Symposium on the Restyled Federal Rules of Evidence

College of William and Mary

Marshall-Wythe School of Law

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Acknowledgment

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SYMPOSIUM PARTICIPANTS

Opening Remarks

Hon. Sidney Fitzwater, Chief Judge, United States District Court of the Northern District of Texas
Chair, Advisory Committee on Evidence Rules

Panel One: Looking Back on the Process of Restyling the Evidence Rules

Hon. Robert L. Hinkle, United States District Judge, Northern District of Florida
Chair of the Evidence Rules Committee for the Restyling Project

Professor R. Joseph Kimble, Thomas Cooley Law School
Style Consultant to the Restyling Project

Hon. Joan N. Ericksen, United States District Judge, District of Minnesota
Member of the Evidence Rules Committee during the Restyling Project

Hon. Marilyn L. Huff, United States District Judge, Southern District of California
Member, Style Subcommittee of the Standing Committee on Rules of Practice and Procedure
Standing Committee Liaison to the Evidence Rules Committee

Hon. Reena A. Raggi, United States Circuit Judge, Court of Appeals for the Second Circuit
Member of the Standing Committee on Rules of Practice and Procedure during the Restyling Project

Hon. Geraldine Soat Brown, United States Magistrate Judge, Northern District of Illinois
Took part in drafting public comment on Restyled Rules on behalf of the Federal Magistrate Judges' Association

Edward H. Cooper, Thomas M. Cooley Professor of Law, University of Michigan Law School
Reporter to the Advisory Committee on Civil Rules

Stephen A Saltzburg, Wallace and Beverley Woodbury University Professor, George Washington University Law School (submitting written statement)
ABA Consultant to the Restyling Project

Moderator: Daniel J. Capra, Reed Professor of Law, Fordham Law School, Reporter to the Evidence Rules Committee

Panel Two: Looking Forward; How Will the Restyled Rules of Evidence Be Used and Applied?

Hon. Andrew D. Hurwitz, Vice Chief Justice, Arizona Supreme Court
Member of the Evidence Rules Committee During the Restyling Project

Hon. Harris L. Hartz, United States Circuit Judge, Court of Appeals for the Tenth Circuit
Member of the Standing Committee on Rules of Practice and Procedure During the Restyling Project

Roger C. Park, James Edgar Hervey Chair of Litigation, University of California Hastings College of the Law

Deborah J. Merritt, John Deaver Drinko-Baker & Hostetler Professor of Law, Ohio State University Michael E. Moritz College of Law

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Paula Hannaford-Agor, Director, Center for Jury Studies, National Center for State Courts

Moderator:

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Consultant to the Evidence Rules Committee and Research Director for the Restyling Project

TAB II.

II. RESTYLED EVIDENCE RULES IN SIDE-BY-SIDE FORMAT

ARTICLE I. GENERAL PROVISIONS[1] Rule 101. Scope	ARTICLE I. GENERAL PROVISIONS Rule 101. Scope; Definitions
These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.	**(a) Scope.** These rules apply to proceedings in United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101. **(b) Definitions.** In these rules: **(1)** "civil case" means a civil action or proceeding; **(2)** "criminal case" includes a criminal proceeding; **(3)** "public office" includes a public agency; **(4)** "record" includes a memorandum, report, or data compilation; **(5)** a "rule prescribed by the Supreme Court" means a rule adopted by the Supreme Court under statutory authority; and **(6)** a reference to any kind of written material or any other medium includes electronically stored information.

Committee Note

The language of Rule 101 has been amended, and definitions have been added, as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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

The Style Project

The Evidence Rules are the fourth set of national procedural rules to be restyled. The restyled Rules of Appellate Procedure took effect in 1998. The restyled Rules of Criminal Procedure took effect in 2002. The restyled Rules of Civil Procedure took effect in 2007. The restyled Rules of Evidence apply the same general drafting guidelines and principles used in restyling the Appellate, Criminal, and Civil Rules.

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

[2] The Federal Appellate, Criminal and Civil Rules have already been restyled. There is no plan to restyle the

1. General Guidelines

Guidance in drafting, usage, and style was provided by Bryan Garner, *Guidelines for Drafting and Editing Court Rules,* Administrative Office of the United States Courts (1969) and Bryan Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995). *See also* Joseph Kimble, *Guiding Principles for Restyling the Civil Rules,* in *Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure,* at page x (Feb. 2005) (available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Prelim_draft_proposed_pt1.pdf); Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 Scribes J. Legal Writing 25 (2008-2009). For specific commentary on the Evidence restyling project, see Joseph Kimble, *Drafting Examples from the Proposed New Federal Rules of Evidence*, 88 Mich. B.J. 52 (Aug. 2009); 88 Mich. B.J. 46 (Sept. 2009); 88 Mich. B.J. 54 (Oct. 2009); 88 Mich. B.J. 50 (Nov. 2009).

2. Formatting Changes

Many of the changes in the restyled Evidence Rules result from using format to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are used throughout. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words are not changed. Rules 103, 404(b), 606(b), and 612 illustrate the benefits of formatting changes.

3. Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. For example, consistent expression is achieved by not switching between "accused" and "defendant" or between "party opponent" and "opposing party" or between the various formulations of civil and criminal action/case/proceeding.

The restyled rules minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or something else, depending on context. The potential for confusion is exacerbated by the fact the word "shall" is no longer generally used in spoken or clearly written English. The restyled rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule.

The restyled rules minimize the use of redundant "intensifiers." These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. The absence of intensifiers in the restyled rules does not change their substantive meaning. *See, e.g.,* Rule 104(c) (omitting "in all cases"); Rule 602 (omitting "but need not"); Rule 611(b) (omitting "in the exercise of discretion").

The restyled rules also remove words and concepts that are outdated or redundant.

4. Rule Numbers

The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity.

5. No Substantive Change

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

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

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

c. The change would restructure a rule in a way that would alter the approach that courts and litigants have used to think about, and argue about, questions of admissibility (e.g., merging Rules 104(a) and 104(b) into a single subdivision); or

d. The amendment would change a "sacred phrase" — one that has become so familiar in practice that to alter it would be unduly disruptive to practice and expectations. Examples in the Evidence Rules include "unfair prejudice" and "truth of the matter asserted."

Rule 102. Purpose and Construction	Rule 102. Purpose
These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.	These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

Committee Note

The language of Rule 102 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 103. Rulings on Evidence	Rule 103. Rulings on Evidence
(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and **(1) Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or **(2) Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.	**(a) Preserving a Claim of Error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and: **(1)** if the ruling admits evidence, a party, on the record: **(A)** timely objects or moves to strike; and **(B)** states the specific ground, unless it was apparent from the context; or **(2)** if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context. **(b) Not Needing to Renew an Objection or Offer of Proof.** Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.
(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.	**(c) Court's Statement About the Ruling; Directing an Offer of Proof.** The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.
(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.	**(d) Preventing the Jury from Hearing Inadmissible Evidence.** To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.
(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.	**(e) Taking Notice of Plain Error.** A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

Committee Note

The language of Rule 103 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 104. Preliminary Questions	**Rule 104. Preliminary Questions**
(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.	**(a) In General.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.
(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.	**(b) Relevance That Depends on a Fact.** When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.
(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.	**(c) Conducting a Hearing So That the Jury Cannot Hear It.** The court must conduct any hearing on a preliminary question so that the jury cannot hear it if: **(1)** the hearing involves the admissibility of a confession; **(2)** a defendant in a criminal case is a witness and so requests; or **(3)** justice so requires.
(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.	**(d) Cross-Examining a Defendant in a Criminal Case.** By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.	**(e) Evidence Relevant to Weight and Credibility.** This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

Committee Note

The language of Rule 104 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 105. Limited Admissibility	Rule 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes
When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.	If the court admits evidence that is admissible against a party or for a purpose — but not against another party or for another purpose — the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

Committee Note

The language of Rule 105 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 106. Remainder of or Related Writings or Recorded Statements	Rule 106. Remainder of or Related Writings or Recorded Statements
When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.	If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.

Committee Note

The language of Rule 106 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE II. JUDICIAL NOTICE Rule 201. Judicial Notice of Adjudicative Facts	ARTICLE II. JUDICIAL NOTICE Rule 201. Judicial Notice of Adjudicative Facts
(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.	**(a) Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.	**(b) Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it: **(1)** is generally known within the trial court's territorial jurisdiction; or **(2)** can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
(c) When discretionary. A court may take judicial notice, whether requested or not. **(d) When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.	**(c) Taking Notice.** The court: **(1)** may take judicial notice on its own; or **(2)** must take judicial notice if a party requests it and the court is supplied with the necessary information.
(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.	**(d) Timing.** The court may take judicial notice at any stage of the proceeding.
(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.	**(e) Opportunity to Be Heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.	**(f) Instructing the Jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

Rule 201

Committee Note

The language of Rule 201 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS Rule 301. Presumptions in General in Civil Actions and Proceedings	ARTICLE III. PRESUMPTIONS IN CIVIL CASES Rule 301. Presumptions in Civil Cases Generally
In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.	In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

Committee Note

The language of Rule 301 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 302. Applicability of State Law in Civil Actions and Proceedings	Rule 302. Applying State Law to Presumptions in Civil Cases
In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.	In a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision.

Committee Note

The language of Rule 302 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE IV. RELEVANCY AND ITS LIMITS **Rule 401. Definition of ''Relevant Evidence''**	ARTICLE IV. RELEVANCE AND ITS LIMITS **Rule 401. Test for Relevant Evidence**
''Relevant evidence'' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.	Evidence is relevant if: **(a)** it has any tendency to make a fact more or less probable than it would be without the evidence; and **(b)** the fact is of consequence in determining the action.

Committee Note

The language of Rule 401 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible	Rule 402. General Admissibility of Relevant Evidence
All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.	Relevant evidence is admissible unless any of the following provides otherwise: • the United States Constitution; • a federal statute; • these rules; or • other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible.

Committee Note

The language of Rule 402 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time	Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons
Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.	The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Committee Note

The language of Rule 403 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes	Rule 404. Character Evidence; Crimes or Other Acts
(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: **(1) Character of accused.** In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution; **(2) Character of alleged victim.** In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor; **(3) Character of witness.** Evidence of the character of a witness, as provided in Rules 607, 608, and 609.	**(a) Character Evidence.** **(1)** ***Prohibited Uses.*** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait. **(2)** ***Exceptions for a Defendant or Victim in a Criminal Case.*** The following exceptions apply in a criminal case: **(A)** a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it; **(B)** subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may: **(i)** offer evidence to rebut it; and **(ii)** offer evidence of the defendant's same trait; and **(C)** in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor. **(3)** ***Exceptions for a Witness.*** Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.	**(b) Crimes, Wrongs, or Other Acts.** **(1)** ***Prohibited Uses.*** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. **(2)** ***Permitted Uses; Notice in a Criminal Case.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must: **(A)** provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and **(B)** do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

Committee Note

The language of Rule 404 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 405. Methods of Proving Character	Rule 405. Methods of Proving Character
(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.	**(a) By Reputation or Opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.
(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.	**(b) By Specific Instances of Conduct.** When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

Committee Note

The language of Rule 405 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 406. Habit; Routine Practice	Rule 406. Habit; Routine Practice
Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.	Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

Committee Note

The language of Rule 406 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 407. Subsequent Remedial Measures	Rule 407. Subsequent Remedial Measures
When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.	When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove: • negligence; • culpable conduct; • a defect in a product or its design; or • a need for a warning or instruction. But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

Committee Note

The language of Rule 407 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 407 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

Rule 408. Compromise and Offers to Compromise	Rule 408. Compromise Offers and Negotiations
(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: **(1)** furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and **(2)** conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.	**(a) Prohibited Uses.** Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: **(1)** furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and **(2)** conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
(b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.	**(b) Exceptions.** The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Committee Note

The language of Rule 408 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 408 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

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

Rule 409. Payment of Medical and Similar Expenses	Rule 409. Offers to Pay Medical and Similar Expenses
Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.	Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

Committee Note

The language of Rule 409 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements	Rule 410. Pleas, Plea Discussions, and Related Statements
Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: **(1)** a plea of guilty which was later withdrawn; **(2)** a plea of nolo contendere; **(3)** any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or **(4)** any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.	**(a) Prohibited Uses.** In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions: **(1)** a guilty plea that was later withdrawn; **(2)** a nolo contendere plea; **(3)** a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or **(4)** a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea. **(b) Exceptions.** The court may admit a statement described in Rule 410(a)(3) or (4): **(1)** in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or **(2)** in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

Committee Note

The language of Rule 410 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 411. Liability Insurance	Rule 411. Liability Insurance
Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.	Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

Committee Note

The language of Rule 411 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 411 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition	Rule 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition
(a) Evidence Generally Inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c): **(1)** Evidence offered to prove that any alleged victim engaged in other sexual behavior. **(2)** Evidence offered to prove any alleged victim's sexual predisposition.	**(a) Prohibited Uses.** The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct: **(1)** evidence offered to prove that a victim engaged in other sexual behavior; or **(2)** evidence offered to prove a victim's sexual predisposition.
(b) Exceptions. **(1)** In a criminal case, the following evidence is admissible, if otherwise admissible under these rules: **(A)** evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence; **(B)** evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and **(C)** evidence the exclusion of which would violate the constitutional rights of the defendant. **(2)** In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.	**(b) Exceptions.** **(1)** ***Criminal Cases.*** The court may admit the following evidence in a criminal case: **(A)** evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence; **(B)** evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and **(C)** evidence whose exclusion would violate the defendant's constitutional rights. **(2)** ***Civil Cases.*** In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(c) Procedure To Determine Admissibility. **(1)** A party intending to offer evidence under subdivision (b) must— **(A)** file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and **(B)** serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative. **(2)** Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.	**(c) Procedure to Determine Admissibility.** **(1)** ***Motion.*** If a party intends to offer evidence under Rule 412(b), the party must: **(A)** file a motion that specifically describes the evidence and states the purpose for which it is to be offered; **(B)** do so at least 14 days before trial unless the court, for good cause, sets a different time; **(C)** serve the motion on all parties; and **(D)** notify the victim or, when appropriate, the victim's guardian or representative. **(2)** ***Hearing.*** Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.
	(d) Definition of "Victim." In this rule, "victim" includes an alleged victim.

Committee Note

The language of Rule 412 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases	Rule 413. Similar Crimes in Sexual-Assault Cases
(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.	**(a) Permitted Uses.** In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.
(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.	**(b) Disclosure to the Defendant.** If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.	**(c) Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.
(d) For purposes of this rule and Rule 415, ''offense of sexual assault'' means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved— **(1)** any conduct proscribed by chapter 109A of title 18, United States Code; **(2)** contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person; **(3)** contact, without consent, between the genitals or anus of the defendant and any part of another person's body; **(4)** deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or **(5)** an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).	**(d) Definition of "Sexual Assault."** In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving: **(1)** any conduct prohibited by 18 U.S.C. chapter 109A; **(2)** contact, without consent, between any part of the defendant's body — or an object — and another person's genitals or anus; **(3)** contact, without consent, between the defendant's genitals or anus and any part of another person's body; **(4)** deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or **(5)** an attempt or conspiracy to engage in conduct described in subparagraphs (1)–(4).

Committee Note

The language of Rule 413 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 414. Evidence of Similar Crimes in Child Molestation Cases	Rule 414. Similar Crimes in Child-Molestation Cases
(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.	**(a) Permitted Uses.** In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.
(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.	**(b) Disclosure to the Defendant.** If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.	**(c) Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.

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

Committee Note

The language of Rule 414 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation	Rule 415. Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation
(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.	**(a) Permitted Uses.** In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation. The evidence may be considered as provided in Rules 413 and 414.
(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.	**(b) Disclosure to the Opponent.** If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.	**(c) Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.

Committee Note

The language of Rule 415 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE V. PRIVILEGES Rule 501. General Rule	ARTICLE V. PRIVILEGES Rule 501. Privilege in General
Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.	The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise: • the United States Constitution; • a federal statute; or • rules prescribed by the Supreme Court. But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Committee Note

The language of Rule 501 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver	Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver
The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.	The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.
(a) Disclosure made in a Federal proceeding or to a Federal office or agency; scope of a waiver. When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if: **(1)** the waiver is intentional; **(2)** the disclosed and undisclosed communications or information concern the same subject matter; and **(3)** they ought in fairness to be considered together.	**(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver.** When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if: **(1)** the waiver is intentional; **(2)** the disclosed and undisclosed communications or information concern the same subject matter; and **(3)** they ought in fairness to be considered together.
(b) Inadvertent disclosure. When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if: **(1)** the disclosure is inadvertent; **(2)** the holder of the privilege or protection took reasonable steps to prevent disclosure; and **(3)** the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).	**(b) Inadvertent Disclosure.** When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if: **(1)** the disclosure is inadvertent; **(2)** the holder of the privilege or protection took reasonable steps to prevent disclosure; and **(3)** the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) Disclosure made in a State proceeding. When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure: **(1)** would not be a waiver under this rule if it had been made in a Federal proceeding; or **(2)** is not a waiver under the law of the State where the disclosure occurred.	**(c) Disclosure Made in a State Proceeding.** When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure: **(1)** would not be a waiver under this rule if it had been made in a federal proceeding; or **(2)** is not a waiver under the law of the state where the disclosure occurred.
(d) Controlling effect of a court order. A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.	**(d) Controlling Effect of a Court Order.** A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding.
(e) Controlling effect of a party agreement. An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.	**(e) Controlling Effect of a Party Agreement.** An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.
(f) Controlling effect of this rule. Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.	**(f) Controlling Effect of this Rule.** Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.
(g) Definitions. In this rule: **(1)** ''attorney-client privilege'' means the protection that applicable law provides for confidential attorney-client communications; and **(2)** ''work-product protection'' means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.	**(g) Definitions.** In this rule: **(1)** "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and **(2)** "work-product protection" means the protection that applicable law provides for tangible material (or its intangible

	equivalent) prepared in anticipation of litigation or for trial.

Rule 502

Committee Note

Rule 502 has been amended by changing the initial letter of a few words from uppercase to lowercase as part of the restyling of the Evidence Rules to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE VI. WITNESSES Rule 601. General Rule of Competency	ARTICLE VI. WITNESSES Rule 601. Competency to Testify in General
Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.	Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision.

Committee Note

The language of Rule 601 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 602. Lack of Personal Knowledge	Rule 602. Need for Personal Knowledge
A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.	A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

Committee Note

The language of Rule 602 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 603. Oath or Affirmation	Rule 603. Oath or Affirmation to Testify Truthfully
Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.	Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

Committee Note

The language of Rule 603 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 604. Interpreters	Rule 604. Interpreter
An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.	An interpreter must be qualified and must give an oath or affirmation to make a true translation.

Committee Note

The language of Rule 604 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 605. Competency of Judge as Witness	Rule 605. Judge's Competency as a Witness
The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.	The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

Committee Note

The language of Rule 605 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 606. Competency of Juror as Witness	Rule 606. Juror's Competency as a Witness
(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.	**(a) At the Trial.** A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.
(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.	**(b) During an Inquiry into the Validity of a Verdict or Indictment.** **(1)** ***Prohibited Testimony or Other Evidence.*** During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters. **(2)** ***Exceptions.*** A juror may testify about whether: **(A)** extraneous prejudicial information was improperly brought to the jury's attention; **(B)** an outside influence was improperly brought to bear on any juror; or **(C)** a mistake was made in entering the verdict on the verdict form.

Committee Note

The language of Rule 606 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 607. Who May Impeach	Rule 607. Who May Impeach a Witness
The credibility of a witness may be attacked by any party, including the party calling the witness.	Any party, including the party that called the witness, may attack the witness's credibility.

Committee Note

The language of Rule 607 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 608. Evidence of Character and Conduct of Witness	Rule 608. A Witness's Character for Truthfulness or Untruthfulness
(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.	**(a) Reputation or Opinion Evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.
(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.	**(b) Specific Instances of Conduct.** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: **(1)** the witness; or **(2)** another witness whose character the witness being cross-examined has testified about. By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

Committee Note

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

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

Rule 609. Impeachment by Evidence of Conviction of Crime	Rule 609. Impeachment by Evidence of a Criminal Conviction
(a) General rule. For the purpose of attacking the character for truthfulness of a witness, **(1)** evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and **(2)** evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.	**(a) In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction: **(1)** for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence: **(A)** must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and **(B)** must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and **(2)** for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.
(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.	**(b) Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if: **(1)** its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and **(2)** the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.	**(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation.** Evidence of a conviction is not admissible if: **(1)** the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or **(2)** the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.
(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.	**(d) Juvenile Adjudications**. Evidence of a juvenile adjudication is admissible under this rule only if: **(1)** it is offered in a criminal case; **(2)** the adjudication was of a witness other than the defendant; **(3)** an adult's conviction for that offense would be admissible to attack the adult's credibility; and **(4)** admitting the evidence is necessary to fairly determine guilt or innocence.
(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.	**(e) Pendency of an Appeal.** A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

Committee Note

The language of Rule 609 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 610. Religious Beliefs or Opinions	Rule 610. Religious Beliefs or Opinions
Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.	Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

Committee Note

The language of Rule 610 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 611. Mode and Order of Interrogation and Presentation	Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence
(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.	**(a) Control by the Court; Purposes.** The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: **(1)** make those procedures effective for determining the truth; **(2)** avoid wasting time; and **(3)** protect witnesses from harassment or undue embarrassment.
(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.	**(b) Scope of Cross-Examination.** Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.
(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.	**(c) Leading Questions.** Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions: **(1)** on cross-examination; and **(2)** when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Committee Note

The language of Rule 611 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 612. Writing Used To Refresh Memory	Rule 612. Writing Used to Refresh a Witness's Memory
Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either— **(1)** while testifying, or **(2)** before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.	**(a) Scope.** This rule gives an adverse party certain options when a witness uses a writing to refresh memory: **(1)** while testifying; or **(2)** before testifying, if the court decides that justice requires the party to have those options. **(b) Adverse Party's Options; Deleting Unrelated Matter.** Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record. **(c) Failure to Produce or Deliver the Writing.** If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial.

Committee Note

The language of Rule 612 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 613. Prior Statements of Witnesses	Rule 613. Witness's Prior Statement
(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.	**(a) Showing or Disclosing the Statement During Examination.** When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.
(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).	**(b) Extrinsic Evidence of a Prior Inconsistent Statement.** Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Committee Note

The language of Rule 613 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 614. Calling and Interrogation of Witnesses by Court	Rule 614. Court's Calling or Examining a Witness
(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.	**(a) Calling.** The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.
(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.	**(b) Examining.** The court may examine a witness regardless of who calls the witness.
(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.	**(c) Objections.** A party may object to the court's calling or examining a witness either at that time or at the next opportunity when the jury is not present.

Committee Note

The language of Rule 614 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 615. Exclusion of Witnesses	Rule 615. Excluding Witnesses
At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.	At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding: **(a)** a party who is a natural person; **(b)** an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; **(c)** a person whose presence a party shows to be essential to presenting the party's claim or defense; or **(d)** a person authorized by statute to be present.

Committee Note

The language of Rule 615 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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

Committee Note

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

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Rule 702. Testimony by Experts	Rule 702. Testimony by Expert Witnesses
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.	A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; **(b)** the testimony is based on sufficient facts or data; **(c)** the testimony is the product of reliable principles and methods; and **(d)** the expert has reliably applied the principles and methods to the facts of the case.

Committee Note

The language of Rule 702 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 703. Bases of Opinion Testimony by Experts	Rule 703. Bases of an Expert's Opinion Testimony
The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Committee Note

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

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Rule 704. Opinion on Ultimate Issue	Rule 704. Opinion on an Ultimate Issue
(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.	**(a) In General — Not Automatically Objectionable.** An opinion is not objectionable just because it embraces an ultimate issue.
(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.	**(b) Exception.** In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

Committee Note

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

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion	Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion
The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.	Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

Committee Note

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

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Rule 706. Court Appointed Experts	Rule 706. Court-Appointed Expert Witnesses
(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.	**(a) Appointment Process.** On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act. **(b) Expert's Role.** The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert: **(1)** must advise the parties of any findings the expert makes; **(2)** may be deposed by any party; **(3)** may be called to testify by the court or any party; and **(4)** may be cross-examined by any party, including the party that called the expert.
(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.	**(c) Compensation.** The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows: **(1)** in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and **(2)** in any other civil case, by the parties in the proportion and at the time that the court directs — and the compensation is then charged like other costs.
(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.	**(d) Disclosing the Appointment to the Jury.** The court may authorize disclosure to the jury that the court appointed the expert.

(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.	**(e) Parties' Choice of Their Own Experts.** This rule does not limit a party in calling its own experts.

Committee Note

The language of Rule 706 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE VIII. HEARSAY Rule 801. Definitions	ARTICLE VIII. HEARSAY Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay
The following definitions apply under this article: **(a) Statement.** A ''statement'' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.	**(a) Statement.** "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.
(b) Declarant. A ''declarant'' is a person who makes a statement.	**(b) Declarant.** "Declarant" means the person who made the statement.
(c) Hearsay. ''Hearsay'' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.	**(c) Hearsay.** "Hearsay" means a statement that: **(1)** the declarant does not make while testifying at the current trial or hearing; and **(2)** a party offers in evidence to prove the truth of the matter asserted in the statement.
(d) Statements which are not hearsay. A statement is not hearsay if— **(1) Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or	**(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay: **(1)** ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement: **(A)** is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; **(B)** is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or **(C)** identifies a person as someone the declarant perceived earlier.

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).	**(2)** ***An Opposing Party's Statement.*** The statement is offered against an opposing party and: **(A)** was made by the party in an individual or representative capacity; **(B)** is one the party manifested that it adopted or believed to be true; **(C)** was made by a person whom the party authorized to make a statement on the subject; **(D)** was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or **(E)** was made by the party's coconspirator during and in furtherance of the conspiracy. The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Committee Note

The language of Rule 801 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Statements falling under the hearsay exclusion provided by Rule 801(d)(2) are no longer referred to as "admissions" in the title to the subdivision. The term "admissions" is confusing because not all statements covered by the exclusion are admissions in the colloquial sense — a statement can be within the exclusion even if it "admitted" nothing and was not against the party's interest when made. The term "admissions" also raises confusion in comparison with the Rule 804(b)(3) exception for declarations against interest. No change in application of the exclusion is intended.

Rule 802. Hearsay Rule	Rule 802. The Rule Against Hearsay
Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.	Hearsay is not admissible unless any of the following provides otherwise: • a federal statute; • these rules; or • other rules prescribed by the Supreme Court.

Committee Note

The language of Rule 802 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial	Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness
The following are not excluded by the hearsay rule, even though the declarant is available as a witness:	The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.	**(1)** ***Present Sense Impression.*** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.	**(2)** ***Excited Utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.
(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.	**(3)** ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.
(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.	**(4)** ***Statement Made for Medical Diagnosis or Treatment.*** A statement that: **(A)** is made for — and is reasonably pertinent to — medical diagnosis or treatment; and **(B)** describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.	**(5)** ***Recorded Recollection.*** A record that: **(A)** is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; **(B)** was made or adopted by the witness when the matter was fresh in the witness's memory; and **(C)** accurately reflects the witness's knowledge. If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.
(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term ''business'' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.	**(6)** ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if: **(A)** the record was made at or near the time by — or from information transmitted by — someone with knowledge; **(B)** the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; **(C)** making the record was a regular practice of that activity; **(D)** all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and **(E)** neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.	**(7)** ***Absence of a Record of a Regularly Conducted Activity.*** Evidence that a matter is not included in a record described in paragraph (6) if: **(A)** the evidence is admitted to prove that the matter did not occur or exist; **(B)** a record was regularly kept for a matter of that kind; and **(C)** neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.
(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.	**(8)** ***Public Records.*** A record or statement of a public office if: **(A)** it sets out: **(i)** the office's activities; **(ii)** a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or **(iii)** in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and **(B)** neither the source of information nor other circumstances indicate a lack of trustworthiness.
(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.	**(9)** ***Public Records of Vital Statistics.*** A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.	**(10)** ***Absence of a Public Record.*** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that: **(A)** the record or statement does not exist; or **(B)** a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.
(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.	**(11)** ***Records of Religious Organizations Concerning Personal or Family History.*** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.
(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.	**(12)** ***Certificates of Marriage, Baptism, and Similar Ceremonies.*** A statement of fact contained in a certificate: **(A)** made by a person who is authorized by a religious organization or by law to perform the act certified; **(B)** attesting that the person performed a marriage or similar ceremony or administered a sacrament; and **(C)** purporting to have been issued at the time of the act or within a reasonable time after it.
(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.	**(13)** ***Family Records.*** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.	**(14)** ***Records of Documents That Affect an Interest in Property.*** The record of a document that purports to establish or affect an interest in property if: **(A)** the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it; **(B)** the record is kept in a public office; and **(C)** a statute authorizes recording documents of that kind in that office.
(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.	**(15)** ***Statements in Documents That Affect an Interest in Property.*** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose — unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.
(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.	**(16)** ***Statements in Ancient Documents.*** A statement in a document that is at least 20 years old and whose authenticity is established.
(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.	**(17)** ***Market Reports and Similar Commercial Publications.*** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.	**(18)** ***Statements in Learned Treatises, Periodicals, or Pamphlets.*** A statement contained in a treatise, periodical, or pamphlet if: **(A)** the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and **(B)** the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice. If admitted, the statement may be read into evidence but not received as an exhibit.
(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.	**(19)** ***Reputation Concerning Personal or Family History.*** A reputation among a person's family by blood, adoption, or marriage — or among a person's associates or in the community — concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.
(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.	**(20)** ***Reputation Concerning Boundaries or General History.*** A reputation in a community — arising before the controversy — concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.
(21) Reputation as to character. Reputation of a person's character among associates or in the community.	**(21)** ***Reputation Concerning Character.*** A reputation among a person's associates or in the community concerning the person's character.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.	**(22)** ***Judgment of a Previous Conviction.*** Evidence of a final judgment of conviction if: **(A)** the judgment was entered after a trial or guilty plea, but not a nolo contendere plea; **(B)** the conviction was for a crime punishable by death or by imprisonment for more than a year; **(C)** the evidence is admitted to prove any fact essential to the judgment; and **(D)** when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant. The pendency of an appeal may be shown but does not affect admissibility.
(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.	**(23)** ***Judgments Involving Personal, Family, or General History, or a Boundary.*** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter: **(A)** was essential to the judgment; and **(B)** could be proved by evidence of reputation.
(24) [Other exceptions.] [Transferred to Rule 807]	**(24)** **[*Other Exceptions*.]** [Transferred to Rule 807.]

Committee Note

The language of Rule 803 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 804. Hearsay Exceptions; Declarant Unavailable	Rule 804. Exceptions to the Rule Against Hearsay — When the Declarant Is Unavailable as a Witness
(a) Definition of unavailability. ''Unavailability as a witness'' includes situations in which the declarant— **(1)** is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or **(2)** persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or **(3)** testifies to a lack of memory of the subject matter of the declarant's statement; or **(4)** is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or **(5)** is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means. A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.	**(a) Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant: **(1)** is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies; **(2)** refuses to testify about the subject matter despite a court order to do so; **(3)** testifies to not remembering the subject matter; **(4)** cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or **(5)** is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure: **(A)** the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or **(B)** the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4). But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: **(1) Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.	**(b) The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness: **(1)** ***Former Testimony.*** Testimony that: **(A)** was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and **(B)** is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.
(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.	**(2)** ***Statement Under the Belief of Imminent Death.*** In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.
(3) Statement against interest. A statement that: **(A)** a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and **(B)** is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.	**(3)** ***Statement Against Interest.*** A statement that: **(A)** a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and **(B)** is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.	**(4)** ***Statement of Personal or Family History.*** A statement about: **(A)** the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or **(B)** another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.
(5) [Other exceptions.] [Transferred to Rule 807]	**(5)** **[*Other Exceptions.*]** [Transferred to Rule 807.]
(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.	**(6)** ***Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.*** A statement offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the declarant's unavailability as a witness, and did so intending that result.

Committee Note

The language of Rule 804 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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

Rule 805. Hearsay Within Hearsay	Rule 805. Hearsay Within Hearsay
Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.	Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

Committee Note

The language of Rule 805 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 806. Attacking and Supporting Credibility of Declarant	Rule 806. Attacking and Supporting the Declarant's Credibility
When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.	When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Committee Note

The language of Rule 806 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 807. Residual Exception	Rule 807. Residual Exception
A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.	**(a)** **In General.** Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804: **(1)** the statement has equivalent circumstantial guarantees of trustworthiness; **(2)** it is offered as evidence of a material fact; **(3)** it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and **(4)** admitting it will best serve the purposes of these rules and the interests of justice. **(b)** **Notice.** The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Committee Note

The language of Rule 807 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION Rule 901. Requirement of Authentication or Identification	ARTICLE IX. AUTHENTICATION AND IDENTIFICATION Rule 901. Authenticating or Identifying Evidence
(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.	**(a) In General.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:	**(b) Examples.** The following are examples only — not a complete list — of evidence that satisfies the requirement:
(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.	**(1)** ***Testimony of a Witness with Knowledge.*** Testimony that an item is what it is claimed to be.
(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.	**(2)** ***Nonexpert Opinion About Handwriting.*** A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.
(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.	**(3)** ***Comparison by an Expert Witness or the Trier of Fact.*** A comparison with an authenticated specimen by an expert witness or the trier of fact.
(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.	**(4)** ***Distinctive Characteristics and the Like.*** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.
(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.	**(5)** ***Opinion About a Voice.*** An opinion identifying a person's voice — whether heard firsthand or through mechanical or electronic transmission or recording — based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.	**(6)** ***Evidence About a Telephone Conversation.*** For a telephone conversation, evidence that a call was made to the number assigned at the time to: **(A)** a particular person, if circumstances, including self-identification, show that the person answering was the one called; or **(B)** a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.
(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.	**(7)** ***Evidence About Public Records.*** Evidence that: **(A)** a document was recorded or filed in a public office as authorized by law; or **(B)** a purported public record or statement is from the office where items of this kind are kept.
(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.	**(8)** ***Evidence About Ancient Documents or Data Compilations.*** For a document or data compilation, evidence that it: **(A)** is in a condition that creates no suspicion about its authenticity; **(B)** was in a place where, if authentic, it would likely be; and **(C)** is at least 20 years old when offered.
(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.	**(9)** ***Evidence About a Process or System.*** Evidence describing a process or system and showing that it produces an accurate result.
(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.	**(10)** ***Methods Provided by a Statute or Rule.*** Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.

Committee Note

The language of Rule 901 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 902. Self-authentication	Rule 902. Evidence That Is Self-Authenticating
Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: **(1) Domestic public documents under seal.** A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.	The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted: **(1)** ***Domestic Public Documents That Are Sealed and Signed.*** A document that bears: **(A)** a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and **(B)** a signature purporting to be an execution or attestation.
(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.	**(2)** ***Domestic Public Documents That Are Not Sealed but Are Signed and Certified.*** A document that bears no seal if: **(A)** it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and **(B)** another public officer who has a seal and official duties within that same entity certifies under seal — or its equivalent — that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.	**(3)** ***Foreign Public Documents.*** A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester — or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either: **(A)** order that it be treated as presumptively authentic without final certification; or **(B)** allow it to be evidenced by an attested summary with or without final certification.
(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.	**(4)** ***Certified Copies of Public Records.*** A copy of an official record — or a copy of a document that was recorded or filed in a public office as authorized by law — if the copy is certified as correct by: **(A)** the custodian or another person authorized to make the certification; or **(B)** a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.
(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.	**(5)** ***Official Publications.*** A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.	**(6)** ***Newspapers and Periodicals.*** Printed material purporting to be a newspaper or periodical.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.	**(7)** ***Trade Inscriptions and the Like.*** An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.
(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.	**(8)** ***Acknowledged Documents.*** A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.
(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.	**(9)** ***Commercial Paper and Related Documents.*** Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.
(10) Presumptions under Acts of Congress. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.	**(10)** ***Presumptions Under a Federal Statute.*** A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.

(11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record— **(A)** was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; **(B)** was kept in the course of the regularly conducted activity; and **(C)** was made by the regularly conducted activity as a regular practice. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.	**(11)** ***Certified Domestic Records of a Regularly Conducted Activity.*** The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.

(12) Certified foreign records of regularly conducted activity. In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record— **(A)** was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; **(B)** was kept in the course of the regularly conducted activity; and **(C)** was made by the regularly conducted activity as a regular practice. The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.	**(12)** ***Certified Foreign Records of a Regularly Conducted Activity.*** In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

Committee Note

The language of Rule 902 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 903. Subscribing Witness' Testimony Unnecessary	Rule 903. Subscribing Witness's Testimony
The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.	A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

Committee Note

The language of Rule 903 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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

Committee Note

The language of Rule 1001 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1002. Requirement of Original	Rule 1002. Requirement of the Original
To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.	An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.

Committee Note

The language of Rule 1002 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1003. Admissibility of Duplicates	Rule 1003. Admissibility of Duplicates
A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.	A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

Committee Note

The language of Rule 1003 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1004. Admissibility of Other Evidence of Contents	Rule 1004. Admissibility of Other Evidence of Content
The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if— **(1) Originals lost or destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or **(2) Original not obtainable.** No original can be obtained by any available judicial process or procedure; or **(3) Original in possession of opponent.** At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or **(4) Collateral matters.** The writing, recording, or photograph is not closely related to a controlling issue.	An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if: **(a)** all the originals are lost or destroyed, and not by the proponent acting in bad faith; **(b)** an original cannot be obtained by any available judicial process; **(c)** the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or **(d)** the writing, recording, or photograph is not closely related to a controlling issue.

Committee Note

The language of Rule 1004 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1005. Public Records	Rule 1005. Copies of Public Records to Prove Content
The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.	The proponent may use a copy to prove the content of an official record — or of a document that was recorded or filed in a public office as authorized by law — if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

Committee Note

The language of Rule 1005 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1006. Summaries	Rule 1006. Summaries to Prove Content
The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.	The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

Committee Note

The language of Rule 1006 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1007. Testimony or Written Admission of Party	Rule 1007. Testimony or Statement of a Party to Prove Content
Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.	The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

Committee Note

The language of Rule 1007 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1008. Functions of Court and Jury	Rule 1008. Functions of the Court and Jury
When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.	Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines — in accordance with Rule 104(b) — any issue about whether: **(a)** an asserted writing, recording, or photograph ever existed; **(b)** another one produced at the trial or hearing is the original; or **(c)** other evidence of content accurately reflects the content.

Committee Note

The language of Rule 1008 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE XI. MISCELLANEOUS RULES Rule 1101. Applicability of Rules	ARTICLE XI. MISCELLANEOUS RULES Rule 1101. Applicability of the Rules
(a) Courts and judges. These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, and to United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms ''judge'' and ''court'' in these rules include United States bankruptcy judges and United States magistrate judges.	**(a) To Courts and Judges.** These rules apply to proceedings before: • United States district courts; • United States bankruptcy and magistrate judges; • United States courts of appeals; • the United States Court of Federal Claims; and • the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands.
(b) Proceedings generally. These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.	**(b) To Cases and Proceedings.** These rules apply in: • civil cases and proceedings, including bankruptcy, admiralty, and maritime cases; • criminal cases and proceedings; and • contempt proceedings, except those in which the court may act summarily.
(c) Rule of privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.	**(c) Rules on Privilege.** The rules on privilege apply to all stages of a case or proceeding.

(d) Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations: **(1) Preliminary questions of fact.** The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104. **(2) Grand jury.** Proceedings before grand juries. **(3) Miscellaneous proceedings.** Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.	**(d) Exceptions.** These rules — except for those on privilege — do not apply to the following: **(1)** the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility; **(2)** grand-jury proceedings; and **(3)** miscellaneous proceedings such as: • extradition or rendition; • issuing an arrest warrant, criminal summons, or search warrant; • a preliminary examination in a criminal case; • sentencing; • granting or revoking probation or supervised release; and • considering whether to release on bail or otherwise.

(e) Rules applicable in part. In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of misdemeanors and other petty offenses before United States magistrate judges; review of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act entitled ''An Act to authorize association of producers of agricultural products'' approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f, 499g(c)); naturalization and revocation of naturalization under sections 310–318 of the Immigration and Nationality Act (8 U.S.C. 1421–1429); prize proceedings in admiralty under sections 7651–7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled ''An Act authorizing associations of producers of aquatic products'' approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of the Act entitled ''An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes'', approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581–1624), or under the Anti-Smuggling Act (19 U.S.C. 1701–1711); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301–392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256–258); habeas corpus under sections 2241–2254 of title 28, United States Code; motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act entitled ''An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes'', approved March 3, 1925 (46 U.S.C. 781–790), as implemented by section 7730 of title 10, United States Code.	**(e) Other Statutes and Rules.** A federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules.

Committee Note

The language of Rule 1101 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1102. Amendments	Rule 1102. Amendments
Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code.	These rules may be amended as provided in 28 U.S.C. § 2072.

Committee Note

The language of Rule 1102 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1103. Title	Rule 1103. Title
These rules may be known and cited as the Federal Rules of Evidence.	These rules may be cited as the Federal Rules of Evidence.

Committee Note

The language of Rule 1103 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

TAB III.

III. Recent Articles on the Restyled Rules of Evidence

A. Kathryn Traylor Schaffzin, *Out With the Old: An Argument for Restyling "Sacred Phrases" Retained in the Proposed Amendments to the Federal Rules of Evidence,* 77 Tenn. L.Rev. 849 (2010).

B. Tom Lininger, *Should Oregon Adopt the New Federal Rules of Evidence?,* 89 Ore. L.Rev. 1407 (2011).

C. Daniel Capra, *Commentary on the Restyled Federal Rules of Evidence,* 2011 LexisNexis Emerging Issues 5875.

TAB III-A.

OUT WITH THE OLD: AN ARGUMENT FOR RESTYLING ARCHAIC "SACRED PHRASES" RETAINED IN THE PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Katharine Traylor Schaffzin [FNa1]

Abstract

On August 11, 2009, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States released its Preliminary Draft of Proposed Style Revision of the Federal Rules of Evidence for public comment. The public comment period ended on February 16, 2010. If the Advisory Committee on Evidence Rules fails to revise the draft in light of public comment, it could be enacted as early as December 1, 2011.

This project to amend the Federal Rules of Evidence is the final stage in the Standing Committee's effort to comprehensively restyle all federal rules, including the Rules of Appellate Procedure, the Rules of Criminal Procedure, and the Rules of Civil Procedure. The goal of this restyling project, like that of the preceding projects, is to amend the Federal Rules of Evidence (the "Rules") to make them more easily understood and to achieve consistency in style and terminology. In keeping with those goals while drafting these proposed amendments, the Advisory Committee endeavored to avoid any restyling that would result in a substantive change in the application of any rule.

One type of alteration that the Advisory Committee deemed "substantive" was any amendment to a "sacred phrase." The Committee defined "sacred phrase" to mean any phrase that has "become so familiar in practice that to alter [it] would be unduly disruptive." The Committee sought to avoid any style improvements changing a "sacred phrase."

The proposed amendments to the Rules do indeed retain certain archaic and often unclear language; it is likely that these phrases remain because the Advisory Committee deemed them "sacred." The proposed amendments, however, also leave several other clauses "familiar in practice" on the cutting room floor. The Committee provided no standard by which it measured the "familiarity" of a particular phrase or the level at which a "disruption" became "undue." Even a comparison of those ***850** phrases which the Committee amended to those which it retained leaves one no more able to discern any rationale or pattern explaining why the Committee deemed some phrases "sacred" and others something less than sacred. It seems that the Committee's classification of phrases as "sacred" was arbitrary.

The proposed restyled language of these not-so-sacred phrases is, nonetheless, an improvement over the existing Rules. They are more easily understood, they achieve consistency of terminology, and they more accurately reflect historic interpretations of the Rules. Meanwhile, the archaic, confusing, and inconsistent language of the sacred phrases remains unimproved despite the restyling effort.

Because the proposed amended Rules preserve the archaic, unclear, and inconsistent language of those phrases the Advisory Committee arbitrarily deemed "sacred," it should not retain any phrase as "sacred." Instead, it should retain only those phrases that are easily understood, accurately reflect judicial application of the Rules, are consistent in terminology, and which cannot otherwise be improved.

I. Introduction

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States Courts (the "Standing Committee") holds the opportunity to comprehensively alter the Federal Rules of Evidence (the "Rules") by design for the first time in thirty-five years. [FN1] The potential impact of this endeavor could have far-reaching consequences for the next thirty-five years or even longer. [FN2] In releasing its Preliminary Draft of Proposed Style Revision of the Federal Rules of Evidence ("Proposed Amendments") for public comment on August 11, 2009, the Standing Committee, through the efforts of the Advisory Committee on the Federal Rules of Evidence (the "Advisory Committee"), made clear that it is prepared to take a huge step forward in restyling the Rules. [FN3]

***851** Because the Proposed Amendments may have such long-term and far-reaching consequences, [FN4] it is imperative that the effort be comprehensive, leaving no opportunity for improvement lost. A complete revision of the Rules will enable practitioners and judges to move forward, confident in the amended Rules and confident that they will remain stable and unchanged for years to come. "Stability is a great thing. Relearning the wheel every year is a negative." [FN5]

The stated goal of the Advisory Committee's restyling project, like that of the projects to restyle the Rules of Appellate Procedure, [FN6] the Rules of Criminal Procedure, [FN7] and the Rules of Civil Procedure, [FN8] is to amend the Rules to make them more easily understandable and to achieve consistency in style and terminology. [FN9] In drafting the Proposed Amendments, the Advisory Committee made great strides in advancing these goals. [FN10] Those efforts, however, fall short in one distinct area: sacred phrases. [FN11]

In attempting to streamline and clarify the Rules, the Committee resolved to avoid any restyling that would result in a substantive change in the application of any rule. [FN12] One type of alteration that it deemed "substantive" was any amendment to a "sacred phrase." [FN13] As defined by the Advisory Committee, a "sacred phrase" is any phrase in the Rules that has "become so familiar in practice that to alter [it] would be unduly disruptive." [FN14] Thus, the Advisory Committee avoided any style improvement which would change a sacred phrase. [FN15]

In applying its resolution concerning sacred phrases, however, the Advisory Committee developed no protocol for conducting such an analysis ***852** consistently. [FN16] To classify a phrase as sacred pursuant to its own definition, the Advisory Committee would have had to determine whether a phrase was "familiar in practice," whether an alteration to such a phrase would be "disruptive," and whether such disruption would be "undue." [FN17] Without any standards to make such determinations, the Advisory Committee categorized some phrases as sacred and other similarly situated phrases as less than sacred; there is no apparent pattern to these decisions. [FN18] Thus, in reaching any determination that a phrase is sacred, the Advisory Committee acted arbitrarily.

The result of the Advisory Committee's arbitrary decisions regarding sacred phrases has led to a preliminary draft of Proposed Amendments [FN19] that alters some phrases that arguably have become so familiar in practice that to alter them would unduly disrupt legal practice. [FN20] Meanwhile, the draft retains archaic and confusing language apparently deemed sacred for the same reason. [FN21] One could argue that many altered clauses are sacred phrases and many unaltered clauses are not. The arbitrary decisions of the Advisory Committee have led to inconsistent results in restyling.

This Article, however, does not propose that the Standing Committee reject those Proposed Amendments that would alter an arguably sacred phrase. Instead, this Article suggests that the Advisory Committee revisit those phrases it left untouched as sacred and revise them in the same way it amended the rest of the Rules: to achieve clarity and consistency. [FN22] Many of the phrases retained as sacred are no more familiar in practice than others the Advisory Committee has amended. [FN23] Moreover, altering these phrases will not likely cause any greater disruption than the alterations proposed to phrases deemed less than sacred; the comprehensive restyling of the Rules will inevitably be disruptive whether sacred phrases are retained or not. [FN24] Finally, these sacred phrases can be improved upon while maintaining their historical meaning. Having come so far, the Advisory and Standing Committees should take this restyling project all the way: out with the old and in with the new.

In Part II, this Article explains the history and goals of the restyling effort. Part III identifies arguably sacred phrases in the current Rules and tracks their origins. Part III.A discusses those arguably sacred phrases ***853** which the Advisory Committee nonetheless proposed to amend, while Part III.B identifies those phrases which the Advisory Committee apparently deemed sacred and chose not to revise. In Part IV, the Article suggests that the Advisory Committee's distinction between sacred phrases and not-so-sacred phrases is an arbitrary one. Part V proposes that the Advisory Committee revise those remaining sacred phrases that are unclear, inconsistent, or difficult to understand. Finally, in Part VI, this Article concludes that, to be truly comprehensive, the restyling of the Federal Rules of Evidence should encompass even those phrases traditionally held sacred.

II. The Restyling Effort

From its inception, the idea of establishing a codified set of evidence rules has been a tall order. The Federal Rules of Evidence, enacted on January 3, 1975, were the culmination of more than a half-century of effort to achieve a uniform system. [FN25] The effort met resistance every step along the way from trial attorneys and trial judges alike. [FN26] In developing a uniform system, some attorneys favored detailed rules, minimizing the discretion of a trial judge, while others argued against rules altogether or at least for briefer rules governing the admission of evidence. [FN27] However, "[i]f there is no struggle, there is no progress"; [FN28] at the conclusion of this half-century battle, the Federal Rules of Evidence became law. [FN29]

The process for amending the Rules is only slightly less arduous than that for enacting the Rules. Absent Congressional action to amend the Rules, it is up to the Judicial Conference of the United States (the "Judicial Conference") to do so. [FN30] Through the Rules Enabling Act, the United States Supreme Court holds ultimate rulemaking authority, [FN31] much of which it delegates to the Judicial Conference. [FN32] To address the issue of amending any federal rule, the Standing Committee appointed five advisory committees: the Appellate Rules Committee, the Bankruptcy Rules Committee, the Civil Rules Committee, the Criminal Rules Committee, and the Evidence Rules Committee. [FN33]

To initially determine whether amendment is appropriate, the Advisory Committee considers suggestions from the public, including judges, ***854** attorneys, professors, and government agencies. [FN34] Having so determined, the Advisory Committee's Reporter drafts a Proposed Amendment for the Committee's consideration. [FN35] Once the Advisory Committee makes appropriate revisions to the Reporter's draft, it submits the Proposed Amendment to the Standing Committee, which may approve the amendment for public comment. [FN36] The Advisory Committee must then reconsider the Proposed Amendment in light of public comment and may either further amend the proposed rule or recommend the proposed rule to the Standing Committee for approval without further revision. [FN37]

If the Standing Committee accepts the Advisory Committee's recommendation, it will in turn recommend the Proposed Amendment to the Judicial Conference. [FN38] Once approved by the Judicial Conference, the Proposed Amendment is transmitted to the United States Supreme Court for review. [FN39] The Supreme Court may then prescribe the Proposed Amendment by forwarding it to Congress by "May 1st of the year in which the [R]ule is to become effective." [FN40] If Congress takes no action, the Proposed Amendment takes effect "on December 1st of the year in which [it was] transmitted to Congress." [FN41]

Beginning in the early 1990s, the Standing Committee commenced a comprehensive effort to restyle the Rules of Appellate Procedure, the Rules of Criminal Procedure, the Rules of Civil Procedure, and the Rules of Evidence. [FN42] The Rules of Appellate Procedure were restyled in 1998, [FN43] the Rules of Criminal Procedure in 2002, [FN44] and the Rules of Civil Procedure in 2007. [FN45] The goal of this vast restyling project is "to simplify, clarify, and make more uniform all of the federal rules of practice, procedure, and evidence." [FN46]

***855** The Advisory Committee on Evidence Rules voted to commence restyling the Federal Rules of Evidence during its Spring 2007 meeting. [FN47] On November 16, 2007, the Advisory Committee established a protocol for accomplishing this restyling effort. [FN48] Specifically, it agreed that Professor R. Joseph Kimble [FN49] would attempt a first draft of a restyled rule. [FN50] Professor Daniel Capra, the Advisory Committee Reporter, would then review the draft "and provide[] suggestions, specifically with an eye to whether any proposed change is substantive rather than procedural." [FN51] In light of Professor Capra's suggestions, Professor Kimble would then revise the draft, if necessary, and forward it to the Advisory Committee for their individual review. [FN52] In responding with comments, "the focus[would] be on whether the draft has made substantive changes to the existing rule, . . ." [FN53]

Professor Kimble would then revise the draft again, considering the Advisory Committee's comments, before forwarding it to the Standing Committee's Subcommittee on Style. [FN54] After the Style Subcommittee's review, the draft would be referred to the Evidence Rules Committee. [FN55] In reviewing the draft, members of the Evidence Rules Committee would:

> a) focus first on the footnotes [of unresolved issues] to determine whether the material footnoted raises a question of "substance" rather than "style"; b) then review the draft to determine whether any changes of substance have been overlooked; and c) finally, provide any important style suggestions. . . . If, after discussion at the Committee meeting, a "significant minority" of the Evidence Rules Committee believes that a change is substantive, then the wording is not approved. In contrast, the Style Subcommittee of the Standing ***856** Committee has the final word on any style suggestions provided by the Advisory Committee. [FN56]

Finally, the Advisory Committee would recommend the restyled rules to the Standing Committee for approval for release for public comment. [FN57]

The Advisory Committee broke the extensive Rules into three groups for ease of drafting and repeated the process described above for each group. [FN58] Although the Advisory Committee would recommend that each group of rules be approved for publication at the time it approved each set, the Standing Committee understood that it would not publish any group of rules until all three had been restyled, at which time the Proposed Amendments would be published in their entirety. [FN59] "The Standing Committee did this with the understanding that at the end of the process there would be a top-to-bottom review of all the restyled rules" prior to publication. [FN60]

During its meeting in Spring 2008, "the Advisory Committee approved the restyling of the first third of the rules (Rules 101-415)." [FN61] At its meeting in June 2008, the Standing Committee approved this first group of rules for release for public comment, but, pursuant to its understanding, the Proposed Amendments were not then released. [FN62] In Fall 2008, the Advisory Committee approved the restyling of the second group of rules (Rules 501-706), and, in January 2009, the Standing Committee approved those rules for release for public comment. [FN63] Again the Proposed Amendments were withheld until all three groups had been approved. [FN64]

Finally, in April 2009, the Advisory Committee approved the last group of rules (Rules 801-1103). [FN65] The Advisory Committee then reviewed all of the approved rules "to ensure consistency throughout the entire set. . . ." [FN66] The Advisory Committee also approved proposed Committee Notes. [FN67] The Advisory Committee recommended that the Standing Committee approve the Proposed Amendments for release for public comment in their entirety. [FN68] On August 12, 2009, the Standing Committee released its ***857** Preliminary Draft of Proposed Style Amendments to the Federal Rules of Evidence for public comment. [FN69]

III. Proposed Restyled Federal Rules of Evidence Affecting Sacred Phrases

In developing the protocol the Advisory Committee followed in reaching the point of publication of the Proposed Amendments, it set forth several guidelines concerning the substance of the restyling effort. [FN70] As with each preceding restyling effort, [FN71] the Advisory Committee sought to avoid any amendment that would substantively alter the application of any rule. [FN72] To confirm that an amendment had no impact on the substance of the rule, the Advisory Committee's protocol required a review of each change no less than four times. [FN73]

One type of alteration that the Advisory Committee deemed substantive was any amendment to a sacred phrase. [FN74] It defined "sacred phrase" to mean any phrase that has "become so familiar in practice that to alter [it] would be unduly disruptive." [FN75] Because such changes were substantive, the Committee resolved to reject any style improvements that changed a sacred phrase. [FN76]

Although the Advisory Committee has suggested two phrases as examples of a larger pool of sacred phrases, [FN77] it has not expressly identified any additional phrase as sacred. However, because it resolved to avoid any change to a sacred phrase, [FN78] one may infer that, where the Proposed Amendments suggest a change, the Advisory Committee implicitly deemed the existing language of a rule less than sacred. Identifying which phrases the Advisory Committee held as sacred is more difficult to determine than which phrases it did not; where original language was maintained, the Advisory Committee may have deemed the language a sacred phrase or may have felt that the language could not be improved upon to achieve the goals of the restyling effort. Part III of this Article attempts to identify those ***858** phrases that are either sacred or almost-but-not-quite sacred to decipher the method by which the Advisory Committee deemed one phrase sacred and another one not.

A. Not-So-Sacred Phrases

The Proposed Amendments include suggested modifications to several Rules which arguably contain sacred phrases. [FN79] Because the Advisory Committee proposed amending those Rules, however, one can infer that it determined that the language therein was not sacred. To reach such a conclusion, the Committee must have determined, first, that the language was not "familiar in practice," second, that such amendments would not be "disruptive," and, third, that any disruption would not be "undue." The following discussion highlights four existing phrases altered in the Proposed Amendments in an attempt to discover how the Advisory Committee reached its implicit conclusion that a phrase is not sacred. [FN80]

1. Rule 603: Calculated to Awaken the Witness' Conscience

In the Proposed Amendments, the Advisory Committee recommends replacing the clause "a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so" [FN81] with "a form designed to impress that duty [to testify truthfully] on the witness's conscience." [FN82] Although the concept described in Rule 603 existed at common law well before Rule 603 was first proposed, the current language was not well-known. [FN83] Both the Model Code of Evidence and the Uniform ***859** Rules of Evidence, predecessors of the Federal Rules of Evidence, presented uniform rules expressing the idea that a witness take an oath which would remind him or her of the duty to tell the truth. [FN84] Both rules, however, expressed the concept in language different from that of Rule 603. [FN85] In addition to the predecessor rules, prior to the introduction of Rule 603 in 1969, courts also used various phrases to describe the same concept. [FN87]

***860** Since its introduction in 1969, however, the language concerning awakening a witness's conscience has been repeated universally by federal courts. [FN88] Moreover, thirty-nine states have adopted a rule of evidence including some reference to "awakening a witness's conscience," [FN89] and even more state courts have used language similar to that in Rule 603. [FN90] The number of courts using such language independently of restating Rule 603 or its state law equivalent since Rule 603, however, is extremely limited, [FN91] indicating that the significance of the language itself is inextricably tied to Rule 603.

Proposed Amended Rule 603 accurately reflects the law on the subject of a witness's oath. [FN92] Moreover, it states the Rule more succinctly than the current version of Rule 603, albeit without the flourish of personification. [FN93] ***861** In amending Rule 603, the Advisory Committee was able to achieve its goal [FN94] in restyling Rule 603 and provide the courts with a consistent and streamlined rule.

2. Rule 801: Admission by Party-Opponent

The Advisory Committee proposed replacing the phrase "admission by party-opponent" [FN95] in Rule 801(d)(2) [FN96] with an "opposing party's ***862** statement." [FN97] Although it falls within the technical definition of hearsay, an admission of a party-opponent is specifically excluded from the hearsay rule; it permits the introduction of statements made out of court by a party to an action when offered by the party's adversary in the case. [FN98] Because the hearsay exclusion exists to prevent testimony from a declarant who is not in court for cross-examination, the rationale does not apply to the statements of a party himself; "[a] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of an oath." [FN99]

The phrase "admission by party-opponent" dates back to at least 1935. [FN100] It had significant meaning prior to the proposed amendments of 1969, [FN101] although the concept was not stated in such language in either the ***863** Model Code of Evidence or the Uniform Rules of Evidence. [FN102] Courts and practitioners have relied on the current language since it was first proposed in 1969. [FN103] The language was further cemented in the familiarity of practitioners when it was adopted by twenty-seven states. [FN104] Although the phrase no longer carries significance independent of the existing rules, [FN105] it is universally referenced by federal and state courts alike. [FN106]

The justification for the proposed amendment is strong. The phrase has historically been a source of misunderstanding because, despite the plain language of the current Rule regarding an "admission," it does not require that a statement admit anything [FN107] or that it be against the party's interest at the time it was made.

[FN108] The proposed change removes the confusion by ***864** more accurately stating the Rule. [FN109] Amending this phrase enabled the Advisory Committee to achieve the goals of the restyling effort particularly in improving the accuracy and understandability of Rule 801(d)(2). [FN110]

3. Rule 404(a): Action in Conformity Therewith

In its draft, the Advisory Committee replaced the clause "for the purpose of proving action in conformity therewith on a particular occasion" in Federal Rule of Evidence 404(a) [FN111] with "to prove that on a particular occasion the person acted in accordance with the character or trait." [FN112] The proposed change would bring the language of Rule 404(a) more closely in line with that of Rule 406 governing the admissibility of habit evidence, which currently includes the phrase "to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." [FN113] The Advisory Committee also proposed amending Rule 406 to include the identical language of that proposed for Rule 404(a). [FN114] ***865** Should the Supreme Court prescribe the proposed amendments to both rules, the language of Rules 404(a) and 406 would be consistent. [FN115]

Prior to the adoption of Rule 404(a) in 1975, [FN116] the phrase "action in conformity therewith" did have significance independent of Rule 404(a); however, its significance was extremely narrow and wholly unrelated to the admissibility of either character or habit evidence. Specifically, the language was used almost exclusively to describe proof of an implied contract. [FN117] Moreover, the phrase "conformity therewith" did not appear in either the Model Code of Evidence or the Uniform Rules of Evidence. [FN118] Since Rule 404(a) was enacted, courts have universally embraced the phrase "action in conformity therewith," [FN119] although states have been reluctant to adopt similar language in their evidence rules.

As currently written, Rules 404(a) and 406 use different language to describe similar concepts, thus rendering the rules inconsistent. [FN120] Moreover, the phrase "action in conformity therewith" is confusing; it is a phrase understood solely by those with experience in practice who have studied its application. To those studying the Federal Rules of Evidence for the first time, the phrase is nearly incomprehensible.

***866** In restyling Rules 404(a) and 406, however, the Advisory Committee successfully maintained the true meaning of the rules governing character and habit evidence. [FN121] The proposed changes to Rules 404(a) and 406 bring the language of the two rules together to achieve clarity and consistency, thus fulfilling the goals of this restyling effort. [FN122]

4. Rule 901: Not Acquired for Purposes of the Litigation

In its revisions, the Advisory Committee also targeted Rule 901(b)(2) governing lay opinions on handwriting. [FN123] It proposed replacing the current language "based upon familiarity not acquired for purposes of the litigation" [FN124] with the clause "based on a familiarity with [the handwriting] that was not acquired for the current litigation." [FN125] The existing phrase had no meaning relevant to handwriting analysis prior to the introduction of Rule 901(b)(2) in 1969. [FN126] Even since its first introduction in 1969, [FN127] the phrase has rarely been used in court opinions. [FN128]

***867** The change to Rule 901(b)(2) which the Advisory Committee proposed is subtle, but nonetheless renders the Rule more accurate by specifying that it only refers to knowledge gained to advance the litigation currently before a court. [FN129] This is both an accurate reflection [FN130] and a more concise statement of the Rule, thus fulfilling the stated goals of the restyling project. [FN131]

B. Sacred Phrases

While the Advisory Committee proposed revising the foregoing arguably sacred phrases, it left several other phrases untouched which would nonetheless benefit from restyling. Although it is impossible to be sure that some of these phrases remain unchanged because the Advisory Committee deemed them sacred, one can infer that such was the case based on the availability of potential improvements [FN132] that would advance the Committee's goals of enhancing the Rules' understandability, clarity, and consistency. [FN133] To deem a phrase "sacred," the Committee

would have implicitly determined that the phrase was "familiar in practice," that any change to such language would be "disruptive," and that any such disruption would be "undue." [FN134]

1. Rule 403: Unfair Prejudice

Although the Advisory Committee suggested restyling the remainder of Rule 403, the proposed Rule 403 retains the phrase "unfair prejudice." [FN135] ***868** Prior to the introduction of Rule 403 in 1969, courts at common law were already familiar with the phrase "unfair prejudice" in reference to the admissibility of relevant evidence [FN136] despite the fact that the Model Code of Evidence and the Uniform Rules of Evidence both utilized the phrase "undue prejudice" instead. [FN137] The phrase "unfair prejudice" has remained ***869** unaltered since it was first introduced as part of Rule 403 in 1969. [FN138] Since its proposal, federal and state courts applying Rule 403 or its state law counterpart have relied on the phrase frequently. [FN139] Forty states have incorporated "unfair prejudice" into their state evidence codes. line[FN140]

The original Advisory Committee notes to Rule 403 provide a definition of "unfair prejudice" as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." [FN141] As applied by the courts, [FN142] the definition is no more concrete than the phrase itself; the definition replaces the immeasurable term "unfair" with the vague modifier "undue." [FN143] Moreover, the definition is wordier than the phrase itself. To revise the phrase "unfair prejudice" would further ***870** complicate, rather than simplify, Rule 403, which would distance the Advisory Committee from reaching its stated goals. [FN144]

2. Rule 801(c): Truth of the Matter Asserted

Few law students or even practitioners understand the definition of hearsay as expressed in Federal Rule of Evidence 801(c). [FN145] In its current form, the rule is archaic and incomprehensible. [FN146] It is also, perhaps, the most familiar in practice of all phrases in the Rules.

The concept of hearsay was developed at English common law and has been applied in the United States since before this nation was founded; [FN147] it has been a consideration for the admissibility of evidence ever since. Hearsay is a statement made out of court used to prove that the contents of the statement are true. [FN148] The definition of hearsay as "an out of court statement offered to prove the truth of the matter asserted" was familiar in practice long before Rule 801 defined it. [FN149] In fact, the Model Code of ***871** Evidence and the Uniform Rules of Evidence both included very similar language. [FN150]

Since its introduction in 1969, [FN151] no court has cited the language defining hearsay in Rule 801 in any judicial opinion independent of a discussion of Rule 801 or its state law equivalent. Nonetheless, that language of Rule 801 has been cited frequently by both state and federal courts, [FN152] and forty-one states have incorporated into their evidence codes. [FN153]

In its restyling effort, the Advisory Committee proposed changes to the first half of the hearsay definition in Rule 801(c), replacing "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence" with "a prior statement-one the declarant does not make while testifying at the current trial or hearing-that the party offers in evidence." [FN154] Those changes clarify an extremely archaic and confusing ***872** Rule, providing clarity to hearsay's definition and achieving the goals of the restyling effort. [FN155] To make such a change, the Advisory Committee must have determined that "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence" is not a sacred phrase, either because it is not familiar in practice, because any change to it would not be disruptive, or because any disruption would be less than undue, despite its longstanding origins and importance in practice. [FN156]

The Advisory Committee, nonetheless, retained the latter half of the definition of hearsay in Rule 801(c), "to prove the truth of the matter asserted," despite the fact that it could easily be stated in plainer and clearer language. [FN157] The only reason not to restyle this phrase would be to avoid making what the Committee would deem a substantive change. [FN158] In fact, without explanation, the Committee specifically declared "the truth of the matter asserted" a sacred phrase. [FN159]

3. Rule 609(b): Substantially Outweighs Its Prejudicial Effect

As restyled, Rule 609(b) retains the phrase "substantially outweighs its prejudicial effect." [FN160] That phrase, however, had no significance prior to the ***873** enactment of Rule 609 in 1975. [FN161] The Model Code of Evidence did not specifically address this issue, although the Uniform Rules of Evidence used the phrase "undue prejudice" to describe the same concept. [FN162] Since the language was first introduced in 1975, courts have universally relied upon it. [FN163] States, however, have been reluctant to incorporate the phrase into their evidence codes, employing the phrase "unfair prejudice" instead. [FN164] Moreover, the significance of the language itself is tied directly to Rule 609, as courts have not used similar language to describe the concept independent of a discussion of Rule 609 or its state law equivalent.

***874** The language "prejudicial effect" in Rule 609(b) is inconsistent with the identical concept of "unfair prejudice," used in Rules 403 and 412. [FN165] Because consistency is a stated goal of the restyling effort, yet inconsistent language remains despite the Advisory Committee's Proposed Amendments, one must infer that the Committee determined that "prejudicial effect" is a sacred phrase protected from revision. [FN166]

4. Rule 606(b): Outside Influence Brought to Bear

In the proposed restyling of Rule 606(b), the Advisory Committee retained another archaic phrase which could be updated to more succinctly state the rule. [FN167] Specifically, the Advisory Committee's proposal maintains the heart of the phrase "whether any outside influence was improperly brought to bear upon any juror[.]" [FN168] Although there was no mention of this concept in either the Model Code of Evidence or the Uniform Rules of Evidence, the United States Supreme Court used this phrase as early as 1891. [FN169] Nonetheless, courts at common law only occasionally relied on this language prior to the introduction of Rule 609(b) in 1975. [FN170] Since 1975, ***875** courts have frequently relied on its language, [FN171] although no state has incorporated the phrase into its evidence code.

Like the reference to "awakening" a witness's conscience, which the Advisory Committee has suggested restyling in Proposed Amendment 603, the phrase "brought to bear" is archaic and unnecessary. [FN172] It could easily be restated. [FN173] Because it was not restyled, however, one must infer that the Committee deemed it to be a sacred phrase. [FN174]

IV. Sanctity Is Arbitrary

The Advisory Committee defined a "sacred phrase" as any phrase that has "become so familiar in practice that to alter [it] would be unduly disruptive." [FN175] Unfortunately, the Advisory Committee provided no specific protocol for determining when a phrase is "familiar in practice," when a change to a phrase would be "disruptive," or when such a disruption would be "undue." [FN176] The categorization of any phrase as "sacred," thus requires the Committee to make three arbitrary determinations.

First, the Advisory Committee must have determined that a phrase was "familiar in practice." [FN177] The Advisory Committee, however, provided no working definition of this concept. It cited no empirical studies of the bench or bar regarding either group's past or present familiarity with any given phrase. [FN178] In hindsight, one can compare those phrases the Advisory Committee suggested amending to those it did not in an attempt to identify how it determined whether a phrase was "familiar in practice." [FN179]

***876** In determining whether a phrase is "familiar in practice," it is logical to evaluate the historical significance of the language before it was incorporated into the Federal Rules of Evidence. [FN180] Unfortunately, however, the Advisory Committee proposed altering at least one phrase which was historically significant before it was incorporated into the Rules; specifically, the Advisory Committee proposed amending Rule 801(d)(2). [FN181] The phrase "admission by party-opponent" was widely used for over a half-century before it was incorporated into the proposed language of Rule 801(d)(2) in 1969. [FN182] Since then, the language has remained universally recognized and frequently applied. [FN183] Clearly, this phrase is "familiar in practice." Nonetheless, the Advisory Committee proposed amending it. [FN184]

By contrast, the Advisory Committee also recommended that other phrases be retained which had limited historical significance before the language became part of the Rules. [FN185] By not attempting to amend these phrases, despite the fact that the existing language fails to satisfy the goals of the restyling effort, [FN186] the Advisory Committee implied that the phrases "unfair prejudice" in Rule 403, "substantially outweighs its prejudicial effect" in Rule 609(b), and "outside influence brought to bear" in Rule 606(b) were "familiar in practice." [FN187] The phrase "substantially outweighs ***877** its prejudicial effect," however, had no significance prior to the introduction of Rule 609(b). [FN188] The phrases "unfair prejudice" and "outside influence brought to bear" enjoyed extremely limited use prior to the introduction of Rules 403 and 606(b). [FN189] Prior to the introduction of the Federal Rules of Evidence in 1969, one could hardly argue that any of these phrases was "familiar in practice." [FN190]

The inconsistent evaluation of various phrases demonstrates the arbitrary nature of the Advisory Committee's analysis of whether a phrase is "familiar in practice." [FN191] If the Committee focused on the significance of a specific phrase prior to 1969, then its decision to retain certain language capable of improvement despite its nonexistent significance was an arbitrary one.

The next inquiry the Advisory Committee must have conducted, at least implicitly, is whether a change to the language of the Rules would be "disruptive." [FN192] In answering this question, the best the Committee could hope to do was to predict the answer; again, there were no empirical studies conducted of the bench or bar. [FN193] Unfortunately, this query is not helpful in narrowing the list of sacred phrases in the Federal Rules of Evidence, because a change to any phrase in the Rules will necessarily cause a disruption among those applying them on a regular basis. [FN194] Moreover, any change to the Rules will present an inconsistency, at least for a time, between the state and federal rules. Such inconsistency will undoubtedly create some level of disruption. [FN195]

Finally, the Advisory Committee must have determined whether the alteration of any phrase would cause a disruption that is "undue." [FN196] Again, the Advisory Committee presented no standard by which it would judge the level of any anticipated disruption. [FN197] To make such a determination, the Advisory Committee would have to predict that changes to one phrase ***878** would disrupt practice more or less than changes to another. Therefore, any such determination would be arbitrary.

Moreover, the restyling of the Rules will inevitably cause a great disruption among the bench and bar; restyling a handful of additional phrases will hardly render such a disruption any more disruptive. [FN198] In fact, one could argue that any disruption caused by restyling a sacred phrase in conjunction with this wholesale restyling effort would actually lessen the potential for disruption such a revision would cause in the future, were it achieved independent of this comprehensive amendment. [FN199]

Without explanation, the Advisory Committee distinguished between phrases of similar historical significance, as well as between those which would be similarly disruptive. [FN200] Applying the Advisory Committee's own definition of a "sacred phrase," one cannot deduce the basis for this disparate treatment of similarly situated phrases. Thus, the classification of phrases as "sacred" was arbitrary.

While it is impossible to know the unpublished analysis of the Advisory Committee in determining which phrases are sacred and which are not, a comparison of those phrases amended and those retained demonstrates the lack of consistency in applying the definition of a sacred phrase. [FN201] Moreover, working backward to find a consistent pattern in such classification leads nowhere; there is no pattern in the Advisory Committee's classifications. [FN202] The inconsistency in the revisions ***879** concerning sacred phrases leads to the conclusion that the Advisory Committee arbitrarily determined which phrases are sacred and which are not.

V. More Sacred Phrases Should Be Restyled

The Advisory Committee's Preliminary Draft of Proposed Style Revision of the Federal Rules of Evidence represents an overwhelming improvement to the existing Rules. However, the Proposed Rules do not go far enough in achieving the goals of the restyling effort: clarity, understandability, and consistency. [FN203] As unsatisfying and inefficient as it may be, the result-maintaining the status quo regarding a handful of phrases-will certainly be no catastrophe. It will, however, leave the door open for future revisions that could be addressed now. As with all amendments to the Federal Rules of Evidence, future revisions will necessarily disrupt future practice; failing to

correct existing stylistic deficiencies in the Rules now will only delay any undue disruptions the Committee hopes to prevent. [FN204]

At least one commentator to the Proposed Amendments has noted his desire that the Advisory Committee thoroughly amend the Rules to avoid piecemeal amendments every several years. [FN205] Practitioners complain that it is more difficult to keep apprised of multiple minor amendments every few years than to take the time to understand a wholesale change to the Rules. [FN206] Thus, the Advisory Committee has a great opportunity to conduct a comprehensive restyling of all Rules, not just those it arbitrarily deemed something less than sacred. The Advisory Committee should not pass up this opportunity.

To achieve the goals of the restyling effort, the Advisory Committee should not maintain any phrase as sacred. It should consider revising the archaic, unclear, and inconsistent language of those phrases it arbitrarily deemed sacred. Instead, the Committee should retain only those phrases that are easily understood, consistent, and cannot be improved. This article proposes the following changes to apparent sacred phrases.

A. Rule 403: Unfair Prejudice

The Advisory Committee suggested no change to the phrase "unfair prejudice" as used in Rule 403 because it deemed it a sacred phrase. [FN207] As ***880** explained above, "unfair prejudice" is defined in the Advisory Committee Notes to Rule 403 as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." [FN208] The phrase itself is more succinct than its definition. Because it includes the undefined term "undue," the definition of unfair prejudice is no more clear than the phrase itself. [FN209] In keeping with the goals of the restyling effort-to improve clarity, understandability, and consistency throughout the Rules-there is no way to improve upon the phrase "unfair prejudice" as it is currently used. [FN210] Thus, this article concludes that the Advisory Committee's recommendation that the phrase "unfair prejudice" remain in Rule 403 should be accepted; not because the phrase is a sacred one, but because there is no way to better state the concept of unfair prejudice.

B. Rule 801(c): To Prove the Truth of the Matter Asserted

As explained above, the phrase "to prove the truth of the matter asserted" used in Rule 801(c) is bewildering. [FN211] It may take many students of the law years of practice before this phrase is truly understood. Nonetheless, the Advisory Committee failed to offer any suggested revision to this language because the committee deemed it a sacred phrase. [FN212]

Nevertheless, the phrase could be vastly improved with the simplest of revisions: replacing the confusing reference to "the matter asserted." [FN213] This article suggests the following two possible improvements: "to prove the truth of the statement made by the declarant" or "to prove the truth of the declarant's statement." Neither change affects the meaning of the Rule, and, because it references the "statement" defined in the preceding clause, [FN214] this minor change should bring greater clarity to readers of the Rule. Such an improvement would fulfill the goals of the restyling effort by achieving clarity and lending understandability to Rule 801(c).

Having gone so far as to propose amendments to the first half of the hearsay definition in Rule 801(c), [FN215] the Advisory Committee has already suggested a change that will likely be unduly disruptive. But, the suggestion that the latter half of Rule 801(c) remain unchanged while the former is amended will likely only compound that disruption. The Committee should ***881** finish the job and propose a comprehensive revision to Rule 801(c) that is understandable to all practitioners and students alike.

C. Rule 609(b): Substantially Outweighs Its Prejudicial Effect

The phrase in Rule 609(b) "substantially outweighs its prejudicial effect" is inconsistent with the phrase "unfair prejudice" used in Rules 403 and 412. [FN216] One might infer by the deliberate choice to maintain the phrases "prejudicial effect" and "unfair prejudice" that the phrases carry differing meanings. The inconsistency encourages such an assumption, but that is incorrect. In fact, the phrase "unfair prejudice" is often substituted for "prejudicial effect" in practice; federal courts have treated the two phrases as interchangeable since the time the Federal Rules of Evidence were first adopted. [FN217]

Thus, this article suggests that the Advisory Committee revise Rule 609(b) to replace "prejudicial effect" with "unfair prejudice." [FN218] Such a change should not disrupt an already existent legal practice. Such a change would achieve the stated goal of this restyling effort to achieve consistency in style and terminology. [FN219]

D. Rule 606(b): Outside Influence Brought to Bear

The Advisory Committee proposed no change to the phrase "outside influence brought to bear" in Rule 606(b). [FN220] That phrase, however, is archaic. Rule 606(b) could be restyled to replace the phrase "brought to bear" with the word "imposed." Such a change is clear, succinct, and maintains the true meaning of the Rule. To revise Rule 606(b) in this way would achieve the goals of this restyling effort. [FN221]

VI. Conclusion

The Advisory Committee's Proposed Amendments to the Federal Rules of Evidence represent a remarkable improvement in terms of clarity, understandability, and consistency. Its efforts, however, failed to reach those phrases the Committee arbitrarily deemed sacred. Those sacred phrases currently stand in the way of the Committee's comprehensive effort to amend the Rules. The Advisory Committee should revise those archaic ***882** and confusing sacred phrases to clarify language that historically has been misunderstood and bring greater consistency of terminology to the Rules. Such changes can be achieved without altering the substance of the Rules. The Advisory Committee should not let this rare opportunity to clarify the Federal Rules of Evidence pass without including these sacred phrases in its effort.

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[FN1]. See Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., Preliminary Draft of Proposed Style Revision of the Fed. Rules of Evidence 1, available at http://www.uscourts.gov/rules/newrules6.htm [hereinafter Comm. on Rules]; Eileen A. Scallen, Proceeding with Caution: Making and Amending the Federal Rules of Evidence, 36 Sw. U. L. Rev. 601, 609 (2008) (stating that the Federal Rules were enacted in 1975).

[FN2]. See Comm. on Rules, supra note 1, at Preface (Memo to the Bench, Bar, and Public), available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/Memo_Bench_ EV.pdf (detailing the extensive review process of changing the Rules).

[FN3]. See Comm. on Rules, supra note 1, at 1 (Report of the Advisory Committee on Evidence Rules), available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Report.pdf.

[FN4]. See infra Part III.A.

[FN5]. Letter from Thomas E. McCutchen, Fellow, American College of Trial Lawyers, to Peter G. McCabe, Sec'y, Admin. Office of the U.S. Courts (Nov. 2, 2009), available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/2009%20Comments%C20Committee% 20Folders/CR%20Comments%202009/09-CR-001-Comment-McCutchen.pdf ("I would like to see fewer amendments and changes made less often. In the area of rules, it is important to know them and it is not nearly as important that they be changed constantly.").

[FN6]. See Fed. R. App. P. 1 advisory committee's note.

[FN7]. See Fed. R. Crim. P. 1 advisory committee's note.

[FN8]. See Fed. R. Civ. P. 1 advisory committee's note.

[FN9]. See Comm. on Rules, supra note 1, at Preface, available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/Memo_Bench_ EV.pdf (explaining the goal of the restyling effort "to simplify, clarify, and make more uniform all of the federal rules of practice, procedure, and evidence").

[FN10]. See infra Part III.A.

[FN11]. See infra Part III.A.

[FN12]. See Comm. on Rules, supra note 1, at 7-8, available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf (advisory committee's note).

[FN13]. Id.

[FN14]. Id. at 8.

[FN15]. Id.

[FN16]. See id.

[FN17]. See id.

[FN18]. See infra Part III.A.

[FN19]. See generally Comm. on Rules, supra note 1, available at http:// www.uscourts.gov/rules/newrules6.htm.

[FN20]. See infra Part III.A.

[FN21]. See infra Part III.B.

[FN22]. See Comm. on Rules, supra note 1, at 1, available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Report.pdf.

[FN23]. See infra Part III.A.

[FN24]. See infra Part III.A.

[FN25]. See Scallen, supra note 1, at 602-09 (discussing events, beginning in 1920, leading to eventual enactment of Federal Rules of Evidence in 1975).

[FN26]. Id.

[FN27]. Id. at 603.

[FN28]. Frederick Douglass, West India Emancipation (Aug. 3, 1857), in Two Speeches 22 (1857).

[FN29]. See Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926 (1975).

[FN30]. See 28 U.S.C. §§ 2072, 2073(b), 2075 (2006); Scallen, supra note 1, at 613.

[FN31]. See 28 U.S.C. §§ 2072, 2073(b), 2075 (2006); Scallen, supra note 1, at 605-06.

[FN32]. See Scallen, supra note 1, at 607, 613.

[FN33]. See 28 U.S.C. § 2073(a)(2) (2006); Scallen, supra note 1, at 613.

[FN34]. See Scallen, supra note 1, at 613.

[FN35]. Id. at 614.

[FN36]. Id. at 615.

[FN37]. Id.

[FN38]. Id.

[FN39]. Id. at 616.

[FN40]. Id.; see 28 U.S.C. §§ 2074, 2075 (2006).

[FN41]. Scallen, supra note 1, at 616; see 28 U.S.C. §§ 2074, 2075 (2006).

[FN42]. The Rules of Appellate Procedure were amended on December 1, 1998. Fed. R. App. P. 1 advisory committee's note. The Rules of Criminal Procedure were amended on December 1, 2002. Order Amending the Federal Rules of Criminal Procedure, 535 U.S. 1157, 1159 (2002) (providing December 1, 2002 as the effective date). The Rules of Civil Procedure were amended on December 1, 2007. Order Amending the Federal Rules of Civil Procedure, 550 U.S. 1003, 1005 (2007) (providing December 1, 2007 as the effective date).

[FN43]. Fed. R. App. P. 1 advisory committee's note.

[FN44]. Order Amending the Federal Rules of Criminal Procedure, 535 U.S. 1157, 1159 (2002) (providing December 1, 2002 as the effective date).

[FN45]. Order Amending the Federal Rules of Civil Procedure, 550 U.S. 1003, 1005 (2007) (providing December 1, 2007 as the effective date).

[FN46]. See Comm. on Rules, supra note 1, at Preface, (Memo to the Bench, Bar, and Public), available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/Memo_Bench_ EV.pdf.

[FN47]. Advisory Comm. on Evidence Rules, Minutes of the Meeting of November 16, 2007, United States Courts, 2, http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/minutes/ev11-2007-min.pdf.

[FN48]. Id. at 2-3.

[FN49]. Professor Kimble is the consultant to the Style Subcommittee of the Standing Committee. He authored the initial drafts of the restyled Federal Rules of Civil Procedure and served as drafting consultant to the Sixth Circuit Committee on Pattern Jury Instructions and the Michigan Committee on Standard Criminal Jury Instructions. The Thomas M. Cooley Law School Faculty Biography for Joseph Kimble, http://www.cooley.edu/faculty/kimble.htm (last visited Sept. 18, 2010).

[FN50]. Advisory Comm. on Evidence Rules, supra note 47, at 3.

[FN51]. Id.

[FN52]. Id.

[FN53]. Id.

[FN54]. Id.

[FN55]. Id.

[FN56]. Id.

[FN57]. Id. at 4.

[FN58]. Id.

[FN59]. Id.

[FN60]. See Comm. on Rules, supra note 1, at 1 (Report of the Advisory Committee on Evidence Rules), available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Report.pdf.

[FN61]. Id. at 4.

[FN62]. Id.

[FN63]. Id.

[FN64]. Id.

[FN65]. Id. at 1.

[FN66]. Id. at 4.

[FN67]. Id.

[FN68]. Id. at 5.

[FN69]. Comm. on Rules, supra note 1, at Preface, (Memo to the Bench, Bar, and Public), available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/Memo_Bench_ EV.pdf.

[FN70]. Id. at 6-8, available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf.

[FN71]. See Advisory Comm. on Evidence Rules, supra note 47, at 2-4.

[FN72]. See Comm. on Rules, supra note 1, at 7-8.

[FN73]. See supra notes 51, 53, and 56 and accompanying text.

[FN74]. See Comm. on Rules, supra note 1, at 8, available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf.

[FN75]. Id.

[FN76]. Id.

[FN77]. Id. (suggesting “unfair prejudice” and “truth of the matter asserted” as examples of sacred phrases).

[FN78]. Id. at 7-8.

[FN79]. See generally Comm. on Rules, supra note 1, at 8-97 available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_ Rules.pdf.

[FN80]. Part III.A.1 highlights the phrase “calculated to awaken the witness' conscience” in Rule 603. Part III.A.2 focuses on the phrase “admission by party-opponent” in Rule 801(d)(2). Part III.A.3 discusses the phrase “action in

conformity therewith" in Rule 404. Finally, Part III.A.4 examines the phrase "not acquired for purposes of the litigation" in Rule 901(b)(2).

[FN81]. The full text of the current version of Rule 603 provides: "Rule 603. Oath or Affirmation[.] Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." Fed. R. Evid. 603.

[FN82]. The full text of Proposed Amended Rule 603 is "Rule 603. Oath or Affirmation to Testify Truthfully[.] Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience." See Comm. on Rules, supra note 1, at 41, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf.

[FN83]. The number of courts using such language prior to the Preliminary Draft of Rule 603 in 1969 could be counted on one hand. See, e.g., Pumphrey v. State, 122 N.W. 19, 20 (Neb. 1909) ("[T]he oath administered was not in a form to bind the conscience or awaken the apprehension of the witness [.]"); Truscott v. Dole, 7 How. Pr. 221, 225 (N.Y. Sup. Ct. 1851) (describing the form of sufficient oath as one which will "more effectually awaken [the witness's] conscience to the responsibility and solemnity of the duty he was performing"); McMillan v. Warner, 38 Tex. 410, 415 (1873) ("[I]t is supposed that the sanctity of an oath will outweigh all exciting causes and awaken the conscience into speaking the truth[.]").

[FN84]. Model Code of Evid. R. 103 (1942); Unif. R. of Evid. 18 (1953) (amended 1999).

[FN85]. Rule 103 of the Model Code of Evidence provided:

> Rule 103. Oath. Every witness before testifying shall be required to express his purpose to testify only to the truth, by oath or, at the option of the witness or the judge, by any other method, including affirmation, which the judge finds to be binding upon the conscience of the witness.

Model Code of Evid. R. 103 (1942). Rule 18 of the Uniform Rules of Evidence provided, "Rule 18. Oath. Every witness before testifying shall be required to express his purpose to testify by the oath or affirmation required by law." Unif. R. of Evid. 18 (1953) (amended 1999). The comment to Rule 18 provided, "[The rule] assumes that the witness has necessary qualifications and is therefore capable of understanding his duty to tell the truth." Unif. R. of Evid. 18 cmt. (1953) (amended 1999).

[FN86]. When it was first proposed in 1969, the rule which was enacted as Rule 603 was named "Rule 6-03." Preliminary Draft of Proposed Rules of Evidence for the U.S. Dist. Courts & Magistrates, R. 6-03, 46 F.R.D. 161, 287 (proposed Mar. 1969); see United States v. Looper, 419 F.2d 1405, 1407 (4th Cir. 1969) (citing Preliminary Draft of Proposed Rules of Evidence for the U.S. Dist. Courts & Magistrates, R. 6-03, 46 F.R.D. at 287). In 1969, the Preliminary Draft of Proposed Rule 6-03 provided, "Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so." Preliminary Draft of Proposed Rules of Evidence for the U.S. Dist. Courts & Magistrates, R. 6-03, 46 F.R.D. at 287. Rule 603 was amended only once, in 1987, in a broad effort to revise all the Federal Rules of Evidence to render them gender-neutral. See Scallen, supra note 1, at 610.

[FN87]. Manual for Courts-Martial ¶ 112 (1951) (describing sufficient oath as "any procedure which appeals to the conscience of the person to whom the oath is administered and which binds him to speak the truth"); State v. Hulsman, 126 N.W. 700, 701 (Iowa 1910) (defining sufficient oath as "any form thereof which is ordinarily calculated to appeal to the conscience of the person to whom it is administered, and by which he signifies that his conscience is bound"); Pumphrey, 122 N.W. at 20 ("The mode of administering an oath shall be such as is most binding upon the conscience of the witness.") (quoting Cobbey's Ann. Stat. § 1350 (1907)).

[FN88]. See, e.g., United States v. Lamere, 337 F. App'x 669, 671 (9th Cir. 2009); Haliym v. Mitchell, 492 F.3d 680, 702 (6th Cir. 2007); United States v. Frazier, 469 F.3d 85, 92 (3d Cir. 2006); United States v. Yates, 391 F.3d 1182, 1190 (11th Cir. 2004); United States v. Pluta, 176 F.3d 43, 51 (2d Cir. 1999); United States v. Hall, 152 F.3d 381, 397 n.8 (5th Cir. 1999); United States v. Allen J., 127 F.3d 1292, 1295 n.3 (10th Cir. 1997).

[FN89]. Ala. R. Evid. 603; Alaska R. Evid. 603; Ariz. R. Evid. 603; Ark R. Evid. 603; Colo. R. Evid. 603; Conn. R. Evid. § 6-2; Del. R. Evid. 603; Haw. R. Evid. 603; Idaho R. Evid. 603; Iowa Code Ann. Rule 5.603 (West 2010);

Ky. R. Evid. 603; La. Code Evid. Ann. art. 603 (2006); Me. R. Evid. 603; Mich. R. Evid. 603; Minn. R. Evid. 603; Miss. R. Evid. 603; Mont. R. Evid. 603; Neb. Rev. Stat. Ann. § 27-603 (Lexis 2009); Nev. Rev. Stat. Ann. § 50.035(West 2009); N.H. R. Evid. 603; N.M. R. Evid. 11-603; N.Y. C.P.L.R. 2309(b) (McKinney 2009); N.C. R. Evid. § 8C-1, Rule 603; N.D. R. Evid. 603; Ohio R. Evid. 603; Okla. Stat. Ann. tit. 12, § 2603 (West 2009); Or. Rev. Stat. Ann. § 40.320(1) (West 2009); Pa. R. Evid. 603; R.I. R. Evid. 603; \fs20fs20 S.C. R. Evid. 603; S.D. Codified Laws § 19-14-3 (2010); Tenn. R. Evid. 603; Tex. R. Evid. 603; Utah R. Evid. 603; Vt. R. Evid. 603; Wash. R. Evid. 603; W. Va. R. Evid. 603; Wis. Stat. Ann. § 906.03(1) (West 2009); Wyo. R. Evid. 603.

[FN90]. See, e.g., People v. Carreon, 151 Cal. App. 3d 559, 581 (Cal. Ct. App. 1984); People v. Coleman, 618 N.E.2d 466, 471 (Ill. App. Ct. 1993) (citations omitted); Ringgold v. State, 367 A.2d 35, 38 (Md. Ct. Spec. App. 1976) (citing People v. Malston, 258 N.E.2d 362, 365 (Ill. App. Ct. 1970).

[FN91]. See Golden v. State, 968 So. 2d 378, 385 (Miss. 2007) (quoting Wilburn v. State, 608 So. 2d 702, 705 (Miss. 1992)) (describing form of oath for jurors in capital case as imparting "the idea he is bound in conscience to perform an act faithfully and truthfully and to awaken and stimulate his conscience and impress his mind with his duty and responsibility to do so"); State v. Short, No. CA91-04-066, 1992 WL 158413, at *2 (Ohio Ct. App. July 6, 1992) (citing Ohio R. Evid. 603; State v. Frazier, 574 N.E.2d 483, 487 (Ohio 1991)) ("Once a court determines that a child is a competent witness, the court can administer an oath in any manner designed to awaken the child's conscience and to impress his or her mind with the duty to testify truthfully.").

[FN92]. See, e.g., Frazier, 469 F.3d at 92 (stating that oaths are administered to remind witnesses of their obligation to testify truthfully); United States v. Saget, 991 F.2d 702, 710 (11th Cir. 1993) (holding that atheist's oath to God was permissible because "he was cognizant of his solemn duty to tell truth").

[FN93]. See Fed. R. Evid. 603; Comm. on Rules, supra note 1, at 41, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf.

[FN94]. See Comm. on Rules, supra note 1, at 1, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Report.pdf.

[FN95]. The current version of Rule 801(d)(2) provides:

Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).
Fed. R. Evid. 801(d)(2).

[FN96]. The Proposed Amendments also suggest making a similar replacement to the text of Rule 613(b). See Comm. on Rules, supra note 1, at 52, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_ Rules.pdf. Rule 613(b) currently provides:

Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).
Fed. R. Evid. 613(b). Proposed Rule 613(b) would provide: Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to question the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Comm. on Rules, supra note 1, at 52, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf.
[FN97]. Proposed Rule 801(d)(2) would state:

An Opposing Party's Statement. The statement is offered against an opposing party and: (A) was made by the party in an individual or representative capacity; (B) is one that the party appeared to adopt or accept as true; (C) was made by a person whom the party authorized to make a statemen t agent or employee on a matter within the scope of that relationship and while it existed; or (E) was made by the party's coconspirator during and in furtherance of the conspiracy. The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).
Comm. on Rules, supra note 1, at 63, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf.
[FN98]. Anthony J. Bocchino & David A. Sonenshein, A Practical Guide to Federal Evidence: Objections, Responses, Rules, & Practice Commentary 190-91 (9th ed. 2009).
[FN99]. Edmund M. Morgan, Basic Problems of Evidence 266 (1963); see also Paul C. Giannelli, Understanding Evidence 463 (3d ed. 2009).

[FN100]. See Milton v. United States, 110 F.2d 556, 560 (D.C. Cir. 1940); John H. Wigmore, A Student's Textbook of the law of Evidence 196-99 (1935).

[FN101]. The common law is replete with dozens of judicial references to "admissions of a party-opponent" prior to Rule 801(d)(2). See, e.g., Rader v. Lichtenthal, 306 F.2d 195, 197 n.3 (2d Cir. 1962); Erceg v. Fairbanks Exploration Co., 95 F.2d 850, 854 (9th Cir. 1938); Planters Mfg. Co. v. Prot. Mut. Ins. Co., 244 F. Supp. 721, 728 (N.D. Miss. 1965); Moore v. Sw. Sash & Door Co., 228 P.2d 993, 996 (Ariz. 1951); People v. Spriggs, 389 P.2d 377, 382 n.4 (Cal. 1964); Sims v. Hoff, 127 S.E. 2d 679, 682 (Ga. Ct. App. 1962); Sampson v. Vill. of Stickney, 180 N.E.2d 457, 460 (Ill. 1962); Smith v. Branscome, 248 A.2d 455, 460 (Md. 1968); In re Coburn, 174 N.W. 134, 137 (Mich. 1919); Henry v. Toney, 64 So. 2d 904, 907 (Miss. 1953); Bartlett v. Kansas City Pub. Serv. Co., 160 S.W.2d 740, 743 (Mo. 1942); Sheets v. Davenport, 150 N.W.2d 224, 229 (Neb. 1967); Anderson Feed & Produce Co. v. Moore, 401 P.2d 964, 967 (Wash. 1965); Liljeblom v. Dept. of Labor & Indus., 356 P.2d 307, 313 (Wash. 1960).

[FN102]. Model Code of Evid. R. 506-508 (1942) (referring to "admissions"); Unif. R. of Evid. 63 (1953) (amended 1999) (referring to "admissions by parties").

[FN103]. When first introduced in 1969, the rule which was enacted as Rule 801(d)(2) was entitled "Rule 8-01(c)(3) Admission by party-opponent." Preliminary Draft of Proposed Rules of Evidence for the U.S. Dist. Courts & Magistrates, R. 8-01(c)(3), 46 F.R.D. 161, 332 (proposed Mar. 1969). Rule 801(d)(2), along with all Federal Rules of Evidence, was amended in 1987 to render the language gender-neutral, see Scallen, supra note 1, at 610; such amendment, however, did not affect the language "admission of party-opponent."

[FN104]. Ala. R. Evid. 801(d)(2); Alaska R. Evid. 801(d)(2); Ariz. R. Evid. 801(d)(2); Ark. R. Evid. 801(d)(2); Colo. R. Evid. 801(d)(2); Del. R. Evid. 801(d)(2); Haw. R. Evid. 803(a)(1); Idaho R. Evid. 801(d)(2); Iowa Code Ann. § 5.801(d)(2) (West 2002); Me. R. Evid. 801(d)(2); Mich R. Evid. 801(d)(2); Miss. R. Evid. 801(d)(2); Mont. R. Evid. 801(d)(2); N.H. R. Evid. 801(d)(2); N.M. R. Evid. 11-801(D)(2); N.C. R. Evid. § 8C-1, Rule 801(d); N.D. R. Evid. 801(d)(2); Pa. R. Evid. 803(25); S.C. R. Evid. 801(d)(2); Tenn. R. Evid. 803(1.2); Tex. R. Evid. 801(e)(2); Utah R. Evid. 801(d)(2); Vt. R. Evid. 801(d)(2); Wash. R. Evid. 801(d)(2); W. Va. R. Evid. 801(d)(2); Wis. Stat. Ann. § 908.01(4)(b) (West 2009); Wyo. R. Evid. 801(d)(2).

[FN105]. Reference to the phrase "admission of party-opponent" independent of a restatement of Federal Rule 801(d)(2) or its state law counterparts is almost nonexistent. See supra note 104.

[FN106]. See, e.g., Johnson v. Weld Co., Colo., 594 F.3d 1202, 1208 (10th Cir. 2010); Nooner v. Norris, 594 F.3d 592, 603 (8th Cir. 2010); Al-Bihani v. Obama, 590 F.3d 866, 879 (D.C. Cir. 2010); Smith v. Allentown, 589 F.3d 684, 693 (3d Cir. 2009); Pinholster v. Ayers, 590 F.3d 651, 704 (9th Cir. 2009); Harris v. State, 301 S.W.3d 141, 157 (Tenn. 2010); Hutchinson v. Taft, 222 P.3d 1250, 1257 (Wyo. 2010).

[FN107]. United States v. Matlock, 415 U.S. 164, 172 (1974) (finding declaration of opposing party admissible for any inference which trial court could reasonably draw from statement regarding any issue involved in case).

[FN108]. See United States v. McDaniel, 398 F.3d 540, 545 n.2 (6th Cir. 2005) (noting that admissibility of statement under Rule 801(d)(2) does not hinge on whether or not statement is against party-declarant's interest); see also United States v. Turner, 995 F.2d 1357, 1363 (6th Cir. 1993) (finding that Rule 801(d)(2) does not limit an admission to a statement against interest); Marquis Theatre Corp. v. Condado Mini Cinema, 846 F.2d 86, 90 n.3 (1st Cir. 1988) (finding that statements against interest must only be made as a hearsay exception).

[FN109]. Preliminary Draft of Proposed Rules of Evidence For the U.S. Dist Courts & Magistrates, R. 8-01(c)(3), 46 F.R.D. 161, 332 (proposed Mar. 1969).

[FN110]. Id.; Fed. R. Evid. 801(d)(2).

[FN111]. The pertinent part of Rule 404(a) provides, "Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes (a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ." Fed R. Evid. 404(a).

[FN112]. Proposed Rule 404(a) provides in pertinent part, "Rule 404. Character Evidence; Crimes or Other Acts (a) Character Evidence. (1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." Comm. on Rules, supra note 1, at 21, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf.

[FN113]. The full text of Rule 406 provides:

> Rule 406. Habit; Routine Practice[.] Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Fed. R. Evid. 406.

[FN114]. The full text of Proposed Rule 406 provides:

> Rule 406. Habit; Routine Practice[.] Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

Comm. on Rules, supra note 1, at 24, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf.

[FN115]. See Fed. R. Evid. 406; Comm. on Rules, supra note 1, at 24, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf.

[FN116]. Rule 404(a) as adopted differs from the language included in the original proposed rule of 1969, entitled "Rule 4-04." That language provided, "for the purpose of proving that he acted in conformity therewith on a particular occasion[.]" Preliminary Draft of Proposed Rules of Evidence for the U.S. Dist. Courts & Magistrates, R. 4-04, 46 F.R.D. 161, 227 (proposed Mar. 1969). Although Rule 404(a) was amended in 1987 to render it gender-neutral and again in 2000, neither amendment altered the phrase "action in conformity therewith." See Fed. R. Evid. 404(a) advisory committee's notes.

[FN117]. See, e.g., Wilson & Co. v. United States, 15 F. Supp. 332, 347 (Ct. Cl. 1936) ("[T]he filing of the consolidated and information returns and the subsequent acts of the parties in conformity therewith are clearly sufficient to establish an implied agreement[.]"); Lippert v. Comm'r, 11 T.C. 783, 787 (Tax Ct. 1948) ("[T]his Court

recognized that the mere signing of a partnership agreement, followed by acts in conformity therewith, was sufficient to constitute a taxable gift[.]").

[FN118]. Model Code of Evid. R. 304-306 (1942); Unif. Rules Evid. 47, 49 (1953) (amended 1999).

[FN119]. The phrase is quoted by thousands of courts applying Rule 404(a) or its state law equivalent. See, e.g., United States v. Wheeler, 349 F. App'x 92, 95 (6th Cir. 2009); United States v. Gallo-Moreno, 584 F.3d 751, 756 (7th Cir. 2009); United States v. Thelisma, 356 F. App'x 217, 219 (11th Cir. 2009); United States v. Turner, 583 F.3d 1062, 1065 (8th Cir. 2009); United States v. Farmer, 583 F.3d 131, 135 (2d Cir. 2009); ; United States v. Niemi, 579 F.3d 123, 128 (1st Cir. 2009); United States v. Jenkins, 347 F. App'x 793, 798 (3d Cir. 2009); Boyd v. San Francisco, 576 F.3d 938, 946-47 (9th Cir. 2009); United States v. Clark, 577 F.3d 273, 288 (5th Cir. 2009).

[FN120]. See supra notes 111 and 113 and accompanying text.

[FN121]. See Fed. R. Evid. 404(a), 406.

[FN122]. See Comm. on Rules, supra note 1, available at http:// www.uscourts.gov/rules/newrules6.htm, and accompanying text.

[FN123]. See id. at 78 (Proposed Rule 901), available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf.

[FN124]. The full text of Rule 901(b)(2) provides, "(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation." Fed. R. Evid. 901(b)(2).

[FN125]. The full text of Proposed Rule 901(b)(2) provides, "(2) Nonexpert Opinion About Handwriting. A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation." Comm. on Rules, supra note 1, at 78 (Proposed Rule 901), available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf.

[FN126]. The phrase was never used at common law relating to handwriting comparisons, although it was used sparingly at common law when referring to a party's attempt to gain an interest in litigation or to gain citizenship for jurisdictional purposes by taking up domicile in a favorable state. See, e.g., Chase v. Austrian, 189 F.2d 555, 557 (4th Cir. 1951); Williams v. Metro. St. Ry. Co., 74 P. 600, 603 (Kan. 1903); Newburg Petro. Co. v. Weare, 27 Ohio St. 343, 351 (1875); Lankford v. Menefee, 145 P. 375, 385 (Okla. 1914); Gascue v. Saralegui Land & Livestock Co., 255 P.2d 335, 338 (Nev. 1953); . Additionally, the concept was not included in either the Model Code of Evidence or the Uniform Rules of Evidence.

[FN127]. Rule 901(b)(2) was first introduced in 1969 as "Rule 9-01(b)(2)," Preliminary Draft of Proposed Rules of Evidence for the U.S. Dist. Courts & Magistrates, R. 9-01(b)(2), 46 F.R.D. 161, 392 (proposed Mar. 1969), and has not since been amended. Fed. R. Evid. 901(b)(2) advisory committee's notes.

[FN128]. Fewer than forty published decisions have relied on this language since the enactment of Rule 901(b)(2). See, e.g., Brown v. State, 965 So. 2d 1023, 1028 (Miss. 2007); State v. Dewitz, 212 P.3d 1040, 1049 (Mont. 2009); Foster v. State, 224 P.3d 1, 4 (Wyo. 2010).

[FN129]. See Comm. on Rules, supra note 1, at 78, (Proposed Rule 901), available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf.

[FN130]. See, e.g., Strother v. Lucas, 31 U.S. 763, 767 (1832) (holding that evidence by comparison of hands is not admissible when witness has had no previous knowledge of handwriting, but is called upon to testify merely from comparison of hands); United States v. Samet, 466 F.3d 251, 254 (2d Cir. 2006) (holding that witness must have familiarity with handwriting which has not been acquired solely for purposes of litigation at hand).

[FN131]. See Comm. on Rules, supra note 1, available at http:// www.uscourts.gov/rules/newrules6.htm, and accompanying text.

[FN132]. See infra Part IV for a discussion of potential improvements to unrevised sacred phrases.

[FN133]. See Comm. on Rules supra note 1, at Preface and accompanying text (memorandum to the bench, bar and public explaining the goal of the restyling effort "to simplify, clarify, and make more uniform all of the federal rules of practice, procedure, and evidence") available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/Memo_Bench_ EV.pdf.

[FN134]. See Comm. on Rules supra note 1, at 8, and accompanying text, available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf (committee note for Proposed Rule 101 describing "sacred phrases" as phrases in rules "that have become so familiar in practice that to alter them would be unduly disruptive").

[FN135]. Proposed Rule 403 provides:

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons[.] The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.
Comm. on Rules, supra note 1, at 20, (Proposed Rule 403), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_ Rules.pdf. The existing rule provides: Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time[.] Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
Fed. R. Evid. 403.

[FN136]. See, e.g., Int'l Shoe Mach. Corp. v. United Shoe Mach. Corp., 315 F.2d 449, 459 (1st Cir. 1963); Loew's Inc. v. Cole, 185 F.2d 641, 661 (9th Cir. 1950); Morris Stulsaft Found. v. Super. Ct. of San Fransisco, 54 Cal. Rptr. 12, 19 (Dist. Ct. App. 1966); State v. Bigner, 112 So. 303, 303 (La. 1927); Bedenk v. St. Louis Pub. Serv. Co., 285 S.W.2d 609, 615 (Mo. 1955); Bunten v. Davis, 133 A. 16, 20 (N.H. 1926); Commonwealth v. Johnson, 81 A.2d 569, 577 (Pa. 1951); State v. Whitener, 89 S.E.2d 701, 712 (S.C. 1955); Sherwin-Williams Co. v. Perry Co., 424 S.W.2d 940, 947 (Tex. Civ. App. 1968); State v. Lantzer, 99 P.2d 73, 76 (Wyo. 1940).

[FN137]. Model Code of Evidence Rule 303(1) presented its balancing test as follows:

(1) The judge may in his discretion exclude evidence if he finds that its probative value is outweighed by the risk that its admission will
(a) necessitate undue consumption of time, or
(b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or
(c) unfairly surprise a party who has not had reasonable ground to anticipate that such evidence would be offered.

Model Code of Evid. R. 303(1) (1942). Uniform Rule of Evidence 45 set forth a balancing test providing: Except as in these rules otherwise provided, the judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered.
Unif. R. Evid. 45 (1953) (amended 1999).

[FN138]. Rule 403 was introduced as Rule 4-03, Preliminary Draft of Proposed Rules of Evidence for U.S. Dist. Courts & Magistrates, R. 4-03, 46 F.R.D. 161, 225 (proposed Mar. 1969), and the language has remained unchanged since then. Fed. R. Evid. 403 advisory committee's note.

[FN139]. See, e.g., Clark v. Arizona, 548 U.S. 735, 793-94 (2006); Old Chief v. United States, 519 U.S. 172, 180, 182-83 (1997); Altman v. Bobcat Co., 349 F. App'x 758, 763 (3d Cir. 2009); United States v. Wheeler, 349 F. App'x 92, 95 (6th Cir. 2009); United States v. Thelisma, 356 F. App'x 217, 219 (11th Cir. 2009); United States v. Mendoza, 346 F. App'x 112, 115 (7th Cir. 2009); United States v. Bunchan, 580 F.3d 66, 71 (1st Cir. 2009); United States v. Keiser, 578 F.3d 897, 904 (8th Cir. 2009); United States v. Pursley, 577 F.3d 1204, 1226 (10th Cir. 2009); United States v. Higuera-Llamos, 574 F.3d 1206, 1209 (9th Cir. 2009); United States v. Clark, 577 F.3d 273, 287 (5th Cir. 2009); United States v. Mercado, 573 F.3d 138, 142 (2d Cir. 2009); United States v. Kamoru, 320 F. App'x 199, 200 (4th Cir. 2009).

[FN140]. Ala. R. Evid. 403; Alaska R. Evid. 403; Ariz. R. Evid. 403; Colo R. Evid. 403; Conn. Code Evid. § 4-3; Del. R. Evid. 403; Fla. Stat. Ann. § 90.403 (West 2009); Haw. R. Evid. 403; Idaho R. Evid. 403; Ind. R. Evid. 403; Iowa Code Ann. § 5.403 (West 2002); La. Code Evid. Ann. art. 403; Me. R. Evid. 403; Md. R. Evid. 5-403; Mich R. Evid. 403; Minn. R. Evid. 403; Miss. R. Evid. 403; Mont. R. Evid. 403; Neb. Rev. Stat. Ann. § 27-403 (Lexis 2009); f2Nev. Rev. Stat. § 48.035 (2009); N.H. R. Evid. 403; N.M. R. Evid. 11-403; N.C. R. Evid. § 8C-1, Rule 403; N.D. R. Evid. 403; Ohio R. Evid. 403; Okla. Stat. Ann. tit. 12, § 2403 (West 2009); Or. Rev. Stat. § 40.160 (2009); Pa. R. Evid. 403; R.I. R. Evid. 403; S.C. R. Evid. 403; S.D. Codified Laws § 19-12-3 (2010); Tenn. R. Evid. 403; Tex. R. Evid. 403; Utah R. Evid. 403; Vt. R. Evid. 403; Wash. R. Evid. 403; W. Va. R. Evid. 403; Wis. Stat. Ann. § 904.03 (West 2009); Wyo. R. Evid. 403.

[FN141]. Fed. R. Evid. 403 advisory committee's note.

[FN142]. See, e.g., United States v. McCallum, 584 F.3d 471, 476 (2d Cir. 2009); Dream Games of Ariz., Inc. v. PC Onsite, 561 F.3d 983, 993 (9th Cir. 2009); Wright v. State, 19 So. 3d 277, 296 (Fla. 2009); State v. Cromer, 765 N.W.2d 1, 9 (Iowa 2009); State v. Garcell, 678 S.E.2d 618, 633 (N.C. 2009); State v. Stokes, 673 S.E.2d 434, 441 (S.C. 2009).

[FN143]. Fed. R. Evid. 403 advisory committee's note.

[FN144]. See supra note 1, at Preface and accompanying text (memorandum to the bench, bar and public explaining the goal of the restyling effort "to simplify, clarify, and make more uniform all of the federal rules of practice, procedure, and evidence"), available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/Memo_Bench_ EV.pdf.

[FN145]. See Vincent DiCarlo, A Summary of the Rules of Evidence: Essential Tools for Survival in Court and Arbitration, Prac. L. Inst., at 155, 178 (Aug. 2003).

[FN146]. The current rule provides, "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c).

[FN147]. See, e.g., Strickland v. Poole, 1 U.S. 14, 14 (1765); Albertson v. Robeson, 1 U.S. 9, 9 (1764).

[FN148]. See, e.g., Anderson v. United States, 417 U.S. 211, 220 (1974); Busby v. United States, 296 F.2d 328, 332 (9th Cir. 1961); Thompson v. Norman, 424 P.2d 593, 598 (Kan. 1967); Greenwald v. State, 157 A.2d 119, 125 (Md. 1960); City of Seattle v. Bryan, 333 P.2d 680, 682 (Wash. 1958).

[FN149]. See, e.g., United States v. Perlstein, 120 F.2d 276, 282-83 (3d Cir. 1941); Terry v. United States, 51 F.2d 49, 52 (4th Cir. 1931); Greater N.Y. Live Poultry Chamber of Commerce v. United States, 47 F.2d 156, 159 (2d Cir. 1931); People v. Kynette, 104 P.2d 794, 806 (Cal. 1940); Duren v. State, 124 S.E. 343, 344-45 (Ga. 1924); Fitzgerald v. State, 72 S.E. 541, 543 (Ga. App. 1911); ; Commonwealth v. Britland, 15 N.E.2d 657, 660 (Mass. 1938); In re Thomasson's Estate, 148 S.W.2d 757, 763 (Mo. 1941); In re Roeder's Estate, 103 P.2d 631, 633 (N.M. 1940); Kutchera v. Minneapolis, St. Paul to Sault Ste. Marie Ry. Co., 212 N.W. 51, 57 (N.D. 1926); Chicago, Rock Island & Pac. Ry. Co. v. Jackson, 162 P. 823, 828-29 (Okla. 1917); Evans v. Pa. Mut. Life Ins. Co. of Phila., 186A. 133, 139 n.13 (Pa. 1936); Brown v. State, 169 S.W. 437, 453 (Tex. Crim. App. 1913); Mower v. Mower, 228 P. 911, 914 (Utah 1924); Hartford v. Faw, 7 P.2d 4, 6 (Wash. 1932); State v. Paun, 155 S.E. 656, 657 (W. Va. 1930); State v. Rotolo, 270 P. 665, 667 (Wyo. 1928).

[FN150]. Model Code of Evidence Rule 501(2) defined hearsay as "a statement of which evidence is offered as tending to prove the truth of the matter intended to be asserted or assumed to be so intended[.]" Model Code of Evid. R. 501(2) (1942). Uniform Rule of Evidence 63 defined hearsay evidence as "[e]vidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated [.]" Unif. R. Evid. 63 (1953) (amended 1999).

[FN151]. Rule 801(c) was introduced as Rule 8-01(c), Preliminary Draft of Proposed Rules of Evidence for U.S. Dist. Courts & Magistrates, R. 8-01(c), 46 F.R.D. 159 (proposed Mar. 1969), and the language has remained unchanged since then. Fed. R. Evid. 801(c) advisory committee's note.

[FN152]. See, e.g., Smith v. City of Allentown, 589 F.3d 684, 693-94 (3d Cir. 2009); Alaniz v. Zamora-Quezada, 591 F.3d 761, 775 (5th Cir. 2009); United States v. Martinez, 588 F.3d 301, 310-11 (6th Cir. 2009); Barlow v. Thompson, 221 P.3d 998, 1004 n.19 (Alaska 2009); People v. Ervine, 220 P.3d 820, 847 (Cal. 2009); State v. Watkins, 224 P.3d 485, 490 (Idaho 2009); State v. Daly, 775 N.W.2d 47, 67 (Neb. 2009); State v. Grant, 776 N.W.2d 209, 213 (N.D. 2009).

[FN153]. Ala. R. Evid. 801(c); Alaska R. Evid. 801(c); Ariz. R. Evid. 801(c); Ark. R. Evid. 801(c); Colo. R. Evid. 801; Conn. Code Evid. § 8-1; Del. R. Evid. 801(c); Fla. Stat. Ann. §90.801(c) (West 2009); Haw. R. Evid. 801; Idaho R. Evid. 801(c); Ind. R. Evid. 801(c); Iowa Code Ann. § 5.801(c) (West 2002); La. Code Evid. Ann. art. 801(C) (2006); Me. R. Evid. 801(c); Md. R. Evid. 5-801(c); Mich. R. Evid. 801(c); Minn. R. Evid. 801(c); Miss. R. Evid. 801(c); Mont. R. Evid. 801(c); Neb. Rev. Stat. Ann. § 27-801(3) (Lexis 2009); Nev. Rev. Stat. § 51.0135 (2009); N.H. R. Evid. 801(c); N.J. R. Evid. 801(c); N.M. R. Evid. 11-801(C); N.C. R. Evid., § 8C-1, Rule 801(c); N.D. R. Evid. 801(c); Ohio R. Evid. 801(c); Okla. Stat. Ann. tit. 12, § 2801(3) (West 2009); Or. Rev. Stat. Ann. § 40.450(3) (West 2009); PA. R. Evid. 801(c); R.I. R. Evid. 801(c); S.C. R. Evid. 801(c); S.D. Codified Laws § 19-16-1(3) (2009); Tenn. R. Evid. 801(c); Tex. R. Evid. 801(d); Utah R. Evid. 801(c); Vt. R. Evid. 801(c); Wash. R. Evid. 801(c); W. Va. R. Evid. 801(c); Wis. Stat. Ann. § 908.01(3) (West 2009); Wyo. R. Evid. 801(c).

[FN154]. Proposed Rule 801(c) retains the phrase "truth of the matter asserted," although the remainder of Rule 801(c) has been restyled: "Hearsay. 'Hearsay' means a prior statement-one the declarant does not make while testifying at the current trial or hearing-that a party offers in evidence to prove the truth of the matter asserted by the declarant." Comm. on Rules, supra note 1, at 62, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf.

[FN155]. See Comm. on Rules, supra note 1, at Preface, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/Memo_Bench_ EV.pdf (committee memo).

[FN156]. See Comm. on Rules, supra note 1, at 8, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/EV_Report.pdf (discussing the Committee's reluctance to make substantive changes to the rules, which included changing familiar "sacred phrases" of evidence).

[FN157]. See infra Part V.B for suggested improvements to Rule 801(c).

[FN158]. See Comm. on Rules, supra note 1, at 7, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/EV_Report.pdf (discussing the Committee's reluctance to make "substantive" changes to the rules).

[FN159]. See Comm. on Rules, supra note 1, at 8, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf (comparing the proposed changes to the hearsay rule with the old rule).

[FN160]. Proposed Rule 609(b) retains the phrase "substantially outweighs its prejudicial effect," although the remainder of the rule has been restyled:

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

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect. . . .
Comm. on Rules, supra note 1, at 47, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf (comparing the proposed changes to the Rule 609 with the old version of the rule). The pertinent portion of the current rule provides: Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.
Fed. R. Evid. 609(b).

[FN161]. The phrase "substantially outweighs its prejudicial effect" did not even appear in Rule 6-09 as proposed in 1969. Preliminary Draft of Proposed Rules of Evidence for the U.S. Dist. Courts & Magistrates, R. 6-09, 46 F.R.D. 161, 296 (proposed Mar. 1969). Moreover, only two cases ever used similar language prior to 1969. E.g., U.S. v. Phillips, 401 F.2d 301, 306 (7th Cir. 1968) (applying balancing test to determine admissibility of prior crime); People v. Forbs, 39 Cal. Rptr. 171, 176-77 (Cal. Dist. Ct. App. 1964) (applying balancing test to determine admissibility of photographs).

[FN162]. The Model Code of Evidence used the phrase "illegitimate prejudice" in reference to general relevance, Model Code Evid. R. 106 advisory committee's note (b) (1942), while the Uniform Rules of Evidence used the term "undue prejudice" in evaluating the admissibility of prior crimes. Unif. R. Evid. 403 (1953) (amended 1999). In 1974, the Uniform Rules of Evidence were amended to refer to "prejudicial effect," in keeping with the forthcoming Federal Rules of Evidence. Unif. R. Evid. 403 (1974) (amended 1999). Interestingly, however, the rule was amended again in 1999 to replace "prejudicial effect" with "unfair prejudice." Unif. R. Evid. 45 (1999).

[FN163]. See, e.g., Schmude v. Tricam Indus. Inc., 556 F.3d 624, 626-27 (7th Cir. 2009); United States v. Nguyen, 542 F.3d 275, 278 (1st Cir. 2008); Simpson v. Thomas, 528 F.3d 685, 689 (9th Cir. 2008); United States v. Eagle, 515 F.3d 794, 804 (8th Cir. 2008); United States v. Ware, 230 F. App'x. 249, 254 (4th Cir. 2007); United States v. Williams, 472 F.3d 81, 87 (3d Cir. 2007); United States v. Walthour, 202 F. App'x. 367, 371 (11th Cir. 2006); United States v. Cox, 159 F. App'x. 654, 658 (6th Cir. 2005); United States v. Avants, 367 F.3d 433, 448 (5th Cir. 2004); United States v. Varnedore, 73 F. App'x. 356, 362 (10th Cir. 2003); United States v. Brown, 603 F.2d 1022, 1027-28 (1st Cir. 1979); United States v. Cathey, 591 F.2d 268, 275 (5th Cir. 1979); United States v. Sims, 588 F.2d 1145, 1148 (6th Cir. 1978); United States v. Cobb, 588 F.2d 607, 612 (8th Cir. 1978).

[FN164]. See, e.g., Md. R. Evid. 5-609(a); Wis. Stat. Ann. § 906.09 (West 2009).

[FN165]. Fed. R. Evid. 609(b); Unif. R. Evid. 403 (1999); Unif. R. Evid. 412 (1999).

[FN166]. Comm. on Rules, supra note 1, at 7, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf.

[FN167]. See infra Part V.D for suggested revisions to Rule 606(b).

[FN168]. In its current form, Rule 606(b) provides, "Inquiry into validity of verdict or indictment. . . . But a juror may testify about . . . (2) whether any outside influence was improperly brought to bear upon any juror[.]" Fed. R. Evid. 606(b). Proposed Amendment 606(b) retains the phrase "outside influence was improperly brought to bear on any juror," although the remainder of the rule has been restyled: "During an Inquiry into the Validity of a Verdict or Indictment (2) Exceptions. A juror may testify about whether: (B) an outside influence was improperly brought to bear on any juror[.]" Comm. on Rules, supra note 1, at 44, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf.

[FN169]. See Simmons v. United States, 142 U.S. 148, 154 (1891) ("There can be no condition of things in which the necessity for the exercise of this power is more manifest, in order to prevent the defeat of the ends of public justice, than when it is made to appear to the court that, either by reason of facts existing when jurors were sworn, but not then disclosed or known to the court, or by reason of outside influences brought to bear on the jury pending

the trial, the jurors, or any of them, are subject to such bias or prejudice as not to stand impartial between the government and the accused.").

[FN170]. See, e.g., Stocks v. State, 18 S.E. 847, 848 (Ga. 1893); State v. Hansford, 92 P. 551, 553 (Kan. 1907); In re Ascher, 90 N.W. 418, 422 (Mich. 1902); McInnis v. State, 57 So. 2d 137, 140 (Miss. 1952); State v. Romeo, 203 A.2d 23, 27 (N.J. 1964); Green v. State, 247 S.W. 84, 88 (Tenn. 1923); Mack v. Commonwealth, 15 S.E. 2d 62, 65 (Va. 1941) (illustrating limited use of the phrase "outside influence was improperly brought to bear"). The phrase "outside influence was improperly brought to bear" was not included in the Preliminary Draft of the Federal Rules of Evidence in 1969. Preliminary Draft of Proposed Rules of Evidence for the U.S. Dist. Courts & Magistrates, R. 6-06(b), 46 F.R.D. 161, 289 (proposed Mar. 1969).

[FN171]. See, e.g., United States v. Villar, 586 F.3d 76, 82-86 (1st Cir. 2009); United States v. Jackson, 549 F.3d 963, 984 (5th Cir. 2008); United States v. Odunze, 278 F. App'x 567, 573 (6th Cir. 2008); Estrada v. Scribner, 512 F.3d 1227, 1236-37 (9th Cir. 2008); United States v. Lakhani, 480 F.3d 171, 184-85 (3d Cir. 2007); United States v. Reithemeyer, 206 F. App'x 644, 646 (8th Cir. 2006); eld HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=6538&FindType=Y&ReferencePositionType=S&SerialNum=2007287491&ReferencePosition=945" United States v. Barber, 147 F. App'x 941, 945-46 (11th Cir. 2005); Biocore, Inc. v. Khosrowshahi, 80 F. App'x 619, 625-26 (10th Cir. 2003); Bell v. Ozmint, 332 F.3d 229, 235 (4th Cir. 2003); United States v. Lanas, 324 F.3d 894, 903 (7th Cir. 2003); United States v. Schwarz, 283 F.3d 76, 98 (2d Cir. 2002) (discussing significant use of Rule 606(b) in the last ten years).

[FN172]. See Comm. on Rules, supra note 1, at 41, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf.

[FN173]. See infra Part V.D for suggested revisions to Rule 606(b).

[FN174]. Comm. on Rules, supra note 1, at 8, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf (defining curriculum to be considered a "sacred phrase").

[FN175]. Id.

[FN176]. Id.

[FN177]. Id.

[FN178]. See generally Comm. on Rules, supra note 1 (illustrating no evidence or reasoning for creating the "sacred phrase").

[FN179]. See Comm. on Rules, supra note 1, at 8, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf.

[FN180]. If the Advisory Committee considered the significance of the language after it was incorporated into the Federal Rules of Evidence, it would provide no assistance in evaluating whether a phrase is "sacred" because nearly every phrase in the Federal Rules of Evidence has enjoyed significance since 1969 simply because the language is codified in the Rules themselves.

[FN181]. See Comm. on Rules, supra note 1, at 63 available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf. For a discussion of the historical significance of the phrase "admission by party-opponent," see supra Part III.A.2.

[FN182]. See supra note 150.

[FN183]. See supra note 153 (illustrating use and frequency of the phrase "admission by a party opponent").

[FN184]. See Comm. on Rules, supra note 1, at 63, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf.

[FN185]. The Advisory Committee proposed no changes to Rules 403, 609(b), or 606(b). See Comm. on Rules, supra note 1, at 20, 44, 47, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf. For a discussion of the historical significance of the phrase "unfair prejudice," see supra Part III.B.1. For a discussion of the historical significance of the phrase "substantially outweighs its prejudicial effect," see supra Part III.B.3. For a discussion of the historical significance of the phrase "outside influence brought to bear," see supra Part III.B.4.

[FN186]. For a discussion of the goals of the restyling effort, see supra note 46 and accompanying text. For a discussion of how maintaining the language of Rule 403 fails to satisfy the goals of the restyling effort, see supra Part III.B.1. For a discussion of how maintaining the language of Rule 609(b) fails to satisfy the goals of the restyling effort, see supra Part III.B.3. For a discussion of how maintaining the language of Rule 606(b) fails to satisfy the goals of the restyling effort, see supra Part III.B.4.

[FN187]. See Comm. on Rules, supra note 1, at 20, 44, 47, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_ Rules.pdf.

[FN188]. See supra Part III.B.3 for a discussion of the historical significance of Rule 609(b).

[FN189]. See supra Part III.B.I for a discussion of the historical significance of Rule 403. See supra Part III.B.4 for a discussion of the historical significance of Rule 606(b).

[FN190]. See Comm. on Rules, supra note 1, at 8, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf.

[FN191]. Id.

[FN192]. See Comm. on Rules, supra note 1, at 8, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf.

[FN193]. See generally Comm. on Rules, supra note 1, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/Memo_Bench_ EV.pdf.

[FN194]. See Mark R. Kravitz, To Revise, or Not to Revise: That is the Question, 87 Denv. U. L. Rev. 213, 219-220 (2010) (discussing the effect of rule changes on practitioners).

[FN195]. Id.

[FN196]. Id.

[FN197]. See Comm. on Rules, supra note 1, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/Memo_Bench_ EV.pdf.

[FN198]. See Kravitz, supra note 194, at 223.

[FN199]. Id.

[FN200]. See Comm. on Rules, supra note 1, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/Memo_Bench_ EV.pdf.

[FN201]. Id.

[FN202]. So, how did the Advisory Committee make its determinations? It is quite possible that it considered the level of perceived need for a revision to a Rule, as well as the available methods for improving the Rule. Such

considerations, however, are well outside the parameters set by the Committee itself for classifying sacred phrases: those phrases so familiar that to alter them would be unduly disruptive. See Comm. on Rules, supra note 1, at 8, available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf. Even if these were legitimate criteria, considering them in hindsight does not reveal any consistency in the Advisory Committee's classifications of phrases as "sacred" or not. The Advisory Committee suggested amendments to Rules which could greatly benefit from revision, as well as those for which there was a much less pressing need for revision. By the same token, it recommended revision to Rules from which the benefits also spread across the spectrum. For example, the Advisory Committee suggested amending Rule 603, although the only improvement to be made was to be more succinct. See supra Part III.A.1, while it suggested no revision to Rule 609(b), which demonstrates an actual inconsistency of language among other rules, see supra Part III.B.3, or to Rule 801(c), which maintains archaic and confusing language that is difficult to understand, see supra Part III.B.2. If the motivation for classifying a phrase as sacred was the degree of benefit the amendment would confer, than the Committee would have sought to amend Rules 609(b) and 801(c) before attending to Rule 603.

[FN203]. See supra note 46 and accompanying text.

[FN204]. See Kravitz, supra note 194, at 224.

[FN205]. See Comm. on Rules, supra note 1, available at http:// www.uscourts.gov/rules/newrules6.htm, and accompanying text.

[FN206]. Id.

[FN207]. See Comm. on Rules, supra note 1, at 8, available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf.

[FN208]. Fed. R. Evid. 403 advisory committee's note.

[FN209]. Fed. R. Evid. 403

[FN210]. See Comm. on Rules, supra note 1, at 1, available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/Memo_Bench_BK_ CR.pdf

[FN211]. Fed. R. Evid. 801(c).

[FN212]. See Comm. on Rules, supra note 1, at 8, available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf.

[FN213]. See Fed. R. Evid. 801(c).

[FN214]. See id.

[FN215]. See Fed. R. Evid. 801(c); supra note 154 for the full text of Proposed Amendment 801(c).

[FN216]. See Fed. R. Evid. 403, 412, 609(b).

[FN217]. See, e.g., United States v. Thomas, 914 F.2d 139, 143 (8th Cir. 1990); United States v. Sims, 588 F.2d 1145, 1149 (6th Cir. 1978); United States v. Mahler, 579 F.2d 730, 734-35 (2d Cir. 1978); United States v. Shapiro, 565 F.2d 479, 481 (7th Cir. 1977).

[FN218]. See Fed. R. Evid. 609(b).

[FN219]. See supra note 46 and accompanying text.

[FN220]. See Fed. R. Evid. 609(d).

[FN221]. See supra note 46 and accompanying text.

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TAB III-B.

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Article

*1407 SHOULD OREGON ADOPT THE NEW FEDERAL RULES OF EVIDENCE?

Tom Lininger [FNa1]

***1408** In recent years, a growing number of states have restructured their evidence codes to emulate the Federal Rules of Evidence (FRE). [FN1] When Illinois adopted the federal model for the first time in the fall of 2010, [FN2] the total number of states following the basic structure of the FRE increased to forty-three. [FN3] Only California, the District of Columbia, Georgia, Kansas, Massachusetts, Missouri, New York, and Virginia have organized their evidence rules in a manner distinct from the basic framework of the FRE. [FN4]

Typically states borrow about ninety percent of the language in the FRE. [FN5] These states follow the macro-level structure of the FRE, but they adapt individual rules to suit local preferences. [FN6] In Oregon, approximately twenty-four individual rules depart significantly from their federal counterparts. [FN7] The similarities between the Oregon Evidence Code (OEC) and the FRE are more noteworthy than the differences. [FN8] Indeed, the appellate courts in Oregon rely extensively ***1409** on federal court decisions as persuasive authority in interpreting the OEC. [FN9]

The trend toward uniformity in state evidence codes will likely build momentum if the U.S. Supreme Court approves the "restyled" version of the FRE as expected in May 2011. [FN10] This approval will culminate a five-year effort to simplify the FRE without changing the substantive meaning of the rules. [FN11] The restyled FRE will provide a more attractive template for the states, and it may help to win over converts among state legislators and judges who disliked the turgid language of the old FRE.

The restyling coincides with increasing pressures on states to adopt standardized rules of evidence. The states' economies are growing more interdependent. Legal practice is more likely than ever to extend across state lines. [FN12] The number of pro se litigants is growing, [FN13] and they are demanding straightforward, standardized ***1410** rules. Indeed, the time is ripe for uniform acceptance of the restyled FRE. [FN14]

Yet, chances are good that Oregon will buck the trend and resist the wholesale adoption of the restyled FRE, at least in the near term. Oregon is a maverick state. [FN15] Oregon was slow to adopt national templates in other areas of the law such as civil procedure [FN16] and legal ethics. [FN17] Led by politicians who proudly proclaim that they are "as independent as Oregon," [FN18] this state is unlikely to track national trends simply for the sake of conformity. Oregon legislators will ***1411** carefully evaluate whether the restyled FRE are a good fit for the state's unique legal system, not whether the new rules work well elsewhere.

This essay explores whether Oregon should adopt the restyled FRE, and if so, to what extent. Part I analyzes the most important differences between the present versions of the OEC and the FRE. (This Part may be useful to students who need to memorize the unique features of the OEC in order to prepare for the Oregon Bar Exam.) Part II considers the primary reasons why the Oregon rules have departed from the federal model over the last few decades. Part III explores the advantages of adopting the restyled federal rules. Part IV addresses the disadvantages of importing the restyled rules in the OEC. Part V suggests one possible compromise that would preserve the distinctive character of the OEC while benefiting from the improvements to the FRE.

I

The Distinctive Features of Oregon's Evidence Code

The OEC has diverged from the FRE in several respects. Some of these differences reflect deliberate policy judgments in 1981, when Oregon first considered the FRE and the closely related Uniform Rules of Evidence as models for Oregon's code. [FN19] Other differences are attributable to the timing of federal amendments since 1981; Oregon does not systematically update its evidence code to incorporate every new addition to the FRE, so federal rules added after 1981 do not always appear in the OEC. [FN20]

***1412** Whether the uniqueness of the OEC is purposeful or accidental, it is noteworthy in about twenty-four provisions. A summary of these provisions appears below. An explanation of the reasons for the distinctiveness of the OEC appears in Part II.

List of presumptions. While the FRE do not address presumptions from a substantive standpoint, OEC 311 lists a total of twenty-six presumptions, ranging from the presumption of intentionality ("A person intends the ordinary consequences of a voluntary act.") [FN21] to the dead man's presumption ("A person not heard from in seven years is dead."). [FN22]

Effect of a presumption in a criminal prosecution. OEC 309 emphasizes that the judge shall not direct the jury to find a presumed fact against the accused. [FN23]

Propensity evidence. OEC 404 generally mirrors FRE 404, except that a striking exception appears in OEC 404(4): propensity evidence is admissible in criminal cases if it is simply relevant. [FN24] OEC 404(4) indicates that relevant propensity evidence is still excludable in criminal cases pursuant to federal or state constitutional law, or pursuant to the policy exclusions in OEC 406-412, [FN25] which are similar to their federal counterparts. [FN26]

Pattern of abuse. In civil or criminal cases, OEC 404-1 allows evidence showing a pattern of abuse. Expert testimony on such abuse is also admissible. [FN27]

Rape shield law. OEC 412 gives greater protection to complainants than does its federal counterpart. FRE 412 allows the defendant to introduce evidence of his prior consensual sex with the complainant; [FN28] OEC 412, by contrast, allows such evidence only when necessary to show bias or motive on the part of the ***1413** complainant. [FN29] OEC 412 goes further than FRE 412 in excluding opinion or reputation evidence concerning the complainant's past sexual behavior, and in excluding evidence suggesting that the complainant's clothes invited the defendant's advances. [FN30]

List of privileges. While the FRE do not enumerate privileges, OEC 503-510 list several: the lawyer-client privilege, [FN31] the psychotherapist-patient privilege, [FN32] the physician-patient privilege, [FN33] the nurse-patient privilege, [FN34] the school employee-student privilege, [FN35] the social worker-client privilege, [FN36] the spousal privilege, [FN37] the clergy-penitent privilege, [FN38] the counselor-client privilege, [FN39] the stenographer-employer privilege, [FN40] the interpreter privilege, [FN41] and the informer privilege, [FN42] among others.

Exception for future violent crime. OEC 504-5 allows a lawyer to reveal his client's intent to commit a crime involving physical injury. [FN43] By contrast, the federal crime-fraud exception allows revelation of such information only when the client intends to commit a crime or fraud and the client is seeking to use the lawyer's services in furtherance of that crime or fraud. [FN44]

Prohibition of comments on privileges. OEC 513 prohibits lawyers from commenting to the jury about whether a witness has invoked a privilege. [FN45]

***1414** Qualification of a juror to testify. Both OEC 606 and FRE 606 prohibit a juror from testifying in the very trial in which she is serving as a juror. FRE 606 goes further, disqualifying a juror from testifying in a hearing concerning the jury's deliberations in the first trial. [FN46] OEC 606 does not include this restriction on subsequent testimony. [FN47]

Cross-examination of a witness about a specific unconvicted act. FRE 608(b) allows a cross-examining attorney to impeach with evidence of a specific unconvicted act bearing on truthfulness, so long as the attorney takes the answer of the witness. [FN48] OEC 608 is much more restrictive. Under Oregon's version, an attorney may not even elicit intrinsic evidence (i.e., admissions on cross) regarding a specific unconvicted act bearing on truthfulness. [FN49] In other words, Oregon lawyers generally need to impeach with convictions, not with unconvicted acts.

Time limit for convictions. OEC 609 allows impeachment with a conviction that is up to fifteen years old. [FN50] The time limit under FRE 609 is ten years. [FN51]

Impeachment of the accused with a prior act of domestic abuse. In prosecutions alleging violent crimes against household members, OEC 609 allows the government to impeach with misdemeanor convictions involving domestic violence, menacing, or harassment--even if these misdemeanors did not involve any sort of deceit. [FN52]

Impeachment with evidence of bias. OEC 609-1 specifically authorizes impeachment with evidence of bias. A subpoint of OEC 609-1 forbids additional evidence of bias after the impeached witness has fully admitted his bias. [FN53] The federal impeachment rules do not directly address bias, although evidence of bias is generally admissible under FRE 401. [FN54]

No rule authorizing the court to call a witness. The OEC has no counterpart to FRE 614, [FN55] which allows the judge to call and interrogate a witness.

***1415** No "Hinckley rule." Oregon lacks a version of FRE 704(b), which prohibits experts from opining on whether the accused had the requisite mens rea to commit the charged offense. [FN56] Congress added this provision to the FRE in 1984 after John Hinckley won a verdict of not guilty by reason of insanity in his prosecution for attempting to assassinate President Ronald Reagan. OEC 704 allows an expert witness to opine about the ultimate issue in any case, including a criminal case. [FN57]

No rule authorizing the appointment of an expert on the court's own motion. The OEC has no version of FRE 706, which allows the judge to select and appoint an expert witness on the judge's own initiative.

Deposition in the same case is exempted from the hearsay definition. Under OEC 801(4)(c), the definition of hearsay does not extend to a deposition taken in the same proceeding in order to preserve the testimony of a witness expected to be absent at trial. [FN58]

No hearsay exception for present sense impression. Oregon chose not to include a hearsay exception along the lines of FRE 803(1), which admits statements that immediately describe perception.

Hearsay exception for a complaint of child abuse or elder abuse. OEC 803(18a) [FN59] allows such hearsay statements if the declarant is available for cross-examination or, when the declarant is unavailable, if the statement bears sufficient indicia of reliability under a multi-factor test reminiscent of the reliability analysis pursuant to Ohio v. Roberts. [FN60] The rule includes a fifteen-day notice requirement. [FN61]

***1416** Procedure for remote testimony by a vulnerable witness. OEC 803(24) sets forth guidelines for a young child or developmentally disabled witness to testify from a remote location via closed-circuit television. An expert must demonstrate that the witness in question is substantially likely to suffer severe emotional or psychological harm if required to testify in open court. [FN62] Oregon has basically memorialized the requirements of Maryland v. Craig [FN63] in an evidence rule.

Hearsay exception for a statement narrating domestic abuse. OEC 803(26) admits statements purporting to describe domestic violence, if the statement was recorded or made to a police officer, an emergency responder, or certain other categories of government employees. [FN64] This rule includes a reliability requirement that imports some of the Roberts jurisprudence. [FN65]

Broader hearsay exception for a dying declaration. While FRE 804(b)(2) allows dying declarations only in homicide prosecutions and civil trials, [FN66] OEC 804(3)(b) allows dying declarations in all categories of trials, including criminal prosecutions alleging crimes other than homicide. [FN67]

Hearsay exception for a statement made in a professional capacity. OEC 804(3)(e) admits a hearsay statement concerning observations made in the declarant's professional capacity and in the ordinary course of professional conduct, so long as the statements are at or near the time of the observations. [FN68]

Broader hearsay exception for forfeiture by wrongdoing. OEC 804(3)(f) and (g) are significantly broader than FRE 804(b)(6). Oregon's version of the doctrine allows a hearsay statement if the ***1417** opponent has purposefully procured the absence of the declarant, either through classic witness tampering [FN69] or through some other misconduct causing death or incapacity. [FN70] So long as the opponent intentionally and knowingly committed the act that caused the unavailability, the opponent need not have specifically intended that the declarant become unavailable as a trial witness. [FN71]

II

Reasons for Oregon's Distinctive Approach

The Oregon Legislature has provided little record of the reasons for its refusal to adopt all of the provisions in the FRE. Nonetheless, it seems likely that Oregon's unique approach is due, at least in part, to five factors: the unusual strength of confrontation rights in Oregon, the state's zealous commitment to privacy, the populist tradition that has led Oregonians to trust juries and to distrust judges, the low tolerance for deceitful tactics by lawyers, and the state's special concern about domestic violence. The following subparts will explore each of these factors in turn.

A. Confrontation Rights in Oregon

The accused enjoys greater confrontation rights in Oregon courts than in federal courts. While the U.S. Constitution guarantees the accused the right "to be confronted with the witnesses against him," [FN72] ***1418** the Oregon Constitution goes a step further. Article 1, section 11 of the Oregon Constitution grants to the accused the right "to meet the witnesses face to face" [FN73]--a right that the Oregon courts have interpreted to impose higher requirements than are necessary under the Federal Confrontation Clause. [FN74]

Oregon's unique confrontation clause places a heavy burden on prosecutors. They cannot offer hearsay against the accused when live testimony is available from the same declarant. Whether the prosecutor is invoking a restricted or unrestricted hearsay exception, [FN75] the Oregon Constitution will not abide the admission of hearsay against the accused until the prosecutor has shown that the declarant is unavailable. This requirement goes far beyond present federal constitutional jurisprudence. [FN76] Oregon is one of the few states that continue to enforce the "unavailability prong" of the Roberts test. [FN77]

***1419** Commensurate with the preference for confrontation in Oregon's constitutional jurisprudence, the OEC assigns a high priority to cross-examination. [FN78] For example, the Oregon Legislature has memorialized some of the confrontation requirements of Roberts in hearsay rules such as OEC 803(18a) and OEC 803(26), and it has retained that language even after the U.S. Supreme Court struck down Roberts in 2004. [FN79] The Oregon Legislature has also memorialized the confrontation requirements for remote testimony by child witnesses. [FN80] Commentators have noted that confrontation of child witnesses is more common in Oregon due to the OEC's distinctive provisions for child witnesses. [FN81]

Oregon's preference for confrontation is evident in the OEC's list of unrestricted and restricted exceptions. Oregon seems wary of the ***1420** unrestricted hearsay exceptions in the FRE because these exceptions do not give preference to live testimony. Thus, Oregon has declined to adopt FRE 804(1), the unrestricted hearsay exception for present sense impressions. On the other hand, Oregon has adopted all of the restricted hearsay

exceptions in the FRE. Oregon has even broadened the scope of OEC 804(3)(b), the restricted exception for dying declarations, and Oregon has added some restricted hearsay exceptions that do not appear in the FRE, such as OEC 804(3)(e) and (g). The curtailment of unrestricted hearsay exceptions, coupled with the expansion of restricted hearsay exceptions, suggests that Oregon favors confrontation of live declarants and feels more comfortable treating hearsay as "a last resort."

In many ways, cross-examination in Oregon courts is more robust than it is in federal courts. OEC 609 permits impeachment with convictions that are up to fifteen years old, while FRE 609 sets the time limit at ten years. OEC 609 allows impeachment with prior misdemeanor crimes of domestic violence, while FRE 609 excludes this evidence. OEC 609-1 specifically authorizes impeachment with evidence of bias; the FRE have no on-point rule for bias. While FRE 614 and 706 allow the judge to call lay and expert witnesses, the OEC does not--an omission that may reflect concern about the difficulty of cross-examining the "judge's witness."

In sum, Oregon demands a higher degree of confrontation than is minimally necessary in federal court. This fundamental difference finds expression in several unique provisions of the OEC that require, or at least facilitate, cross-examination.

B. Privacy Rights in Oregon

While Oregon favors confrontation in court, this state also zealously protects its citizens' right to privacy. The state has a libertarian culture that traces back to its frontier history. Oregonians have always enjoyed a large measure of privacy due to the state's sparse population relative to its size. [FN82] Ever since Lewis and Clark blazed a trail to the mouth of the Columbia River in 1805, Oregon has ***1421** celebrated an "ethos of rugged individualism," [FN83] and privacy is an important part of that legacy.

The drafters of the Oregon Constitution made sure that this state would protect privacy rights in a manner befitting its libertarian history. Article 1, section 9 of the Oregon Constitution defines the privacy right with language different from that used in the Federal Fourth Amendment, and Oregon courts have seized upon this difference as authorization to protect privacy rights more strictly. [FN84]

Oregon's deep commitment to privacy is evident in this state's criminal justice system. For example, Oregon courts have repudiated the federal "open fields" doctrine. [FN85] Oregon courts hold that warrants are necessary before police may monitor suspects' cars with GPS technology, [FN86] while the federal courts in this state permit such tracking. [FN87] Oregon courts have rejected the federal "good faith exception" to the exclusionary rule. [FN88] The Oregon Legislature prohibited state and local police officers from inquiring about the immigration status of any person. [FN89] Oregon lawmakers recently created a criminal offense for "invasion of personal privacy." [FN90]

Oregon's Rules of Civil Procedure also protect privacy to an unusual degree. Oregon does not allow civil litigants to use all the discovery techniques that are available in federal court. For example, interrogatories are not permissible in Oregon. [FN91] Oregon does not ***1422** allow civil litigants to depose their opponents' experts, or even to discover the identity of those witnesses, in advance of trial. [FN92]

Other legislative acts show Oregonians' deep concern about privacy rights. Oregon passed the strictest law in the nation to safeguard the personal information that employers maintain concerning their employees. [FN93] Oregon has pioneered legislation to protect genetic and medical privacy. [FN94] Oregon has prohibited the use of credit checks as a means of screening prospective employees. [FN95] Oregon legislators refused to cooperate in the federal government's recent attempt to establish a standardized ID card for U.S. citizens; among other concerns, legislators cited their fear that the new regime would compromise personal privacy. [FN96]

Given Oregon's zeal to protect privacy in so many different contexts, it is not surprising that the OEC has surpassed the FRE in safeguarding the personal information of witnesses. Oregon has established strong evidentiary privileges for a wide range of relationships. Oregon recognizes the lawyer-client privilege, the psychotherapist-patient privilege, the physician-patient privilege, the nurse-patient privilege, the school employee-student privilege,

the social worker-client privilege, the spousal privilege, the clergy-penitent privilege, the counselor-client privilege, the stenographer-employer privilege, the interpreter privilege, and the informer privilege, among others. [FN97] Oregon courts enforce privileges strictly, ***1423** declining to find waiver except in clear cases, [FN98] and prohibiting attorneys from commenting on the invocation of a privilege. [FN99]

Outside the context of privilege law, the OEC includes several unique provisions that reflect the state's respect for privacy. Oregon's rape shield law, OEC 412, goes much further than its federal counterpart in protecting the privacy of complainants in rape cases; Oregon's version excludes evidence of the complainant's dress, reputation, and prior consensual sexual history, unless the latter is offered for a narrow list of permissible purposes. [FN100] OEC 311 lists presumptions that seem intended, at least in part, to protect privacy: the presumption that children born in wedlock are legitimate, [FN101] the presumption that a man and woman holding themselves out to be married are in fact married, [FN102] and the presumption that a person takes ordinary care of the person's own concerns. [FN103]

In sum, several unique provisions of the OEC are attributable to this state's unusual commitment to privacy. Oregonians have long valued their freedom from intrusion by others, including the government. Such values have influenced the development of evidentiary rules that protect privacy more than their federal counterparts.

C. Oregon's History of Populism and Faith in Juries

Oregon is arguably the most populist state in the nation. No state has a stronger tradition of direct democracy than does Oregon. Over the last century, Oregonians have voted on more initiatives and ***1424** referenda than have voters in any other state. [FN104] Some of the most important laws in this state's history--relating to crime, property rights, taxation, assisted suicide, and environmental protection, among other topics--owe their genesis to ballot measures, not to legislative enactments. [FN105]

Just as Oregon reveres direct democracy, Oregon places great trust in juries. The jury allows the common man to control the courtroom in the same way he controls the rest of the state government. The Oregon Constitution uses strong language in Article 1, section 17, which provides that "the right of Trial by Jury shall remain inviolate." [FN106] Scholars comparing state constitutions have noted that Oregon's clause requiring jury trials uses more emphatic language than is typical in such clauses. [FN107]

Attempts to check the power of juries have usually proven unsuccessful in this state. When advocates for tort reform persuaded legislators to approve a $500,000 cap on noneconomic damages, the Oregon Supreme Court struck down this law as a limitation on the right to trial by jury. [FN108] Oregon gained notoriety when the state's appellate courts reinstated a jury's $80 million verdict against Philip Morris, then reinstated the same verdict again after the U.S. Supreme Court remanded the case based on concerns about possible ***1425** overreaching by the jury. [FN109] Oregon stands by its controversial rule permitting nonunanimous jury verdicts in felony cases, even though forty-eight states and the U.S. courts insist upon unanimous verdicts in all felony trials. [FN110] Oregon voters even approved a measure allowing prosecutors to veto defendants' waivers of jury trials in criminal cases. [FN111]

Oregon's confidence in juries manifests itself in several distinctive provisions of the OEC. While FRE 404(b) forbids the introduction of propensity evidence except for limited purposes, OEC 404(4) allows the use of propensity evidence in criminal cases: "In criminal cases, evidence of other crimes, wrongs or acts by the defendant is admissible if relevant . . . ." [FN112] Oregon also has declined to adopt FRE 704(b), the so-called "Hinckley Rule" that prevents the jury from considering expert testimony on the mental state of the accused. OEC 609 allows juries to consider convictions of witnesses that occurred within the prior fifteen years, [FN113] while the time limit under FRE 609 is ten years. [FN114] As these examples illustrate, Oregon trusts its juries to hear a wider range of evidence than is admissible in federal court.

***1426** Conversely, Oregon's evidence rules reflect a distrust of judges. Perhaps fearing that judges would usurp the fact-finding role of juries, the framers of the Oregon rules declined to adopt provisions of the FRE that allow judges to call and question witnesses, and that allow judges to summon expert witnesses at public expense. [FN115]

OEC 309, which governs presumptions, departs from the federal model in emphasizing that "[t]he judge is not authorized to direct the jury to find a presumed fact against the accused." [FN116] The Oregon rules also differ from the federal rules in allowing jurors to testify after rendering their verdict; Oregon's approach permits jurors to reveal procedural improprieties that occurred during the trial, including improper influence brought to bear on the jury by the judge. [FN117]

Oregon's populist values pervade the state's evidentiary rules. Provisions of the FRE that limit the scope of evidence heard by the jury, or that increase the power of judges in the fact-finding process, are conspicuously absent from the OEC.

D. Oregon's Insistence on Honesty and Fair Play in Litigation

Oregon takes an unusually hard line against deceit by lawyers. The Oregon Supreme Court has interpreted the state's ethics code to prohibit any dishonesty by lawyers, even the use of undercover investigative techniques that are common in the other forty-nine states. [FN118] The Oregon Supreme Court issued an order insisting upon ***1427** civility and candor by lawyers appearing in the state's courts. [FN119] This concern about deceit by lawyers is not new. A notorious 1974 ruling by the Oregon Supreme Court suspended an assistant attorney general who mischaracterized answers given by a government witness in response to a discovery request. [FN120]

When Oregon legislators considered whether to adopt the FRE at the end of the 1970s, they modified rules that appeared to be too indulgent of mendacity. For example, Oregon adopted a unique crime-fraud exception to various privileges, allowing disclosure where necessary to reveal "a clear and serious intent" to commit certain categories of crime. [FN121] The federal crime-fraud exception is more restrictive, [FN122] and its narrow scope hinders the detection of some criminal and fraudulent schemes.

Oregon's intolerance of gamesmanship manifests itself most clearly in the OEC's unique hearsay exceptions. OEC 804(3)(f) and (g), which set forth the doctrine of forfeiture by wrongdoing, are particularly noteworthy. If an opponent of hearsay has purposefully procured the unavailability of a hearsay declarant, or has intentionally engaged in conduct that would foreseeably cause such unavailability, then that opponent forfeits any objection that might otherwise be available under the hearsay rules. [FN123] The U.S. Supreme Court indicated recently that Oregon's doctrine of forfeiture by wrongdoing is the most expansive in the nation. [FN124] Similarly, Oregon's version of the dying declaration exception is among the most expansive in the ***1428** nation, reflecting this state's commitment to the equitable principle [FN125] that one who kills a witness should not profit from the absence of that witness at trial. Simply put, Oregon's evidentiary rules do not reward the litigant or attorney who has unclean hands.

E. Oregon's Special Concern About Domestic Violence and Sexual Assault

Oregon has earned a national reputation for innovating new strategies to facilitate prosecution of domestic violence and sexual assault. [FN126] A coalition of Democratic and Republican legislators has found common ground in the campaign to protect victims from such crimes. [FN127] While Oregon's Democrats are generally wary of laws and rules that burden the accused, the imperative of prosecuting violence against women has generally trumped concerns about procedural protections for the accused.

Oregon's evidentiary rules are replete with special provisions for prosecutions of domestic violence and sexual assault. Several examples appear in Oregon's hearsay rules. OEC 803(18a) admits hearsay statements from children or seniors complaining of abuse. [FN128] OEC 803(24) prescribes a procedure for young children or disabled witnesses to testify from a remote location via closed circuit ***1429** television when necessary to avoid psychological harm. [FN129] OEC 803(26) admits statements narrating domestic violence to police and other professionals within twenty-four hours of the incident. [FN130] Neither the FRE nor any other state evidence code devotes so many of its unrestricted hearsay exceptions to the express purpose of prosecuting intimate violence. [FN131]

The OEC freely admits evidence of past misconduct by the accused if the present prosecution alleges domestic violence or sexual assault. OEC 609 allows impeachment of testifying defendants with evidence of their prior misdemeanors involving domestic violence, even if those misdemeanor offenses did not include dishonesty as an element. [FN132] FRE 609 would never abide such evidence. [FN133] Similarly, OEC 404-1 departs from FRE 404 in allowing the prosecution to admit evidence that the accused has engaged in a pattern of abuse or harassment; there is no need for the defendant to "open the door" before the prosecution can offer such evidence in Oregon. [FN134] By contrast, OEC 412 is far stricter than its federal counterpart in limiting evidence of the complainant's history in cases involving allegations of rape. [FN135] Critics complain that Oregon has tilted the playing field significantly in such cases. [FN136]

The special rules for prosecution of domestic violence and sexual assault are not doctrinally consistent with the rest of the OEC. There is no principled reason why intimate violence requires such special treatment, while the OEC relegates other categories of violent crime to the baseline rules. The only explanation lies in the politics of violence against women, which make for strange bedfellows in the Oregon Legislature.

***1430** III

Advantages of Adopting the New FRE in Oregon

Adoption of the restyled FRE could prove beneficial in Oregon for several reasons. First, the new language would simplify Oregon's evidentiary rules, eliminating idiosyncratic and confusing language. Second, the adoption of the FRE would enlarge the universe of citable case law for Oregon judges and practitioners. Third, the standardization of evidence law could help to facilitate the regional practice of law. Fourth, greater uniformity could reduce the incentives for "forum shopping." Finally, adoption of the FRE would provide an excuse to fix imperfections in the OEC, particularly in OEC 608 and 609. Each of these potential advantages is discussed in turn below. Part IV then considers disadvantages of importing the restyled FRE to Oregon.

A. Enhanced Clarity

The primary advantage of the restyled FRE is their simplification of the evidentiary rules. Such clarity streamlines trial practice and improves the likelihood that cases will settle in advance of trial because parties will be better able to predict the admissibility of their evidence at trial. Rates of malpractice would hopefully drop as lawyers would better understand the requirements of the evidentiary rules, and the number of convictions reversed due to ineffective assistance of counsel would hopefully drop as well. Pro se litigants would welcome the simplification of the OEC, especially now that the recession has necessitated that a growing number of litigants represent themselves. Law students would find evidence law more accessible, and the similarity of the FRE to the OEC would ease the difficulty of preparing for the Oregon Bar Exam.

One way that the drafters of the restyled FRE improved the clarity of the rules is by substituting plain language for the existing versions of the rules, which were often convoluted, technical, and verbose. The restyled FRE minimized the use of inherently ambiguous words; for example, the restyling eliminated the use of "shall," which can mean "must," "may," or something else, depending on the context. [FN137] The restyled FRE reduced the use of inconsistent terms, such as switching between "accused" and "defendant" in a single rule, or ***1431** switching between "party opponent" and "opposing party" within the same rule. [FN138] The restyled rules reduced the use of redundant "intensifiers" because these phrases merely state the obvious and suggest unwarranted inferences when they are absent from other rules. [FN139] The restyled FRE present many of the rules in outline form, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. [FN140]

A few examples show the improvement to the rules. Some rules have benefited greatly from the deletion of redundant or unnecessary language. Examples include FRE 401, [FN141] FRE 601, [FN142] and FRE 604. [FN143] Oregon has followed the original federal model for all three ***1432** rules, [FN144] so Oregon should strongly consider adopting the restyled versions.

The use of vertical lists has significantly improved several rules. FRE 104(c), [FN145] FRE 609(d), [FN146] FRE 702, [FN147] and FRE 803(6) [FN148] all ***1433** became much clearer when presented with progressively indented subpoints. The reorganization makes the rules easier to scrutinize quickly, allowing the reader to find the relevant portion right away. Oregon borrowed the old versions of all four rules from the FRE, so Oregon should update the OEC in accordance with the revisions to the FRE.

A few "restylings" of the FRE actually introduce slight substantive nuances. For example, the old version of FRE 201(f) provides that judicial notice "may be taken at any stage of the proceeding." This ***1434** language is objectionable because, to the extent that it is accurate, it is unnecessary. The language also seems to be somewhat misleading because judicial notice is not permissible on appeal in a criminal case. [FN149] The restyled version of the FRE drops subpoint (f) entirely. Similarly, the restyling of FRE 407 has improved that rule by making clear that evidence of subsequent remedial measures is admissible only to prove ownership, control, or feasibility when the opponent has raised a genuine dispute as to these matters. [FN150] The present version of FRE 407 uses the qualifier "if controverted" at the end of several permissible purposes, creating ambiguity as to whether it modifies the whole or just the last antecedent. [FN151] "Restylings" of this sort have both substantive and stylistic dimensions, but they would be welcome additions to the OEC.

The present opacity of the FRE is not an urgent problem, but it needlessly causes confusion, hinders efficiency, and impedes pro se practice. The restyled FRE clarify the original rules without distorting their meaning. Oregon would benefit by adopting at least ***1435** some of the restyled FRE, so litigants in this state can more easily understand the rules of evidence.

B. Expansion of Citable Case Law

Oregon attorneys sometimes complain about the dearth of appellate court decisions interpreting this state's evidentiary rules. There are only two appellate courts in Oregon: the Oregon Supreme Court and the Oregon Court of Appeals. Oregon's appellate courts issue approximately thirty to fifty opinions per year that cite the terms "Oregon Evidence Code" or "OEC." [FN152] A significant portion of these decisions address the evidentiary rules only in dicta or in summaries of procedural history, so the actual number of opinions interpreting the OEC is significantly less than thirty to fifty per year.

States considering whether to adopt national uniform rules have sometimes cited the benefit of enlarging the case law available to practitioners and judges in those states. For example, when Kentucky decided to adopt the FRE, an advisory committee noted that "there is a substantial and growing body of case law construing these Rules, case law which can be of invaluable assistance in the application of a new set of evidence rules for Kentucky." [FN153] The widespread adoption of a standardized code helps small states achieve the economies of scale that are necessary to establish a comprehensive body of case law.

C. Facilitation of Regional Practice

Oregon lawyers increasingly practice in other states. Oregon's largest city, Portland, sits across the Columbia River from Vancouver, a sizeable city in Washington, and the citizens of these cities interact as if they live in the same community. As the number of interstate commercial transactions grows, clients require lawyers who can represent them in several different jurisdictions. [FN154] At least fifty law firms in Portland have offices in one or more other states. [FN155] In ***1436** addition to lawyers at these multistate firms, a wide range of other lawyers--including government officials, in-house counsel for businesses of all sizes, and even solo practitioners--are handling cases that require them to cross state lines. The volatility of the economy has only heightened the interest in interstate practice, as lawyers are more willing than ever to travel great distances in order to find work.

State bars are recognizing the increasingly interstate character of legal practice, and many are taking steps to assist lawyers whose caseloads straddle state boundaries. The Oregon Bar has entered into a reciprocal arrangement with thirty-eight other state bars, whereby members of one bar may gain admission to the other bars after having served as a lawyer in good standing for three years. [FN156] The state bars have amended their rules regulating unauthorized practice of law, and they have allowed limited practice by lawyers admitted in other states. [FN157]

In light of this trend toward the regional integration of law practice, the standardization of evidentiary rules is a sensible proposition. Uniformity in evidence rules reduces inefficiency in interstate practice. [FN158] The greater the harmony between the OEC and neighboring states' evidence codes, the more easily Oregon-based lawyers can practice in those states. Oregon, Idaho, and Washington have all modeled their evidence codes after the FRE, so these jurisdictions may wish to remain in step with one another by adopting the restyled federal rules.

***1437** D. Decreased Incentives for "Forum Shopping"

Parties filing lawsuits often have a choice of venues. They may choose between many states in which there are sufficient minimum contacts for jurisdiction. They may also choose between the state and federal courts, assuming that the matter implicates a federal question, meets the requirements for diversity jurisdiction, or otherwise qualifies for hearing in a federal court.

Criminal prosecutions are also portable. In a case involving interstate criminal activity, prosecutors can elect to file charges in one or more of the states in which the acts occurred, or prosecutors may file charges in federal court. Even purely intrastate crimes, such as drug and gun offenses, are potentially subject to dual federal and state jurisdiction. The U.S. Code has criminalized over 4500 offenses, and it overlaps significantly with state criminal codes. [FN159]

The potential to file in many different fora naturally invites "forum shopping"--i.e., the comparison of advantages and disadvantages that each jurisdiction might offer. If evidence rules vary significantly between jurisdictions, these differences might become a factor in the selection of a forum. [FN160] There is usually no practical remedy for the party aggrieved by an opponent's forum shopping, although some courts have listed forum shopping among the factors that might support abstention. [FN161]

Forum shopping is objectionable for a number of reasons. It could require defendants to appear in faraway jurisdictions. It allows the plaintiff or prosecutor to select the very most favorable system of rules. It erodes public confidence in the judicial system because the party on offense gets to "customize" the set of rules according to that party's liking.

***1438** Uniform rules reduce the opportunities for forum shopping. While other reforms might also be helpful--e.g., the curtailment of overlapping substantive jurisdiction and the limitation of prosecutors' discretion to file charges wherever they please--the standardization of procedural rules such as evidence codes will be a crucial part of the campaign to reduce forum shopping.

E. Significant Changes to the Substance of the OEC

One additional advantage of adopting the restyled FRE is that Oregon could copy a few federal rules that are substantively different from, and superior to, their counterparts in Oregon. The restyling project did not change the substance of these rules, but the states' review of the restyled FRE provides an excuse to consider substantive differences between the FRE and OEC that predated the restyling.

Oregon should consider importing two federal rules that are substantively different from their counterparts in the OEC. The first is FRE 608(b). That rule allows impeachment with specific unconvicted acts that bear on character for truthfulness--either acts by the witness himself or by another about whom the witness has given opinion or reputation evidence inconsistent with the specific acts. [FN162] FRE 608(b) requires the impeaching attorney to take the answer of the witness, rather than proving up the acts by extrinsic evidence. [FN163] OEC 608(2) is far more restrictive than FRE 608(b). Oregon's rule not only bans extrinsic evidence of specific unconvicted acts but also prohibits the impeaching attorney from inquiring at all about such acts on cross-examination. [FN164] This ***1439** limitation is inconsistent with Oregon's general preference for rigorous confrontation and cross-examination. [FN165] OEC 608(2) also undermines the OEC's goal of promoting candor in court because witnesses can give general opinion and reputation evidence without any accountability when the specific facts contradict these generalizations. [FN166] Oregon made a mistake in adopting its unique version of

OEC 608(2) back in 1981, and the restyled version of FRE 608(b) would fit better in the overall schedule of the OEC at the present time.

A second federal rule that presents substantive advantages over its Oregon counterpart is FRE 609(a). This rule sets forth the procedure for impeaching witnesses with evidence of convictions that bear on character for truthfulness. [FN167] Until 2001, Oregon adhered to the federal model, permitting impeachment with felonies and misdemeanor crimes involving dishonesty and false statements. In 2001, the Oregon Legislature added a third category of crimes to the list of impeachable offenses under OEC 609. When a defendant is prosecuted for certain crimes of violence against a family or household member, and when that defendant elects to testify, the prosecutor may impeach the defendant with a prior misdemeanor conviction for a crime involving assault, menacing, or harassment of a family or household member. [FN168] Oregon is the only state in the ***1440** nation that allows such impeachment under its version of Rule 609. The prior commission of misdemeanor crimes involving violence has little bearing on the tendency of a witness to lie on the stand. Oregon's zeal for the prosecution of domestic violence [FN169] is misplaced in OEC 609. The time has come to adopt the federal version of this rule.

IV

Disadvantages of Adopting the New FRE in Oregon

Notwithstanding the considerations explored in Part III, wholesale adoption of the restyled FRE in Oregon would be detrimental for at least three reasons. First, Oregon would lose the unique evidentiary rules that it has crafted over the last four decades; most of these rules are well suited to the peculiar culture and constitutional law in this state. Second, if Oregon completely discarded the OEC, this state would lose the benefit of appellate case law that has interpreted the OEC since 1981. Third, the adoption of the FRE in Oregon might stultify innovation, and it might necessitate that Oregon march in lockstep with other jurisdictions that adhere closely to the FRE. The following subparts discuss each of these considerations in turn.

A. Loss of Unique Substantive Rules

With the exception of OEC 608(b) and 609(a), discussed in Part III.A above, the OEC is a good fit for this state, at least on a substantive level. The rules mirror the unique culture of Oregon. This state values accountability, so confrontation takes on a greater significance in the OEC than in the FRE. Oregon values privacy, so the OEC carefully protects the secrets of parties and lawyers. Oregon has great faith in juries, so the OEC shows juries a wider range of evidence than federal juries can see. Oregon insists upon honesty and fair play, so the OEC imposes strict penalties for gamesmanship in litigation. Oregon regards violence against women and children as an urgent problem, so the OEC includes several customized provisions designed to facilitate prosecutions of these crimes. Simply put, the restyled FRE do not match the values and culture of this state as well as the OEC.

***1441** Aside from such policy concerns, the restyled FRE do not align well with the contours of the Oregon Constitution. Oregon's confrontation clause is more demanding than its federal counterpart. The OEC demands more confrontation than the FRE because the Oregon Constitution demands it. The OEC also admits a wider range of hearsay because the confrontation requirements under Article 1, section 11 of the Oregon Constitution provide a backstop to the statutory regulation of the OEC. The symbiotic relationship between the Oregon Constitution and the OEC is evident in other contexts. Article 1, section 9 protects privacy as strictly as the OEC's privilege rules. Article 1, section 17 insists on jury trials with the same ardor that OEC 404(4) insists on showing juries all relevant evidence.

Given this state's unique policy concerns and constitutional framework--not to mention Oregon's fierce sense of independence--the wholesale importation of the restyled FRE into the OEC seems inconceivable. A more plausible alternative would be for Oregon to adopt the restyled versions of those federal rules that Oregon had already adopted before the restyling project. Part V of this essay offers a list of particular provisions in the restyled FRE that Oregon should adopt because they comport with the policy goals and constitutional foundations of the OEC.

B. Confusion in Applying Old Case Law

If Oregon were to overhaul the OEC to match the FRE, appellate decisions interpreting the old versions of Oregon rules could lose their force. Ironically, the improvement of the evidentiary rules would come at the cost of losing three decades' worth of interpretive decisions. Oregon's appellate courts infrequently issue opinions interpreting Oregon's evidentiary rules, so it might take decades for these courts to replace their existing precedents with new opinions interpreting the revised rules.

This cost is too high. The Oregon Legislature should take care to memorialize when a new rule is substantively identical to its predecessor. Oregon chose not to adopt any of the FRE's commentary back in 1981, but now commentary is crucial. Every time the commentary to the revised OEC makes clear that new rules track the old, the case law predating the amendments will remain persuasive.

***1442** C. Ossification of the OEC

Some critics fear that adoption of a uniform code will stultify innovation in the future. [FN170] According to this view, the states are valuable "laboratories" in which to experiment with new evidentiary rules. Once the states adopt a national template, they may become more reluctant to depart from that template. [FN171]

This concern might make sense in another state, but Oregonians feel little compunction about coloring outside the lines. One encouraging example is Oregon's adoption of the ABA Model Rules of Professional Conduct in 2004. At the time of the initial adoption, Oregon emulated the style of the ABA version but preserved, in large part, the substance of the preexisting Oregon rules. Thereafter, Oregon made several revisions to the ABA template, virtually on an annual basis. [FN172] Oregon's ethical code remains a dynamic document, and there is no reason to expect that Oregon's evidentiary rules would fare differently if Oregon were to adopt the restyled FRE.

V

Proposal: Selective Adoption of the Restyled FRE

The most prudent course for Oregon would be to adopt most, but not all, of the restyled FRE. Oregon should adopt any restyled federal rule that replaces a prior federal rule that Oregon adopted wholesale. In other words, if a comparison of an Oregon evidentiary rule to a federal evidentiary rule revealed no substantive differences in 2010, then Oregon should adopt the restyled version of that rule.

Oregon should not, however, replace the following rules in the Oregon Evidence Code: OEC 309 and 311 (governing presumptions), OEC 404 and 404-1 (governing the use of uncharged misconduct), OEC 412 (rape shield), OEC 503-13 (privileges), OEC 614 (setting forth the procedure for Oregon courts to call and interrogate witnesses), OEC 704 (allowing experts to testify regarding the mental ***1443** state of the accused), OEC 801 (setting forth Oregon's unique definition of hearsay), and OEC 803 and 804 (setting forth Oregon's unique hearsay exceptions). These rules comport with Oregon's distinctive legal and cultural history. Oregon has made a deliberate choice not to follow the federal template as to these rules, and the stylistic revision of the federal template does not necessitate that Oregon revisit its choice regarding the substance of these rules.

Oregon should change two of its rules that currently diverge from the federal versions. OEC 608 and 609 are inferior to their federal counterparts. OEC 608 forbids Oregon attorneys from eliciting intrinsic evidence of unconvicted acts bearing on untruthfulness. [FN173] This provision limits the cross-examination and confrontation that Oregon values so much in other contexts. Further, given the decline in resources for criminal prosecution in this state, the lack of a conviction is not necessarily a sign that the unconvicted conduct is innocent.

In prosecutions of domestic violence, OEC 609 allows the government to impeach the defendant with evidence of his prior domestic violence, including misdemeanors. [FN174] This rule is unwise. Prior misdemeanors that consist solely of violent acts (as opposed to deceitful acts) are not automatically probative of truthfulness. Such evidence might be useful in showing the defendant's character for violence, but OEC 404-1 already permits this use

of the evidence without resort to OEC 609. [FN175] There is no compelling reason why defendants accused of domestic violence should be more vulnerable to impeachment on grounds of truthfulness than defendants accused of other serious crimes, such as murder of a victim who is not an intimate partner.

Conclusion

There are several compelling reasons for Oregon to incorporate most of the new changes to the FRE. The restyling of the FRE will improve accessibility, will reduce forum shopping, will enhance the predictability of judicial rulings, and will facilitate interstate commerce by promoting consistency in litigation procedures. Just as simplicity and uniformity are valuable in other states, they would be salutary in Oregon. This state should promptly adopt the restyled ***1444** versions of any rules in the OEC that presently mirror their federal counterparts.

Most of Oregon's unique evidentiary rules, however, should survive the restyling process. After all, the purpose of restyling was not to change the substance of any evidence code. Oregon attorneys and judges have become accustomed to this state's distinctive evidence rules, and dramatic changes to the rules would bring confusion rather than clarity. While Oregon should end its misguided experiments with OEC 608 and 609, most of Oregon's unique rules suit this state well.

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[FN1]. 6 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence T-1 (Joseph M. McLaughlin ed., 2d ed. 2011).

[FN2]. On September 27, 2010, the Illinois Supreme Court adopted an evidence code modeled after the FRE. The newly adopted evidence rules in Illinois are very similar to their federal counterparts in both format and substance. For the new rules, commentary, and order of approval, see Illinois Rules of Evidence, Committee Commentary (2010), available at http:// www.illinoislawyernow.com/wp-content/uploads/2010/09/Evidence.pdf.

[FN3]. 6 Weinstein & Berger, supra note 1 (indicating--in an analysis that apparently preceded the update in Illinois--that forty-two states have followed the FRE model).

[FN4]. Id. In Massachusetts, the Supreme Judicial Court has adopted the Massachusetts Guide to Evidence, which follows the framework of the FRE, but is not an evidence code. Supreme Judicial Court Advisory Comm. on Mass. Evidence Law, Massachusetts Guide to Evidence (2011), available at http:// www.mass.gov/courts/sjc/guide-to-evidence/massguidetoevidence.pdf.

[FN5]. While no scholar has quantified the extent to which states' evidence codes track the federal template, a cursory glance at the similarities suggests that approximately ninety percent of the language in most states' codes derives from the FRE.

[FN6]. See 6 Weinstein & Berger, supra note 1 (detailing differences between the FRE and various states' codes).

[FN7]. For a detailed analysis of these provisions, see infra Part I.

[FN8]. Approximately half of the provisions in the OEC are virtually identical to the corresponding provisions in the FRE. E.g., Or. Evid. Code 103-104 (procedure for admitting evidence); Or. Evid. Code 201 (judicial notice); Or. Evid. Code 401-403 (weighing relevance versus prejudice); Or. Evid. Code 407-412 (policy-based exclusions of otherwise relevant evidence); Or. Evid. Code 601-606 (eligibility rules for witnesses); Or. Evid. Code 611-615 (procedure for examining witnesses); Or. Evid. Code 701-705 (expert witnesses); Or. Evid. Code 801 (definition of hearsay); Or. Evid. Code 901-903 (authentication); Or. Evid. 1001-1008 (best evidence doctrine).

[FN9]. Stephanie Midkiff, Oregon Law & Practice: A New Practitioners' Tool, Or. St. B. Bull., July 2004, at 25, 28, available at http:// www.osbar.org/publications/bulletin/04jul/practice.html ("Because the Oregon Evidence Code is based on the Federal Rules of Evidence, it follows that federal case law plays a huge part in the interpretation of the Oregon Code."). On April 15, 2011, a search of the OR-CS database of Westlaw yielded 147 results in response to the following query: "fre" (federal /2 rule /2 evidence) "fed. r. evid." Given the paucity of evidence decisions by Oregon appellate courts, the frequency with which the Oregon courts cite the FRE is striking.

[FN10]. In August 2009, the Committee on Rules of Practice and Procedure released the entire package of draft amendments for public comment under the Rules Enabling Act, 28 U.S.C. §§ 2071-2077 (2006). The deadline for public comment was February 16, 2010. Judicial committees are now reviewing the draft rules, and the Supreme Court will decide by May 1, 2011, whether to issue the amendments. Absent any intervention by Congress, the restyled FRE would take effect on December 1, 2011. The restyling of the FRE would not have been possible without the able leadership of Daniel Capra, Reed Professor of Law at Fordham Law School, who has served as Reporter for the Judicial Conference Advisory Committee on the Federal Rules of Evidence since 1996.

[FN11]. Advisory Comm. on Evidence Rules, Minutes of the Meeting 12 (2006), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda% 20Books/Evidence/EV2006-04.pdf (initiating the project to restyle the FRE); Memorandum from Robert L. Hinke, Chair, Advisory Comm. on Evidence Rules, to Hon. Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure 2 (May 12, 2008), available at http:// federalevidence.com/pdf/2008/07-July/Ad%20CommEvidMay2008.pdf (setting forth standards for restyling, which provide that the Committee should generally avoid proposing substantive changes to FRE).

[FN12]. Trippe S. Fried, Licensing Lawyers in the Modern Economy, 31 Campbell L. Rev. 51, 52 (2008) (noting the increasing prevalence of interstate practice).

[FN13]. Stephan Landsman, The Growing Challenge of Pro Se Litigation, 13 Lewis & Clark L. Rev. 439, 443 (2009) (discussing the rise in pro se litigation); Nina Inger VanWormer, Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon, 60 Vand. L. Rev. 983, 988 (2007) (noting that federal and state courts "have seen significant increases in the number of self-represented civil litigants in recent years").

[FN14]. Several authors have discussed the benefits of uniformity in evidence law. See, e.g., Margaret A. Berger, The Federal Rules of Evidence: Defining and Refining the Goals of Codification, 12 Hofstra L. Rev. 255, 260 (1984) (discussing the benefits of the FRE); Stephen A. Saltzburg, The Federal Rules of Evidence and the Quality of Practice in Federal Courts, 27 Clev. St. L. Rev. 173, 181 (1978) (arguing that uniformity improves practice by lawyers, decisions by judges, and the overall quality of the law); Kenneth Williams, Do We Really Need the Federal Rules of Evidence?, 74 N.D. L. Rev. 1, 5-7 (1998) (summarizing arguments in favor of uniformity). But see Paul F. Kirgis, A Legisprudential Analysis of Evidence Codification: Why Most Rules of Evidence Should Not Be Codified--But Privilege Law Should Be, 38 Loy. L.A. L. Rev. 809, 813-31 (2004) (criticizing the arguments for uniformity in the evidence rules).

[FN15]. Tom Bates & Mark O'Keefe, Suicide Law Reflects Oregon Politics: Voters Tend to Be Quirky But Consistent in Maverick State, Plain Dealer (Cleveland), Nov. 21, 1994, at 3E (discussing Oregon's notorious independent streak); see also Tom Lininger, Should Oregon Adopt the New ABA Model Rules of Professional Conduct?, 39 Willamette L. Rev. 1031, 1031-32 (2003) (noting various ways in which Oregon's laws and rules have departed from the national norm).

[FN16]. The Restyled Federal Rules of Civil Procedure took effect in 2007, but as of May 12, 2011, the Oregon Rules of Civil Procedure have incorporated very few of the provisions in the restyled federal rules. Compare Or. R. Civ. P., available at http://www.leg.state.or.us/ors/orcpors.htm, with Restyled Fed. R. Civ. P., available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/Prelim_draft_proposed_pt1.pdf.

[FN17]. The ABA promulgated the Model Code of Professional Responsibility in 1969, and Oregon adopted this code in 1971. See In re Porter, 320 Or. 692, 702 n.8, 890 P.2d 1377, 1383 (1995) (en banc). In 1983, the ABA discarded the Model Code and replaced it with the Model Rules of Professional Responsibility. Oregon waited an

astounding twenty-two years to adopt the ABA Model Rules. Order Adopting Oregon Rules of Professional Conduct, Order No. 04-044 (2004), available at http:// www.publications.ojd.state.or.us/RULE80.htm. Even then, Oregon did not adopt the interpretative comments that accompanied the ABA Model Rules.

[FN18]. U.S. Representative Peter DeFazio of Oregon's Fourth District has long insisted that he is "as independent as Oregon." E.g., As Independent As Oregon, Peter DeFazio for Congress, http://www.defazioforcongress.org/ (last visited May 17, 2011). U.S. Senator Ron Wyden campaigned for reelection in 2010 with this slogan: "Different. Like Oregon." Steve Law, Oregon Voters Not as Angry, Portland Trib., Oct. 21, 2010, http:// www.portlandtribune.com/news/story.php?story_id=128761184777815000 (noting Wyden's use of this slogan).

[FN19]. See Charles Steringer, The Clergy-Penitent Privilege, 76 Or. L. Rev. 173, 181 n.52 (1997) (indicating that, in 1981, Oregon joined thirty-six other states in adopting evidence codes patterned after the FRE); see also Dara Loren Steele, Expert Testimony: Seeking an Appropriate Admissibility Standard for Behavioral Science in Child Sexual Abuse Prosecutions, 48 Duke L.J. 932, 950 n.98 (1999) (noting that Oregon is among the states that adopted the Uniform Rules of Evidence in whole or in part).

[FN20]. For example, Oregon did not adopt a version of the "Hinckley Rule," FRE 704(b), the limitation on expert testimony that Congress adopted in 1984 after John Hinckley won a verdict of not guilty by reason of insanity in his trial for attempting to assassinate President Ronald Reagan. Oregon never added a counterpart to FRE 415, which Congress approved in 1994 to allow propensity evidence in civil suits for sexual assault and child abuse. Oregon waited nearly a decade to adopt a version of the federal forfeiture-by-wrongdoing rule, FRE 804(b)(6), which took effect in 1997; the Oregon Legislature added analogous rules, OEC 804(3)(f) and (g), in 2005. Oregon has not yet adopted a version of the federal privilege-waiver rule, FRE 502, which took effect in 2009.

[FN21]. Or. Evid. Code 311(1)(a).

[FN22]. Or. Evid. Code 311(1)(s).

[FN23]. Or. Evid. Code 309.

[FN24]. Or. Evid. Code 404(4).

[FN25]. Id.

[FN26]. Compare id. with Fed. R. Evid. 404(b). Given the breadth of OEC 404(4), it is not surprising that Oregon lacks analogs of FRE 413 and 414, which allow propensity evidence in prosecutions involving allegations of sexual assault and child molestation. Oregon does not have any equivalent of FRE 415, however, which allows propensity evidence in civil suits of sex assault and child molestation. OEC 404(4) does not extend to such evidence because it applies only in criminal cases; OEC 404-1 applies to evidence showing a pattern of abuse, but this provision is not as broad as FRE 415.

[FN27]. Or. Evid. Code 404-1.

[FN28]. Fed. R. Evid. 412(b)(1)(B).

[FN29]. Or. Evid. Code 412(2)(b)(A).

[FN30]. Or. Evid. Code 412(1)(b) (barring "reputation or opinion evidence presented for the purpose of showing that the manner of dress of an alleged victim of the crime incited the crime or indicated consent to the sexual acts alleged in the charge").

[FN31]. Or. Evid. Code 503.

[FN32]. Or. Evid. Code 504.

[FN33]. Or. Evid. Code 504-1.

[FN34]. Or. Evid. Code 504-2.

[FN35]. Or. Evid. Code 504-3.

[FN36]. Or. Evid. Code 504-4.

[FN37]. Or. Evid. Code 505.

[FN38]. Or. Evid. Code 506.

[FN39]. Or. Evid. Code 507.

[FN40]. Or. Evid. Code 508a.

[FN41]. Or. Evid. Code 509-1, 509-2.

[FN42]. Or. Evid. Code 510.

[FN43]. Or. Evid. Code 504-5.

[FN44]. See United States v. Zolin, 491 U.S. 554, 556 (1989) (interpreting the crime-fraud exception under federal law).

[FN45]. Or. Evid. Code 513(2).

[FN46]. Fed. R. Evid. 606(b).

[FN47]. Or. Evid. Code 606.

[FN48]. Fed. R. Evid. 608(b).

[FN49]. See Or. Evid. Code 608(2).

[FN50]. Or. Evid. Code 609(3)(a).

[FN51]. Fed. R. Evid. 609(b).

[FN52]. Or. Evid. Code 609(2)(a).

[FN53]. Or. Evid. Code 609-1(2).

[FN54]. See Fed. R. Evid. 401.

[FN55]. Fed. R. Evid. 614.

[FN56]. Fed. R. Evid. 704(b).

[FN57]. See Or. Evid. Code 704 (adopting the language and legislative history of FRE 704).

[FN58]. Or. Evid. Code 801(4)(c).

[FN59]. Or. Evid. Code 803(18a).

[FN60]. In Ohio v. Roberts, the Court developed a two-part test for the admissibility of hearsay offered against the accused. 448 U.S. 56, 65-66 (1980). One component of the test focused on the availability of the declarant, and the other component focused on the reliability of the evidence. Id. In interpreting the reliability prong of the Roberts test, subsequent rulings examined a list of circumstances similar to the list appearing in OEC 803(18a)(b). Crawford v. Washington, 541 U.S. 36, 60-65 (2004) (listing various factors considered by courts applying the reliability test under Roberts). While Crawford overruled Roberts, several states such as Oregon have not eliminated language in their evidence statutes memorializing the Roberts criteria. E.g., Snowden v. State, 846 A.2d 36, 39 n.7 (Md. Ct. Spec. App. 2004) (discussing the prevalence of "tender years statutes" that require assessment of reliability using Roberts standards and listing examples of such statutes); Wesley Fain, The Constitutionality of Alabama's Tender Years Statute After Crawford, 40 Cumb. L. Rev. 919, 919-20 (2010).

[FN61]. Or. Evid. Code 803(18a)(a).

[FN62]. Or. Evid. Code 803(24).

[FN63]. 497 U.S. 836, 853 (1990) (holding that the "State's interest in the physical and psychological well-being of child abuse victims [was] sufficiently important to outweigh ... a defendant's right to face his or her accusers in court" if denial of this face-to-face confrontation was necessary to protect the accuser from "emotional trauma").

[FN64]. Or. Evid. Code 803(26)(a)(A).

[FN65]. Or. Evid. Code 803(26)(a)(B); Roberts, 448 U.S. at 65-66; see also supra note 60.

[FN66]. Fed. R. Evid. 804(b)(2).

[FN67]. Or. Evid. Code 803(3)(b). Most states limit the dying declaration exception to civil cases and homicide prosecutions, but a few states follow Oregon's approach and admit this evidence in every category of case. E.g., Cal. Evid. Code § 1242 (West 2011); Colo. Rev. Stat. § 13-25-119 (2010); Kan. Stat. Ann. § 60-460(e) (2009); Wis. Stat. Ann. § 908.045(3) (2009). For a discussion of the two alternatives, see Tom Lininger, Reconceptualizing Confrontation After Davis, 85 Tex. L. Rev. 271, 315-20 (2007).

[FN68]. Or. Evid. Code 804(3)(e).

[FN69]. Or. Evid. Code 804(3)(g).

[FN70]. Or. Evid. Code 804(3)(f).

[FN71]. See Or. Evid. Code 803(3)(f). Oregon approved its unique forfeiture rules in 2005. See 2005 Or. Laws 1232. These rules stand in contrast to the U.S. Supreme Court's ruling in California v. Giles, 554 U.S. 353 (2008). In Giles, the Court held that the constitutional doctrine of forfeiture by wrongdoing requires proof of specific intent to silence the declarant as a trial witness. Id. at 359-62. The Giles majority noted in a footnote that Oregon's forfeiture rules are broader than their counterparts in other states, and they are broader than the forfeiture doctrine that the Court approved in Giles. Id. at 367 n.2 ("Only a single state evidentiary code appears to contain a forfeiture rule broader than our holding in this case (and in Crawford) allow..... The lone forfeiture exception whose text reaches more broadly than the rule we adopt is an Oregon rule adopted in 2005." (citations omitted)). Of course, the Giles holding applies only to hearsay offered against the accused, while the Oregon forfeiture rules apply to civil and

criminal trials. The Oregon rules are not unconstitutional on their face because they do not necessarily offend the Confrontation Clause, which applies only when the government offers evidence against the accused.

[FN72]. U.S. Const. amend. VI. The Sixth Amendment of the U.S. Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id.

[FN73]. Article 1, section 11 of the Oregon Constitution provides, in pertinent part, as follows:

> In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor ....

Or. Const. art. I, § 11.

[FN74]. State v. Moore, 334 Or. 328, 331-41 (2002) (discussing the difference between the federal and state confrontation clauses and declining to follow the post-Roberts federal confrontation jurisprudence that dispensed with the unavailability test when the prosecution offered evidence against the accused pursuant to the firmly rooted hearsay exception).

[FN75]. The term "restricted hearsay exception" refers to exceptions under OEC 804, all of which require as a predicate that the proponent show the declarant is unavailable for one of the enumerated reasons. Or. Evid. Code 804(3). The term "unrestricted hearsay exception" refers to exceptions under OEC 803, which do not require unavailability. Or. Evid. Code 803.

[FN76]. The unavailability requirement derives from Ohio v. Roberts, 448 U.S. 56, 65 (1980). The Court's subsequent rulings dispensed with the unavailability requirement when the prosecution offered the evidence pursuant to a firmly rooted hearsay exception. E.g., United States v. Inadi, 475 U.S. 387, 394 (1986) ("Roberts cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable."). The Court abrogated Roberts altogether in Crawford. Crawford v. Washington, 541 U.S. 36, 60-65 (2004). Oregon, however, continues to apply the unavailability requirement in Roberts because Oregon shares the "preference for face-to-face accusation" that the U.S. Supreme Court discussed in Roberts. 448 U.S. at 65; accord State v. Lucas, 213 Or. App. 277, 278-79 (2007) (noting that Oregon continues to follow the unavailability requirement in Roberts even after Crawford); Moore, 334 Or. at 331-41 (indicating that Oregon's continued application of the unavailability test does not depend on the U.S. Supreme Court's continued adherence to that test).

[FN77]. See, e.g., State v. McGriff, 871 P.2d 782, 790 (Haw. 1994) (holding that the state constitution imposes the unavailability requirement); State v. Lopez, 926 P.2d 784, 789 (N.M. Ct. App. 1996) (same); see also State v. Branch, 865 A.2d 673, 371-72 (N.J. 2005) (declining to require the declarant's testimony or unavailability as a condition of admissibility, but stating that "the issue deserves careful study," and submitting the matter "to the Supreme Court Committee on the Rules of Evidence to consider whether a rule change would be advisable").

[FN78]. Confrontation is important as a policy matter. Confrontation advances utilitarian objectives because it aids in the discovery of the truth. 2 John Henry Wigmore, A Treatise on the System of Evidence in Trials at Common Law § 1367, at 1697 (1904) (characterizing cross-examination as "the greatest legal engine ever invented for the discovery of the truth"); 3 William Blackstone, Commentaries *373 (indicating that the "open examination of witnesses ... is much more conducive to the clearing up of truth"); Matthew Hale, The History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better"); cf. Crawford, 541 U.S. at 61-62 (discussing the utility of cross-examination).

There is also an equitable rationale for confrontation; the accuser must be accountable in court for his accusation, and face-to-face confrontation assures accountability.

Confrontation serves deontological objectives by according respect to both the declarant and the accused, and by granting them autonomy in giving and challenging evidence.

[FN79]. Crawford, 541 U.S. at 60-65 (holding that Roberts is no longer good law).

[FN80]. Or. Evid. Code 803(24) (prescribing the procedure for closed-circuit testimony).

[FN81]. Crawford, Davis & the Right of Confrontation: Where Do We Go from Here?, 19 Regent U. L. Rev. 507, 520 (2007) (printing comments of Robert Mosteller, a professor at Duke Law School, during a symposium on the Supreme Court's recent jurisprudence under the Confrontation Clause).

[FN82]. Of the thirty-six counties in Oregon, only one, Multnomah, is predominantly urban. See Local Government, Or. Blue Book, http:// bluebook.state.or.us/local/index.htm (last visited May 17, 2011) (providing detailed information about each county's population and area).

[FN83]. Brian Fox, Op-Ed, Oregon's Future at Risk, Oregonian, Mar. 26, 2010, http://www.oregonlive.com/opinion/index.ssf/2010/03/oregons_future_at_ risk.html.

[FN84]. For an excellent discussion of the difference between the U.S. and Oregon constitutions with respect to privacy rights, see Jack L. Landau, The Search for the Meaning of Oregon's Search and Seizure Clause, 87 Or. L. Rev. 819, 851-59 (2008).

[FN85]. State v. Dixson, 307 Or. 195, 208, 766 P.2d 1015, 1022 (1988) (en banc).

[FN86]. State v. Campbell, 306 Or. 157, 172-73, 759 P.2d 1040, 1048-49 (1988) (holding that an electronic tracking device on an auto requires a warrant absent an emergency).

[FN87]. United States v. Pineda-Moreno, 591 F.3d 1212, 1215-17 (9th Cir. 2010) (allowing police to install GPS devices on suspects' vehicles without search warrants).

[FN88]. State v. Toste, 196 Or. App. 11, 21 n.4 (2004) (noting that Oregon lacks an equivalent to the federal good faith exception).

[FN89]. Or. Rev. Stat. § 181.850 (2009) (prohibiting state and local law enforcement officials from assisting in any way with investigation of immigration offenses).

[FN90]. Or. Rev. Stat. § 163.700 (2009) (criminalizing the "invasion of personal privacy," which includes photographing or otherwise recording a person in a state of nudity, among other provisions).

[FN91]. See Or. R. Civ. P. 36 A (listing various discovery methods similar to those available in federal court, but omitting interrogatories).

[FN92]. See Or. R. Civ. P. 36 B (indicating scope of permissible pretrial discovery); Gwin v. Lynn, 344 Or. 65, 71, 176 P.3d 1248, 1252 (2008) ("ORCP 36 B does not authorize trial courts to order pretrial disclosure of the identity and intended testimony of expert witnesses.").

[FN93]. Phillip Gordon, New Oregon Law Imposes Most Stringent Information Security Standards Yet on Employers, Littler Workplace Privacy Counsel (Aug. 13, 2007), http://privacyblog.littler.com/2007/08/articles/data-security/new-oregon-law-imposes-most-stringent-information-security-standards-yet-on-employers/.

[FN94]. Oregon Genetic Privacy Law, Or. Health Authority, http:// public.health.oregon.gov/DiseasesConditions/GeneticConditions/Pages/research.aspx (last visited May 17, 2011) (containing summaries of genetic privacy laws in Oregon).

[FN95]. Only a handful of states have such laws. Jessica Van Berkel, New Law Prohibits Credit History Checks by Most Employers, Oregonian, June 30, 2010, http://www.oregonlive.com/politics/index.ssf/2010/06/new_law_prohibits_ credit_check.html.

[FN96]. Michelle Cole, Oregon Lawmakers Reject Federal Real ID Costs, Oregonian, May 29, 2009, http:// www.oregonlive.com/politics/index.ssf/2009/05/oregon_lawmakers_reject_ federa.html (reporting that the Oregon House of Representatives approved a bill that directed state agencies not to comply with the federal "Real ID" law).

[FN97]. Or. Evid. Code 503-510 (setting forth various evidentiary privileges); see supra notes 31-42 and accompanying text. The FRE do not enumerate privileges in the federal system. Most states have not established as many evidentiary privileges as Oregon has, and most states do not enforce their privileges as strictly as Oregon does. See 3 Weinstein & Berger, supra note 1, §§ 501-10.

[FN98]. E.g., Or. Evid. Code 511 (providing for waiver of privilege by voluntary disclosure); Or. Evid. Code 512 (refusing to find waiver for matters disclosed under compulsion or without the opportunity to claim privilege).

[FN99]. Or. Evid. Code 513 (prohibiting adverse comment on, or inference from, invocation of privilege).

[FN100]. See supra notes 28-30 and accompanying text (comparing OEC 412 with FRE 412).

[FN101]. Or. Evid. Code 311(1)(v) (establishing the presumption that "[a] child born in lawful wedlock is legitimate").

[FN102]. Or. Evid. Code 311(1)(u) (establishing the presumption that "[a] man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage").

[FN103]. Or. Evid. Code 311(1)(b) (establishing the presumption that "[a] person takes ordinary care of the person's own concerns").

[FN104]. Norman R. Williams, Direct Democracy, the Guaranty Clause, and the Politics of the "Political Question" Doctrine: Revisiting Pacific Telephone, 87 Or. L. Rev. 979, 980-81 (2008) ("[B]etween 1902 and 2007, Oregonians put 340 initiatives and 62 referenda on the ballot. Of those, 118 of the initiatives and 21 of the referenda passed. During the same period, the Oregon Legislature referred 407 measures to the people, of which 233 passed."). Oregon leads the nation in its reliance on direct democracy. See Jeff Mapes, Only a Few Ballot Initiatives Look to Qualify for Oregon Ballot This November, Oregonian, Apr. 3, 2010, http:// www.oregonlive.com/politics/index.ssf/2010/04/only_a_few_ballot_ initiatives.html (observing that Oregon "has had more ballot initiatives than any other state--357--since it pioneered direct democracy in 1904").

[FN105]. See Oregon Election History, Or. Blue Book, http:// bluebook.state.or.us/state/elections/elections06.htm (last visited May 17, 2011) (maintaining a list of all ballot measures in Oregon elections and the results in each election).

[FN106]. Or. Const. art. I, § 17.

[FN107]. Steven G. Calabresi & Sarah E. Agudo, Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?, 87 Tex. L. Rev. 7, 77 (2008) (noting that the Oregon Constitution uses relatively emphatic language requiring jury trials in civil cases).

[FN108]. Lakin v. Senco Prods., Inc., 329 Or. 62, 78-79, 987 P.2d 463, 473 (1999) (striking down limits on damage awards under Or. Rev. Stat. §18.560(1) because this law violated the constitutional right to jury trials in civil cases under Article I, section 17 of the Oregon Constitution), clarified, 329 Or. 369, 987 P.2d 476 (1999).

[FN109]. Williams v. Philip Morris, Inc., 344 Or. 45, 61, 176 P.3d 1255, 1263-64 (2008) (reinstating a jury verdict awarding $80 million in damages, even though the U.S. Supreme Court had remanded the case); see also Ashbel S. Green, Justices Uphold Cigarette Damages: Oregon's High Court Once Again Affirms $79.5 Million Verdict Against Philip Morris, Oregonian, Feb. 1, 2008, http://blog.oregonlive.com/oregonianextra/2009/03/history_of_the_williams_ family.html#11.

[FN110]. UCLA law professor Eugene Volokh has challenged the Oregon rule by filing a petition for writ of certiorari on September 9, 2010, in Herrera v. Oregon. Petition for a Writ of Certiorari, Herrera v. Oregon (No. A141205), available at http://www.law.ucla.edu/volokh/herrera.pdf. The U.S. Supreme Court previously rejected such a challenge to Oregon's rule in Apodaca v. Oregon, 406 U.S. 404 (1972). For a general discussion of Oregon's distinctive rule and the cert petition filed by Professor Volokh, see Editorial, A New Challenge to Non-Unanimous Jury Convictions, Wash. Examiner (Sept. 17, 2010), http://www.washingtonexaminer.com/opinion/blogs/Examiner-Opinion-Zone/A-new-challenge-to-non-unanimous-jury-convictions-103160269.html (indicating that only Oregon and Louisiana allow nonunanimous verdicts in felony trials).

[FN111]. In 1996, Oregonians approved Ballot Measure 40, which gave the public, through the prosecutor, the right to demand jury trial in criminal cases. The measure passed with a majority of nearly sixty percent, but the Oregon Supreme Court later invalidated this result because the ballot measure in question stated multiple questions in violation of the Oregon Constitution. Armatta v. Kitzhaber, 327 Or. 250, 256-58, 959 P.2d 49, 53 (1998) (holding that multiple propositions require separate votes).

[FN112]. Or. Evid. Code 404(4).

[FN113]. Or. Evid. Code 609(3)(a).

[FN114]. Fed. R. Evid. 609(b).

[FN115]. The OEC has no counterpart to FRE 614, which allows the court to call and interrogate witnesses.

[FN116]. Or. Evid. Code 309(1).

[FN117]. Compare Fed. R. Evid. 606 (preventing a juror from testifying in the present trial or in a subsequent hearing concerning the jury's deliberations) with Or. Evid. Code 606 (preventing a juror from testifying in the present trial but not preventing the juror from testifying in a subsequent hearing concerning the jury's deliberations).

[FN118]. In re Conduct of Gatti, 330 Or. 517, 532-33, 8 P.3d 966, 976 (2000) (en banc) (interpreting Oregon's ethical rule against dishonesty by lawyers, then labeled DR 1-102(A)(3), to forbid lawyers' involvement in deceptive undercover investigations). While all states share the same provision in their codes of ethics, every other court addressing this issue has held that the rule against dishonesty does not automatically bar lawyers from supervising deceptive undercover operations by police. See, e.g., Apple Corps Ltd. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456 (D.N.J. 1998) (holding that a public or private lawyer could properly employ an undercover investigator to detect ongoing violations of law, especially where detection of these violations would otherwise be difficult); Minn. Lawyers Prof'l Responsibility Bd., Op. No. 18, Secret Recordings of Conversations (1996) (same); Bd. of Comm. on Grievances & Discipline, Sup. Ct. of Ohio, Op. 97-3 (1997) (same); Ethics Advisory Comm., Utah State Bar, Op. 02-05 (2002) (a government attorney does not violate the ethical rule prohibiting dishonesty if the lawyer directs a covert investigation involving dishonesty); Va. State Bar, Va. Legal Ethics Op. 1738, Attorney Participation in Electronic Recording Without Consent of Party Being Recorded (2002) (same). No state other than Oregon interpreted this rule to prohibit lawyers' involvement in deceptive undercover investigations.

[FN119]. Or. State Bar, Statement of Professionalism (2006), available at http://www.osbar.org/_docs/rulesregs/professionalism.pdf.

[FN120]. In re Preston, 269 Or. 271, 272, 525 P.2d 59, 59 (1974) (en banc) (indicating that the respondent was less than candid in complying with interrogatories directed at the government witness).

[FN121]. Supra notes 43-44 and accompanying text.

[FN122]. See, e.g., In re Green Grand Jury Proceedings, 492 F.3d 976, 982-83 (8th Cir. 2007) (setting forth elements of the crime-fraud exception and collecting opinions in other federal circuit courts listing similar requirements).

[FN123]. Or. Evid. Code 804(3)(f)-(g).

[FN124]. In California v. Giles, 554 U.S. 353 (2008), the Court noted that Oregon's forfeiture rules are broader than their counterparts in other states, and they are broader than the federal forfeiture rule in FRE 804(b)(6). Id. at 367 n.2.

[FN125]. One rationale for the dying declaration exception is the equitable concern that murderers should be accountable for the hearsay statements of their victims. Richard D. Friedman, The Confrontation Clause Re-Rooted and Transformed, 2004 Cato Sup. Ct. Rev. 439, 467 (2004) ("[T]he admissibility of dying declarations ... is best understood as a reflection of the principle that a defendant who renders a witness unavailable by wrongful means cannot complain about her absence at trial."). FRE 804(b)(2), the federal version of this exception, admits a hearsay statement by a person who believes his or her death is imminent, if the statement concerns the cause or circumstances of the declarant's death, and if the present proceeding is either a civil trial or a prosecution for homicide. Fed. R. Evid. 804(b)(2). Oregon is among a handful of states extending the dying declaration exception to all categories of criminal prosecutions, not just homicide cases. See supra notes 66-67 and accompanying text.

[FN126]. Tom Lininger, Should Oregon Adopt the New ABA Model Rules of Professional Conduct?, 39 Willamette L. Rev. 1031, 1033 (2003) (discussing Oregon's leadership in innovating strategies for prosecuting domestic violence).

[FN127]. E.g., Vicki Walker & Tom Lininger, Bill Would Help Prosecute Batterers, Register-Guard (Eugene, Or.), Apr. 18, 2004 (copy on file with author) (sounding themes that would appeal to both Democrats and Republicans). See generally Aya Gruber, Rape, Feminism, and the War on Crime, 84 Wash. L. Rev. 581, 582-86 (2009) (explaining the alliance between progressive feminists and conservative advocates of crime control).

[FN128]. Or. Evid. Code 803(18a).

[FN129]. Or. Evid. Code 803(24).

[FN130]. Or. Evid. Code 803(26).

[FN131]. See Fed. R. Evid. 803; 6 Weinstein & Berger, supra note 1, art. VIII (comparing states' analogs to FRE 803).

[FN132]. Or. Evid. Code 609(2).

[FN133]. Fed. R. Evid. 609 (allowing impeachment with convictions only for misdemeanor offenses that include dishonesty as an element).

[FN134]. Compare Or. Evid. Code 404-1 with Fed. R. Evid. 404.

[FN135]. Compare Or. Evid. Code 412 with Fed. R. Evid. 412. OEC 412 is longer than FRE 412 and sets forth more limitations on the use of evidence concerning the prior sexual activity and dress of the complainant.

[FN136]. E.g., Peter R. Dworkin, Confronting Your Abuser in Oregon: A New Domestic Violence Hearsay Objection, 37 Willamette L. Rev. 299, 304-06 (2001) (noting criticisms of OEC 803(26) raised by the Oregon Criminal Defense Lawyers Association and the Juvenile Rights Project).

[FN137]. Restyled Fed. R. Evid. 101 advisory committee's note, available at http://federalevidence.com/pdf/2009/Misc/FRE_Restyle_101-415.pdf.

[FN138]. Id.

[FN139]. Id.; see, e.g., Restyled Fed. R. Evid. 104(c) (omitting "in all cases"); Restyled Fed. R. Evid. 602 (omitting "but need not"); Restyled Fed. R. Evid. 611(b) (omitting "in the exercise of discretion").

[FN140]. Restyled Fed. R. Evid. 101 advisory committee's note.

[FN141]. The current version of FRE 401 reads as follows:

Rule 401.Definition of "Relevant Evidence." "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The restyled FRE 401 reads as follows:

Rule 401.Test for Relevant Evidence. Evidence is relevant if it has any tendency to make more or less probable the existence of a fact that is of consequence in determining the action.

[FN142]. The current version of FRE 601 reads as follows:

Rule 601.General Rule of Competency. Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

The restyled FRE 601 reads as follows:

Rule 601.Competency to Testify in General. Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision.

[FN143]. The current version of FRE 604 reads as follows:

Rule 604.Interpreters. An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

The restyled FRE 604 reads as follows:

Rule 604.Interpreter. An interpreter must be qualified and must give an oath or affirmation to make a true translation.

[FN144]. Of course, Oregon would not need to adopt the second sentence of the restyled FRE 601, which specifies which state's competency rules will apply in a federal diversity action.

[FN145]. The current version of FRE 104(c) reads as follows:

(c) Hearing of jury.Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

The restyled FRE 104(c) reads as follows:

(c) Matters That the Jury Must Not Hear. A hearing on a preliminary question must be conducted outside the jury's hearing if:

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

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

[FN146]. The current version of FRE 609(d) reads as follows:

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

The restyled version of FRE 609(d) reads as follows:

(d) Juvenile Adjudications. Evidence of a juvenile adjudication is admissible under this rule only if:
(1) it is offered in a criminal case;
(2) the adjudication was of a witness other the defendant;
(3) a conviction of an adult for that offense would be admissible to attack the adult's credibility; and
(4) admitting the evidence is necessary to fairly determine guilt or innocence.

[FN147]. The current version of FRE 702 reads as follows:

Rule 702.Testimony by Experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The restyled FRE 702 reads as follows:

Rule 702.Testimony by Expert Witnesses. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

[FN148]. The current version of FRE 803(6) reads as follows:

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The restyled FRE 803(6) reads as follows:

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;
(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
(C) making the record was a regular practice of that activity; and
(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(b)(11) or (12) or with a statute permitting certification.

But this exception does not apply if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

[FN149]. E.g., United States v. Jones, 580 F.2d 219, 224 (6th Cir. 1978) (holding that judicial notice is not permissible on appeal in a criminal case because it would violate the right to jury trial).

[FN150]. The current version of FRE 407 reads as follows:

Rule 407.Subsequent Remedial Measures. When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if converted, or impeachment.

The restyled FRE 407 reads as follows:

Rule 407.Subsequent Remedial Measures. When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or--if disputed--proving ownership, control, or the feasibility of precautionary measures.

[FN151]. As applied in statutory construction, the rule of the last antecedent provides that a modifier generally refers to the most proximate prior noun. See 2A Norman J. Singer, Statutes and Statutory Construction § 47.33 (6th ed. 2000).

[FN152]. These figures derive from the following search in the OR-CS database of Westlaw: da(last 10 years) & ("oregon evidence code" OEC).

[FN153]. Garrett v. Commonwealth, 48 S.W.3d 6, 13 (Ky. 2001) (quoting Ky. R. Evid. prefatory note (1989)).

[FN154]. Fried, supra note 12, at 52 (noting the increasing prevalence of interstate practice).

[FN155]. Martindale Hubbell maintains a searchable database that lists all the firms in Portland and indicates which firms have an office in another state as well. A search of this database on November 15, 2010, indicated that at least fifty firms in Portland have offices in other states. The database is available at Martindale.com, http://www.martindale.com/Find-Lawyers-and-Law-Firms.aspx (last visited May 17, 2011).

[FN156]. Admissions, Or. State Bar, http://www.osbar.org/admissions #reciprocity (last visited May 17, 2011) (detailing Oregon's policy on reciprocal agreements).

[FN157]. See, e.g., Or. R. Prof'l Conduct 5.5 (setting forth many procedures through which lawyers may appear on a short-term basis, even without membership in the bar of that jurisdiction). The foreign lawyer may seek pro hac vice admission, may associate with local counsel, or many confine his or her work to some tasks for which local admission is not necessary, such as mediation, interviews of witnesses, or negotiation of contracts. Id. Prior to 2005, the Oregon Code of Professional Responsibility was less accommodating of interstate practice. DR 3-101(B) provided simply that "[a] lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction." Or. Code of Prof'l Responsibility, DR 3-101(B) (2003).

[FN158]. But see Kirgis, supra note 14, at 813-31 (suggesting that uniform evidence rules are not crucial for efficiency and that the major challenges in interstate trial practice arise from the novelty of each case and the logistics of trial preparation rather than from the variation between states' evidence rules).

[FN159]. E.g., Lindsey C. Boney IV, Forum Shopping Through the Federal Rules of Evidence, 60 Ala. L. Rev. 151, 188-89 (2008) (noting that differences in evidence law and other procedural rules lead to forum shopping).

[FN160]. Erik Luna & Paul G. Cassell, Mandatory Minimalism, 32 Cardozo L. Rev. 1, 21 (2010) ("Congress has slowly but surely obtained a general police power to enact virtually any offense, adopted repetitive and overlapping statutes, criminalized behavior that is already well covered by state law, created a vast web of regulatory offenses, and extended federal jurisdiction to almost any sort of deception or wrongdoing, virtually anywhere in the world. At

last count, there were about 4500 federal crimes on the books, with the largest portion enacted over the past four decades.").

[FN161]. Anthony L. Ryan, Principles of Forum Selection, 103 W. Va. L. Rev. 167, 188 (2000) (noting that forum shopping or "rule-of-evidence shopping" might be a factor influencing a court's decision to abstain).

[FN162]. The restyled version of FRE 608(b) provides as follows:

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

(1) the witness; or

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

[FN163]. Fed. R. Evid. 608(b).

[FN164]. OEC 608(2) provides as follows: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of a crime as provided in ORS 40.355, may not be proved by extrinsic evidence. Further, such specific instances of conduct may not, even if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness." Or. Evid. Code 608(2).

[FN165]. See supra Part II.A.

[FN166]. See supra Part II.D.

[FN167]. The restyled version of FRE 609(a) provides as follows:

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

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

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

(B) must be admitted if the witness is a defendant in a criminal case and the probative value of the evidence outweighs its prejudicial effect; and

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

[FN168]. See supra note 52 and accompanying text. OEC 609(2)(a), the provision that admits misdemeanor crimes of domestic violence in order to impeach the accused, does not include any requirement that the crimes must have involved dishonesty. Or. Evid. Code 609(2)(a). The only requirement is that the crimes must be similar to the presently charged offense. Under the guise of impeachment, OEC 609(2) explores the propensity of the accused to commit crimes of domestic violence.

[FN169]. See supra Part II.E.

[FN170]. See generally Kirgis, supra note 14, at 837-38 (discussing the tendency of uniform rules to become obsolete due to "legislative inertia").

[FN171]. See Edward A. Hartnett, Against (Mere) Restyling, 82 Notre Dame L. Rev. 155, 178 (2007) (commenting

that, with respect to the restyled Federal Rules of Civil Procedure, "adoption of the restyled rules may make it harder for more substantial reform to be made").

[FN172]. The Oregon Rules of Professional Conduct reflect the date on which amendments take effect. Many amendments postdated the adoption of these rules in 2004. Or. Rules of Prof'l Conduct (2010), available at http://www.osbar.org/_docs/rulesregs/orpc.pdf.

[FN173]. Or. Evid. Code 608(2).

[FN174]. Or. Evid. Code 609(2).

[FN175]. See Or. Evid. Code 404-1.

89 Or. L. Rev. 1407

TAB III-C.

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COMMENTARY ON THE RESTYLED FEDERAL RULES OF EVIDENCE

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I. Introduction

The Restyled Rules of Evidence --- effective December 1, 2011 --- represent the last chapter in the effort to make the national rules of procedure more clear, concise, consistent, and easier to use.[2] The Judicial Conference Standing Committee on Rules of Practice and Procedure (the "Standing Committee") has conducted a decades-long project to adopt clear and consistent style conventions for all of the national rules of procedure. The rules had been enacted without consistent style conventions --- actually without any style conventions --- so there were differences from one set of rules to another, and even from one rule to another within the same set. Different rules expressed the same thought in different ways, leading to a risk that they would be interpreted differently. Different rules sometimes used the same word or phrase to mean different things, again leading to a risk of misinterpretation. Drafters made no effort to write the rules in plain English.

Despite some initial opposition, each of the restyling projects has proved successful — substantially assisting lawyers, judges and law students in understanding and applying the rules. The Restyled Evidence Rules have won legal writing awards, including a Clear Mark award for plain language and the Burton Award for Legal Reform.

II. The Process for Restyling the Evidence Rules

With the approval of the Chief Justice of the United States — who is the Chair of the Judicial Conference — the Advisory Committee on Evidence Rules undertook its restyling project beginning in the Fall of 2007. The Committee established a step-by-step process for restyling in compliance with previous restyling projects and with the Rules Enabling Act. Those steps involved multiple levels of drafting and review by the Evidence Rules Committee, the Style Subcommittee of the Standing Committee, as well as substantial input from judges, lawyers and academics.

The author of this Comment served as the Reporter for the Restyling Project. Professor Joseph Kimble, a legal writing professor, served as the principal restylist.

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[2] The Federal Appellate, Criminal and Civil Rules have already been restyled. There is no plan to restyle the remaining set of national rules --- the Federal Rules of Bankruptcy Procedure --- because those Rules are inherently tied to Bankruptcy statutes that would not be restyled.

The restyling protocol was as follows:

1. The restylist prepared a first draft. The Reporter commented on the draft, pointing out where the proposals would make a substantive change and also suggesting style improvements. Thus, the main role of the Reporter was to protect against any substantive changes being made in the course of restyling the Rules. The restylist then prepared a second draft for review by the Advisory Committee as a whole.

2. The Advisory Committee reviewed the second draft to determine whether proposed changes were substantive and to provide style suggestions. If the Advisory Committee determined that a change was substantive --- see the definition of "substantive" below --- then the change was not implemented. If the Advisory Committee determined that the proposed change was one of style --- but disagreed with the change --- then the Style Subcommittee of the Standing Committee on Rules of Practice and Procedure would have the last word.

No Substantive Change

The most challenging part of the restyling process was to improve the style of the Evidence Rules *without changing the substance*.. The Advisory Committee established a working definition of a substantive change — a proposed change is "substantive" if:

- under the existing practice in any circuit, it could lead to a different result on a question of admissibility;

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

- it changes the structure of a rule or method of analysis in a manner that would fundamentally alter how courts and litigants have thought about, or argued about, the rule --- for example, changing or intermixing the concepts of admissibility (Rule 104(a)) and conditional relevance (Rule 104(b); or

- it changes a "sacred phrase" — phrases that have become so familiar to courts and litigators that to change them would result in substantial dislocation costs --- for example, "truth of the matter asserted."

During the review of the Restyled Rules, the Advisory Committee caught approximately 100 instances of a restyled draft that would have rendered a substantive change to the Evidence Rules. When the Rules were issued for public comment, members of the public raised a number of substantive changes --- around 10 --- that had not been caught by the Advisory Committee. When the Rules then came before the Standing Committee for final approval, another handful of substantive changes were found, and corrected. All this is to state the obvious --- it's hard to amend every single Evidence Rule for style and yet avoid making any substantive change at all. And it's hard to uncover all substantive changes even in a careful review --- every time you read it, you see something else.

It may be that some arguably substantive changes may be found as courts start applying the Restyled Rules --- but it is hoped that the courts will take the Committee at its word, and consider the Committee Note which says that no substantive change is intended. That has generally been the case so far with the other restyling projects --- where courts might detect a change in meaning, they ordinarily rely on the Advisory Committee Note and hold that no substantive change has been made. *See, e.g., Constien v. United States*, 628 F.3d 1207, 1215 n. 7 (10th Cir. 2010) (finding a change in meaning in Civil Rule 4, but relying on the Committee Note to hold that no substantive change had been made).

Why No Substantive Changes?

The Restyling Project would never have received the green light without a guarantee that it would (to the best of human ability) avoid substantive changes. Changes to the Evidence Rules are costly. The Evidence Rules are often applied "on the fly" by courts and litigants, thus any change is likely to disrupt proceedings by upsetting settled expectations and common understanding. The Advisory Committee has always taken the position that substantive changes are to be proposed only where the existing rule is not working efficiently, is causing confusion, or is subject to conflicting interpretations by various courts.

The Restyling Project changes every single evidence Rule. The only way to allay the general (and well-grounded) concern about settled expectations was to avoid at all costs any substantive change. The Advisory Committee, in proposing the Restyling Project, could then credibly argue that whatever expectations and understandings would be changed by the Restyling would be minor, and outweighed by the fact that the Rules would be easier to approach and apply.

As the Restyling Project went forward, the Advisory Committee discovered a few Rules that might be worthy of a substantive amendment. The Advisory Committee is currently reviewing some proposals for substantive change that were uncovered by the Restyling effort.

III. Goals of Restyling

The Restyling effort provides consistent terminology, plain language, and generally makes the Evidence Rules more user-friendly. That end-product results from many specific techniques applied consistently throughout the rules.

First, the Restyled Evidence Rules use a special visual format to achieve an easier-to-use presentation. The rules are broken down into logical parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. These formatting changes make the Restyled Rules easier to read and understand even when the words are not changed.

Second, the Restyled Rules reduce the use of inconsistent terms that say the same thing in different ways. For example, consistency is achieved by not switching between "accused" and "defendant," or between "party opponent" and "opposing party," or among the various formulations of civil and criminal action/case/proceeding.

Third, the Restyled Rules minimize the use of inherently ambiguous words. According to the restylist, the most egregious example is the word "shall" --- which can mean "must," "may," or something else, depending on context. Moreover, "shall" is no longer generally used in spoken or clearly written English. The Restyled Rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each Rule. (Though it is interesting to note that the Supreme Court's Order referring the Restyled Rules to Congress uses "shall" multiple times.)

Fourth, the Restyled Rules minimize the use of redundant "intensifiers." These are expressions that try to add emphasis, but instead state the obvious and create negative implications for other rules in which the language is not included. For example, phrases like "in the interests of justice" have been largely eliminated because presumably everything that a court does in ruling on evidence must be in the interests of justice.

Fifth, the Restyled Rules improve the drafting of the Evidence Rules by changing passive to active voice whenever possible; eliminating unnecessary, vague, or redundant language; and correcting inadvertent errors in the original rules.

Sixth, the Restyled Rules seek to accommodate technological advances in the presentation of evidence by including, in a new definitions section, language that defines written material to include material stored in electronic form. The definitions are set forth in Rule 101.

Seventh, the Restyled Rules streamline the rules by placing recurring terms in the definition section so that those terms do not have to be fully stated in each rule. See Rule 101.

Eighth, the Restyled Rules make clear in each Committee Note that the changes are stylistic only and no change in the meaning or application of the Rules is intended. With respect to a few of the Rules, however, the Advisory Committee determined that the Restyling changes that were implemented might raise questions about whether the Restyled Rule might operate as an inadvertent substantive change. For those Rules, the basic Committee Note was expanded to address what the Committee foresaw as possible questions that might arise in the Bench and Bar.

IV. Examples of the Effect of Restyling

What follows is an analysis of 1) how the goals of the Restyling have been implemented, and 2) the problems that were encountered in restyling some of the Rules. The analysis uses particular Rules as examples. For each Rule used, the pre-restyled Rule is in the left column and the Restyled Rule is on the right.

Rule 103. Rulings on Evidence	**Rule 103. Rulings on Evidence**

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and **(1) Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or **(2) Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.	**(a) Preserving a Claim of Error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and: **(2)** if the ruling admits evidence, a party, on the record: **(A)** timely objects or moves to strike; and **(B)** states the specific ground, unless it was apparent from the context; or **(2)** if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context. **(b) Not Needing to Renew an Objection or Offer of Proof.** Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.
(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.	**(c) Court's Statement About the Ruling; Directing an Offer of Proof.** The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.
(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.	**(d) Preventing the Jury from Hearing Inadmissible Evidence.** To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.
(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.	**(e) Taking Notice of Plain Error.** A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

REPORTER'S COMMENT ON RESTYLED RULE 103

Rule 103 is one of a handful of Restyled Rules in which the internal subdivisions were restructured. As you can see, for example, the plain error provision is subdivision (d) in the original, subdivision (e) as restyled. The reason for this particular restructuring is that restylists try to avoid hanging (i.e.., unnumbered) indent paragraphs. They believe that everything should be a numbered or lettered subdivision if possible, as it is more user-friendly and also easier to cite. Thus, the hanging paragraph in old subdivision (a) has been turned into a new subdivision (b).

Of course there is a cost to restructuring subdivisions --- anyone engaged in an electronic search for cases involving the provision about preserving error from an in limine determination will now be looking under Rule 103(b). For all cases decided before December 1, 2011, the search for "Rule 103(b)" will be problematic in two respects: 1) it won't uncover any cases on point; and 2) it will uncover cases off point, i.e., those dealing with old Rule 103(b).

For this reason, the Advisory Committee resolved to keep the restructuring of subdivisions to a minimum. The restylist had to make a compelling case for restructuring. With respect to Rule 103, the Advisory Committee determined that the benefits of restructuring outweighed the costs --- the in limine provision is now easier to cite, it is conceptually independent from other provisions in the Rule, and there are not so many cases citing Rule 103 that the disruption to electronic searches would be profound.

It should also be noted that the Advisory Committee prohibited any change to rule numbers themselves. That is, it forestalled all efforts to reorganize or combine the numbered rules. That was considered too disruptive.

Finally, Rule 103 illustrates an important goal of restyling – to change from the passive to the active voice. Thus, in subdivision (a), "Error may not be predicated upon . . ." is changed to "A party may claim error . . . only . . ."

Rule 106. Remainder of or Related Writings or Recorded Statements	**Rule 106. Remainder of or Related Writings or Recorded Statements**
When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.	If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.

REPORTER'S COMMENT TO RESTYLED RULE 106

One of the major goals of restyling was to "electrify" the Evidence Rules, i.e., to update the language to accommodate technological changes in the presentation of evidence. When the Rules were adopted in the 1970's, it is understandable that the focus was on the presentation of hardcopy evidence. Rules throughout refer to "writings" and similar paper-based words. Rule 106 is an example. When the restyling effort began, the Reporter was determined to modify every use of the term "writing" to include "in any form" or "including in electronic form." The restylist concluded that employing such a solution in every rule referring to a writing would be balky --- there are at least 30 evidence rules that refer to paper in some way. So the Reporter and restylist came up with an alternative solution --- a provision in the definitions section, Rule 101, stating that any reference to anything in written form includes information in electronic form.

In the Advisory Committee's view, the expansion of the Rules to cover electronic evidence is not substantive. After extensive research, the Committee determined that the courts were accommodating electronic evidence under the existing rules, so any change to explicitly accommodate such evidence would not alter any evidentiary result in a Federal court. The change was nonetheless an important recognition of technological advancements and a valuable statement that the Evidence Rules are up-to-date with modern developments in the presentation of evidence.

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS **Rule 301. Presumptions in General in Civil Actions and Proceedings**	**ARTICLE III. PRESUMPTIONS IN CIVIL CASES** **Rule 301. Presumptions in Civil Cases Generally**
In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.	In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

REPORTER'S COMMENT ON RESTYLED RULE 301

The balky reference to "civil actions and proceedings" has been streamlined to "a civil case." Research indicated that for purposes of the Evidence Rules, there was no distinction between a civil action and a civil proceeding. Just to be safe, the definitions section, Rule 101, defines "civil case" to include both civil actions and civil proceedings.

Another innovation is to simplify the original rule's confusingly-put reference to "the burden of proof in the sense of the risk of nonpersuasion." All that was meant by that was the "burden of persuasion" --- so the Restyled Rule uses the more direct term.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes	**Rule 404. Character Evidence; Crimes or Other Acts**
(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: **(1) Character of accused.** In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution; **(2) Character of alleged victim.** In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor; **(3) Character of witness.** Evidence of the character of a witness, as provided in Rules 607, 608, and 609.	**(a) Character Evidence.** **(3)** ***Prohibited Uses.*** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait. **(4)** ***Exceptions for a Defendant or Victim in a Criminal Case.*** The following exceptions apply in a criminal case: **(A)** a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it; **(B)** subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may: **(i)** offer evidence to rebut it; and **(ii)** offer evidence of the defendant's same trait; and **(C)** in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor. **(4)** ***Exceptions for a Witness.*** Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.	**(b) Crimes, Wrongs, or Other Acts.** **(1)** ***Prohibited Uses.*** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. **(2)** ***Permitted Uses; Notice in a Criminal Case.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must: **(A)** provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and **(B)** do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

REPORTER'S COMMENT ON RESTYLED RULE 404(b)

Rule 404(b) provides that a bad act "may be admissible" to prove not-for-character purposes such as intent, motive, etc. The restyling consultant sought to change it to "the court may admit" for a not-for-character purpose. The consultant's position was that "*may* be admis*sible*" was a potentiality on top of a potentiality, and also that it was in the passive voice. But the Department of Justice objected strenuously to the proposed change, on the ground that it had fought in the courts for 40 years to establish the proposition that the phrase "may be admissible" mandates treating Rule 404(b) as a rule of *inclusion*, not exclusion. Given that hard-fought battle --- which the Department had won in every federal court --- the Department was not about to start over again with a new phrase. In other words, in the Department's view, the phrase "may be admissible" was a sacred phrase that could not be restyled. The Advisory Committee agreed with the Department --- meaning that, under the protocol employed for Restyling, the change could not be implemented.

In the Reporter's view, the notice provision in Restyled Rule 404(b) contains a possible substantive change. The original rule states that a bad act is admissible for a not-for-character purpose "provided that" in a criminal case the government gives proper notice to the defendant. Thus admissibility is conditioned on the notice. The restyled notice provision *requires* the government to provide notice but does not specifically say that the evidence is inadmissible if

notice is not given. This leaves the government to argue that even if it does not give notice, the evidence should be admitted --- the remedy could instead be something like a sanction. Restylists are opposed to legalistic terms such as "provided that" but that does not justify making a substantive change. The Advisory Committee, however, did not find the change to the notice provision to be substantive; and the Standing Committee ultimately approved the change to the notice provision.

Rule 406. Habit; Routine Practice	**Rule 406. Habit; Routine Practice**
Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.	Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

REPORTER'S COMMENT ON RESTYLED RULE 406

The original rule states that habit evidence is "relevant" to prove conduct in conformity. The restylist proposed changing the word "relevant" on the ground that all evidence must be relevant under Rule 401 to be admissible --- so the use of "relevant" here was thought to be superfluous. The Reporter noted that the habit rule has always been superfluous in the sense that it states that relevant evidence is admissible. But the rule is nonetheless important because 1) it emphasizes the distinction between character (which is usually excluded to prove conduct) and habit (which is usually admitted to prove conduct), and 2) it emphasizes that certain common-law limitations on habit evidence --- corroboration and the absence of an eyewitness --- have been lifted in the Federal Rules. The Reporter argued that the word "relevant" should be retained in order to keep the emphases that animated the original rule. But the Advisory Committee found that the change from "relevant" to "may be admitted" was one of style only. Under the Restyling Protocol, the Advisory Committee had the final word over substance, while the Rules Committee had the final word over questions of style.

Rule 407. Subsequent Remedial Measures	**Rule 407. Subsequent Remedial Measures**
When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the	When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove: • negligence; • culpable conduct; • a defect in a product or its design; or

exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.	• a need for a warning or instruction. But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

REPORTER'S COMMENT ON RESTYLED RULE 407

The original Rule 407 is a rule of exclusion --- it excludes subsequent remedial measures if offered for certain listed purposes. The second sentence of the original Rule provides that if the evidence is offered for any other purpose, the Rule is simply inapplicable --- "This rule does not require the exclusion . . . "

The restylist was of the opinion that the "rule does not require the exclusion" was bad style. He proposed "the court may admit" the evidence if offered for a proper purpose. The Reporter disagreed, arguing that the proposed restyling changed the character of the rule --- from one that expressed no opinion about evidence offered for a proper purpose, to one that provides an affirmative ground of admissibility for such evidence. The Advisory Committee ultimately determined that the change was one of style rather than substance. But as a compromise, the Committee added a second paragraph to the basic restyling Committee Note, which provides as follows:

> Rule 407 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

Another restyling innovation employed in Restyled Rule 407 (as well as a few other Rules such as 402 and 501) is the use of "bullet points." Bullet points can help to unpack a Rule that is dense with a list of factors, and make it easier to approach and apply. But the use of bullet points is not without controversy. Some lawyers and judges objected to their use on the ground that a bullet point cannot be cited conveniently. The Committee's response to that criticism was that the concepts that were being bulleted could not have been individually cited under the old rule. Because of the controversy, however, bullet points are used sparingly in the Restyled Rules --- generally speaking only when the original rule sets forth a string of independent concepts in a long-running sentence, and those concepts can be broken out conveniently into a vertical list.

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases	Rule 413. Similar Crimes in Sexual-Assault Cases
(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant. * * *	**(a) Permitted Uses.** In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant. * * *

REPORTER'S COMMENT TO RULE 413(a)

As drafted and enacted by Congress, Rule 413(a) provided that evidence of the defendant's commission of "another offense or offenses of sexual assault" is admissible. The restylist thought that language was cumbersome and proposed to change it to "another sexual assault." The Reporter objected that this would be a substantive change because the use of the word "another" --- in place of the plural in the original rule --- could be read to allow admissibility of *only one* sexual assault. Thus, a defendant with more than one sexual assault in his past could argue to the court that only one of them could be admitted under the Rule. The restylist argued that there is a restyling convention providing that a reference to the singular automatically includes a reference to the plural. Members of the Advisory Committee responded that proper rulemaking cannot be dependent on restyling conventions that are not specifically set forth in any rule. The Advisory Committee eventually determined that a reference to "another offense" would result in a substantive change to the rule. So the Restyled Rule now provides that the court may admit evidence that the defendant committed "any other sexual assault."

ARTICLE V. PRIVILEGES Rule 501. General Rule	ARTICLE V. PRIVILEGES Rule 501. Privilege in General
Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.	The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise: • the United States Constitution; • a federal statute; or • rules prescribed by the Supreme Court. But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

REPORTER'S COMMENT ON RESTYLED RULE 501

The provision concerning applicability of state privilege law does not accurately describe the case law under Rule 501. As written and restyled, the language provides that state privilege law governs every claim arising under state law that is brought in a federal court. But this is not so when a state claim is joined with a federal claim --- either under pendent jurisdiction or independently in diversity when joined with a federal claim. The federal courts have generally held that when state claims are joined with federal claims, the federal rule of privilege prevails. *See, e.g., Hancock v. Hobbs,* 967 F.2d 462 (11th Cir. 1992).

It could be argued that while restyling the Evidence Rules, the Advisory Committee should have taken the opportunity to conform the Rules to case law where there is a divergence from the text of a rule. But that would have been a much more massive undertaking, and often would have involved substantive changes to the existing rules. In this case such a change would be substantive because there are some reported cases that apply state law when joined with a federal claim, at least in certain narrow circumstances.

Rule 605. Competency of Judge as Witness	**Rule 605. Judge's Competency as a Witness**
The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.	The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

REPORTER'S COMMENT ON RESTYLED RULE 605

One of the goals of restyling is to delete excess verbiage. But care must be taken lest the words deleted have a possible substantive importance. In Rule 605, the restylist thought that the phrase "may not testify in that trial as a witness" could be shortened to "may not testify." In other words, the word "witness" was thought duplicative of the word "testify." How else can you testify other than as a witness?

But the Advisory Committee opposed deleting "witness" on the ground that there is a large body of case law concerning the permissibility of judges commenting on the evidence --- not as "witnesses" but in their role instructing the jury. It could be argued that a judge in such a situation is "testifying" but not as a witness --- and Rule 605 was never intended to apply to judges commenting on the evidence. Thus, cutting out the term "witness" could be argued to expand the scope of Rule 605 to cover judges commenting on the evidence, and this would be a substantive change. The Advisory Committee therefore disapproved the proposal to delete the phrase "as a witness" from Restyled Rule 605.

Rule 608. Evidence of Character and Conduct of Witness	Rule 608. A Witness's Character for Truthfulness or Untruthfulness
(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.	**(a) Reputation or Opinion Evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.
(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.	**(b) Specific Instances of Conduct.** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: **(1)** the witness; or **(2)** another witness whose character the witness being cross-examined has testified about. By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

REPORTER'S COMMENT ON RESTYLED RULE 608(b)

Rule 608(b) by its terms states that bad-act impeachment of a witness must occur on "cross-examination." Yet this is not an accurate statement of the law. Under Rule 607, a party is permitted to impeach witnesses on direct --- that may be done either to attack an unfavorable witness or to take the wind out of the sails of the adversary's expected impeachment of a favorable witness. The Advisory Committee considered whether to change the "cross-examination" limitation in the context of the Restyling Project. Reasonable minds can differ on this question. The "cross-examination" limitation has been rightly ignored by courts and litigants, and could be thought to be the kind of unnecessary verbiage that a restyling effort should delete. But ultimately the Committee determined that the restyling effort should have a limited impact --- any attempt to bring all of the language of the Evidence Rules into accordance with the case law would constitute a vast project and could result in inadvertent substantive

changes. The Committee compromised by adding a paragraph to the basic restyling Committee Note, which reads as follows:

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

Rule 609. Impeachment by Evidence of Conviction of Crime	**Rule 609. Impeachment by Evidence of a Criminal Conviction**
(a) General rule. For the purpose of attacking the character for truthfulness of a witness, **(1)** evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and **(2)** evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.	**(a) In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction: **(1)** for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence: **(A)** must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and **(B)** must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and **(2)** for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence. * * *	**(b) Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if: **(3)** its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and **(4)** the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use. * * *

REPORTER'S COMMENT ON RESTYLED RULE 609(a)

The restylist suggested that the reference to Rule 403 in Rule 609(a)(1) should be deleted because "Rule 403 applies to everything unless the rule says otherwise" --- so the reference to Rule 403 was considered excess verbiage. But the Reporter argued that the reference to Rule 403 should be kept in the unique circumstances presented by Rule 609(a)(1). Rule 609 contains four separate tests for admitting prior convictions --- one for crimes requiring proof of a dishonest act or false statement (automatic admissibility); one for other felonies when offered against a criminal defendant (probative value must outweigh prejudice); one for other felonies when offered against any other witness (admitted unless prejudice substantially outweighs probative value, i.e., the Rule 403 test); and one for old crimes (Rule 609(b), admissible only if the probative value substantially outweighs the prejudicial effect). Given all the different tests for admissibility being thrown about in so short a space, the Reporter argued that it was useful, even necessary, to specify that one of them was the Rule 403 test. Courts and litigants should not have to reason from a failure to specify a balancing test in that forest of other balancing tests. The Advisory Committee agreed with the Reporter.

Rule 611. Mode and Order of Interrogation and Presentation	**Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence**

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.	**(a) Control by the Court; Purposes.** The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: **(1)** make those procedures effective for determining the truth; **(2)** avoid wasting time; and **(3)** protect witnesses from harassment or undue embarrassment.
(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination. * * *	**(b) Scope of Cross-Examination.** Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination. *** * ***

REPORTER'S COMMENT ON RESTYLED RULE 611(b)

One of the goals of the Restyling Project was to eliminate the use of the passive voice. So for example, the restylist would change a phrase like "the evidence may be admissible" because it doesn't refer to an actor. Use of the active voice would change that phrase to "the court may admit the evidence" --- and so forth. But as any drafter knows, the passive voice is sometimes useful --- indeed necessary --- to keep a sentence fuzzy when it is unclear (or uncomfortable to address) who if anyone has the responsibility for acting.[3] Rule 611(b) is an example. The original states that "cross-examination should be limited to the subject matter of the direct examination . . ." But limited by whom? The restylist proposed changing this language to "the court should limit cross-examination" to the subject matter of the direct. But the Advisory Committee thought that the active voice mischaracterized how Rule 611(b) works in practice --- it is really a collective effort of the parties and the court to apply a rule of thumb. Moreover, a statement that the court "should" limit the scope of cross-examination creates tension with the second sentence of the rule, which states that the court has discretion to expand the scope of cross-examination. To say the court "should" limit the scope but "may" expand it arguably has the rule working at cross-purposes and micromanages the court. For all these reasons, the Advisory Committee determined that a switch to the active voice would actually change the substance of the rule --- it would alter the way the rule is applied in the courts. Accordingly, the passive voice is retained in Rule 611(b).

[3] For example, "the dishes remain unwashed" could be thought less accusatory, in the context of a domestic discussion, than "you need to wash the dishes."

Rule 615. Exclusion of Witnesses	Rule 615. Excluding Witnesses
At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.	At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding: **(a)** a party who is a natural person; **(b)** an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; **(c)** a person whose presence a party shows to be essential to presenting the party's claim or defense; or **(d)** a person authorized by statute to be present.

REPORTER'S COMMENT ON RESTYLED RULE 615

Why did the subdivisions get changed from numbers to letters? Because the standard convention in proper rulemaking is the following sequence: number, small letter, number, capital letter, little roman letter. E.g., Rule 801(d)(2)(A). Unfortunately, the original rules were numbered haphazardly --- see, e.g., this rule and Rule 803, which follows a number with a number. The Restyling Project endeavoured to apply conventional numbering sequences in the Evidence Rules --- at least where the change would not be too disruptive to electronic searches and basic understandings. As discussed below, the numbering in Rule 803 has not been changed, for fear of a significant disruption to an important and oft-cited set of rules.

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

	Rule 702.

REPORTER'S COMMENT ON RESTYLED RULE 701

One goal of restyling is to eliminate superfluous language. The references in Article VII to "opinions" are usually --- but not always --- accompanied by a reference to "inferences." The restylist proposed eliminating all the references to inferences on the ground that they were superfluous of the term "opinion." The Advisory Committee (specifically the Committee's invaluable consultant, Professor Ken Broun) conducted substantial research into whether opinions and inferences are or could be subject to different treatment as evidence. The Committee determined that there is no evidentiary difference between an opinion and an inference, and more importantly that no reported case on Evidence had distinguished between opinions and inferences in any respect. An inference is defined as "the process of arriving at some *conclusion* that, though it is not logically derivable from the assumed premises, possesses some degree of probability relative to the premises." That's just a flowery way of saying it is an opinion. The term "opinion" is certainly broader than "inference" but there is no inference that is not an opinion. Therefore the Advisory Committee agreed with the proposal to delete all references to inferences in Article VII. In an excess of caution, the Committee Notes to Rules 701, 703, 704 and 705 were expanded to explain the Committee's reasoning for deleting the references to inferences and to note that no change in practice was intended.

Rule 704. Opinion on Ultimate Issue	**Rule 704. Opinion on an Ultimate Issue**
(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.	**(a) In General — Not Automatically Objectionable.** An opinion is not objectionable just because it embraces an ultimate issue.
(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.	**(b) Exception.** In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

REPORTER'S COMMENT ON RESTYLED RULE 704(b)

The restylist sought to delete the last sentence of Rule 704(b) on the ground that it was a "redundant intensifier." But careful reviews of that proposed change by a member of the Standing Rules Committee forestalled that change. The Standing Committee member argued that it was useful to emphasize the point that ultimate issues of the defendant's intent are for the jury. Trial judges on the Advisory Committee and on the Standing Committee stated they used the last sentence of Rule 704(b) to explain to litigants *why* experts are not permitted to testify to whether the defendant had the requisite mental state to commit the charged crime. That means that the language is properly emphatic and instructive, not redundant.

ARTICLE VIII. HEARSAY **Rule 801. Definitions**	**ARTICLE VIII. HEARSAY** **Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay**
The following definitions apply under this article: **(a) Statement.** A ''statement'' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.	**(a) Statement.** "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.
(b) Declarant. A ''declarant'' is a person who makes a statement.	**(b) Declarant.** "Declarant" means the person who made the statement.
(c) Hearsay. ''Hearsay'' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.	**(c) Hearsay.** "Hearsay" means a statement that: **(1)** the declarant does not make while testifying at the current trial or hearing; and **(2)** a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) Statements which are not hearsay. A statement is not hearsay if— **(1) Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or	**(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay: **(1)** ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement: **(A)** is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; **(B)** is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or **(C)** identifies a person as someone the declarant perceived earlier.

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).	**(2)** ***An Opposing Party's Statement.*** The statement is offered against an opposing party and: **(A)** was made by the party in an individual or representative capacity; **(B)** is one the party manifested that it adopted or believed to be true; **(C)** was made by a person whom the party authorized to make a statement on the subject; **(D)** was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or **(E)** was made by the party's coconspirator during and in furtherance of the conspiracy. The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

REPORTER'S COMMENT ON RESTYLED RULE 801

Restyling Rule 801 raised a number of difficult drafting and policy questions:

1. Rule 801(a) --- the original rule is vague on whether an oral or written assertion must be intended as an assertion in order to qualify as hearsay. The "it" in the rule is placed in a way that appears to make the intent requirement applicable only to nonverbal conduct. The Advisory Committee considered the possibility of clarifying whether the intent requirement applied to oral or written assertions as well as conduct. It determined that the case law was not uniform on whether there is an intent requirement for implied oral and verbal assertions. Clarifying the rule to *reject* an intent requirement would therefore result in a change of case law in the many courts holding that an implied assertion is not hearsay unless there is an intent to communicate what is implied in the statement. And clarifying the rule to *include* an intent requirement for implied assertions would change the case law in courts that have come out the other way. Any change would thus be substantive under the protocol used by the Advisory Committee, and was not a candidate for a change within the context of restyling.

When the Restyled Rule 801(a) was reviewed by the Supreme Court, the Court suggested to the Advisory Committee that the applicability of the intent requirement in Rule 801(a) be clarified --- but the Court accepted the Advisory Committee's explanation that such clarification would be substantive. For more on implied assertions and Rule 801(a) see Saltzburg, Martin and Capra, 4 Federal Rules of Evidence Manual, Par. 801.02.

2. Rule 801(c) --- the definition of hearsay has received a helpful clarification, which is consistent with the case law. The existing rule says that a statement is hearsay if it is offered for the "truth of the matter asserted." A novice might well ask, "asserted where?" The Restyled Rule answers that the focus is on the proffered out-of-court statement and what is asserted *in that statement*. Hopefully the "in the statement" clarification will help students in better understanding the hearsay rule.

3. Rule 801(d)(2) --- "admissions." The term "admissions" is an inaccurate description of those statements that are admissible under Rule 801(d)(2). A party might make a statement that "admits" nothing --- indeed it could be expressly made to deny something. Yet if such a statement can be used in the adversary's favor at trial --- for example a false alibi by the defendant that the government wants to use to show the defendant's consciousness of guilt --- that statement is admissible despite the fact that it is hearsay. So a statement admissible under Rule 801(d)(2) does not have to be an "admission" of anything. The term "admissions" also has given rise to courts and litigants talking about "admissions against interest." And that inaccurate term has raised confusion with the separate exception in Rule 804(b)(3) for declarations against interest. Accordingly, the Advisory Committee thought it helpful to completely eliminate any reference to "admissions" in the Restyled Rules of Evidence. They are now called statements by an "opposing party." This change was properly within the confines of the Restyling Project as it alters no result in any case. It only changes the inaccurate language used to come to the correct result of admitting against a party the statements made by that party or its agents.

Rule 802. Hearsay Rule	**Rule 802. The Rule Against Hearsay**
Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.	Hearsay is not admissible unless any of the following provides otherwise: • a federal statute; • these rules; or • other rules prescribed by the Supreme Court.

REPORTER'S COMMENT ON RESTYLED RULE 802

The Restyling helpfully changes "the hearsay rule" to "the rule against hearsay" --- see the title to Restyled Rule 802. That title is carried through to the text of the exceptions The restylist's thought was that the new title is more descriptive --- it says not only that it *is* a rule but also says something about what the rule *does*.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial	**Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness**
The following are not excluded by the hearsay rule, even though the declarant is available as a witness:	The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.	**(1)** ***Present Sense Impression.*** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.	**(2)** ***Excited Utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.
(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.	**(3)** ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.
(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.	**(4)** ***Statement Made for Medical Diagnosis or Treatment.*** A statement that: **(A)** is made for — and is reasonably pertinent to — medical diagnosis or treatment; and **(B)** describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.	**(5)** ***Recorded Recollection.*** A record that: **(A)** is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; **(B)** was made or adopted by the witness when the matter was fresh in the witness's memory; and **(C)** accurately reflects the witness's knowledge. If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.
(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term ''business'' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.	**(6)** ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if: **(A)** the record was made at or near the time by — or from information transmitted by — someone with knowledge; **(B)** the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; **(C)** making the record was a regular practice of that activity; **(D)** all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and **(E)** neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.	**(7)** ***Absence of a Record of a Regularly Conducted Activity.*** Evidence that a matter is not included in a record described in paragraph (6) if: **(A)** the evidence is admitted to prove that the matter did not occur or exist; **(B)** a record was regularly kept for a matter of that kind; and **(C)** neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.
(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness. *** * ***	**(8)** ***Public Records.*** A record or statement of a public office if: **(A)** it sets out: **(i)** the office's activities; **(ii)** a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or **(iii)** in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and **(B)** neither the source of information nor other circumstances indicate a lack of trustworthiness. * * *

REPORTER'S COMMENT ON RESTYLED RULE 803

Numbering

The hearsay exceptions in Rule 803 are improperly numbered according to style conventions. A number follows a number, e.g., "Rule 803(1)." Proper numbering of subdivisions would be 803(a), 803(b) and so forth. The restylist proposed this renumbering but it was emphatically rejected by the Advisory Committee. The Committee concluded that the

benefits of proper numbering were far outweighed by the costs of 1) upsetting electronic searches of the hundreds of cases decided under Rule 803, and 2) disrupting the common understanding and lexicon used by courts and litigants for some of the most important rules in the Federal Rules of Evidence. The transaction costs of renumbering were thus thought to be too substantial.

Paper-Based Rules

Note that many of the Rule 803 exceptions cover documents, records, memoranda, etc. --- similar terms set forth in a legalese-type list so that nothing is missed. The Restyled Rules make two innovations regarding these paper-based exceptions. First, the multiple references to "records, memoranda, documents," etc. are streamlined by defining "record" to include all similar terms. See Rule 101. Second, these rules now cover electronic evidence --- by way of a definition of any kind of written material to include information in electronic form. See Rule 101.

Rule 803(8), Trustworthiness Clause

The Restyled Rule 803(8) places the trustworthiness clause in a separate paragraph, in order to clear up an ambiguity in the original rule — whether the trustworthiness clause applies only to (C) reports or to all reports. (The original rule is ambiguous because the trustworthiness clause is tacked on to the end of the rule, connected by a comma to the description of reports admissible under (C)). Commentators and case law indicate that the trustworthiness requirement should, does, and was intended to apply to *all* public reports (and so would be parallel with business records, as the trustworthiness clause in that exception applies to all records proffered under it). So the Restyling clarifies the rule in accordance with its original intent and with the case law.

Rule 806. Attacking and Supporting Credibility of Declarant	**Rule 806. Attacking and Supporting the Declarant's Credibility**
When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.	When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

REPORTER'S COMMENT ON RESTYLED RULE 806

The Restyling fixed a glitch in the original rule. Rule 806 is intended to allow an adversary to impeach a hearsay declarant to the same extent as if the declarant were testifying --- because in effect the declarant *is* testifying when their out-of-court statement is offered for its truth. The first sentence of the rule indicates that statements of party-opponents' agents --- while denominated "not hearsay" --- are covered by the rule to the same extent as statements admitted under the hearsay exceptions. This makes sense because those agency statements are offered for their truth and the party-opponent should be allowed to attack the declarant's credibility to the same extent as if the agent testified at trial. Calling them "not hearsay" is simply a device used in the Federal Rules to differentiate party-statements from those that are admitted because they are reliable --- but functionally a statement admitted under Rule 801(d) has the same effect as a statement admitted under a hearsay "exception."

The problem with the original rule is that the reference to agency-statements set forth in the first sentence is not carried through to the second and third sentences, which provide details on how to attack the credibility of a hearsay declarant. That is, those latter sentences refer to "hearsay" without also referring to statements admitted under Rule 801(d)(2)(C), (D) or (E). The Restyling fixes the anomaly by simply deleting the references to "hearsay" in the second and third sentences. There is no need to keep referring to hearsay, as the first sentence adequately states the problem being treated, so any further reference is superfluous --- and in this case incomplete and confusing.

Rule 1008. Functions of Court and Jury	**Rule 1008. Functions of the Court and Jury**
When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.	Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines — in accordance with Rule 104(b) — any issue about whether: **(a)** an asserted writing, recording, or photograph ever existed; **(b)** another one produced at the trial or hearing is the original; or **(c)** other evidence of content accurately reflects the content.

REPORTER'S COMMENT ON RESTYLED RULE 1008

Restyled Rule 1008 showcases two aspects of the Restyling that were designed to make the Evidence Rules more user-friendly. First, it unpacks the existing rule to make it easier to approach visually --- the subdivisions are broken out of the mass of the rule and laid out in vertical form. Second, the Restyled Rule provides more specific references to the rules referred to in the text --- see, e.g., the reference to Rule 104(b) as opposed to the original reference to Rule 104. The referenced rules can thus be more easily accessed by courts and litigants. .

ARTICLE XI. MISCELLANEOUS RULES **Rule 1101. Applicability of Rules**	**ARTICLE XI. MISCELLANEOUS RULES** **Rule 1101. Applicability of the Rules**
(a) Courts and judges. These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, and to United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms ''judge'' and ''court'' in these rules include United States bankruptcy judges and United States magistrate judges.	**(a) To Courts and Judges.** These rules apply to proceedings before: • United States district courts; • United States bankruptcy and magistrate judges; • United States courts of appeals; • the United States Court of Federal Claims; and • the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands.
(b) Proceedings generally. These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.	**(b) To Cases and Proceedings.** These rules apply in: • civil cases and proceedings, including bankruptcy, admiralty, and maritime cases; • criminal cases and proceedings; and • contempt proceedings, except those in which the court may act summarily.
(c) Rule of privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.	**(c) Rules on Privilege.** The rules on privilege apply to all stages of a case or proceeding.

(d) Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations: **(1) Preliminary questions of fact.** The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104. **(2) Grand jury.** Proceedings before grand juries. **(3) Miscellaneous proceedings.** Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.	**(d) Exceptions.** These rules — except for those on privilege — do not apply to the following: **(2)** the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility; **(2)** grand-jury proceedings; and **(3)** miscellaneous proceedings such as: • extradition or rendition; • issuing an arrest warrant, criminal summons, or search warrant; • a preliminary examination in a criminal case; • sentencing; • granting or revoking probation or supervised release; and • considering whether to release on bail or otherwise.

(e) Rules applicable in part. In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of misdemeanors and other petty offenses before United States magistrate judges; review of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act entitled ''An Act to authorize association of producers of agricultural products'' approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f, 499g(c)); naturalization and revocation of naturalization under sections 310–318 of the Immigration and Nationality Act (8 U.S.C. 1421–1429); prize proceedings in admiralty under sections 7651–7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled ''An Act authorizing associations of producers of aquatic products'' approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of the Act entitled ''An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes'', approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581–1624), or under the Anti-Smuggling Act (19 U.S.C. 1701–1711); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301–392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256–258); habeas corpus under sections 2241–2254 of title 28, United States Code; motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act entitled ''An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes'', approved March 3, 1925 (46 U.S.C. 781–790), as implemented by section 7730 of title 10, United States Code.	**(e) Other Statutes and Rules.** A federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules.

REPORTER'S COMMENT ON RESTYLED RULE 1101

Rule 1101(d)(3) lists certain "miscellaneous proceedings" in which the Evidence Rules are inapplicable. Case law indicates that the list is not exclusive. *See, e.g., United States v. Palesky,* 855 F.2d 34 (1st Cir. 1988) (Evidence Rules are not applicable in hearings held to determine whether a person will be committed to or released from a psychiatric facility --- Rule 1101(d)(3) not read to provide an exclusive list). The Advisory Committee determined that it was important to provide notification to courts and especially to litigants that the list is not exclusive --- i.e., there are a number of other proceedings in which the Evidence Rules have been found inapplicable. Accordingly, the words "such as" were added before the list in Rule 1101(d)(3). The list was also modified to recognize that supervised release has replaced parole in the Federal system.

The original Evidence Rule 1101(e) set forth a laundry list of proceedings in which the Evidence Rules are applicable only to the extent that matters of evidence are not governed by other specified rules or statutes. After substantial research, the Advisory Committee determined that this provision was devoid of substantive effect. All of the proceedings specified are civil actions or proceedings tried in the federal courts. The Evidence Rules are already applicable to these proceedings under the provisions of Rule 1101(a) and (c). So the only apparent purpose for subdivision (e) is to highlight the fact that other rules and statutes might trump the Evidence Rules in particular circumstances. Yet this merely states the obvious. There are a large number of statutes that trump the Evidence Rules in specific circumstances. Rule 1101(e) is not comprehensive; and moreover some of the statutes referred to in the rule have been abrogated or repealed.

The Advisory Committee considered whether Rule 1101(e) should be retained in order to prevent the enumerated statutes from being superseded by the (later-enacted) restyling amendment to Rule 1101. But the Committee determined that these independent statutes would not be superseded by amending Rule 1101(e). This is because the Evidence Rules are written so as not to supersede any statutory rule of evidence. The statutory rules of evidence generally govern one of five topics: 1) presumptions; 2) relevance and prejudice; 3) privilege; 4) hearsay; and 5) authentication. On none of these topics do the Evidence Rules preclude statutory authority from determining whether evidence is admissible. For example, Rule 301 provides a rule on presumptions, but only to the extent not otherwise provided for by federal statute. Rule 402 says that relevant evidence is admissible --- unless otherwise provided by federal statute, etc.. Rule 501 provides for a federal common law of privilege --- except as otherwise provided by statute, etc.. Rule 802 provides that hearsay is not admissible --- except as otherwise provided by statute, etc.. And Rule 901 governs authenticity, but does not purport to supersede statutes that provide for authentication; the examples in 901 are illustrative only.

Accordingly, the Advisory Committee deleted the laundry list of proceedings in Rule 1101(e) and substituted general language cautioning the user that other statutes and rules may trump the Evidence Rules in determining admissibility in certain proceedings.

CONCLUSION

The Restyled Rules of Evidence are a good faith effort by the Advisory Committee and the Standing Committee to make the rules more clear and easy to apply, without making any change in their substantive application. Student experience with the Restyled Rules in the early going appears to be positive --- students seem to find the Restyled Rules more accessible and user-friendly. Early reports from courts and academics are also positive. On the other hand practicing lawyers --- who are usually resistant to change, especially in the Evidence Rules --- appear to be less enamoured. Time will tell if the benefits of having more user-friendly Rules outweigh the transition costs. The other cost of restyling --- the thousands of hours spent by the Advisory Committee, the restylists, the Standing Committee and this author in developing Restyled Rules --- should probably be counted in the cost-benefit analysis as well. In which case, it was probably not worth the effort. ☺