ADVISORY COMMITTEE
ON
EVIDENCE RULES

Philadelphia, PA

April 1, 2011

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

Philadelphia, Pennsylvania

April 1, 2011

I. Opening Business

Opening business includes approval of the minutes of the Fall, 2010 meeting; a report on the January 2011 meeting of the Standing Committee; a report on the status of the restyling project; and tributes to departing members.

II. 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 Committee is considering whether certain exceptions — especially Rule 803(10) — should be amended to comply with *Melendez-Diaz*. The agenda book contains the Reporter's memorandum on the subject, prepared after consultation with the Justice Department.

III. Possible Amendments to 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? At the last meeting the Committee resolved to consider proposed amendments to these rules after getting input from interested groups. The agenda book contains a memorandum from the Reporter setting forth proposed amendments and the opinions received from the ABA Litigation Section and the American College of Trial Lawyers.

IV. Possible Amendment to Rule 801(d)(1)(B)

The agenda book contains a memorandum from the Reporter analyzing the possibility of amending Rule 801(d)(1)(B) to provide that a prior consistent statement is exempt from the hearsay rule whenever it is admissible to rehabilitate the credibility of the declarant-witness.

V. Possible Amendment to Rule 806

The agenda book contains a memorandum from the Reporter analyzing the possibility of amended Rule 806 to provide: 1) that extrinsic evidence can be used to impeach a hearsay declarant's character for truthfulness; and 2) that a criminal defendant whose hearsay statement is admitted in a multiple defendant trial, and who chooses not to testify, may not be impeached under Rule 806.

VI. Restyling Symposium, October 2011

A symposium on the restyled Rules of Evidence is being planned as part of the Fall 2011 meeting of the Evidence Rules Committee. The agenda book contains a short memorandum from the Reporter indicating the planning to date. The Chair and the Reporter invite and encourage input from Committee members at and after the Spring meeting.

VII. Privilege Project

A number of years ago the Evidence Rules Committee agreed to undertake a project to draft rules of privilege that would describe the current state of privilege law in the federal courts. The privilege project was delayed during the restyling effort. Professor Broun has now revived the project. The agenda book contains a memo from Professor Broun describing the project and setting forth the drafts of some of the privilege rules.

VIII. Crawford Outline

The updated outline on federal cases on confrontation after *Crawford v. Washington* is included in the agenda book.

IX. Next Meeting

ADVISORY COMMITTEE ON EVIDENCE RULES

Chair:	**Reporter:**
Honorable Sidney A. Fitzwater Chief Judge United States District Court Earle Cabell Federal Building and U. S. 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. Chief Judge, 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 Judge United States District Court 12W United States Courthouse 300 South Fourth Street Minneapolis, MN 55415
William T. Hangley, Esq. Hangley, Aronchick, Segal & Pudin, P.C. One Logan Square, 27th Floor Philadelphia, PA 19103-6933	Marjorie A. Meyers, Esq. Federal Public Defender Southern District of Texas 440 Louisiana, Suite 1350 Houston, Texas 77002
Honorable Lisa Monaco Associate Deputy Attorney General (Ex-officio) 950 Pennsylvania Avenue, N.W. – Room 4208 Washington, DC 20530	Paul Shechtman, Esq. Stillman, Friedman & Shechtman 425 Park Avenue New York, NY 10022
Elizabeth J. Shapiro, Esq. AD, Federal Programs Branch U. S. Dept. of Justice – Civil Division 20 Massachusetts Ave., N.W., Room 7152 Washington, DC 20530	**Liaison Members:** Honorable Paul S. Diamond United States District Court James A. Byrne United States Courthouse 601 Market Street, Room 6613 Philadelphia, PA 19106

Honorable Marilyn L. Huff United States District Court Edward J. Schwartz U. S. Courthouse Suite 5135 940 Front Street San Diego, CA 92101	Honorable John F. Keenan United States District Court 1930 Daniel Patrick Moynihan U. S. 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	**Consultant:** Professor Kenneth S. Broun University of North Carolina School of Law CB #3380, Van Hecke-Wettach Hall Chapel Hill, NC 27599
Secretary: Peter G. McCabe Secretary, Committee on Rules of Practice & Procedure Washington, DC 20544	**Chief Counsel:** Andrea Kuperman Chief Counsel to the Rules Committees 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600

LIAISON MEMBERS

Appellate:	
Dean C. Colson	(Standing Committee)
Bankruptcy:	
Judge James A. Teilborg	(Standing Committee)
Civil:	
Judge Arthur I. Harris	(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 Rules Committee)
Judge Marilyn Huff	(Standing Committee)

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

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Ms. Gale B. Mitchell Administrative Specialist Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544

Ms. Denise London Administrative Officer Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
Ms. Chianti D. Butler Staff Assistant Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
Ms. Rasheedah Henry Program Assistant Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544

FEDERAL JUDICIAL CENTER

Joe Cecil (Rules of Practice & Procedure) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Marie Leary (Appellate Rules Committee) Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Molly T. Johnson (Bankruptcy Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Emery G. Lee (Civil Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Laural L. Hooper (Criminal Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Tim Reagan (Evidence Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003

Advisory Committee on Evidence Rules

Members	Position	District/Circuit	Start Date	End Date
Sidney A. Fitzwater Chair	D	Texas (Northern)	2010	2013
Joseph F. Anderson, Jr.	D	South Carolina	2005	2011
Brent R. Appel	JUST	Iowa	2010	2013
Anita Brody	D	Pennsylvania (Eastern)	2007	2013
Paul S. Diamond**	D	Pennsylvania (Eastern)	2009	2012
Joan N. Ericksen	D	Minnesota	2005	2011
William T. Hangley	ESQ	Pennsylvania	2006	2012
John F. Keenan**	D	New York (Southern)	2007	2013
Marjorie A. Meyers	FPD	Texas (Southern)	2006	2012
Lisa Monaco*	DOJ	Washington, DC	----	Open
Paul Schectman	ESQ	New York	2010	2013
Daniel J. Capra Reporter	ACAD	New York	1996	Open

Principal Staff: Peter G. McCabe 202-502-1800

* Ex-officio

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

Tab 1

Opening Business — Minutes of Fall, 2010 Meeting

Advisory Committee on Evidence Rules

Minutes of the Meeting of October 12, 2010

San Diego, California

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 12, 2010 in San Diego, California.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Joseph F. Anderson, Jr.
Hon. Brent R. Appel
Hon. Anita B. Brody
Hon. Joan N. Ericksen.
Marjorie A. Meyers, Esq.
Paul Shechtman, 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. Robert L. Hinkle, former Chair of the Evidence Rules Committee
Hon. Paul S. Diamond, Liaison from the Civil Rules Committee
Hon. Karen Caldwell, Liaison from the Bankruptcy Rules Committee
William W. Taylor, III, Esq., former member of the Evidence Rules Committee
John K. Rabiej, Esq., Rules Committee Support Office
James N. Ishida, Esq., Rules Committee Support Office
Peter McCabe, Esq., Secretary to the Standing Committee
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Timothy Reagan, Esq., Federal Judicial Center
Jeffrey Barr, Esq., Rules Committee Support Office

I. Opening Business

Judge Fitzwater, the new chair of the Committee, welcomed the members and stated that he was honored to return to service on the Rules Committees.

The minutes of the Spring 2010 meeting were approved with two revisions.

Judge Fitzwater asked Judge Hinkle to speak about the departing members of the Committee. Judge Hinkle noted that Bill Taylor had provided stellar service to the Committee, most importantly from his perspective as a practitioner in high-level litigation. Bill Taylor then expressed his gratitude to the Committee members and praised the Committee's work. Judge Hinkle noted that Justice Hurwitz could not attend the meeting due to an accident. Committee members expressed their best wishes for Justice Hurwitz's quick recovery and noted that his brilliant contributions to the work of the Committee — especially in the effort to enact Rule 502 — would be sorely missed.

The Reporter then requested the opportunity to provide a tribute to Judge Hinkle. The Reporter noted that the recently completed restyling project could not have been accomplished without Judge Hinkle's brilliant efforts. Committee members lauded Judge Hinkle's wise counsel, his integrity, and his inspirational leadership.

The Chair then welcomed and introduced the new members of the Committee — Justice Brent Appel of the Iowa Supreme Court, and Paul Shechtman, a practicing lawyer and adjunct Evidence professor at Columbia Law School. The Chair also welcomed Judge Diamond as the new liaison from the Civil Rules Committee, and Judge Caldwell, who was substituting for Judge Wiznur, the Bankruptcy Rules Committee liaison.

At the Chair's request, Judge Hinkle reported on the June meeting of the Standing Committee. The Standing Committee unanimously approved the restyled Evidence Rules. That approval was the result of the hard work and cooperative efforts of the Style Subcommittee of the Standing Committee, the Evidence Committee, and Professor Kimble, the style consultant. The product was substantially improved by careful readings by three members of the Standing Committee before its June meeting — Judge Raggi, Judge Hartz, and Dean Levi. Judge Hinkle and the Reporter expressed their gratitude to Judges Raggi and Hartz and to Dean Levi for their time and outstanding effort.

Judge Rosenthal then reported on legislative developments. She noted that the Rules Committee had already contacted staff members of the House Judiciary Committee to provide background on the restyling project, and that staffers had responded affirmatively. The Rules Committee is continuing to monitor two pieces of proposed legislation: 1) a proposal to alter the *Twombley/Iqbal* construction of Civil Rule 8; and 2) the proposed Sunshine in Litigation Act, which if enacted would have an impact on orders issued under Evidence Rule 502. At this point, neither bill is near enactment, but the Rules Committee will continue to monitor developments.

II. Restyling Project

The Restyled Rules of Evidence have been approved by the Standing Committee and the Judicial Conference. After the Evidence Rules Committee completed its work on the project, some changes were made in response to comments and suggestions from Standing Committee members in advance of the Standing Committee's meeting. Those changes were approved by Judge Hinkle, the Reporter, Professor Kimble, and the members of the Style Subcommittee of the Standing Committee. At the Fall Committee meeting, the Reporter presented those changes for the Committee's information and review.

Examples of changes reviewed at the meeting included:

1) reinserting "wrongs" into Rule 404(b) to assure that all evidence currently covered by the Rule will remain so — the concern being that evidence of "crimes or other acts" as restyled might not cover a wrongful failure to act;

2) making a slight change to Restyled Rule 602 to clarify that when a witness testifies to both expert and lay matters, the witness must have personal knowledge as a foundation for the lay testimony;

3) reinserting the last sentence of Rule 704(b), to emphasize that the criminal defendant's mental state is a jury question; and

4) changing Rule 901(a) to clarify that authentication is a requirement for proffered evidence.

III. Possible Amendments to Federal Rules in Light of *Melendez-Diaz v. Massachusetts*

In *Melendez-Diaz v. Massachusetts,* the Supreme Court held that certificates reporting the results of forensic tests conducted by analysts were "testimonial" and therefore the admission of such a certificate (in lieu of testimony) violated the accused's right to confrontation. The Court reasoned that the certificates were prepared exclusively for use in a criminal trial, as substitutes for trial testimony, and so were testimonial within the meaning of the Confrontation Clause as construed by *Crawford v. Washington.*

The Reporter prepared a memorandum for the Committee on the effect of *Melendez-Diaz* on the constitutionality, as applied, of the hearsay exceptions that cover records in the Federal Rules of Evidence. The memorandum made the following tentative conclusions:

1) Records fitting within the business records exception are unlikely to be testimonial, and

addressing any uncertainty about the constitutional admissibility of business records in certain unusual cases should await more case law development.

2) Records admissible under the public records exception are unlikely to be testimonial, because to be admissible under that exception the record cannot be prepared with the primary motivation of use in a criminal prosecution.

3) Authenticating business and public records by certificate under various provisions in Rule 902 is unlikely to raise constitutional concerns, because the Court in *Melendez-Diaz* found an exception to testimoniality for certificates that did nothing but authenticate a document. Addressing any uncertainty about the constitutionality of the Rule 902 provisions in criminal cases should await more case law development.

4) *Melendez-Diaz* appears to bar the admission of certificates offered to prove the absence of a public record under Rule 803(10). Like the certificates at issue in *Melendez-Diaz,* a certificate proving up the absence of a public record is prepared with the sole motivation that it will be used at trial — as a substitute for live testimony. Lower courts after *Melendez-Diaz* have recognized that admitting a certificate of absence of public record under Rule 803(10) violates the accused's right to confrontation after *Melendez-Diaz.*

In light of the above, the Committee discussed the possibility of an amendment to Rule 803(10) that would correct the constitutional problem raised by *Melendez-Diaz.* It was suggested that the problem arises mostly in cases involving a) illegal reentry, in which the government must prove that the defendant did not have permission to re-enter, and b) firearms prosecutions, in which the government has to prove that a firearm was not properly licensed.

The possible fix suggested in the Reporter's memo was to add a "notice-and-demand" procedure to the Rule: requiring production of the person who prepared the certificate only if the defendant made a pretrial demand for that production. The Court in *Melendez-Diaz* specifically approved a state version of a notice-and-demand procedure, and the Reporter's draft added the language from that state version to the existing Rule 803(10).

Committee members were divided on whether to propose an amendment to Rule 803(10) that would add the basic notice-and-demand procedure used as an example in *Melendez-Diaz.* The public defender argued that *Melendez-Diaz* did not raise any substantial practical problems of compliance, because the parties could stipulate to the absence of a record, or the case agent could check for the record and then simply testify to its absence as part of that agent's overview testimony. She noted however that she had contacted other public defenders on the subject and found no objection to the addition of a notice-and-demand procedure to Rule 803(10).

Another member questioned whether a notice-and-demand procedure would be very helpful in alleviating the burden of producing a government witness. The member predicted that defendants would enter such demands pro forma, and then would simply stipulate to the record once the

government produced the witness. But others thought that a notice-and-demand procedure would be helpful for at least two reasons. First, not all defendants would engage in the gamesmanship of making the demand solely to impose a burden on the government. Second and more important, a notice-and-demand procedure would at least provide predictability, because a prosecutor would know that the witness must be produced. The alternative — a proffered stipulation to which the defendant may or may not respond — does not provide the same predictability.

Another member noted that whatever the value of a notice-and-demand procedure, the fundamental problem of Rule 803(10) is that it is unconstitutional as applied. And one of the primary goals of the Committee has been to propose amendments necessary to cure any constitutional defect in the Evidence Rules. While a notice-and-demand procedure may not have a profound practical impact, the fact is that it would cure the constitutional infirmity in Rule 803(10) after *Melendez-Diaz.*

The DOJ representative presented preliminary statistics indicating that *Melendez-Diaz* has imposed burdens on the government in presenting evidence of the absence of a public record. She stated that the Department would welcome a notice-and-demand provision, but wished to review the notice-and-demand procedures that do exist to determine which version might be optimal. The Department does not intend to propose the so-called "subpoena procedure," which would impose the burden of producing the witness on the accused rather than the government. Committee members recognized that the constitutionality of a subpoena procedure was doubtful after *Melendez-Diaz*, where the Court declared that the right to confrontation could not be satisfied by providing a right of compulsory process.

At the end of the discussion, the Committee unanimously resolved to consider a proposed amendment to Rule 803(10) at its next meeting. The Reporter was directed to work with the Justice Department to review all the possible viable alternatives for a notice-and-demand procedure, including ones that add procedural details such as providing for continuances. The Reporter was also asked to consider an alternative draft that would prevent the use of Rule 803(10) when a record is offered by the government in a criminal case.

IV. *Crawford* Developments

The Reporter provided the Committee with a case digest of all federal circuit cases discussing *Crawford v. Washington* and its progeny. The digest was grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Committee reviewed the memo and noted that — with the possible exception of Rule 803(10), discussed supra — nothing in the developing case law mandated an amendment to the Evidence Rules at this time. The Committee resolved to continue to monitor a number of important developments, including: 1) the Supreme Court's consideration of *Michigan v. Bryant,* which may have an effect on the admissibility of excited utterances under Rule 803(2); 2) the Supreme Court's

consideration of *Bullcoming v. New Mexico,* which concerns whether certificates can be introduced by a witness other than the person who prepared it, and which may have an effect on the application of Rule 703; and 3) the case law allowing testimonial statements to be admitted not for their truth but for "background" or "context."

V. Proposed Amendment to Rule 410

During the restyling process, the American College of Trial Lawyers provided a number of detailed and helpful comments for improvement of the Restyled Rules as they were issued for public comment. One set of the College's comments was addressed to Rule 410, but the College noted that those comments called for substantive changes to the Rule. Accordingly the Committee's consideration of the suggested changes to Rule 410 was deferred until the restyling project was completed.

At the Fall 2010 meeting, the Committee considered a memorandum from Professor Broun and the Reporter that evaluated the changes proposed by the College. Two basic changes were proposed: 1) clarify that the protections of Rule 410 apply only to a party in the case in which the evidence is offered, i.e., that a withdrawn guilty plea is admissible if the person who entered the plea is only a witness and not a party in the case; and 2) provide that the protection for "withdrawn" guilty pleas also extends to guilty pleas that are rejected or vacated by the court. The most important suggestion was the one concerning guilty pleas of testifying witnesses — the College had suggested that many defense counsel do not ask for such information from the government because they do not believe the withdrawn guilty plea of a cooperating witness would be admissible under Rule 410.

The memorandum noted that there is some ambiguity in the text of Rule 410 as to whether it protects against admission of withdrawn guilty pleas of witnesses, as opposed to the defendant in the case. But the memorandum also noted that the case law, while sparse, has held uniformly that Rule 410 does not apply to withdrawn guilty pleas of testifying witnesses. Likewise, all of the major treatises state that Rule 410 does not apply to the withdrawn guilty pleas of testifying witnesses. As to vacated and rejected guilty pleas, the case law again is sparse, but it uniformly holds that Rule 410 does preclude admission of a vacated or rejected guilty plea of the defendant in the case. The reasoning is that the policy of protecting plea discussions is as applicable when the plea is rejected or vacated as it is when the plea is withdrawn.

In discussion, both the DOJ representative and the public defender noted that they had surveyed others in their respective departments and found no reports of any problem in the operation of Rule 410 — either in general or with respect to the two suggestions made by the College. Given the uniformity of case law and the lack of any problem in operation of the Rule, the Committee unanimously resolved not to propose any amendment to Rule 410.

VI. Proposed Amendment to Rules 803(6)-(8)

The restyling project uncovered an ambiguity in Rules 803(6)-(8), the hearsay exceptions for business records, absence of business records, and public records. Those exceptions in current form set forth admissibility requirements and then provide that a record meeting those requirements is admissible despite the fact it is hearsay "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The rules do not specifically state which party has the burden of showing trustworthiness or untrustworthiness.

The restyling sought to clarify the ambiguity by providing that a record fitting the other admissibility requirements would satisfy the exception if "the opponent does not show that" the source of information, etc., indicate a lack of trustworthiness. But the Committee did not submit this proposal as part of restyling because research into the case law indicated that the change would be substantive. While most courts impose the burden of proving untrustworthiness on the opponent, a few courts require the proponent to prove that the record is trustworthy. Thus the proposal would have changed the law in at least one court, and so was substantive under the restyling protocol.

When the Standing Committee approved the Restyled Rules, several members suggested that the Evidence Rules Committee consider making the minor substantive change that would clarify what is implicit in Rules 803(6)-(8) — that the opponent has the burden of showing untrustworthiness. Those members believed that allocating the burden to the opponent made sense for a number of reasons, including: 1) the Rules' reference to a "lack of trustworthiness" suggests strongly that the burden is on the opponent, as it is the opponent who would want to prove the lack of trustworthiness; 2) almost all the case law imposes the burden on the opponent; and 3) if the other admissibility requirements are met, the qualifying record is entitled to a presumption of trustworthiness, and adding an additional requirement of proving trustworthiness would unduly limit these records-based exceptions.

In discussion, some members suggested that it was better to leave the rule fuzzy on who has the burden as to untrustworthiness. They suggested that the determination of trustworthiness might be a process and a court may decide that a record is untrustworthy even if the opponent does not provide any evidence or argument on that subject. Others suggested that imposing the burden on the opponent might impose difficulties on opponents who may not have an opportunity to discover and present evidence of untrustworthiness — although whatever difficulty exists is in fact already imposed by the predominant case law. Another member noted that there has to be a burden allocation; that allocation is only relevant when the evidence is in equipoise; and therefore that a clarification allocating the burden to the opponent in a narrow band of cases is well-justified. The DOJ representative noted that the Department was in favor of the change as a helpful clarification.

After discussion, the Committee directed the Reporter to check with representatives of the ABA Litigation Section, the American College of Trial Lawyers, and other interested parties to determine whether it would be helpful to propose an amendment that would clarify that the burden of showing untrustworthiness is on the opponent. The Committee determined that it would revisit

the question of a possible amendment at the next meeting. The Committee also determined that if an amendment were to be proposed to allocate the burden to the opponent, a statement should be included in the Committee note that the opponent, in meeting that burden, is not necessarily required to introduce affirmative evidence of untrustworthiness.

VII. Proposal to Amend Rule 801(d) "Not Hearsay" Designation

The Committee considered a public comment from Professor Sam Stonefield, suggesting a change to the designation of hearsay statements admissible under Rule 801(d) as "not hearsay." The problem is that the statements that fall under Rule 801(d) — prior statements of testifying witnesses and statements of party-opponents — do in fact fit the definition of hearsay and yet the Rule says that they are "not hearsay." Analytically, it would be better to call these provisions "hearsay exceptions" because that is what they are. (The categories were designated "not hearsay" because admissibility was not grounded on the kinds of circumstantial guarantees of reliability that supported the traditional hearsay exceptions. But this attempt to alleviate confusion has in fact caused confusion because something that is hearsay is called "not hearsay.").

The Reporter prepared a memo on the public comment, and set out the various drafting alternatives, from minimal to more radical reorganization of all the hearsay exceptions. In discussion, Committee members were unconvinced of the need for an amendment. They noted that there is no practical difference between a statement that is "not hearsay" under Rule 801(d) and one that is "hearsay but subject to an exception" under Rules 803, 804 and 807. When covered by any of these Rules, the statement is admissible for its truth despite the fact it is hearsay. Thus, the change would be a technical one. Committee members concluded that courts and litigants have become comfortable with referring to, e.g., statements of party-opponents as not hearsay, and therefore any marginal benefit in the proposed amendment would be outweighed by the disruption that such an amendment — that any amendment — would cause. The Committee determined unanimously that it would not propose an amendment to change the designation of Rule 801(d) statements.

VIII. Circuit Conflict on Rule 804(b)(1)

The Reporter provided a memo on a circuit split that has developed in the application of the hearsay exception for prior testimony, Rule 804(b)(1). That Rule provides a hearsay exception for testimony offered against a party who, at the time it was made, had a motive and opportunity to develop it that was "similar" to the motive and opportunity it would have if the declarant could be produced for trial. The split is over the admissibility of grand jury testimony that is favorable to the accused. Some circuits have held that such favorable testimony is generally inadmissible against the government at trial, because the prosecutor's motive to develop such testimony is ordinarily not similar to what it would be at trial, given the differing operative standards of proof at grand jury and trial. Other circuits have held that such testimony is admissible, noting that the respective motives need only be "similar" and not identical or equally intense.

The Committee determined that any attempt to amend the Rule would probably cause more problems than it would solve. The conflict in the cases concerns an important question, but it is a narrow one in the context of Rule 804(b)(1). Any attempt to amend the Rule would also have to take into account the consequences for admissibility of preliminary hearing testimony against the accused. And most importantly, resolving the question of admissibility one way or the other would surely be controversial. For example, the DOJ would certainly oppose any rule that made exculpatory grand jury testimony automatically admissible against the government, as such a rule would of necessity change grand jury practice by turning the questioning of every grand jury witness into a trial-like event. And the defense bar would correspondingly oppose any rule change that would bar the admission of exculpatory grand jury testimony in the circuits where that is the law. Finally, drafting a solution that would cover all the nuances of when exculpatory testimony might fairly be admissible against the government under a "similar motive" test would be extremely difficult.

Committee members also noted that the Supreme Court has previously shown an interest in interpreting Rule 804(b)(1) as it applies to grand jury testimony, so it is at least possible that the current circuit conflict will be resolved by the Court.

After discussion, the Committee resolved that it would continue to monitor the circuit split, but that it would not propose an amendment to Rule 804(b)(1) at this time.

IX. Privilege Project

Several years ago the Committee voted to undertake a project to publish a pamphlet that would describe the federal common law on evidentiary privileges. The Committee determined that it would not be appropriate to propose an actual codification of all the evidentiary privileges to Congress. But it concluded that it could perform a valuable service to the Bench and Bar by setting forth in text and commentary the privileges that exist under federal common law. Professor Broun had prepared drafts of a number of privileges, but the project was put on hold given the time and resources required for the restyling project.

At the meeting, Professor Broun reported on the status of the project and the Committee resolved that he should again take up the project and report back to the Committee with drafts and commentary in Spring 2011.

X. Next Meeting

The Spring 2011 meeting of the Committee is tentatively scheduled for April 1 in Philadelphia.

Respectfully submitted,

Daniel J. Capra
Reporter

Draft Minutes of the Standing Committee Meeting of January 6-7, 2011, will be provided at the meeting.

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

September 14, 2010

The Judicial Conference of the United States convened in Washington, D.C., on September 14, 2010, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. § 331. The Chief Justice presided, and the following members of the Conference were present:

First Circuit:

Chief Judge Sandra L. Lynch
Chief Judge Mark L. Wolf,
District of Massachusetts

Second Circuit:

Chief Judge Dennis Jacobs
Chief Judge William K. Sessions III,
District of Vermont

Third Circuit:

Chief Judge Theodore A. McKee
Chief Judge Harvey Bartle III,
Eastern District of Pennsylvania

Fourth Circuit:

Chief Judge William B. Traxler, Jr.
Judge James P. Jones,
Western District of Virginia

Fifth Circuit:

Chief Judge Edith Hollan Jones
Judge Sim Lake III,
Southern District of Texas

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Amendments. The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed amendments to Appellate Rules 4 (Appeal as of Right — When Taken) and 40 (Petition for Panel Rehearing), together with committee notes explaining their purpose and intent. The Judicial Conference approved the proposed rules amendments and authorized their transmittal to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Statutory Amendment. The Committee also recommended seeking legislation to amend 28 U.S.C. § 2107, consistent with the proposed amendment to Appellate Rule 4, to clarify and make uniform the treatment of the time to appeal in all civil cases in which a federal officer or employee is a party. The Conference adopted the Committee's recommendation.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Amendments. The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed amendments to Bankruptcy Rules 2003 (Meeting of Creditors or Equity Security Holders), 2019 (Representation of Creditors and Equity Security Holders in Chapter 9 Municipality and Chapter 11 Reorganization Cases), 3001 (Proof of Claim), 4004 (Grant or Denial of Discharge), 6003 (Interim and Final Relief Immediately Following the Commencement of the Case — Applications for Employment; Motions for Use, Sale, or Lease of Property; and Motions for Assumption or Assignment of Executory Contracts), and new Rules 1004.2 (Petition in Chapter 15 Cases) and 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence), together with committee notes explaining their purpose and intent. The Judicial Conference approved the proposed rules amendments and new rules and authorized their transmittal to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Forms Amendments. The Committee also submitted to the Judicial Conference proposed revisions to Official Forms 9A, 9C, 9I, 20A, 20B, 22A, 22B, and 22C. The Judicial Conference approved the revised forms to take effect on December 1, 2010.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed amendments to Criminal Rules 1 (Scope; Definitions), 3 (The Complaint), 4 (Arrest Warrant or Summons on a Complaint), 6 (The Grand Jury), 9 (Arrest Warrant or Summons on an Indictment or Information), 32 (Sentencing and Judgment), 40 (Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District), 41 (Search and Seizure), 43 (Defendant's Presence), and 49 (Serving and Filing Papers), and new Rule 4.1 (Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means), together with committee notes explaining their purpose and intent. The Judicial Conference approved the proposed amendments and new rule and authorized their transmittal to the Supreme Court for its consideration with a recommendation

that they be adopted by the Court and transmitted to Congress in accordance with the law.

FEDERAL RULES OF EVIDENCE

The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed restyled Evidence Rules 101-1103, together with committee notes explaining their purpose and intent. The restyling of the Evidence Rules is the fourth in a series of comprehensive style revisions to simplify, clarify, and make more uniform all of the federal rules of practice, procedure, and evidence. The Judicial Conference approved the proposed restyled rules amendments and authorized their transmittal to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

COMMITTEE ACTIVITIES

The Committee on Rules of Practice and Procedure reported that it approved publishing for public comment proposed amendments to Bankruptcy Rules 3001, 7054, and 7056, proposed revisions of Bankruptcy Official Forms 10 and 25A, and a proposed new attachment and supplements to Bankruptcy Official Form 10, and proposed amendments to Criminal Rules 5 and 58, and a new Criminal Rule 37. The comment period expires on February 16, 2011.

Tab 2

Report on Possible Amendment to Rule 803(10), Notice-and-Demand Provisions, etc.

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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 — Notice and Demand Remedy
Date: March 1, 2011

At its last meeting, the Committee considered a memorandum from the Reporter analyzing the effect of the Supreme Court's opinion in *Melendez-Diaz v. Massachusetts,* 129 S.Ct. 2527 (2009), on some of the hearsay exceptions in the Federal Rules of Evidence. The memo considered whether amendments to any of the hearsay exceptions are necessary in light of *Melendez-Diaz.*

The memorandum made the following tentative conclusions:

1) Records fitting within the business records exception are quite unlikely to be testimonial, and addressing any uncertainty about the constitutional admissibility of business records in certain unusual cases should await more case law development.

2) Records admissible under the public records exception are quite unlikely to be testimonial, because to be admissible under that exception the record cannot be prepared with the primary motivation of use in a criminal prosecution.

3) Authenticating business and public records by certificate under various provisions in Rule 902 is unlikely to raise constitutional concerns, because the Court in *Melendez-Diaz* found an exception to testimoniality for certificates that did nothing but authenticate a document. Addressing any uncertainty about the constitutionality of the Rule 902 provisions in criminal cases should await more case law development.

4) *Melendez-Diaz* bars the admission of certificates offered to prove the absence of a public record under Rule 803(10) when that certificate is prepared for use in the criminal case. Like

the certificates at issue in *Melendez-Diaz,* a certificate proving up the absence of a public record is usually prepared with the sole motivation that it will be used at the criminal trial — as a substitute for live testimony — the main example being a CNR in an illegal reentry case. Lower courts after *Melendez-Diaz* have recognized that admitting a certificate of absence of public record under Rule 803(10), when it is prepared for the criminal case, violates the accused's right to confrontation after *Melendez-Diaz.*[1]

The minutes of the last meeting reflect the Committee's determination regarding the Reporter's suggestion that *Melendez-Diaz* requires an amendment to Rule 803(10):

> [T]he Committee discussed the possibility of an amendment to Rule 803(10) that would correct the constitutional problem raised by *Melendez-Diaz.* It was suggested that the problem arises mostly in cases involving a) illegal reentry, in which the government must prove that the defendant did not have permission to re-enter, and b) firearms prosecutions, in which the government has to prove that a firearm was not properly licensed.
>
> The possible fix suggested in the Reporter's memo was to add a "notice-and-demand" procedure to the Rule: requiring production of the person who prepared the certificate only if the defendant made a pretrial demand for that production. The Court in *Melendez-Diaz* specifically approved a state version of a notice-and-demand procedure, and the Reporter's draft added the language from that state version to the existing Rule 803(10).
>
> Committee members were divided on whether to propose an amendment to Rule 803(10) that would add the basic notice-and-demand procedure used as an example in *Melendez-Diaz.* The public defender argued that *Melendez-Diaz* did not raise any substantial practical problems of compliance, because the parties could stipulate to the absence of a record, or the case agent could check for the record and then simply testify to its absence as part of that agent's overview testimony. She noted however that she had contacted other public defenders on the subject and found no objection to the addition of a notice-and-demand procedure to Rule 803(10).
>
> Another member questioned whether a notice-and-demand procedure would be very helpful in alleviating the burden of producing a government witness. The member predicted that defendants would file such demands pro forma, and then would simply stipulate to the record once the government produced the witness. But others thought that a notice-and-demand procedure would be helpful for at least two reasons. First, not all defendants would engage in the gamesmanship of making the demand solely to impose a burden on the government. Second and more important, a notice-and-demand procedure would at least provide predictability, because a prosecutor would have advance notice that the witness must be produced. The alternative — a proffered stipulation to which the defendant may or may not respond — does not provide the same predictability.

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[1] A copy of the *Melendez-Diaz* report is included after this Report in the agenda book.

Another member noted that whatever the value of a notice-and-demand procedure, the fundamental problem of Rule 803(10) is that it is unconstitutional as applied. And one of the primary goals of the Committee has been to propose amendments necessary to cure any constitutional defect in the Evidence Rules. While a notice-and-demand procedure may not have a profound practical impact, the fact is that it would cure the constitutional infirmity in Rule 803(10) after *Melendez-Diaz.*

At the end of the discussion, the Committee unanimously resolved to consider a proposed amendment to Rule 803(10) at its next meeting. The Reporter was directed to work with the Justice Department to review all the possible viable alternatives for a notice-and-demand procedure, including ones that add procedural details such as providing for continuances. The Reporter was also asked to consider an alternative draft that would prevent the use of Rule 803(10) when a record is offered by the government in a criminal case.

* * *

This memorandum sets forth possible versions of a notice-and-demand addition to Rule 803(10), to preserve its constitutionality as applied in criminal cases. The possible versions are taken from the States. Twenty states have some version of a notice-and-demand requirement before laboratory certificates may be admitted without a witness, and as discussed in the prior memorandum, several such versions received the Supreme Court's imprimatur in *Melendez-Diaz.* The memorandum also considers two subsidiary issues: 1) Whether Rule 803(10) should be amended to prohibit its application against criminal defendants; and 2) Whether a notice and demand provision should be added to the public records exception, Rule 803(8).

The Reporter has consulted with and obtained helpful and timely input from the DOJ — many thanks to Betsy Shapiro for her help. The Department's views are set forth in this Report.

I. Drafting Issues for a Notice-and-Demand Provision for Rule 803(10)

A. Basic Version — Texas

The Reporter's previous memorandum set forth a proposed notice-and-demand provision based upon the Texas provision that was approved by the *Melendez-Diaz* Court. That provision, as incorporated into Restyled Rule 803(8), read as follows:

> **(10) Absence of a Public Record.** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if ~~the testimony or certification is admitted to prove that~~:

1

(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.[2]

This provision is basic. It does the following:

- It specifies the amount of days for the notice and the demand.

- It uses the term "before trial" to be consistent with the terminology of the notice provisions of restyled Rules 412-415.

- It specifically provides that admissibility will be conditioned on providing timely notice and on the defendant's failure to object within the allotted time period.

Note that this basic version does not say anything about what happens if the defendant *does* object, i.e., it does not say that the witness must be produced. But arguably there is no need to make such a specification, for at least two reasons. First, production of the witness is the answer to *every* situation in which the proponent offers hearsay and it is not admissible under a hearsay exception — Rule 803(10) is not special in that regard and so there would appear to be no need to discuss production of the witness under that Rule alone. Second, in fact a proper demand does not *require* the government to produce the witness who checked the record. It simply means that the certificate is not admissible. Even if the certificate is barred, the government could seek to prove the absence of the fact in ways other than by producing the witness. For example, the government in an illegal reentry case could prove the absence of permission to reenter by circumstantial evidence — that the defendant was found in hiding, fled from immigration officers, etc. Also, there is a possibility, discussed below, that the government could prove the absence through some witness other than the person who checked the record — or the government could simply have a different witness check the record. Thus it appears inadvisable to add a provision that *requires* the government to produce the witness who prepared the certificate whenever the defendant exercises a timely demand.

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[2] If there is to be a specified time period it should be a multiple of seven in order to comply with the time-counting provisions of the Federal Rules.

B. No Specification of Time Period for Notice:

The Ohio notice-and-demand provision— Ohio Rev. Code Ann. § 2925.21 — does not provide specific time periods for the notice.[3] It states as follows:

> The prosecuting attorney shall serve a copy of the report on the attorney of record for the accused, or on the accused if the accused has no attorney, prior to any proceeding in which the report is to be used against the accused * * * . The report shall not be prima facie evidence * * * if the accused or the accused's attorney demands the testimony of the person signing the report, by serving the demand upon the prosecuting attorney within seven days from the accused or the accused's attorney's receipt of the report. The time may be extended by a trial judge in the interests of justice.[4]

Most states require the notice to be provided a specific number of days before trial. The time periods vary: 10 days; 11 days; 15 days; 20 days; 21 days; 28 days; 30 days. North Carolina provides for a notice period of within 5 business days of the day the prosecution received the report.

Reporter's Comment:

It is of course for the Committee to determine whether a specific time period should be added for the notice requirement. The Evidence Rules — to Professor Kimble's chagrin — are not consistent in treatment of time periods in notice provisions. Rules 404(b) and 807 do not specify a particular time period for giving notice. But the most recently added notice provisions — to Rules 412 and 413-15 — do put specific time periods on the notice requirements. And certainly the predominant approach in the Civil, Criminal and Appellate Rules is to impose specific time periods for notice requirements. See, e.g., Criminal Rule 12.1 (14 days for notice of alibi); Civil Rule 38 (14-day period for notice of invocation of jury trial right).

In terms of length and specificity, there does not appear to be a good reason to distinguish the notice requirement for certificates from any other requirement for notifying the adverse party of an intent to introduce evidence. Therefore it may be appropriate to provide a 14-day time period in the notice provision of Rule 803(10).

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[3] Connecticut, Georgia, and Illinois also provide no specific time period for notice to the accused. Conn. Gen. Stat. § 21a-283(b); Ga. Code. Ann. § 35-3-154.1; Ill. Comp. Stat. Ann. 5/115-15.

[4] Regarding the last sentence: time-extenders will be discussed below.

C. Specific Time Period for Demand:

Every state requires the accused's demand for witness testimony to be made within a particular time period. Again, the time periods differ, both as to the amount of time and reference point:

- within [5] [7] [10] [14] [15] days of the accused's receipt of the report
- at least [5] [10] [15] [20] days before the date of the trial;

Reporter's Comment:

While the States are divided in their approach, the majority start the demand period from the time of receipt of the notice. This makes sense as it is a more definite reference point than the time of trial. Also the time runs forward rather than backward.

D. No Specific Provision for Notice:

The Iowa provision — Iowa Code § 691.2 — does not itself specifically require the government to provide any notice at all. It states as follows:

> A party or the party's attorney may request that an employee or technician testify in person at a criminal trial * * * by notifying the proper county attorney * * * at least ten days before the date of the criminal trial * * * .

See also Maine — Me. Rev. Stat. Ann. tit. 17-A: Certificate is admissible "unless, within 10 days written notice to the prosecution, the defendant requests that a qualified witness testify * * *";

and Oregon — Or. Rev. Stat. § 475.235: "If the defendant intends to object at trial to the admission of a certified copy * * *, not less than 15 days prior to trial the defendant shall file written notice of the objection with the court and serve a copy on the district attorney."

Reporter's Comment:

It seems preferable to specify that the prosecutor must notify the defendant of the intent to use the certificate without a witness. Otherwise it is left to each defense counsel, of whatever level of experience, to issue a demand within the proper time period. It may well be that in some states such notice need not be specified in the statute because the state follows an open file policy or there is some other independent notice requirement. But that is not the case in the federal system. It is also

at least relevant that the notice-and-demand provisions approved by the Court in *Melendez-Diaz* contained specific requirements that the prosecutor provide notice of intent to offer the certificate at trial.

E. No Specific Condition on Admissibility

The Texas provision (incorporated above into a draft amended Rule 803(10)) specifically provides that a certificate is not admissible unless the government complies with the notice and demand procedure. A few state provisions do not.

For example, the Alaska provision (Alaska Stat. § 12.45.084) provides that the prosecutor "shall serve a copy of the report on the attorney of record for the accused" at least 20 days before the hearing, and the accused "may demand the testimony of the person signing the report." But it only implies that the certificate's admissibility is dependent on compliance with the procedure. Other states (like Texas) in various ways make it clear that the certificate is not admissible if the defendant makes a proper demand after notice. See, e.g., Conn. Gen. Stat. §21(a)-283(b) ("If such copy is to be offered into evidence at a trial" the prosecutor must notify the defendant, etc.); Md. Code. Ann. § 10-36(2)(i) ("If the timely and proper notice required under this paragraph is provided by the defendant, the test results are inadmissible without the testimony of the technician or analyst."); Nev. Rev. Stat. §50.320(3) ("If the defendant makes such an objection, the court shall not admit the affidavit or declaration into evidence and the prosecuting attorney may cause the person to testify to any information contained in the affidavit or declaration."); S.C. R. Crim. P. 6 ("If such objection is properly made, the trial judge shall require the chemist or analyst to be present at trial for the purpose of personally testifying."); Va. Code Ann. § 19-2-187.1(B) ("If timely objection is made, the certificate shall not be admissible into evidence unless (i) the testimony of the person who performed the analysis or examination * * * is present and subject to cross-examination by the accused, (ii) the objection is waived by the accused or his counsel in writing before the court, or (iii) the parties stipulate before the court to the admissibility of the certificate.").

Reporter's Comment:

A similar problem (of failing to tie notice to admissibility) was found during the restyling effort with respect to the notice provision of Rule 404(b). The existing Rule 404(b) states that bad acts are admissible for a non-character purpose "provided that" the government gives timely notice. Professor Kimble took this language out of the restyling and the restyled rule does not specifically condition admissibility on notice. The Reporter raised a concern about this change but the Committee found it to be stylistic.

But at any rate, all things being equal it seems obviously preferable to specify that admissibility of a certificate is conditioned on complying with the notice and demand procedure.

Specific language will be clarifying and will preclude any argument that the court could provide some sanction other than exclusion — a sanction that might well be insufficient to satisfy the Confrontation Clause under *Melendez-Diaz*. It is notable that the change to Rule 404(b) in restyling was made because Professor Kimble objected to use of the term "provided that" — but that term is not used in the draft change to Rule 803(10) set forth above.

F. Good Cause for Excusing Time Limits.

The basic Texas provision does not specifically provide for any exception to the time period for providing notice or for making a demand. Other states so provide. For example, Kansas Stat. Ann. § 22-3437(a) states, at the end of the provision setting out the time periods for notice and demand, the following sentence:

> "The time limitations set forth in this section may be extended upon a showing of good cause."

See also Ohio Rev. Code Ann. § 2925.51(c): "The time may be extended by a trial judge in the interests of justice."

And New Jersey Stat. Ann. §2C:35-19(c): "The time limitations set forth in this section shall not be relaxed except upon a showing of good cause."

For a more elaborate and balky version, see Wash. St. Super. Ct. Crim. R. 6.13:

The court shall exclude such report if:

> (i) a copy of the report and certificate has not been served upon the defendant or the defendant's attorney at least 15 days prior to the trial date or, upon a showing of good cause, such lesser time as the court deems proper; or
>
> * * *
>
> (iii) at least 7 days prior to the trial date or, upon a showing of good cause, such lesser time as the court deems proper, the defendant has served a written demand upon the prosecutor to produce the expert witness at the trial.

Reporter's Comment:

Many of the notice provisions in the existing Rules of Evidence contain a good cause provision — see Rules 404(b), 412(c), and 413. (Rule 807 does not contain a good cause provision). It would seem to make sense to hew as closely as possible to the restyled provisions on notice, and

that would point toward adding a good cause proviso to the notice-and-demand time periods in Rule 803(10). Moreover, given the exigencies of litigation, it would seem to make good sense as a matter of policy to provide some leeway for the government in satisfying the notice requirement and for the defendant in satisfying the demand requirement.

It goes without saying that the good cause requirement, if it is to be specified, should be applied to both the notice and the demand time limits. While the nature of the good cause arguments might differ, there is no apparent reason to allow a good cause excuse for one side but not the other.

Assuming that the Committee finds it appropriate to add a good cause provision, it makes eminent sense to add it as a separate sentence covering both the notice and demand requirements — as do Kansas and Ohio — as opposed to having to say it twice, as does Washington.

If a good cause provision were added to the basic "Texas" template, it would look 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) if the prosecutor intends to offer a certification in a criminal case, 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 — unless the court, for good cause, sets a different time for the notice or the objection.

Note that the phrase "unless the court, for good cause, sets a different time" is lifted from the restyled Rule 412

G. Continuance for Producing the Witness

A few states specifically provide that the court may — or must — grant a continuance to

give the prosecution time to produce the witness if the prosecution has acted diligently to produce the witness within the specified time period. For example, Georgia Code. Ann. § 35-3-154.1 provides in pertinent part as follows:

> (e) The defendant may object in writing any time after service of the report, but at least ten days prior to trial, to the introduction of the report. If objection is made, the judge shall require the [witness] to be present to testify.[5] The state shall diligently investigate the witness's availability and report to the court. If the witness is not available on a timely basis, the court shall grant a continuance.

See also Va. Code Ann. § 19-2-187.1(C):

> Where the person who performed the analysis and examination is not available for hearing or trial and the attorney for the Commonwealth has used due diligence to secure the presence of the person, the court shall order a continuance. Any continuances ordered pursuant to this subjection shall not total more than 90 days if the accused has been held continuously in custody and not more than 180 days if the accused has not been held continuously in custody.

Reporter's Comment:

Unlike a good cause exception to notice timing periods, which exist in a number of Evidence Rules, none of the Evidence Rules address the possibility of a continuance in any circumstance. For example, Rule 804(a) defines unavailability, but nothing in that Rule specifically addresses the question whether the court should grant a continuance if a presently unavailable hearsay declarant would become available at a later date.

The absence of any reference to continuances in the Evidence Rules is probably understandable given the fact that courts have discretion to enter continuances in the interest of justice — they don't need an Evidence Rule to provide for that power. *See, e.g., Danjaq LLC v. Sony Corp.,* 263 F.3d 942 (9th Cir. 2001) (noting that trial court has discretion to grant or deny a continuance); *Drake v. Portuondo,* 321 F.3d 338, 344 (2d Cir.2003) ("Whether to grant or deny a continuance 'is a matter traditionally within the discretion of the trial judge.'"), (quoting *Ungar v. Sarafite,* 376 U.S. 575, 589 (1964).[6] It is notable that in applying Rule 804(a) to absent or ill

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[5] For reasons stated above, and federal rule should not *require* the government to produce the witness in order to prove the fact — especially when the fact is the absence of a record. The discussion that follows focuses on whether provision should be made for a continuance *should the government decide to produce the witness.*

[6] It is true that some of the other national rules specifically provide that the court may give extra time for certain motions or arguments. See, e.g., Civil Rule 56(d) (if a nonmovant

declarants, federal courts consider the possibility of using continuances even though that possibility is not specifically provided for in the Rule. *See, e.g., United States v. Faison,* 679 F.2d 292 (3d Cir. 1982) (trial judge abused discretion in finding a declarant unavailable due to illness because he did not sufficiently consider the possibility that the trial could have been continued until the declarant's health had improved).

The Committee may wish to balance the benefit of addressing the possibility of a continuance against the cost of loading up the amendment with so many details that it becomes difficult to read and apply. The Committee might also note that providing for the possibility of continuance in Rule 803(10), while not providing for the same possibility in other rules such as Rule 804(a) or the other notice provisions, may raise a negative inference about the trial court's discretion to grant a continuance under those other rules.

If the Committee wishes to add continuance language to the basic template, it could look like this (together with the good cause language discussed above).

> **(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 — unless the court, for good cause, sets a different time for the notice or the objection. If the defendant objects to the certification and the government wishes to produce the witness who prepared the certificate but the witness cannot be produced despite diligent efforts, the court may grant a continuance.

Note that the last sentence does not really fit with what went before. It should probably be set off as a separate subdivision. But that would create a problem, as a new Subdivision (C) would only

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shows that it cannot present facts essential to justify its opposition, the court may allow time to obtain affidavits or take discovery).

elaborate on the requirements of (B) and would essentially be unrelated to the provisions of (A). Another alternative — breaking down (B) into separate subparts — is also complicated because (B) is already connected to (A) by a conjunctive. Adding conjunctives to a subpart is confusing and awkward. A final alternative is to move the continuance sentence to a hanging paragraph. But as the Committee is aware, hanging paragraphs are anathema to restylists.[7]

H. Specific Provision on Waiver.

A few states specifically provide that if the defendant fails to enter a demand, he waives his right to object to the certificate. For example, Md. Code Ann. § 10-306 (b)(3) provides that:

> "Failure to give timely and proper notice constitutes a waiver of the defendant's right to the presence and testimony of the technician or analyst."

See also New Jersey Stat. Ann. §2C:35-19(c):

> "A failure to comply with the time limitations regarding the notice of objection required by the section shall constitute a waiver of any objections to the admission of the certificate."

And Minnesota Stat. §634.15(b):

> If the accused person or the accused person's attorney does not comply with the ten-day requirement * * * the prosecutor is not required to produce the person who performed the analysis or examination or prepared the report. In this case, the accused person's right to confront that witness is waived and the report shall be admitted into evidence.

Reporter's Comment:

The closest example to the question presented here is Rule 404(b), which requires the prosecutor to provide notice of bad acts evidence "[o]n request by a defendant in a criminal case." No specific mention is made of the fact that if the defendant does not ask for it, he waives his right to notice. Nor would it appear that any such specific statement is necessary. It is a standard principle that the failure to timely move for relief results in a waiver under the Evidence Rules. That basic principle is embodied in Rule 103, which provides that the opponent must make a timely objection to a ruling admitting evidence in order to preserve a claim of error (i.e., in order to avoid a waiver).

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[7] If the Committee wishes to add a provision on continuance, then the Reporter will consult with Professor Kimble to see if he has a more elegant solution. Usually, he does.

That rule would appear to apply directly to the failure to demand production of the witness under a notice-and-demand procedure, because the demand is essentially an objection to the admission of the certificate. Thus a further reference to waiver in Rule 803(10) would be superfluous. But even if Rule 103 were not directly applicable, the principle that failing to act at the proper time constitutes a waiver is part and parcel of the Evidence Rules. *See, e.g., United States v. Bruguier,* 161 F.3d 1145 (8th Cir. 1998) (before asking a character witness about a bad act by the defendant, the prosecutor must present good faith proof to the court that the event occurred; but there was no error in failing to do so in this case because the defendant never demanded such a production).

As with other details discussed previously, caution is necessary before loading the amendment up with so many provisions that it is difficult to read and apply. The addition of a waiver provision also presents the problem, discussed above, of fitting within Subdivision (B) without requiring more subdivisions or, God forbid, a hanging paragraph (or two).

Finally, the use of the term "waiver" is itself problematic because of recent cases and scholarship noting the distinction between "waiver" and "forfeiture" — waiver being the knowing and intentional relinquishment of a right, and forfeiture being conduct or misconduct deemed to result in the loss of a right. *See, e.g.,* Evidence Rule 804(b)(6) (providing for a "forfeiture" of a hearsay objection by misconduct). Applying the "waiver"/ "forfeiture" distinction is often fraught with difficulty when a party fails to make an objection. *See United States v. Hamilton,* 499 F.3d 734 (7th Cir. 2007) (extensive discussion of whether the failure to object to a jury instruction was a waiver or a forfeiture).[8]

In light of these difficulties, it seems prudent to avoid what might be considered an unnecessary foray into the distinction between waiver and forfeiture when it comes to a defendant's failure to exercise a timely demand for the government witness's testimony — unnecessary because the principles of waiver/forfeiture are already in place.

If the Committee decides to add a "waiver"/ "forfeiture" provision to the notice and demand procedure, it could look like this (together with the other provisions previously discussed):

> **(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

[8] The Standing Committee just sent a proposed amendment to the Criminal Rules back to the Advisory Committee to work through the distinction between waiver and forfeiture in Criminal Rule 12.

(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 — unless the court, for good cause, sets a different time for the notice or the objection. If the defendant objects to the certification, the court may grant a continuance if the witness who prepared the certificate is not available to testify, despite diligent efforts to produce the witness. The defendant [forfeits] [waives] the right to cross-examine the witness by failing to comply with the time limitations for demanding the witness's production.

I. Specific Provision on Subpoena Power.

Delaware Code Ann. tit. § 10, 4332(b) provides as follows:

(b) Witness for defense. — Nothing contained in this subchapter shall prevent the defendant from summoning a witness mentioned in this subchapter as a witness for the defense.

Reporter's Comment:

It is probably unnecessary to provide a specific reference to the defendant's power to call adverse witnesses in his own case-in-chief. Evidence Rule 607 already provides that "Any party, including the party that called the witness, may attack the witness's credibility." The Supreme Court in *Melendez-Diaz* itself recognized that, under the Compulsory Process Clause, the defendant could call the government agent in his case-in-chief. While that power was not a substitute for the right of confrontation, the Court made clear that the defendant had such a right, even without a rule so specifying. Finally, if a rule is necessary, Criminal Rule 17 provides subpoena power for the defendant to call witnesses. For all these reasons, a reference to the defendant's ability to call a government witness is the kind of detail that seems unnecessary and would lead to overloading the amendment with self-evident provisions. However, if the Committee wishes to add such a provision, the following sentence can be added to the end of the template, subdivision (B):

Nothing in this rule prevents the defendant from calling the witness in the defendant's case-in-chief.

J. Who Must Be Produced? The Bullcoming Question.

After *Melendez-Diaz,* both federal and state courts have considered whether lab tests can be proven through the testimony of a witness other than the person who actually conducted the test. Almost all courts have permitted the results to be proven through the testimony of an expert who has relied on the report, so long as the expert is giving his or her own opinion and is not acting solely as a conduit for the testimonial hearsay. For example, in *United States v. Turner,* 591 F.3d 928 (7th Cir. 2010), 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. Thus, the lab report results were much like the evidence found testimonial in *Melendez-Diaz*, but unlike in that case the government called a live witness. The defendant objected, however, that the witness did not conduct the tests and was relying on testimonial statements from other chemists, in violation of *Crawford.* But 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* requires that any official involved in forensic testimony must be produced for cross-examination. But the court rejected that broad view 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."

The Supreme Court this term is considering whether a positive lab test can be proved through the testimony of an expert. The Court is reviewing the New Mexico Supreme Court's decision in *State v. Bullcoming,* 147 N.M. 487, 226 P.3d 1 (2010). The State court found no confrontation violation "because the analyst who prepared the report was a mere scrivener who simply transcribed the results generated by a gas chromatograph machine and, therefore, the live, in-court testimony of another qualified analyst was sufficient to satisfy Defendant's right to confrontation."

A question for the Committee is whether any amendment to Rule 803(10) should take account of the possibility that the *absence* of a public record could be proved through an expert instead of the person who actually did the search. The answer would appear to be that no reference to other witnesses should be necessary in the Rule 803(10) context. This is so for at least three reasons:

1. Assuming an expert were to testify to the results of a search conducted by another government official, the testimony does not present a hearsay problem because it is the expert's testimony, and not the underlying search, that is admitted. Rule 703, not Rule 803(10), regulates a) whether an expert can rely on hearsay, and b) whether the hearsay may be disclosed to the jury as the basis for the expert's opinion. If the report is introduced not for its truth but only to illustrate the basis for the expert's opinion, then it does not violate

Crawford, because the Supreme Court declared in *Crawford* that the Confrontation Clause regulates testimonial statements only when they are offered for their truth. Note that the strict balancing test added to Rule 703 in 2000 prevents the proponent from using an expert as a conduit for introducing otherwise inadmissible hearsay under the guise of illustrating the expert's opinion. Thus, nothing needs to be added to Rule 803(10) to cover the possibility of an expert testifying to results found by another. Indeed an addition may raise confusion about the applicability and operation of Rule703.

2. It is possible that expert testimony would not even be permissible to prove the absence of a public record. In a case like *Bullcoming*, an expert makes his or her own assessment about a positive labe test. That testimony is based on scientific or other specialized knowledge and so is properly within Rule 702. It's not clear that a similar expertise is required when it comes to assessing a search for the absence of a public record. So it is not absolutely certain that there would ever be a *Bullcoming* issue as applied to Rule 803(10) — if the certificate is not admissible, the record may not be proveable by a witness other than the one who searched the record.[9]

3. The government does not need to go through the hoops of expert testimony in order to call a witness other than the person who searched for the record. The easier path is simply to conduct a new search by an available witness. So again, no mention needs to be made in Rule 803(10) of the possibility that a witness other than the one who conducted the search will testify to the results of that search.

K. Conclusion on 803(10) Notice-and-Demand Provision

The previous discussion indicates that there are a lot of possible moving parts to a notice-and-demand provision. To summarize the Reporter's suggestions:

1. The basic Texas rule, approved by the Supreme Court in *Melendez-Diaz*, serves as a good template for a notice-and-demand provision.

2. The rule should contain specific time periods.

3. The time for demand should be measured from the date of receipt of notice, rather than the number of days before trial.

4. A good cause provision should be added to provide parallelism with other notice provisions in the Evidence Rules.

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[9] Lay testimony would not work in the *Bullcoming* situation because the lay witness would not have personal knowledge of the test.

5. The amendment need not address such details as continuance, waiver, and testimony by an expert.

6. The amendment should not provide that if the defendant makes a proper demand, the government must produce the person who prepared the certificate.

Putting all these factors together, the Committee might consider the following amendment to Rule 803(10) for release for public comment:

(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) if the prosecutor in a criminal case intends to offer a certification [that is testimonial?], the prosecutor provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court, for good cause, sets a different time for the notice or the objection.

The Committee Note to an Amended Rule 803(10) Could 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 that admitting such a certificate without the testimony of a witness violates 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, with minor variations, a "notice-and-demand" procedure that was approved by the *Melendez-Diaz* Court. See Tex. Code Crim. P. Ann., art. 38.41.

Note on Bracket "that is testimonial?":

It is not clear that *every* certificate of absence of public record offered against an accused will

be testimonial. Perhaps a certificate of "no record found" might be prepared in a civil or disciplinary proceeding and it could later become relevant in a criminal proceeding — e.g., a certificate that the defendant does not have a license to practice law or medicine. Perhaps a certificate might be prepared in order to report to another agency on licensing requirements, compliance with public health laws, and so forth, and it later becomes relevant in a criminal case. It is hard to predict what kinds of certificates might be prepared outside a testimonial context, but it certainly seems inaccurate to say that *all* certificates offered under 803(10) will be testimonial. And if a certificate is not testimonial, there is no strong justification for a notice-and-demand procedure — because admitting that certificate is consistent with the accused's confrontation rights.

On the other hand, there are difficulties with adding the proviso "that is testimonial." First, an unschooled reader is not likely to know that "testimonial" refers to the Confrontation Clause and the *Crawford* test. Second, even if the reference is known, determining whether a particular hearsay statement is "testimonial" can involve a murky and fact-dependent inquiry. Thus there will be some unpredictability in applying the rule and in determining whether the notice-and-demand procedure should be followed.

On the other hand, it is certainly the case that the vast majority of certificates offered under Rule 803(10) will be testimonial. Almost all the reported cases concern two fact situations: 1) an illegal reentry case in which lack of permission to reenter is proven by a CNR; and 2) a firearms case in which the lack of a license is proved by a certificate.

The Committee may wish to consider whether a vague narrowing of notice-and-demand applicability is worth the effort. Put another way, it may be appropriate (and user-friendly) to extend the notice-and-demand requirement to *all* certificates offered under Rule 803(10). A bright line rule, will be overprotective as applied to those few-and-far-between certificates that are non-testimonial; but that minimal cost may be warranted by the substantial benefit of ease of application.

DOJ Position on Proposed Notice and Demand Provision Set Forth Above:

Betsy Shapiro emailed the following report on the text of a possible amendment to Rule 803(10) as set forth above:

> I discussed your memo today with a large number of our criminal appellate chiefs. We fully support your proposed amendment as set forth on page 17 of the memo. We would recommend not including the bracketed language -- [that is testimonial] -- for the reasons you state. It injects a complex legal concept into what should be a straightforward and easy to apply procedural rule. We recognize the potential for overinclusivness, but think the trade-off in easy application is worth it. We particularly think it is important to tie the counting of the objection to receipt of the notice, and not to the date of the trial, as trial dates are moving targets. 14 and 7 are sensible time frames, as is the good cause provision.

II. Should 803(10) Be Amended to Make It Inapplicable to Certificates Offered Against Criminal Defendants?

At the last meeting, a Committee member suggested considering an amendment to Rule 803(10) that would prohibit its use against the accused in a criminal case. For purposes of illustration, such an amendment might look like this:

> (10) ***Absence of a Public Record.*** Testimony — or a certification under Rule 902 when offered in a civil case or in a criminal case against the government — 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 for a statement or matter of that kind.

Reporter's Comment:

Barring the government's use of Rule 803(10) in a criminal case seems to be a radical move — especially given the notice-and-demand alternative approved by the Supreme Court in *Melendez-Diaz*. Given that the Court has held that a notice-and-demand procedure fully protects the defendant's right to confrontation while leaving the government the possibility of introducing the certificate (at least under some conditions) there seems to be no good reason for preventing the government from even having that possibility. It is true that the government could do a work-around in some cases by getting a stipulation from the defendant. But as members noted at the last meeting, the notice-and-demand procedure reaches the same result while providing the government some important structure and predictability. There does not seem to be a compelling reason to reject the more predictable procedure.

Moreover, the suggested bar on admitting all certificates of absence of public record is overbroad. The ostensible reason for such a bar is that all such certificates are testimonial. But as stated above, it is not clear that *every* certificate of the absence of a public record would be testimonial. If a certificate is prepared in non-testimonial circumstances and becomes relevant in a subsequent criminal case, why should it be barred?

In sum, a complete bar on admitting certificates of absence of public records against the accused appears to be overreaching and unjustified by the concerns that support an amendment to Rule 803(10).

It should be noted that the DOJ is opposed to any proposal that would bar the use of Rule 803(10) against defendants in a criminal case.

III. Should a Notice-and-Demand Provision Be Added to Rule 803(8)?

The notice-and-demand provisions from the states, used as examples in this memo, do not cover proof through certificate of the absence of a public record. Rather, they all concern lab reports, such as those involved in *Melendez-Diaz*. Thus, these notice-and-demand provisions cover proof of public records rather than the *absence* of public records.. This raises the question whether the Federal exception for public records, Rule 803(8), should be amended to include a notice-and-demand provision for records offered against the accused in a criminal case.

Restyled Rule 803(8) provides as follows:

> **(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.

Reporter's Comment:

A notice-and-demand provision is necessary under Rule 803(10) because the vast majority of certificates offered under that rule will be testimonial. But that is not at all the case with official reports under Rule 803(8). Rule 803(8) already has exclusionary language in criminal cases that prevents admissibility of testimonial reports. Subdivision (A)(i) and (A)(ii) have been construed to preclude admission against the accused of official reports that were prepared with the primary motive of use in a criminal prosecution. That is the very definition of testimonial under *Crawford* and *Davis*. *See, e.g., United States v. Pena-Gutierrez,* 222 F.3d 1080 (9th Cir. 2000) (law enforcement investigative report prepared for use in criminal prosecution inadmissible under Rule 803(8)); *United States v. Oates,* 560 F.2d 45 (2d Cir. 1977) (report of a lab test by a United States Customs Service chemist on substance found on defendant at arrest was not admissible under Rule 803(8)). *Compare United States v. Grady,* 544 F.2d 598 (2d Cir. 1976) (routine tabulation of serial numbers, in a non-adversarial context, was admissible under Rule 803(8)).

The Supreme Court in *Melendez-Diaz* emphasized that the exclusionary language in Rule 803(8) makes it extremely unlikely, if not impossible, to admit testimonial hearsay under the Federal Rules exception. In a discussion of the Federal Rules' business and public records exceptions, Justice Scalia stated as follows:

> 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." Id., at 114, 63 S.Ct. 477.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").

In other words, the lab reports that were admitted by the Massachusetts state court would have been inadmissible under Federal Rules 803(6) and (8).

Lower courts after *Melendez-Diaz* have continued to find that the scope of admissibility under Rule 803(8) is contiguous with the definition of non-testimoniality under *Crawford* — that is, if a record is admissible under Rule 803(8), it will be non-testimonial, while a testimonial record is not admissible under the terms of Rule 803(8).[10] *See, e.g., United States v. Caraballo,* 595 F.3d 1214 (11th Cir. 2010) (In an alien smuggling case, I-213 forms containing basic biographical information were admissible under Rule 803(8) and were not testimonial; the exclusionary language 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*, because 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."); *United States v. Orozco-Acosta,* 607 F.3d 1156 (9th Cir. 2010) (in an illegal reentry case, the court found that a CNR was testimonial, but also held that admitting the warrant of deportation was proper; the warrant was admissible under Rule 803(8), and was not testimonial, because its "primary purpose is not for use at trial.").

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[10] It is not that admission of a record satisfies the Confrontation Clause *simply because* it satisfies a hearsay exception. (If that were true, then there would be no constitutional worries about Rule 803(10)). Rather the particular admissibility limitations of Rule 803(8)— prohibiting adversarial reports — happens to match the limitations of the Confrontation Clause after *Crawford.*

In sum, with respect to Rule 803(8), there appears to be no need for a notice-and-demand procedure to protect the accused's confrontation rights — because those rights are already fully protected by the exclusionary language currently in the Rule.

It could be argued that a notice-and-demand procedure should be added to Rule 803(8) for two slightly different reasons: 1) On the off-chance that some court wrongly admits a testimonial report under Rule 803(8), the notice-and-demand procedure will protect against constitutional error; and 2) it might be appropriate as a policy matter to add such a procedure when official reports are offered against an accused, whether they are testimonial or not.

Neither of these arguments appear sound. First, assuming there is a risk that a court will admit a testimonial record erroneously, that risk exists under *any* hearsay exception. It cannot follow that a notice-and-demand procedure should be added to all the hearsay exceptions.[11] The result would be that because of a low risk of mistaken admission, the option to admit hearsay would shift from the proponent to the opponent of the evidence. Such a radical change in offering hearsay probably should not be implemented in the absence of a critical, constitutionally-based need for the change. It should be noted that the states with notice-and-demand procedures do not apply them to *all* official records — those provisions apply only to lab reports.

The second argument — that a notice-and-demand procedure is good policy — raises essentially the same concerns. An across-the-board notice-and-demand procedure for public records would present a radical shift. It would require in-court testimony (at the defendant's election) for a whole host of reports found admissible under Rule 803(8) that are routine and non-adversarial. Examples include warrants of deportation (*Orozco-Acosta*); a record indicating that a particular car made a border crossing at a particular time (*United States v. Orozco,* 590 F.2d 789 (9th Cir. 1979); data prepared before the government even knows who the suspect is (*Grady, supra*) and reports prepared before a crime has even occurred. None of these reports are anywhere close to testimonial; all of them can be admitted under current law without a witness. Arguably the interest in granting the defense control over proffering hearsay would need to be substantial before such a radical shift is implemented. And there is nothing about currently admitted public reports that raises the interest of the defendant above the non-testimonial hearsay that is admitted under any other hearsay exception.

It should also be noted that a notice-and-demand provision is not easily added as a drafting matter, because the reports to which it would apply are set forth in three separate subdivisions. The possible solution, while not elegant, is either a hanging paragraph or another subsection. Here is a try:

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[11] In fact it is probably *less* likely that Rule 803(8) will be used to admit testimonial hearsay than some other exceptions — Rule 803(8) contains specific language that effectively excludes testimonial reports, and evidence such as lab reports is quite unlikely to be admitted after the specific holding in *Melendez-Diaz.*

(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; and

(C) the prosecutor in a criminal case provides written notice of the intent to offer the record or statement at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court, for good cause, sets a different time for the notice or the objection.

The question is obviously one for the Committee, but it does not appear that a case has been made for extending the notice-and-demand provision to Rule 803(8).

It should be noted that the DOJ strongly objects to adding a notice-and-demand procedure to Rule 803(8).

IV. Conclusion

There is a good argument that a basic notice-and-demand procedure, together with a good cause proviso, should be added to Rule 803(10). The procedure probably should not be specifically limited, in the text of the Rule, to certificates that are testimonial. A broader limitation — preventing the use by the government of Rule 803(10) in criminal cases — appears problematic. And there does not appear to be a substantial reason for adding a notice-and-demand provision to Rule 803(8).

Tab 3

1. Report on Possible Amendment to the Trustworthiness Clauses of Rule 803(6), (7) and (8)

2. Letters from ABA Litigation Section and American College of Trial Lawyers in Support of the Proposed Amendment

FORDHAM
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Philip Reed Professor of Law

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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: March 1, 2011

At its last meeting, the Committee considered a possible amendment to the trustworthiness clauses of Evidence Rules 803(6)-(8). 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. Therefore the amendment would change the evidentiary result in at 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.**

That same basic language is used in Rule 803(7) and (8).[1] 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

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[1] 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.

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).

The minutes of the last meeting reflect the Committee's preliminary determination on the proposed amendments to Rules 803(6)-(8):

> [Some Committee members involved in the restyling effort] believed that allocating the burden to the opponent made sense for a number of reasons, including: 1) the Rules' reference to a "lack of trustworthiness" suggests strongly that the burden is on the opponent, as it is the opponent who would want to prove the lack of trustworthiness; 2) almost all the case law imposes the burden on the opponent; and 3) if the other admissibility requirements are met, the qualifying record is entitled to a presumption of trustworthiness, and adding an additional requirement of proving trustworthiness would unduly limit these records-based exceptions.
>
> In discussion, some members suggested that it was better to leave the rule fuzzy on who has the burden as to untrustworthiness. They suggested that the determination of trustworthiness might be a process and a court may decide that a record is untrustworthy even if the opponent does not provide any evidence or argument on that subject. Others suggested that imposing the burden on the opponent might impose difficulties on opponents who may not have an opportunity to discover and present evidence of untrustworthiness — although whatever difficulty exists is in fact already imposed by the predominant case law. Another member noted that there has to be a burden allocation; that allocation is only relevant when the evidence is in equipoise; and therefore that a clarification allocating the burden to the opponent in a narrow band of cases is well-justified. The DOJ representative noted that the Department was in favor of the change as a helpful clarification.
>
> After discussion, the Committee directed the Reporter to check with representatives of the ABA Litigation Section, the American College of Trial Lawyers, and other interested parties to determine whether it would be helpful to propose an amendment that would clarify that the burden of showing untrustworthiness is on the opponent. The Committee determined that it would revisit the question of a possible amendment at the next meeting. The Committee also determined that if an amendment were to be proposed to allocate the burden to the opponent, a statement should be included in the Committee note that the opponent, in meeting that burden, is not necessarily required to introduce affirmative evidence of untrustworthiness.

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 four parts. Part One reviews the pertinent case law, which is essentially unchanged since the last Committee meeting — 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 again analyzes the 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 reports on the views solicited from the ABA Litigation Section and the American College of Trial Lawyers. Part Four sets out a draft amendment and Committee Note.

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.,

United States v. Kaiser, 609 F.3d 556, 576 (2nd Cir. 2010) ("Kaiser has succeeded in raising questions about the trustworthiness of the [records], but he has failed to show that the district court abused its discretion in finding that they were sufficiently trustworthy under Rule 803(6). * * * Residual doubts on the question of trustworthiness would go to the weight of the evidence, not its admissibility.");

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 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."); *Sullivan v. Dollar Tree Stores, Inc.*, 623 F.3d 770 (9th Cir. 2010) ("A party opposing the introduction of a public record bears the burden of coming forward with enough negative factors to persuade a court that a report should not be admitted." – DOL report found untrustworthy because it was incomplete (with exhibits not attached); author was unknown; no hearing was held; and it appeared to be an internal draft); 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.").

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. Views of ABA Litigation Section and American College of Trial Lawyers

Pursuant to the Committee's direction, the Reporter sought the input of the ABA Litigation Section and the American College of Trial Lawyers.[2] The letters from these organizations are attached to this Report. Briefly summarized, they state support for the proposed amendment.

ABA Litigation Section: The letter is not the formal position of the Section, but of attorneys actively involved in the leadership and conversant in the subject matter. Those attorneys unanimously approved the proposed amendments as "good policy" and in order to provide "needed uniformity among the circuits."

American College: The Federal Rules of Evidence Committee of the American College supports the proposed amendment, listing the following reasons: 1) it accords with the majority practice and so will not be disruptive; 2) a contrary rule would accomplish very little in practice, as proponents would simply add trustworthiness language to the affidavits they use to qualify business records; 3) the other admissibility requirements of Rules 803(6) and (8) already contain substantial guarantees of trustworthiness and so it would be overkill to require an extra showing; and 4) the proposed amendment will set forth a helpful process for courts and counsel to follow.

IV. Draft Amendments and Committee Note

The previous memo contained two drafting choices — one that put the burden on the opponent and the other that put it on the proponent. The latter alternative has been dropped from this memo as it is not supported by policy or reason, and moreover it is opposed by the Litigation Section and the American College.

The drafts below cover all three rules, 803(6)-(8). If one of them is going to be amended, then all should be, because they all have a trustworthiness clause. Amending only one or two would leave unnecessary questions about how to construe those left unamended.

---

[2] Recall that another important organization, the DOJ, supports an amendment that would specifically allocate the burden of proving untrustworthiness to the opponent of the evidence.

What follows is a draft amendment and Committee Note to Rule 803(6).

(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.

Possible Committee Note to Rule 803(6)

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.")

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. A determination of untrustworthiness necessarily depends on the circumstances.

What follows is a draft amendment and Committee Note to Rule 803(7):

(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 opponent does not show that the possible source of the information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

Possible Committee Note to Rule 803(7)

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — set forth in Rule 803(6) — then the burden is on the opponent to show a lack of trustworthiness. The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

What follows is a draft amendment and Committee Note to Rule 803(8)

(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 opponent does not show that the source of information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

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). The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. A determination of untrustworthiness necessarily depends on the circumstances.

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January 31, 2011

Email and mail

Daniel J. Capra
Philip Reed Professor of Law
Fordham University School Of Law
140 West 62nd Street
New York, NY 10023

Re: Possible Amendments to Rules 803(6)-(8)

Dear Dan:

As Reporter for the Advisory Committee on Evidence Rules, you have solicited the views of the American Bar Association Section of Litigation (the "Section") regarding suggested amendments to Fed. R. Evid. 803(6)-(8) (the business records/absence/public records hearsay exceptions), to state explicitly that it is the opponent's burden to show that the source of information or the circumstances of its preparation indicate a lack of trustworthiness.

At the threshold, I must point out that, as a subordinate entity of the American Bar Association, the Section does not have the power to offer independent positions or opinions; those can come only from the ABA itself, after a process nearly as labyrinthine and time consuming as those under the Rules Enabling Act. But when an important matter is brought to the attention of the Section, our leadership addresses it promptly and thoughtfully, and we provide a response, not of the Section as such, but of attorneys who are actively involved in Leadership and are conversant with the subject matter.

Our review of the suggested amendments began with the Section's Federal Practice Task Force, of which I am Co-Chair. After thorough review and discussion – aided immeasurably by your Memorandum of September 16, 2010 – the members of the Task Force (judges and lawyers) were unanimous in their personal views that the amendments are good ones that should be formally proposed by the Advisory Committee and ultimately become part of the Federal Rules of Evidence.

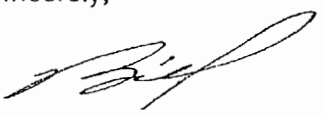
Then, at the most recent meeting of Section Leadership earlier this month, I reported to the Section's governing body, Council, on the suggested amendments and the Task Force's deliberations, and solicited the views of the members of Council. Naturally, no vote was taken, but the comments with respect to the suggested amendments were uniformly favorable, and I was authorized to inform you of the members' favorable reaction.

The Section Leadership members who discussed the matter were united in expressing their view that the suggested amendments reflect good policy, and that adopting them will provide needed uniformity among the circuits in the construction of Rule 803.

The Section's Chair, Hilarie Bass, has asked me to communicate the Section Leadership's delight that the Advisory Committee saw fit to solicit our views before making a formal proposal respecting these amendments. The Section of Litigation considers itself the voice of the attorneys (and, ultimately, the parties) for whom rules of procedure and evidence have the most meaning and the greatest consequence. We are grateful for your giving us the opportunity to consider and discuss these important suggested amendments, and we hope that you will do so again in the future.

Please do not hesitate to call on me if you require further information. Warmest regards.

Sincerely,



William T. Hangley

cc (by email and mail):

Hon. Lee H. Rosenthal
Hon. Sidney A. Fitzwater
Hilarie Bass, Esquire, Section Chair
Ronald L. Marmer, Esquire, Section Chair Elect
William R. Bay, Esquire, Section Vice-Chair
Irwin H. Warren, Co-Chair, Federal Practice Task Force

February 14, 2011

Fedex Overnight, Tracking No. 796758885560

Daniel J. Capra
Philip Reed Professor of Law
Fordham University School of Law
140 West 62nd Street
New York, NY 10023

Re: *American College of Trial Lawyers Federal Rules of Evidence Committee Views on Possible Amendments to Rules 803(6)-(8) of the Federal Rules of Evidence*

Dear Professor Capra:

This letter sets forth the views of the Committee on the Federal Rules of Evidence (the "Committee") of the American College of Trial Lawyers (the "College") pertaining to certain proposed amendments to Federal Rules of Evidence 803(6)-(8) dealing with exceptions to the hearsay rule for records of regularly conducted activities, the absence of entries in records, and public records and reports The College is dedicated to maintaining and improving the standards of trial practice, the administration of justice and the ethics of the legal profession. The Committee is charged by the College with monitoring the operation of the Federal Rules of Evidence generally, to determine the adequacy of the operation of the rules in federal cases, and to evaluate proposed changes. We submit these comments with the hope that they may prove useful in the rulemaking process.

I am the chair of the Committee, which has considered the proposed amendments and, in consultation with the leadership of the College, recommends adoption of the amendment proposed in your memorandum to the Advisory Committee dated September 16, 2010 clarifying that the burden of proving a lack of trustworthiness is borne by the opponent of the evidence proffered. Your memorandum ably canvasses the case law and the policy considerations underlying the requirement that the opponent bear the burden of proving lack of trustworthiness. We endorse those considerations for the following reasons.

First, it is our experience that the general practice in the federal courtroom is to place the burden on the opponent. Therefore, the

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proposed amendment is not a change in general practice, notwithstanding the fact that there is some authority for the contrary position.

Second, a contrary rule would accomplish very little in practice. As the rules have provided for some years now, declarations of compliance under Rule 902(11) or Rule 902(12) are often offered in support of the admissibility of evidence under the subject provisions. We think it likely that, if the burden were placed on the proponent of a record, the proponent would simply incorporate in its declaration language tracking the "trustworthiness" clause of these rules into the certifications. We suggest that this would be of little help to district judges making these decisions on a day-to-day basis.

Third, the Committee considers that the requirements of 803(6) and (8) that precede the trustworthiness clause already incorporate time tested indicia of trustworthiness such that the burden of demonstrating untrustworthiness is appropriately placed on the opponent of the evidence. Rule 803(6), for example, requires proof that a record is "kept in the course of a regularly conducted business activity, and [that] ... it was the regular practice of that business activity to make" such record. Our experience has been that courts often emphasize the extent to which the record keeper otherwise relies in ordinary course on the proffered record or statement, reasoning that if the record keeper places significant reliance upon the statement, the record is sufficiently reliable to meet the threshold for admissibility. The Committee's concern here is that, if an additional "trustworthiness" burden were placed on the proponent of the evidence, it would be nothing more than a redundant requirement because the court will in any event require proof of reliance by the record keeper.

In short, placing the burden on the proponent effectively adds very little to the record developed before a district court and ultimately will not assist the court in making the decision on admissibility. Accordingly the Committee believes that the proposed amendment is not a change in the law, as we see the rule applied day in and day out, and will advance clarity on an important issue. Moreover, placing the burden on the opponent to show lack of trustworthiness is consistent with the adversary nature of our system and ultimately will provide a helpful process for district judges to make admissibility decisions on a day-to-day basis.

The College is pleased that the Advisory Committee has solicited its views before making a decision. The College strives to measure and marshal consensus on various legal issues touching upon the practice of trial law in our state and federal courts and it is particularly gratifying

when the Advisory Committee and the Committee on Rules of Practice and Procedure of the Judicial Conference solicits its views.

Please do not hesitate to contact me if you have any further questions.

Sincerely,

Robert E. Welsh, Jr.
Chair, Federal Rules of Evidence Committee

REWjr/cab

cc: Gregory Joseph
Honorable Lee H. Rosenthal
Honorable Sidney A. Fitzwater
Hilarie Bass, Esquire, Section Chair
Ronald L. Marmer, Esquire, Section Chair Elect
William R. Bay, Esquire, Section Vice-Chair
Irwin H. Warren, Co-Chair, Federal Practice Task Force

Tab 4

Report on Possible Amendment to Rule 801(d)(1)(B)

FORDHAM
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Daniel J. Capra
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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Possible Amendment to Evidence Rule 801(d)(1)(B)
Date: March 1, 2011

A number of years ago, the Committee directed the Reporter to prepare a memorandum on the advisability of proposing an amendment to Evidence Rule 801(d)(1)(B). The proposal was a suggestion by Judge Bullock, who then served as the Standing Committee's liaison to the Evidence Rules Committee. The Committee tabled the proposal as it was involved in other projects at the time. As the Committee now may have room on its agenda to consider previously tabled proposals, the Chair and the Reporter thought it appropriate to bring the proposed amendment to Rule 801(d)(1)(B) before the Committee at this time.

Judge Bullock proposed that Rule 801(d)(1)(B) be amended to provide that prior consistent statements are admissible under the hearsay exception whenever they would be admissible to rehabilitate the witness' credibility. The justification is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements.

This memorandum is in six parts. Part One sets forth Rule 801(d)(1)(B) and its application by the Supreme Court in *Tome v. United States*. Part Two discusses the potential practical problems caused by a distinction between prior consistent statements admissible under the hearsay exemption and consistent statements admissible only to rehabilitate a witness's credibility. Part Three discusses the case law on the subject. Part Four sets forth pertinent state law variations on Rule 801(d)(1)(B). Part Five discusses the arguments in favor of and against an amendment that would extend the hearsay exception to any consistent statement admissible for rehabilitation. Part Six sets forth a model for amending Rule 801(d)(1)(B) in accordance with Judge Bullock's suggestion, and a model Committee Note.

It is important to note that this memorandum does not necessarily advocate the adoption of an amendment to Rule 801(d)(1)(B). It is intended only to provide background to the Committee on the problems posed by the existing Rule. It is of course for the Committee to determine whether the high costs of an amendment are justified in this circumstance.

I. Background: Rule 801(d)(1)(B) and *Tome v. United States*

Rule 801(d)(1)(B), as restyled, reads as follows:

> **(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:
> >
> > * * *
> >
> > > **(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;

The original Advisory Committee Note to Rule 801(d)(1)(B) reads as follows:

> (B) Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.

Tome v. United States

At one time there was dispute among the courts about whether a statement can be admissible for its truth under Rule 801(d)(1)(B) when the witness is attacked for having a motive to falsify and the prior consistent statement was made *after* the motive to falsify arose. The Supreme Court resolved this dispute in *Tome v. United States*, 513 U.S. 150 (1995). The defendant in *Tome* was tried for sexual abuse of his young daughter. At trial the daughter implicated the defendant, basically by answering yes or no to a series of leading questions. On cross-examination defense counsel asked some questions that were designed to show that the daughter preferred living in her mother's neighborhood rather than where her father lived, and therefore the daughter might have had a motive to fabricate her accusations. The prosecution then called six witnesses, each of whom testified that the daughter had made statements to them accusing the defendant of sexual abuse. The Tenth Circuit

held that all of these statements were properly admitted for their truth under Rule 801(d)(1)(B).

The Tenth Circuit rejected Tome's argument that the girl's consistent statements should not have been admitted because they were made at a time when she had the desire to live with her mother, i.e., they were made subject to the same motive to falsify as existed at the time the witness testified. That Court was of the opinion that Rule 801(d)(1)(B) did not require that a statement predate the charged motive to fabricate before it can be admitted as a prior consistent statement.

The Supreme Court, in an opinion by Justice Kennedy for five Justices, held that a prior consistent statement is not admissible for its truth under Rule 801(d)(1)(B) unless the statement was made *before* the charged fabrication or improper influence or motive arose. Because of this temporal limitation, the daughter's consistent statements in *Tome* could not be admitted as proof that the defendant abused her.

Justice Kennedy relied heavily on the common-law rule, under which prior consistent statements were not admissible to rebut a charge of recent fabrication or improper motive unless they were made before the fabrication or motive to falsify arose. According to Justice Kennedy, the drafters of the Federal Rules intended to preserve the common-law "pre-motive" timing requirement. He based this conclusion on several factors: (1) the "somewhat peculiar language" of Rule 801(d)(1)(B) tracked the language concerning prior consistent statements in common-law cases, thus implying an intent to carry over the common-law timing rule; (2) the Notes by the Advisory Committee "disclose a purpose to adhere to the common law in the application of evidentiary principles, absent express provisions to the contrary" and there is no indication in the Notes of an intent to abrogate the common-law pre-motive requirement with respect to prior consistent statements; (3) the common-law courts uniformly adhered to the pre-motive requirement, and "with this state of unanimity confronting the drafters of the Federal Rules of Evidence, we think it unlikely that they intended to scuttle entirely [the common-law requirement]"; (4) imposing a pre-motive requirement on prior consistent statements was consistent with the Advisory Committee's generally cautious approach to prior consistent statements, or, as the Court put it, the Committee's "stated unwillingness to countenance the general use of prior prepared statements as substantive evidence."

It is odd that the *Tome* Court relied so heavily on the common law in finding a pre-motive requirement in Rule 801(d)(1)(B). The common-law rule concerned admissibility of prior consistent statements solely to rehabilitate the credibility of a witness. The common law did not provide that such statements could be admitted for their truth. So it is clear that the Advisory Committee *did* intend to change the common-law rule, in a rather fundamental way.

The Limited Coverage of the Current Rule 801(d)(1)(B)

The Rule states that only those prior consistent statements that are offered to rebut a charge of fabrication, motive, or influence can be used substantively — i.e., for the truth of the statement as opposed to rehabilitation of a witness' credibility. But many prior consistent statements could be

offered for other kinds of rebuttal, such as to explain an inconsistency or failure of memory. As Justice Scalia observed in his concurring opinion in *Tome*: "Only the premotive-statement limitation [in the existing rule] makes it rational to admit a prior corroborating statement to rebut a charge of recent fabrication or improper motive, but not to rebut a charge that the witness' memory is playing tricks."

In sum, Rule 801(d)(1)(B) grants substantive admissibility to certain prior consistent statements and not others. Only those statements that are made in rebuttal to a charge that the witness has a motive to fabricate testimony are admissible as substantive evidence under the Rule; and only those statements that predate the motive qualify, because statements that are made after the motive arose do not rebut the attack on the witness's credibility.

II. The Problem of Distinguishing Between Substantive and Rehabilitative Use of Prior Consistent Statements

The Court in *Tome* did not hold that the pre-motive requirement must always be satisfied before prior consistent statements may even be heard by the factfinder. Case law indicates that prior consistent statements can be introduced for *credibility* purposes, to rehabilitate a witness, whenever they are responsive to an attack on the credibility of a witness. One such situation is where the consistent statement is offered to explain or to clarify an inconsistent statement introduced by the adversary. *See, e.g., United States v. Brennan*, 798 F.2d 581 (2d Cir. 1986) (prior statement was not admissible to rebut a charge of improper motive, but it was admissible to clarify an inconsistency: "prior consistent statements may be admissible for rehabilitation even if not admissible under Rule 801(d)(1)(B)"). If the witness claims, for example, that the apparently inconsistent statement was taken out of context, he can explain the context, and this explanation may include the introduction of statements consistent with his testimony. If offered on credibility, the hearsay rule is no bar to the statement. The evidence is relevant under Rule 401 and admissible under Rule 402 to rehabilitate the witness's credibility. *See United States v. Parodi,* 703 F.2d 768 (4th Cir. 1983) ("proof of prior consistent statements of a witness whose testimony has been allegedly impeached may be admitted to corroborate his credibility whether under Rule 801(d)(1)(B) or under traditional federal rules, irrespective of whether there was a motive to fabricate."). As the Court stated in *United States v. Harris*, 761 F.2d 394 (7th Cir. 1985), the general principle set forth in Rule 801(d)(1)(B) — i.e., "the motive to fabricate must not have existed at the time the statements were made or they are inadmissible" — "need not be met to admit into evidence prior consistent statements which are offered solely to rehabilitate a witness rather than as evidence of the matters asserted in those statements."

However, to be admitted *substantively*, in the absence of some other hearsay exception, a prior consistent statement must be relevant to rebut a charge of recent fabrication or improper

influence or motive and must (under *Tome*) have been made before the motive to fabricate arose. *See, e.g., United States v. Awon,* 135 F.3d 96 (1st Cir. 1998) (error to admit statements under Rule 801(d)(1)(B); prosecution witnesses were attacked on the ground that they were seeking leniency, and the prior statements were made only after the witnesses were informed that the police knew they were involved in criminal activity and could benefit themselves by cooperating; therefore the consistent statements were made after the motive to falsify arose). Where a consistent statement is admissible for rehabilitative purposes such as to explain an inconsistency, and yet is not admissible as substantive evidence under Rule 801(d)(1)(B), the adversary is entitled to a limiting instruction as to the appropriate use of the evidence. *See, e.g., United States v. Castillo,* 14 F.3d 802 (2d Cir. 1994) (a prior consistent statement can be offered to rehabilitate the witness's credibility even though it is not admissible under Rule 801(d)(1)(B); however, a limiting instruction must be given and the prosecutor cannot abrogate "the court's limiting instructions by improperly arguing the truth of the hearsay testimony" during opening and closing arguments).

There are two basic practical problems in the distinction between substantive and credibility use as applied to prior consistent statements. First, as Judge Bullock noted, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. *See, e.g., United States v. Simonelli,* 237 F.3d 19, 27 (1st Cir. 2001) ("[T]he line between substantive use of prior statements and their use to buttress credibility on rehabilitation is one which lawyers and judges draw but which may well be meaningless to jurors."). Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement adds no real substantive effect to the proponent's case. This is in contrast to prior *inconsistent* statements under Rule 801(d)(1)(A), where the prior statement can have an important substantive effect as it by definition does not duplicate the witness's trial testimony.[1]

An example of the lack of practical effect in the Rule 801(d)(1)(B) substantive/credibility distinction is *United States v. White,* 11 F.3d 1446 (8th Cir. 1993). Prior consistent statements were offered not to rebut a charge of improper motive, but to explain away an apparent inconsistency. The court noted that the rehabilitative statements "were admissible when accompanied by a limiting instruction," but they were not admissible for their truth under Rule 801(d)(1)(B) because they did not precede any motive that the witness might have had to fabricate his trial testimony. So the court held that the trial court erred in admitting the statements without a limiting instruction. But the error

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[1]. It bears noting that the distinction between impeachment and substantive evidence for prior inconsistent statements is that those admitted substantively are made under oath at a formal proceeding, and so are thought to be more reliable. (Congress added this limitation, changing the Advisory Committee's original proposal that all prior inconsistent statements could be admitted substantively). In contrast, there is no reliability-based distinction between prior consistent statements that are admissible substantively and those that are admissible solely for the purpose of assessing credibility. The distinction is based on the purpose behind the rehabilitation but there is no policy reason for preferring one purpose over another.

was by definition harmless because the prior consistent statements were "duplicative" of the witness's testimony at trial. Thus, as Judge Bullock points out in an article on the subject, distinctions between substantive and nonsubstantive use of prior consistent statements "are normally distinctions without practical meaning." Frank W. Bullock, Jr. & Steven Gardner, *Prior Consistent Statements and the Premotive Rule,* 24 Fla. St. U. L. Rev. 509, 540 (1997). *See also* This is why Judge Bullock advocates that "the Federal Rules should explicitly provide that all prior consistent statements, when admissible to rehabilitate, are admissible as substantive evidence." Id.

III. Case Law on the Substantive/Non-Substantive Distinction of Rule 801(d)(1)(B)

Most courts have held that if a prior consistent statement is probative to rehabilitate the credibility of a witness, it need not satisfy the pre-motive requirement of Rule 801(d)(1)(B)–that is, while Rule 801(d)(1)(B) controls whether a prior consistent statement is admissible for its truth, it does not govern admissibility of a consistent statement when offered solely to rehabilitate the witness. There is, however, some apparently conflicting case law holding that a prior consistent statement must be admissible under Rule 801(d)(1)(B) or not at all. Thus, an amendment to the Rule could be justified at least in part by the need to unify the case law.

Cases from the circuits are summarized in this section:

D.C. Circuit:

United States v. Stover, 329 F.3d 859 (D.C. Cir. 2003): The Court affirmed four defendants' drug-related convictions. It held that the Trial Judge properly admitted prior statements by a witness to the FBI on redirect examination after the witness was cross-examined concerning an inconsistency between the witness's trial testimony and one statement he made to the FBI. Thus, the statement was offered to explain an inconsistency, not to rebut a charge of recent fabrication or improper motive. The Court concluded that consistent statements not offered for their truth are not governed by Rule 801 (d)(1)(B) and the timing rule adopted by the Supreme Court in *Tome*. The Court reasoned as follows:

> [S]tatements may be introduced for reasons other than their truth. Suppose a witness testifies on direct examination to fact X and then on cross-examination is asked about his statement, made sometime before trial, suggesting that he believed not-X. Could the party who called the witness ask him to verify his prior consistent statements even though the witness made them after he had a motive to shade the truth? We think the answer is yes, and so do other courts of appeals. *See United States v. Simonelli,* 237 F.3d 19, 26-27 (1st Cir. 2001); *United States v. Ellis,* 121 F.3d 908 (4th Cir. 1997); *United States v. Pierre,* 781 F.2d 329, 331-33 (2d Cir. 1986); *United States v. Harris,* 761 F.2d 394, 399-400 (7th Cir. 1985). * * * These

prior statements would not be offered for the truth of the matter asserted - fact X - and therefore would not need to satisfy Rule 801(d)(1)(B). They would be introduced to show that the witness did not give statements on direct that were inconsistent with what he had said before. * * * The prior statements would be admissible on this basis because of the cross-examination. They would be relevant, under Fed.R.Evid. 401, to a matter of consequence – namely, that the witness made inconsistent statements about fact X, which would tend to undermine his credibility. * * *

Here, the only prior statements the Government introduced on redirect that clarified an apparent inconsistency were those concerning whether Ouaffai knew drug dealers other than Harrison. These statements were properly admitted (though not on the ground the District Court recited). The rest of Ouaffai's prior statements were not targeted at rebutting the inconsistencies probed during cross-examination, but served only to show that most of Ouaffai's testimony on direct examination was consistent with his earlier statements. It thus was error to admit them. See FED. R. EVID. 402.

Thus, the Court found that Rule 401 permits relevant rehabilitation but that some statements were not relevant to rebut inconsistencies. It held that the error in admitting the irrelevant statements was harmless.

First Circuit

United States v. Simonelli, 237 F.3d 19, 27 (1st Cir. 2001). The Court notes that "the line between substantive use of prior statements and their use to buttress credibility on rehabilitation is one which lawyers and judges draw but which may well be meaningless to jurors." The Court joined "the majority view" that "where prior consistent statements are not offered for their truth but for the limited purpose of rehabilitation, Rule 801(d)(1)(B) and its concomitant restrictions do not apply. When the prior statements are offered for credibility, the question is not governed by Rule 801." The Court held that prior grand jury statements of the witness were properly admitted in part for completeness and to explain inconsistencies. However, much of the grand jury testimony was erroneously admitted, because it was "not really for rehabilitation." Rather, the government "was just presenting again the testimony it presented on direct, this time through the testimony about statements to the grand jury."

However, the court found the improperly admitted consistent statements were harmless error: "The evidence was cumulative and the line between what was useful for completeness and what went beyond is a judgment call. At most the evidence was an extra helpiing of what the jury had heard before."

Second Circuit

United States v. Pierre, 781 F.2d 329, 333 (2d Cir. 1986): Prior consistent statements were properly admitted to explain an apparent inconsistency. As rehabilitation evidence, it did not have to meet the requirements of Rule 801(d)(1)(B).

United States v. Al-Moayad, 545 F.3d 139 (2d Cir. 2008): The court found error in admitting an informant's hand-written notes purporting to memorialize the contents of his initial meeting with an FBI agent. They were offered as the informant's prior consistent statements, but they were not properly admitted because they were not made before the informant's motive to falsify arose. The Court added that the notes would probably have been inadmissible even for the limited purpose of rehabilitating the witness's credibility, because the defendants did not impeach the witness with prior inconsistent statements and the notes had no rebutting force beyond the mere fact that the witness had repeated on a prior occasion a statement consistent with his trial testimony.

Third Circuit

United States v. Casoni, 950 F.2d 893, 905-6 (3d Cir. 1991): The court holds that where prior consistent statements are not offered for their truth but for the limited purpose of rehabilitation, Rule 801(d)(1)(B) does not apply.

Fourth Circuit

United States v. Mohr, 318 F.3d 613, 626 (4th Cir. 2003): A government witness was cross-examined extensively about a written statement he had made. On redirect he was permitted to read portions of the written statement that were consistent with his in-court testimony. The defendant argued that Rule 801(d)(1)(B) was violated because the written statement was prepared after the witness had a motive to lie. But the Court noted:

> The flaw in this argument is, as we explained in *United States v. Ellis,* 121 F.3d 908 (4th Cir. 1997), that Rule 801(d)(1)(B) is not "the only possible avenue for admitting" prior consistent statements.

In this case, the prior consistent statements were found properly admitted under the doctrine of completeness. Defense counsel used only a portion of the statement for cross-examination, and thereby created a misleading impression that justified rebuttal with consistent parts of the statement.

Sixth Circuit

United States v. Denton, 246 F.3d 784 (6th Cir. 2001): Consistent statements were offered to rebut the contention that certain prior statements of the witness were inconsistent with her in-court testimony. Because the consistent statements were offered to rehabilitate the witness and not for their truth, there was no need to comply with the requirements of Rule 801(d)(1)(B).

Seventh Circuit

United States v. Harris, 761 F.2d 394 (7th Cir. 1985): The court holds that the requirements of Rule 801(d)(1)(B) "need not be met to admit into evidence prior consistent statements which are offered solely to rehabilitate a witness rather than as evidence of the matters asserted in those statements."

Eighth Circuit

United States v. Bowman, 798 F.2d 333 (8th Cir. 1986): The Court found that it was error to admit consistent statements of a cooperating witness under Rule 801(d)(1)(B), because they were made during plea bargaining and thus after a motive to falsify arose. However, the consistent statements were in the end properly admitted, albeit for the wrong reasons, because "the statements were admissible for the purpose of rehabilitating the witness, even if not admissible for the truth of the matters asserted in those statements."

United States v. Hoover, 543 F.3d 448 (8th Cir. 2008): Prior consistent statements were properly admitted not under Rule 801(d)(1)(B), but to show that there was really no inconsistency between certain of the witness's prior statements and his trial testimony. The jury was properly instructed that the statements could only be used to evaluate the witness's credibility, insofar as they might explain the alleged inconsistencies.

Ninth Circuit

Unlike the other circuits, the Ninth Circuit holds that a prior consistent statement must be admissible under Rule 801(d)(1)(B) (and its premotive requirement) or not at all. Thus, in *United States v. Beltran,* 165 F.3d 1266 (9th Cir. 1999), the court held that it was error to instruct the jury that a prior consistent statement may be used solely for credibility. Judge Kozinski, concurring, noted that such an instruction is essentially worthless:

The court here instructed the jurors to use the boy's prior consistent statements solely to evaluate his credibility. However, if they concluded the boy was telling the truth at trial, they also must have concluded that the substance of his statements - that Beltran gave him the heroin - was true as well. The credibility/substance distinction is illusory in this context.

In *United States v. Miller*, 874 F.2d 1255, 1272-73 (9th Cir.1989), the Court held specifically that a prior consistent statement must be admissible under the requirements of Rule 801(d)(1)(B) or not at all. The Court reasoned as follows:

Svetlana testified that she and Miller attempted to penetrate the KGB on behalf of the FBI. After the government had used the sidebar to impeach Svetlana's testimony that Miller had never shown nor given her a classified document, Miller sought to introduce seven prior statements of Svetlana to rehabilitate her.

Federal Rule of Evidence 801(d)(1)(B) provides that prior statements are admissible if they are (1) consistent with a witness' trial testimony and (2) offered to rebut a charge of recent fabrication or improper influence or motive. In this circuit, rehabilitative prior statements are admissible as substantive evidence under Rule 801(d)(1)(B) only if they were made before the witness had a motive to fabricate. *Breneman*, 799 F.2d at 473; *United States v. Rohrer*, 708 F.2d 429, 433 & n. 4 (9th Cir. 1983); *United States v. Rodriguez*, 452 F.2d 1146, 1148 (9th Cir. 1972). The district court refused to admit Svetlana's prior statements because they were all made after her arrest, a time when she clearly had a motive to fabricate. Miller argues that this decision was incorrect because, even if the statements were inadmissible as *substantive* evidence under Rule 801(d)(1)(B), they should have been admitted for the limited purpose of rehabilitating the witness' impeached credibility. When introduced for that limited purpose, argues Miller, the statements are not hearsay because they are not being offered for the truth of the matter asserted. The government responds by arguing that the requirement of no motive to fabricate applies regardless of whether the statements are being introduced only for a limited purpose.

We begin by noting that at least two circuits have indeed held that the requirement that there be no motive to fabricate does not apply when the prior consistent statement has been offered solely for rehabilitation and not as substantive evidence. *See United States v. Brennan*, 798 F.2d 581, 587-88 (2d Cir. 1986); *United States v. Harris*, 761 F.2d 394, 398-400 (7th Cir. 1985). In order to decide whether we will follow this rule, we must first examine both the purpose of the requirement that there be no motive to fabricate and the nature of the requirement.

* * *

We reject the distinction drawn in both *Harris* and *Brennan*. We do so for two reasons. First, since the requirement of no prior motive to fabricate is rooted in Rules 402 and 403, and not in the terms of Rule 801(d)(1)(B), there is no basis for limiting the requirement to cases involving prior statements under Rule 801(d)(1)(B). Indeed, we fail to see how a statement that has no probative value in rebutting a charge of "recent fabrication or improper influence or motive," *see* Fed.R.Evid. 801(d)(1)(B), could possibly have probative value for the assertedly more "limited" purpose of rehabilitating a witness. If

"repetition does not imply veracity," *see Harris*, 761 F.2d at 399, then proof of repetition cannot rehabilitate.

Second, the distinction drawn by *Harris* and *Brennan* is inconsistent with the legislative history of Rule 801(d)(1)(B). Prior to the adoption of Rule 801(d)(1)(B), prior consistent statements were traditionally only admissible for the limited purpose of rebutting a charge of recent fabrication or improper influence or motive. *See* Fed.R.Evid. 801(d)(1)(B) advisory committee's notes. The Rule goes one step further than the common law and admits all such statements as substantive evidence. The Rule thus does not change the type of statements that may be admitted; its only effect is to admit these statements as *substantive* evidence rather than solely for the purpose of rehabilitation. Accordingly, it no longer makes sense to speak of a prior consistent statement as being offered solely for the more limited purpose of rehabilitating a witness; any such statement is admissible as *substantive* evidence under Rule 801(d)(1)(B). In short, a prior consistent statement offered for rehabilitation is either admissible under Rule 801(d)(1)(B) or it is not admissible at all. The distinction drawn by *Brennan* and *Harris* is therefore untenable.

* * *

The Court in *Miller* seems to reject the proposition that a prior consistent statement could be used to rehabilitate credibility for purposes other than rebutting a charge of bad motive or recent fabrication. But a simple hypothetical can show that the court's position in *Miller* is too limited. Assume a witness who testifies that he saw the defendant murder the victim in a drive-by, gang-related shooting. On cross-examination, he is impeached with a prior inconsistent statement, i.e., that when interviewed by the police shortly after the murder, he told the police that he saw nothing. On redirect, he explains that when he was approached by the police, he was afraid to get involved due to the nature of the crime. But when he talked it over with his wife later that week, he decided that he would "do the right thing" and testify against the defendant. The conversation between the witness and his wife involves a prior consistent statement. It is not offered to rebut a charge of recent fabrication or bad motive because the witness is not being so charged. Rather, it is being offered to explain an inconsistency–a purpose apparently not covered by Rule 801(d)(1)(B). Thus, the Court in *Miller* appears wrong in its premise, i.e., that prior consistent statements are only probative to rehabilitate a witness when they address a charge of recent fabrication or improper motive.

But the Court in *Miller* confusingly softened its disagreement with the majority view by taking an expansive view of the term "recent fabrication". The court elaborated as follows:

This does not imply that we disagree with the result in either *Brennan* or *Harris*. Although we do not believe that prior consistent statements may be admitted for rehabilitation apart from Rule 801(d)(1)(B), we do not agree with the very strict manner in which those cases apply the requirement of no motive to fabricate. Indeed, the *Harris* and *Brennan* courts seem to have created an end run around Rule 801(d)(1)(B) in order to blunt

the apparent harshness of the requirement. For example, in *Brennan*, the Second Circuit first concluded that the prior consistent statements made by a government witness (Mr. Bruno) before a grand jury were inadmissible under Rule 801(d)(1)(B) because Mr. Bruno's fear of prosecution gave him a reason to fabricate. The court then went on to conclude, however, that the statements were admissible for the limited purpose of rehabilitation. Bruno had been impeached with other statements he made during his grand jury testimony, and the court therefore concluded that the consistent statements were admissible because they helped to "amplif[y] and clarif[y]" the alleged inconsistent statements, and because they helped to "cast doubt . . . on whether the impeaching statement[s] [were] really inconsistent with the trial testimony." 798 F.2d at 589. *See also Harris*, 761 F.2d at 400 (despite presence of motive to fabricate, which barred admission under Rule 801(d)(1)(B), government was permitted to rehabilitate witness with consistent statements made during same interview as allegedly inconsistent ones; statements were relevant to "whether the impeaching statements really were inconsistent within the context of the interview"); *United States v. Pierre*, 781 F.2d 329, 333 (2d Cir. 1986) (prior consistent statement that is inadmissible as substantive evidence under Rule 801(d)(1)(B) is admissible for limited purpose of rehabilitation where it "tends to cast doubt on whether the prior inconsistent statement was made or on whether the impeaching statement is really inconsistent with the trial testimony" or where it "will amplify or clarify the allegedly inconsistent statement.").

We believe that these cases interpret the requirement of no motive to fabricate too strictly. The requirement should not be applied as a rigid *per se* rule barring all such prior consistent statements under Rule 801(d)(1)(B), without regard to other surrounding circumstances that may give them significant probative value. Indeed, our conclusion that the requirement emerges from the relevancy concerns of Rules 402 and 403 implies that trial judges should consider motivation to fabricate as simply one of several factors to be considered in determining relevancy-albeit a very crucial factor. Thus, the trial judge must evaluate whether, in light of the potentially powerful motive to fabricate, the prior consistent statement has significant "probative force bearing on credibility apart from mere repetition." *Pierre*, 781 F.2d at 333. This determination rests in the trial judge's sound discretion.

The meaning of the above passage is unclear. It could mean that the Ninth Circuit will admit as substantive evidence all of the consistent statements that other courts find admissible for rehabilitation only. In other words, statements that rebut a charge of inconsistency (as opposed to a motive to fabricate) are admissible *as substantive evidence* because of the court's expansive construction of the term "motive to fabricate." This construction is indicated by the court's statement that the prior consistent statements were not admissible *under Rule 801(d)(1)(A)* because "Svetlana's prior statements in no way help to explain or amplify the inconsistent statement with which she was impeached."

The difference, then, between the Ninth Circuit's view and the majority view appears to be that the statements admissible only for rehabilitation under the majority view appear to be admissible *for their substantive effect* under Ninth Circuit precedent. This is because of the Ninth Circuit's unjustifiably broad construction of the term "recent fabrication or improper influence or motive."

The Ninth Circuit appears to construe this language to mean, "whenever the consistent statement is relevant to rehabilitate the witness."

In subsequent cases, the Ninth Circuit has appeared to backtrack from its statement in *Miller* that a prior consistent statement must be admissible under Rule 801(d)(1)(B) or not at all. See *United States v. Collicott,* 92 F.2d 973 (9th Cir. 1996) (noting that prior consistent statements can be admissible outside of Rule 801(d)(1)(B) if the adversary "opens the door" and the consistent statements are necessary to place the adversary's impeachment in proper context).

Eleventh Circuit

United States v. Paradies, 98 F.3d 1266 (1th Cir. 1996) (consistent statement not admissible under Rule 801(d)(1)(B) because it was made after the witness's motive to falsify arose; however it was admissible for rehabilitation purposes).

Conclusion on the Case Law

Whether there is a "conflict" in the case law construction of Rule 801(d)(1)(B) depends on what the Ninth Circuit is really saying when it says that "a prior consistent statement is admissible under Rule 801(d)(1)(B) or not at all." This broad statement must be tempered by the Ninth Circuit's broad construction of the Rule to permit admission of consistent statements under a type of totality of circumstances approach that appears to boil down to whether the statement is probative to rehabilitate the witness–which is the same analysis that other courts use to admit statements that they say are *not* covered by Rule 801(d)(1)(B).

This difference in analysis may not create a difference in result–prior consistent statements that are relevant to rebut impeachment other than for bad motive or recent fabrication apparently will be heard by the factfinder regardless of the circuit. But if the Ninth Circuit means what it implies in *Miller*, there will be a difference in procedure: courts in the Ninth Circuit should not give a limiting instruction that the prior consistent statement offered to explain an inconsistency or lack of memory is only admissible for credibility purposes. Courts in all of the other circuits with case law on the subject would give such an instruction.

What is more important than a conflict in procedure and analysis among the circuits, however, is the problematic distinction between use of a prior consistent statement for rehabilitation purposes rather than for its truth. This evanescent distinction is, as Judge Bullock points out, one that jurors are quite unlikely to appreciate. So the real question for the Committee is whether the costs of an amendment are justified by the benefits of eliminating this distinction as applied to prior

consistent statements. In the process, an amendment would also solve the analytical confusion or conflict in the courts about the scope of Rule 801(d)(1)(B) and the process for using such statements for rehabilitation outside the text of the Rule.

IV. State Law Variations

Hawaii

Hawaii Rule 802.1 provides that consistent statements of testifying witnesses are admissible if offered in compliance with Hawaii Evidence Rule 613(c). Rule 613(c) attempts to set forth all of the situations in which a prior consistent statement is probative to rehabilitate the witness's credibility. So Rule 802.1 basically means that if a prior consistent statement is admissible for rehabilitation under the Rules, it is also admissible for its truth.

Hawaii Rule 613(c) provides as follows:

Rule 613. Prior Statements of Witnesses

* * *

(c) Prior Consistent Statement of Witness. Evidence of a statement previously made by a witness that is consistent with the witness' testimony at the trial is admissible to support the witness' credibility only if it is offered after:

(1) Evidence of the witness' prior inconsistent statement has been admitted for the purpose of attacking the witness' credibility, and the consistent statement was made before the inconsistent statement; or

(2) An express or implied charge has been made that the witness' testimony at the trial is recently fabricated or is influenced by bias or other improper motive, and the consistent statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen; or

(3) The witness' credibility has been attacked at the trial by imputation or inaccurate memory, and the consistent statement was made when the event was recent and the witness' memory fresh.

Comment on Hawaii provisions:

The Hawaii drafters were trying to be helpful by placing prior consistent statements in two separate rules–one dealing with impeachment and one dealing with hearsay. A lawyer looking to determine whether prior consistent statements are admissible for rehabilitation would probably look first in Article Six, not in Article Eight. (Under the Federal Rules, there is no specific Rule covering prior consistent statements offered for rehabilitation. Admissibility is therefore governed by Rule 403).

The problem with the Hawaii structure is that it is difficult to define with specificity just when a prior consistent statement is probative to rehabilitate a witness. Hawaii Rule 613(c) is underinclusive in at least two respects. First, it does not cover situations in which a witness is impeached with a portion of a prior statement, and introduction of a consistent part of the statement is necessary to correct a misleading attack–what some courts refer to as the completeness principle and other courts refer to as "opening the door." Second, it requires that prior consistent statements offered in response to a prior inconsistent statement must have been made *before* the statement offered for impeachment. But it is clear that a consistent statement can explain away an apparent inconsistency even if it was made *after* the inconsistent statement. An example was given earlier in this memo of the witness who initially disclaims knowledge of a gang-related shooting due to fear, then changes his mind when he talks to his wife about it. Such a consistent statement would not be admissible under Hawaii Rule 613(b) (and therefore not admissible for its truth under Rule 802.1)–but it would be probative to rehabilitate the witness under Rule 403.

The bottom line is that it may make sense to provide a hearsay exception contiguous with rehabilitation (as Hawaii does), but it is problematic to try to define all of the ways in which a prior consistent statement may be admissible to rehabilitate a witness. It is arguably better to leave the question of admissibility for rehabilitation to the discretion of trial judges under Rule 403.

If the Committee decides, however, that the Hawaii structure is a useful one, then an amendment can be prepared accordingly–including a new subdivision (c) to Federal Rule 613.

Indiana

Indiana Rule 801(d)(1)(B) specifically provides that prior consistent statements are not admissible unless offered in response to a charge of recent fabrication or bad motive *"and made before the motive to fabricate arose"*;

Note: Montana, Oklahoma and South Carolina have substantively identical provisions.

Comment on Indiana Provision

Indiana codifies the pre-motive requirement found by the Court in *Tome.* While this is a useful addition, it seems quite unnecessary to add such a provision at the Federal level. *Tome* imposed the pre-motive requirement for all prior consistent statements offered under Rule

801(d)(1)(B), and none of the lower courts are in dispute about this point. Adding the Indiana provision to the Federal Rule would do nothing to solve the question of whether there should be a difference between statements offered under Rule 801(d)(1)(B) and those offered "solely for rehabilitation."

Minnesota

Minnesota Rule of Evidence 801(d)(1)(B) explicitly equates substantive use of prior consistent statements with their admissibility for rehabilitation, as advocated by Judge Bullock. Rule 801(d)(1)(B) provides that a statement is not hearsay if it is

> "consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility as a witness;"

Comment on Minnesota Provision

The Minnesota rule abolishes the problematic distinction between substantive and rehabilitation evidence as applied to prior consistent statements. Minnesota trial judges do not have to give an instruction that is all but impossible to follow. One possible problem, however, is that the rule provides for substantive admissibility whenever the testimony is "helpful" in evaluating the declarant's credibility. Presumably the term "helpful" means "relevant"– and if that is so, the term "relevant" would be preferred for consistency. But the more important problem is that a prior consistent statement should not be admissible automatically to rehabilitate the credibility of a witness whenever it passes the minimal threshold of relevance under Rule 401. There will be occasions, though presumably rare, in which the probative value of a consistent statement for evaluating credibility will be substantially outweighed by the risk of prejudice or confusion. Thus, prior consistent statements should be subject to the same Rule 403 balancing test that applies to all other evidence offered for purposes of credibility. In sum, if the Committee wishes to follow the Minnesota approach of equating rehabilitation with substantive admissibility, it should do so by incorporating Rule 403 rather than a simple relevance standard.

Pennsylvania

In Pennsylvania, prior consistent statements are admissible *only* for rehabilitation purposes. See Pa. R. Evid. 613. Pennsylvania Rule 613 provides that prior consistent statements are admissible to rehabilitate the witness if they are offered

(1) to rebut a charge of fabrication, bias, improper influence or motive, or faulty memory and the statement was made before that which has been charged existed or arose; or (2) having made a prior inconsistent statement, which the witness has denied or explained, and the consistent statement supports the witness' denial or explanation.

Comment on Pennsylvania Provision

The Pennsylvania provision solves the tension under the Federal Rules that arises because some prior consistent statements are admissible for their truth while others are admissible only for rehabilitation. But it does so by rejecting Federal Rule 801(d)(1)(B) entirely. And it requires a confusing limiting instruction to be given every time a prior consistent statement is admitted. This Committee would follow the Pennsylvania "solution" only if it desired to return to the common-law notion that prior consistent statements should never be admissible for their truth.

V. Advantages and Disadvantages of an Amendment to Rule 801(d)(1)(B)

A. Advantages

An amendment that would equate substantive admissibility with admissibility for rehabilitation would simplify the law and the practice with respect to prior consistent statements. It would end the difficulty of instructing the jury that a statement replicating the witness's testimony is not to be used as proof of the fact stated but only for purposes of assessing the witness's credibility. In reality, as Judge Kozinski observes, those two concepts cannot be separated when it comes to prior consistent statements. The jury must believe the prior statement to be true in order for it to be relevant to credibility.

Moreover, an amendment will eliminate a distinction that has no practical effect outside the jury box. At least with prior inconsistent statements, the distinction between substantive admissibility and use for impeachment has some practical effect. If a statement can be used only for credibility, it cannot be considered by the court in ruling on a motion for directed verdict or judgment n.o.v. . So if, for example, a prior inconsistent statement is admissible "for its truth" rather than solely for credibility, that can have a critical impact in close cases. There is no similar effect with prior consistent statements, because they by definition duplicate the substantive evidence that was already presented by the witness on the stand.

Finally, an amendment will rectify the analytical confusion at least within the Ninth Circuit as to whether prior consistent statements are admissible for rehabilitation other than under Rule 801(d)(1)(B). And it will eliminate an apparent conflict in practice between the Ninth and the other Circuits, concerning whether statements offered to explain an inconsistency or for completeness are admissible as substantive evidence.

It should be noted that Judge Bullock's suggested amendment does not mean that more prior consistent statements will be admitted than previously. It does not mean that witnesses would be able to carry all of their prior consistent statements into court and parade them before the factfinder. Rather, the amendment simply eliminates the distinction between substantive and rehabilitation use for consistent statement that are admissible under existing law.

B. Disadvantages

The disadvantages of an amendment of Rule 801(d)(1)(B) are mostly the same as are presented with any amendment — upsetting expectations and existing case law and creating traps for unwary lawyers who do not keep up with changes in the Federal Rules. But it could be argued that there is an additional disadvantage in the amendment of Rule 801(d)(1)(B) in particular. It would clearly change the specific ruling in *Tome*, because a pre-motive limitation would not apply to all statements admissible under an amended Rule 801(d)(1)(B).

An amendment to the language of Rule 801(d)(1)(B) could not be considered as *overruling Tome*, however. The *Tome* Court construed the language that it had before it. An amendment would not reject the construction of that language, but rather would substitute more expansive language that would eliminate the distinction between evidence admissible for substantive purposes and evidence admissible only for rehabilitation. The Court in *Tome* recognized that Congress could have enacted a more expansive Rule 801(d)(1)(B) to cover all prior consistent statements probative of rehabilitation–but the Court simply held that Congress did not do so. *See Tome,* 513 U.S. at 159.

On the other hand, the amendment would indeed expand the hearsay exception, and it could be argued that the majority in *Tome* was concerned about the expansive use of prior consistent statements as an exception to the hearsay rule. The majority at one point in the opinion addressed the government's arguments with the following concern:

> The case before us illustrates some of the important considerations supporting the Rule as we interpret it, especially in criminal cases. If the Rule were to permit the introduction of prior statements as substantive evidence to rebut every implicit charge that a witness' in-court testimony results from recent fabrication or improper influence or motive, the whole emphasis of the trial could shift to the out-of-court statements, not the in-court ones. The present case illustrates the point. In response to a rather weak charge that A.T.'s testimony was a fabrication created so the child could remain with her mother, the Government was permitted to present a parade of sympathetic and credible witnesses who did no more than recount A.T.'s detailed out-of-court statements to them. Although those statements might have been probative on the question whether the alleged conduct had occurred, they shed but minimal light on whether A.T. had the charged motive to fabricate. At closing argument before the jury, the Government placed great reliance on the prior statements for substantive purposes but did not once seek to use them to rebut the impact of the alleged motive.

513 U.S. at 165.

It is for the Committee to determine whether, in light of all of the above, the advantages outweigh the costs of an amendment to Rule 801(d)(1)(B). It should be noted, however, that the concerns expressed by the Court in *Tome* could be addressed by a court under Rule 403. See the draft Committee Note to the proposed amendment.

VI. Draft of Proposed Amendment To Evidence Rule 801(d)(1)(B)

What follows is a model draft of an amendment to Rule 801(d)(1)(B) that would provide for substantive admissibility of a prior consistent statement whenever the statement would be admissible to rehabilitate a witness. Because rehabilitation is governed by Rule 403, that standard is included explicitly in the text of the amendment.

(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:
>
> * * *
>
> **(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~~ admissible, subject to Rule 403, to rehabilitate the declarant's credibility as a witness;

Draft of Proposed Committee Note for Amendment to Rule 801(d)(1)(B)

Rule 801(d)(1)(B), as originally adopted, provided for substantive use of certain prior consistent statements of a witness subject to cross-examination. As the Advisory Committee noted, "[t]he prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally."

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not provide for admissibility of, for example, consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it include consistent statements that would be probative to rebut a charge of bad memory. Thus, the Rule left many prior consistent statements potentially admissible for the limited purpose of rehabilitating a witness's credibility, but not admissible

for their truth. *See, e.g., Tome v. United States,* 513 U.S. 150, 158-9 (1995) (noting that prior consistent statements that are probative to rebut a charge of bad memory might be admissible to rehabilitate the witness, but not for their truth). The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others held that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

The amendment provides that prior consistent statements are exempt from the hearsay rule whenever they are admissible under Rule 403 to rehabilitate the witness. *Compare* Minn.R.Evid. 801(d)(1)(B) (providing that a consistent statement is exempt from the hearsay rule when "helpful to the trier of fact in evaluating the declarant's credibility as a witness"). It extends the argument made in the original Advisory Committee Note to its logical conclusion. As commentators have stated, "[d]istinctions between the substantive and nonsubstantive use of prior consistent statements are normally distinctions without practical meaning," because "[j]uries have a very difficult time understanding an instruction about the difference between substantive and nonsubstantive use." Hon. Frank W. Bullock, Jr. and Steven Gardner, *Prior Consistent Statements and the Premotive Rule*, 24 Fla.St. L.Rev. 509, 540 (1997). *See also United States v. Simonelli,* 237 F.3d 19, 27 (1st Cir. 2001) ("the line between substantive use of prior statements and their use to buttress credibility on rehabilitation is one which lawyers and judges draw but which may well be meaningless to jurors").

[Prior consistent statements were not admissible under the original Rule 801(d)(1)(B) when they were made after the declarant's alleged motive to falsify arose. *Tome v. United States,* 513 U.S. 150 (1995). The Court in *Tome,* in finding a "premotive" requirement in the original Rule, relied heavily on the language of that Rule and on the fact that it appeared to track the common law, which had similarly imposed a premotive requirement. The amendment changes the focus of the Rule by equating rehabilitative and substantive use, and as such it rejects any rigid adherence to a premotive requirement. This is not to say, however, that a prior consistent statement offered to rebut a charge of improper motive is always admissible regardless of when it is made. The fact remains that a consistent statement postdating the witness's motive to falsify is rarely rehabilitative of the witness's credibility, because it is usually made under the same cloud of improper motive as the witness's testimony. *See Tome, supra,* 513 U.S. at 158 (distinguishing between the probative force of statements made before and after the witness's motive to falsify arose). Moreover, under Rule 403, the trial judge has the discretion to exclude prior consistent statements when their rehabilitative value is substantially outweighed by the risk that the jury will use the statements improperly. For example, where the charge of improper motive or influence is weak, a trial judge might well exclude a prior consistent statement, lest "the whole emphasis of the trial * * * shift to the out-of-court statements, not the in-court ones." *Tome, supra,*

513 U.S. at 163.][2]

[2]. Reporter's Note: This paragraph of the draft committee note was written at a time when the purpose of Committee Notes was to assist courts and counsel in applying the rule. The current policy is to make notes as short and accordingly as unhelpful as possible. So if the Committee does wish to proceed with this amendment, it may wish to consider deleting this paragraph.

Tab 5

Report on Possible Amendment to Rule 806

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Possible Amendment to Evidence Rule 806
Date: March 1, 2011

A number of years ago the Committee directed the Reporter to prepare a memorandum on the advisability of amending Evidence Rule 806, the Rule permitting impeachment of hearsay declarants under certain conditions. The proposed amendment was tabled in light of other pressing matters. Now that the restyling project is over, the Chair and the Reporter decided to present this memorandum to the Committee once again.

Rule 806 provides that if a hearsay statement is admitted under a hearsay exception or exemption, the opponent as a general rule may impeach the hearsay declarant to the same extent as if the declarant were testifying in court. The courts are in dispute, however, about whether a hearsay declarant's character for truthfulness may be impeached with prior bad acts under Rule 806. If the declarant were to testify at trial, he could be asked about pertinent bad acts, but no evidence of those acts could be proffered — Rule 608(b) prohibits extrinsic evidence of bad acts offered to impeach the witness's character for truthfulness. For hearsay declarants, however, ordinarily the only way to impeach with bad acts is to proffer extrinsic evidence, because the declarant is not on the stand to be asked about the acts. Rule 806 does not explicitly say that extrinsic evidence of bad acts is allowed. The result of this inspecificity in the Rule has led some courts to prohibit bad acts impeachment of hearsay declarants, while others permit it.

A second problem with the Rule is that under certain conditions a criminal defendant can be impeached with prior convictions even though he never takes the stand. This problem can arise in a multi-defendant case where one defendant's hearsay statement is offered to implicate a co-defendant, and the co-defendant responds with evidence impeaching the defendant's credibility.

This memorandum is divided into five parts. Part One sets forth the Rule, the Committee Note, and general commentary about the Rule. Part Two discusses the conflict in the case law over

whether a hearsay declarant may be impeached with extrinsic evidence of bad acts. Part Three discusses the problem of impeaching non-testifying criminal defendants. Part Four discusses the possible benefits and disadvantages of an amendment. Part Five sets forth a model for amending the Rule to provide specifically that extrinsic evidence of prior bad acts are admissible to impeach a hearsay declarant's character for truthfulness, subject to Rule 403; a variation on that model addresses the further problem of impeachment of non-testifying criminal defendants.

It is important to note that this memorandum does not necessarily advocate an amendment to Rule 806. It is provided to apprise the Committee of existing problems under the Rule. It is for the Committee to determine whether those problems are sufficiently grave to justify the steep costs of an amendment.

I. Rule, Note, and General Commentary

Rule 806 currently reads 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.[1]

The original Committee Note to the Rule reads as follows:

The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though

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[1]. The prior memorandum to the Committee also addressed a drafting glitch under the original Rule. That Rule referred to agency-statements as equivalent to hearsay in the first sentence of the Rule, but in the second and third sentences, the reference to "hearsay" was not so qualified. Specifically, the original rule read as follows:

> 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.

Emphases added.

That drafting ambiguity in the original is that it is unclear whether the last two sentences are applicable to agency-statements admitted under Rule 801(d)(2). That ambiguity was fixed in the restyling by referring to "the statement" — rather than "the hearsay statement" in the second and third sentence. Just another benefit from the restyling effort.

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he had in fact testified. See Rules 608 and 609. There are however, some special aspects of the impeaching of a hearsay declarant which require consideration. These special aspects center upon impeachment by inconsistent statement, arise from factual differences which exist between the use of hearsay and an actual witness and also between various kinds of hearsay, and involve the question of applying to declarants the general rule disallowing evidence of an inconsistent statement to impeach a witness unless he is afforded an opportunity to deny or explain. See Rule 613(b).

The principal difference between using hearsay and an actual witness is that the inconsistent statement will in the case of the witness almost inevitably of necessity in the nature of things be a *prior* statement, which it is entirely possible and feasible to call to his attention, while in the case of hearsay the inconsistent statement may well be a *subsequent* one, which practically precludes calling it to the attention of the declarant. The result of insisting upon observation of this impossible requirement in the hearsay situation is to deny the opponent, already barred from cross-examination, any benefit of this important technique of impeachment. The writers favor allowing the subsequent statement. McCormick § 37, p. 69; 3 Wigmore § 1033. The cases, however, are divided. Cases allowing the impeachment include People v. Collup, 27 Cal. 2d 829, 167 P.2d 714 (1946); People v. Rosoto, 58 Cal. 2d 304, 23 Cal. Rptr. 779, 373 P.2d 867 (1962); Carver v. United States, 164 U.S. 694, 17 S. Ct. 228, 41 L. Ed. 602 (1897). Contra, Mattox v. United States, 156 U.S. 237, 15 S. Ct. 337, 39 L. Ed. 409 (1895); People v. Hines, 284 N.Y. 93, 29 N.E.2d 483 (1940). The force of *Mattox*, where the hearsay was the former testimony of a deceased witness and the denial of use of a subsequent inconsistent statement was upheld, is much diminished by *Carver*, where the hearsay was a dying declaration and denial of use of a subsequent inconsistent statement resulted in reversal. The difference in the particular brand of hearsay seems unimportant when the inconsistent statement is a *subsequent* one. True, the opponent is not totally deprived of crossexamination when the hearsay is former testimony or a deposition but he is deprived of crossexamining on the statement or along lines suggested by it. Mr. Justice Shiras, with two justices joining him, dissented vigorously in *Mattox*.

When the impeaching statement was made *prior* to the hearsay statement, differences in the kinds of hearsay appear which arguably may justify differences in treatment. If the hearsay consisted of a simple statement by the witness, e.g., a dying declaration or a declaration against interest, the feasibility of affording him an opportunity to deny or explain encounters the same practical impossibility as where the statement is a subsequent one, just discussed, although here the impossibility arises from the total absence of anything resembling a hearing at which the matter could be put to him. The courts by a large majority have ruled in favor of allowing the statement to be used under these circumstances. McCormick § 37, p. 69; 3 Wigmore § 1033. If, however, the hearsay consists of former testimony or a deposition, the possibility of calling the prior statement to the attention of the witness or deponent is not ruled out, since the opportunity to cross-examine was available. It might thus be concluded that with former testimony or depositions the conventional foundation should be insisted upon. Most of the cases involve depositions, and Wigmore

describes them as divided. 3 Wigmore § 1031. Deposition procedures at best are cumbersome and expensive, and to require the laying of the foundation may impose an undue burden. Under the federal practice, there is no way of knowing with certainty at the time of taking a deposition whether it is merely for discovery or will ultimately end up in evidence. With respect to both former testimony and depositions the possibility exists that knowledge of the statement might not be acquired until after the time of the cross-examination. Moreover, the expanded admissibility of former testimony and depositions under Rule 804(b)(1) calls for a correspondingly expanded approach to impeachment. The rule dispenses with the requirement in all hearsay situations, which is readily administered and best calculated to lead to fair results.

Notice should be taken that Rule 26(f) of the Federal Rules of Civil Procedure, as originally submitted by the Advisory Committee, ended with the following: "... and, without having first called them to the deponent's attention, may show statements contradictory thereto made at any time by the deponent." This language did not appear in the rule as promulgated in December, 1937. See 4 Moore's Federal Practice §§ 26.01[9], 26.35 (2d ed. 1967). In 1951, Nebraska adopted a provision strongly resembling the one stricken from the federal rule: "Any party may impeach any adverse deponent by self-contradiction without having laid foundation for such impeachment at the time such deposition was taken." R.S. Neb. § 251267.07.

For similar provisions, see Uniform Rule 65; California Evidence Code § 1202; Kansas Code of Civil Procedure § 60462; New Jersey Evidence Rule 65.

The provision for cross-examination of a declarant upon his hearsay statement is a corollary of general principles of cross-examination. A similar provision is found in California Evidence Code § 1203.

General Commentary

If a hearsay statement is introduced into evidence because it qualifies as an exception to the hearsay rule, it is being introduced for its truth. This makes the credibility of the hearsay declarant important. The hearsay declarant's statements are the equivalent of trial testimony. For this reason, Rule 806 provides that the credibility of the hearsay declarant generally can be attacked and supported just as if the declarant is on the stand testifying. In other words, the ways in which a witness can be impeached and rehabilitated should also be the ways in which a hearsay declarant can be impeached and rehabilitated.

If a declarant's statement is not being offered for its truth, then it is not hearsay, and impeachment of the declarant is not permitted under Rule 806. This makes sense, because if the

statement is not offered for its truth, there is no concern about the credibility of the declarant, and so there is no need for evidence on that subject.

Two hypothetical situations can help to illustrate the different posture in which impeachment of a witness testifying at trial and impeachment of a hearsay declarant often take place. If a witness *W* is available to testify at trial, he takes the stand and tells his story. Under Rule 613, no foundation need be laid prior to the introduction of *W*'s inconsistent statement, but at some point *W* must be given a chance to explain. Since *W* is present at trial, any statement that is introduced to impeach will have been made prior to trial.

If, however, *W* is unavailable at trial or is not called to testify, and in place of live testimony a statement by *W* is introduced because it satisfies a hearsay exception or exemption, e.g., it is a declaration against interest, Rule 806 provides that *W* may still be impeached. Impeachment occurs when a statement inconsistent with the hearsay declaration is introduced. This statement may well have been made *after* the hearsay statement that qualifies as an exception or exemption. Circumstances make it impossible to require that a foundation be laid when the statement qualifying as an exception or exemption is made, because the party wishing to impeach is often not present, and even if present, may have no idea that a trial will result and that a future inconsistent statement will be made. Accordingly, Rule 806 makes a special provision for impeachment with inconsistent statements or conduct. It dispenses with the foundation requirement that applies to such impeachment with trial witnesses. No opportunity to explain or deny the statement need be provided to a hearsay declarant.

The goal of Rule 806 is straightforward: to allow an adversary to impeach a hearsay declarant as if the declarant were testifying at trial. The problem with the Rule is one of execution. Many of the rules and methods governing impeachment of trial witnesses are dependent on the presence of the witness who is being impeached. Where that witness is a hearsay declarant, some adjustments must be made. It seems fair to state that Rule 806, as drafted, has not done a very good job of making all of the necessary adjustments. This memo focuses on two problems that can arise under the Rule, as shown in the case law.

II. Impeachment With Prior Bad Acts and the Extrinsic Evidence Limitation

Rule 608(b) restricts impeachment to questions addressed to a witness on the stand and limits the examiner to the witness's answers; that Rule precludes extrinsic evidence of specific acts offered to impeach the witness's character for truthfulness. It can therefore be argued that using extrinsic evidence of a specific act of a hearsay declarant who is not present to testify is equally impermissible. In one sense, this would mean that impeaching hearsay declarants would be subject to the same bar as is applied to impeaching trial witnesses. On closer inspection, however, there is no equality of impeachment if the Rule 608(b) limitation on extrinsic evidence applies to impeachment of hearsay declarants. If the attacking party cannot impeach the declarant with specific instances of conduct, she is clearly worse off than she would have been if her opponent had called the declarant to testify: if the witness were testifying, the attacking party would at least be allowed to *ask* the witness about the prior bad act. She would have to take the witness's answer, but at least she could ask. In contrast, with a hearsay declaration, there is ordinarily nobody who can be asked about the witness's prior act of misconduct. The attacking party may luck out if there is a witness who testifies to the hearsay statement and that witness also happens to know something about the alleged bad act. But this would be only by chance. See *United States v. Washington,* 263 F.Supp.2d 413, 423 n.5 (D.Conn. 2003) ("Although . . . the tension between Rules 806 and 608(b) is somewhat alleviated where defense counsel can cross-examine the witness to the hearsay statement about the declarant's misconduct as it bears on the declarant's character for truthfulness or untruthfulness, no such consolation prize exists for defendants such as Washington, against whom hearsay statements are admitted into evidence through a witness who has never had any contact with or any knowledge of the declarant — here, an administrator who oversaw the 911 system in the city of New Haven.").

Professor Cordray points out another problem with imposing an extrinsic evidence limitation on impeachment of hearsay declarants: it could give rise to abusive practice. *See* Cordray, *Evidence Rule 806 and the Problem of the Nontestifying Declarant*, 56 OHIO STATE L.J. 495, 526 (1995):

> If the attacking party cannot impeach the declarant with specific instances of conduct, she is clearly worse off than she would have been if her opponent had called the declarant to testify. ... In addition, if Rule 806 is applied to enforce the prohibition on extrinsic evidence, parties might be encouraged to offer hearsay evidence rather than live testimony. For example, if a party felt that a witness was vulnerable to attack under Rule 608(b), that party might attempt to insulate the witness from this form of impeachment by offering his out-of-court statements, rather than calling him to testify. If, however, the attacking party were allowed to impeach a nontestifying declarant with extrinsic evidence of untruthful conduct, the incentive to use hearsay evidence would be removed. ... These considerations militate strongly in favor of modifying Rule 608(b)'s ban on extrinsic evidence when the attacking party seeks to impeach a nontestifying declarant with specific instances of conduct showing untruthfulness.

Conflict in the Courts

Rule 806 does not explicitly state whether the extrinsic evidence rule is applicable to impeachment of a hearsay declarant's character for truthfulness. The courts are in apparent conflict on the question.

The Second Circuit has taken the view that a hearsay declarant may be impeached with extrinsic evidence of bad acts, so long as the declarant could have been asked about the bad acts on cross-examination had he testified. In *United States v. Friedman,* 854 F.2d 535 (2d Cir. 1988), the defendant was on trial for racketeering, resulting from kickbacks in the New York City Parking Bureau. The court admitted numerous hearsay declarations of Donald Manes, a co-conspirator. The defendant in response offered evidence that Manes had lied to hospital personnel and pretended that he had been assaulted when he had actually attempted suicide. The extrinsic evidence was a videotape of Manes's own account of his attempted suicide and fabrication of an assault. The trial judge excluded the evidence. The court on appeal observed that the extrinsic evidence offered by the defendant would not have been barred by Rule 608(b), because Manes was unavailable and could not be cross-examined. In such cases, "resort to extrinsic evidence may be the only means of presenting such evidence to the jury." In this case, however, the Court found no error because the excluded evidence was not very probative of Manes's truthfulness, and it would have injected evidence of Manes' subsequent suicide into the case. As such, the extrinsic evidence was properly excluded under Rule 403. Thus, the *Friedman* Court took the position that the absolute exclusion of extrinsic evidence found in Rule 608(b) is not applicable when an adversary proffers bad act evidence to impeach a hearsay declarant's character for truthfulness. Rather, admissibility is controlled by Rule 403. *See also United States v. Washington,* 263 F.Supp.2d 413 (D.Conn. 2003) (treating *Friedman* as a holding, and ruling that extrinsic evidence of a hearsay declarant's prior bad act should have been admitted).

The D.C. Circuit in *United States v. White,* 116 F.3d 903 (D.C. Cir. 1997), came to a different result. In *White,* an undercover officer testified about a deceased declarant's hearsay statements. The defendant sought to ask the officer whether the declarant had ever made false statements on an employment application or had ever violated court orders. The trial court precluded the cross-examination, and the Court of Appeals affirmed. The Court declared that the extrinsic evidence limitation of Rule 608(b) applied to impeachment of hearsay declarants with prior bad acts under Rule 806. Because the witness did not know anything about the declarant's bad acts, the defendants would have had to present extrinsic evidence for the impeachment to be probative. The Court found no abuse of discretion in the ruling that cross-examination under these circumstances would be of little utility.

The *White* Court's ruling – that the Rule 608(b) preclusion of extrinsic evidence applied to bad acts offered to impeach a hearsay declarant – was not heavy on analysis. But the Third Circuit, in *United States v. Saada,* 212 F.3d 210, 221-22 (3d Cir. 2000), engaged in an extensive analysis of the Rule to conclude that extrinsic evidence may never be admitted to prove a bad act offered to impeach a hearsay declarant's character for truthfulness. In *Saada* the government impeached a

hearsay declarant whose statement was offered by the defense. The hearsay was admitted on the defendant's behalf under the excited utterance exception, and it appeared to indicate that a warehouse was flooded by accident rather than as an attempt to defraud an insurance company. The declarant was a judge. To attack the declarant's credibility, the government asked the court to take judicial notice of two New Jersey Supreme Court decisions ordering the declarant's removal from the bench and disbarment for unethical conduct, as well as the factual details supporting those decisions, which reflected his unethical conduct. The defendant objected, arguing that a hearsay declarant could not be impeached with extrinsic evidence of bad acts. The trial judge took judicial notice of the bad acts. The *Saada* Court found this to be error, reasoning that the language and structure of Rule 806 do not grant an exception to the preclusion of extrinsic evidence established in Rule 608(b). The Court's analysis is as follows:

> Appellants argue that if Yaccarino had testified, Rule 608(b) would have prevented the government from introducing extrinsic evidence of his unethical conduct, and would have limited the government to questioning him about that conduct on cross-examination. Thus, appellants argue, judicial notice of the evidence constituted improper impeachment of a hearsay declarant. The government correctly avers that it would have been allowed to inquire into Yaccarino's misconduct on cross-examination if he had testified at trial because Rule 806 allows a party against whom a hearsay statement is admitted to call the declarant as a witness and "to examine the declarant on the statement as if under cross-examination." Because Yaccarino's death foreclosed eliciting the facts of his misconduct in this manner, the government argues that it was entitled to introduce extrinsic evidence of his misconduct. In effect, the government argues that, read in concert, Rules 806 and 608(b) permit the introduction of extrinsic evidence of misconduct when a hearsay declarant is unavailable to testify.
>
> At the outset, we note that the issue of whether Rule 806 modifies Rule 608(b)'s ban on extrinsic evidence is a matter of first impression in this circuit, and a matter which the majority of our sister courts likewise has not yet addressed. Indeed, there are only two circuit court opinions construing the effect of Rule 806's intersection with Rule 608(b). Those cases are themselves in conflict. In *United States v. Friedman*, 854 F.2d 535 (2d Cir. 1988), the Second Circuit held that the trial court properly excluded impeachment evidence that a hearsay declarant had lied to the police because that evidence was not probative of the truthfulness of the hearsay statement there at issue. In doing so, however, the court suggested that extrinsic evidence of such misconduct would have been admissible had the misconduct been probative of truthfulness: "[Rule 608(b)] limits such evidence of 'specific instances' to cross-examination. Rule 806 applies, of course, when the declarant has not testified and there has by definition been no cross-examination, and resort to extrinsic evidence may be the only means of presenting such evidence to the jury." The Second Circuit's position in *Friedman* conflicts with the District of Columbia Circuit's more recent statement in *United States v. White*, 116 F.3d 903 (D.C. Cir. 1997). In that case, the district court had allowed defense counsel to cross-examine a police officer about a hearsay declarant's drug use, drug dealing, and prior convictions, but had not allowed defense counsel to impeach the declarant's

credibility by asking the officer whether the declarant had ever made false statements on an employment form or disobeyed a court order. The declarant was unavailable because he had been murdered. The court of appeals concluded that defense counsel should have been allowed to cross-examine the officer about the declarant's making false statements and disobeying a court order. In doing so, the court observed that defense counsel "could not have made reference to any extrinsic proof of those acts" during cross-examination. Thus, in contrast to the Second Circuit in *Friedman*, the D.C. Circuit in *White* took the position that the ban on extrinsic evidence of misconduct applies in the context of hearsay declarants, even when those declarants are unavailable to testify.

We agree with the approach taken by the court in *White*, and conclude that Rule 806 does not modify Rule 608(b)'s ban on extrinsic evidence of prior bad acts in the context of hearsay declarants, even when those declarants are unavailable to testify. We perceive our holding to be dictated by the plain — albeit imperfectly meshed — language of Rules 806 and 608(b). As discussed, Rule 806 allows impeachment of a hearsay declarant only to the extent that impeachment would be permissible had the declarant testified as a witness, which, in the case of specific instances of misconduct, is limited to cross-examination under Rule 608(b). The asserted basis for declining to adhere to the clear thrust of these rules is that the only avenue for using information of prior bad acts to impeach the credibility of a witness — cross-examination — is closed if the hearsay declarant cannot be called to testify. We are unpersuaded by this rationale. First, the unavailability of the declarant will not always foreclose using prior misconduct as an impeachment tool because the witness testifying to the hearsay statement may be questioned about the declarant's misconduct — without reference to extrinsic evidence thereof — on cross-examination concerning knowledge of the declarant's character for truthfulness or untruthfulness. And, even if a hearsay declarant's credibility may not be impeached with evidence of prior misconduct, other avenues for impeaching the hearsay statement remain open. For example, the credibility of the hearsay declarant — and indeed that of the witness testifying to the hearsay statement — may be impeached with opinion and reputation evidence of character under Rule 608(a), evidence of criminal convictions under Rule 609, and evidence of prior inconsistent statements under Rule 613. The unavailability of one form of impeachment, under a specific set of circumstances, does not justify overriding the plain language of the Rules of Evidence.

The *Saada* Court relied on the special treatment given in Rule 806 to inconsistent statements, as creating an inference of congressional refusal to give similar dispensation to bad act impeachment:

We also read the language of Rule 806 implicitly to reject the asserted rationale for lifting the ban on extrinsic evidence. Rule 806 makes no allowance for the unavailability of a hearsay declarant in the context of impeachment by specific instances of misconduct, but makes such an allowance in the context of impeachment by prior inconsistent statements. Rule 613 requires that a witness be given the opportunity to admit or deny a prior inconsistent statement before extrinsic evidence of that statement may be introduced. If a hearsay declarant does not testify, however, this requirement will not usually be met. Rule

806 cures any problem over the admissibility of a non-testifying declarant's prior inconsistent statement by providing that evidence of the statement "is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain." See generally Fed. R. Evid. 806 advisory committee's notes. The fact that Rule 806 does not provide a comparable allowance for the unavailability of a hearsay declarant in the context of Rule 608(b)'s ban on extrinsic evidence indicates that the latter's ban on extrinsic evidence applies with equal force in the context of hearsay declarants.

The *Saada* Court noted the negative consequences of its construction of Rule 806:

> In reaching this conclusion, we are mindful of its consequences. Upholding the ban on extrinsic evidence in the case of a hearsay declarant may require the party against whom the hearsay statement was admitted to call the declarant to testify, even though it was the party's adversary who adduced the statement requiring impeachment in the first place. And, as here, where the declarant is unavailable to testify, the ban prevents using evidence of prior misconduct as a form of impeachment, unless the witness testifying to the hearsay has knowledge of the declarant's misconduct. See generally 4 Mueller & Kirkpatrick, Federal Evidence § 511 at 894 n.7 (2d ed. 1994); Margaret Meriwether Cordray, *Evidence Rule 806 and the Problem of Impeaching the Nontestifying Declarant*, 56 Ohio St. L.J. 495, 525-530 (1995). Nevertheless, these possible drawbacks may not override the language of Rules 806 and 608(b), and do not outweigh the reason for Rule 608(b)'s ban on extrinsic evidence in the first place, which is "to avoid minitrials on wholly collateral matters which tend to distract and confuse the jury . . . and to prevent unfair surprise arising from false allegations of improper conduct." *Carter v. Hewitt,* 617 F.2d 961, 971 (3d Cir. 1980).

The arguable problem with the reasoning in *Saada* is that it is inconsistent with the *intent* of Rule 806, which is to give the opponent of the hearsay the same leeway for impeachment as it would have if the declarant testified at trial. Under *Saada*, the opponent of the hearsay is put in a worse position with respect to bad acts of the hearsay declarant. The opponent could at least raise the bad acts on cross-examination if the declarant were to testify, whereas if the statement is introduced as hearsay it is unlikely that the jury will hear about the hearsay declarant's bad acts.

In sum, there is a clear conflict in the courts as to the relationship between Rules 806 and 608(b). Two circuits hold that Rule 608(b) governs impeachment of hearsay declarants as well as trial witnesses, while one circuit finds an implicit exception in Rule 806 to the extrinsic evidence requirement of Rule 608(b).

III. Impeachment of Non-Testifying Criminal Defendants

The admissibility of extrinsic evidence of bad acts is the major problem that the Committee considered in its decision to direct the Reporter to write a memo on the advisability of amending Rule 806. However, another problem has been raised in the application of the Rule — the possibility, as discussed in Professor Cordray's article, *supra*, that a non-testifying criminal defendant in a multi-defendant case could have his credibility impeached even though he never testifies.

It is standard trial practice for a defense lawyer and defendant, in deciding whether to testify, to consider the consequences of impeachment. Criminal defendants who exercise their constitutional right not to testify often do so in order to keep prejudicial information about their background away from the jury, where that information would be admissible to impeach the defendant's character for truthfulness. As Professor Cordray notes, however, Rule 806 by its terms creates a situation in which a criminal defendant might be impeached even though he never takes the stand.

The problem is illustrated by what happened to the defendant Finch in *United States v. Bovain,* 708 F.2d 606, 613-4 (11th Cir. 1983). Seven defendants were tried jointly for conspiracy. A witness testified about hearsay statements that Finch, a codefendant, had made about Rickett, another codefendant. These statements were admissible under the coconspirator exemption from the hearsay rule, Rule 801(d)(2)(E). Rickett then impeached Finch's credibility as a hearsay declarant by introducing Finch's prior convictions for theft and narcotics. Finch was thus impeached even though he never testified at trial. The Court of Appeals found this permissible. It noted as follows:

> [T]he result reached by the district court is straightforward and logical. Because Finch is a hearsay declarant, his testimony may be treated like that of a witness (Rule 806), and as a witness, he can be impeached (Rules 608, 609). Therefore, the certified records of Finch's prior convictions were admissible for impeachment purposes (Rule 609).
>
> The district court was careful to instruct the jury that evidence of Finch's convictions could be used to discredit the accuracy of his out-of-court statements, but that the prior crimes could not be considered as evidence of Finch's guilt on the charges contained in the indictment. In a conspiracy case, the trial judge has the difficult task of balancing the countervailing interests of all the codefendants. Decisions on the admissibility of evidence are committed to the sound discretion of the district court, and will not be overturned on appeal absent a clear abuse of that discretion. This situation was unusual in that both Rickett and Finch were defendants, but neither testified, and one sought to impeach the other during cross-examination of a third party. The trial judge evaluated the rights and interests at stake from many perspectives and ruled that the probative value of the evidence outweighed the risk of prejudice to Finch. Based on the applicable policy considerations and rules, the admission of the prior crimes evidence did not constitute an abuse of the court's discretion.

Professor Cordray considers the result in *Bovain* to be problematic because "the defendant who has done nothing to place his credibility in issue – indeed, has actively sought to keep it from

becoming an issue – loses the protection that silence normally affords him." She argues that this result is contrary to the policy of Rule 609, which is based on the principle that a criminal defendant should receive protection from prior convictions unless he "opens the door" by testifying and possibly trying to mislead the jury that he has led a "blameless life." She concludes as follows:

> For these reasons, Rule 806 should be amended to prevent introduction of a criminal defendant's prior convictions in these circumstances. More specifically, Rule 806 should be amended to provide that, if the declarant is the accused, then the declarant may be impeached with prior convictions only if he has affirmatively placed his credibility in issue.

With reference to placing credibility "in issue", Professor Cordray contrasts *Bovain* (where that did not occur), with *United States v. Lawson,* 608 F.2d 1129 (6th Cir. 1979). Lawson was charged with counterfeiting. Defense counsel cross-examined a government witness, who was a secret service agent, to bring out the fact that Lawson had consistently denied any involvement; counsel also introduced a written statement in which Lawson denied all complicity in the counterfeit activities. In response, the government introduced Lawson's conviction that would have been admissible under Rule 609 had he testified. The Court found no error: "By putting these hearsay statements before the jury his counsel made Lawson's credibility an issue in the case the same as if Lawson had made the statements from the witness stand." Therefore Rule 806 was applicable, and Lawson could be impeached as if he testified. Thus, by using the limitation– "only if he has affirmatively placed his credibility in issue"– Professor Cordray would distinguish cases like *Bovain*, where impeachment of the defendant/hearsay declarant would not be permitted, from cases like *Lawson* where under Rule 806 the defendant could be impeached as if he testified.

It is for the Committee to determine whether the problem raised by Professor Cordray is serious enough to be addressed in an amendment. *Bovain* appears to be the only reported case in which a defendant was impeached under Rule 806 even though he never testified and never tried to bring in any of his own exculpatory statements. In other cases, such as *Lawson* and *United States v. Noble,* 754 F.2d 1324 (7th Cir. 1985), the defendant's hearsay statements were admitted in the course of defense counsel's cross-examination of a government witness, and so the defendant was properly impeached as if he had testified at trial.

In *United States v. Robinson,* 783 F.2d 64, 67-8 (7th Cir. 1986), a situation arose similar to *Bovain*, but the trial court chose to solve it by refusing to allow the defendant to impeach the credibility of the codefendant whose hearsay statement was admitted against him. The Court found no error, holding that the trial court has discretion to use "the *Bovain* solution" or to refuse impeachment entirely. The amendment proposed by Professor Cordray would in effect preclude the *Bovain* solution and would mandate the result in *Robinson*, i.e., impeachment of the codefendant hearsay declarant would not be permitted where the declarant did nothing to introduce the statement.

It should be noted that the rights of *two* defendants are involved when the hearsay statement of one codefendant is admitted against another. The hearsay declarant has a complaint that he should not be impeached because he never chose to testify and did nothing to interject his credibility into

the trial. But the defendant against whom the hearsay is admitted also has a complaint that if he is not permitted to impeach the declarant's credibility, then he is deprived of evidence that is important to his defense. There is a constitutional underpinning to the rights of both defendants. The impeachment of the hearsay declarant/defendant is in some tension with the defendant's constitutional right to refuse to testify. On the other hand, the preclusion of impeachment is in tension with the other defendant's constitutional right to confront the witnesses against him. See *United States v. Burton*, 937 F.2d 324, 329 (7th Cir. 1991) (declaring that the Confrontation Clause can be violated if the defendant is prohibited from impeaching a hearsay declarant, but finding no plain error in prohibiting impeachment in this case).

IV. Benefits and Disadvantages of an Amendment to Rule 806

Benefits

One major benefit of an amendment to Rule 806 would be to resolve a conflict in the circuits over whether extrinsic evidence of prior bad acts are admissible to impeach a hearsay declarant who is not testifying at trial. This conflict has arisen because a literal interpretation of the Rule is in conflict with the intent of the Rule. The intent of the Rule is to allow an adversary to use any form of impeachment of a hearsay declarant as could be used if the declarant were to testify at trial. But a literal interpretation of the Rule would prohibit the use of extrinsic evidence of bad acts (because no special dispensation is made for such evidence in Rule 806), thus making it impossible in most cases to impeach a hearsay declarant with bad acts. Given the importance and value attached to impeachment of hearsay declarants (see, e.g., *United States v. Inadi,* 475 U.S. 387 (1986) (noting the importance of impeachment of hearsay declarants whose statements are offered against a criminal defendant, citing Rule 806)) this deficiency in the literal text of the Rule seems unjustified. Thus, an amendment to Rule 806 dispensing with the extrinsic evidence limitation would not only resolve a conflict, it would also promote the spirit and intent of the Rule.[2]

With respect to the impeachment of non-testifying defendants — the benefit of an amendment would arguably be to lead to a fair result protecting the criminal defendant's right to remain silent and refuse to testify. It is arguably unfair to introduce prejudicial impeachment evidence against a defendant who has done nothing at trial to warrant such impeachment.

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[2]. It should also be noted that clarification from the Supreme Court is unlikely, as the conflict is over a narrow evidence question.

Disadvantages

In addition to the costs that are attendant to every rules amendment, there are a few special considerations that might be taken into account in deciding whether to propose an amendment to Rule 806.

First, it could be argued that the problems addressed here with respect to Rule 806 are narrow; they rarely arise; and in fact Rule 806 is rarely cited or invoked. But the contrary argument is that if an Evidence Rule is problematic — especially if it is subject to conflicting interpretations — the Evidence Rules Committee should be addressing it as part of its obligations to assure that all the Evidence Rules are working properly.

Second, and specifically with respect to impeachment of non-testifying defendants, an argument against an amendment is that there is no reason for a rule to prefer the rights of the impeached defendant over those of the impeaching defendant. Thus, the resolution of the question of impeachment of non-testifying defendants is not self-evident, as it involves competing interests and countervailing constitutional considerations.

Of course the problem of impeaching non-testifying co-defendants could be resolved by severing the trials of the impeaching and impeached defendants. Rules on severance are not evidentiary rules, however. One way to look at an amendment concerning non-testifying co-defendants is that it would be an evidentiary rule that operates as a rule on severance; that is, if the Rule permits impeachment, that will impact on the decision to sever the trial, as would a Rule prohibiting it. Query whether the Committee should propose an amendment having an effect on severance questions, at least without consulting the Criminal Rules committee.

As discussed, there are two court opinions addressing this problem. The *Bovain* court reads the Rule literally and allows A to impeach B. The *Robinson* court does not disagree with the *Bovain* result, but reads *Bovain* as only one solution to this complex problem; both courts seem to agree that treatment of impeachment of non-testifying co-defendants should be left to the discretion of district court judges. In *Robinson*, the Court prohibited A from impeaching B, and the Court of Appeals found no abuse of discretion.

Given the complex balance of interests involved, it could be argued that it is appropriate to leave the treatment of impeachment of non-testifying defendants to the discretion of the district court. It would not appear that any amendment is necessary to implement any judicial discretion in the matter, as the courts in *Bovain* and *Robinson* found ample discretion without any language to that effect in the Rule.

V. Models for a Proposed Amendment to Rule 806

Models for a proposed amendment to Rule 806 are set forth below. The models address the two problems in the Rule that arguably give rise to a need for an amendment. Those problems are:

1. Impeachment of hearsay declarants with extrinsic evidence of bad acts.

2. Impeachment of non-testifying criminal defendants.

The models begin on the next page.

Model One: Permitting Extrinsic Evidence of Bad Acts to Impeach a Hearsay Declarant, Subject to Rule 403:

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. And the court may admit extrinsic evidence of the declarant's conduct when offered to attack or support the declarant's character for truthfulness. 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.

Possible Committee Note

The amendment permits a party to impeach a declarant with extrinsic evidence of specific acts when offered to prove the declarant's character for truthfulness, subject to the balancing test of Rule 403. This change is consistent with the intent of Rule 806, which is to provide a party with all the methods of impeachment that the party would have if the declarant were to testify. If the declarant were to testify, the attacking party would at least be allowed to ask the witness about bad acts probative of the witness's character for truthfulness, subject to Rule 403. In contrast, an out-of-court declarant cannot even be asked about an act of misconduct. Therefore, extrinsic evidence is often the only way that the act can be presented to the jury, and should be permitted unless its probative value as to character for truthfulness is substantially outweighed by the factors set forth in Rule 403.

Moreover, a rule prohibiting impeachment of declarants with extrinsic evidence could give rise to abusive practice:

> [I]f Rule 806 is applied to enforce the prohibition on extrinsic evidence, parties might be encouraged to offer hearsay evidence rather than live testimony. For example, if a party felt that a witness was vulnerable to attack under Rule 608(b), that party might attempt to insulate the witness from this form of impeachment by offering his out-of-court statements, rather than calling him to testify. If, however, the attacking party were allowed to impeach a nontestifying declarant with extrinsic evidence of untruthful conduct, the incentive to use hearsay evidence would be removed.

Margaret Cordray, *Evidence Rule 806 and the Problem of the Nontestifying Declarant*, 56 OHIO STATE L.J. 495, 526 (1995).

The contrary result reached by some courts was based on the fact that Rule 806 did not by its terms give special consideration to impeaching declarants with bad acts, while it had specifically given such consideration to impeaching declarants with inconsistent statements. That discrepancy in the text of the Rule has been rectified by this amendment.

Model Two: Permitting Extrinsic Evidence of Bad Acts to Impeach a Hearsay Declarant, Subject to Rule 403, and Prohibiting Impeachment of a Non-testifying Criminal Defendant Who Does Not Affirmatively Introduce His Own Hearsay Statement.

Rule 806. Attacking and Supporting Credibility of Declarant

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. And the court may admit extrinsic evidence of the declarant's conduct when offered to attack or support the declarant's character for truthfulness. 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. If the declarant is a criminal defendant in the case, that defendant's character for truthfulness may be attacked only if the defendant has affirmatively placed it before the factfinder.

Committee Note to Model Two

The amendment makes two changes to the Rule.

First, the amendment permits a party to impeach a declarant with extrinsic evidence of specific acts offered to prove the declarant's character for truthfulness, subject to the balancing test of Rule 403. This change is consistent with the intent of Rule 806, which is to provide a party with all the methods of impeachment that the party would have if the declarant were to testify. If the declarant were to testify, the attacking party would at least be allowed to ask the witness about bad acts probative of the witness's character for truthfulness, subject to Rule 403. In contrast, an out-of-court declarant cannot even be asked about an act of misconduct. Therefore, extrinsic evidence is often the only way that the act can be presented to the jury, and should be permitted unless its probative value as to character for truthfulness is substantially outweighed by the factors set forth in Rule 403.

Moreover, a rule prohibiting impeachment of declarants with extrinsic evidence could give rise to abusive practice:

> [I]f Rule 806 is applied to enforce the prohibition on extrinsic evidence, parties might be encouraged to offer hearsay evidence rather than live testimony. For example, if a party felt that a witness was vulnerable to attack under Rule 608(b), that party might attempt to insulate the witness from this form of impeachment by offering his out-of-court statements, rather than calling him to testify. If, however, the attacking

party were allowed to impeach a nontestifying declarant with extrinsic evidence of untruthful conduct, the incentive to use hearsay evidence would be removed.

Margaret Cordray, *Evidence Rule 806 and the Problem of the Nontestifying Declarant*, 56 OHIO STATE L.J. 495, 526 (1995).

The contrary result reached by some courts was based on the fact that Rule 806 did not by its terms give special consideration to impeaching declarants with bad acts, while it had specifically given such consideration to impeaching declarants with inconsistent statements. That discrepancy in the text of the Rule has been rectified by this amendment.

The second change to the Rule prohibits a party from impeaching a criminal defendant's character for truthfulness when the defendant's hearsay statements (or statements defined as not hearsay under Rule 801(d)(2)(C)(D), or (E)) are offered against that party and the defendant has not affirmatively placed character for truthfulness before the factfinder. For example, in a conspiracy prosecution of multiple defendants, one defendant's out-of-court statement is potentially admissible against other defendants under Rule 801(d)(2)(E). If the defendants against whom the statements are offered are allowed to impeach the defendant/hearsay declarant with convictions or bad acts, the jury may well be prejudiced against that defendant, even though that defendant has done nothing to inject character into the case and has decided not to testify for fear of impeachment. A rule prohibiting impeachment of the defendant-declarant's character for truthfulness will protect that defendant's right to refuse to testify.

Tab 6

Report on Planning for the Restyling Symposium

FORDHAM
University School of Law

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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: Symposium on the Restyled Rules of Evidence
Date: March 1, 2011

Judge Fitzwater has proposed that as part of its Fall 2011 meeting, the Evidence Rules Committee put together a symposium on the Restyled Rules of Evidence — which will go into effect about a month after the meeting. The Fall meeting will be conducted at William and Mary Law School, and the Law School has enthusiastically agreed to assist the Committee in putting on the symposium.

Judge Fitzwater and the Reporter have begun the effort to put the symposium together. Here is a description of the preparations thus far:

1. We propose two panels — one looking backward on the restyling effort, how it operated and how the Committee addressed and resolved the problems presented; and the other looking forward to how the Restyled Rules might be applied and interpreted.

2. The symposium will be held on the morning of Friday, October 28. The Fall meeting of the Committee will be held thereafter, on Friday afternoon.

3. The symposium proceedings will be published in the Fordham Law Review.

4. The following people have agreed to make a presentation at the symposium — with subject matter of the presentation to be determined:

- Judge Robert Hinkle
- Professor Joe Kimble
- Professor Steve Saltzburg (Litigation Section representative on the restyling project).

- Judge Reena Raggi (Standing Committee member who provided very helpful comments)
- Judge Harris Hartz (former Standing Committee member who provided very helpful comments)
- Justice Andy Hurwitz
- Professor Deborah Merritt, Ohio State (comment on Rule 1101)
- Professor Roger Park, Hastings (provided public comment)
- Judge S. Allan Alexander, Federal Magistrate Judges' Association
- Professor Katherine Schaffzin, Memphis (provided public comment).

In addition, Judge Fitzwater has invited participation from the National Center for State Courts, which is located in the area. Hopefully a representative will attend to provide some perspective on whether and how the restyling will influence states to change their evidence codes.

5. Members of the Standing Committee will be invited to attend, as well as members of the William and Mary community. Of course we are hoping for special participation from the members of the Style Subcommittee of the Standing Committee, without whom the restyling could never have been accomplished.

6. The symposium will not be open to the public.

We will discuss plans for the symposium at the Spring meeting, and we invite and encourage any suggestions that Committee members may have. For example, we have intentionally avoided filling up the panels for the symposium. If anyone has a suggestion for topics, symposium participants, or anything else please let us know.

Tab 7

Report on the Privilege Project

Prepared by Professor Ken Broun

Memorandum To: Advisory Committee on Evidence Rules

From: Ken Broun, Consultant

Re: Privilege Project

Date: February 25, 2011

Congress has excluded rules governing privilege from the Rules Enabling Act process. Any new Rule on privilege must come from Congress rather than the judiciary. 28 U.S.C. §2074(b). In light of that statute, this Committee has, for the most part, not dealt with the possibility of new rules governing privilege. The only exception has been Rule 502, governing inadvertent waiver and scope of waiver. However, even that rule, although initially drafted in this Committee, went through the usual legislative process.

Fed.R.Ev. 501 provides that privilege questions are to be governed by the principles of the common law, except with respect to an element of a claim or defense as to which State law supplies the rule of decision, in which case state law is to be applied. Except for Rule 502, the federal law dealing with privileges has evolved through case law.

Ten years ago, the Committee decided that, in lieu of rules governing privilege, it would attempt to survey the federal law of privilege since the adoption of Rule 501. I was hired as a consultant to work with the reporter, Dan Capra, to try to create survey rules covering the most important privileges. The intention was that the survey rules would be published, either in a monograph or in a publication such as Federal Rules Decision. The rules would not have any binding effect but would constitute a guide for the courts in much the same way as does a Restatement of the law. There would be no attempt to make new law or to change existing case law trends. Points of uncertainty or conflict would be noted but not resolved.

I prepared two survey rules in response to the Committee's charge: psychotherapist-patient privilege and attorney-client privilege. There was considerable discussion of both survey rules in a subcommittee appointed to review the rules and in the Committee itself. Amendments and additional research were prepared in response to the comments made in those discussions.

The project has been on an undeclared hold since 2006. The Committee has been occupied primarily with Rule 502 and then the extensive work of the restyling project. My time has been spent primarily in assisting with those projects.

At the Fall, 2010 meeting, I was asked to renew my work on the project. I have begun by revising and updating the survey rule on the psychotherapist-patient privilege. The revised and updated rule is attached to this memo. In addition, I reviewed the attorney-client privilege survey rule and reworked some of its provision as well as the commentary. However, *I have not*

had the opportunity to update the case law with regard to the attorney-client privilege which is current only through 2005. I attach the survey rule on attorney-client privilege in order for the committee to comment on the form of the rule and commentary. My hope would be that the Committee would advise me as to the form and that I would fully update the rule for the Fall, 2011 meeting.

I look forward to getting the Committee comments on both rules as well as on the project generally.

SURVEY RULE: PSYCHOTHERAPIST-PATIENT PRIVILEGE

(a) Definitions. As used in this rule:

(1) A "communication" is any expression through which a privileged person intends to convey information to another privileged person or any record containing such an expression;

(2) A "patient" is a person who consults a psychotherapist for the purpose of diagnosis or treatment of the patient's mental or emotional condition;

(3) A "psychotherapist" is a person licensed [authorized] in any domestic or foreign jurisdiction, or reasonably believed by the patient to be licensed [authorized] to engage in the diagnosis or treatment of a mental or emotional condition;

(4) A "privileged person" is a patient, psychotherapist or an agent of either who is reasonably necessary to facilitate communications between the patient and the psychotherapist or who is participating in the diagnosis or treatment of the patient under the direction of a psychotherapist;

(5) A communication is "in confidence" if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one except a privileged person will learn the contents of the communication.

(b) General Rule of Privilege.

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a communication made in confidence between or among privileged persons for the purposes of obtaining or providing diagnosis or treatment of patient's mental or emotional condition.

(c) Who May Invoke the Privilege

A patient or a personal representative of an incompetent or deceased patient may invoke the privilege. A patient may, implicitly or explicitly, authorize a psychotherapist, the agent of either, or any person who participated in the diagnosis or treatment of the patient under the direction of a psychotherapist to invoke the privilege on behalf of the patient.

(d) Exceptions. The psychotherapist privilege does not apply to a communication

(1) relevant to an issue in proceedings to hospitalize the patient for mental or emotional illness if the psychotherapist, in the course of diagnosis or treatment, has determined that the patient is in need of hospitalization;

(2) made in the course of a court-ordered investigation or examination of the mental or emotional condition of the patient, whether a party or a witness, with respect to the particular purpose for which the examination is ordered, unless the court orders otherwise;

(3) relevant to the issue of the mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense;

(4) that occurs when a patient consults a psychotherapist to obtain assistance to engage in a crime or fraud or to escape detection or apprehension after the commission of a crime or fraud or to aid a third person to engage in a crime or fraud or to escape detection or apprehension after the commission of a crime or fraud. Regardless of the patient's purpose at the time of consultation, the communication is not privileged if the patient uses the physician's or psychotherapist's services to engage in or assist in committing a crime or fraud or to escape detection or apprehension after the commission of a crime or fraud;

(5) in which the patient has expressed an intent to engage in conduct likely to result in imminent death or serious bodily injury to the patient or another individual and the disclosure of such information is necessary to prevent death or injury;

(6) relevant to an issue in a proceeding challenging the competency of the psychotherapist;

(7) relevant to a breach of duty by the psychotherapist. Such statements are admissible only to the extent reasonably necessary to prove a fact at issue involving the breach of duty; or

(8) relevant for a psychotherapist to reveal in a proceeding to resolve a dispute with a patient. Such statements are admissible only to the extent reasonably necessary to prove a fact at issue in the dispute; or

(9) that is subject to a duty to disclose under the laws of the United States.

COMMENTARY ON THE PSYCHOTHERAPIST-PATIENT PRIVILEGE SURVEY RULE

In General

The parameters of the psychotherapist-patient privilege in the federal courts effectively began to be formed with the recognition of that privilege in the 1996 Supreme Court decision in *Jaffee v. Redmond*, 518 U.S. 1 (1996). But even before *Jaffee*, the Proposed Federal Rules of Evidence contained such a privilege (Proposed Rule 504) and some circuits had recognized its existence prior to *Jaffee*, *e.g.*, *In re Doe*, 964 F.2d 1325 (2d Cir. 1992) (qualified privilege exists); *In re Zuniga,* 714 F.2d 632, 640 (6th Cir. 1983) (privilege exists but does not apply to identity or fact and time of treatment). But Congress had refused to adopt Rule 504 and, prior to *Jaffee*, some circuits refused to recognize it, *e.g. U. S. v. Burtrum*, 17 F.3d 1299 (10th Cir. 1994) (no psychotherapist-patient privilege in criminal child sexual abuse case); *In re Grand Jury Proceeding*, 867 F.2d 562 (9th Cir. 1989) (no psychotherapist-patient privilege in federal criminal case); *United States v. Corona*, 849 F.2d 562, 566-67 (11th Cir. 1988) (same).

The Court in *Jaffee* recognized a psychotherapist-patient privilege and applied it to confidential communications to a licensed social worker. The Court's rationale was utilitarian: the privilege serves the public interest by facilitating the process of appropriate treatment for individuals suffering from a mental or emotional problem. Communications to a psychotherapist were distinguished from those made to a physician for physical ailments where "treatment . . . can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests." The Court noted (518 U.S. at 10):

> Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

The Court was influenced by the adoption of some form of psychotherapist privilege in all 50 states. Most, like the Court in *Jaffee*, extend the privilege to social workers.

The Court was careful to reject any notion that the privilege be qualified by a balancing component (518 U.S. at 17):

> Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege.

Nevertheless, by footnote, the Court noted that "there are situations in which the privilege must give way," thus opening the door for exceptions such as those existing with regard to other privileges now recognized under federal common law. (518 U.S. at 18, n.19).

Not surprisingly, the lower federal courts dealing with the privilege have turned first to *Jaffee* for guidance as to its dimensions. Moreover, because of the limited opportunity for guidance in that decision and the relatively short length of time that has existed for development of a body of law, the courts are often creating new law with every decision about the privilege.

The survey rule seeks to reflect the Court's description of the privilege in *Jaffee* as well as the interpretation and refinement of that rule by the lower federal courts since 1996. Many potentially significant issues involving the privilege have yet to reach the federal courts. The survey rule seeks to set forth the position taken by the lower courts where such a position is clear and consistent. In some instances, such as whether a psychotherapist must in all instances be licensed, a minority view is set forth as an alternative. In other instances, as with regard to the requirement in some courts that the patient actually call the psychotherapist in question to testify or use the communications to him or her before the privilege is deemed waived, a small minority view is ignored. Where there is no federal authority on the question, the survey rule borrows from holdings in connection with other privileges, especially the more frequently litigated attorney-client privilege. The approach of looking to the attorney-client privilege for guidance in connection with the psychotherapist privilege is one that is commonly used by the courts in setting the parameters of the latter.

As is the case with the other privileges in this survey, the rule is intended to reflect existing case law or a prediction of what that case law would be like rather than to make judgments with regard to the wisdom of any of the privilege's parameters.

The form and much of the language of the survey rule is the same as that used for other privileges in this survey. It is borrowed to some extent from the Proposed Federal Rules of Evidence with regard to privilege, from the latest draft of the Uniform Rules of Evidence and from other sources including the Restatement with Regard to Lawyers.

Some significant differences exist between the survey rule and the recast Uniform Rule 503 setting forth a Physician/Mental Health Provider privilege. Particular substantive differences are based upon federal case law and are discussed in connection with the provisions of the rule in which they exist. The survey rule also differs in form from the Uniform Rule.

The most important difference between the survey rule and Uniform Rule 503 concerns the more limited applicability of the survey rule, at least if the broader options of the Uniform Rule are selected. Uniform Rule 503 provides four options for application of the privilege: 1) psychotherapists, 2) physicians and psychotherapists, 3) physicians and mental health-providers and 4) mental-health providers. *See, generally,* Robert H. Aronson, *The Mental Health Provider Privilege in the Wake of* Jaffee v. Redmond, 54 Okla.L.Rev. 591 (2001). The survey rule applies to psychotherapists only, although the term is broadly defined so as to reach other professionals,

including social workers licensed (or optionally, authorized) to provide diagnosis or treatment of mental or emotional conditions.

There is no federal authority for a privilege that applies to physicians generally. The dictum in the *Jaffee* case set out above, regardless of the questionable validity of its observation distinguishing physical and mental ailments, negates the existence of a general physician-patient privilege. Most federal courts dealing with the issue have reached the same result. Leading cases rejecting such a physician-patient privilege are *Hancock v. Dodson,* 958 F.2d 1367, 1373 (6th Cir. 1992); *United States v. Moore*, 970 F.2d 48 (5th Cir. 1992); *United States v. Bercier*, 848 F.2d 917 (8th Cir. 1988). For a more recent case rejecting a general physician-patient privilege, see *United States v. Bek,* 493 F.3d 790 (7th Cir. 2007).1 Moreover, the term "mental health provider" has not been used in federal cases and may imply a broader application of the privilege than would be recognized in the federal courts, especially if the rule is limited to professionals who are licensed rather than simply authorized. See discussion in connection with Survey Rule (a)(3), below.

(a) **Definitions. As used in this rule:**

(1) A "communication" is any expression through which a privileged person intends to convey information to another privileged person or any record containing such an expression;

The primary source for this definition is the law involving attorney-client communications. *See* Survey Rule, Attorney-client Privilege. *See, e.g., United States v. Sayan*, 968 F.2d 55, 63-64 (D.C. Cir. 1992) (privilege applied only to communications not observations made by an accountant serving as the attorney's agent). There was no attempt to define communication in Proposed Federal Rule 504. Similarly, Uniform Rule 503 contains no such definition.

The Court in *Jaffee* refers to "confidential communications" and relies on the need for an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories and fears.(518 U.S. at 10) More specifically, the Court in *Jaffee* protected the social worker's notes as well as her recollection of the communications from the patient. *See also Jane Student 1 v. Williams*, 206 F.R.D. 306, 310 (S.D. Ala. 2002), where the court notes that the privilege is limited to communications between the patient and her psychotherapist, but that the privilege includes notes made by the psychotherapist. It also necessarily protects information from such conversations appearing in records prepared by someone other than the psychotherapist (as long as the third person's receipt of the information does not destroy confidentiality and thus the privilege).

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1 [1] For a criticism of the dictum in *Jaffee* distinguishing patient statements of physical as opposed to mental ailments and discussing the wisdom of a broader medical privilege in the federal courts *see* Kenneth S. Broun, The Medical Privilege in the Federal Courts – Should It Matter Whether Your Ego or Your Elbow Hurts? 38 Loy.L.A.L.Rev. 657 (2004).

As in the case of the survey rule dealing with the attorney-client privilege, this definition includes communications going from the professional (in this case, the psychotherapist) to the person seeking his or her professional assistance (in this case, the patient) as well as communications going the other way. As discussed in connection with the attorney-client survey rule, there are some federal cases dealing with the attorney-client privilege that protect communications from the attorney only to the extent they would disclose confidential client communications. *See, e.g., Potts v. Allis-Chalmers Corp.* 118 F.R.D. 597 (N.D. Ill. 1987). Other cases take a broader view that provides protection for confidential communications from the attorney to the client. *See Sprague v. Thorn Americas, Inc.* 129 F.3d 1355, 1369-70 (10th Cir. 1997). For reasons more fully discussed in connection with the attorney-client privilege, the survey rule adopts the broader position of the *Sprague* case for both privileges.

(2) A "patient" is a person who consults a psychotherapist for the purpose of diagnosis or treatment of the patient's mental or emotional condition;

This definition is based on the language of the *Jaffee* case. Uniform Rule 503 defines patient as an individual who consults or is examined or interviewed by one of the professionals listed in that rule. The language and holding of the Court in *Jaffee* would seem to require that the patient be a person who not only consults a psychotherapist but who does so for the purpose of diagnosis or treatment of the patient's own mental or emotional condition.

See, e.g., United States v. Romo, 413 F.3d 1044 (9th Cir. 2005) (conversation with prison counselor not within privilege where session not related to therapy and diagnosis, despite fact that same counselor had previously provided therapy); *E.E.O.C. v. Nichols Gas & Oil, Inc.*, 256 F.R.D. 114 (W.D.N.Y. 2009) (no privilege where physician consulted only for referral to a mental health profession or a prescription for medication to treat depression or anxiety); *Cappetta v. GC Services, Ltd.,* 266 F.R.D. 121 (E.D.Va. 2009) (records sought involved marital counseling only); *Tesser v. Board of Education,* 154 F.Supp.2d 388 (E.D.N.Y. 2001). In *Tesser* , the court held that plaintiff's husband's consultation with his own psychiatrist about his wife's depression would be privileged only to the extent that the communications involved his own feelings and emotions. The court stated that communications must be made in the course of treatment, even if there was an expectation of privacy.

(3) A "psychotherapist" is a person licensed [authorized] in any domestic or foreign jurisdiction, or reasonably believed by the patient to be licensed [authorized] to engage in the diagnosis or treatment of a mental or emotional condition.

The language of the definition of a psychotherapist is borrowed in large measure from Uniform Rule 503. However, optional language that would expand the definition to persons authorized but not necessarily licensed is added based upon federal cases that have expanded the privilege to cover such persons. The definition also excludes language included in the Uniform Rule 503 definition of psychotherapist specifically referring to treatment for addiction to alcohol or drugs. There are no cases that specifically deal with the application of the privilege where the

treatment is only for addiction to alcohol or drugs. It is possible, perhaps likely, that a federal court would conclude that such treatment comes within the licensing or authorization of a person engaging in diagnosis or treatment of a mental or emotional condition, but there is no case law that would support the addition of such specific language to the definition.

There is no question that licensed psychotherapists are included in the privilege as applied in the federal courts. The Court in *Jaffee* stated (518 U.S. at 15):

> . . . we hold that confidential communications between a *licensed* psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence. (emphasis added)

The Court goes on to extend the privilege to confidential communications made to "licensed social workers." (518 U.S. at 15). Although the definition contained in this survey rule neither uses the term "social worker" or the broader term used in Uniform Rule 503, "mental health provider," the language of the definition is intended to cover any licensed [or authorized] social worker engaging in the treatment of mental or emotional conditions.

The more troubling question for the federal courts has not been the application of the privilege to licensed social workers; that is clearly stated in *Jaffee*. Rather, the cases raise the issue of whether the privilege should be extended to persons who are engaged in the kind of treatment involved in *Jaffee*, but who are not licensed by any state. The Court in *Jaffee* used the term "licensed." Yet, some lower courts have applied the psychotherapist-patient privilege in instances in which the communication was made to a person who was not licensed.

In *Oleszko v. State Compensation Insurance Fund*, 243 F.3d 1154 (9th Cir. 2001), the court applied the privilege to unlicensed counselors employed by an Employee Assistance Program (EAP). The court found an analogy to the licensed social worker in *Jaffee*, stating (243 F.3d at1157-58):

> EAPs, like social workers, play an important role in increasing access to mental health treatment. . . . Growing numbers of EAPs help employees who would otherwise go untreated to get assistance. The availability of mental health treatment in the workplace helps to reduce the stigma associated with mental health problems, thus encouraging more people to seek treatment. EAPs also assist those who could not otherwise afford psychotherapy by providing and/or helping to obtain financial assistance.

The court went on to note that the EAPs work as part of a team with licensed psychologists or social workers (243 F.3d at 1158). Based upon this language, one could argue that the EAP in *Oleszko* would have come within the language of section (a)(4) of the survey rule, defining a privileged person as including "an agent of either [the patient or the psychotherapist] who is reasonably necessary to facilitate communications between the patient and the psychotherapist or who is participating in the diagnosis or treatment of the patient under

the direction of a psychotherapist." Nevertheless, it is also possible that the court would have reached the same conclusion even if an agency relationship were not established or there was no showing that the EAP was working under the direction of a licensed psychotherapist.

Other cases in which the courts have used a definition of psychotherapist that went beyond licensed persons are *Greet v. Zagrocki*, 1996 WL 724933 (E.D.Pa. 1996) (privilege protects files with regard to police officer's consultation of department's Employee Assistance Program. The consultation was with regard to department's "in-house alcohol dependency program."); *United States v. Lowe*, 948 F.Supp. 97 (D.Mass. 1996) (communications to unlicensed rape crisis counselor privileged. The victim waived the privilege to a limited extent by agreeing to in camera review of records.); *Richardson v. Sexual Assault/spouse Abuse Resource Center, Inc.* 2011 WL 442111(D.Md. 2011) (communications to unlicensed spousal abuse resource center counselor).

Not all federal courts dealing with the question have applied as generous a definition as did the courts in *Oleszko, Greet, Lowe,* and *Richardson.* In *U.S. v. Schwensow,* 151 F.3d 650, 657-58 (7th Cir. 1998) statements to Alcoholics Anonymous volunteer telephone operators were not protected. The court noted that the operators did not possess credentials that might qualify as "licensed." However, in *Schwensow*, there were other factors upon which the court relied that prevented the application of the privilege and might well have prevented its application even if the operators had been fully licensed. In that case, the operators did not identify themselves as therapists or counselors. They did not confer with the defendant in a fashion that resembled a psychotherapy session. There was no indication that the AA office provided counseling services. The telephone calls in question were made for the purpose of finding out the address of a detoxification center, not for help in coping with alcoholism. The court stated that the interactions did not relate to diagnosis, treatment or counseling and "under no circumstances can these communications be interpreted as 'confidential communications' entitled to protection from disclosure under Rule 501." (151 F.3d at 658).

In *Jane Student 1 v. Williams*, 206 F.R.D. 306, 310 (S.D. Ala. 2002), the court held that licensed counselors were covered by the privilege, but unlicensed counselors were not. The court specifically rejected the reasoning of *Oleszko* based in part upon the language in *Jaffee* applying the privilege to "licensed" social workers. The court also believed that there needed to be a brighter line for the boundaries of the privilege than would exist if unlicensed mental health providers were included. The court noted that all but eight states recognizing a social worker privilege limit that privilege to persons actually licensed.

See also Carman v. McDonnell Douglas Corp., 114 F.3d 790 (8th Cir. 1997) (no privilege for communications to company ombudsman despite presumed confidentiality of such communications).

The language of the definition, "reasonably believed by the patient," finds support in *Speaker ex rel. Speaker v. County of San Bernardino*, 82 F. Supp.2d 1105, 1112 (C.D. Calif. 2000) where the court stated ". . . if he reasonably believed that Dr. Mathews was a psychologist or a licensed social worker." The court supported its holding by reference to the similar holdings

under the attorney-client privilege.

The definition of psychotherapist in the survey rule is intended to be broad enough to cover physicians dealing with mental or emotional health questions. *See Finley v. Johnson Oil Co.*, 199 F.R.D. 301 (S.D. Ind. 2001) (privilege applies to communications to general practitioners dealing with mental health questions).

(4) A "privileged person" is a patient, psychotherapist or an agent of either who is reasonably necessary to facilitate communications between the patient and the psychotherapist or who is participating in the diagnosis or treatment of the patient under the direction of a psychotherapist;

The language of this definition is based upon similar language in the survey rule dealing with the attorney-client privilege. The most significant language in the definition deals with the application of the privilege to agents who either facilitate communications between the patient and the psychotherapist or who participate in the diagnosis or treatment "under the direction of a psychotherapist." There is little case law involving questions of agency under the psychotherapist-patient privilege. In *Jane Student 1 v. Williams*, 206 F.R.D. 306, 310 (S.D. Ala. 2002), the court held that notes will be privileged even if they are written by someone other than a psychotherapist, provided that confidentiality is maintained. Other authority for the language in the definition would require analogy to cases dealing with the attorney-client privilege. *See, e.g., Winchester Capital Management Co. V. Manufacturers Hanover Trust Co.*, 144 F.R.D. 170, 172 (D. Mass. 1992) (privilege extended to principal of corporate client where disclosure by attorney was reasonable and necessary); *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961) (privilege extended to accountant hired by attorney to aid in understanding the client's financial situation).

(5) A communication is "in confidence" if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one except a privileged person will learn the contents of the communication.

Again, the language of this definition tracks the definition of "in confidence" in the survey rule governing the attorney-client privilege. In the case of this definition, there is federal authority dealing with the issue in connection with the psychotherapist-patient privilege. Some of that authority pre-dates the *Jaffee* case in lower court cases where courts recognized the existence of the privilege but limited its application to communications that were truly confidential.

For example, in *In re Doe*, 711 F.2d 1187, 1193-94 (2d Cir. 1983), the court did not reach a definitive conclusion as to whether a psychotherapist-privilege existed. Instead, the court held that, even if it existed, the privilege would not apply where there were no communications of "the intensely personal nature that the psychotherapist patient privilege is designed to protect from public scrutiny." In *Doe*, the communications were from 70 patients a day who were

seeking the dispensing of a controlled substance.

Similarly, *In re Zuniga*, 714 F.2d 632 (6th Cir. 1983) involved records from psychotherapists accused of defrauding Blue Cross-Blue Shield. The court recognized the existence of psychotherapist privilege but refused to protect the identity, or fact and time of his treatment, stating (714 F.2d at 640):

> In weighing these competing interests, the Court is constrained to conclude that, under the facts of this case, the balance tips in favor of disclosure. The essential element of the psychotherapist-patient privilege is its assurance to the patient that his innermost thoughts may be revealed without fear of disclosure. Mere disclosure of the patient's identity does not negate this element. Thus, the Court concludes that, as a general rule, the identity of a patient or the fact and time of his treatment does not fall within the scope of the psychotherapist-patient privilege.

See also In re Grand Jury Subpoenas Duces Tecum Date Jan. 30, 1986, 638 F.Supp. 794, 797-99 (D. Me. 1986), where the court, citing *Zuniga*, held that the psychotherapist privilege does not preclude disclosure of the identity of a patient or the fact and time of his treatment.

Post-*Jaffee* cases holding that identity of patient or dates of treatment not within the privilege include *Santelli v. Electro-Motive,* 188 F.R.D. 306 (N.D.Ill. 1999); *Vanderbilt v. Town of Chilmark,* 174 F.R.D. 225 (D. Mass. 1997); *Hucko v. City of Oak Forest,* 185 F.R.D. 526 (N.D.Ill. 1999); *Booker v. City of Boston,* 1999 WL 734644 (D. Mass. 1999).

Other issues that have arisen after *Jaffee* in connection with the confidentiality of communications involve instances in which a session with a psychotherapist was mandatory and whether, if mandatory, a report of the session was to be made to someone other than the patient. Most of the cases dealing with the issue have involved situations where, like *Jaffee*, a police officer has been ordered to undergo some kind of psychological evaluation.

Courts have held that the privilege still applies despite the mandatory nature of the psychological evaluation. *Speaker v. County of San Bernardino,* 82 F. Supp.2d 1105, 1116-17 (C.D.Calif. 2000) (fact that session is mandatory does not destroy privilege where the patient is told by his employer that the session would be confidential); *Caver v. City of Trenton*, 192 F.R.D. 154, 162 (D.N.J. 2000) (privilege applied where no confidential information disclosed by psychologist to police chief, but rather only a "yes" or "no" as to whether the officer was fit to return to duty).

The opposite result with regard to the application of the privilege has occurred where the police officer knew that the results of the sessions would be reported to his or her superiors. *See, e.g., Barrett v. Vojtas*, 182 F.R.D. 177, 181 (W.D. Pa. 1998). In *Barrett*, the court held that the privilege did not apply where a police officer was ordered to seek treatment and "more importantly" knew that the psychiatrist would report back to the police department with regard to the examination. The officer knew that a status report and recommendations would be made.

The fact that he thought communications themselves would be confidential did not make the privilege applicable.

In *Kamper v. Gray,* 182 F.R.D. 597 (E.D.Mo. 1998), the court also refused to apply the privilege where a police officer knew that the results of an evaluation would be reported to his superiors. In contrast, with regard to another police officer, a voluntary professional counseling session was held to be protected. *See also* Estate v. Turnbow v. Ogden City, 254 F.R.D. 434 (D.Utah 2008) (no expectation of privacy for session that was part of application for police employment).

See also Scott v. Edinburg, 101 F. Supp. 2d 1017, 1020 (N.D.Ill. 2000) (no privilege existed where the police officer knew that testing results would be reviewed by the police chief); *U.S. v. Auster*, 517 F.3d 213 (5th Cir. 2008) (psychotherapist privilege inapplicable because defendant had no reasonable basis to believe his statements were confidential; court discusses the contrary position of the 6th and 9th circuits; "There is not a uniform consensus among the states regarding statements made with no reasonable expectation of confidentiality.")

(b) General Rule of Privilege.

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a communication made in confidence between or among privileged persons for the purposes of obtaining or providing diagnosis or treatment of patient's mental or emotional condition.

The language of the general rule is consistent with the language used in the other survey privileges including the attorney-client privilege. It is also consistent with Uniform Rule 503, except that there is no specific reference to addiction to alcohol or drugs. As in the case of the definition of psychotherapist, this language is left out of the survey rule because of the absence of specific federal authority dealing with the issue.

Although some pre-*Jaffee* decisions had described a qualified psychotherapist-patient privilege, see, *e.g., In re Doe,* 964 F.2d 1325 (2d Cir. 1992), the Court in *Jaffee* was clear in its holding that the privilege should be absolute rather than qualified. Nevertheless, a few district courts cases after *Jaffee* have held the privilege to be qualified where the defendant seeks information otherwise within the privilege to assist in making out a defense in a criminal case.

In *U.S. v. Robinson,* 583 F.3d 1265 (10th Cir. 2009), the court held that the defendant's due process and Confrontation Clause rights were violated when he was denied access to a critical Government witness's mental health records and was prevented from cross-examining the witness with regard to his mental health history. The court relied on *Pennsylvania v. Ritchie,* 480 U.S. 39 (1987) for the holding that the defendant had a right to have the court review records of child abuse *in camera* to determine whether there was information helpful to the defense case. The *Ritchie* case involved a state confidentiality statute rather than the psychotherapist-patient privilege.

In *United States v. Mazzola*, 217 F.R.D. 84 (D. Mass. 2003), the court held that the privilege would not apply to prevent a defendant in a criminal case from obtaining the psychiatric records of a key government witness. The court stated:

> Although the societal interest in guarding the confidentiality of communications between a therapist and his or her client is significant, it does not outweigh the need for effective cross examination of this key government witness at the criminal trial. [citing *Jaffee*] Reason and experience caution against recognizing a blanket federal common law privilege for therapist records of an important government witness regarding therapy sessions temporally proximate to the criminal charges.

In *United States v. Alperin*, 128 F. Supp. 2d 1251 (N.D. Cal. 2001), the defendant sought psychiatric records of the victim in an assault case in which he had claimed self-defense. The court applied the federal privilege announced in *Jaffee*, but stated that the need for confidentiality had to be balanced against the defendant's Sixth Amendment rights to a fair trial and to confront witnesses. Although applying the privilege in a case governed by federal law, the court looked to California cases that had balanced the privilege against the rights of an accused in a criminal case. The court ordered an *in camera* review of the psychiatric records to determine the value of the evidence to the defendant.

In *United States v. Hansen*, 955 F. Supp. 1225 (D. Montana 1997), the court dealt with a request for psychiatric records of a now-deceased victim. The court held that the psychiatrist could assert the privilege on behalf of the deceased patient. However, the court ordered production of the records, stating (955 F. Supp. at 1226):

> The holder of the privilege has little private interest in preventing disclosure, because he is dead. The public does have an interest in preventing disclosure since persons in need of therapy may be less likely to seek help if they fear their most personal thoughts will be revealed, even after their death . . . . However, I find that the defendant's need for the privileged material outweighs this interest.

The court did not elaborate as to whether it would have reached a different result had the patient still been alive.

In *United States v. Haworth*, 168 F.R.D. 660 (D.N.M. 1996), the court recognized the defendant's Sixth Amendment rights to information relevant to his defense, but nevertheless held that there was no right to examine records that were privileged under psychotherapist-patient privilege. However, the defendant would be permitted to cross-examine the patient in question with regard to his treatment.

On the other side of the ledger, several federal courts have maintained the confidentiality of communications within the psychotherapist-patient privilege even where records were sought

by the defendant in a criminal case. The court in *United States v. Shrader*, 716 F. Supp. 2d 464, 472 (S.D. W.Va. 2010) reviewed the lower court decisions on the issue and concluded that *Jaffee* had foreclosed the possibility of a balancing test even as against a Sixth Amendment claim to the right of confrontation. The court noted:

> Moreover, the possibility that the psychotherapist-patient privilege is secondary to the Sixth Amendment is directly contrary to other similar privileges. Any court would make short work of an argument that the attorney-client privilege can be overcome by a criminal defendant's cross-examination needs. The argument that the psychotherapist-patient privilege is only applicable when not inconvenient for a criminal defendant is similarly deficient.

The Eighth Circuit has indicated that it would apply the privilege even in the face of a defendant's claim of Sixth Amendment rights. *Johnson v. Norris*, 537 F.3d 840 (8th Cir. 2008); *Newton v. Kemna*, 354 F.3d 776 (8th Cir. 2004). Both cases involved habeas petitions in which a state court had applied its psychotherapist-patient privilege to prevent a defendant from discovering psychological records of a prosecution witness. In both, the court cited *Jaffee* as precedent for its holding that the Sixth Amendment would not override the psychotherapist-patient privilege.

The Eighth Circuit also dealt with the issue in ; *Johnson v. Norris*, 537 F.3d 840 (8th Cir. 2008) where it upheld denial of defendant's request of witness's psychotherapy records in a habeas case. The court stated: "Even if the Supreme Court's decisions suggest that some degree of balancing is necessary in a criminal case, they seem to provide only general guidance. . . Given the absence of direct guidance from the Supreme Court in this area, the decisions of the Arkansas courts to enforce the psychotherapist-patient privilege under these circumstances were within the range of reasonableness permitted by AEDPA.").

See also Peterson v .U.S., 352 F. Supp. 2d 1016 (D.S.D. 2005) (psychotherapist-patient privilege is not secondary or inferior to a criminal defendant's trial rights); *U.S. v. Doyle,* 1 F. Supp.2d 1187 (D. Or. 1998) (sentencing hearing; defendant's Sixth Amendment rights did not trump the confidentiality of victim's statements to psychotherapist).

The survey rule describes a privilege that is absolute. Some courts may hold that the Sixth Amendment rights of the accused will cause the court to qualify that privilege. Despite this possibility, it does not seem useful to qualify the rule. In the absence of Supreme Court guidance, it seems likely that there will continue to be a split of authority on the issue. Moreover, any rule excluding evidence has the potential to be trumped by an application of the United States Constitution.

c) Who May Invoke the Privilege

A patient or a personal representative of an incompetent or deceased patient may invoke the privilege. A patient may, implicitly or explicitly, authorize a psychotherapist,

the agent of either, or any person who participated in the diagnosis or treatment of the patient under the direction of a psychotherapist to invoke the privilege on behalf of the patient.

The language of this section tracks the language with regard to invocation of the privilege in the survey rule governing attorney-client privilege. Although the language differs, the substantive rule of the section is the same as Uniform Rule 503(c). The substance of the section is supported by the few federal cases that have been decided dealing with the issue in connection with the psychotherapist-patient privilege.

Examples of federal court holdings with regard to standing to invoke the psychotherapist-patient privilege are *United States v. Schlette*, 842 F.2d 1574, 1583, n. 5, *amended*, 854 F.2d 359 (9th Cir. 1988) (pre-*Jaffee;* government could not assert the psychotherapist privilege on behalf of a deceased person; only personal representative of the deceased could claim privilege); *United States v. Lowe,* 948 F.Supp. 97 (D. Mass. 1996) (rape crisis center had no standing to assert privilege on behalf of a victim).

(d) Exceptions. The psychotherapist privilege does not apply to a communication

Section (d) of the survey rule deals with exceptions to the application of the psychotherapist-patient privilege. General waiver considerations, such as the communication of information to non-privileged persons are treated under the general waiver rule. The issue of waiver by conveying information to non-privileged persons may present some unique problems in the psychotherapist context. See *In re Zuniga,* 714 F.2d 632 (6th Cir. 1983) (waiver by submitting information to insurer); *In re Pebsworth*, 705 F.2d 261 (7th Cir. 1983) (same; but with strong concurring opinion where judge would not destroy privilege, but rather view the disclosure to the insurer as the same as a disclosure to a nurse or a paralegal).

(1) relevant to an issue in proceedings to hospitalize the patient for mental or emotional illness if the psychotherapist, in the course of diagnosis or treatment, has determined that the patient is in need of hospitalization;

There are no federal cases directly dealing with this exception and no comparable situation involving other privileges covered by the survey rules. Despite this absence of authority, the situation seems to be one in which the courts would almost certainly create an exception. Authority may be gleaned from the footnote in the *Jaffee* opinion noting that there are situations in which the privilege "must give way." 518 U.S. at 18, n.19. In that footnote, the court refers to "a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist." The Court's suggestion is most pertinent to the "dangerous patient" exception set forth in section (d)(5). However, it would also lend support to this subsection.

The language of the subsection tracks that of Uniform Rule 503(d)(1).

(2) made in the course of a court-ordered investigation or examination of the mental

or emotional condition of the patient, whether a party or a witness, with respect to the particular purpose for which the examination is ordered, unless the court orders otherwise;

Again, there is no express federal authority for this subsection. The rationale for its inclusion in the survey rule is the same as with regard to subsection (1): the courts would almost certainly recognize it based upon footnote 19 in *Jaffee* (518 U.S. at 18, n. 19). The language of the subsection tracks that in Uniform Rule 503(d)(2).

See U.S. v. Daniels, 541 F.3d 915 (9th Cir. 2008) (no violation of psychotherapist-patient privilege where disclosure from probation officer to treatment provider was pursuant to a supervised release condition with the purpose of rehabilitation).

(3) relevant to the issue of the mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense;

Although treated as an exception to the privilege in this survey rule, most courts dealing with the question of the application of the privilege in instances in which the patient relies on a mental or emotional condition refer to the issue as one of waiver.

There are many cases dealing with whether a party has waived the psychotherapist privilege by asserting a claim emotional distress or similar damage claim. The courts have taken several approaches to the issue. A clear majority of the cases favors the rule that a party waives the claim by asserting a claim for emotional damages. The cases following this majority rule are divided into those cases that find that a mere claim in a pleading is sufficient for there to be a waiver (referred to below as the "broad" rule) and those that require a showing that the plaintiff is relying on more than "garden variety" emotional distress, i.e., that he or she will offer some specific proof of distress beyond that which normally flows from the harm itself or some indication that the plaintiff will offer some form of expert testimony on the issue(referred to below as the "in-between" rule). A minority of cases holds that a plaintiff does not waive the privilege unless he or she introduces the testimony of the psychotherapist to whom the confidential statements were made or testifies about those statements. *See generally* Deidre M. Smith, An Uncertain Privilege: Implied Waiver and the Evisceration of the Psychotherapist-Patient Privilege in the Federal Courts, 58 De Paul L. Rev. 79 (2008).

The Broad Rule.

Several courts have held that the mere pleading of emotional distress is sufficient to waive the privilege. *E.g., Maday v. Public Libraries of Saginaw,* 480 F.3d 815 (6th Cir. 2007) (plaintiff had introduced some of the records to support her claim of emotional distress); *Doe v. Oberweis Dairy*, 456 F.3d 704 (7th Cir. 2006) (where plaintiff placed psychological state in issue, defendant was entitled to discover related records; records may be sealed and use limited at trial to protect patient's privacy); *Schoffstall v. Henderson,* 223 F.3d 818 (8th cir. 2000);

Sarko v. Penn-Del Directory Co., 170 F.R.D. 127 (E.D. Pa. 1997) (see discussion below); *Lanning v. Southeastern Pennsylvania Transportation Authority*, 1997 WL 597905 (E.D. Pa. 1997); *EEOC; v. Danka Industries, Inc.*, 990 F.Supp. 1138 (E.D.Mo. 1997); *Sidor v. Reno*, 1998 WL 164823 (S.D.N.Y. 1998) (in *Sidor*, the plaintiff not only sought damages for emotional distress but challenged the decision of her employer to terminate her on the grounds that she was dangerous to herself and to others); *Kirchner v. Mitsui & Co.(U.S.A.), Inc.*, 184 F.R.D. 124 (M.D. Tenn. 1998); *Doe v. City of Chula Vista*, 196 F.R.D. 562 (S.D. Cal. 1999) (reversing magistrate judge opinion adopting narrow view of privilege); *Sanchez v. U.S. Airways, Inc.* 202 F.R.D. 131 (E.D. Pa. 2001); Wheeler v. City of Orlando, 2007 WL 4247889 (M.D.Fla. 2007) (claim for intentional infliction of emotional distress waived privilege). See also *Dixon v. City of Lawton, Okla.*, 898 F.2d 1443 (10th Cir. 1990) (pre-*Jaffee*).

The *Sarko* case is illustrative of the reasoning of courts taking this position. In *Sarko*, the court gave three basic reasons for finding waiver. First, it relied on pre-*Jaffee* decisions that had found waiver, citing *Topol v. Trustees of University of Pennsylvania*, 160 F.R.D. 476, 477 (E.D. Pa. 1995) and *Price v. County of San Diego*, 165 F.R.D. 614, 622 (S.D. Cal. 1996). Secondly, it noted that the *Jaffee* decision had analogized the policy considerations supporting the psychotherapist privilege to those supporting the attorney-client privilege and that the latter privilege is waived when the advice of counsel is in issue. Lastly, quoting from *Premack v. J.C.J. Ogar, Inc.*, 148 F.R.D. 140, 145 (E.D. Pa. 1993), the courted stated: ". . . we agree that allowing a plaintiff 'to hide . . . behind a claim of privilege when that condition is placed directly at issue in a case would simply be contrary to the most basic sense of fairness and justice.'" (170 F.R.D. at 130)

The In-Between Rule

Several courts have held that a party does not waive the privilege simply by filing a pleading claiming emotional distress, but will waive it if the party designates an expert to testify on that issue. Similarly, more recent cases have articulated a test that finds no waiver where the plaintiff's claim involves only the "garden variety" emotional distress that flows from an injury rather than a specific emotional ailment.

In *Santelli v. Electro-Motive*, 188 F.R.D. 306 (N.D.Ill. 1999), the court rejected a bright line narrow test or a bright line broad test. It specifically rejected *Vanderbilt v. Town v. Chilmark*, 174 F.R.D. 225 (D. Mass. 1997), discussed below, that the privilege is waived only by introducing evidence of the communication or by calling the particular psychotherapist as a witness. The court expressed concern that this narrow view would permit the plaintiff to call a non-treating psychotherapist and prevent cross-examination based upon what she told her treating psychotherapist. However, the court said that the mere assertion of a claim for emotional distress was not sufficient. In *Santelli*, the plaintiff had expressly limited her claim to negative emotions she suffered from alleged sex discrimination and retaliation and indicated she would forego introducing evidence about emotional distress that necessitated care or treatment by a physician. Describing its view of the application of the waiver rule in this instance, the court stated (188 F.R.D. at 309):

While we believe that a party waives her psychotherapist-patient privilege

> by electing to inject into a case either the fact of her treatment or any symptoms or conditions that she may have experienced, Santelli is doing neither.

Other cases with similar views are *Allen v. Cook County Sheriff's Department*, 1999 WL 168466 (N.D. Ill. 1999) (mere seeking of damages for emotional distress does not waive privilege; plaintiff would waive privilege if she put her mental condition at issue by disclosing that she intended to call her psychotherapist or another expert to establish her claim); *Hucko v. City of Oak Forest,* 185 F.R.D. 526 (N.D. Ill. 1999) (no waiver merely by asserting claim for emotional distress; distinguishes cases where plaintiff has offered or indicated any intent to offer prior consultation with psychiatrist in order to support claim; court did find waiver based upon plaintiff's assertion that the statute of limitations should be tolled because he was preoccupied with treatment and medications); *Adams v. Ardcor*, 196 F.R.D. 339 (E.D.Wis. 2000) (following *Santelli* and *Hucko*; mere inclusion of a request for damages based on emotional distress does not waive privilege, but naming a psychologist as an expert witness waived privilege as to other consultations with psychotherapists).

Another relevant authority is *Speaker v. County of San Bernardino,* 82 F. Supp.2d 1105, 1118-20 (C.D. Cal. 2000). *Speaker* involved a claim against a law enforcement officer who had shot and killed plaintiffs' deceased. The court held that the defendant police officer waived privilege as to question of perception distortion by testifying that his perception of the incident was distorted and by submitting the report of an expert that the distortion resulted from the trauma of the incident. However, court found no waiver with regard to other aspects of the defendant's consultation with a psychotherapist. The court discusses both the broad a narrow views of the privilege but states that it would have reached the same result under either rule. The patient, whether he or she is the plaintiff or defendant, must actually place his or her condition in issue in order to waive the privilege.

Several cases have distinguished between a claim based on some specific emotional ailment and mere "garden variety" emotional distress that would occur in an otherwise well person as a result of the harm in question.

Two relatively recent Court of Appeals cases set forth a rule that finds no waiver of the psychotherapist-patient privilege from an allegation of "garden variety" emotional distress. *Koch v. Cox*, 489 F.3d 384 (D.C. Cir. 2007) involved an age and disability discrimination claim. The plaintiff had abandoned claims for damages due to emotional stress, although he acknowledged that he suffered from depression. The court reviewed the narrow broad and middle ground rules and found that there was no waiver of the privilege despite the plaintiff's acknowledgement of depression. Only "garden variety" emotional distress was claimed. Similarly in *In re Sims*, 534 F.3d 117 (2d Cir. 2008), the court stated that a claim for pain and suffering or "garden variety" emotional distress waives the privilege. The mere statement by the plaintiff that he suffers from depression or anxiety for which he does not seek damages does not give rise to a waiver. The court added that the plaintiff may withdraw or abandon all claim for emotional distress to avoid a forfeiture of the privilege. The privilege is not overcome when the party's mental state is put into issue by another party.

To the same effect are *Kuntsler v. City of New York*, 2006 WL 2516625 (S.D.N.Y. 2006); *Miles v. Century 21 Real Estate*, 2006 WL 2711534 (E.D. Ark.2006). *See also Jacobs v. Conn. Community Technical Colleges*, 258 F.R.D. 192 (D. Conn. 2009) (no waiver for just seeking damages for emotional distress, but waiver resulted when plaintiff identified psychologists and social workers who treated him for a major depressive disorder due to his work situation).

Directly contrary is *Ciroco v. U.S. Bureau of Prisons*, 2003 WL 1618530 (S.D.N.Y. 2003) (only a "minority of courts" say no waiver when only "garden variety" emotional distress is claimed; however, plaintiff's mental state fundamental to the events in that case).

The Narrow Rule

The leading case setting forth the narrow view of waiver is *Vanderbilt v. Town v. Chilmark*, 174 F.R.D. 225, 228-30 (D. Mass. 1997). In *Vanderbilt*, the plaintiff sought damages for gender discrimination claiming emotional distress. The court disagreed with the broad view of waiver as set forth in *Sarko v. Penn-Del Directory Co.*, discussed above. Unlike the court in *Sarko*, the court in *Vanderbilt* rejected any argument based on pre-*Jaffee* decisions, noting that the Court in *Jaffee* had made a point of rejecting any balancing in connection with the psychotherapist privilege. The court equated a finding a waiver of the privilege because the evidence becomes relevant to a claim made by the patient with the sort of balancing, or qualified privilege, rejected in *Jaffee*. In *Sarko*, the court had analogized the situation to waivers under the attorney-client privilege where there is waiver if the client relies on advice of counsel. The court in *Sarko* argued that the case before it was not based on the advice of the psychotherapist but was rather more like a suit for attorney's fees where, the court said, there is no waiver.[2] Third, the court in *Sarko* had based its holding in part on the fairness of permitting the opposing party to introduce the communications with the psychotherapist where the patient relies on his emotional condition as an element of his claim or as a basis for damages. The court in *Vanderbilt* rejected the *Sarko* analysis in this regard, finding that waiver would be justified only if the plaintiff were to introduce the substance of the conversations with the psychotherapist.

[2]The survey rule with regard to the attorney-client privilege in fact provides for an exception to the privilege where the evidence is relevant and reasonably necessary for an attorney to reveal in a proceeding to resolve a dispute with a client. The applicability of the exception to disputes over fees is consistent with the general law. See Restatement of the Law Governing Lawyers, § 133.

Another case taking the narrow view is *Booker v. City of Boston,* 1999 WL 734644 (D. Mass. 1999) (privilege not waived unless plaintiff makes positive use of the privileged material).

The Survey Rule

Subsection (d) (3) rejects the most narrow view, exemplified by the *Vanderbilt case*, with regard to waiver of the privilege based upon a claim involving mental or emotional distress. The bulk of authority does not support such a limited approach. Although a minority rule has been left as an option in the survey rule in other instances (most significantly with regard to the issue of whether a psychotherapist must be licensed or simply authorized), in this instance the narrow view seems out of step with the approach of the privilege taken by most courts and unsupported by the language in *Jaffee*.

On the other hand, the survey rule does not attempt to provide language that would cause a court to choose between the broad rule, finding a waiver of the privilege merely by raising an emotional or mental condition in the pleadings, and an "in-between" rule that would require some more affirmative step to raise the issue, such as disclosing that an expert will be called to testify to that condition. Subsection (d)(3) refers simply to cases in which a patient "relies upon the condition" as an element of a claim or defense. The case law will have to develop further to determine when the mere raising of the condition in the pleadings is sufficient to call the exception into play.

The language of this subsection closely tracks that of Uniform Rule 503(d)(3).

(4) that occurs when a patient consults a psychotherapist to obtain assistance to engage in a crime or fraud or to escape detection or apprehension after the commission of a crime or fraud or to aid a third person to engage in a crime or fraud or to escape detection or apprehension after the commission of a crime or fraud. Regardless of the patient's purpose at the time of consultation, the communication is not privileged if the patient uses the physician's or psychotherapist's services to engage in or assist in committing a crime or fraud or to escape detection or apprehension after the commission of a crime or fraud;

Proposed Federal Rule 504, setting forth a psychotherapist-patient privilege, did not contain a crime-fraud exception. Uniform Rule 503(d)(4) does provide for a crime-fraud exception. Although the language of the survey rule differs from that of the Uniform rule, the general content of the exceptions are the same. The language of the survey rule closely tracks that of the similar exception in the survey attorney-client privilege.

The matter has arisen infrequently since the rejection of that rule by Congress. However, those courts that have considered the question have consistently found the existence of such an exception to the privilege as it has developed as part of the federal common law.

The leading case is *In re Grand Jury Proceedings (Gregory P. Violette)*, 183 F.3d 71 (1st Cir. 1999). In *Violette*, the defendant was charged with presenting trumped up disabilities for the purpose of obtaining credit disability insurance payments. The government sought information

through grand jury subpoenas from defendant's psychiatrists; the defendant claimed privilege. The lower court had found the *Jaffee* privilege to be inapplicable because the defendant did not have a *bona fide* therapeutic purpose in consulting the psychiatrists. While not necessarily disagreeing with that analysis, the Court of Appeals preferred to deal with the situation as one in which the privilege as articulated in *Jaffee* applied, but where an exception for statements made for the purpose of facilitating a criminal act came into play. The court used precedent involving the attorney-client privilege to reach its result, especially *United States v. Jacobs*, 117 F.3d 82, 87-89 (2d Cir. 1997) The court described the exception to the attorney-client privilege as applying in cases such as *Jacobs* when the client was engaged in (or was planning) criminal or fraudulent activity when the communications took place and the communications were intended by the client to facilitate or conceal the criminal activity (183 F.2d at 75). The court applied the same policy to the psychotherapist-patient privilege. The mental health benefits of protecting such communications "pale in comparison to the normally predominant principal of utilizing all rational means for ascertaining truth." (183 F.3d at 77 (quotation marks deleted)) The court stated that the exception applies when communications "are intended directly to advance a particular criminal or fraudulent endeavor." (183 F.3d at 77) The court found that the evidence in *Violette*, consisting of the government agent's affidavit establishing that the defendant was engaged in illegal and fraudulent conduct and that he obtained assistance from the psychiatrists, was sufficient for the exception to be invoked. The court noted that the exception applied even though the doctors may have been "unwitting pawns" in the defendant's scheme (183 F.3d at 78).

A similar exception to the psychotherapist privilege was suggested in United States v. Witt, 542 F. Supp. 696 (S.D.N.Y. 1982) (pre-*Jaffee*), although there were multiple other reasons for rejecting the existence of the privilege in that case.

(5) in which the patient has expressed an intent to engage in conduct likely to result in imminent death or serious bodily injury to the patient or another individual and the disclosure of such information is necessary to prevent death or injury;

The primary support for this exception is contained in a footnote to the *Jaffee* case, where the Court said (518 U.S. at 18, n. 19):

> Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.

The language of the exception tracks that of Uniform Rule 503(d)(5), although the Uniform Rule subsection does not contain anything that is the equivalent of the last clause, which requires that the disclosure of the information be "necessary to prevent death or injury." The additional language is added based upon federal cases that provide authority for that limitation on the exception.

In *United States v. Chase,* 340 F.3d 978 (9th Cir. 2003) (*en banc*), the full Ninth Circuit Court of Appeals, reversing a panel's decision finding the existence of an exception,[3] held that there was no dangerous patient exception to the psychotherapist-patient privilege at a criminal trial held after the danger had passed. The court distinguished the application of the privilege in this context from the exception to confidentiality granted to psychotherapists where a there is a danger to the patient or others. The exception to confidentiality, existing in state law, is different from an exception that would permit the psychotherapist to testify in criminal case – even one arising out of the threats made in confidence. The court stated:

> . . . ordinarily testimony at a later criminal trial focuses on establishing a past act. There is not necessarily a connection between the goals of protection and proof. If a patient was dangerous at the time of *Tarasoff* disclosure[4], but by the time of the trial the patient is stable and harmless, the protection rationale that animates the exception ot the states' confidentiality laws no longer applies.

Although recognizing the language cited from the *Jaffee* case, the court held that it had no application under the circumstances of this case – where the danger had passed and all that was involved was proof of the crime rather than protection of individuals. The court found the error harmless in this case. Three judges would have recognized the exception.

In *United States v. Glass*, 133 F.3d 1356 (10th Cir. 1998), the court recognized the existence of a "dangerous patient" exception but treated it in such a way as to confirm the language of the last clause in this section of the survey rule: "the disclosure of such information is necessary to prevent death or injury." In *Glass*, the defendant had expressed a threat to his psychotherapist to kill President Clinton and his wife. A psychotherapist had prescribed outpatient mental health treatment for him while the defendant was residing at his father's home. An outpatient nurse informed local law enforcement when the defendant left his father's home. The Secret Service contacted the psychotherapist who disclosed defendant's threats. The court noted the *Jaffee* footnote and stated that it would recognize the existence of an exception to the privilege that would apply to a threat that was serious when uttered and where disclosure was the only means of averting harm. However, the court was unable to decide the application of the privilege on the record before it. It stated (133 F.3d at 1359):

> . . . on the record before us, we have no basis upon which we can discern how ten days after communicating with his psychotherapist, Mr. Glass' statement was transformed into a serious threat of a harm which could only be averted by disclosure.

The Court remanded for inquiry into the psychotherapist's and Secret Services's view as

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[3] United States v. Chase, 301 F.3d 1019 (9th Cir. 2002).

[4] Tarasoff v. Regents of Univ. of Cal.,551 P.2d 334 (1976) (When therapist determines or should determine that his patient presents a serious danger of violence to another, the therapist incurs an obligation to use reasonable care to protect the intended victim. This duty may call for him to warn the intended victim or notify the police).

to the seriousness of the threat.

In *United States v. Hayes*, 227 F.3d 578 (6th Cir. 2000) the court also rejected the exception as applied in an instance in which it could not be said that disclosure was necessary to the safety of another individual. The court dealt with threats to federal officers and a claim of privilege based upon the psychotherapist-patient privilege. The court distinguished between the ethical duty of a psychotherapist to disclose threats to prevent harm to others and a required disclosure at a court hearing after the threat had passed. The court found the footnote in *Jaffee* to relate to the former situation, but not the latter. There is a strong dissent in *Hayes* to the effect that once the psychotherapist has informed the patient of the need to disclose threats for the protection of others, the privilege no longer attaches.

(6) relevant to an issue in a proceeding challenging the competency of the psychotherapist;

(7) relevant to a breach of duty by the psychotherapist. Such statements are admissible only to the extent reasonably necessary to prove a fact at issue involving the breach of duty; or

(8) relevant for a psychotherapist to reveal in a proceeding to resolve a dispute with a patient. Such statements are admissible only to the extent reasonably necessary to prove a fact at issue in the dispute; or

Subsections (d)(6)(7) and (8) have no federal case authority nor was anything comparable contained in Proposed Rule 504. The subsections are based upon similar exceptions contained in the survey rule governing the attorney-client privilege. Subsections (6) and (7) track similar exceptions in Uniform Rule 503.

(9) that is subject to a duty to disclose under the laws of the United States.

Uniform Rule 503 provides that there is an exception to the privilege where there is a duty to disclose under "[statutory law]." This exception is borrowed from that provision, but limited to disclosures required under federal law. There is no federal case law on the subject. There is nothing that would lead to the conclusion that a duty to disclose under state law would be recognized by the federal courts.

ATTORNEY-CLIENT PRIVILEGE SURVEY RULE

(a) Definitions. As used in this rule:

(1) A "communication" is any expression through which a privileged person intends to convey information to another privileged person or any record containing such an expression;

(2) A "client" is an individual who or an organization that consults a lawyer to obtain professional legal services;

(3) An "organization" is a corporation, unincorporated association, partnership, trust, estate, sole proprietorship, governmental entity, or other for-profit or not-for-profit association.

(4) An "attorney" is a person who is authorized to practice law in any domestic or foreign jurisdiction or whom a client reasonably believes to be an attorney;

(5) A "privileged person" is a client, that client's attorney, or an agent of either who is reasonably necessary to facilitate communications between the client and the attorney.

(6) A communication is "in confidence" if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one except a privileged person will learn the contents of the communication.

(b) General Rule of Privilege.

A client has a privilege to refuse to disclose and to prevent any other person from disclosing a communication made in confidence between or among privileged persons for the purpose of obtaining or providing legal assistance for the client. The client's identity and the fee paid to the attorney are privileged only if the disclosure of this information would thereby disclose a confidential communication, such as the client's motive for seeking representation.

(c) Who May Claim the Privilege.

A client, a personal representative of an incompetent or deceased client, or a person succeeding to the interest of a client may invoke the privilege. A client may, implicitly or explicitly, authorize an attorney, agent of the attorney, or an agent of a client to invoke the privilege on behalf of the client.

(d) Standards for Organizational Clients

With respect to an organizational client, the attorney-client privilege extends to a communication that

(1) is otherwise privileged within this rule;

(2) is between an organization's agent and a privileged person where the communication concerns a legal matter of interest to the organization within the scope of the agent's agency or employment; and

(3) is disclosed only to privileged persons and other agents of the organization who reasonably need to know of the communication in order to act for the organization.

(e) Privilege of Co-Clients and Common-Interest Arrangements.

If two or more clients are jointly represented by the same attorney in a matter or if two or more clients with a common interest in a matter are represented by separate attorneys and they agree to pursue a common interest and to exchange information concerning the matter, a communication of any such client that is otherwise privileged and relates to matters of common interest is privileged as against third persons. Any such client may invoke the privilege unless the client making the communication has waived the privilege. Unless the clients agree otherwise, such a communication is not privileged as between the clients. Communications between clients or agents of clients outside the presence of an attorney or agent of an attorney representing at least one of the clients are not privileged.

(f) Exceptions. The attorney-client privilege does not apply to a communication

(1) from or to a client who is now deceased if the communication is relevant to an issue between parties who claim an interest through the same deceased client, either by testate or intestate succession or by an inter vivos transaction;

(2) that occurs when a client consults an attorney to obtain assistance to engage in a crime or fraud or aiding a third person to do so. Regardless of the client's purpose at the time of consultation, the communication is not privileged if the client uses the attorney's advice or other services to engage in or assist in committing a crime or fraud.

(3) that is relevant and reasonably necessary for an attorney to reveal in a proceeding to resolve a dispute with a client concerning the compensation or reimbursement that the attorney reasonably claims the client owes the attorney;

(4) that is relevant and reasonably necessary for an attorney to reveal in order to defend against an allegation by anyone that the attorney, the attorney's agent, or any person for whose conduct the attorney is responsible acted wrongfully or negligently during the course of representing a client;

(5) relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(6) between a trustee of an express trust or a similar fiduciary and an attorney or other privileged person retained to advise the trustee concerning the administration of the

trust, if relevant to a beneficiary's claim of breach of fiduciary duties;

(7) between an organizational client and an attorney or other privileged person, if offered in a proceeding that involves a dispute between the client and shareholders, members, or other constituents of the organization toward whom the directors, officers, or similar persons managing the organization bear fiduciary responsibilities, provided the court finds

> **(A) those managing the organization are charged with breach of their obligations toward the shareholders, members, or other constituents or toward the organization itself;**
>
> **(B) the communication occurred prior to the assertion of the charges and relates directly to those charges; and**
>
> **(C) the need of the requesting party to discover or introduce the communication is sufficiently compelling and the threat to confidentiality sufficiently confined to justify setting the privilege aside.**

COMMENTARY ON ATTORNEY-CLIENT PRIVILEGE SURVEY RULE

(a) Definitions. As used in this rule:

(1) A "communication" is any expression through which a privileged person intends to convey information to another privileged person or any record containing such an expression;

The definition in part (a) (1) is taken from the Restatement (Third) of the Law Governing Lawyers § 69 (2000).

The definition of a communication within the meaning of the rule provides an essential limiting parameter of the rule. In addition to providing a guideline as to what is within the rule, the definition necessarily and perhaps more importantly delineates what is not a communication.

Confining the privilege to "expressions" is consistent with the federal cases. For example, a client's appearance is not regarded as a communication, *see United States v. Kendrick,* 331 F.2d 110, 113-114 (4th Cir. 1964); *Provenzano v. Singletary,* 3 F.Supp. 2d 1353, 1367 (M.D. Fla. 1997) *aff'd,* 148 F.3d 1327 (11th Cir. 1998), nor is his or her demeanor, *In re Walsh,* 623 F .2d 489 (7th Cir. 1980). A characterization of a client as a "sly fox" is not a communication protected by the privilege. *United States v. Sayan,* 968 F.2d 55, 64 (D.C. 1992). There is some authority that the mental competency of a client is within the privilege, *see Gunther v. United States,* 230 F.2d 222, 223-224 (D.C. Cir. 1956), but this is clearly a minority position. *See* Edward J. Imwinkelried, The New Wigmore §6.7.1 (2002). Even in the *Gunther* case, the court does not quarrel with the definition of a communication as an expression, but rather expresses concern that testimony with regard to competency would necessarily open the inquiry into the "factual data," *i.e.,* the actual communications between lawyer and client.

The federal courts have consistently held that the identity of a client is not itself a communication. *E.g., United States v. Blackman,* 72 F.3d 1418, 1425 (9th Cir. 1995); *Lecourt v. United States,* 125 F.3d 79,86 (2d Cir.1997); *In re Shargel,* 742 F.2d 61, 62 (2d Cir. 1984). Whether the revelation of identity is tantamount to the disclosure of a communication is another question and is addressed in the commentary to part (b).

The definition recognizes that a communication need not be oral, but may be contained in a record intending to convey information between lawyer and client. *See* 1 McCormick on Evidence, § 89 at 359 (6th ed. 2006). This does not mean that any information contained in a document passed between lawyer and client is a communication. Indeed, the courts have consistently held that a preexisting document does not become privileged simply because it is passed from client to lawyer. *See, e.g., Fisher v. United States,* 425 U.S. 391,404 (1976); *United States v. Robinson,* 121 F.3d 971, 975 (5th Cir. 1997). Rather, the record itself must be an expression of information from the client to the lawyer or vice versa.

The definition does not distinguish between communications coming from the client and communications coming from the lawyer. A communication meets the definition so long as it is between privileged persons – defined later in the rule as both lawyer and client – regardless of

which one is speaking. Some federal cases take a narrow view of the privilege and confine its application either to expressions made by the client or to attorney communications that reveal client confidences. *See, e.g., In re Fischel,* 557 F.2d 209,212 (9th Cir. 1977); *Potts v. Allis-Chalmers Corp.,* 118 F.R.D. 597, 602 (N.D. Ind. 1987). The court in *Potts* criticized the extension of the privilege to all communications from the attorney as "contrary to the expressed intention of the Seventh Circuit to confine the privilege to the narrowest limits consistent with the privilege's purpose."

However, there is also support in the federal cases for the broad extension of the privilege to all communications from lawyer to client. *Sprague v. Thorn Americas, Inc.,* 129 F.3d 1355, 1369-70 (10th Cir. 1997); *United States v. Amerada Hess Corp.,* 619 F.2d 980,986 (3d Cir. 1980). *See also* Timothy P. Glynn, Federalizing Privilege, 52 Amer.U.L.Rev. 59, 100-101 (2002). The Court in the *Sprague* case gives the topic extended discussion, setting forth the rationale for both the narrow and the broad approach to the issue. In deciding upon a broad application of the rule, the Court relies upon the reasoning of the district court in *In re LTV Securities Litigation,* 89 F.R.D. 595,605 (N.D. Tex. 1981). In *LTV,* the court rejected the narrower view, emphasizing that predictability of confidence is central to the role of the attorney and that "[a]doption of such a niggardly rule has little to justify it and carries too great a price tag." The court also relied upon an earlier Tenth Circuit case, *Natta v. Hogan,* 392 F.2d 686, 692-93 (10th Cir. 1968) where the court noted: "The recognition that privilege extends to statements of a lawyer to a client is necessary to prevent the use of the lawyer's statements as admissions of the client." The operation of the privilege to protect communications going both from the lawyer and from the client is also consistent with proposed Federal Rule 503 and Uniform Rule of Evidence 502. Thus, despite some authority to the contrary, the Survey Rule adopts the broader approach to the definition of communications.

(2) A "client" is an individual who or an organization that consults a lawyer to obtain professional legal services;

This definition is based on Proposed Rule 503(a) (1) and Uniform Rule 502(a)(1), with some language changes.

The definition is in accord with the law generally, *see* 1 McCormick on Evidence, *supra* at § 88 (6th ed. 2006). The federal cases confirm that the payment of a fee is not essential. *United States* v. *Costanzo,* 625 F.2d 465, 469 (3d Cir. 1980). However, the consultation must be for legal services, not as a friend, *Modern Woodmen of America* v. *Watkins,* 132 F.2d 352,354 (5th Cir. 1942), as a business advisor, *United States* v. *United Shoe Machinery Corp.,* 89 F.Supp. 357, 360 (D. Mass. 1950), or as an accountant, *Olender* v. *United States,* 210 F.2d 795,866-67 (9th Cir. 1954). The court in *Modern Woodman,* stated (132 F.2d 352):

> If the statement is about matters unconnected with the business at hand, or in a general conversation, or to the lawyer merely as a personal friend, the matter is not privileged. The fact that a person is a lawyer does not disqualify him as a witness, for he, like any other person, may testify to any competent facts except those which came to his knowledge by means of confidential relations with his client.

(3) An "organization" is a corporation, unincorporated association, partnership, trust, estate, sole proprietorship, governmental entity, or other for-profit or not-for-profit association.

This definition is consistent with Proposed Federal Rule 503(a) (1), Uniform Rule 502 and Restatement (Third) of the Law Governing Lawyers § 73-74 (2000), although none of those sources contain a separate definition of organization.

The definition is supported by federal case authority. Despite some musings to the contrary, *see Radiant Burners, Inc.* v. *American Gas Assn.*, 207 F. Supp. 771, 772-73 (N.D.Ill. 1962), the privilege has consistently been applied to corporations. *See Upjohn Corp.* v. *United States,* 449 U.S. 383, 389-92 (1981); *Radiant Burners, Inc.* v. *American Gas Assn.*, 320 F.2d 314, 322-24 (7th Cir. 1963). The few cases dealing with the issue have extended the privilege to unincorporated associations. *See United States* v. *Rowe,* 96 F.3d 1294, 1296 (9th Cir. 1996) (law firm); *Kneeland* v. *National Collegiate Athletic Ass 'n,* 650 F. Supp. 1076, 1087 (W.D. Tex. *1986), rev'd on other grounds,* 850 F.2d 224 (5th Cir. 1988) (unincorporated association). *See also Nesse* v. *Shaw Pittman,* 206 F.R.D. 325, 329-30 (D.D.C. 2002) (privilege applied to communications to law firm's general counsel but not to member of management committee). For the view that the privilege should not extend to unincorporated entities, *see* 24 C. Wright & K. Graham, Federal Practice & Procedure § 5477 (1986).

The applicability of the privilege to governmental entities has also been recognized by the federal courts. *See Town of Norfolk v. Corps o/Engineers,* 968 F.2d 1438,1457-58 (1st Cir. 1992) (Army Corps of Engineers); *Coastal Corp.* v. *Duncan,* 86 F.R.D. 514, 520 (D. Del. 1980) (Department of Energy, *dictum).* Again, some writers have argued against such an extension of the privilege. *See discussion in* 24 Wright & Graham *supra,* at § 5475. This is not to say that the privilege applies to communications between federal officials and government attorneys in all instances. For example, in the context of grand jury subpoenas, the courts have held that the privilege will not apply where one federal government arm, *i.e.,* the grand jury, seeks information from counsel for another federal government agency. *See In re Grand Jury Subpoena Duces Tecum,* 112 F.3d 910,915-16 (8th Cir. 1997); *In re Lindsey,* 158 F.3d 1263, 1278 (D.C. Cir. 1998). The issues involved in applying the privilege in the governmental context are more fully discussed in the Appendix to this Commentary, Part 1. *Also see* the discussion in connection with the Standard for Organizations Clients, part (d).

(4) An "attorney" is a person who is authorized to practice law in any domestic or foreign jurisdiction or whom a client reasonably believes to be an attorney;

This definition is based upon Proposed Federal Rule of Evidence 503(a)(2) and Uniform Rule of Evidence 502(a)(3).

The few federal cases dealing with the issue have held that the privilege applies when the client reasonably believes that the person consulted is a lawyer, even if that belief is incorrect. *See United States* v. *Tyler,* 745 F. Supp. 423, 435 (W.D.Mich. 1990) (reasonable belief that fellow prisoner was a lawyer); *United States* v. *Boffa,* 513 F.Supp. 517,523 (D.Del. 1981) (reasonable belief is sufficient, but not established under the facts of case); *United States* v. *Ostrer,* 422

F.Supp. 93, 98 (S.D.N.Y. 1976) (reasonable belief that lawyer was extending legal, rather than simply friendly, advice).

The courts have also held that communications with an individual licensed as an attorney in a foreign jurisdiction are within the privilege, *Renfteld Corp.* v. *E. Remy Martin & Co., S.A.,* 98 F.R.D. 442, 444 (D.Del. 1982). Because of licensing arrangements and titles of lawyers vary significantly from nation to nation, there has been some dispute as to who is qualified as a lawyer in a particular country. In the *Renfteld* case, the court stated that the requirement is a functional one of whether the individual is competent to render legal advice and is permitted by law to do so. The corporate in-house counsel in *Renfteld* was found to be so authorized under French law. In *Honeywell, Inc.* v. *Minolta Camera Co., Ltd.,* 1990 WL 66182, 2-4 (D.N.J. 1990), the court took issue with the functional test, finding that communications to a Japanese individual who had never been licensed as an attorney in Japan or elsewhere were not within the privilege, despite the fact that the person sought to give legal advice. The language of this definition takes an approach consistent with both *Renfteld* and *Honeywell.* The test is whether the person in question was *authorized* to practice law in the foreign jurisdiction. The lawyer in *Renfteld* was; the person in *Honeywell* was not. Whether an individual is in fact authorized to practice will necessarily be dependent on the court's analysis of the facts and the law of the foreign jurisdiction. The definition gives as much general guidance as is warranted.

A question related to the application of the privilege to persons authorized to practice law in foreign jurisdictions is the issue of whether the court's should recognize as privileged communications with non-lawyers who are covered by a comparable privilege in other countries. However, this question is more appropriately viewed as a choice of law problem. The question is whether the foreign privilege should be recognized, not whether the federal attorney-client privilege should apply. *See, e.g., Golden Trade, S.rL* v. *Lee Apparel Co.* 143 F.RD. 514, 51819 (S.D.N.Y. 1993)(communications between attorney and foreign patent agent assisting him come within ambit of the privilege); *SmithKline Beecham Corp.* v. *Apotex Corp.,* 193 F.RD. 530,535-36 (N.D. Ill. 2000) (question was the application of the privilege by law of the United Kingdom).

There is also the related issue of the application of the privilege to communications with United States patent agents. A number of cases have held that communications between a patent agent and a client may be privileged where the proceeding is before the patent office and the agent is registered with that office. *See, e.g., In re Ampicillin Antitrust Litigiation,* 81 F.RD. 377,391 (D.D.C. 1978); Daiske Yoshida, Note, The Applicability of the Attorney-Client Privilege to Communications with Foreign Legal Professionals, 66 Fordham L.Rev. 209 (1997). There are certainly instances in which a patent agent is acting as the agent either of an attorney or the client and the communications are privileged under the usual application of the attorneyclient privilege. *See Foseco Int'l Ltd.* v. *Fireline, Inc.* 546 F.Supp. 22, 25 (N.D. Ohio 1982); *see also* discussion in connection with definition (a) (5). However, some courts, such as in both *Ampicillin* and *Foseco,* have the recognized the existence of privileged communications beyond the situation where the patent agent is acting for the attorney. The definition in this Survey Rule would not recognize such an extension. However, the exclusion of patent agents from the definition of attorney within the rule does not mean that such communication are not privileged. There may well be a separate privilege governing patent agents subject to its own rules and limitations. It is simply not the attorney-client privilege and thus not covered by this Survey Rule.

(5) A "privileged person" is a client, that client's attorney, or an agent of either who is reasonably necessary to facilitate communications between the client and the attorney.

This definition is based upon Restatement (Third) of the Law Governing Lawyers § 70 (2000). It is also consistent with both Proposed Federal Rule 503 and Uniform Rule 502.

The issues involved in this definition concern the question of who is an agent of either the client or the attorney. The definition itself provides only a broad rule, stating that the agent be "reasonably necessary to facilitate communications."

The words "reasonably necessary" are added to the definition in the Restatement § 70 in dealing with the agents of either the client or the lawyer. However, the Comment to the Restatement section notes that "a person is a confidential agent for communication if the person's participation is reasonably necessary to facilitate the client's communication with a lawyer or another privileged person. Although the same language is not used in either Proposed Federal Rule 503 or Uniform Rule 502, the addition of the words "reasonably necessary" is not inconsistent with those rules.

The language is also consistent with the federal cases. The leading case on the issue involved communications made by a client to an accountant in his attorney's employ. *United States* v. *Kovel,* 296 F.2d 918, 922 (2d Cir. 1961). The court noted that what was "vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer." The court compared the role of the accountant to that of a foreign language interpreter:

> [T]he presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not to destroy the privilege, any more than would that of the linguist ...; the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit.

See also United States v. *Alvarez,* 519 F.2d 1036, 1045-46 (3d Cir. 1975) (privilege extended to client communication with psychiatrist); *Mendenhall* v. *Barber-Greene Co.,* 531 F. Supp. 951, 953-54 (N.D. Ill. 1982) (privilege applied to communications with foreign patent agents who were agents of the attorney); *Cedrone* v. *Unity Sav. Ass 'n.,* 103 F.R.D. 423, 429 (E.D.Pa. 1984) (internal memoranda and conversations between lawyers in the same firm were within the privilege).

A leading case setting forth limits on the privilege where agents are involved is *United States* v. *Ackert,* 169 F.3d 136, 139 (2d Cir. 1998), where the court found that there was an insufficient showing that an investment banker was hired to translate or interpret information given to the attorney by the client. Rather, the consultant was sought out for information about a proposed transaction and its tax consequences. It was not sufficient that the information was of assistance to the attorney.

The party claiming the privilege has the burden of showing that the person with whom the

communications took place was the agent of either the lawyer or the client for the purpose of facilitating legal services. Where that burden is not met, the privilege fails. *See United States* v. *Adlman,* 68 F.3d 1495, 1500 (2d Cir. 1995) (insufficient showing that auditor was consulted to assist in giving legal as opposed to tax advice); *Von Bulow* v. *Von Bulow,* 811 F.2d 136, 146 (2d Cir. 1987) (party failed to meet burden to show that person claiming to be a paralegal was assisting lawyer in representation of the client); *FTC* v. *TRW, Inc.,* 628 F.2d 207, 213 (D.C. Cir. 1980) (party failed to meet burden of showing that the report prepared by a credit reporting agency was done as an agency for attorneys); *Dabney* v. *Investment Corp. Of America,* 82 F.R.D. 464, 464-65 (E.D. Pa. 1979) (law student not found to been acting as agent or associate of attorney; no privilege).

The same considerations apply where it is the client, rather than the lawyer, who has employed or used the agent. *See In re Bieter,* 16 F.3d 929, 938-40 (8th Cir. 1994) (business consultant found to be agent of client); *In re Grand Jury Proceedings,* 947 F.2d 1188, 1190-91 (4th Cir. 1991) (clients' conversations with accountant immediately before consulting lawyer were privileged; earlier conversations not found to be for purpose of assisting client in communicating with his lawyer); *Miller* v. *Haulmark Transport Systems,* 104 F.R.D. 442, 444-45 (E.D.Pa. 1984) (presence of insurance agent instrumental in arranging coverage that was the subject of the lawsuit did not destroy privilege where presence was the limited purpose of aiding the attorney).

(6) A communication is "in confidence" if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one except a privileged person will learn the contents of the communication.

This definition is based on Restatement (Third) of the Law Governing Lawyers § 71 (2000), although it differs from the Restatement section as discussed below. It is also consistent with both Proposed Federal Rule 503 and Uniform Rule 502.

There are primarily two kinds of situations in which the confidentiality of a communication may come into question. First, is where someone other than the lawyer or client was present and in a position to hear the communication. Second, is where the client may have intended that the communication be relayed to another person.

In the first scenario, the presence of a third person will not destroy confidentiality where the other person is an agent of either the lawyer or the client for the purpose of assisting in the rendering of legal services. *See* discussion in the commentary to part (a)(5). *Compare Kevlik v. Goldstein,* 724 F.2d 844,849 (lst Cir. 1984) (confidentiality not destroyed by presence of client's father) *with CaJritz* v. *Kolslow,* 167 F.2d 749 (D.C. Cir. 1948) (presence of client's sister destroyed confidentiality where no sufficient reason shown for her presence). *See also Cavallaro v. United States,* 284 F.3d 236,247 (lst Cir. 2002) (presence of accountants who were not acting to aid in obtaining legal advice destroyed confidentiality of the communications); Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence, § 183, 186 (2d ed. 1994).

The phrase "reasonably believe that no one except a privileged person will learn the contents of the communication" is consistent with federal cases holding that reasonable

precautions must be taken to assure confidentiality. *United States v. Gann,* 732 F.2d 714, 723 (9th Cir. 1984) (no privilege where statement made by client to attorney on telephone within hearing of law enforcement personnel); *United States v. Waller,* 581 F.2d 585, 585-86 (6th Cir. 1978) (leaving notepad in prominent place in a public courtroom was not consistent with a claim of confidentiality). *But see Gomes v. Vernon,* 255 F.3d 1118, 1133 (9th Cir. 2001) (prisoners did all as they could to secure documents' confidentiality within the context of a prison situation).

The second situation in which confidentiality is in doubt is where the client may have intended the communication to be communicated to another person. Under the definition, if the communication is made with the intention of it being conveyed publicly, there is no confidentiality. This result is consistent with a great number of federal cases. *See, e.g., In re Grand Jury Proceedings,* 33 F.3d 342,355 (4th Cir. 1994) (matters were communicated to attorneys for use in connection with public disclosures); *United States* v. *Oloyede,* 982 F.2d 133 (4th Cir. 1992) (information intended for use in citizenship applications); *Colton* v. *United States,* 306 F.2d 633, 638 (2d Cir. 1962) (information given for inclusion in tax return not confidential).

Federal cases have held that matters communicated to an attorney where the client is seeking advice on the possibility of disclosure may still be privileged. *In re Grand Jury Proceedings,* 33 F.3d 342,354 (4th Cir. 1994); *United States* v. *(Under Seal),* 748 F.2d 871, 878 (4th Cir. 1984). However, these same cases conclude that once there is a decision to disclose the privilege no longer exists. Furthermore, as stated in *Under Seal,* all of the details underlying the data which was to be published is outside the privilege. The court noted (748 F.2d at 875, n. 7):

> The details underlying the published data are the communications relating the data, the document, if any, to be published containing the data, all preliminary drafts of the document, and any attorney's notes containing material necessary to the preparation of the document. Copies of other documents, the contents of which were necessary to the preparation of the published document, will also lose the privilege.

Not all federal courts have followed the Fourth Circuit in this respect. Thus, the court in *Schenet* v. *Anderson,* 678 F. Supp. 1280, 1283 (E.D. Mich. 1988), relying in large measure on *United States* v. *Schlegel,* 313 F. Supp. 177, 179 (D. Neb. 1970), declined to follow that authority, stating:

> [T]he attorney-client privilege applies to all information conveyed by clients to their attorneys for the purpose of drafting documents to be disclosed to third persons and all documents reflecting such information, to the extent that such information is not contained in the document published and is not otherwise disclosed to third persons. With regard to preliminary drafts of documents intended to be made public, the court holds that preliminary drafts may be protected by the attorney-client privilege. Preliminary drafts may reflect not only client confidences, but also the legal advice and opinions of attorneys, all of which is protected by the attorney client privilege. The privilege is waived only as to those portions of the preliminary drafts ultimately revealed to third parties.

The Survey Rule definition of "in confidence" does not deal directly with this split in authority. The language can be interpreted as supporting either line of case authority. A more expansive discussion of this issue is contained in the Appendix to this Commentary, Part 2.

The definition of "in confidence" found in Restatement § 71 differs from the definition in this Survey Rule in that the Restatement section adds that the communication may be in confidence if made either to a privileged person or "another person with whom communications are protected under a similar privilege." The Restatement Comment supplies no authority for this addition. The additional clause is contrary to cases that find that communications made by' one spouse to a lawyer in the presence of the other spouse are not confidential unless the nonclient spouse is found to be an agent of the client. *See discussion in State* v. *Gordon,* 504 A.2d 1020, 1024-26 (Conn. 1985) (issue was whether wife, who participated in conferences and assisted husband's defense counsel was really agent of the State).

(b) General Rule of Privilege.

A client has a privilege to refuse to disclose and to prevent any other person from disclosing a communication made in confidence between or among privileged persons for the purpose of obtaining or providing legal assistance for the client. The client's identity and the fee paid to the attorney are privileged only if the disclosure of this information would thereby disclose a confidential communication, such as the client's motive for seeking representation.

The general rule of privilege set out in Section (b) is derived from several sources including Restatement (Third) of the Law Governing Lawyers § 67 (2000), Proposed Federal Rule of Evidence 503 and Uniform Rule of Evidence 502. However, the second sentence of the section, dealing with identity and fee, is not contained in any of those sources and is intended to reflect and emphasize the prevailing holdings of federal cases.

The first sentence of the rule draws upon the definitions contained in Section (a)(1)-(6). The discussions in this commentary concerning the case law supporting those definitions is also pertinent to the general rule. Thus, cases such as *United States v. Ostrer,* 422 F.Supp. 93, 98 (S.D.N.Y. 1976) (reasonable belief that lawyer was extending legal, rather than simply friendly, advice) support the general rule as well as the definition of "attorney in Section (a)(4). *See generally* 1 McCormick on Evidence § 88 (6th ed. 2006).

Other significant federal cases ruling on whether a communication was for the purpose of obtaining or providing legal assistance include: *Simon v. GD. Searle & Co.,* 816 F.2d 397, 40204 (8th Cir. 1987)(documents intended to apprise lawyers of business matters will be privileged only if they embody an implied request for legal advice based on the documents); *United States v. Tedder,* 801 F.2d 1437, 1442-43 (4th Cir. 1986) (communications not privileged where lawyer consulted as a friend and not for legal advice); *United States v. Wilson,* 798 F.2d 509, 513 (1st Cir. 1986) (no privilege where lawyer's services sought as a negotiator or messenger rather than as a lawyer); *United States v. Johnston,* 146 F.3d 785, 794 (10th Cir. 1998) (no privilege where lawyer was acting as a messenger for drug dealers rather than as a lawyer); *United States v. Knoll,* 16 F.3d 1313, 1322 (2d Cir. 1994) (papers relating solely to business transactions not privileged);

United States v. Aramony, 88 F.3d 1369, 1387-90 (4th Cir. 1996) (executive's communications to internal investigators and corporate counsel were not privileged where executive did not seek legal advice on his own behalf).

The court's discussion in *United States v. Frederick,* 182 F.3d 496 (7th Cir. 1999) is particularly enlightening. In *Frederick,* the court considered communications made by a client to an individual who was both an accountant and a lawyer. The information concerned both tax returns and IRS audits. The court rejected the existence of an client-accountant privilege. 182 F.3d at 500. It then affirmed the trial court's rejection of an attorney-client privilege under the circumstances of the case, finding that the communications with the lawyer/accountant were in his capacity as an accountant. In the course of its discussion, the court considered the issue of documents prepared for use both in preparing tax returns and for use in litigation, stating (182 F.3d at 501-02):

> Put differently, a dual-purpose document a document prepared for use in preparing tax returns *and* for use in litigation is not privileged; otherwise, people in or contemplating litigation would be able to invoke, in effect, an accountant's privilege, provided that they used their lawyer to fill out their tax returns. And likewise if a taxpayer involved in or contemplating litigation sat down with his lawyer (who was also his tax preparer) to discuss both legal strategy and the preparation of his tax returns, and in the course of the discussion bandied about numbers related to both consultations: the taxpayer could not shield these numbers from the Internal Revenue Service. This would be not because they were numbers, but because, being intended (though that was not the only intention) for use in connection with the preparation of tax returns, they were an unprivileged category of numbers. *(Emphasis by the court)*

See also *Montgomery County* v. *Micro Vote Corp.,* 175 F.3d 296,301-04 (3d Cir. 1999) (reversing trial court determination that lawyer acted as an "election consultant," finding instead. that the services were legal, applying Pennsylvania law but citing Federal authority); *United States* v. *Bauer,* 132 F.3d 504, 507-09 (9th Cir. 1997) (privilege attached where attorney not merely conveying public information as an officer of the court, but giving legal advice); *Rehling* v. *City of Chicago,* 207 F.3d 1009, 1019 (7th Cir. 2000) (police department counsel was giving legal advice to senior officers when he advised them concerning placement of disabled officer).

Although there do not seem to be federal cases directly on point, the modem trend, adopted by this section of the Survey Rule, is that the client may assert the privilege against an eavesdropper, provided that reasonable precautions were taken to preserve the confidentiality of the communication. *See* Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence, § 186 (2d ed. 1994). *See also Lively* v. *Washington County Dist. Court,* 747 P.2d 320, 321 (Okla. 1987)(phone conversation with attorney secretly videotaped). Both Proposed Federal Rule 503 and Uniform Rule 502 take this position.

The second sentence of this section of the rule, dealing with the identity of the client and the fee paid to the attorney, is not contained in any of the other rules that have served as the basis for this Survey Rule. As discussed in the commentary to section (a) (1) of this Survey Rule, the identity of the client is not itself a communication and is therefore ordinarily outside the rule. The

sentence is intended to reinforce the holding of a majority of federal cases that clearly establish that rule, while making clear that the privilege may attach but only if the disclosure of such information would disclose a confidential communication.

A view at odds with this sentence of the rule was at least suggested by language in *Baird* v. *Koerner,* 279 F.2d 623, 632 (9th Cir. 1960). In that case, an attorney had paid back taxes on behalf of an undisclosed client. The court held that the disclosure of the client's identity would necessary convey information that would be conceded to be part of the usual privileged communication between attorney and client. The *Baird* case has been cited as creating what has come to be known as a "last link" rule, *i.e.,* that where "a strong probability exists that disclosure of such information would implicate the client in the very criminal activity for which legal advice was sought" the privilege will attach. *United States v. Hodge and Zweig,* 548 F.2d 1347, 1353 (9th Cir. 1977). *See also* discussion in 1 McCormick on Evidence § 90 (6th ed. 2006).

The "last link" rule has been almost universally rejected in the federal courts. Instead, the courts have held that the identity or facts of retention of a lawyer are ordinarily not protected by the privilege, despite their incriminating nature. Cases such as *In re Shargel,* 742 F.2d 61 (2d Cir. 1984), are representative of the prevailing view. In *Shargel,* the government sought information as to whether an attorney had represented certain defendant and the amount of fees pays as evidence of "unexplained wealth." 742 F.2d at 62. In finding that no privilege protected the identity and amount offers, the court stated (742 F.2d at 64):

> It seems evident to us that a broad privilege against the disclosure of the identity of clients and of fee information might easily become an immunity for corrupt or criminal acts. [citation omitted] Such a shield would create unnecessary but considerable temptations to use lawyers as conduits of information or of commodities necessary to criminal schemes or as launderers of money. The bar and the system of justice will suffer little if all involved are aware that assured safety from disclosure does not exist.
>
> We adhere to our prior decisions, therefore, and define the limits of the privilege in terms of the goal of enabling lawyers to render informed legal advice and advocacy. We of course continue to recognize that "there may be circumstances under which the identification of a client may amount to the prejudicial disclosure of a confidential communications," [citation omitted]. However, we find no such circumstances here.

See also In re Grand Jury Proceedings, 791 F.2d 663, 665 (8th Cir. 1986) (court rejects "last link" analysis); *Clarke v. American Commerce Nat 'l Bank,* 974 F.2d 127 (9th Cir. 1992) (identity not privileged where records did not reveal communications); *Vingelli v. United States,* 992 F.2d 449,452 (2d Cir. 1992) (same). Several federal cases refusing to protect the identity of clients involved situations where a lawyer seeks to shield the name of clients making fee payments in excess of $10,000 in cash. *See, e.g., Lefcourt v. United States,* 125 F.3d 79, 86 (2d Cir. 1997); *United States v. Leventhal,* 961 F.2d 936, 941 (11th Cir. 1992).

What is required in order for the privilege to apply is a link to communications, including the motive of the client. Such circumstances may occur, for example, where revelation of the

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client's identity would necessarily link the client to already disclosed communications. *See, e.g., In re Grand Jury Proceedings,* 517 F.2d 666,672 (5th Cir. 1975); *United States v. Liebman, 742* F.2d 807,810 (3d Cir. 1984). The privilege may also exist where the disclosure of identity would necessarily reveal the client's motive. For example, in *In re Subpoenaed Grand Jury Witness,* 171 F .3d 511, 514 (7th Cir. 1999), the court protected identity, stating:

> We will not go into detail as to why we make this finding – that would be showing the hand to the government – but we are sure that disclosure of this information would identify a client of Hagen's who is potentially involved in targeted criminal activity which, on this record, would lead to revealing that client's motive to pay the legal bills for some of Hagen's other clients. And motive, we think:, is protected by the attorney-client privilege.

See also In re Grand Jury Proceeding, Cherney, 898 F.2d 565, 568 (7th Cir. 1990) (identity protected where revelation would reveal client's motive).

(c) Who May Claim the Privilege.

A client, a personal representative of an incompetent or deceased client, or a person succeeding to the interest of a client may invoke the privilege. A client may, implicitly or explicitly, authorize an attorney, agent of the attorney, or an agent of a client to invoke the privilege on behalf of the client.

This section of the Survey Rule is based on Restatement (Third) of the Law Governing Lawyers § 86 (2000), Proposed Federal Rule of Evidence 503 (c) and Uniform Rule of Evidence 502(c).

The section is fully consistent with federal law. All authorities agree that the privilege is that of the client, not the attorney. *See* 1 McCormick on Evidence § 92 (6th ed. 2006); Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 200 (2d ed. *1994). See also In re Grand Jury Subpoena,* 220 F.3d 406,408 (5th Cir. 1967) (in-house counsel had no right to assert privilege waived by corporate client). The attorney may raise the privilege on behalf of the client, *Fisher* v. *United States,* 425 U.S. 391,402 n. 8 (1976), and the attorney is duty bound to assert the privilege in the client's absence. *Republic Gear Co.* v. *Borg-Warner Corp.,* 381 F.2d 551, 556 (2d Cir. 1967).

Although there seem to be no specifically articulating that the attorney has implicit authority to invoke the privilege, the language in this section providing for implicit authority is consistent with general law, *see* Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence, § 200 (2d ed. 1994), as well as with Proposed Federal Rule 503(c) and Uniform Rule 502(c). These sources all provide that an attorney's authority is presumed in the absence of evidence to the contrary.

Most of the federal cases dealing with authority to invoke the privilege involve the question of who is the client. Thus, in *Commodity Futures Trading Comm 'n* v. *Weintraub,471* U.S. 343,350-51 (1985) the Supreme Court held that the trustee in bankruptcy, not the debtor's directors had the right to claim the privilege. *But see In re Foster,* 188 F.3d 1259, 1265-66 (10th

Cir. 1999) (individual debtor may hold privilege as opposed to trustee in bankruptcy). *See also United States* v. *International Bhd. of Teamsters,* 119 F.3d 210,215 (2d Cir. 1997) (campaign organization in union election, not campaign manager, held privilege); *In re Bevill, Bresler & Schulman Asset Mgt. Corp.,* 805 F.2d 120, 126 (3d Cir. 1986) (corporation, not officers, held privilege); *In re Grand Jury Subpoenas,* 144 F.3d 653, 658-59 (10th Cir. 1998) (corporate officer could claim privilege for communications on his own behalf but not on behalf of corporation).

The language of this section providing that the privilege may be claimed by "a person succeeding to the interest of a client" is consistent with these cases, although it does not elaborate on the issue.

As set forth in this section, a personal representative of an incompetent or deceased may claim the privilege. There is no longer any doubt that, in the federal court, the privilege survives the death of the client. *Swidler & Berlin v. United States,* 524 U.S. 399,405-06 (1998). The privilege in that case was claimed by the attorney on behalf of the deceased client. Because the issue was not raised in the case, there was no discussion of the question of who can raise the privilege on behalf of the deceased person and, perhaps more controversially, who, if anyone, would have the ability to waive it.

The issue of who actually holds the privilege after death has not been addressed in the federal cases. Both Proposed Federal Rule 503(c) and Uniform Rule 502(c) provide that the privilege may be claimed by the client's personal representative. Neither rule expressly states that the personal representative also has the right to waive the privilege. However, states with statutory or rule privileges containing similar language have held that the right to claim the privilege necessarily entails the right to waive it. *See, e.g., In Curtis' Estate,* 394 P.2d 59, 62 (Kan. 1964); *Scott v. Grinnell,* 161 A.2d 179, 183 (N.H. 1960). It likely that if this Survey Rule were adopted either as a rule or a statute, the language would have the same necessary effect. This Survey Rule obviously does not have the same effect. It seems probable that the federal courts will go in the direction that gives the personal representative the right both to claim and waive the privilege, but that matter has not yet been resolved.

(d) Standards for Organizational Clients

With respect to an organizational client, the attorney-client privilege extends to a communication that

(1) is otherwise privileged within this rule;

(2) is between an organization's agent and a privileged person where the communication concerns a legal matter of interest to the organization within the scope of the agent's agency or employment; and

(3) is disclosed only to privileged persons and other agents of the organization who reasonably need to know of the communication in order to act for the organization.

Section (d) is not contained in this form in any of the standard sources. It is derived in part

from Restatement (Third) of the Law Governing Lawyers §§ 73-74 (2000), but differs from the Restatement in at least two important respects. First, unlike Restatement §73, the Survey Rule requires, consistent with *Upjohn Corp. v. United States,* 449 U.S. 383 (1981), that the communication concern a legal matter "within the scope of the agent's agency or employment."

Section (d) also differs from the Restatement in that it provides, through its definition of organization in Section (a) (3), that communications between attorneys and agents of private organizations and governmental are to be analyzed under the same test. Specific problems in connection with the application of the privilege in the governmental context are discussed below.

Neither Proposed Federal Rule 503 nor Uniform Rule 502 have a specific section dealing with the organizational client. However, Survey Rule Section (d) is consistent with those rules. Proposed Rule 503(b) makes privileged communications between the client "or his representative." Uniform Rule 502(a)(4) includes a person "who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client."

The language of this section is an attempt to articulate the Supreme Court's holding in the *Upjohn* case. As stated in 1 McCormick on Evidence § 87.1 at 349 (6th ed. 2006), the basic principles of the holding are that information communicated by corporate agents to an attorney or representative of an attorney will be privileged if(1) it is communicated for the express purpose of securing legal advice for the corporation; (2) it relates to the specific corporate duties of the communicating employee; and (3) it is treated as confidential within the corporation itself. *Upjohn Corp. v. United States,* 449 *U.S. at* 394. Although the Court in *Upjohn* cautioned that it was not stating a rule for all cases, the court's opinion in that case has been widely regarded as doing so. The rule is firm in the federal courts. *See, e.g., Admiral Ins. Co. v United States Dist. Court,* 881 F.2d 1486, 1492-93 (9th Cir. 1989) (employee's communications to lawyer concerning matters within the scope of his employment even though the company planned to terminate the employee after the interview); *James Julian, Inc. v. Raytheon Co.,* 93 F.R.D. 138, 141-42 (D. Del. 1982) (privilege upheld against claim that corporation did not adequately maintain confidentiality); *Leucadia, Inc. v. Reliance Ins. Co.,* 93 F.R.D. 674, 678 (S.D.N.Y. 1983)(communications between employees of predecessor company made in confidence for the purpose of legal advice were privileged).

Although Section (a) (3) defines organizations as including government entities and, as stated above, Section (d) applies the same standard to government entities as to other organizations, there may be a significant difference in the application of the test in the government situation. The key portion of the standard in this respect is Section (d) (1) requiring that the communication be "otherwise privileged." Federal courts have held that there is no privilege for communications made to a government attorney in the course of that attorney's duties in the face of a grand jury subpoena. In so holding, the court in *In re Lindsey,* 158 F.3d 1263, 1272 (D. C. Cir. 1998) stated:

> When any executive branch attorney is called before a federal grand jury to give evidence about alleged crimes within the executive branch, reason and experience, duty and

tradition dictate that the attorney shall provide that evidence. With respect to investigations of federal criminal offenses, and especially offenses committed by those in government, government attorneys stand in a far different position from members of the private bar.

To the same effect is *In re Grand Jury Subpoenas Duces Tecum,* 112 F.3d 910,915-16 (8th Cir. 1997) (President Clinton and his wife could not claim privilege for communications to White House lawyers as against a grand jury subpoena). The same holding has been applied where a federal grand jury seeks information from attorneys for state agencies. *In re Witness Before the Special Grand Jury 2000-2,* 288 F.3d 289,294 (7th Cir. 2002) ("[I]nterpersonal relationships between an attorney for the state and a government official acting in an official capacity must be subordinate to the public interest in good and open government, leaving the government lawyer duty-bound to report internal criminal violations, not to shield them from public exposure).

Thus, the test for privilege with regard to communications between corporate and government employees and their corporate or government lawyers may be the same, but the privilege will not exist at all in the government context where the information is sought in a criminal case. *See also* Appendix to this Commentary, Part 1.

Specific exceptions to the privilege in dealing with claims against trustees and disputes between organizations and their shareholders, members or other constituents are considered in connection with Sections (f) (5) and (6) of the Survey Rule.

(e) Privilege of Co-Clients and Common-Interest Arrangements.

If two or more clients are jointly represented by the same attorney in a matter or if two or more clients with a common interest in a matter are represented by separate attorneys and they agree to pursue a common interest and to exchange information concerning the matter, a communication of any such client that is otherwise privileged and relates to matters of common interest is privileged as against third persons. Any such client may invoke the privilege unless the client making the communication has waived the privilege. Unless the clients agree otherwise, such a communication is not privileged as between the clients. Communications between clients or agents of clients outside the presence of an attorney or agent of an attorney representing at least one of the clients are not privileged.

Section (e) is based on Restatement (Third) of the Law Governing Lawyers §§ 75-76 (2000), although it is modified in some respects. It is also consistent with Proposed Federal rule 503«b) and Uniform Rule 502(b).

The portion of the rule covering situations where two or more clients consult a single lawyer or law firm, has not been the subject of much controversy in the federal or state courts. Communications among the lawyer and joint clients are privileged as against the rest of the world; they are not privileged as between or among the parties. *See Grand Trunk Western R. Co.* v. *H. W. Nelson Co.,* 116 F.2d 823,835 (6th Cir. 1941); 1 McCormick on Evidence § 91 (6th ed. 2006).

Most of the federal court decisions, however, involve the other scenario addressed by Section (e), where two or more clients with a common interest in a matter are represented by separate attorneys and agree to pursue a common interest and to exchange information concerning the matter.

The language of the survey differs from Restatement § 76, dealing with common interest arrangements, in that it states specifically that the clients must not only have a common interest, but agree to pursue it together before they communicate in confidence. *See, e.g., United States v. Melvin,* 650 F.2d 641,646 (5th Cir. 1981) (conversations including party who had not yet agreed to the joint representation not privileged).

The common interest privilege applies whether or not a litigated matter is involved, *see In re Regents of Univ. of California,* 101 F.3d 1386, 1389-90 (Fed. Cir. 1996) (patent application) and to plaintiffs in litigation as well as defendants, *see Schachar v. American Academy of Ophthalmology, Inc.,* 106 F.R.D. 187, 191 (N.D. Ill. 1985) (plaintiffs involved in different lawsuits). However, the rule makes clear, as do the cases that the communications must otherwise be privileged. Thus, information supplied by the client must be shown to be communicated for the purpose of obtaining legal advice. If not, it is not privileged, irrespective of the existence of a joint defense or common interest. *See United States v. Bay State Ambulance & Hosp. Rental Serv.,* 874 F.2d 20, 29 (lst Cir. 1989) (client failed to show that communication was for purposes involving the joint defense).

A common interest privilege sometimes will not arise, even where two clients jointly consult lawyers with regard to related matters. For example, in *In re Grand Jury Subpoena Duces Tecum,* 112 F.3d 910,922 (8th Cir. 1997), the court held that matters discussed in connection with the Whitewater investigation between Hilary Rodham Clinton and her lawyers and lawyers representing the Office of the President were not within the common interest doctrine. Mrs. Clinton's interests were in avoiding personal liability, criminal or civil; the White House as a governmental institution did not have a similar interest.

The last sentence of the Survey Rule, dealing with communications between clients or their agents outside the presence of an attorney or her agent is not found in the Restatement, Proposed Federal Rule 503 or Uniform Rule 502. Although there is no direct authority on the point, by way of dictum, the court in *United States v. Gotti,* 771 F. Supp. 535, 545 (E.D.N.Y. 1991) stated that such communications would not be protected. *See also* Stephen A. Saltzburg, Michael M. Martin, Daniel J. Capra, Federal Rules of Evidence Manual, § 501[5][e] at 501-33 (8th ed. 2002)

As in the case of the joint defense, the common interest privilege does not apply in later actions between or among the parties. *E.g., Simpson v. Motorists Mut. Ins. Co.,* 494 F.2d 850, 854 (7th Cir. 1974) (statement made by insurer defending an insured not privileged in a coverage action against the insurer).

The sentence in section (e) providing that any client may invoke the privilege "unless the client making the communication has waived" it is consistent with the federal cases. *See., e.g., In re Grand Jury Subpoenas,* 89-3 & 89-4, 902 F.2d 244, 248, 249 (4th Cir. 1990) (no unilateral

waiver of privilege); *In re Grand Jury Subpoenas Duces Tecum,* 406 F. Supp. 381, 394 (S.D.N.Y. 1975) (waiver of privilege by one co-client did not destroy privilege as to communications by other co-clients).

This section of the Survey Rule includes the language of Restatement §§ 75-76, providing that the communication is not privilege as between clients *"unless the clients agree otherwise."* The rule adopts the language based upon the considerations set forth the Reporter's Note to Restatement § 75 (at 583):

> No direct authority has been found for giving effect to agreements among co-clients that the privilege shall be preserved in subsequent adverse proceedings between them. The approach taken [in the Restatement section and Comment] is consistent with the theory of the co-client privilege and with the basis for removing the privilege in subsequent adverse proceedings, the presumed intent of the co-clients and fairness considerations. [citation omitted] The result is similar to that which would obtain if the parties contracted on other matters. Perhaps most obviously, the result is the same that would be reached if, during litigation itself, adversary parties agreed to a confidentiality obligation as part of an effort to expedite pretrial discovery or for other reasons.

(f) Exceptions. The attorney-client privilege does not apply to a communication

(1) from or to a client who is now deceased if the communication is relevant to an issue between parties who claim an interest through the same deceased client, either by testate or intestate succession or by an inter vivos transaction;

This subsection is taken from Restatement (Third) of the Law Governing Lawyers § 81 (2000). A similar provision is found in Proposed Federal Rule 503(d)(2) and Uniform Rule 502(d)(2).

The provision is supported by cases from a number of jurisdictions. *See* 1 McCormick on Evidence, § 94 at 379 (6th ed. 2006). The Supreme Court, while deciding that the privilege generally survives the death of the client, noted the existence of this exception. *Swidler & Berlin v. United States,* 524 U.S. 399,404 (1998). Indeed, the Court looked to cases applying the testamentary exception as affirming the survival of the privilege under other circumstances. In addition to a number of state cases, the Court also cites *Glover v. Patten,* 165 U.S. 394 (1897) for its recognition of the testamentary exception in the federal courts. In *Glover,* the Court stated (165 U.S. at 406):

> [W]e are of opinion that, in a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged. While such communications might be privileged if offered by third persons to establish claims against an estate, they are not within the reason of the rule requiring their exclusion, when the contest is between the heirs or next of kin. The Court in *Glover* goes on to note that it would be arbitrary to hold that the privilege belongs to one and not to others claiming from the deceased. The same considerations would seem

to apply regardless of whether the litigation involves testate or intestate succession or inter vivos transactions.

(2) that occurs when a client consults an attorney to obtain assistance to engage in a crime or fraud or aiding a third person to do so. Regardless of the client's purpose at the time of consultation, the communication is not privileged if the client uses the attorney's advice or other services to engage in or assist in committing a crime or fraud.

This exception is based on the language of Restatement (Third) of the Law Governing Lawyers § 82 (2000), with one significant difference. Restatement § 82 requires that the criminal or fraudulent purpose for which a client seeks assistance be "later accomplished." This exception does not require the fulfillment of the criminal or fraudulent purpose. The exception is consistent with Proposed Federal Rule 503(d)(I) and Uniform Rule 502(d)(1), neither of which requires that the crime or fraud actually take place.

The elimination of the requirement of actual fulfillment of the criminal or fraudulent purpose is consistent with most, but not all, federal authority. For cases holding that there is no such requirement *see United States* v. *Collis,* 128 F.3d 313, 320 (6th Cir. 1997) (crime or fraud need only have been the objective of the client); *In re Grand Jury Proceedings,* 87 F.3d 377,381 (9th Cir. 1996) (since government need not prove that the crimes succeeded, it is not required to prove that the communications in fact helped the targets commit the crime); *In re Grand Jury Subpoena Duces Tecum (Marc Rich & Co., A.G.),* 731 F.2d 1032, 1039 (2d Cir. 1984) ("the client need not have succeeded in his criminal or fraudulent scheme for the exception to apply;" court finds documents unprivileged without resolving the issue of whether a crime or fraud had in fact been committed); *In re Rigby,* 199 B.R. 358, 361-62 (Bankr. E.D. Tex. 1995) (finding that "Whether or not there has been an actual harm caused ... is irrelevant. 'No harm, no foul' ... is not the standard. It is the intent of the client that controls and not the success of the fraudulent act").

To the contrary is *In re Sealed Case,* 107 F.3d 46,49 (D.C. Cir. 1997). In that case, the court stated that the client must have carried out the crime or fraud, citing the Comment to the Restatement arguing that to hold otherwise would "penalize a client for doing what the privilege is designed to encourage consulting a lawyer for the purpose of achieving law compliance." However, in that case, there was no question that the crime had in fact been committed by a corporate vice-president. The only issue was whether the corporation itself had consulted its counsel for a criminal purpose and the court found the evidence insufficient to support the invocation of the crime-fraud exception under these circumstances.

By requiring that the consultation be "for the purpose of obtaining assistance to engage in a crime or fraud," the exception set out in this subsection takes into account the federal cases that state that communication must be made "in furtherance of' a crime or fraud. *See, e.g., In re BankAmerica Corp. Securities Litigation,* 270 F.3d 639, 642 (8th Cir. 2001) ("legal advice was obtained in furtherance of the fraudulent activity and was closely related to it"); *In re Spalding Sports Worldwide, Inc.,* 203 F.3d 800,808 (Fed. Cir. 2000)(communication not "in furtherance" where disputed conduct actually lowered the chance of fraud). *See also* Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence, § 195 (2d ed. 1994). A statement that is merely relevant to a criminal or fraudulent act, and not in furtherance of it, is not within the exception. *In re Richard*

Roe, Inc. 68 F.3d 38, 40 (2d Cir. 1995) (lower court improperly used relevancy test). Again, the crime or fraud need not actually have been completed so long as the client intended the communications to be in its furtherance. *E.g., In re Grand Jury Subpoena Duces Tecum (Marc Rich & Co., A.G.),* 731 F.2d 1032, 1039 (2d Cir. 1984).

The exception is also consistent with virtually all of the federal cases in that it looks only to the client's intention. The attorney's intention is irrelevant. *See, e.g., In re Sealed Case,* 754 F.2d 395 (D.C. Cir. 1985); *United States* v. *Friedman,* 445 F.2d 1076 (9th Cir. 1971) (attorney need not be aware of the illegality involved). *But see In re Sealed Case,* 107 F.3d 46, 47 n. 2 (D.C. Cir. 1998) ("there may be rare cases ... in which the attorney's fraudulent or criminal intent death a claim of privilege even if the client is innocent").

The language in this subsection referring to statements made for the purpose of aiding a third person to commit a crime or fraud is also consistent with the federal cases. *See, e.g., In re Doe,* 551 F.2d 899, 900-902 (2d Cir. 1977) (client informed lawyer of scheme by third persons to bribe juror in client's case; crime/fraud exception applied); *United States* v. *Hodge & Zweig, 548* F.2d 1347, 1354-55 (9th Cir. 1977) (consultation for the purpose of carrying out agreement of members of drug conspiracy to furnish bail and pay legal expenses for arrested members).

The language of this exception is limited to statements to obtain assistance to engage in crime or fraud. It does not include other tortious conduct. However, several federal cases that have looked at the issue have expanded the exception to include intentional torts. Virtually all are district court opinions. *E.g., Recycling Solutions, Inc.* v. *Dist. o/Columbia,* 175 F.RD. 407, 409 (D.D.C. 1997); *Horizon o/Hope Ministry* v. *Clark County, Ohio,* 115 F.RD. 1,5 (S.D. Ohio *(1986). See also the dictum in United States* v. *United Shoe Machinery Corp.,* 89 F. Supp. 357, 358 (D. Mass. 1950) (communications not privileged if made "for the purpose of committing a crime or tort") The District of Columbia Circuit uses language that includes "other type of misconduct fundamentally inconsistent with the basic premises of the adversary system." *In re Sealed Case,* 754 F.2d 395 , 399 (D.C. Cir. 1989); *In re Sealed Case,* 676 F.2d 793, 812 (D.C. Cir. 1982). However, these District of Columbia Circuit cases both involved activities that were criminal or fraudulent, rather than simply tortious.

Several other federal cases have refused to extend the exception beyond fraud or crime. Most prominent is *Motley v. Marathon Oil Co.,* 71 F.3d 1547, 1551 (10th Cir. 1995) (crime/fraud exception did not apply to statements even if in furtherance of illegal racial discrimination if not criminal or fraudulent). *See also Bulk Lift Inti.* v. *Flexon & Systems, Inc.,* 122 F.RD. 493, 496 (W.D.La. 1988) (fraud, not mere inequitable conduct must be involved). *See also Cooksey* v. *Hilton Int'l Co.,* 863 F.Supp. 150, 151 (S.D.N.Y. 1994) (exception may apply to "intentional torts moored in fraud"). The rationale of such cases is perhaps best reflected in the Comment to Restatement (Third) of the Law Governing Lawyers, §82, p. 616-17: "[L]imiting the exception to crimes and frauds produces an exception narrower than principle and policy would otherwise indicate. Nonetheless, the prevailing view limits the exception to crimes and frauds. The actual instances in which a broader exception might apply are probably few and isolated, and it would be difficult to formulate a broader exception that is not objectionably vague."

There is an old Supreme Court case, *Alexander v. United States,* 138 U.S. 353, 360 (1891),

in which the Court stated that the crime/fraud exception "should be limited to cases where the party is tried for the crime in furtherance of which the communication was made." However, the *Alexander* case involved a situation in which the consultation with the lawyer had nothing to do with any future crime. The murder in question, if had been committed by the client, had already taken place. The consultation had to do with business advice dealing with the ownership of horses. At most, the communications had relevancy to the past crime, but were not made to obtain assistance to engage in a crime or fraud. The federal courts have generally not hesitated to apply the exception despite the fact that the criminal or fraudulent conduct is not directly involved in the case in which the privilege is claimed. One case clearly applying the privilege to a case not involving the subject of the communication is *Petition of Sawyer,* 229 F.2d 805, 808-09 (7th Cir. 1956). The court in *Sawyer* refused to apply the Supreme Court's statement in *Alexander,* finding it dictum. Instead, it held that the crime/fraud exception applied to remove the privilege from communications made by a non-party witness in the case to his attorney because the statements were made in connection with a proposal to give false testimony. *See also, United States v. Reeder,* 170 F.3d 93, 106 (1st Cir. 1999) (consultations with attorney not privileged under the crime/fraud exception even though consultations involved conduct that covered up rather than directly involved the crimes involved in the case); *In re Berkeley & Co.,* 629 F.2d 548, 554-55 (8th Cir. 1980) (court doubts validity of statements in *Alexander,* but finds applicability of exception based upon related nature of the subject of the communication and the crimes under investigation); *SEC v. Harrison,* 80 F.Supp. 226,230-31 (D.D.C. 1948) (exception applicable in investigatory proceedings in which no charge of fraud was made; *Alexander* case distinguished as involving communications concerning a past crime). In all of these instances, the statements related in some way to the conduct involved in the litigation. However, it could hardly be otherwise in order for the communications to be relevant.

Ordinarily, the key factor under the crime/fraud exception is the intent of the client to engage in the crime or fraud at the time of the consultation with the lawyer. Indeed, there is language in federal cases limiting the exception to situations where it is shown that "the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme." *In re Sealed Case,* 754 F.2d 395, 399 (D.C. Cir. 1985). However, there are also cases applying the exception where the evidence does not really show the client's state of mind at the time of the consultation with the attorney. The second sentence of the exception is intended to deal with the situation where the client uses the lawyer's advice to engage in or assist a crime or fraud, irrespective of the client's intention at the time of consultation. The language is taken from Restatement § 82 (b) and is supported by federal cases as well as cases from other jurisdictions. *See United States v. Ballard,* 779 F .2d 287, 292-93 (5th Cir. 1986) (conversations with attorney concerning the disclosure of transfer of assets prior to bankruptcy filing not within privilege where client hired another lawyer who filed bankruptcy without disclosing assets); *Fidelity-Phenix Fire Ins. Co. v. Hamilton,* 340 S.W.2d 218 (Ky. 1960)(no privilege where client consulted lawyer who told him that insurance policy did not cover a fire because of coverage limitations; client then had another lawyer file suit on policy relating a different set of facts) . These cases must be distinguished from situations where there is simply proof that the client committed a crime or fraud after consulting the lawyer. *See, e.g., Pritchard-Keang Nam Corp. v. Jaworski,* 751 F.2d 277,281-82 (8th Cir. 1984) (that communications with attorneys may help prove that a fraud occurred does not mean that the communications were used in perpetrating the fraud); *In re Sealed Case,* 107 F.3d 46,50 (D.C. Cir. 1997) (mere fact that a person commits a crime after consulting

with counsel does not establish a prime facie case that the consultation was in furtherance of the fraud; showing "temporal proximity between the communication and a crime is not enough"). The distinction between these cases and cases such as *Ballard* and *Fidelity-Phenix,* reflected in the second sentence of this subsection, is, in the latter instance, the existence of evidence of the use of the consultation with the attorney in the perpetration of the crime of fraud.

Issues with regard to the procedural aspects of asserting the crime-fraud exception to the attorney-client privilege are discussed in the Appendix to this Commentary, Part 3.

(3) that is relevant and reasonably necessary for an attorney to reveal in a proceeding to resolve a dispute with a client concerning the compensation or reimbursement that the attorney reasonably claims the client owes the attorney;

This subsection is based upon Restatement (Third) of the Law Governing Lawyers §83(1). It is covered in Proposed Federal Rule 503 (d)(3) and Uniform Rule 502(d)(3) by language excepting from the privilege communications "relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer." The Restatement language is used in this section as well as the next (Section (1) (4)) because it more specifically states the rule as found in the case law. In both this subsection and subsection (4), the Restatement language, unlike that of the Proposed Federal rule or the Uniform Rule, makes clear that there is an exception from the privilege only insofar as the communications are relevant and reasonably necessary to resolve the dispute. The Restatement language also follows the case law in that it limits breaches of duty by the client to instances involving compensation or reimbursement.

There is federal case authority for an exception to the privilege where an attorney is in a fee dispute with a client. *Cannon v. U.S. Acoustics Corp.,* 532 F.2d 1118, 1120 (7th Cir. 1976) (recognizing exception).

Although not specifically covered by this section, the language of the section, as well as section (f) (4), limiting revelations to those relevant and reasonably necessary to resolve the dispute would make such case appropriate for protective orders limiting the dissemination of the information. *See, e.g., Siedle v. Putnam Investments, Inc.,* 147 F.3d 7, 10 (1st Cir. 1998) (documents that may be subject to attorney-client privilege properly sealed against public revelation).

This subsection does not definitively resolve the issue of whether the exception should apply in an action brought by corporate counsel for retaliatory discharge. Although the issue raised in such instances is ordinarily confidentiality under the applicable Rules of Professional Conduct, questions of privilege may also arise. The few cases considering the issue are split on the issue as to whether a retaliatory discharge complaint is the kind of dispute between lawyer and client as to compensation or reimbursement that will give rise to the exception. *Compare Willy v. Coastal States Management Co.,* 939 S.W.2d 193, 196-200 (Tex. Ct. App. 1996) (discharge claim may not be brought where proof of the claim would necessarily reveal confidential communications) *with Kachmer v. Sun Gard Data Systems, Inc.,* 109 F.3d 173, 178 (3d Cir. 1997) (possibility of revelation of confidential communications did not preclude retaliatory discharge action). *See also Siedle v. Putnam Investments, Inc.* 147 F.3d 7, 11 (1st Cir. 1998) (lawyer may

not use confidential information as a sword to make out a claim of defamation against client). The language used in the subsection leaves the question of whether instances of retaliatory discharge or similar claims involve compensation.

(4) that is relevant and reasonably necessary for an attorney to reveal in order to defend against an allegation by anyone that the attorney, the attorney's agent, or any person for whose conduct the attorney is responsible acted wrongfully or negligently during the course of representing a client;

This subsection is based upon Restatement (Third) of the Law Governing Lawyers § 83(2). Like subsection (f)(3), the same concept is covered in Proposed Federal Rule 503 (d)(3) and Uniform Rule 502(d)(3) by language excepting from the privilege communications "relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer." Again as in subsection (3), the Restatement language is used to make clear that the exception to the privilege applies only to the extent that the information is relevant and reasonably necessary to reveal in the attorney's defense.

The exception as set forth is consistent both with the general law, *see* 1 McCormick on Evidence, § 91 at 367-68 (6th ed. 2006), and the federal cases, *see* Stephen A. Saltzburg, Michael M. Martin, Daniel J. Capra, Federal Rules of Evidence Manual, §§ 501.02([I][i], 501.03 [i][ii] (8th ed. 2002). Cases dealing with the exception include *Tasby v. United States,* 504 F.2d 332,336 (8th Cir. 1974) (privilege inapplicable where ineffective assistance of counsel alleged); *In re National Mtg. Equity Corp. Mtg. Pool Certificates Sees. Litig.,* 120 F.R.D. 687, 691-92 (C.D. Cal. 1988) (attorney-client privilege did not prevent attorney from revealing client confidences to defend against third-party allegations of fraud against the attorney); *First Fed. Sav. & Loan v. Oppenheim, Appel, Dixon* & *Co.,* 110 F.R.D. 557 (S.D.N.Y. 1986) (attorney entitled to disclose information to defend himself against charges brought by a third party, although exception would be limited to protect against unnecessary violation of the client's interest). *See also United States v. Ballard,* 779 F.2d 287 (5th Cir. 1986) (exception recognized but court holds that bringing of malpractice action against attorney did not operate as a waiver of the privilege in subsequent criminal action against client).

This rule is properly treated as an exception to the privilege rather than as a waiver by the client. As illustrated by the *In re National Mtg. Equity Corp. Mtg. Pool Certificates Sees. Litig.* and *First Fed. Sav.* & *Loan* cases cited above, the exception may be invoked by counsel even though the client has taken no action that might be construed as a waiver.

(5) relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

This subsection is taken from Proposed Federal Rule 503(d)(4) and Uniform Rule 502(d) (5).

Although there do not appear to be any federal cases dealing with the issue, the rationale of the Advisory Committee in proposing the exception to the Federal Rule seems sound:

> When the lawyer acts as attesting witness, the approval of the client to his so doing may safely be assumed, and waiver of the privilege as to any relevant lawyer-client communication is a proper result.

An argument can be made that the exception is unnecessary. The communications are arguably not intended to be confidential.

(6) between a trustee of an express trust or a similar fiduciary and an attorney or other privileged person retained to advise the trustee concerning the administration of the trust, if relevant to a beneficiary's claim of breach of fiduciary duties;

Subsection (6) is based upon Restatement (Third) of the Law Governing Lawyers § 84 (2000).

Sometimes referred to as the fiduciary doctrine, this exception is most often supported by the argument that the fiduciary acts for the beneficiaries and that the attorney is seeking advice for their benefit. For example, the court in *Washington-Baltimore Newspaper Guild Local* 35 *v. Washington Star Corp.,* 543 F. Supp. 906, 909 (D.D.C. 1982), dealing with the privilege in the context of a claim by beneficiaries of an ERISA plan against their employer, stated:

> When an attorney advised a fiduciary about a matter dealing with the administration of an employee's benefit plan, the attorney's client is not the fiduciary personally, but rather, the trust's beneficiaries.

Professor Imwinkelried states the rationale somewhat differently and less dependently on the theory that the fiduciary acts for the beneficiary in communicating with the attorney. He states simply that "the rationale for overriding the fiduciary's privilege is that the fiduciary's duty to the beneficiary is paramount to the fiduciary's right to the privilege." Edward J. Imwinkelried, The New Wigmore, §6.13.2 at 960 (2002).

Whatever is the best articulation of the rationale for the rule, the rule as set forth in this subsection is consistent with the federal cases. *See In re Occidental Petroleum Corp.,* 217 F.3d 293 (2000) (no privilege where breaches of fiduciary duty relating to Employee Stock Ownership Plan alleged); *In re Long Island Lighting Co.,* 129 F.3d 268,271,273 (2d Cir. 1997)(employer, as fiduciary under employee benefit plan covered by ERISA, could not claim privilege as to matters concerning the administration of the plan); *United States v. Evans,* 796 F.2d 264, 265-66 (9th Cir. 1986) (no privilege as between pension trustee and attorney advising the trustee with regard to administration of the trust).

Under this subsection, there is no requirement that the beneficiary be required to show "good cause," such as must be done in order for the communications to come within the exception set forth in subsection (7), below. *See Helt v. Metropolitan Dist. Comm 'n,* 113 F.R.D. 7, 10 n.2 (D. Conn. 1986) *(dictum).*

The exception does not apply where the fiduciary is communicating with the an attorney with regard to his or her personal liability. *See, e.g., United States v. Mett,* 178 F.3d 1058, 106466

(9th Cir. 1999).

(7) between an organizational client and an attorney or other privileged person, if offered in a proceeding that involves a dispute between the client and shareholders, members, or other constituents of the organization toward whom the directors, officers, or similar persons managing the organization bear fiduciary responsibilities, provided the court finds

(A) those managing the organization are charged with breach of their obligations toward the shareholders, members, or other constituents or toward the organization itself;

(B) the communication occurred prior to the assertion of the charges and relates directly to those charges; and

(C) the need of the requesting party to discover or introduce the communication is sufficiently compelling and the threat to confidentiality sufficiently confined to justify setting the privilege aside.

This subsection is based on Restatement (Third) of the Law Governing Lawyers § 85 and the case of *Garner* v. *Wolfinbarger,* 430 F.2d 1093 (5th Cir. 1970). The rationale of this exception is similar to that articulated in support of the fiduciary doctrine: management of an organization acts for the benefit of the organization's shareholders or other constituents or, to paraphrase Professor Imwinkelried's statement in connection with the fiduciary doctrine, management's duty to the shareholders is paramount to management's right to the privilege.

Nevertheless, there are some significant differences between fiduciaries, as in the case of employers acting for their employees with regard to an ERISA plan, and corporate management. As stated in Jack P. Friedman, Is the *Garner* Qualification of the Corporate Attorney-Client Privilege Viable after *Jaffee* v. *Redmond?,* 55 Bus. Law. 243,272-73 (1999):

> Notwithstanding the fiduciary duty that corporate management owes to corporate shareholders, modern scholarship suggest that corporate directors and officers do not manage exclusively for the benefit of shareholders. Corporate directors owe a fiduciary duty primarily to the corporation itself and a corporation may have interests that differ from those of its shareholders.

Thus, the courts in sometimes finding an exception to the privilege in actions brought by shareholders against corporate management do not always do so. The exception as stated in the leading case of *Garner* v. *Wolfinbarger* would apply only if certain criteria were met. The court in *Garner* imposed a "good cause" criteria on the shareholders seeking the benefit of the exception. The court articulated the criteria as follows(430 F.2d at 1104):

> There are many indicia that may contribute to a decision of presence or absence of good cause, among them the number of shareholders and the percentage of stock they represent; the bona fides of the shareholders; the nature of the shareholders' claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the

information and availability of it from other sources; whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether the communication related to past or to prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

As in the case of the Restatement, the list of nine factors in *Garner* is reduced and embellished in subsection (f)(7). *See* Comment c. to Restatement §85. For example, one criterion that is not articulated in the exception is whether the communication is "of advice concerning the litigation itself." The Restatement comments also notes the elimination of a specific statement of such a criterion, stating (Restatement (Third) of the Law Governing Lawyers § 85, Comment at 631):

> The factor can be misunderstood. It does not mean that all communications that might also be immunized under the lawyer work-product doctrine [internal cross-reference omitted] should be immune from discovery by a beneficiary, particularly if the communication also is subject to a "good cause" exception as work product. The factor instead refers to situations in which a second lawyer has been retained to defend the organization or its managers against the beneficiary's claim and thus the communications were not contemporaneous with the acts being challenged by the beneficiary. It is important that *Garner* be applied in a way that recognizes the legitimate interest of an organization in resisting a derivative or similar claim.

For a case discussing the distinction between the exception as applied with regard to pre-litigation communications from corporate management to counsel and communications between management and litigation counsel, as to which the work product privilege applies, see *In re Int 'l Systems & Controls Corp. Securities Litigation,* 693 F.2d 1235, 1239 (5th Cir. 1982) (communications between management and counsel involved in litigation considered under work product privilege).

The *Garner* doctrine has been followed by many federal courts that have considered the question, usually irrespective of whether the action is derivative or brought by shareholders in their own right. *See, e.g., Fausekv. White,* 965 F.2d 126, 130-31 (6th Cir. 1992)(exception applies where shareholder brought action in his own right); *In re Gen. Instrument Corp. Sec. Litig.,* 190 F.RD. 527,529 (N.D. Ill. 2000) (applies exception in derivative action); *Bailey v. Meister Brau,* 55 F.RD. 211, 213 (N.D. IlL 1972) (conversations between corporate officer and counsel not privileged in securities law action brought by shareholder); *Valente v. PepsiCo, Inc.,* 68 F.RD. 361, 367-68 (D.Del. 1975) (communications by corporate directors owing fiduciary duties to minority shareholders not privileged in class action brought by minority shareholders). Cases have also extended the doctrine beyond the corporation to other organizations. *E.g., Nellis v. Air Line Pilots Ass 'n* 144 F.RD. 68 (E.D. Va. 1992) (labor union).

Other courts have put limitations on its applicability. *See, e.g., Weil v. Investment/Indicators Research & Management, Inc.,* 647 F.2d 18,23 (9th Cir. 1981)(doctrine

limited to derivative actions; shareholders did not own stock at time of the suit); *In re LTV Securities Litigation,* 89 F.RD. 595,607-08 (N.D. Tex. 1981) *(Garner* exception does not apply where the communications took place after the alleged wrongdoing was completed).

Some courts have rejected the *Garner* holding and its good cause limitation. *See Shirvani v. Capital Investing Corp.,* 112 F.RD. 389, 390-91 (D.Conn. 1986) (shareholder interests can be protected by application of the crime/fraud exception).

The Friedman article, cited above, takes the position that *Garner* establishes a balancing test for the privilege and that balancing in connection with privilege was rejected by the United States Supreme Court in cases such as *Jaffee v. Redmond,* 518 U.S. 1, 18 (1996) (psychotherapist-patient privilege must be absolute in order to be effective in promoting a free flow of information between patient and psychotherapist). Friedman would provide an absolute exception applicable in shareholder derivative actions, such as *Garner* itself, arguing that in such cases the shareholders are acting in the role of management. But he would reject the exception entirely where in non-derivative actions. Friedman, *supra* at 281.

Other writers are critical of the exception generally as inhibiting the free flow of information between management and corporate counsel. *See, e.g.,* Stephen A. Saltzburg, Michael M. Martin, Daniel J. Capra, Federal Rules of Evidence Manual, § 501.02[5]([I][ii] (8th ed. 2002). The authors of that text state that if *Garner* is to apply at all, it should be limited to shareholders derivative litigation. One of the authors of that text, Stephen A. Saltzburg, took a somewhat different position in a law review article, Stephen A. Saltzberg, Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: *Garner* Revisited, 12 Hofstra L. Rev. 817 (1984). In that article, Saltzburg is critical of the doctrine as inhibiting the flow of information from corporate officers to the corporation's attorney. However, he is also critical of the limitation of the doctrine to derivative cases, arguing that the rationale should be the same whether the shareholders sue on behalf of the corporation or in their own right.

Like the drafters of Restatement § 85, this Survey Rule adopts what can be discerned as the prevailing federal rule there is an exception to the attorney-client privilege for communications between management and corporate or organizational counsel in actions brought by shareholders or other constituents under the circumstances set forth in subsection (f)(7). The exception applies both in derivative and non-derivative cases.

The argument that the *Garner* doctrine creates a qualified privilege, bringing in a balancing test and thus created uncertainty in the application of the privilege certainly raises a valid concern. However, one could also look at the exception not as creating a balancing test for the application of the privilege but rather as applying the exception unless the shareholder fails to bring himself or herself within the policy of the exception. In other words, the exception is absolute once the shareholder demonstrates that the cause of action he or she brings and their status entitle them to it. Similarly, although the argument that the exception should be limited to derivative actions has some appeal, one could argue that the analogy to the fiduciary doctrine is such that the shareholder himself or herself is entitled to the benefit of the communications, whether or not the suit is brought on behalf of the corporation.

This is one of the areas of the Survey Rule whose full parameters will have to await future judicial development.

APPENDIX -- SOME SIGNIFICANT ISSUES FOR FUTURE RESOLUTION

1. Government Attorneys

Proposed Federal Rule of Evidence 503 was drafted with the clear intent of including communications between government officials and government lawyers. Rule 503(a)(1) included within its definition of a "client" "a person, public officer, or corporation, association, or other organization or entity, either public or private."

Restatement (Third) of the Law Governing Lawyers § 74 extends the privilege to communications between government officials and their attorneys. Uniform Rule of Evidence 502 also covers such communications but with a significant limitation discussed below.

The federal cases confirm the existence of the privilege in at least civil cases, although limiting its application in significant ways. The application of the privilege in criminal cases, certainly in its application to grand jury subpoenas, is even more circumscribed.

Recognizing the general application of the privilege to government lawyers in many federal cases, the Survey Rule includes governmental entities within the definition of organizations in Part (a) (3). However, the full dimensions of the privilege will have to await further case development.

A. Civil cases

The issue of attorney-client privilege as applied to a government agency in civil cases frequently occurs in the application of Exemption 5 to the Freedom of Information Act (5 U.S. § 552)(FOIA). The FOIA requires federal agencies to make public their rules, opinion, order, records and proceedings. Exemption 5,5 U.S.C. § 552(b)(5) states:

> This section does not apply to matters that are ... inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

A significant number of opinions have stated that the attorney-client privilege protects at least some agency communications from disclosure under Exemption 5.

An example of a case in which the courts applied the privilege to government activities is *Green v. IRS,* 556 F. Supp. 79 (N.D. Ind., 1982) (privilege applied to protect communication from IRS District Counsel to U.S. Attorney requesting him to initiate proceedings to enforce an IRS summons). *See also Brinton v. Dep 't of State,* 636 F.2d 600 (D.C. Cir. 1980) (privilege recognized but not applied where no showing that the attorney's communications were based on or related to confidences from the client); *Mead Data Cent., Inc. v. United States Dep 't of Air Force,* 566 F.2d 242, 252-55 (D.C. Cir. 1977) (privilege recognized but not applied where insufficient showing that it involved confidential information).

Cases applying the privilege other than in an Exemption 5 context include *Town of Norfolk v. Corps of Eng 'rs,* 968 F.2d 1438, 1457-58 (1st Cir. 1992) (privilege applied to communications between Army Corps of Engineers and United States Attorney) and *Department of Econ. Develop. v. Arthur Andersen & Co.,* 139 F.R.D. 295, 300 (S.D.N.Y. 1991) (existence of possibility of privilege with regard to communications by a British government agency to its attorneys).

The application of the privilege to governmental operations is, however, limited by the unique nature of those operations.

For example, in *Tax Analysts v. IR.S.,* 117 F.3d 607 (D.C. Cir. 1997), the court recognized that the attorney-client privilege may apply where the client is a government agency and the attorney an agency lawyer. The court indicated that confidential information transmitted by field personnel regarding "the scope direction or emphasis of audit activity" would be protected by the privilege. 117 F.3d at 618. However, citing *Schiefer* v. *United States,* 702 F.2d 233 (D.C. Cir. 1983) and *Coastal States Gas Corp. v. Department of Energy,* 617 F.2d 854 (D.C. Cir. 1980) , the court held that the privilege would not apply to legal conclusions containing "neutral, objective analyses of agency regulations" based solely on information supplied by persons outside the agency. Citing *Coastal States,* 617 F .2d at 863. In distinguishing the privilege as applied to government officials from that applied where the client is a private person, the court noted (117 F.3d at 619):

> Private attorneys, one would hope, usually give objective advice to their clients. That does not deprive their communications of the privilege's protection. But no private attorney has the power to formulate the law to be applied to others. Matters are different in the governmental context, when the counsel rendering the legal opinion in effect is making law .... FSAs [the Field Service Advice memoranda sought in this case] issued by the Chief Counsel create a body of private law, applied routinely as the government's legal position in its dealings with taxpayers. It is this quality, not the objective character of the legal analyses in the documents, that *Schiefer* and *Coastal States* deem significant. [citing cases] Under those decisions, FOIA exemption 5 and the attorney-client privilege may not be used to protect this growing body of agency law from disclosure to the public.

The articulation of the privilege in a governmental context may be best stated in Uniform Rule of Evidence 502. Uniform 502 broadly defines client in a way that would include government officials and their lawyers. Rule 502(a)(I) states:

> "Client" means a person for whom a lawyer renders professional legal services or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

However, under Uniform Rule 502(d)(7), the privilege as applied to government officials is limited in a significant way. There is no privilege under that section of the Uniform Rule

> as to a communication between a public officer or agency and its lawyers unless the communication concerns a pending investigation, claim or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to act upon the claim or conduct a pending investigation, litigation, or proceeding in the public

interest.

The exception to the privilege set out in the Uniform Rule is not precisely in accord with cases such as *Tax Analysts* and *Coastal States* but may be a justifiable extension of the policies expressed in those cases. In those cases, the courts were concerned that the communication involve confidential communications rather than simply opinions on agency rules or policies. Arguably, a communication, in order to meet the confidential information requirement of cases such as *Tax Analysts,* would have to involve the kind of pending investigation and impairment of ability of act upon that claim referred to in Uniform Rule 502(d)(7). The drafters of the Uniform Rule seem to have captured the factors that would call for the application of the privilege in some government contexts and not in others. Whether the Rule becomes a basis for future federal law remains to be seen.

Criminal Cases - Grand Jury Subpoenas

Despite the application of the privilege in at least a limited extent in civil cases, some federal circuits have flatly refused to recognize the existence of a privilege in another context – where a grand jury has sought information concerning the activities of the official. Whether those cases have captured the policies behind the privilege in the government context as well as the courts and Uniform Rule 502 have in civil cases is another question.

In re Lindsey, 158 F.3d 1263 (D. C. Cir. 1998) is one of the two cases holding that legal counsel to the Office of the President could not raise the attorney-client privilege to withhold information from the grand jury. *Lindsey* arose under the extended Independent Counsel's investigation of President Clinton. Although recognizing the general applicability of the attorney-client privilege to communications between government officials and government lawyers, the court found no privilege in the face of a grand jury subpoena to the President's legal counsel. The rationale for the *Lindsey* case is not entirely clear. Indeed it seems based on several different notions. One is that the grand jury and the office of the Independent Counsel both occupy positions within the federal government. As in the case of information sought by a corporate shareholder in *Garner v. Wolfinbarger,* 430 F.2d 1093 (5th Cir. 1970), the information is simply sought by the entity itself-in this case the federal government. *See* 158 F.3d at 1276. But the court is also heavily influenced by the fact that the attorney in this instance serves the Office of President and the unique nature of that office cuts against the operation of the privilege. The court has difficulty distinguishing communications with attorneys from other communications between the president and his advisors which are covered by the qualified Executive Privilege rather than the absolute attorney-client privilege. 158 F.3d at 1278. The court also points to the traditional adherence, although not necessarily compelled adherence, of the Office of the President to the precepts of28 U.S.c. § 535(b), providing that information received relating to violations of the law be reported to the Attorney General. 158 F.3d at 1274. The court also noted that much of the communications concerned the possibility of the impeachment of the president. The court finds impeachments to be "fundamentally a *political* exercise"[emphasis by the court] rather than a legal

one. 158 F.3d at 1277.

The other case arising from the extended Whitewater independent Counsel investigation is *In re Grand Jury Subpoena Duces Tecum,* 112 F.3d 910 (8th Cir. 1997). The court found in that case that the privilege did not protect communication between legal counsel to the president and the president's wife, Hillary Rodham Clinton, as against a grand jury subpoena. The court in that case articulates its reasoning a little more clearly than in *Lindsey.* It finds no privilege when "an entity of the federal government seeks to withhold information from a federal criminal investigation." Thus, the court presumably does not base its decision on anything unique about the Office of the President. The court relies, in part on the executive privilege case, *United States* v. *Nixon,* 418 U.S. 683 (1974), which it notes establishes the principle that the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes. The court also relied on the statutory duty to report criminal wrongdoing by other employees to the Attorney General. 28 U.S.C. § 4344(b) (1994). The court concluded (112 F.3d at 921:

> We believe the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials. We also believe that to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets.

Lindsey and *In re Grand Jury Subpoena* may well ultimately stand for the proposition that all government attorneys must yield to a grand jury subpoena. Certainly the court in *In re Grand Jury Subpoenas* uses a rationale that would seem to require such a result. However, the facts of both these cases are sufficiently unique that they may be limited to the situations involving the Office of the President, or perhaps even more limited to the dynamic circumstances surrounding the investigation of President Clinton.

One case has extended the *Lindsey* and *In re Grand Jury Subpoena* cases beyond their application to President Clinton's legal problems and, indeed, beyond the context of the federal government. In *In re A Witness Before Special Grand Jury 2000-2,* 288 F.3d 289 (7th Cir. 2002) the court considered the application of the privilege to communications between a state official and a state government lawyer., The lawyer had been subpoenaed to testify before a grand jury concerning the activities of future Governor George Ryan when he was Illinois Secretary of State. The court held that the privilege did not apply, relying heavily on the *Lindsey* and *In re Grand Jury Subpoena* cases. The court stated (288 F.3d at 294):

> In the final analysis, reason and experience dictate that the lack of criminal liability for government agencies and the duty of public lawyers to uphold the law and foster an open and accountable government outweigh any need for a privilege in this context.

The *Lindsey* and *In re Grand Jury Subpoena* cases have been criticized in the legal literature. For example, Todd A. Ellinwood, *"In the Light of Reason and Experience": The Case for a Strong Government Attorney-Client Privilege,* 2001 Wis. L. Rev. 1291, argues that those

cases create a situation in which communications between government officials are unduly chilled. The author argues that government will work better in the interest of the public if officials feel free to consult with attorneys. He would deny the privilege, even in the face of a grand jury subpoena, only in the instance where the official's conduct has been "clearly illegal." *See also Adam M. Chud, Note, In Defense of the Government Attorney-Client Privilege,* 84 Cornell L. Rev. 1682 (1999) (privilege should exist as against a grand jury subpoena except for communications regarding personal issues, ongoing criminal investigations or clearly criminal activity); *Note: Maintaining Confidence in Confidentiality: The Application of the Attorney-Client Privilege to Government Counsel,* 112 Harv. L. Rev. 1995 (1999) (privilege to extend in both civil and criminal cases provided that the communications concerned official rather than personal conduct).

Cases have not come up in most circuits and it is certainly possible that other courts will view the issue differently than the courts in the D.C., Eighth and Seventh Circuits. Although the Seventh Circuit decision in *In re Witness Before Special Grand Jury 2000-2* did not involve President Clinton's legal problems, the cases from the other circuits were tied closely to all of the issues involved in that extended and explosive controversy. Both of the other cases also clearly involved the office of the Presidency and the relationship between the attorney-client privilege and the executive privilege outlined in *United States* v. *Nixon.* An argument certainly can be made that the public interest requires no different test for communications with a president's lawyers as opposed to his other advisors. Arguably, all such communications should be viewed under the balancing test set forth in *Nixon.* But the balancing test applied by reason of the Executive Privilege to presidential consultations does not apply with regard to other government officials.

Is there a policy justification sufficient to deny attorney-client privilege protection to any government official as against a grand jury subpoena?

As expressed in the *Lindsey* and *In re Grand Jury Subpoena* cases, there are certainly valid reasons for refusing to recognize the privilege as against a grand jury subpoena. The fact that the information is being sought by another branch of the same government is at least a significant consideration. An even stronger policy consideration is the fact that the government attorney has an obligation to the government generally, rather than to a particular public agency or official. Certainly, that obligation is particularly strong where the government lawyer has learned of criminal wrongdoing. Arguably, the obligation to the public to disclose the information should supersede an obligation to the government client.

None of the proposals from the law review writers to substitute a different test for denial of the privilege to government officials seems compelling. Applying the privilege except where the conduct is "clearly illegal" creates a difficult inquiry for the courts. Similarly, distinguishing "personal" from "official activity" may also be troublesome. A balancing approach suggested by the dissenting Judge Kopfin *In re Grand Jury Subpoena,* suffers from the injection of uncertainty into the privilege, something that the Supreme Court found in *Jaffee* v. *Redmond, 518* U.S. 1, 17 (1996) would "eviscerate the effectiveness of [a] privilege."

Yet, the arguments put forth in the various law review articles against denying protection entirely also make sense. The privilege exists in order to foster a free flow of information between

attorney and client. Removing the privilege in the face of a grand jury subpoena is almost certain to stifle that flow of information.

There may be no one solution to the issue. Different fact patterns may result in different judicially crafted solutions.

2. Information Intended to be Divulged and Preliminary Drafts

One of the issues as which there is no definitive federal result is the privileged status of preliminary drafts of documents ultimately disclosed to the public.

A client may provide information to an attorney for the purposes of obtaining the attorney's assistance in preparing a document to be publicly disseminated, for example, a prospectus or a tax return. Most federal cases broadly hold that no privilege attaches to information given for such a purpose because the client does not intend the information to remain confidential. *See, e.g., United States v. Hubbard,* 16 F.3d 694, 697 (6th Cir. 1994) (information communicated to attorney to be conveyed to bankruptcy trustee and court via written pleading); *In re Grand Jury Proceedings,* 33 F.3d 342 (4th Cir. 1994) (information used by counsel to prepare SEC filings); *In re Grand Jury Proceedings,* 727 F.2d 1352 (4th Cir. 1984) (communications with attorney for purpose of private placement of limited partnership interests; fact that attorney never acted on information not controlling); *United States v. Cote,* 456 F.2d 142 (8th Cir. 1972) (information contained in working papers later transcribed into tax returns). *See also,* Christopher B. Mueller & Laird C. Kirkpatrick, Evidence §5.13 at 371 (2d ed. 1999).

Based on similar considerations of lack of intent for confidentiality, some federal courts have gone further and held that material underlying the published information, including preliminary drafts of letters or documents which are to be published to third parties, lack confidentiality. *E.g., United States v. (Under Seal),* 748 F.2d 871,875 n. 7 (4th Cir. 1984) ("The details underlying the published data are the communications relating the data, the document, if any, to be published containing the data, all preliminary drafts of the documents, and any attorney's notes containing material necessary to the preparation of the document."). *See also North Carolina Elec. & Light Membership Corp. v. Carolina Power & Light Co.,* 110 F.R.D. 511,517 (M.D.N.C. 1986).

Other federal courts have reached different conclusions with regard to preliminary drafts as well as information supplied for the purpose of creating such drafts, at least to the extent that the information was not ultimately disclosed. The leading case is *Schenet v. Anderson,* 678 F. Supp. 1280, 1283 (B.D. Mich. 1988), relying in large measure on *United States v. Schlegel, 313* F. Supp. 177, 179 (D. Neb. 1970). In *Schenet,* the court stated:

> [T]he attorney-client privilege applies to all information conveyed by clients to their attorneys for the purpose of drafting documents to be disclosed to third persons and all documents reflecting such information, to the extent that such information is not contained in the document published and is not otherwise disclosed to third persons. With regard to preliminary drafts of documents intended to be made public, the court holds that

preliminary drafts may be protected by the attorney-client privilege. Preliminary drafts may reflect not only client confidences, but also the legal advice and opinions of attorneys, all of which is protected by the attorney-client privilege. The privilege is waived only as to those portions of the preliminary drafts ultimately revealed to third parties.

Taking the same general approach is *In re Grand Jury Subpoena Duces Tecum Dated Sept.* 15, 1983 *(Marc Rich & Co. A.G.),* 731 F.2d 1032,1037 (2d Cir. 1984). The issue in that case involved whether information provided an attorney that may at some point be transmitted to the client's employees generally was privileged. The court stated:

> The possibility that some of the information contained in these documents may ultimately be given to AG employees does not vitiate the privilege. First, it is important to bear in mind that the attorney-client privilege protects communications rather than information; the privilege does not impede disclosure of information except to the extent that the disclosure would reveal confidential communications. [citing case] Thus, the fact that certain information in the documents might ultimately be disclosed to AG employees did not mean that the communication to [counsel] were foreclosed from protection by the privilege as a matter of law. Nor did the fact that certain information might later be disclosed to others create the factual inference that the communications were not intended to be confidential at the time they were made. If confidentiality were not intended, of course the privilege would not attach, [citing case]; but we see no indication that confidentiality was not intended. For example, although some of the documents appear to be drafts of communications the final version of which might eventually be sent to other persons, and as distributed would not be privileged, we see no basis in the record for inferring that AG did not intend that the drafts -which reflect its confidential requests for legal advice and were no distributed to be confidential. Confidentiality may also, of course be waived; but we see no indication that a waiver has yet occurred.

See also American Nat. Bank & Trust Co. of Chicago v. *AXA Client Solutions, LLC, 2002* WL 1058776 (N.D. IlL) (only parts of draft letters ultimately disclosed to third parties via final version of the letter must be disclosed); *Muller* v. *Walt Disney Prods,* 1994 WL 801529 (drafts of contract would be protected, but insufficient showing of what drafts contained).

The Second Circuit's opinion in *Marc Rich & Co., A.G.,* may be distinguishable from the other cases protecting preliminary drafts based upon the fact that there does not seem to have been a final decision on public dissemination of the information. Even the Fourth Circuit in the *Under Seal* case recognized that privilege may still exist where the attorney is asked only to research the *possibility* of filing public papers. The court in *Under Seal* stated; 748 F.2d at 875-76:

> Only when the attorney has been authorized to perform services that demonstrated the client's intent to have his communications published will the client lose the right to assert the privilege as to the subject matter of those communications.

At least one court has followed the precedent of the *Schenet* case in a limited way,

holding that privilege may attach to preliminary drafts but only "if they were prepared or circulated for the purpose of giving or obtaining legal advice and *contain information or provisions not included in the final version."* (Emphasis added) *Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.,* 174 F.R.D. 609,633 (MD. Pa. 1997).

The result in *Andritz* is criticized by one author, Paul R. Rice, Attorney-Client Privilege in the United States, § 5:13 (2d Ed.), who states:

> This limitation is questionable because the fact that the drafts contain no additional information or comments from either the client or the attorney reveals substantive information about the content of the attorney-client communication.

Professor Rice and others strongly support the position of courts in cases like *Schenet* providing privilege protection for drafts of those documents. Professor Rice comments(Attorney-Client Privilege in the United States, § 5.13 at 99:

> If drafts are prepared for client approval, it is illogical to conclude that the client relinquished all expectations of confidentiality in the communications relating to and disclosed in the drafts.

Rice would extend the protection even to drafts prepared by a client for review by the attorney, so long as the attorney's communication with the public does not reveal that the information contained in it was communicated to the attorney by the client. *See also,* Paul R. Rice, Attorney-Client Privilege: Continuing Confusion About Attorney Communications, Drafts, Pre-existing Documents, and the Source of Facts Communicated, 48 Am. D.L.Rev. 967,9961005 (1999).

Professor Edward J. Imwinkelried, in The New Wigmore, Evidentiary Privileges, § 6.8.2 b, at 703 (2002) also supports the protection of preliminary drafts.

> While there is contra authority, the better and prevailing view is that even if the client realized that a final draft of a document would be publicly disclosed, the client might have intended that the earlier tentative drafts would be confidential. If the client understood the document to be a preliminary draft, he or she would contemplate further discussions with the attorney to complete the draft by finalizing the decisions regarding which information to insert in the ultimate version of a legal document such as a pleading. The tentative drafts generated before the final decision to "go public" are thus protected. [footnotes omitted]

The view most limiting the application of the privilege in the preliminary draft situation seems to be confined to the courts in the Fourth Circuit. The prevailing view seems to be more receptive to the application of the privilege, at least to the extent that the drafts differ from the final form or the information conveyed is not ultimately disclosed.

The direction of the federal law on the question of preliminary drafts and related information will depend upon where the courts come out on the fundamental decision to construe

the privilege narrowly, so as to maximize the information ultimately admissible in courts, or broadly, so as to limit that admission in order to protect the free flow of information between lawyer and client. A reasonable conceptual and policy argument can be made in either direction.

If the attorney-client privilege is justified only when protecting information intended to be confidential, one could argue that there is no expectation of confidentiality for information intended to be made public. Therefore, if public disclosure is the ultimate goal of the representation, all of the details leading to that disclosure should also fairly be disclosed. An opposing party and the justice system is entitled to know the background of information public disclosed when there was no intention to keep such information confidential. Protection should be denied even if there is ultimately no disclosure because it is the client's intention at the time of communication with counsel that should be controlling.

On the other hand, if the goal of the attorney-client privilege is to encourage a free flow of communications between attorney and client, one can argue that preliminary conversations and drafts reflecting those conversations ought to be protected. Even courts taking a hard line against the application of the privilege in connection with information to be publicly disclosed have held that the privilege should apply where the client is unsure as to whether there would ultimately be disclosure. *See United States* v. *(Under Seal),* 748 F.2d 871, 875-76 (4th Cir. 1984). Based on the same notion, one could argue that the client and her attorney ought to be able to discuss the precise terms of disclosure without the risk that matters ultimately determined not to be disclosed, perhaps with the advice of counsel, would be unprivileged. Thus, a discussion of the precise terms with counsel, as well as information supplied for the possibility of disclosure but not disclosed ought to be protected. Similarly, drafts, at least those containing differences from the final draft and/or comments of counsel, ought similarly to be protected. Such protection would serve the goal of furthering communication between attorney and client. Even under this argument, drafts identical to the original should probably be unprotected, although, as Professor Rice argues, even those drafts may reflect communications. Such a view would be consistent with the generally recognized notion that the privilege protects communications not information. *See, e.g., In re Grand Jury Subponean Duces Tecum Dated Sept.* 15, 1983 *(Marc Rich & Co. A.G.),* 731 F.2d 1032 (2d Cir. 1984).

3. Determining the Existence of the Crime-Fraud Exception

Perhaps the most difficult issues facing the federal courts with regard to the crime-fraud exception to the attorney-client privilege involve the procedure and standards for determining its application. Although the standard for ordering an *in camera* review of allegedly privileged documents was clearly articulated in *United States* v. *Zolin,* 491 U.S. 554 (1989), questions and conflicts exist among the circuits with regard to several other important matters. Included in the issues not fully or consistently resolved by the case law are: 1) whether an *in camera* review is required or whether the exception can be applied without such a review; 2) the ultimate showing necessary to vitiate the privilege; 3) whether and how the claimed privilege holder may rebut a prima facie showing that the communications were within the exception; 4) what evidence may be considered by the court in reaching either its threshold or ultimate decision; 5) how the court may discern the client's intent to commit a crime or fraud; and 6) whether the exception applies only to

words that are themselves in furtherance of a crime or fraud or whether it applies to the entire conversation or document in which the words were spoken or appear.

The uncertainty and the seeming ease with which the exception may be used to abrogate the privilege have been of concern, especially to the criminal defense bar. The procedure for applying the exception came under particularly strong attack in a report of the American College of Trial Lawyers, *The Erosion o/the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations* 27 (2002), where it is argued:

> The current rules allow prosecutors to obtain an *in camera* review based on unsubstantiated information that they may have collected through an unlawful intrusion into the privilege, without giving defendants an opportunity to challenge the reliability or validity of that evidence.

The report quotes with approval from H. Lowell Brown, *The Crime-Fraud Exception to the Attorney-Client Privilege in the Context of Corporate Counseling,* 87 Ky. L. J. 1191, 1259-60 (1999):

> The absence of notice of the basis of the crime-fraud claim further aggravates the inability of the privilege holder to meaningfully respond and to preserve the privilege. The court is also deprived of the robust factual development and legal argument necessary for an informed judicial decision.

As will be discussed, the case law seems to justify some concern. Whether, all factors being considered, the procedure needs changing is a question to be resolved elsewhere.

A. The threshold determination for *in camera* review

The Supreme Court in *Zolin* required a party seeking to apply the exception to show "a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish that the crime-fraud exception applies." 491 U.S. at 572. Not surprisingly, virtually all circuits adopt this language verbatim. *See, e.g., In re Sealed Case,* 107 F.3d 46 (D.C. Cir. 1997); *United States v. Edgar,* 82 F.3d 499 (1st Cir. 1996); *Haines v. Liggett Group, Inc.,* 975 F.2d 81 (3d Cir. 1991); *In re Grand Jury Proceedings, Thursday Special Grand Jury September Term,* 1991,33 F.3d 342 (4th Cir. 1994); *In re Grand Jury Subpoena,* 190 F.3d 375 (5th Cir. 1999); *In re BankAmerica Corp. Sees. Litig.,* 270 F.3d 639 (8th Cir. 2001); *United States v. Chen,* 88 F.3d 1495 (9th Cir. 1996); *Motley v. Marathon Oil Co.,* 71 F.3d 1547 (10th Cir. 1995); *Cox v. Administrator United States Steel & Carnegie,* 17 F.3d 1386 (11 th Cir. 1994). Only the Second Circuit varies the formulation, describing the threshold showing as "a factual basis [that] must strike 'a prudent person' as constituting 'a reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud, and that the communications were in furtherance thereof.'" *United States v. Jacobs,* 117 F.3d 82, 87 (2d Cir. *1997)(quoting in re John Doe,* 13 F.3d 633,637 (2d Cir. 1994)).

This threshold burden has been described as "relatively low to discourage abuse of privilege and to ensure that mere assertions of the attorney-client privilege will not become sacrosanct." *In re Grand Jury Investigation,* 974 F.2d 1068, 1072 (9th Cir. 1992). However, other courts have noted that the threshold is not so low as to allow the mere allegation of a crime or fraud to vitiate the privilege and thus "discourage many would-be clients from consulting an attorney about entirely legitimate legal dilemmas." *In re Grand Jury Proceedings (Corporation),* 87 F.3d 377,381 (9th Cir. 1996). The burden requires that the proponent of the exception make a "specific showing that a particular document or communication was made in furtherance of the client's alleged crime or fraud." *In re Bankamerica Corp. Sees. Litig.,* 270 F.3d 639, 642 (8th Cir.2001). The burden required by the Court in *Zolin* is seen as striking "a balance between the intrusion imposed upon the privilege by the *[in camera]* review process and the likelihood that *in camera* review may reveal evidence to establish the applicability of the crime-fraud exception." *In re Grand Jury Investigation,* 974 F.2d 1068, 1072 (9th Cir. 1992) (citing *Zolin,* 491 U.S. at 572).

B. Is *in camera* review required?

Zolin established that, once the threshold showing is made, the decision to engage in *in camera* review rests in the "sound discretion of the district court." 491 U.S. at 572. The Court added:

> The court should make that decision in light of the facts and circumstances of the particular case, including, among other things, the volume of materials the district court has been asked to review, the relative importance to the case of the alleged privileged information, and the likelihood that the evidence produced through *in camera* review, together with other available evidence then before the court, will establish that the crimefraud exception does apply. The district court is also free to defer its *in camera* review if it concludes that additional evidence in support of the crime-fraud exception may be available that is *not* allegedly privileged, and that production of additional evidence will not unduly disrupt or delay the proceedings. *Id.*

Zolin does not consider the question of whether *in camera* review is *required* before a decision is made to apply the crime-fraud exception. There seems to be only one Court of Appeals opinion expressly dealing with a case in which the crime-fraud exception was applied without the court requiring an *in camera* inspection. In *In re Bankamerica Corp. Sees. Litig.,* 270 F.3d 639,644 (8th Cir. 2001), the court reversed a decision in which the district court had found the crime-fraud exception applicable without an *in camera* review of the documents. The court stated that it had found no case "in which this court affirmed an order to produce documents under the crime-fraud exception where the district court did not first review the documents *in camera."* The court added:

> Requiring a threshold showing of facts supporting the crime-fraud exception followed by *in camera* review of the privileged materials helps ensure that legitimate communications by corporations seeking legal advice as to their disclosure obligations under the federal securities laws are not deterred by the risk of compelled disclosure under the crime-fraud exception. Therefore, district courts should be highly reluctant to order disclosure without

conducting an *in camera* review of allegedly privileged materials. In this case, given the above-described shortcomings of plaintiffs' threshold showing, the district court abused its discretion in ordering disclosure without *in camera* review of the eleven documents. *Id.*

The facts in the *Bankamerica Corp.* case were such that the application of the crime-fraud exception was in doubt. Whether an *in camera* review would be required in the face of clear evidence of the exception's applicability is another question.

C. The ultimate showing required

Once the threshold showing has been made and *in camera* review undertaken, what test is to be applied by the court in determining the applicability of the exception – the ultimate showing? The court in *Zolin* expressly declined to address that issue as not being before it. *Zolin,* 491 U.S. at 564-65.

A commonly cited phrasing of the ultimate showing was articulated in *In re Grand Jury Proceedings,* 183 F.3d 71, 75 (1999):

> [T]he party invoking [the crime-fraud exception] must make a prima facie showing: (1) that the client was engaged in (or was planning) criminal or fraudulent activity when the attorney client communications took place; and (2) that the communications were intended by the client to facilitate or conceal the criminal or fraudulent activity.

As noted by the Supreme Court in *Zolin,* the term *"prima facie,"* although commonly used to describe the ultimate showing for the application of the crime-fraud exception, is confusing when used in this context. *See Zolin,* 491 U.S. at 565, n. 7. The more common use of the term *"prima facie"* is to connote a shifting or at most a preliminary satisfaction of a burden of going forward, rather than a determination of an issue. Yet, as used in this context, the showing is sufficient to dispel the privilege altogether without affording the client an opportunity to rebut the *prima facie* showing. Id. *(citing* Note, 51 Brooklyn L. Rev. 913,918-19 (1985)). The Court declined to resolve the confusion and the use of the term persists. *See, e.g., United States* v. *Davis,* 1 F.3d 606, 609 (7th Cir. 1993); *United States* v. *Chen,* 99 F.3d 1495, 1503 (9th Cir. 1996); *In re Sealed Case,* 107 F .3d 46,50 (D.C. Cir. 1997).

How much proof is sufficient to establish such a *prima facie* case? While it is clear that the standard is not "beyond a reasonable doubt," *see, e.g., United States* v. *Chen,* 99 F.3d 1495, 1503 (9th Cir. 1996) ("[P]roof beyond a reasonable doubt is not necessary to justify application of the crime fraud exception."), courts have pondered whether "[i]n terms of the level of proof,...a 'prima facie showing' [is] a preponderance of the evidence, clear and convincing evidence, or something else." *In re Sealed Case,* 107 F.3d 46, 50 (D.C. Cir. 1997).

The burden is less than "clear and convincing evidence" and almost as certainly less than even a "preponderance of the evidence." The Third Circuit, for example, has stated that the ultimate showing "requires presentation of evidence which, if believed by the fact-finder, would be sufficient to support a finding that the elements of the crime-fraud exception were met." *In re Grand Jury Subpoena,* 223 F.3d 213, 217 (3d Cir. 2000). The Seventh Circuit, on the other hand,

has described the evidentiary showing necessary to satisfy the ultimate showing burden as "something to give colour to the charge [that the crime-fraud exception applies]; there must be 'prima facie evidence that it has some foundation in fact.'" *United States* v. *Davis,* 1 F.3d 606,609 (7th Cir. 1993) *(quoting Matter of Feldberg,* 862 F.2d 622, 625 (7th Cir. 1985)). The Court went on to state that "'prima facie evidence' [does] not mean 'enough to support a verdict in favor of the person making the claim,'" but rather "evidence sufficient 'to require the adverse party, the one with superior access to the evidence and in the best position to explain things, to come forward with that explanation.'" *Id.* Finally, the Court noted that "if the district court finds such an explanation satisfactory 'the privilege remains.'" *Id.*

The Sixth Circuit stated that the ultimate, or prima facie, showing "is the same as that for probable cause--such that 'a prudent person [would] have a reasonable basis to suspect the perpetration of a crime or fraud' --and not as demanding as the 'clear and convincing' threshold." *United States* v. *Clem,* 2000 U.S. App. LEXIS 6395 at *1 0 (6th Cir. Mar. 31, 2000). The Ninth Circuit described the ultimate showing burden as requiring evidence creating "'reasonable cause to believe that the attorney's services were utilized in furtherance of the ongoing unlawful scheme," 'United *States* v. *Chen,* 99 F.3d 1495, 1503 (9th Cir. 1996) *(quoting In re Grand Jury Proceedings (The Corporation),* 87 F.3d 377, 381 (9th Cir. 1996)). and then defined "reasonable cause" as "more than suspicion but less than a preponderance of the evidence."

One court sought to review the tests in the various courts, stating in *In re Grand Jury Subpoenas,* 144 F.3d 653,660 (10th Cir. 1998):

> Although the exact quantum of proof necessary to meet the prima facie standard has not been decided by the Supreme Court, see *Zolin,* 491 U.S. at 563-64 & n. 7, 109 S.Ct. 2619, several circuits have attempted to define precisely what the standard requires. See, e.g., *In re Richard Roe, Inc.,* 68 F.3d 38, 40 (2d Cir.1995) (probable cause to believe a crime or fraud has been committed); *Haines* v. *Liggett Group Inc.,* 975 F.2d 81, 95-96 (3d Or.1992) (evidence that if believed by the fact finder would be sufficient to support a finding that the elements of the crime-fraud exception were met); *In re International Sys. & Controls Corp. Sec. Litig.,* 693 F.2d 1235,1242 *(5*th Cir. *1982)* (evidence such as will suffice until contradicted and overcome by other evidence); *United States* v. *Davis,* 1 F.3d 606, 609 (7th Cir.1993) (evidence presented by the party seeking application of the exception is sufficient to require the party asserting the privilege to come forward with its own evidence to support the privilege); *In re Grand Jury Proceedings (Appeal of Corporation),* 87 F.3d 377,381 (9th Cir.1996) (reasonable cause to believe attorney was used in furtherance of ongoing scheme); *In re Grand Jury Investigation (Schroeder),* 842 F.2d 1223,1226 (llth Cir.1987) (evidence that if believed by the trier of fact would establish the elements of some violation that was ongoing or about to be committed); *In re Sealed Case,* 107 F.3d 46, 50 (D. C. Cir. 1997) (evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud). We need not articulate the exact quantum of proof here because under any of these announced standards, the government has made a prima facie showing.

See also In re Grand Jury Proceedings (Violette), 183 F.3d 71, 78 (1st Cir. 1999) ("the district court's determination that the government carried its burden is unassailable, regardless of

which version of the standard applies."); *Intervenor v. United States,* 144 F.3d 653,660 (10th Cir. 1998) ("We need not articulate the exact quantum of proof here because under any of these announced standards, the government has made a prima facie showing.").

At some point, the Supreme Court is likely to weigh in on the issue of the ultimate showing establishing what exactly is meant by *prima facie* in this context and how much proof is necessary to satisfy that burden. Until then, each circuit is committed to a test that is at least slightly different from each of its sister circuits.

D. Rebuttal by the Proponent of the Privilege

At least some of the cases seeking to set a standard of proof for the ultimate application of the crime-fraud privilege assume that once the *prima facie* showing has been made, the proponent of the privilege will have an opportunity to come forward with its own evidence to support the privilege. *See, e.g., United States v. Davis,* 1 F.3d 606, 609 (7th Cir. 1993). The reality is not so clear. Although the courts have recognized that the "crime fraud standard does seem to contemplate the possibility that the party asserting the privilege may respond with evidence to explain why the vitiating party's evidence is not persuasive," *United States v. Under Seal (In re Grand Jury Proceedings),* 33 F.3d 342, 352 (4th Cir. 1994), whether this opportunity for rebuttal is actually given will probably depend upon the nature of the case and the context of the inquiry. Cases that involve grand jury inquiries are in a different category from those that do not.

Grand jury cases present a unique struggle for the courts, as the ideals of protecting the secrecy of grand jury proceedings on the one hand, and protecting the due process rights of a criminal defendant on the other, come squarely into conflict. When faced with this conflict, the First Circuit stated:

> The law seems well-settled that, in the context of grand jury proceedings, the government may proffer ex parte the evidence on which it bases its claim that a particular privilege does not apply, and that the court may weigh that evidence, gauge its adequacy, and rule on the claim without affording the putative privilege holder a right to see the evidence proffered *or an opportunity to rebut it.*

In re Grand Jury Proceeding (Violette), 183 F.3d 71, 79 (1st Cir. 1999) (emphasis added) *(Violette* dealt with the crime-fraud exception in the context of the psychotherapistpatient privilege, but relied upon the established law regarding the crime-fraud exception in the realm of attorney-client privilege as the basis for its decision).

A ruling such as that in the *Violette* case does not translate to an absolute lack of opportunity to ever rebut the prima facie case in a criminal proceeding involving a grand jury. For example, the district court provided the defendant in that case an opportunity to provide argument on why the privilege should not be vitiated. *Violette* 183 F.3d at 73. Rather, the position of the First Circuit was that a defendant does not have the right to see, and therefore specifically rebut, the government's submission in support of the crimefraud exception *if* that submission warrants

protection due to the secret nature of the grand jury. The Second,[1] Third,[2] Fourth[3] Eighth,[4] and Tenth[5] Circuits are in accord with this decision, refusing to require an opportunity to review and rebut evidence presented to establish a prima facie case that the crime-fraud exception applies when confronted with the need to protect the secrecy of grand jury proceedings. *See also In re Grand Jury Proceeding Impounded,* 241 F.3d 308, 318 n9 (3d Cir. 2001) ("Because the need for secrecy in grand jury proceedings prohibits an adversarial proceeding regarding ex parte, *in camera* evidence, *courts may rely exclusively on ex parte materials in finding sufficient prima facie evidence to invoke the crime-fraud exception ..."* (emphasis added).

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[1] *See* John Doe, Inc. v. United States (In re John Doe, Inc.), 13 F.3d 633 (2d CiI. 1994) ("Appellants were thus properly denied access to the sealed affidavit, and *any resultant limit on their ability to rebut the government's submission was of marginal importance* and not violative of due process." *Id.* at 636. (emphasis added)).

[2] *See* In re Grand Jury Proceeding Impounded, 241 F.3d 308, 318 n9 (3d Cir. 2001). The Court stated that "[b]ecause the need for secrecy in grand jury proceedings prohibits an adversarial proceeding regarding ex parte, *in camera* evidence, courts may rely exclusively on ex parte materials in finding sufficient prima facie evidence to invoke the crime-fraud exception." The Court went on to say that our judicial system must place reliance "'on the district court's discretion and appellate review of the exercise of that discretion to ensure that the power of the grand jury is not abused while preserving the secrecy that is a necessary element of the grand jury process.'" */d. (quoting* In re Grand Jury Subpoena, 223 F.3d 213,219 (3d Cir. 2000)).

[3] *See* United States v. Under Seal (In re Grand Jury Proceedings), 33 F.3d 342, 352-53 (4th Cir. 1994). Faced with the defendant's argument that he should have been allowed access to the *in camera* submission of the government and, following that review, a chance to rebut the evidence, the Court stated that "[h]owever appealing [the argument] may sound, we have [previously] rejected such an argument ...the government has the right to preserve the secrecy of its submission because it pertains to an on-going investigation." *Id.* at 353.

[4] *See* In re Grand Jury Subpoena as to C97-216, 187 F.3d 996 (8th Cir. 1999). The district court informed defendant's attorney that the defense "could also file an argument or brief concerning the application of the crime-fraud exception ...appellant's counsel did neither." *Id.* at 997. The Eighth Circuit, in response to defendant's argument that he should have been allowed to "inspect and rebut the [ex parte] affidavit," *id.* at 997-98, agreed with the government that there was no error in refusing to allow the defendant access to the ex parte submission., *See id.* at 998.

[5] *See* Intervenor v. United States (In re Grand Jury Subpoenas), 144 F.3d 653 (10th Cir. 1998). The Court stated that "[t]he district court did not abuse its discretion in refusing to allow Intervenor to review the contents of the government's ex parte, *in camera* submission and in refusing to hear rebuttal evidence," *id.* at 663, and went on to note that the district court had in fact "entertained some of counsel's arguments intended to rebut the government's prima facie showing." *Id.*

The problem for the defendants in these grand jury criminal cases is that an opportunity to rebut the government's assertion that the crime-fraud exception applies is severely limited if the court relies solely on material protected as grand jury material, as the court is entitled to do, because the defendant will have no access to the material and, therefore, little or no idea what type of evidence, or the strength of that evidence, he is trying to rebut.

The limitations on rebuttal by the defendant in grand jury inquiries ordinarily do not apply in other criminal cases. For example, the Third Circuit has noted that "[w]here there are no secrecy or confidentiality imperatives ...there would seem to be no impediment to permitting the attorney to challenge the government's prima facie evidence, subject also to the Supreme Court's admonition to avoid 'mistrials.'" *In re Grand Jury Proceeding Impounded,* 241 F.3d 308, 318 n9 (3d Cir. 2001). Similarly, the Fourth Circuit has recognized the opportunity for rebuttal envisioned by the crime-fraud exception. *United States v. Under Seal (In re Grand Jury Proceedings),* 33 F.3d 342, 352 (4th Cir. 1994) ("The crime-fraud standard does seem to contemplate the possibility that the party asserting the privilege may respond with evidence to explain why the vitiating party's evidence is not persuasive.").

Civil cases in which the crime-fraud exception arises track the trend of non-grand jury related criminal cases. As with the non-grand jury cases, the lack of secrecy imperatives in most civil cases removes the "impediment to permitting the attorney to challenge the government's prima facie evidence." *In re Grand Jury Proceeding Impounded,* 241 F.3d 308, 318 n9 (3d Cir. 2001) (noting that "[i]n the civil context, we have permitted" the opportunity to challenge the evidence constituting the prima facie case of the crime-fraud exception's applicability). Without the off-setting grand jury concerns, "fundamental concepts of due process require that the party defending the privilege be given the opportunity to be heard, by evidence and argument, at the hearing seeking an exception to the privilege." *Haines v. Liggett Group, Inc.,* 975 F.2d 81, 96 (3d Cir. 1992). The court in *Haines* added that adequate protection of the attorney-client privilege can only be assured "when the district court undertakes a thorough consideration of the issue, *with the assistance of counsel on both sides of the dispute." Id.* (emphasis added) *(citing* Matter of Feldberg, 862 F.2d 622 (7th Cir. 1988).

Language in Ninth Circuit cases casts some doubt on the uniformity of an approach to be taken in non-grand jury cases. Although the Ninth Circuit cases involve grand jury proceedings, the opinions in those cases seem to reach beyond that context. *In re Grand Jury Proceedings (Doe),* 1993 U.S. App. LEXIS 1247 at *3-4 (9th Cir. Jan. 22, 1993) was an appeal from the district court's refusal to hold "an adversarial evidentiary hearing on whether the crime-fraud exception applie[d] to the information that the government [sought] from Roe's attorney, Doe." After reviewing the case law from its sister circuits, the Ninth Circuit held "that an adversarial minitrial is not required to determine whether the government shows a prima facie foundation for application of the crime-fraud exception." *Id. at* *8. This holding is in line with the decisions of the other circuits. *See, e.g., In re Grand Jury Proceeding Impounded,* 241 F.3d 308, 318 (3d Cir. 2001) ("...subject also to the Supreme Court's admonition to avoid 'minitrials'"); *In re Grand Jury Proceedings (Vargas),* 723 F.2d 1461, 1467 (10th Cir. 1983) (the case cited by the Ninth Circuit as support for its holding). However, the Court went on to state that while the district court could

consider rebuttal evidence, there was no requirement that this be done so long as the district court judge was satisfied that the proponent of the exception had met its burden, adding:

> [I]t is difficult to see how specification of any further requirements [than that the judge may, in his discretion, take evidence from the proponent of the privilege into consideration) could reduce the chance of mistake. *Requiring the district court to hear the client's rebuttal to the government's prima facie proffer would in many cases serve no purpose because the government's proof is clear.* Furthermore, the Supreme Court has cautioned that needless 'procedural delays and detours' in grand jury proceedings frustrate the public's interest in 'fair and expeditious administration of the criminal laws. *Id. at* *11 (emphasis added) *(quoting* United States v. R. Enter., Inc., 498 U.S. 292, 298-99 (1991).

Although the court's remarks could well be limited to the grand jury context, they are also arguably applicable to other situations in both criminal and civil cases. The Ninth Circuit followed this case with *In re Grand Jury Subpoena* 92-1 *(SJ),* 31 F.3d 826, 830 (9th Cir. 1994), in which the court stated (without reference to *In re Grand Jury Proceedings (Doe),* that while it is not improper for a district court to consider evidence offered by the proponent of the attorney-client privilege, there is no requirement that such a hearing take place.

E. Evidentiary considerations at each stage of the crime-fraud analysis

Just as the burden place on the proponent of the crime-fraud exception is different at each stage of the two-step analysis, the evidence that may be present at each stage is also different.

a. The threshold inquiry

The rule controlling this difference is found in *Zolin,* where the Court described the evidence that may be used during the threshold showing as "any relevant evidence, lawfully obtained,[6] that has not been adjudicated to be privileged." *United States v. Zolin,* 491 U.S. 554, 575 (1989). Although the proponent of the exception may not use privileged documents, communications, or other materials in making the threshold showing, the *Zolin* court held that "evidence directly but incompletely reflecting the content of the contested communications, generally will be strong evidence of the subject matter of the communications themselves," *id.* at 573, and that so long as the material submitted by the proponent of the exception "has not itself been determined to be privileged, its exclusion does not serve the policies which underlie the attorney-client privilege," *id.* at 574 n.12. and the material may be used "not only in the pursuit of in camera review, but also may provide the evidentiary basis for the ultimate showing that the crime-fraud exception applies." *Id.*

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[6] Although this issue does not appear to arise often, the legality of the proponent's evidence has nevertheless been challenged by some litigants. *See, e.g.,* In re Sealed Case, 162 F.3d 670,67374 (D.C. Cir. 1998) (in which Monica Lewinsky challenged as unlawful the obtainment of tape recorded conversations she had with Linda Tripp).

The courts of appeals often give only a brief description of the material submitted by the proponent of the exception to make the threshold showing.[7] For example, the court may disclose that the proponent of the exception simply presented "an in camera, ex parte good faith statement of evidence as to the alleged criminal activity,"[8] without describing what information the statement actually contained. The descriptions, however, are nevertheless helpful as examples of materials the courts of appeals have found useful for threshold showings in the past. Examples of threshold submissions include: summaries of grand jury testimony;[9] grand jury documents;[10] government affidavits;[11] tape recordings;[12] affidavits of FBI and Customs agents;[13] sworn declarations of corporation "insiders;"[14] rulings and opinions of trial judges from previous proceedings in the same case;[15] exhibits created by the proponent of the crime-fraud exception;[16] transcripts of telephone conversations;[17] press releases;[18] company profit and loss statements;[19]

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[7] One reason for the lack of information available is that many of these cases involve on-going grand jury investigations. No less than 82 of the approximately 170 federal courts of appeals cases that at least mention both the crime-fraud exception and the attorney-client privilege are set in the context of secret grand jury proceedings.

[8] Intervenor v. United States, 144 F.3d 653, 657 (10th Cir. 1998).

[9] *See* In re Sealed Case, 162 F.3d 670, 673-74 (D.C. Cir. 1998); In re Grand Jury Proceedings, 33 F.3d 342,345 (4th Cir. 1994); In re Bankamerica Corp. Secs. Litig., 270 F.3d 639, 642 (8th Cir. 2001); John Roe, Inc. v. United States, 142 F.3d 1416, 1419 (11th Cir. 1998).

[10] *See* In re Sealed Case, 162 F.3d 670, 673-74 (D.C. Cir. 1998); In re Grand Jury Proceedings, 33 F.3d 342,345 (4th Cir. 1994); John Roe, Inc. v. United States, 142 F.3d 1416, 1419 (11th Cir. 1998).

[11] *See* In re John Doe, Inc., 13 F.3d 633,635 (2d Cir. 1994); In re Grand Jury Subpoena, 223 F.3d 213,219 (3d Cir. 2000); In re Grand Jury Subpoena as to C97-216, 187 F.3d 996 (8th Cir. 1999); In re Grand Jury Subpoena 92-1(SJ), 31 F.3d 826,830 (9th Cir. 1994).

[12] *See* United States v. Jacobs, 117 F.3d 82, 87-88 (2d Cir. 1997).

[13] *See* In re John Doe, Inc., 13 F.3d 633, 635 (2d Cir. 1994); United States v. Clem, 2000 U.S. App. LEXIS 6395 at *2 (6th Cir. Mar. 31, 2000).

[14] *See* In re Sealed Case, 754 F.2d 395, 398 (D.C. Cir. 1985).

[15] *See* In re Sealed Case, 754 F.2d 395, 398 (D.C. Cir. 1985).

[16] *See* In re Sealed Case, 754 F.2d 395, 398 (D.C. Cir. 1985).

[17] *See* United States v. Clem, 2000 U.S. App. LEXIS 6395 at *2 (6th Cir. Mar. 31, 2000).

telephone records;[20] and business invoices.[21] On the rare occasion that a more in-depth description of the contents of the threshold submission is given, the description clearly evinces the requirement that "it isn't enough for the government merely to allege that it has a *sneaking suspicion* the client was engaging in or intending to engage in a crime or fraud when it consulted the attorney,"[22] as in each case the proponent of the exception made very specific allegations and statements of fact.[23]

b. The ultimate showing

Once the threshold showing has been made and the proponent of the exception attempts to make the ultimate showing that the exception applies, the evidence available for consideration expands. The Supreme Court, in *Zolin,* made clear that in the ultimate showing stage the court may take into account the contested communications in conjunction with the other evidence. 491 U.S. 554, 569 (1989) "In our view, the costs of imposing an absolute bar to consideration of the communications *in camera* for purpose of establishing the crime-fraud exception are intolerably high ....A *per se* rule that the communications in question may never be considered creates, we feel, too great an impediment to the proper functioning of the adversary process.". *See also United States v. Edgar,* 82 F.3d 499, 509 (lst Cir. 1996); *John Doe, Inc. v. United States (In re John Doe, Inc.),* 13 F.3d 633, 637 (2d Cir. 1994); *United States v. Under Seal (In re Grand Jury Proceedings),* 33 F.3d 342, 350 (4th Cir. 1994); *In re Bankamerica Corp. Sees. Litig., 270* F.3d 639, 641-42 (8th Cir. 2001); *United States v. De La Jara,* 973 F.2d 746, 748 (9th Cir. 1992).

c. Non-documentary evidence

The evidence presented in support of, or in opposition to, application of the crime

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[18] *See* In re Bankamerica Corp. Secs. Litig., 270 F.3d 639, 642 (8th Cir. 2001).

[19] *See* In re Bankamerica Corp. Secs. Litig., 270 F.3d 639, 642 (8th Cir. 2001).

[20] *See* In re Grand Jury Subpoena 92-1 (SJ), 31 F.3d 826, 830 (9th Cir. 1994) (government submitted an affidavit based, in part, on phone records of the subject of the grand jury investigation).

[21] *See* In re Grand Jury Subpoena 92-1(SJ), 31 F.3d 826, 830 (9th Cir. 1994) (government submitted an affidavit based, in part, on invoices of the subject of the grand jury investigation).

[22] In re Grand Jury Proceedings (Corporation), 87 F.3d 377, 381 (9th Cir. 1996) (emphasis added).

[23] *See* In re Grand Jury Subpoena 92-1(SJ), 31 F.3d 826, 830 (9th Cir. 1994); United States v. Jacobs, 117 F.3d 82, 87-88 (2d Cir. 1997); In re Sealed Case, 754 F.2d 395, 398 (D.C. Cir. 1985).

fraud exception is not limited to documentary evidence. This principle is evident from the Supreme Court's language in *Zolin* that "the court is not required to avert its eyes *(or close its ears)." Zolin,* at 568. Not surprisingly, the court may hear and consider argument on the application of the crime-fraud exception at both the threshold stage[24] and the ultimate showing stage of the inquiry.[25] Additionally, it is permissible for the court to conduct an *in camera* interview of a witness when determining whether the appropriate evidentiary showing in support of the exception's application has been made. *See, e.g., In re Grand Jury Subpoena as to C97-216,* 187 F.3d 996, 997 (8tb Cir. 1999) ("The court informed them that based on its review of the affidavit and supporting materials, the government bad made a threshold showing to justify *an in camera examination of the attorney to determine if the crime-fraud exception applied."* (emphasis added); *John Doe, Inc. v. United States (In re John Doe, Inc.),* 13 F.3d 633, 635 (2d Cir. 1994) ("The district court then concluded on the basis of the affidavit that the threshold showing bad been made, and it decided to question the attorney in camera."). As with other forms of evidence submitted by the proponent of the crime-fraud exception, there is no requirement in criminal grand jury cases that the proponent of the privilege be allowed access to the live testimony considered by the court. *See, e.g., John Doe, Inc. v. United States (In re John Doe, Inc.)* at 637 (noting first that the district court "decided to question the attorney in camera ...because of a concern for preserving grand jury secrecy, [the district court] denied the requests of the attorney's and appellants' counsel that they be permitted to be present during the examination," and then that "[i]n Light of the district court's legitimate concern that the secrecy of the grand jury be preserved, its in camera examination of the attorney was the most effective method of determining that the crime fraud exception bad been established"). Moreover, at least where the person questioned . by the judge is a potential grand jury witness, it is permissible for a district court to order that the witness not be interrogated by the proponent of the attorney-client privilege after the *in camera* examination, *see John Doe, Inc. v. United States (In re John Doe, Inc.)* at 637. and to refuse a subsequent request by the proponent of the attorney-client privilege to review the *in camera* examination. *See In re Grand Jury Subpoena as to C97-116* at 998 ("...appellant's counsel stated the relief he really was seeking was an opportunity to review the in camera examination ...we know of [no] right appellant has to such review.").

d. Determining the intent of the client

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[24] *See, e.g.,* John Doe, Inc. v. United States (In re John Doe, Inc.), 13 F.3d 633,637 (2d Cir. 1994) ("The district court proceeded to an in camera review of the allegedly privileged communication only after oral argument and after the threshold showing required by Zolin was made. Then, on the basis of information garnered from the affidavit, oral argument and the in camera examination of the attorney, it determined that the crime-fraud exception had been established.")

[25] *See, e.g.,* Intervenor v. United States (In re Grand Jury Subpoenas), 144 F.3d 653, 657 (10th Cir. 1998) (" ...the court did allow counsel for Intervenor to present arguments intended to rebut the prima facie showing.").

Once the judge begins to consider the evidence presented by the proponent of the crime-fraud exception, the intent of the proponent of the privilege becomes a central issue. Specifically, the court must determine "whether the client made or received the otherwise privileged communication with the intent to further [or conceal] an unlawful or fraudulent act," *In re Sealed Case,* 223 F.3d 775, 778 (D.C. Cir. 2000), because the mere fact that "some communications may be related to a crime is not enough to subject the communication to disclosure." *In re Antitrust Grand Jury,* 805 F.2d 155, 168 (6th Cir. 1986).

In some cases, such as when the attorney is intimately involved in the crime or fraud with her client, the issue of intent will be clear-cut. However, in most cases the issue of intent will be more opaque. These crime-fraud cases, as with cases in other areas of the law in which intent is an issue, often require that the intent be inferred from other evidence and circumstances. *See, e.g., United States v. Wonderly,* 70 F.3d 1020, 1023 (8th Cir. 1995) (stating that "[i]ntent to defraud need not be shown by direct evidence; rather, it may be inferred from all the facts and circumstances surrounding the defendant's actions."); *Florence Mfg. Co. v. Dowd,* 189 F. 44,46 (2d Cir. 1911) (stating, in an unfair competition case, that "in many of these unfair competition cases, the fraudulent intent is inferred from the facts"). As the Eighth Circuit noted, "since the condition of the mind is rarely susceptible to direct proof, recourse must be to all pertinent circumstances." *United States v. Hardesty,* 645 F.2d 612, 614 (8th Cir. 1981).

One circumstance considered by the courts is whether the attorney provided actual services at the behest of her client, such as the filing of documents or the making of statements to investigators, that served to further or conceal the crime or fraud. For example, in *In re Sealed Case,* 754 F.2d 395, 402 (D.C. Cir. 1985), the court considered the clients' use of their attorneys to present perjured testimony and "file and verify the authenticity of false documents" as evidence of the client's intent. Similarly, in *United States v. Under Seal (In re Grand Jury Proceeding),* 102 F.3d 748, 752 (4th Cir. 1996), the Fourth Circuit considered the client's use of its attorneys to "file pleadings, documents, and to write letters" to legitimize an illegal loan as evidence of the client's intent. Finally, in *United States v. Chen,* 99 F.3d 1495,1503-04 (9th Cir. 1996), the Ninth Circuit considered as evidence of intent the defendants' use of their attorneys to prepare fraudulent Customs corrective disclosures designed to further and conceal fraudulent Customs and income tax dealings. The court in *Chen* noted that the evidence tended to show that the defendants were "proposing to make a fraudulent corrective disclosure to Customs in order to evade income taxes," *id.* and "were using their lawyers to help prepare the paperwork for this fraudulent scheme, and using their prestige in the customs bar to hide it." *Id.*

Another circumstance considered by the courts of appeals is whether the client bas already set upon a criminal course when she sought the assistance of counsel, which assistance served to further or conceal the crime or fraud. In *United States v. Jacobs, 117* F.3d 82, 88 (2d Cir. 1997), the defendant was involved in a fraudulent debt elimination program. Before engaging his attorney in an investigation of the program's merits, the defendant "had already agreed to host a seminar [for the fraudulent program] in Cincinnati and obtained a false driver's license, social security card and juristic identification in Mexico." *Id.* After receiving his attorney's evaluation, the defendant "used the communications to lend credibility to the scheme, by telling prospective customers that his attorney declared the program legal." *Id.* at 89. The Second Circuit court of appeals concluded, based on this evidence, that it was "reasonable to believe...that Jacobs' intent in securing Attorney

Swob's opinion was to further his Debt Elimination Plan." *Id.*

The Ninth Circuit reached a similar conclusion in *United States v. Martin,* 278 F.3d 988,1001 (9th Cir. 2002). In *Martin,* the defendant established a sham company that posed as the United States division of a legitimate Hong Kong corporation, and that was "created solely to defraud legitimate businesses." *Id.* In holding that the crime-fraud exception vitiated the attorney-client privilege otherwise applicable to communications between the defendant and attorney, the Ninth Circuit stated that "[b]efore Defendant hired [the attorney], he had already researched the real CCM[, the Hong Kong corporation], filed a false Dun & Bradstreet report that listed actual CCM officers as being affiliated with the bogus CCM, and obtained a $ 2 million line of credit from IBM claiming to be the real CCM." *Id.* The Court then concluded that the attorney "was hired as CCM's 'general counsel' *id.* to assist Defendant in continuing the CCM fraud," and the crime-fraud exception therefore applied.

Some courts have held that the mere fact that a client sought advice regarding a legitimate legal issue, and then at some later time violated the law about which the advice was sought does not, without more, activate the crime-fraud exception. For example, in *In re Sealed Case,* 107 F.3d 46 (D.C. Cir. 1997), the president and vice president of a corporation met with its general counsel to discuss campaign finance laws. A few weeks later the vice president of the corporation supposedly violated the campaign finance laws by soliciting donations from corporate clients to a particular candidate, and then reimbursing those clients with corporate funds. *Id.* at 48. The court, in finding that the government had not met its burden of showing the crime-fraud exception's application, stated:

> Companies operating in today's complex legal and regulatory environments routinely seek legal advice about how to handle all sorts of matters, ranging from their political activities to their employment practices to transactions that may have antitrust consequences. There is nothing necessarily suspicious about the officers of this corporation getting such advice. True enough, within weeks of the meeting about campaign finance law, the vice president violated that law. *But the government had to demonstrate that the Company sought the legal advice with the intent to further its illegal conduct. Showing temporal proximity between the communication and a crime is not enough. Id.* at 50 (emphasis added).

The Eighth Circuit reached the same conclusion in *In re Bankamerica Corporate Securities Litigation,* 270 F.3d 639, 643-44 (8th Cir. 2001) where the Court cited the Second Circuit's opinion in *Sealed Case* as support for its conclusion that "it is not enough to show that an attorney's advice was sought before a decision was made not to disclose information that is alleged, as a matter of hindsight, to have been material."

In determining intent, an issue may arise as to the identity of the client especially where corporations are involved. For example, in *In re Sealed Case,* discussed above, a corporation sought advice regarding campaign finance laws. The corporation's vice president was alleged subsequently to have violated those laws. In noting that the government had failed to carry its burden under the crime-fraud exception, the Second Circuit stated:

The critical consideration is that the government's presentation had to be aimed at the

intent and action of the client....The holder of the privilege is the client and, in this case, the client was the Company, not the vice president. Unless the government made some showing that the *Company* intended to further and did commit a crime, the government could not invoke the crime-fraud exception to the privilege. *In re Sealed Case,* 107 F.3d at 50 (emphasis added).

The Court then concluded that "there was no way of knowing or even guessing whether the vice president was on a frolic of his own, against the advice of Company counsel, when he reimbursed the donors with corporate funds," *id.* and that, although "there are circumstances under which corporations are responsible for the crimes of their agents," *id.* the government had not offered "anything in terms of evidence or law to support the idea that the Company bore criminal responsibility for the acts of this officer." *Id.* at 51.

e. What words are covered by the crime-fraud exception?

An issue may arise under the crime-fraud exception as to whether the exception applies only to words that are themselves in furtherance of a crime or fraud or whether it applies to the entire conversation or document in which the words were spoken or appear. It is often difficult to discern a court's treatment of this issue. Often the exact communications are not reflected in the court's opinion and it is difficult to tell whether the court is referring simply to the words themselves or to an entire conversation or document. *See, e.g., In re Bankamerica Corporate Sees. Litig.,* 270 F.3d 639, 642 (8thCir. 20ot); *United States v. Under Seal (In re Grand Jury Proceedings),* 102 F.3d 748, 751-52 (4th Cir.1996). At least one court has held "that the crime-fraud exception does not operate to remove communications concerning past or completed crime or frauds from the attorney client privilege," *In re Federal Grand Jury Proceedings 89-10,938* F.2d 1578, 1581-82 (11th Cir. 1991), even if the subsequent communication simply memorializes earlier communications that are themselves subject to the exception. *Id.* The Court in that case held that the exception is inapplicable even if the subsequent communications occur with the same lawyer whose advice was earlier sought by the client to further or conceal a crime or fraud. *Id.* at 1582-83. *See also In re Sealed Case,* 244 U.S. App. D.C. 11, 754 F2d 395,402 (D.C. Cir. 1985) (communications with attorneys who had been involved with the client's past crimes remained privileged).

But the issue is more in doubt with regard to statements that may not themselves be communications in furtherance of a crime or fraud but which are made in the same conversation or document. Although the cases are far from clear, there seems to be a distinction between oral and written communications. The courts seem more willing to parse oral conversations than written ones. For example, in *United States v. Davis,* 1 F.3d 606 (7th Cir. 1993), the Seventh Circuit approved the district court's "expressly limit[ing] the government's inquiry to 'asking [the attorney] whether, during the course of his representation of [the client], [the client] admitted lying to him about the existence of the pertinent document and his compliance with the grand jury's subpoena.'" *Id.* at 611. Neither the district court nor the court of appeals authorized delving into other topics that arose at or near the time of the exchange involving the existence of the pertinent document. Similarly, in *In re Grand Jury Proceedings (Doe),* 1993 *U.S. App. LEXIS 1247* at *13 (9th Cir. Jan. 151993), the Ninth Circuit approved the district court's order limiting the attorney's testimony to

very specifically identified transactions. In these cases, both the Seventh and the Ninth Circuits seems to treat an oral exchange between lawyer and client as composed of many small communications, some of which were subject to disclosure and some of which were not.

The same limiting language does not seem to appear in cases involving documents containing communications between lawyer and client. In *In re Bankamerica Corporate Securities Litigation,* 270 F.3d 639, 642 (8th Cir. 2001), the government sought production of eleven documents that "contain or reflect attorney-client communications *relevant to"* the corporate disclosure issues which were the subject of investigation. The court's language leaves it far from clear that the documents solely concerned the disclosure issues under investigation, yet the Eighth Circuit directed the district court to "determine, *separately for each document,* whether plaintiffs have made the threshold showing required in *Zolin." Id.* at 644 (emphasis added). Rather than directing the district court to determine whether some portions of the document in question were subject to the crime-fraud exception while some portions retained their privileged status, the Court's language treated these documents as items to be disclosed or protected as a whole. Similarly in *United States v. Richard Roe, Inc. (In re Richard Roe, Inc.),* 68 F.3d 38 (2d Cir. 1995), the Second Circuit remanded the case to the district court "for an examination of each document under the proper standard" *id.* at 41 and directed the court to "determine which, if any, of the documents ... were in furtherance of a crime or fraud." *Id.* Like the Eighth Circuit in *Bankamerica,* the Second Circuit appears to have treated each document as wholly subject to disclosure or wholly subject to protection, rather than treating the documents as composed of many smaller communications for which the crime-fraud exception may eviscerate the privilege as to only some portions of the non-oral exchange, while leaving the privilege intact as to other portions.

Conclusion

The future development of the law involving the crime-fraud exception to the attorney-client privilege will likely flesh out the issues set for forth in this section. The Supreme-Court may have to address some of them, especially the "ultimate showing" required for the application of the exception and the extent to which the proponent of the privilege can rebut the opponent's evidence. Without such a resolution, the fears expressed in the American College of Trial Lawyer's report referred to above may continue to plague this area of the law.

Tab 8

Outline on *Crawford* Case Law Developments

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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: March 1, 2011

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. A possible amendment to rectify the unconstitutionality of that Rule is set forth 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 applicable unless accomplice's hearsay statement is testimonial:** ***United States v. Figueroa-Cartagena,*** 612 F.3d 69 (1st Cir. 2010): The defendant's codefendant had made hearsay statements in a private conversation that was taped by the government. The statements directly implicated both the codefendant and the defendant. At trial the codefendant's statements were admitted against him, and the defendant argued that the *Bruton* line of cases required severance. But the Court found no *Bruton* error, because the hearsay statements were not testimonial in the first place. The statements were from a private conversation so the speaker was not primarily motivated to have the statements used in a criminal prosecution. The Court stated that the "*Bruton/Richardson*

framework presupposes that the aggrieved co-defendant has a Sixth Amendment right to confront the declarant in the first place."

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)); ***United States v. Damra,*** 621 F.3d 474 (statements made by a coconspirator "by their nature are not testimonial").

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 testimonial 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 relate 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."

Expert's reliance on notes prepared by lab technicians did not violate the Confrontation Clause: *United States v. Pablo,* 625 F.3d 1285 (10th Cir. 2010): The defendant was tried for rape and other charges. Two lab analysts conducted tests on the rape kit and concluded that the DNA found at the scene matched the defendant. The defendant complained that the lab results were introduced through the testimony of a forensic expert and the lab analysts were not produced for cross-examination. But the court found no plain error and affirmed the convictions. The court reasoned that the notes of the lab analysts were not admitted into evidence and were never offered for their truth. To the extent they were discussed before the jury, it was only to describe the basis of the expert's opinion — which the court found to be permissible under Rule 703. The court observed that "[t]he extent to which an expert witness may disclose to a jury otherwise inadmissible testimonial hearsay without implicating a defendant's confrontation rights * * * is a matter of degree." According to the court, if an expert "simply parrots another individual's testimonial hearsay, rather than conveying her own independent judgment that only incidentally discloses testimonial hearsay to assist the jury in evaluating her opinion, then the expert is, in effect, disclosing the testimonial hearsay for its substantive truth and she becomes little more than a backdoor conduit for otherwise inadmissible testimonial hearsay." In this case the court, applying the plain error standard, found insufficient indication that the expert had operated solely as a conduit for testimonial hearsay.

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.

Retaliatory Murder of Witnesses Who Testified Against the Accused in a Prior Case Is Not a Forfeiture in the Trial for Murdering the Witnesses: *United States v. Henderson,* 626 F.3d 626 (6th Cir. 2010): The defendant was convicted of bank robbery after two people (including his accomplice) testified against them. Shortly after the defendant was released from prison, the two witnesses were found murdered. At the trial for killing the two witnesses, the government offered statements made by the victims to police officers during the investigation of the bank robbery. These statements concerned their cooperation and threats made by the defendant. The trial judge admitted the statements after finding by a preponderance of the evidence that the defendant killed the witnesses. That decision, grounded in forfeiture, was made before *Giles* was decided. On appeal, the court found error under *Giles* because "Bass and Washington could not have been killed, in 1996 and 1998, respectively, to prevent them from testifying against [the defendant] in the bank robbery prosecution in 1981." Thus there was no showing of intent to keep the witnesses from testifying, as *Giles* requires for a finding of forfeiture. The court found the errors to be harmless.

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.").

Confessions of other targets of an investigation were testimonial, but did not violate the Confrontation Clause because they were offered to rebut charges against the integrity of the investigation: *United States v. Christie,* 624 F.3d 558 (3rd. Cir. 2010): In a child pornography investigation, the FBI obtained the cooperation of the administrator of a website, which led to the arrests of a number of users, including the defendant. At trial the defendant argued that the investigation was tainted because the FBI, in its dealings with the administrator, violated its own guidelines in treating informants. Specifically the defendant argued that these misguided law enforcement efforts led to unreliable statements from the administrator. In rebuttal, the government offered and the court admitted evidence that twenty-four other users confessed to child pornography-related offenses. The defendant argued that admitting the evidence of the others' confessions violated the hearsay rule and the Confrontation Clause, but the court rejected these arguments and affirmed. It reasoned that the confessions were not offered for their truth, but to show why the FBI could believe that the administrator was a reliable source, and therefore to rebut the charge of improper motive on the FBI's part. As to the confrontation argument, the court declared that "our conclusion that the testimony was properly introduced for a non-hearsay purpose is fatal to Christie's *Crawford* argument, since the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."

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.

Statements by confidential informant included in a search warrant were testimonial and could not be offered at trial to explain the police investigation: ***United States v. Holmes,*** 620 F.3d 836 (8th Cir. 2010): In a drug trial, the defendant tried to distance himself from a house where the drugs were found in a search pursuant to a warrant. On redirect of a government agent — after defense counsel had questioned the connection of the defendant to the residence — the trial judge permitted the agent to read from the statement of a confidential informant. That statement indicated that the defendant was heavily involved in drug activity at the house. The government acknowledged that the informant's statements were testimonial, but argued that the statements were not hearsay, as they were offered only to show the officer's knowledge and the propriety of the investigation. But the court found the admission to be error. It noted that informants' statements are admissible to explain an investigation "only when the propriety of the investigation is at issue in the trial." In this case, the defendant did not challenge the validity of the search warrant and the propriety of the investigation was not disputed. The court stated that if the real purpose of admitting the evidence was to explain the officer's knowledge and the nature of the investigation, "a question asking whether someone had told him that he had seen Holmes at the residence would have addressed the issue * * * without the need to go into the damning details of what the CI told Officer Singh."

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).

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.
>
> 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.
>
> **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

Admission of purported drug ledgers violated the defendant's confrontation rights where the proof of authenticity was the fact that they were produced by an accomplice at a proffer session: *United States v. Jackson,* 625 F.3d 875 (5th Cir. 2010): In a drug prosecution, purported drug ledgers were offered to prove the defendant's participation in drug transactions. An

officer sought to authenticate the ledgers as business records but the court found that he was not a "qualified witness" under Rule 803(6) because he had no knowledge that the ledgers came from any drug operation associated with the defendant. The court found that the only adequate basis of authentication was the fact that the defendant's accomplice had produced the ledgers at a proffer session with the government. But because the production at the proffer session was unquestionably a testimonial statement — and because the accomplice was not produced to testify — admission of the ledger against the defendant violated his right to confrontation under *Crawford.*

Note: The *Jackson* court does *not* hold that business records are testimonial. Rather it holds that the evidence used to *authenticate* the business record was testimonial. *Jackson* could be cited for authority that proving authenticity through a certificate under Rule 803(6) might be testimonial.

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))." ***Accord, United States v. Ali,*** 616 F.3d 745 (8th Cir. 2010) (business records prepared by financial services company, offered as proof that tax returns were false, were not testimonial, as "*Melendez-Diaz* does not apply to the HSBC records that were kept in the ordinary course of business.").

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. * * *
>
> 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."

Witness's reference to statements made by a victim in a forensic report did not violate the Confrontation Clause because the declarant testified at trial: *United States v. Charbonneau,* 613 F.3d 860 (8th Cir. 2010): Appealing from child-sex-abuse convictions, the defendant argued that it was error for the trial court to allow the case agent to testify that he had conducted a forensic interview with one of the victims and that the victim identified the perpetrator. The court recognized

that the statements by the victim may have been testimonial. But in this case the victim testified at trial. The court declared that "*Crawford* did not alter the principle that the Confrontation Clause is satisfied when the hearsay declarant, here the child victim, actually appear in court and testify in person."

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).

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