceptions. It still retained the two general categories -- declarant availability immaterial and declarant unavailable -- and grouped the hearsay exceptions within these two categories, but these two categories were now just groupings of specific categorical exceptions, and not themselves general exceptions. The Third Draft also created the new residual exceptions, Rule 803(24) and Rule 804(b)(5), combined and recodified in 1997 as Rule 807. Finally, it changed the numbering system from one with a hyphen after the first number (1-01, 2-01, 3-01) to one with 3-digit numbers (101, 201, 301).

803 Hearsay Exceptions. Availability of Declarant Immaterial

~~(a) GENERAL PROVISIONS. A statement is not excluded~~... ...

~~(b) ILLUSTRATION. By way of illustration only,~~... ...

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: [803(1)-(23) transferred from 803(b); 803(24) is the new residual exception]

[117] 51 F.R.D. 315 (1971).

804 Hearsay Exceptions: Declarant Unavailable

~~(a) GENERAL PROVISIONS. A statement is not excluded~~ ... ...

~~(b) ILLUSTRATION. By way of illustration only,~~ ... ...

(a) Definition of Unavailability. From former 8-01(d)

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: [804(b)(1)-(4) are same; 804(b)(5) is the new residual exception]

B. The Reasons Given for the "Not Hearsay" Classification

This part presents, in the Reporter's own words, the reasons – separate for each type of statement -- for the Federal Rules treatment of admissions and prior statements. Section II-C then discusses those reasons and demonstrates why they did not justify the decision to classify them as "not hearsay."

Admissions

In Memorandum No.19, the Reporter noted that "the question whether a particular type of statement-evidence is classed as nonhearsay or as hearsay-but-under-exception may seem on first impression to be mere terminological quibbling: in either event the hearsay rule does not call for exclusion."[118] He then went on to say:

> "If, however, the Committee is favorably disposed to the general design of the over-all proposed approach to hearsay, it is desirable to eliminate admissions from the category of hearsay as it will not fit comfortably into either of the major exception groups laid out in proposed Rules 8-03 and 8-04."[119]

This – "it will not fit comfortably" -- was the Reporter's reason for his treatment of admissions. This "bad fit" rationale is in part tautological: if Rule 8-03(a) and its illustrative exceptions required reliability and Rule 8-04(a) and its illustrative exceptions required unavailability, then admissions by definition did not meet those requirements. But there were also policy reasons: the Reporter wanted to avoid the harms that he felt a "bad fit" would cause both to admissions and to the hearsay exceptions. What were those harms?

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[118] Memorandum No. 19, *supra*, note 108, at 86.

[119] *Id.* This passage concluded, "See Reporter's Memo of 9/12/67." Unfortunately, an exhaustive search of the Judicial Conference records has failed to produce that memo. See record of an August 2, 2010 voicemail from Elizabeth Endicott, librarian at the Administrative Office of the United States Courts in Washington, D.C. (on file with author).

The "bad fit" had two possible negative consequences: 1) a contraction in the scope of the admissions exception, so that all admissions would have some "assurances of accuracy" or 2) an expansion in the hearsay admitted with no assurance of accuracy.[120] The Reporter wrote that if admissions were placed as an illustrative exception in Rule 8-03(b), there would be pressure on courts "to discard the traditional free-wheeling common law treatment [for admissions] and to search instead for some assurances of reliability..."[121] Courts might narrow the admissions exception in order to make it more reliable (as required by Rule 8-03), and the Reporter thought that this would be an undesirable outcome.

While the Reporter did not directly discuss the impact of a "bad fit" on the hearsay exceptions, one can easily infer the harm that he feared – that admissions would distort (and likely expand) the interpretation of the new general hearsay exception. If admissions were listed as an "illustrative exception," as an example of the type of evidence that has the "assurances of accuracy" required by Rule 8-03(a), then courts would be inclined (or pressured) to admit other statements that, like some admissions, have no "assurances of accuracy."

There was only mild questioning of the Reporter's treatment of admissions during the drafting stage. At the first hearsay meeting, the Reporter provided a general overview of his approach to hearsay and, in response to introductory questioning, said that he would "exclude it from the hearsay definition" and that "he would simply say that they are not hearsay."[122] The minutes reflect that the members were pleased with his overall approach.[123] At the December, 1967 meeting, Advisory Committee member Craig Spangenburg asked why admissions should not be treated as a hearsay exception. The Reporter responded by saying that he would prefer to wait to discuss that issue until the next meeting, when they would be discussing Rule 803 and his suggested approach to the hearsay exceptions.[124] At the next meeting in March, 1968, the Reporter raised the issue again and pointed out how admissions "have no real circumstantial guarantees of proof... [and]...just did not fit well into 8-03." After that presentation, the Advisory Committee voted unanimously to approve the treatment of admissions.[125]

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[120] As discussed in the next sub-section, while an expansion of the unenumerated exceptions seems to this writer a more likely outcome than a contraction of the admissions exception, the impact either way would likely be quite small. And any impact – in either direction -- could be easily eliminated by placing admissions into its own, separate hearsay exception, apart from either Rule 803 or Rule 804, so that neither the admissions exception nor the Rule 803 or 804 exceptions would cross-contaminate the other. But there is no indication that the Reporter or the Advisory Committee considered or evaluated such a separate exception.

[121] *Id.* at 87

[122] Minutes of October, 1967 meeting, 33, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV10-1967-min.pdf

[123] *Id.* at 33-35.

[124] Minutes of December, 1967 meeting, 4, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV12-1967-min.pdf

[125] Minutes of March, 1968 meeting, 17-18, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV03-1968-min.pdf

Although there is no further record of Committee discussion of the matter, in an article published while the preliminary rules were still under consideration, another member of the Advisory Committee, Professor Thomas Green, wrote briefly in support of the original Rule 8-03(c) position, giving two distinct and internally inconsistent reasons. First, he gave the Reporter's reason, that it is difficult to fit admissions into the theory of the hearsay exceptions. He then added that the most convenient approach was to treat admissions, not as hearsay, but as circumstantial evidence of conduct.[126] He did not (nor did the Reporter or any other Advisory Committee member) advance Wigmore's "hearsay rule satisfied" position to justify the different treatment of admissions.

Only three of the many comments recorded in the Advisory Committee's internal records addressed Rule 8-01(c)'s exclusion of admissions from the definition of hearsay. Two letters expressed support.[127] A third letter, from Attorney Leonard Rubin, opposed it and suggested that admissions be treated as a hearsay exception. Stating that admissions had always been treated as exceptions and were so treated by the Model Code and the Uniform Rules, he argued that "[t]here seems to be no justification for excluding them from the definition of hearsay."[128] Recognizing that admissions did not fit within the parameters of the Rule 803 and Rule 804 exceptions, Attorney Rubin suggested that admissions and prior statement should be listed separately as "General Exceptions," a suggestion very similar to the "four categories" approach recommended in Section V.[129]

While the Reporter did not expressly comment on Attorney Rubins' suggestion, he did discuss the treatment of admissions in his response to the comments from several organizations on Rule 8-01(c) and Rules 8-03 and 8-04 in a May, 1970 memo.[130] In several fascinating sentences, he described two alternative approaches, one that became Rule 801(d) and the other that never surfaced again. First, he wrote, "An alternative ... will be to place them in a special subsection (d), with a prefatory statement, "A statement is not hearsay if..."[131] Here, in May, 1970, is the first expression of the "special" Rule 801(d) and the new "not hearsay" category. While the memo did not provide his reasons for the special section concept, he advanced it while he was reworking the text of Rule 801(c), the hearsay definition section. It is likely that the Reporter decided to keep Rule 801(c) clean, uncluttered and focused on the definition of hearsay, which meant that he needed another place for admissions and prior statements. Perhaps the Reporter also

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[126] Thomas F. Green, Jr., *Highlights of the Proposed Federal Rules of Evidence*, 4 Ga. L. Rev. 1, 39 (1969). This was the approach favored by the early Wigmore and, as we will see, one of his supporters, Professor John Strahorn.

[127] Letters from American College of Trial Lawyers and ABA Section on Litigation, microformed on Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-1988, Nos. Ev-305-01, Ev. 614-58 (Cong. Info. Serv.).

[128] Letter from Attorney Rubin, August 27, 1969, microformed on Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-1988, No. Ev-501-19 (Cong. Info. Serv.).

[129] *Id.*

[130] Memorandum from Edward Cleary, May 21-27, 1970, microformed on Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-1988, No. Ev-214-94 (Cong. Info. Serv.). He stated that adding the phrase "other than one made by the declarant while testifying at the trial or hearing" to Rule 8-01(c) "may be an improvement," and noted that, if the change were made, Rules 8-01(c)(2)(prior statements) and (3)(admissions) would have to be renumbered.

[131] *Id.*

decided that, in drafting terms, it was clearer and better to have an explicitly labeled "not hearsay" category under Rule 801(d), as opposed to relying on a default non-hearsay category implied from the exclusion from hearsay in Rule 8-01(c).

Even more dramatically, the Reporter immediately followed this suggestion by briefly sketching another possibility:

> "A further alternative treatment of (2) and (3) is available if the Advisory Committee should adopt the general approach to hearsay suggested by the ABA Committees and the American College Committee, i.e. transpose the present illustrations into exceptions and add a growth and development section. Prior statements... and admissions...could then be included in the itemization of exceptions, since the pressure of logic and organization would no longer require that they be excluded from the definition of the hearsay rather than included in the exceptions."[132]

Including admissions and prior statements "in the itemization of exceptions" was precisely the approach of the three predecessor codes. His brief presentation did not address how to deal with the distinctiveness of admissions and prior statements and the fact that, as he had previously argued, they "do not fit well" with either the Rule 803 or Rule 804 categories. However, once he had abandoned his initial innovative approach to the hearsay exceptions, he was free of "the pressure of logic and organization" imposed by that approach and was able, for one brief moment in May, 1970, to consider treating admissions and prior statements as exceptions.

His May, 1970 memorandum is the final written word on the classification issue.[133] In its third draft, the Advisory Committee selected the first alternative presented in the memo, the creation of Rule 801(d). There is no record of the reason(s) for this selection. By the time of the third draft, the Reporter and Advisory Committee were near the end of a six-year drafting process, and the documentation of their work, in terms of minutes and memoranda, had virtually stopped.[134] The lack of contemporaneous records at this final, critical moment is a disappointment. However, working from the records that we do have, it seems clear that the reason for creating a new Rule 801(d) with the

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[132] *Id.*

[133] The classification was addressed one additional time, but only indirectly. The Senate Committee on the Judiciary noticed a potential coverage gap in Rule 806, the rule governing impeachment of hearsay declarants, for the makers of out-of-court statements falling under Rule 801(d)(2)(C), (D) and (E). It proposed amending Rule 806 to read, "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..." (emphasis added to indicate new language). The Committee report seemed to understand and to accept the Reporter's classification, noting "...the reason such statements are excluded from the operation of rule 806 is likely attributable to the drafting technique used to codify the hearsay rule, *viz.* some statements, instead of being referred to as exceptions to the hearsay rule, are defined as statements which are not hearsay."

[134] The May, 1970 memorandum is the last memo in the microfiche file. The Committee had meetings in May and December, 1970. There are minutes for the May meeting, which discussed the revisions through Rule 406. http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV05-1970-min.pdf There are no records of minutes of the December, 1970 meeting, where the decision to adopt Rule 801(d) was presumably discussed and approved.

"not hearsay" terminology in the third draft was the same as the reason for excluding admissions and prior statements from the definition of hearsay in Rule 8-01(c) in the first two drafts. It was the "will not fit comfortably" reason given at the outset in Memorandum No.19.

Prior Statements

Most of the Reporter's discussion of prior statements in Memorandum No.19 concerned the admissibility issue, not the classification issue. This focus was understandable because, at the time of the drafting, the orthodox rule was still the majority rule. The Reporter, like reformers before and since, wanted to change the orthodox rule and make most prior statements generally admissible. He used the pertinent sections of Memorandum No. 19, and later the text of the ACN, to make the case for this broader admissibility.

When he did touch briefly on the classification issue, his treatment of prior statements was quite different than admissions. Whereas his discussion of admissions omitted the predecessor codes, his discussion of prior statements began by noting that both the Model Code and the Uniform Rules treated prior statements as a hearsay exception and then stating that his proposal treats them "as not falling in the category of hearsay in the first place."[135] Observing that "the result is the same[, i]n either event the hearsay rule does not operate to exclude the evidence,"[136] he concluded:

> "in view of the Reporter, the basis for not excluding the evidence is that the conditions of giving testimony are satisfied, and hence logic dictates a classification as non-hearsay."[137]

Although he did not cite Wigmore at this point, this rationale for classifying prior statements as non-hearsay is identical to Wigmore's rationale for placing all prior statements in the "hearsay rule satisfied" category. Because the witness is in court and testifying under oath, the testimonial conditions have been met and the purposes of the hearsay rule are satisfied.

Interestingly, the Reporter did not use "bad fit" and incompatibility with Rule 803/Rule 804 as a rationale for treating them as "not hearsay." If he had done so, however, he would have observed that prior statements have the same issue as admissions – they do not "fit comfortably" with either Rule 803 or Rule 804, because of the requirement with prior statements that the declarant appear as a witness.[138]

The minutes indicated that, when the Advisory Committee discussed the treatment of prior statements at both the October, 1967 and May, 1968 meetings, their

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[135] Memorandum No. 19, *supra.* note 108, at 70.
[136] *Id.*
[137] *Id.*
[138] Presumably the Reporter would have also thought that "bad fit" would cause analogous distorting effects, although the direction of the distortion would be different, since prior statements have such strong assurances of reliability. It would tend to shrink the exceptions, whereas including admissions as an exception would tend to enlarge them.

discussion focused almost exclusively on whether, and to what extent, to admit prior statements as substantive evidence, and not on the how question. Interestingly, in support of admitting prior statements, Judge Weinstein made reference to New Jersey Rule 63(1), adopted from the Uniform Rules, and the Reporter made reference to the California Evidence Code.[139] Both of these states had recently decided to admit prior statements as substantive evidence, but as a hearsay exception, not as "not hearsay." The minutes do not reflect whether Judge Weinstein and the Reporter called attention to the "hearsay exception" aspect, as well as the substantive admissibility aspect, of the New Jersey and California codes.

C. Evaluating the Reporter's Reasons

The assessment of the Reporter's reasons for treating admissions and prior statements as he did and creating Rule 801(d) depends on the question asked and the criteria used to evaluate the answer. If the question is -- are admissions and prior statements different from the other hearsay exceptions and should they be treated differently? -- then the answer is yes, and the Reporter's reasons are fully satisfactory. Those reasons fully support the negative decision of how not to classify admissions. If there are only two categories of hearsay exceptions, one based on reliability and with the availability of the declarant immaterial and the other based on necessity and requiring that the declarant be unavailable, it makes sense not to place admissions and prior statements into either of those exceptions.

However, his reasons do not help in making the more important affirmative decision and answering the *how* question actually before the Advisory Committee: how should admissions and prior statements be classified in an evidence code? Should they be treated, as Wigmore once urged, as non hearsay in the traditional, definitional sense? Should they be excluded from the definition of hearsay (as in drafts ##1 and 2)? Or is it better to follow the Model Code, the Uniform Rules and the California Evidence Code and treat admissions and prior statements as hearsay but then, in recognition of their distinctiveness, place them in their own hearsay exception? Or should they be placed in new, separate categories and, if so, should those new categories be separate hearsay exceptions or something called "not hearsay"?

There are two possible approaches to answering the *how* question. The one that I favor and demonstrate in Section V uses criteria drawn from the standards of rule drafting – primarily clarity and consistency -- and then applies those criteria to the various possible ways of classifying admissions and prior statements.[140] Unfortunately, the Reporter and the Advisory Committee did not follow this approach.

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[139] Minutes, October, 1967 meeting, 40, 42. http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV10-1967-min.pdf Dean Joiner cited a Kansas case, which was decided under the Kansas version of the Uniform Rules. Chairperson Jenner also cited the New Jersey rule and said that it was "equivalent to what is being presented in this proposed rule." *Id.* at 46.

[140] As discussed in Section V, there is also a secondary factor that I call educational, the ability of the classification to educate users as to the distinctiveness of admissions and prior statements and their differences from the out-of-court statements covered by the other hearsay exceptions.

Instead, to the extent that they even recognized the *how* question, the Reporter and Advisory Committee used an approach that relied on two other factors: first, the protection of the Reporter's goal of rationalizing the hearsay exceptions; and second, a scholarly assessment of the essential nature of admissions and prior statements. I will discuss and evaluate these two factors in turn.

Rationalizing the Hearsay Exceptions

The Reporter was strongly committed to creating a rational system for the hearsay exceptions. While noting that some writers had been skeptical about such a project,[141] "...the Reporter believes that the hearsay exceptions may be seen in larger outlines of acceptable rationality."[142] His plan for achieving "acceptable rationality" consisted "of recognizing two general exceptions to the rule excluding hearsay, one prescribing conditions for declarations of unavailable declarants and the other prescribing conditions for declarations without regard to whether the declarant is unavailable."[143] He used the traditional hearsay exceptions, not as categorical exceptions as in the common law and the prior codes, but as examples to illustrate the nature and scope of these two general exceptions. He hoped that the general exceptions would and "encourage growth and development in this area of the law" while the illustrative traditional exceptions would "preserv[e]...the values of the past"[144]

The Reporter's approach to the exceptions drew strong criticism during the public comment period following the publication of the Preliminary Draft. Critics argued that the "illustrative" approach would vest too much discretion with the trial judge and create conditions of uncertainty that would make it difficult to prepare adequately for trial. Several groups suggested that the Committee return to the common law approach, change the illustrations to categorical hearsay exceptions and then add a separate residual exception to provide for future growth.[145]

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[141] Memorandum No. 19, *supra.* note 108, at 236. He quoted two of the skeptics: Morgan (hearsay is "a conglomeration of inconsistencies due to the application of competing theories, inconsistently applied," from Foreward to Model Code of Evidence 46 (1942)) and Chadbourne ("To admit some, but to stop short of admitting all, declarations of unavailable declarants and to perform the operation on a rational basis is, as experience has proved, a difficult endeavor.").

[142] Memorandum No. 19, *supra.* note 108, at 236. In the Introductory Hearsay Note that accompanied the preliminary draft, the Reporter identified three approaches to the hearsay exceptions and wrote that the federal rules were taking the third approach, that of "rationalizing the hearsay exceptions." In remarks to the New York City Bar shortly after the publication of Preliminary Draft, he said that he sought to accomplish two things in the proposed hearsay rules: "one is to weave the values of the traditional hearsay rule into a cohesive patter, in lieu of a crazy quilt, and the other is to reverse the unhappy process...by which justifications are transformed into requirements, resulting in more and more and smaller and smaller pigeonholes into which things must be fitted. Accordingly Rule 8-03 and 8-04 set forth in broad outlines two large categories of hearsay exceptions." Edward W. Cleary, 25 Record of NYCBA 142, 145-46 (1970).

[143] Memorandum No. 19, *supra.* note 108, at 236

[144] Memorandum No. 19, *supra.* note 108, at 24.

[145] Letter from American College of Trial Lawyers, microformed on Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-1988, Nos. Ev-305-01, Ev-614-58 (Cong. Info. Serv.).Trial Lawyers.

In the 1971 Revised Draft, the Reporter yielded to the criticism and retreated to the current system of categorical exceptions. He revised the Introductory Note: The Hearsay Problem for the third draft, so that the rules were no longer "rationalizing" the hearsay exceptions (as stated in the first draft of the Introductory Note) but instead used the approach "of the common law, i.e., a general rule excluding hearsay, with exceptions under which evidence is not required to be excluded even though hearsay."[146] The exceptions were then "collected under two rules."[147] The Third Draft thus transformed Rules 8-03(a) and 8-04(a) from broadly-phrased general exceptions into largely ceremonial headings in which the traditional hearsay exceptions were "collected."

As we have seen, the Reporter thought that admissions and prior statements were a "bad fit" that would undermine the rationality and distort the interpretation of the hearsay exceptions. There are two minor problems with this view. First, like Wigmore, he achieved some semblance of rationality for the hearsay exceptions by using Wigmore's technique of not considering some types of evidence as hearsay exceptions. Second, importance of the Reporter's concern was undermined when he replaced the general exceptions with the categorical exceptions in the third draft, as he recognized in his May 20, 1970 memorandum.[148] But the fundamental problem with the Reporter's "bad fit" concern is that it addresses only the negative decision to exclude admissions and prior statements from those categories of hearsay exceptions and is simply non-responsive to the important question of how they should be classified. It does not affirmatively justify the decision to classify them as "not hearsay."

Scholarly Assessment

The Reporter's treatment of the extensive scholarship on admissions was incomplete, inaccurate and misleading. Because the Reporter's inaccuracies and misrepresentations were so striking, I discuss his treatment of admissions at considerable length and then follow with a much briefer review of prior statements.

The Reporter began his discussion of admissions by observing that "the authorities have differed in some measure" in their views on admissions and then noting that Wigmore changed his position based on the influence of Morgan's writing.[149] However, he never clearly explained either Wigmore's original or Morgan's contrary

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[146] Fed. R. Evid., Introductory Note on Hearsay advisory committee's note.

[147] *Id.*

[148] There are two supplemental points about the rationalizing goal after the third draft. First, one might argue that that it is still necessary to avoid treating admissions and prior statements as exceptions, to prevent them from distorting the residual exceptions (then 803(24) and 804(b)(5), now Rule 807), in the manner discussed with the "bad fit" supra. To the extent that there is a distortion problem, it can be addressed and eliminated in the language of the residual exception more effectively than by creating a "not hearsay" category. Second, to the extent that it has any validity, the rationalizing/ anti-distortion goal has been somewhat undermined by the promulgation of the Rule 804(b)(6), a hearsay exception that has no claim to reliability and therefore could, if the Reporter's fears are correct, distort the interpretation of the residual exception.

[149] Memorandum No. 19, *supra.* note 108, at 87

position. After noting that Wigmore placed the admissibility of admissions on two grounds (inconsistency and self-contradiction of a witness, and the incongruity of a party objecting to the lack of opportunity to cross-examine himself), the Reporter stated that "he [Wigmore] concluded that admissions were not hearsay."[150]

His claim that Wigmore "concluded that admissions were not hearsay" was an oversimplification that obscured three points important in thinking about the appropriate classification. First, when admissions are offered for self-contradiction, they are not offered for their truth and thus are not hearsay under the traditional definition (Wigmore called this use "hearsay rule inapplicable"). Wigmore held this position in the first edition of the Treatise but modified it in the second and third editions. Second, Wigmore treated admissions used as substantive evidence as "hearsay rule satisfied," a category that also included former testimony and depositions. Thus, using Wigmore as authority for classifying admissions as non hearsay would also suggest using him as authority for similarly classifying former testimony (or explaining the reasons for not doing so). Finally, Wigmore never used the term "not hearsay" in this manner. For Wigmore, admissions offered as substantive evidence were hearsay, but the hearsay exclusionary rule did not apply because its purpose had been satisfied.

The Reporter was even more misleading when he discussed the views of two other scholars, Professor John Strahorn and Dean Charles McCormick. The Reporter praised one of Strahorn's articles as "perhaps the most searching examination yet made of the hearsay rule"[151] Like Wigmore, Strahorn was a relentless classifier. Modifying Wigmore's terminology, he placed all out-of-court statements into three categories: 1) the hearsay rule inapplicable (for evidence that was not offered to prove its truth and thus was not hearsay under the traditional view); 2) the hearsay rule partially satisfied (for former testimony and past recollection recorded); and 3) the "genuine hearsay exceptions." Strahorn placed admissions in the hearsay rule inapplicable category.

For Strahorn, admissions did not qualify as a "genuine hearsay exception" or fit into his "hearsay rule partially satisfied" category. After looking at the special circumstances under which admissions are received into evidence (including the lack of personal knowledge or competence requirements and the allowance of opinions),[152] he concluded that admissions have "nothing in common with the genuine hearsay exceptions and totally lack the identifying features found in all of them."[153] They also did not fit his "hearsay rule partially satisfied" category, which was for out-of-court statements that met most, but not all, of what he called the "conditioning devices" that assured the trustworthiness of the testimony.[154] That category contained only two types of

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[150] *Id.*

[151] *Id.* at 89. The article was published in two parts. John S Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. Penn. L. Rev. 484 and 564 (1937). In the Advisory Committee Note to Rule 801(d), the Reporter used the Strahorn article as his first citation.

[152] *See* notes 6-7, *supra*.

[153] Strahorn, *supra.* note 151, at 575

[154] In addition to oath, presence in the courtroom and cross-examination, these "conditioning devices" also include sequestration, discover and publicity. *Id.* at 484. Surprisingly, despite the author's knowledge of

statements: former testimony (where only demeanor is missing) and past recollection recorded (where the "conditioning devices" are applied to the witness in the courtroom and not at the time of the making of the statement).[155] Admissions did not fit this category because "the concept of the party's 'cross-examining' himself, or applying the conditioning devices to himself, seems an awkward one."[156] At this point, Strahorn considered either adding a fourth category for admissions, "hearsay rule waived," or making admissions a second sub-category of the hearsay rule inapplicable category, but decided that "to have to fall back on waiver or estoppel is very weak analysis."[157]

Strahorn concluded that admissions fit into the hearsay rule inapplicable category because, in his view, admissions were "offered not to prove the truth of their content, but for some other relevant purpose..."[158] He made a distinction between statements used as conduct (where the hearsay rule was inapplicable) and statements used as narration (where the hearsay rule applies). With admissions, he believed that the statements themselves were relevant conduct, regardless of their truth or falsity. As he put it:

> "The fact of the utterance by the party and his opponent's desire to use it throw some light on the separate and non-contemporaneous conduct of the party-speaker, viz., his conduct of the affair on which the instant case hinges. The justification for using admissions, as for circumstantial utterances generally, is the relation between the utterance and the other relevant conduct of the speaker."[159]

Strahorn then tied this approach to the view Wigmore expressed in his first edition and to the analogy to prior inconsistent statements.[160] "Just as a prior inconsistent statement of a witness is admissible [for impeachment] without reference to whether it is the present or previous statement which is false, so it is that the admissions comes in equally soon whether it, standing alone, be true or false."[161] In such a case, "there is no concern for their trustworthiness,"[162] and therefore the hearsay rule is inapplicable. Though never using the term not hearsay to describe admissions, Stahorn placed them in his "hearsay rule inapplicable" category because he believed that they were not hearsay in the traditional sense of that term.

Wigmore's views and the similarity between his "hearsay rule partially satisfied" and Wigmore's "hearsay rule satisfied" category, Strahorn does not cite Wigmore in his discussion of this category.

[155] *Id.* at 494, 496.

[156] *Id.* at 577.

[157] *Id.* at 577-578.

[158] *Id.* at 488

[159] *Id.* at 572-573

[160] Strahorn described Wigmore's position as a "modified" one, but this characterization seems inaccurate. Strahorn emphasized only the inconsistency/self-contradiction strand of Wigmore's writing on prior statements and quoted from the 1935 edition of his Code of Evidence and his Student Textbook on Evidence (1935). *Id.*, n. 49, 572 But the 1940 edition of the Wigmore treatise repeats the language of the 1923 treatise, thus strongly suggesting that Wigmore did not "modify" but rather retained his dualistic view of admissions.

[161] *Id.* at 573.

[162] *Id.* at 573

Dean Charles McCormick was an evidence luminary of the rank of Wigmore and Morgan.[163] He was one of the main drafters of the Uniform Rules of Evidence, and his 1954 Handbook on Evidence was the first major Evidence treatise since the publication of Wigmore's third edition in 1940.[164] In his handbook, McCormick summarized the views of different scholars on the classification of admissions. He identified Wigmore's initial ("hearsay rule inapplicable) and revised ("hearsay rule satisfied") positions, as well as Morgan's (hearsay exception) and Strahorn's (hearsay rule inapplicable) views.[165] He also divided admissions into two different types, recognizing both "express admissions" (by which he meant a party's oral or written statements) and admissions by conduct (the acts of a party such as fleeing the scene of a crime or refusing to call a witness or produce evidence.)[166]

After concluding his presentation of the different positions of the writers, McCormick wrote:

> "The present writer [McCormick] finds Morgan's classification of admissions as an exception to the hearsay rule, and his explanation therefore, most convincing as to express admissions and Strahorn's theory of admissions as circumstantial evidence most satisfactory as to admissions by conduct."[167]

McCormick thus agreed with Morgan that oral and written admissions should be treated as hearsay and classified as a hearsay exception. For admissions by conduct, he agreed with Strahorn (and the Uniform Rules and both the proposed and enacted Rule

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[163] Professor Falknor referred to McCormick, along with Wigmore and Morgan, as one of "the three masters." Judson Falknor, 1953 Ann. Survey of Am. Law. 755. When Wigmore was forced to retire in 1934, he recruited McCormick, then Dean at the North Carolina, to teach evidence at Northwestern, where he stay until he returned to the University of Texas Law School as dean in 1940. 40 Tex. L. Rev. 176 (1961).

[164] Charles C. McCormick, Handbook on the Law of Evidence (1954)[hereinafter, McCormick, Handbook]. McCormick died in 1963, shortly before the beginning of the drafting of the Federal Rules.

[165] I have one quibble with McCormick's summary. After describing Stahorn's views, he stated that "the affinity between this [Strahorn's] view and Wigmore's is apparent." *Id.* at 503. This statement obscured the important fact that, in Strahorn's view, admissions are not hearsay because they are not offered to prove the truth of the matter asserted, whereas in later Wigmore's view, admissions were considered for their truth but were excluded from the hearsay rule because the concern about cross-examination has been satisfied (causing him to place them in his "hearsay rule satisfied" category).

[166] *See id.* at 525-547 (1st ed 1954). Wigmore had originally made this distinction, using the terms "express" and "implied" admissions.

[167] *Id.* Interestingly, when Professor (former Reporter) Cleary became editor of the hornbook for the second edition in 1972, he deleted this concluding paragraph. Instead, he inserted a new paragraph, which stated: "On balance, the most satisfactory justification of the admissibility of admissions is that they are the product of the adversary system, sharing, though on a lower and non-conclusive level, the characteristics of admissions of pleadings or stipulations. This view has the added advantage of avoiding the need to find with respect to admissions the circumstantial guarantees of trustworthiness which traditionally characterize hearsay exceptions; admissions are simply classed as non-hearsay." McCormick, Handbook, 629 (2d Ed. 1972). Professor Cleary then continued: "Nevertheless, the usual practice is to regard admissions as an exception to the hearsay rule, and as a matter of convenience the discussion of them is located at this point in this textbook." *Id.*

801(a)) that such "non-assertive conduct" should be excluded from the definition of statement and thus not be regarded as hearsay.

In Memorandum No.19, the Reporter inaccurately implied that McCormick might support his proposed treatment of admissions. Concluding his discussion of Wigmore, Morgan, Strahorn and McCormick, the Reporter stated:

"McCormick took a position straddling Morgan and Strahorn."[168]

This statement was literally true but terribly misleading. On the critical issue of how to classify the most common type of admissions – verbal or "express admissions" -- McCormick came down squarely on the side of treating admissions as hearsay and then as a hearsay exception. Far from a straddle, it was a clear vote for classifying admissions as a hearsay exception, not as not hearsay.

In addition to the Reporter's misleading discussion of the authorities, he also failed to mention or discuss the Model Code, the Uniform Rules or the California Code, each of which, as we have seen, treated admissions as hearsay with a separate exception. This omission contributed to the failure to present and evaluate other alternatives for classifying admissions.

The Reporter's discussion of the classification issues for prior statements was better than for admissions, but was still incomplete and flawed. It was incomplete because it did not mention McCormick's famous article, at the end of which he drafted a model statute that treated prior statements as a hearsay exception.[169] Then, while his observation about prior statements – that the "conditions for giving testimony are satisfied" – was correct, his next statement that "logic dictates a classification as non-hearsay"[170] does not necessarily follow. The classification should be determined by practical reason and experience, not by "logic" (by which he presumably meant deductive, syllogistic reasoning). Practical reason and experience, not logic, establish the definitions and categories for evidence law (indeed, as we have known at least since Holmes,[171] for all law). "Logic" then operates somewhat mechanistically to place the objects (in our case, the out-of-court statements offered for their truth) into the correct categories.

Our current definition of hearsay as an out-of-court statement offered for its truth is the product of practical reason and experience. In light of this definition, it logically follows that a prior out-of-court statement offered for its truth is hearsay. If we had a different hearsay definition – say, "Hearsay is a statement by a person who is not a

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[168] Memorandum No.19, *supra.* note 108, at 89

[169] McCormick, *Turncoat Witness*, *supra.* note 5.

[170] Memorandum No.19, *supra.* note 108, at 70.

[171] "The life of the law has not been logic; it has been experience." Oliver Wendall Holmes, Jr. *The Common Law* 1 (1881).

witness in the current trial" -- then we would logically have a different result, and prior statements of witnesses would "logically" not be hearsay.[172]

Given the fact that prior statements of witnesses are hearsay under the current definition, two subsequent policy questions arise: 1) the whether question: whether, even though hearsay, prior statements should be admitted as substantive evidence; and 2) the how question: if so, should this be accomplished by creating a hearsay exception or by creating, either implicitly or explicitly, a new classification of "not hearsay." The answers to these questions should be and are based on practical reason and experience. As the Reporter himself recognized when discussing which prior statements to include and exclude from Rule 801(d), "the judgment is one more of experience than logic."[173]

Section III Rule 801(d) in Practice

Rule 801(d), while poorly written, has not caused significant problems for lawyers and judges, because they have largely ignored the "not hearsay" terminology and instead have used other, more useful and descriptive words. This adaptive practice has been true in the courtroom and in most reported cases, treatises and law school casebooks.

The Supreme Court has decided four cases involving Rule 801(d). In those cases, the Court has used the terms "exemption,"[174] "exception,"[175] and "exclusion"[176] more frequently than "not hearsay." The proposed Advisory Committee Note for the stylistic

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[172] Of course this alternative definition is not and never has been the legal definition of hearsay. The fact that the declarant is a witness goes to concerns about cross-examination, oath and demeanor that are policy issues that underlie the hearsay definition, but have not been made a part of that definition.

[173] ACN to Rule 801(d)(1). The Reporter wrote this in explaining whether he should follow the Model Code and Uniform Rules and allow all prior statements to be admitted as substantive evidence, or follow California and exclude some. It of course echoes Holmes' famous statement quoted in n. 176 supra.

The Reporter also relied on practical reason in deciding how to classify depositions and former testimony, both of which Wigmore had placed it in his "hearsay rule satisfied" category. Drawing on (although not citing) McCormick, the Reporter wrote, "It is believed that the thinking of the profession generally does not put depositions in the category of hearsay...On the other hand, a lawyer seeking to explore the admissibility of former testimony..would probably turn to hearsay as the appropriate classification." Id. at 84 (*See* McCormick, Handbook, *supra.* note 164, at 480: "it follows the usage most familiar to the profession..."). Using "the thinking of the profession" as a criteria is an excellent example of practical reason in this context.

[174] U.S. v. Inadi, 475 U.S. 387 (1986). While the opinion uses the term "exemption" in several places, it states it most clearly in footnote 12: "Federal Rule of Evidence 801 characterizes out-of-court statements by co-conspirators as exemptions from, rather than exceptions to, the hearsay rule. Whether such statements are termed exemptions or exceptions, the same Confrontation Clause principles apply." *Id.* at n. 12.

[175] Bourjailly v. U.S., 483 US 171 (1987). The Court uses the phrase "co-conspirator exception" and "exception" four times in the opinion. Justice Blackmun's dissent uses the phrase "co-conspirator exemption" ten times.

[176] U.S. v. Owens, 484 U.S. 554 (1988).

revisions to the current Federal Rules refers to the "hearsay exclusion" in Rule 801(d).[177] Lower court cases egularly used similar terminology.[178]

Most treatises are similarly eclectic and relaxed with their terminology. Professors Saltzburg, Martin and Capra tell us that "The Federal Rules provide for exemptions rather than exceptions..." and that the fact "that the Fed Rules chose the redefinition approach, rather than the approach of the creating exceptions, is of no great moment."[179] Law school casebooks provide similar treatment.[180] The reason for this relaxed eclecticism is simple. "There is no practical difference between an exception to the hearsay rule and an exemption from that rule. If a statement fits either an exemption or an exception, it is not excluded by the hearsay rule, and it can be considered as substantive evidence if it is not excluded by any other rule (e.g. Rule 403)."[181]

The facts that the choice of terminology does not make a difference in terms of admissibility and that lawyers and judges have found and use other terminology means that Rule 801(d) can work without creating a crisis but not that it is an appropriate rule. Some states have recognized this and have adopted innovative alternative approaches. I look at those approaches in the following section, before concluding in Section V with an evaluation of five different approaches and the prospects for amending the rule.

Section IV Rule 801(d) and The "Not Hearsay" Classification in the States

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[177] Memorandum from Reporter to Advisory Committee, April 1, 2010, in Memorandum from Robert L. Hinkle, Chair, Advisory Committee on Evidence Rules to the Hon. Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States app. A at 281 (May 10, 2010), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/EV05-2010.pdf.

[178] *See, e.g.*, for "exemption": U.S. v. Brockenborrugh, 575 F.3d 726 (D.C.Cir. 2009), U.S. v. DiSantis, 565 F.3d 354 (7th Cir 2009); for "exclusion": U.S. v. Holden, 557 F.3d 698 (6th Cir 2009) and Bennett v. Saint-Gobain Corp., 507 F.3d 23 (1st Cir. 2007); and for "exception": U.S. v. Ayala, 601 F.3d 256 (4th Cir. 2010) and U.S. v. Mitchell, 596 F.3d 18 (1st Cir. 2010).

[179] 4 Steven H. Saltzburg, Michael M. Martin & Daniel J. Capra, 801-411 Rules of Evidence Manual (9th ed. 2006). A recent hornbook says: "Most courts and commentators refer to these two classes of evidence...as hearsay exemptions or exclusions. In this text, we will denote these special classes with the term "exemptions" or, occasionally, with the phrases "statutory nonhearsay" or "definitional nonhearsay." Graham C. Lilly, Steven H. Saltzburg & Daniel J. Capra, Principles of Evidence, 160-161 (2009).

Professor Michael Graham uses the term "exemption" and writes that "[u]se of the term "exemption" to appy to prior statements...as well as admissions... helps to relieve the confusion." 30B Michael Graham, Federal Practice and Procedure 28, n.19 (2006). Professors Mueller and Kirkpatrick note that "Rule 801(d)(2)(A) creates what amounts to an exception for personal or individual statements made by a party and offered against him" and that "it is more convenient to refer to admissions doctrine as a hearsay exception." 4 Christopher R. Mueller, Laird Kirkpatrick, Federal Evidence 360, 361 (3rd ed 2007)

[180] See, e.g., Ronald Allen, Kuhns, Swift, Schwartz, Evidence: Text, Problems and Cases (4th ed. 2006)(says that there are 8 exemptions and 29 exceptions and that "there is no difference"); Lempert, Gross and Liebman, A Modern Approach to Evidence (4th ed 2000)(treats them as exceptions); Prater, Capra, Saltzburg, Arguello, Evidence: The Objection Method (3rd. 2007)(use exemption and exclusion interchangeably); Rothstein, Raeder and Crump, Evidence: Cases, Materials and Problems (3rd ed 2006)(exemption). George Fisher, Evidence 392 (2d ed. 2002)(treats them as exceptions).

[181] 4 Saltzburg et. al., *supra* note 179, at 801-27

Early on, even before the final enactment of the federal rules, states began to adopt some version of the federal rules as their state evidence code. Acting first, Nevada in 1971 adopted the Preliminary Draft.[182] New Mexico and Wisconsin modeled their new rules on the proposed rules promulgated by the Supreme Court in 1972.[183] Several other states jumped on the bandwagon soon after Congress enacted the federal statute, as did the National Conference of Commissioners on Uniform State Laws (NCCUSL), which stated, when it discarded the 1954 Uniform Rules in 1974 and adopted the federal rules as the new Uniform Rules:

> "We believe uniformity in the law of evidence is desireable [sic] . To conform state and federal practice is to require a lawyer to learn one set of rules instead of two. The lawyer will better serve the public in whichever of these forums he may be litigating..."[184]

The state adoptions continued apace and as of August, 2010, forty-three states have adopted some version of the federal rules.[185] Especially in light of the experience with the Model Code and the Uniform Rules, this record of state adoptions is a remarkable achievement.

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[182] NV ST 51.035.

[183] New Mexico amended its rules in 1976 to conform to the rules that Congress enacted. *See* NM R Rev Rule 11-801. WI ST 908.01

[184] Prefatory Note to Uniform Rules of Evidence at 256 (1974). The 1974 Uniform Rules did not include Rule 801(d)(1)(C)(prior statements of identification), because it was adopted before Congress reinstated that provision.

[185] The states are Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware; Florida, Hawaii, Idaho, Indiana, Kentucky, Iowa, Louisiana, Maine, Massachusetts, Maryland, Michigin, Minnesota, Mississippi, Montana, Nebraska, New Jersey, North Carolina, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming. The citations are available at Barbara E. Bergman & Nancy Holland, *Wharton's Criminal Evidence,* (15th ed. 1997 and 2009-2010 supplement).

I included both Connecticut and Massachusetts as adopting jurisdictions, although each state was clear that it was adopting only the general organization and numbering system of the federal rules and was simply restating its existing evidence rules in the federal format. For Connecticut, *see* Section 1-2(a), Connecticut Code of Evidence (2009)(one of "[t]he purposes of the [c]ode [is] to adopt Connecticut case law regarding the rules of evidence as rules of court...." in a format "readily accessible body of rules to which the legal profession conveniently may refer" and not to adopt "the Federal Rules of Evidence or cases interpreting those rules." Commentary to Rule 1-2(a)). In a 2008 case, the Connecticut Supreme Court held that the evidence rules in the Code of Evidence are binding on the Superior Court judges but that the appellate courts "retain the authority to develop and change the rules of evidence through case-by-case common-law adjudication." State v. DeJesus, 228 Conn. 418, 953 A.2d 45 (2008). For Massachusetts, see Introduction, Massachusetts Guide to Evidence (2010)(these are "not rules, but rather ... a guide to evidence based on the law as it exists today... Ultimately, the law of evidence in Massachusetts is what is contained in the authoritative decisions of the Supreme Judicial Court and of the Appeals Court, and the statutes duly enacted by the Legislature.").

While uniformity has been the primary goal of the state adoptions, no jurisdiction adopted the federal rules *verbatim*, and most have modified them in two or more ways.[186] When making these modifications, states have decided that the advantages of a customized state rule in expressing or protecting an important state interest outweighed the disadvantages of non-uniform language. In such instances, the "quality" of a particular provision matters more than uniformity.[187] As a result, states have added considerable variety into the putatively uniform rules.

The non-adoption of Rule 801(d) has been part of that variety. Nine of the adopting states have rejected Rule 801(d) either in whole or in part and have instead classified admissions or prior statements or both as hearsay exceptions.[188] Adopting the federal rules in 1979, Florida rejected Rule 801(d) and instead classified admissions as a Rule 803 exception and placed prior statements as an exclusion in the definition section (as was done in the first two drafts of the federal rules).[189] When North Carolina adopted the federal rules in 1984, it treated admissions as a hearsay exception but did not permit any substantive use of any prior statements.[190] Tennessee treated admissions as a hearsay exception and also created an exception for statements of prior identification and, in accordance with its case law, not for prior inconsistent or consistent statements.[191] Kentucky classified both admissions and prior statements as hearsay exceptions,[192] as did New Jersey, which had adopted the Uniform Rules in 1967 and then in 1993 amended its rules to conform to the numbering system of the Federal Rules of Evidence.[193]

Four jurisdictions in particular -- Hawaii, Maryland, Pennsylvania and Connecticut -- have developed innovative approaches to the classification of admissions and prior statements, with Hawaii leading the way. Guided by the Reporter for the Hawaii Rules of Evidence, Professor Addison Bowman, Hawaii decided to maintain the common law approach of treating admissions and prior statements as hearsay exceptions

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[186] Kinvin L. Wroth, *The Federal Rules of Evidence in the States: a Ten Year Perspective*, 30 Vill. L. Rev. 1315 (1985); Kenneth W. Graham, Jr. *State Adaptation of the Federal Rules: The Pros and Cons*, 43 Okla. L. Rev. 293, 310 (1990).

[187] See. e.g., Neil Cohen, *A Meta-Analysis of the Tennessee Rules of Evidence*, 57 Tenn. L. Rev. 1, 16 (1989)(" "The many areas where the Tennessee rules improve on federal language and content are also impressive. The Commission resisted the temptation to adopt the Federal Rules of Evidence *in toto*. Rather, the Commission did a careful analysis of each rule and made some courageous changes in the federal approach.")

[188] In alphabetical order, the nine states that adopted the federal rules but have not followed Rule 801(d) are: Connecticut; Ct R Rev § 8-5 (1), Florida; Fl St § 90.803 (18), Hawaii; HRS § 626-1, Kentucky; KY ST Rev Rule 801A, Maryland; MD R Rev Rule 5-802.1, New Jersey; NJ R Evid N.J.R.E. 803, North Carolina; NC ST EV §8C-1, Pennsylvania,; Pa.R.E. 803 (25), and Tennessee; TN R REV Rule 803.

[189] Florida also created three different exceptions for former testimony – one for former testimony in a prior civil trial with the same parties and issues, FL St §90-803(22); one for former testimony in civil trials; and one for former testimony in criminal trials. FL St § 90.804 (2) (a) is an exception inspired by Wigmore's "hearsay rule satisfied" treatment of former testimony. See generally Ehrhardt Fl State L Rev article

[190] NC ST EV §8C-1, Rule 801..

[191] TN R Rev Rule 803. (1.1), TN R Rev Rule 803. (1.2); *See also* Neil P. Cohen, *A Meta-Analysis of the Tennessee Rules of Evidence*, 57 Tenn. L. Rev. 1 (1989)

[192] KY ST Rev Rule 801A

[193] *See* N.J. R Evid. (1967) and NJ R Evid N.J.R.E. 803.

and then to create separate declarant-based exceptions to highlight their distinctiveness. It created a new category, Rule 803(a), exclusively for admissions and then placed all the "Rule 803" exceptions as sub-sections in a new Rule 803(b) category.[194] It also created a new Rule 802.1 for statements by a witness and, following the California Evidence Code, included the exception for past recorded recollections in the new category.[195] The Hawaii model is one variation of what I call the "four categories" approach, with categories based on whether the declarant is a witness, a party-opponent, unavailable, or where their availability is immaterial.

In 1986, Maryland followed the Hawaii model, using identical language.[196] Pennsylvania (in 1992)[197] and Connecticut (in 1999)[198] each created a new category for prior statements but treated admissions as a general hearsay exception where the availability of the declarant was immaterial.[199]

There were seven states that, as of August, 2010, had not adopted the Federal Rules of Evidence, and all seven treat admissions and prior statements as hearsay exceptions. Two of them already had their own state evidence codes prior to the enactment of the federal rules and retained those codes: California, with the California Evidence Code, and Kansas, as the first adopter of the original Uniform Rules. The five remaining non-adopting states – Georgia, Illinois, Missouri, New York, and Virginia -- have no overall evidence codes and instead rely for their evidence law on a mix of case law, statutes and court rules.[200] Each jurisdiction follows the traditional common law approach of classifying admissions and prior statements as hearsay exceptions.[201]

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[194] HI St § 626-1 Rule 803. (a). In addition to the admissions categories of the federal rules, the Hawaii rule also includes several sub-categories drawn from the California Evidence Code. Id.

[195] HI St § 626-1 Rule 802.1

[196] MD R Rev Rule 5-802.1, 5-803. Justice Chasanow supported the state adoption of the rules but, in a separate opinion, objected to the fact that Maryland modified "over 80% of the Federal Rules" in its adoption." 333 Md. XXXIX (1993). Interestingly, he specifically objected to Rule 803(a): "In an unnecessary attempt to prove that Wigmore, the other evidence scholars and the Federal Rules of Evidence when they classified admissions as non-hearsay, the Rules Committee...classified them as hearsay, but an exception to the rule. This change, like so many others, is unnecessary and a potential source of confusion and misinterpretation." Id. at XLIV-XLV. He also objected to the changes in prior statements. Id.

[197] Pa.R.E., §Rule 803.

[198] Ct R Rev §8-3

[199] Connecticut's category for witnesses is called "Declarant Must Be Available;" Pennsylvania's is "Testimony of Declarant Necessary." Pennsylvania (but not Connecticut) included Past Recollection Recorded in the "declarant is a witness" category.

[200] Georgia has an evidence code – the Code of 1863. However, because of the age of the code, Georgia's evidence law today is the old code, newer statutes and common law. Paul S. Milich, The Proposed New Georgia Rules of Evidence: An Overview (2010), http://www.gabar.org/public/pdf/news/proposed_new_evidence_rules_milich.pdf The proposed new rules treat admissions as a hearsay exception but prior statements as not hearsay. Proposed Georgia Rules of Evidence Rules 801(d)(1) and (2), http://www.gabar.org/public/pdf/news/proposed_new_evidence_rules.pdf

[201] *Lumpkin v. Deventer North America, Inc.*, 295 Ga.App. 312, 316 (Ga.App., 2008) (admission by agent is admissible under exception to rule against hearsay); *Vojas v. K mart Corp.*, 312 Ill.App.3d 544, 547 (Ill.App. 5 Dist., 2000) (exception to the hearsay rule makes admissions by a party admissible.); *Gamble v. Browning*, 277 S.W. 3d 723, 729 (Mo.App. 2008) (Excerpt of videotape in which defendant admitted to setting up plaintiff in a burglary was an admission by a party opponent and, thus, was admissible as an

My final comment on state practices concerns the reasons given – or, more often, not given – for adopting or not adopting Rule 801(d). In only one of the 34 jurisdictions that adopted Rule 801(d), Texas, is there any record of the reasons for selecting Rule 801(d).[202] One might have expected at least one jurisdiction to have discussed the possible problems of adding a new, contradictory meaning for the not hearsay term, but there have been none.[203] The *imprimatur* of the federal rules and the desire for uniformity have been sufficient in the themselves.

Two of the nine states that rejected Rule 801(d) did give reasons for their action – terse and conclusory, but reasons nevertheless. The Pennsylvania Advisory Committee Notes stated:

> "The Pennsylvania rules, like the common law, call an admission by a party-opponent an exception to the hearsay rule. The Pennsylvania rules, therefore, place admissions by a party opponent in Pa.R.E. 803 with other exceptions to the hearsay rule in which the availability of the declarant is immaterial. The difference between the federal and Pennsylvania formulations is organizational. It has no substantive effect."[204]

and

> "Subsection (a) is similar to F.R.E. 801(d)(1)(A), except that the Pennsylvania rule classifies those kinds of inconsistent statements that are described therein as exceptions to the hearsay rule, not exceptions to the definition of hearsay."[205]

The Hawaii comments said that admissions were treated "as exceptions to the hearsay rule rather than as non-hearsay." It also pointed out that they were placed in Rule 803, where the availability of the declarant was immaterial and then in a separate

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exception to the hearsay rule in a malicious prosecution action.); *Albert v. Denise*, 181 A.D.2d 732, 732 (N.Y.A.D. 2 Dept.,1992) (Statement that mother had used cocaine in his presence and had attempted to have him take cocaine was admissible under hearsay exception for prior statements); *Parker v. Com*monwealth, 41 Va.App. 643, 649 (Va.App.,2003)(prior statements admissible as an exception to the hearsay rule).

[202] The Texas Commentary, written by Professor Olin Guy Wellborn as Reporter, gave a short statement of reasons ("Even though these statements in form would fit the definition of hearsay, they are not excluded as hearsay because they do not invoke all the policies behind the hearsay rule." Commentary, Texas Rules of Evience Rule 801(e)). Interestingly, several states noted, in their state Advisory Committee Notes, that Rule 801(d) marked a departure from the state tradition of treating admissions (and sometimes prior statements) as hearsay exceptions. See the ACN or comments to Rule 801(d) for Alabama, Mississippi, Vermont and Ohio. Showing some ambivalence about its adoption, Alabama's ACN says, "These statements [prior statements in Rule 801(d)(1)]...are declared *arbitrarily* not to be hearsay." (emphasis supplied).

[203] One might have especially expected some commentary from Utah, which adopted the original Uniform Rules in 1971 and then switched to the federal rules in 1983. Ronald N. Boyce & Edward L. Kimball, *Utah Rules of Evidence 1983 - - Part III*, 1995 UT L Rev 717, 718 (1995).

[204] Advisory Committee Note, Pa St Rev Rule 803 (25).

[205] Advisory Committee Note, PA St Rev Rule 803.1 (1).

exception, (a), with the other Rule 803 exceptions placed in a sub-section (b), because "[t]he rationales for paragraphs (a) and (b) of this rule differ markedly."[206]
For prior statements, placed in a new Rule 802.1, the comment noted that "[t]his rule effects a reorganization of certain of the hearsay provisions found in Article VIII of the federal rules. The formulation follows generally the scheme of Cal. Evid. Code in treating all appropriate prior witness statements in a single rule."[207]

As has been the case from the time of the Model Code in 1942 to today, the classification of admissions and prior statements has not been the subject of expansive discourse or commentary by the codifiers.

V. An Evaluation of the Six Alternatives

This section will evaluate six alternative approaches to classifying admissions and prior statements and then consider the several different ways that the preferred alternative – the "four categories" approach – might be implemented through amendments to the federal rules. Before beginning the evaluation, we would do well to remember what McCormick said about the definition of hearsay and apply it to our problem: Too much should not be expected of a classification.[208] That wisdom reminds us that it is unreasonable to expect any classification of admissions and prior statements to capture fully all the theoretical and practical issues involved with these types of statements. If classified as "not hearsay" as in Rule 801(d), there is both confusion over the term's meaning and the risk of inconsistent use. If classified as hearsay and an exception, there may be a reduced emphasis on the distinctiveness of admissions and prior statements and, since we are not writing on a blank slate, the costs of change after thirty-five years of usage.

On the other hand, neither should we expect too little of a classification. When used as part of a code of rules, we have every reason to demand that a classification and its accompanying terminology comport with the basic criteria for rule-drafting: clarity and consistency. These are the standards of the Guidelines for Drafting and Editing the Federal Rules and the leading works on drafting.[209] They are also consistent with the goals that the Reporter himself expressed at the beginning of the drafting process.[210] To

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[206] Comment, Hawaii 803(a).
[207] Comment, Hawaii, 802.1.
[208] McCormick wrote, "Too much should not be expected of a definition." McCormick, Handbook, *supra.* note 164, at 459. He then went on to say that a definition "cannot furnish answers to all the complex problems of an extensive field (such as hearsay) in a sentence. The most it can accomplish is to furnish a helpful starting-point for discussion of the problems, and a memory-aid in recalling some of the solutions. But if the definition is to remain brief and understandable, it will necessarily distort some parts of the picture. Simplification is falsification." *Id.* at 459-460.
[209] Byron Garner, Guidelines for Drafting and Editing the Federal Rules (5th ed. 2009). Reed Dickerson, The Fundamentals of Drafting 16 (2d ed. 1986), Lawrence E. Filson and Sandra L. Strokoff, The Legislative Drafter's Desk Reference (2d ed. 2008).
[210] As noted in Section II-A, at the second meeting of the Advisory Committee in October, 1965, the Reporter told the members that "words should be used in their ordinary meaning whenever possible" and that he was drafting the rules "to be as usable and accessible as possible."

the two main criteria of clarity and consistency, I would also add a third, what I will call the education factor: the ability of the classification to educate users as to the distinctiveness of admissions and prior statements and their differences from the out-of-court statements covered by the other hearsay exceptions.[211]

The six alternatives for evaluating under these criteria are:

1) the Federal Rule approach, with Rule 801(d) and the "not hearsay" terminology;
2) the approach of the First Draft and Second Draft, excluding admissions and prior statements from the definition of hearsay in the definition section, Rule 801(c);
3) the predecessor code approach, treating admissions and prior statements as one of a list of hearsay exceptions;
4) the "three categories" approach adopted by Connecticut and Pennsylvania; and
5) the "four categories" approach that I am recommending.[212]
6) a "four categories" approach where the categories for admissions and prior statements are labeled "exemptions" or "exclusions" instead of "exceptions."

Rule 801(d) scores poorly on clarity and consistency. Under Rule 801(d)(1), a prior inconsistent statement is called not hearsay if offered to impeach and "not hearsay" if offered substantively. An admissions is both hearsay under Rule 801(c) and "not hearsay" under Rule 801(d)(2). It is unclear and confusing to have the same term, not hearsay, used in an inconsistent manner.

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[211] These criteria for evaluating the various alternatives are different from and narrower than the goals of the initial codification effort, which also included uniformity, reform and accessibility. The selection of one or another alternative approach to the treatment of admissions and prior statements will have no impact on reform, only a possible short-term impact on uniformity, and should help accessibility.

I have not included as evaluative criteria the two factors that most concerned the Reporter, rationalizing the hearsay exceptions and using the scholarly assessments. As discussed in Section II-C, while those factors may have some bearing on the negative decision of how not to treat admissions and prior statements, they provide no assistance with the affirmative decision of how these statements should be treated.

[212] In addition to having four categories – one each for declarant as a witness, declarant as a party-opponent, availability of declarant immaterial and declarant unavailable – the recommended approach follows California and Hawaii and includes past recollection recorded exception in the declarant as a witness category (thus moving it from its present placement in Rule 803(5)).

A past recorded recollection *is* a prior statement of a witness. Under the terms of the exception, the declarant of the past recorded recollection must appear as a witness in court and testify as to the foundational requirements of the exception. California, Hawaii and Maryland place past recorded recollections within the exception for prior statements. The Reporter's reasons for not placing it with the other prior statements and classifying it instead as a Rule 803 exception, where the availability of the declarant is immaterial, and are weak. He said that he did not place it with the prior statements provision because Rule 801(d)(1) "requires that declarant be 'subject to cross-examination,' as to which the impaired memory aspect of the exception raises doubts." ACN, Rule 803(5)(interestingly, the quoted language was not in the original ACN but was added in the third draft). There may have been some doubt in 1967 about whether the witness with an impaired memory was subject to cross-examination, there has been no doubt since United States v. Owens, 484 U.S. 554 (1988). And the unquestioned non-compliance with Rule 803 and Rule 804 should have trumped any possible doubt over a possible fit with prior statements.

The approach of the First Draft and Second Draft has the same problem. Excluding admissions and prior statements from the hearsay definition does not make them disappear from the courtroom. Lawyers still offer the statements at trials, opponents still object, and lawyers and judges need a term to describe them. If they are not hearsay, what are they? The default term for evidence that is not hearsay is "not hearsay," which creates the inconsistency with the traditional meaning of not hearsay.

The final four alternatives all score much better on clarity and consistency. They follow the traditional approach, using the term not hearsay only to describe statements that are not offered for their truth and the term hearsay exception to describe statements offered for their truth that we nevertheless wish to admit into evidence. This usage is clear and consistent.

On the education criterion, Rule 801(d) educates somewhat, but in an indirect and opaque manner. Rather than highlighting what admissions and prior statements are (statements by the declarant as a party and as a witness), Rule 801(d) instead asserts that they are "not hearsay," whereas they are hearsay under the definition of Rule 801(c).[213] As such, it is more confusing than enlightening. Second, by combining admissions and prior statements together in one rule, Rule 801(d) misses the opportunity to educate as to how these two types of statements differ from each other and to remind judges and lawyers that the reasons for granting their admissibility are very different. Prior statements are very reliable, among the best of the admissible hearsay. Admissions are, doctrinally at least, notably unreliable. Grouping them together is artificial and misleading. It did not make sense when Wigmore did it, first as "hearsay rule inapplicable" as self-contradiction and then as "hearsay rule satisfied," and it does not make sense in Rule 801(d).

The predecessor codes missed the opportunity to educate when they placed admissions and prior statements in an undifferentiated list of hearsay exceptions. The "three categories" approach educates as to the distinctiveness of prior statements but fails to do so for admissions. Only the fifth alternative, the "four categories," approach performs the educational function effectively. By putting admissions and prior statements in separate categories, it emphasizes their difference, from each other and from the other hearsay exceptions. By labeling those categories correctly, as "Declarant as a Witness" and "Declarant as a Party-Opponent," it reinforces both the reason for their distinctiveness and the rationales for their admissibility.[214]

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[213] Which is why Professors Lilly, Saltzburg and Capra correctly called the Rule 801(d) usage an "oxymoron." Lilly et. al., *supra.* note 14.

[214] As another example of the "there is no perfect solution" maxim, a "four categories" amendment that would provide clarity, consistency and educational value for admissions and prior statements would at the same time render certain applications of Rule 806 either redundant or puzzling. If prior statements were a hearsay exception, Rule 806's authorization of the impeachment of the declarant-witness is redundant, since a witness is already impeachable qua witness. If admissions were a hearsay exception, Rule 806 would authorize a party-opponent to impeach his or her own statement. While this makes sense (and Rule 806 endorses it in the context of vicarious admissions), for personal admissions it is strange.

The sixth and final alternative is a variation on the "four categories" approach that labels the categories for declarant as a witness and declarant as a party as exemptions or exclusions intead of exceptions. The use of one of these synonyms would further highlight the educational point that admissions and prior statements are different from the other exceptions, stressing that they are so different that we use a different noun to describe them. However, this seems like overkill. Creating separate exceptions is sufficient to make the educational point. There is no need to introduce an additional term with the same meaning, and there is a cost (yet another term of art to remember) in doing so. In this instance, simpler is better.

The basic "four categories" approach is superior in terms of clarity, consistency and education, and federal and state evidence codes should be amended to incorporate this approach. Assuming that one agrees with the merits of this argument, it is then necessary to consider the issue of amending the rules, first in terms of form and renumbering issues and finally in terms of the standards for amendment of the Advisory Committee on the Federal Rules of Evidence.

Implementing The "Four Categories" Approach

While an amendment that incorporates the "four categories" approach will not change any of the operative language of the rules for admissions and prior statements, it will necessarily change some of the introductory language and the numbering and placement of the rules. Those with more familiarity with the rules drafting and amending process will surely have better insights than mine, but I can at least begin the discussion by suggesting several possible approaches, two that are minimalist and two that are more thoroughgoing.[215]

One minimalist approach would retain the framework and specific rule language of Rule 801(d) but would change the titles of the main rule and the two sub-rules. Thus, the title of Rule 801(d) would change from "Statements which are not hearsay" to "Hearsay Exceptions." The title of Rule 801(d)(1) would become "Declarant is a Witness" and Rule 801(d)(2) would become "Declarant is a party-opponent." Additionally, Rule 803(5) would move and become a new Rule 801(d)(1)(4). This approach has the important advantage of being minimally disruptive to the other rules. While it continues to group admissions and prior statements together and thus loses the opportunity to educate as to their distinctiveness, it could provide a different kind of future educational benefit. It might remind readers twenty years from now – when they inquire as to why these two exceptions are placed in Rule 801(d) and grouped together -- of how confusing the classification issue once was.

[215] Any amendment to Rule 801(d) will require other conforming amendments. Certain language of Rule 806 -- "a statement defined in Rule 801(d)(2)(C), (D), or (E)" -- should be deleted. If the amendments are more thoroughgoing and result in a renumbering of the rules, other rules that refer to certain hearsay exceptions by number (such as Rules 901(11) and (12), would need to be changed. In addition, any renumbering will certainly complicate electronic searches.

Another minimalist approach would follow the one used by several states. Hawaii, Maryland and Pennsylvania created a new category for statements by witnesses and then simply shoehorned in the new category as a new sub-section of an existing category: Rule 802.1 in Hawaii, Maryland, and Rule 803.1 in Pennsylvania. While each of these states then placed admissions into an exception within their Rule 803 category, amenders could simply create another new sub-section for admissions, such as Rule 802.2 or 803.2. This approach is awkward and forced and is not recommended.

A more thoroughgoing approach would be to create the two new categories in renumbered sections of Article VIII. One version of this approach might delete and move Rule 801(d)(1) to the new Rule 803, Rule 801(d)(2) to the new 804, and 803(5) to the new Rule 803(4). It would then result in the following rules:

803 Declarant as a witness – Prior Statements[216]
804 Declarant as a party-opponent – Statements of party-opponents[217]
805 Availability of declarant immaterial[218]
806 Declarant unavailable

Another version might create the new category only for declarant as a witness and, for admissions, follow Hawaii and Maryland by placing it in a new Rule 803(a) category and moving the current Rule 803 exceptions to a newly-created Rule 803(b) category. This version has the advantage of emphasizing the similarity that admissions have with the other Rule 803 exceptions (the availability of the declarant is indeed immaterial) but it runs the risk of underemphasizing the differences.

Amending the Federal Rules of Evidence

The final issue is evaluating an amendment incorporating the "four categories" approach (whether minimalist or more thoroughgoing) under the standards governing the amendment process. The amendment of the Federal Rules of Evidence follows the same well-defined Rules Enabling Act process as the other federal court rules.[219] The statutory authority for the amendment process is vested with the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, commonly known as the "Standing Committee," which has delegated the initial rule-amending authority to one of five advisory committees – in the case of evidence, the Advisory Committee on Evidence Rules.[220]

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[216] This would include the language from the current Rule 801(d)(1) as well as the current Rule 803(5), which would be a new Rule 803(4).

[217] This would include the language from the current Rule 801(d)(2).

[218] Rule 803(5) would be deleted and its language transferred to the new Rule 803(4)

[219] James C. Duff, The Rulemaking Process: A Summary for the Bench and Bar (April 2006), http://www.uscourts.gov/rules/proceduresum.htm; 28 U.S.C. §2073(b). This process governs amendments to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure and the Federal Bankruptcy Rules, as well as the Federal Rules of Evidence. Of course, Congress can also unilaterally amend the federal rules, as it did with Rule 412 and Rules 413-415.

[220] The Advisory Committee begins the amending process, by studying an issue and then drafting an amendment and submitting it for public review and comment. The Advisory Committee then presents its

After being unceremoniously abolished soon after the enactment of the Federal Rules of Evidence in 1975, the Advisory Committee on Evidence Rules was reestablished in 1992.[221] In 1993, the Advisory Committee established a general approach for determining when it will amend one of the federal rules, and it has generally followed that approach in evaluating amendments since that time. In addition to this general approach, the Advisory Committee is currently participating in the ongoing effort of the Standing Committee to "restyle" the federal rules. This restyling project, started in the early 1990s with the Federal Rules of Appellate Procedure[222] and now reaching the Federal Rules of Evidence, is designed "to simplify, clarify and make more uniform all of the federal rules of practice, procedure and evidence."[223] There are thus two approaches to amending the rules – a general amendment or a restyling amendment.

The Advisory Committee stated its approach for considering a general amendment as follows:

> Its philosophy has been that an amendment to a Rule should not be undertaken absent a showing either that it is not working well in practice or that it embodies a policy decision believed by the Committee to be erroneous. Any amendment will create uncertainties as to interpretation and sometimes unexpected problems in practical application. The trial bar and bench are familiar with the Rules as they presently exist and extensive changes might affect trials adversely for some time to come. Finally, amendments that seek to provide guidance for every conceivable situation that may arise would entail complexities that might make the rules difficult to apply in practice.[224]

It is unclear if an amendment embodying the "four 4 categories" approach will qualify under this philosophy. On the one hand, it does not meet either of the two factors in the first sentence. It cannot be said that Rule 801(d) is "not working well in practice."[225] Although the language of Rule 801(d) is awkward, judges and lawyers have

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proposed amendment to the Standing Committee, which reviews it and, if approved, presents the proposed amendment to the Judicial Conference. If approved, the Judicial Conference then transmits the proposed amendment to the Supreme Court. The Supreme Court then reviews and, if approved, promulgates the amendment by forwarding it to Congress by May 1 of any given year. The amendment takes effect on December 1 of that year unless Congress takes action.

[221] *Self-Study*, 168 F.R.D. 679 (1996)

[222] The Rules of Appellate Procedure were amended with an effective date of December 1, 1998. Fed. R. App. P. 1, Advisory Committee Note. The Rules of Criminal Procedure were amended with an effective date of December 1, 2002. The Rules of Civil Procedure were amended with an effective date of December 1, 2008. *See* Common Rules of Practice & Procedure of the Judicial Conference of the U.S., Preliminary Draft of Proposed Style Revision of the Federal Rules of Evidence at 2 (May 6, 2009, released for public comment on Aug. 11, 2009)

[223] *See* Common Rules of Practice & Procedure of the Judicial Conference of the U.S., Preliminary Draft of Proposed Style Revision of the Federal Rules of Evidence at 2 (May 6, 2009, released for public comment on Aug. 11, 2009)

[224] 156 F.R.D. 339 (1994)

[225] *See* Section III *supra.*

adapted well. Further, it likely does not "embod[y] a policy decision believed by the Committee to be erroneous." Indeed, because the issue is classification, not admissibility, the dispute over Rule 801(d) does not involve what one typically thinks of as a policy decision.[226]

On the other hand, and counting in its favor, this amendment is unlikely to "create uncertainties as to interpretation and sometimes unexpected problems in practical application," or to disorient the bench and bar or adversely affect future trials. In fact, the amendment is likely to be welcomed by the bench and bar, will improve clarity and communication, and will lead to fewer uncertainties of interpretation and problems in practice. Also counting as a positive is the fact that Rule 801(d) was not included in the list of rules that the Advisory Committee has tentatively decided "not to amend..."[227] The Advisory Committee at least has not closed the door on the suggested changes to Rule 801(d), and the enactment of an amendment will turn on whether the Advisory Committee believes that it is meritorious. As the current Reporter has written: "Amending or abrogating rules of evidence only makes sense if the benefits of an amendment outweigh the costs. If the courts are surviving with a rule as they appear to be, however unhappily, then benefits of a rule change are unlikely to outweigh the costs. This is not to speak of the costs of upsetting settled expectations that comes with any rule change."[228]

The status of the proposed amendment under the second approach, the Advisory Committee's restyling program, is also uncertain. While it seems clear that Rule 801(d) would not have been adopted if the drafters had used the Guidelines for Drafting and Editing the Federal Rules in the drafting of the original rules, it is unclear whether the proposed amendment would qualify now as a restyling amendment.[229] Such an amendment can affect only style, not substance, and the Advisory Committee has stated that a proposed change is substantive if:

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[226] Under the general understanding of that term in evidence circles, "policy decisions" involve questions of admissibility, such as whether to apply Rule 407 to products liability cases, the scope of the attorney-client privilege in the corporate context or the standards for determining the expertise of an expert witness.

[227] 156 F.R.D. 339 (1994). It is unlikely that Rule 801(d) and the "not hearsay" language has any supporters. While many writers have made harsh comments, *see* notes. 12-14 *supra.*, I have found only two people who have had anything good to say: Professor Thomas Green in 1970, n. 127 *supra.*, and Dean Mason Ladd in 1973, Mason Ladd, *Some Highlights of the New Federal Rules of Evidence*, 1 Fl. St. L. Rev. 191, 197 (1973) ("Surely one of the highlights of the new evidence rules is 801(d),entitled statements which are "not hearsay.").

[228] Daniel J. Capra, *Recipe for Confusion: Congress and the Federal Rules of Evidence*, 55 U. Miami L. Revl 691, 702 (2001).

[229] This discussion of the restyling criteria is primarily heuristic, not for practical effect during the current restyling, which is nearing completion. The restyling project began in 2007, draft amendments were published for public comment in August, 2009, and the Advisory Committee approved those amendments in April, 2010 and sent them to the Standing Committee. Memorandum from Robert L. Hinkle, Chair, Advisory Committee on Evidence Rules to the Hon. Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States 1-6 (May 10, 2010), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/EV05-2010.pdf.

1. Under the existing practice in any circuit, it could lead to a different result on a question of admissibility; or
2. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made; or
3. It changes the structure of a rule or method of analysis in a manner that fundamentally changes how courts and litigants have thought about, or argued about, the rule; or
4. It changes what Professor Kimble has referred to as a "sacred phrase" – "phrases that have become so familiar as to be fixed in cement."[230]

The proposed "four categories" amendment is clearly stylistic, not substantive, on Criteria ## 1 and 2, because it would not change either the result or procedure on an admissibility issue. It also seems stylistic on Criterion #4. While the term not hearsay to describe the impeachment use of an out-of-court statement is likely a sacred phrase,[231] Rule 801(d)'s commandeering of that phrase for its novel, inconsistent use is a usurpation of that traditional phrase that should be undone, not retained.

However, because it will change the "structure of a rule and method of analysis in a manner that fundamentally changes how courts and litigants have thought about, or argued about, the rule," the proposed amendment is likely substantive under Criterion #3. The purpose – indeed the virtue -- of the proposed amendment is to change, for the better, the way that courts and litigants think and talk about admissions and prior statements. Rather than having to think and talk in a convoluted way, all participants will be able to converse clearly. Evidence would be not hearsay if it is not offered for its truth; hearsay but admissible under an exception if it meets the exception's requirements, or hearsay with no exception if it does not. Evidence law would take a welcome step backwards, returning to a hearsay world with two questions (is it hearsay; if not, is there an applicable exception)and three categories. This change would be a simplification, a clarification and a welcome improvement – but appears to be a substantive change under Criterion #3.

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A classification as substantive not stylistic does not doom an amendment. It simply remits it to the regular amendment process, not the style process. One hopes that, during the regular amendment process, the Advisory Committee will see the wisdom – for the stylistic reasons of clarity and consistency – to consider and then to recommend the amendment of Rule 801(d).

If adopted, an amendment embodying the "four category" approach will not change the quantum or type of hearsay evidence that is admitted or excluded. But it will provide greater clarity and less confusion in the terminology used to classify the evidence

[230] Id. at 3-4.
[231] The Advisory Committee determined that "truth of the matter asserted" was a sacred phrase and did not change it in the proposed restyling. Id

that we admit and thus would help us all to journey more safely and confidently "through the hearsay thicket."[232]

[232] John M. Maguire, *The Hearsay System: Around and Through the Hearsay Thicket*, 14 Vand. L. Rev. 141 (1960).

TAB 8

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Intercircuit conflict in applying Rule 804(b)(1)
Date: September 16, 2010

A circuit split has developed in the application of Rule 804(b)(1) — the hearsay exception for prior testimony — in a relatively narrow fact situation: the prosecutor calls a witness before the grand jury, and the witness gives testimony favorable to the defendant. At trial, the witness is unavailable (usually because he declares the Fifth Amendment privilege and the government refuses to immunize him) and the defendant offers the grand jury testimony under Rule 804(b)(1).

The 2nd and 1st Circuits have held that exculpatory grand jury testimony is usually inadmissible under Rule 804(b)(1). The D.C. and the 6th and 9th Circuits have held that such testimony is usually admissible.

A circuit split on the meaning of an Evidence Rule is a potential justification of an amendment of that Rule. This memo discusses the split in the circuits and provides some analysis on whether an amendment to Rule 804(b)(1) might be warranted. The memo concludes that an amendment to the Rule is probably not justified at this point.

Rule 804(b)(1):

The restyled Rule 804(b)(1) provides as follows:

(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.

The dispute in the courts is over whether the government has a "motive to develop" exculpatory testimony at the grand jury that is "similar" to the motive it would have at trial.

2nd and 1st Circuit Position:

The leading Second Circuit case is *United States v. DiNapoli*, 8 F.3d 909 (2d Cir. 1993), in which two witnesses gave grand jury testimony that favored the defendant, then each declared their privilege and refused to testify at trial. The *DiNapoli* court rejected the extreme views of both the government and the defendant — the government arguing that the prosecution *never* has a similar motive to develop testimony at the grand jury as it would have at trial, and the defendant arguing that the prosecution *always* has a similar motive to develop grand jury testimony as it would have at trial. The court analyzed the question of similar motive as follows:

> The proper approach ... in assessing similarity of motive under Rule 804(b)(1) must consider whether the party resisting the offered testimony at a pending proceeding has at a prior proceeding an interest of *substantially similar intensity* to prove (or disprove) the same side of a substantially similar issue. The nature of the two proceedings — both what is at stake and the applicable burden of proof — and, to a lesser extent, the cross-examination at the prior proceeding — both what was undertaken and what was foregone — will be relevant though not conclusive on the ultimate issue of similarity of motive. (Emphasis added).

Applying these principles to the facts, the *DiNapoli* court found that the government did not, in the instant case, have a similar motive to develop the testimony of the witnesses at the grand jury as it would have had at the trial. The court noted that at the time the witnesses gave exculpatory testimony at the grand jury, there was no doubt about probable cause as to any of the defendants in the case, because they had already been indicted, and the grand jury was simply investigating whether other targets should be indicted. As the court put it, "the grand jury had already been persuaded, at least by the low standard of probable cause, to believe that the [conspiracy] existed and that the defendants had participated in it to commit crimes." In contrast, at trial, where the government had the burden to prove the defendants guilty beyond a reasonable doubt, the prosecutor would have had a substantial incentive to attack the testimony of any exculpatory witness.

While the *DiNapoli* Court refused to establish a bright-line rule, it is clear that, under the Court's decision, exculpatory grand jury testimony will only rarely be admissible against the government under Rule 804(b)(1). A similarity of motive is likely to be found only where the indictment is in doubt because the case as to probable cause is close — in that narrow situation, the intensity of interest in attacking an exculpatory witness will be similar to what it would be at a trial. *See, e.g., United States v. Peterson*, 100 F.3d 7 (2d Cir. 1996) (exculpatory grand jury testimony was

not admissible as prior testimony where the evidence before the state grand jury "provided ample probable cause to indict Peterson" and therefore there was no reason for the government to attack Peterson's exculpatory testimony in the same manner as it would have done at trial).

The First Circuit is in accord with the Second Circuit's view that the government's motive to develop testimony at the grand jury is usually not similar to the motive to develop testimony at trial. See *United States v. Omar*, 104 F.3d 519, 522-24 (1st Cir.1997)

D.C. and 6th and 9th Circuit View.

In contrast, the D.C. and 6th and 9th Circuits appear to use a bright-line rule that exculpatory grand jury testimony is *always* admissible against the government at trial — i.e., that there is always a similar motive to attack the exculpatory testimony at these two proceedings. *See, e.g., United States v. Miller*, 904 F.2d 65 (D.C. Cir. 1990); *United States v. Foster*, 128 F.3d 949, 957 (6th Cir.1997). This view is explained by the 9th Circuit, which adopted the D.C. Circuit view, in the recent case of *United States v. McFall,* 558 F.3d 951 (9th Cir. 2009). The *McFall* court analyzed the "similar motive" question in the following passage:

> The question is whether the government's motive in examining Sawyer [the exculpatory witness] before the grand jury was sufficiently similar to what its motive would be in challenging his testimony at McFall's trial. Prosecutors need not have pursued every opportunity to question Sawyer before the grand jury; the exception requires only that they possessed the motive to do so.
>
> * * *
>
> As a threshold matter, we must determine at what level of generality the government's respective motives should be compared, an issue that has divided the circuits. See 2 McCormick on Evid. § 304 (6th ed.2006) (noting that the circuits appear to be in disagreement over "whether in typical grand jury situations exculpatory testimony meets" Rule 804(b)(1)'s similar motive requirement). In *United States v. Miller,* 904 F.2d 65, 68 (D.C.Cir.1990), the D.C. Circuit compared the government's respective motives at a high level of generality. The *Miller* Court concluded that "[b]efore the grand jury and at trial" the testimony of an unavailable co-conspirator "was to be directed to the same issue — the guilt or innocence" of the defendants — and thus, the government's motives were sufficiently similar. Id.; accord *United States v. Foster*, 128 F.3d 949, 957 (6th Cir.1997) (citing *Miller* with approval). McFall's trial counsel made a similar argument before the district court, contending that the government's primary goal in questioning Sawyer before the grand jury was to incriminate McFall. At trial, the government's motivation would, of course, have been the same.

In *United States v. DiNapoli*, 8 F.3d 909 (2d Cir.1993) (en banc), in contrast, the Second Circuit required comparison of motives at a fine-grained level of particularity. See id. at 912 ("[W]e do not accept the proposition ... that the test of similar motive is simply whether at the two proceedings the questioner takes the same side of the same issue."); see id. (stating that the proper test for similarity of motive is whether the questioner had "a substantially similar degree of interest in prevailing" on the related issues at both proceedings) (emphasis added); accord *United States v. Omar,* 104 F.3d 519, 522-24 (1st Cir.1997) (concluding that the government will rarely have a similar motive in questioning a witness before a grand jury as it would have at trial).

* * *

The government's motivation in questioning Sawyer before the grand jury was likely not as intense as it would have been at trial, both because it had already indicted McFall, and because the standard of proof for obtaining a conviction is much higher than the standard for securing an indictment. We cannot agree, however, with the Second Circuit's gloss on Rule 804(b)(1). As one of the dissenters in *DiNapoli* (an en banc decision) noted, the requirement of similar "intensity" of motivation conflicts with the rule's plain language, which requires "similar" but not identical motivation. Id. at 916 (Pratt, J., dissenting) * * * .

On balance, we agree with the D.C. Circuit's elaboration of the "similar motive" test and conclude that the government's fundamental objective in questioning Sawyer before the grand jury was to draw out testimony that would support its theory that McFall conspired with Sawyer to commit extortion — the same motive it possessed at trial. That motive may not have been as intense before the grand jury, but Rule 804(b)(1) does not require an identical quantum of motivation.

In sum, the dispute in the courts is over how to interpret "similar motive" with respect to exculpatory grand jury testimony. The Second Circuit view is that "motive" includes a requirement of similar "intensity" of interest in developing the testimony at the grand jury, while the Ninth Circuit rejects that position.

Should an Amendment be Proposed to Rectify the Conflict in the Circuits?

I asked Ken Broun for his opinion on the advisability of an amendment to Rule 804(b)(1) to provide a uniform approach to exculpatory grand jury testimony. This is his response:

I have looked at the *McFall* case. It is hard to imagine a rule amendment that would deal with the issue. The circuit split has to do with how fine-grained the analysis should be of the government's motives to examine before the grand jury as opposed to the current trial. The rule doesn't specify the degree of analysis in any situation (for example, preliminary

hearings where different courts take different approaches). I don't see any reason to single out grand jury proceedings for special comment in the rules.

Ken's analysis has a lot of merit. Any amendment would be dealing with a very narrow fact situation — exculpatory grand jury testimony. Moreover, the only amendment that could be cleanly written is one that would automatically admit exculpatory grand jury testimony against the government. The contrary view — that of the Second Circuit — is not an automatic rule excluding such testimony. Rather it is a case by case approach that is already being conducted under the language of the existing rule — it would be more difficult to codify the Second Circuit view. One possible iteration is: "but grand jury testimony is admissible under this exception if at the time of the testimony the obtaining of the indictment is in doubt." Query whether that will be helpful. Another possible iteration is "but grand jury testimony is admissible under this exception only if the prosecutor has an interest in developing the grand jury testimony that is of similar intensity as the interest in developing it at trial." Again, query if that is sufficient to capture all the possible permutations.

An automatic rule of admissibility could be written more cleanly. For example, something like the following sentence could be added to the end of the rule :

> "Testimony of a witness at a grand jury is admissible against the government under this exception."

But it is likely that a rule amendment *mandating* admissibility of exculpatory grand jury testimony would be strenuously opposed in several quarters. And on the merits, that amendment could result in a change in grand jury practice in a number of circuits that would require some serious consideration (and perhaps empirical research). Certainly it could be predicted that a rule change from a case by case approach to automatic admissibility would require prosecutors in districts subject to the change to treat every instance of exculpatory grand jury testimony as a trial-like event. A mandated change in practice before a grand jury should not be done lightly by way of an evidence rule.

The other alternative would be to try to add something about "intensity" of motive to the Rule — that is, a general amendment as opposed to one dealing only with exculpatory grand jury testimony. An amendment incorporating the Second Circuit approach might look like this:

> **(B)** is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive and intensity of interest to develop it by direct, cross-, or redirect examination.

An amendment incorporating the Ninth Circuit approach might look like this:

> **(B)** is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar ~~motive~~ goal to develop it by direct, cross-, or

redirect examination.

[The word "goal" is not ideal, but it seems less likely to be read as having an intensity factor. The option of "motive, but not including intensity of interest" seems confusing and balky.]

But to apply new language outside the grand jury context may create unintended consequences in a wide variety of cases and situations, including depositions and preliminary hearings. And yet to limit the reference to "intensity" to grand jury testimony would probably be confusing and would impose the substantial costs of an amendment for a relatively small return.

One possible solution to resolving the circuit split on this important but relatively narrow application of Rule 804(b)(1) is not rulemaking, but rather Supreme Court adjudication. The Supreme Court has shown an interest in the question of the admissibility of exculpatory grand jury testimony, having decided *United States v. Salerno*, 505 U.S. 317 (1992). [The Second Circuit decision in *DiNapoli* was on remand from the Supreme Court in *Salerno.*] In that case, the Court held that "similar motive" was dependent on the facts, and that a "similar motive" could not be found simply because it would be fair to the parties to do so. The Court left to the lower courts the question whether the government's motive in developing grand jury testimony in any particular case is similar to that at trial. Now that the courts have split on the question of application of the similar motive standard to grand jury testimony, it is at least possible that the Court may be interested in rectifying the conflict. At the very least, given the recency of the 9th Circuit's weighing-in, it would appear to make some sense to hold off on any amendment for the near future — perhaps to allow other circuits to take up the question.

Conclusion

The conflict over the admissibility of exculpatory grand jury testimony under Rule 804(b)(1) is based on different views of the term "similar motive." It is an important problem and a uniform rule is most advisable. But any amendment to the language to rectify the conflict could raise problems of application — as well as dispute on the merits — while any benefit would likely be limited to a handful of cases. Given the difficulties of an amendment, it may be prudent to await further case development and possible Supreme Court review. But if the Committee wishes to proceed with a proposed amendment, a draft will be prepared for the next meeting.

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24 Easter Sunday	25 Easter Monday	26	27	28	29	30
						U.S. Federal Holidays are in Red.

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