ADVISORY COMMITTEE
ON
EVIDENCE RULES

Coral Gables, FL
May 3, 2013

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ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

Coral Gables, Florida

May 3, 2013

I. Opening Business

Opening business includes:

- Approval of the minutes of the Fall, 2012 meeting;
- A report on the January, 2013 meeting of the Standing Committee; and
- A welcome to new members.

II. Proposed Amendment to Rule 801(d)(1)(B)

The proposed amendment to Rule 801(d)(1)(B) was released for public comment. At the meeting, the Committee will determine whether to recommend to the Standing Committee that the amendment be referred to the Judicial Conference. The agenda book contains a memorandum from the Reporter on the public comments and on possible changes to the proposal.

III. Possible Amendments to Rules 803(6), 803(7) and 803(8)

The proposed amendment to Rules 803(6), (7), and (8) were released for public comment. At the meeting, the Committee will determine whether to recommend to the Standing Committee that the amendments be referred to the Judicial Conference. The agenda book contains a memorandum from the Reporter on the public comment received.

IV. Possible Amendment to Rule 902(1)

The agenda book contains a short memo on a recent Ninth Circuit case holding that records of Indian tribes are not self-authenticating under Rule 902(1) because tribes are not in the list of

public entities set forth in the rule. At the meeting, the Committee will be asked if it wishes to consider a full report for the next meeting on a possible amendment to Rule 902(1)

V. *Crawford* and *Williams v. Illinois*

The Supreme Court's recent decision in *Williams v. Illinois* has brought uncertainty and confusion to the question of how the Confrontation Clause interacts with the Federal Rules of Evidence — specifically the hearsay exceptions and Rule 703. The agenda book contains a memorandum discussing the impact of *Williams* on the Evidence Rules. That memorandum includes a description of cases applying *Williams*, as well as an analysis of the post-*Crawford* federal circuit cases.

VI. Symposium on Technology and the Federal Rules of Evidence

The Evidence Rules Committee is sponsoring a symposium on whether the Evidence Rules should be amended to accommodate technological advances in the presentation of evidence. This symposium will take place on the morning before the Fall, 2013 meeting of the Committee. The agenda book contains a short memo on the plans for the symposium.

VII. Privilege Project

The agenda book contains a submission from Professor Broun on the clergy-penitent privilege. Professor Broun will provide an oral report on the Privilege Project.

VIII. Electronic Signatures

The Bankruptcy Rules Committee has approved for submission to the Standing Committee an amendment to Bankruptcy Rule 5005(a) that would permit the use of electronic signatures of individuals who are not registered users of CM/ECF without requiring the retention of the original documents bearing a handwritten signature. The Bankruptcy Rules Committee seeks the advice of the Evidence Rules Committee on any evidentiary concerns arising from the proposed amendment.

IX. Next Meeting

The next meeting of the Committee is scheduled for Friday October 11, 2013, in Portland Maine.

ADVISORY COMMITTEE ON EVIDENCE RULES

Chair, Advisory Committee on Evidence Rules	**Honorable Sidney A. Fitzwater** Chief Judge United States District Court Earle Cabell Federal Bldg. and U.S. Courthouse 1100 Commerce Street, Room 1528 Dallas, TX 75242-1310
Reporter, Advisory Committee on Evidence Rules	**Professor Daniel J. Capra** Fordham University School of Law 140 West 62nd Street New York, NY 10023
Members, Advisory Committee on Evidence Rules	**Honorable Brent R. Appel** Iowa Supreme Court Iowa Judicial Branch Building 1111 East Court Avenue Des Moines, IA 50319 **Honorable Anita B. Brody** United States District Court 7613 James A. Byrne United States Courthouse 601 Market Street Philadelphia, PA 19106-1797 **Edward C. DuMont, Esq.** WilmerHale 1875 Pennsylvania Avenue, NW Washington, DC 20006 **Honorable Stuart M. Goldberg** Principal Associate Deputy Attorney General (ex officio) United States Department of Justice 950 Pennsylvania Avenue, N.W. – Room 4208 Washington, DC 20530 **A.J. Kramer, Esq.** Federal Public Defender Indiana Plaza 625 Indiana Avenue, N.W. – Suite 550 Washington, DC 20004

Members, Advisory Committee on Evidence Rules *(cont'd.)*	**Honorable William K. Sessions III** United States District Court Federal Building 11 Elmwood Avenue, 5th Floor Burlington, VT 05401 **Elizabeth J. Shapiro, Esq.** AD, Federal Programs Branch United States Department of Justice – Civil Division 20 Massachusetts Avenue, N.W. - Room 7152 Washington, DC 20530 **Paul Shechtman, Esq.** Zuckerman Spaeder LLP 1185 Avenue of the Americas, 31st Floor New York, NY 10036 **Honorable John A. Woodcock, Jr.** Chief Judge United States District Court Margaret Chase Smith Federal Building 202 Harlow Street, 3rd Floor Bangor, ME 04401-4901
Consultant, Advisory Committee on Evidence Rules	**Professor Kenneth S. Broun** University of North Carolina School of Law CB #3380, Van Hecke-Wettach Hall Chapel Hill, NC 27599
Liaison Members, Advisory Committee on Evidence Rules	**Honorable Paul S. Diamond** *(Civil)* United States District Court James A. Byrne United States Courthouse 601 Market Street, Room 6613 Philadelphia, PA 19106 **Honorable John F. Keenan** *(Criminal)* United States District Court 1930 Daniel Patrick Moynihan U.S. Courthouse 500 Pearl Street New York, NY 10007-1312 **Honorable Richard C. Wesley** *(Standing)* United States Court of Appeals Livingston County Government Center Six Court Street Geneseo, NY 14454-1043

Liaison Members, Advisory Committee on Evidence Rules *(cont'd.)*	**Honorable Judith H. Wizmur** *(Bankruptcy)* Chief Judge United States Bankruptcy Court Mitchell H. Cohen U.S. Courthouse 2nd Floor – 400 Cooper Street Camden, NJ 08102-1570
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Advisory Committee on Evidence Rules

Members	Position	District/Circuit	Start Date	End Date
Sidney A. Fitzwater Chair	D	Texas (Northern)	2010	2013
Brent R. Appel	JUST	Iowa	2010	2013
Anita Brody	D	Pennsylvania (Eastern)	2007	2013
Paul S. Diamond**	D	Pennsylvania (Eastern)	2009	2015
Edward C. Dumont	ESQ	Washington, DC	2012	2015
Stuart M. Goldberg*	DOJ	Washington, DC	----	Open
John F. Keenan**	D	New York (Southern)	2007	2013
A.J. Kramer	FPD	Washington, DC	2012	2015
Paul Schectman	ESQ	New York	2010	2013
William K. Sessions III	D	Vermont	2011	2014
John A. Woodcock, Jr.	D	Maine	2011	2014
Daniel J. Capra Reporter	ACAD	New York	1996	Open
Principal Staff: Jonathan C. Rose 202-502-1820				

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* Ex-officio

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

LIAISON MEMBERS

Liaison for the Advisory Committee on Appellate Rules	**Gregory G. Garre, Esq.**	***(Standing)***
Liaison for the Advisory Committee on Appellate Rules	**Judge Adalberto Jordan**	***(Bankruptcy)***
Liaison for the Advisory Committee on Bankruptcy Rules	**Roy T. Englert, Jr., Esq.**	***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Diane P. Wood**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Marilyn L. Huff**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Judith H. Wizmur**	***(Bankruptcy)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Paul S. Diamond**	***(Civil)***
Liaison for the Advisory Committee on Evidence Rules	**Judge John F. Keenan**	***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

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TAB 1

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TAB 1A

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Advisory Committee on Evidence Rules

Minutes of the Meeting of October 5, 2012

Charleston, South Carolina

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 5, 2012, at the Charleston School of Law, in Charleston, South Carolina.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Brent R. Appel
Hon. Anita B. Brody
Hon. William Sessions
Hon. John A. Woodcock, Jr.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

William T. Hangley, Esq., departing member of the Committee
Marjorie A. Meyers, Esq., departing member of the Committee
Hon. Richard Wesley, Liaison from the Standing Committee
Hon. Paul Diamond, Liaison from the Civil Rules Committee
Hon. John F. Keenan, Liaison from the Criminal Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
Timothy Reagan, Esq., Federal Judicial Center
Peter McCabe, Esq., Secretary to the Standing Committee
Jonathan Rose, Chief, Rules Committee Support Office
Benjamin Robinson, Esq., Rules Committee Support Office

Julie Albert, Fordham Law School
Alfred W. Cortese, Jr., Esq., Lawyers for Civil Justice
Alexander R. Dahl, Esq. Lawyers for Civil Justice
Professor Ann Murphy, Gonzaga University School of Law
Professor Liesa Richter, University of Oklahoma College of Law
Hon. Lee H. Rosenthal, Former Chair of the Standing Committee
Dan Smith, Esq., Department of Justice
John Vail, Esq., Center for Constitutional Litigation, P.C.

I. Opening Business

Welcoming Remarks and Departing Members

Judge Fitzwater, the Chair of the Committee, greeted the members and thanked Dean Andrew Abrams and the Charleston School of Law for hosting the Committee. Dean Abrams welcomed the members and observers, and expressed his thanks for holding the committee meeting at the law school. He highlighted the school's commitment to developing practical lawyering skills and the significant pro bono contributions of his students.

Judge Fitzwater recognized several current and departing members of the Committee. He congratulated Paul Schectman on his recent election to the American Law Institute. He welcomed former Committee member Judge Joseph F. Anderson, Jr., who traveled from Columbia, South Carolina to observe the meeting. Judge Fitzwater thanked Judge Anderson for his many contributions to the restyling effort, and Judge Anderson in turn thanked the Committee members for their service and applauded the success of the restyled rules.

Judge Fitzwater recognized the distinguished service of two departing members, William T. Hangley and Marjorie Myers. He highlighted their significant contributions to the Committee stretching back before his tenure as Chair. Mr. Hangley brought the perspective of an experienced trial attorney to the complex process of evidence rulemaking, which proved especially critical during the restyling process. He also solicited helpful input from the American Bar Association's Section of Litigation and the American College of Trial Lawyers. Ms. Myers proved to be a superb advocate for the federal defenders, but she always sought the best result, not simply what would be most advantageous to her clients. Judge Fitzwater noted that Ms. Myers worked especially well with her counterpart from the Department of Justice. Members added their sincere thanks for the hard work performed by and friendships forged with Mr. Hangley and Ms. Myers. Their service to the committee and practical insights will be sorely missed.

Mr. Rose reported on the status of the Committee's vacancies and pending appointments. He noted that the Chief Justice is expected to select replacements for Mr. Hangley and Ms. Myers imminently.

Public Hearings

Judge Fitzwater noted that the Committee has scheduled two public hearings for members of the public who wish to present testimony on the proposed amendments to Rules 801 and 803. The first is scheduled in conjunction with the Standing Committee's semi-annual meeting, on January 4, 2013, in Boston, Massachusetts. A second public hearing is scheduled for January 22, 2012, in Washington D.C. Judge Fitzwater stated that there was strong support for publication at the Standing Committee. Mr. Robinson reported that no comments had yet been received by the Administrative Office.

Approval of Minutes

The minutes of the Spring 2012 Committee meeting were approved.

Rule 502 Symposium

Judge Fitzwater commented on the Rule 502 Symposium that took place on the morning before the meeting. He remarked that the symposium far exceeded his expectations and raised a number of important suggestions for promoting the use of Rule 502 to reduce discovery costs. He noted that a transcript of the proceedings — as well as a number of articles from Symposium participants — will be published in the Fordham Law Review.

Judge Fitzwater invited those present to share their observations about the symposium. The members all agreed that the presentation was excellent. A judge member strongly suggested that Rule 502 be referenced in the Federal Rules of Civil Procedure so that parties at the outset of the proceedings are aware of its importance in reducing the costs of preproduction privilege review. Another member added that the work ahead is largely in the hands of the Advisory Committee on Civil Rules, and that the Committee should monitor the progress of that committee. A third member expressed concerns about the perceived approach of a "tipping point" if the costs of reviewing and producing electronically stored information continue to eclipse the amounts in controversy.

The members discussed whether to undertake work to develop a model Rule 502 order. A judge member recommended pursuing a model order that could be broadly publicized, prior to the proliferation of local rules or standing orders that may fail to incorporate important concepts examined during the symposium. The reporter stated that several symposium participants had agreed to work together further to develop a model order, which will be published in the symposium edition of the Fordham Law Review. The reporter noted several potential obstacles the Committee could encounter if it sought to take the lead in drafting and "issuing" a model order. The Reporter suggested, and the members generally agreed, that the better way for the Committee to draw attention to the benefits of Rule 502 may be to send a letter from the Committee to each chief judge highlighting the rule, the symposium, and the model order. Judge Fitzwater recommended that such a letter be discussed at the Standing Committee meeting.

A judge member suggested, and the full committee agreed, that in addition to any letter writing initiative, the Federal Judicial Center should be strongly encouraged to develop judicial education and training materials addressing Rule 502. One member observed that newly-appointed judges with primarily criminal practice backgrounds might have little or no knowledge of Rule 502, and all members agreed that it would be worthwhile to develop specific materials for the orientation seminar for newly-appointed federal judges. Another member remarked that a program of orientation on Rule 502 will be just as useful to sitting judges.

The Committee briefly discussed the application of Rule 502 in the criminal law setting. A member noted that there are important Sixth Amendment issues yet to be resolved before the courts of appeals. Another member stated that subdivision (d) of Rule 502 will have limited use in criminal

proceedings, but the Committee should be aware of the possibility of "intentional inadvertent disclosures" by defense counsel in criminal cases, notwithstanding the obvious ethical implications. The member noted that if unscrupulous defense counsel believed the fruits of her intentional inadvertent disclosure could be placed out of reach of prosecutors, there may be a strong temptation to intentionally produce privileged material and then demand use fruits protection from the court (through a *Kastigar* hearing or otherwise). The members agreed that little if anything could be done in the text of the rule to eliminate the possibility of such strategic behavior.

Mr. Rose observed that the reporter handled with ease the difficult task of moderating a panel of such high-caliber judges, practitioners, and academics, and suggested that the continued use of such symposia as introductory events to committee meetings would continue to enhance the public perception of the rulemaking process and increase participation from the bench, bar, and public. The members joined Judge Fitzwater's sincere thanks to the Reporter and the symposium participants for a well-executed program.

June Meeting of the Standing Committee

Judge Fitzwater reported on the June meeting of the Standing Committee. He summarized the Committee's report and his presentation to the Standing Committee including the Committee's proposals: 1) to refer an amendment to Rule 803(10) to the Judicial Conference; and 2) to release proposed amendments to Rules 801(d)(1)(B) and Rules 803(6)-(8) for public comment. The Standing Committee unanimously approved all of the Committee's proposals.

II. Proposed Amendment to Rule 803(10)

The Committee briefly discussed the proposed amendment to Rule 803(10). That amendment adds a notice-and-demand procedure to the Rule in cases where the government is offering a certificate against a defendant in a criminal case. Such certificates are in almost all cases "testimonial" and so introducing them against an accused will violate the Confrontation Clause under the Supreme Court's opinion in *Melendez-Diaz v. Massachusetts*. Under the notice-and-demand procedure, the person who prepared the certificate need not be produced to testify if the government provides timely notice of intent to proffer the certificate and the defendant fails to timely demand production of the witness. In *Melendez-Diaz,* the Court declared that the use of a notice-and-demand procedure (and the defendant's failure to demand production under that procedure) would cure an otherwise unconstitutional use of testimonial certificates.

The Advisory Committee's proposed amendment was approved by the Judicial Conference on the consent calendar at its September 2012 session. The Supreme Court will have until May 1, 2013, to review the proposed amendment. Unless Congress takes action to modify, defer, or reject the proposed amendment, it would become effective on December 1, 2013.

III. Proposed Amendment to Rule 801(d)(1)(B)

At the Spring 2012 meeting the Committee voted to recommend that a proposed amendment to Evidence Rule 801(d)(1)(B) — the hearsay exemption for certain prior consistent statements — be released for public comment. Under the proposal, Rule 801(d)(1)(B) would be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The justification for the amendment is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements.

Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility — specifically those that rebut a charge of recent fabrication or improper influence or motive — are also admissible substantively. In contrast, other rehabilitative statements — such as those that explain a prior inconsistency or rebut a charge of faulty recollection — are not admissible under the hearsay exemption but only for rehabilitation. There are two basic practical problems in the distinction between substantive and credibility use as applied to prior consistent statements. First, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement ordinarily adds no real substantive effect to the proponent's case.

As of the date of the fall meeting, no formal public comment had been received on the proposed amendment. But the Reporter noted that a professor had raised a concern that the proposed amendment might "overrule" the Supreme Court's decision in *Tome v. United States*, because it might be read to allow the admission of prior consistent statements for substantive effect even though those statements were made *after* a witness's motive to falsify arose. The Reporter reiterated that the point of the amendment was *not* to admit more prior consistent statements. The only point was to provide the same (substantive effect) treatment for all the statements currently admitted as prior consistent statements. The Reporter recognized that *if* a court found that a prior consistent statement made after the motive to falsify arose would actually be properly admitted to rehabilitate the witness's credibility, then under the amendment that statement would also be admitted as substantive evidence. But the Reporter noted that 1) such an event was extremely unlikely; and 2) in the narrow band of cases in which it could even possibly occur, it would in any case, under the logic of the amendment, be appropriate to treat such a statement as substantively admissible. That is because under the proposed amendment, all prior consistent statements that are admissible for rehabilitation are also admissible substantively.

The Committee concluded that prior consistent statements made after a motive to falsify might be admitted as substantive evidence, but that such an admission would not reflect any alteration to the present scope of admissibility (instead clarifying how admissible evidence may be used). The Committee's consultant on privileges noted that *Tome v. United States* was not a constitutional case, and that any variance between the proposed amendment to Rule 801(d)(1)(b) and the Court's holding would not run afoul of transubstantive rulemaking concerns.

The Reporter suggested that the draft committee note accompanying the proposed rule be revised to eliminate the citation to a relevant law review article. He noted the Standing Committee's preference to avoid legal citations in committee notes. The members acknowledged the helpful input of Frank W. Bullock, Jr., the author of the article and former member of the Standing Committee, who first suggested that the Committee pursue the amendment. The members agreed to discuss further refinements to the proposed amendment at the Committee's Spring 2013 meeting, after the close of the public comment period.

IV. Possible Amendment to Rules 803(6)-(8)

The Committee briefly discussed the proposed amendments to Rules 803(6)-(8), the hearsay exceptions for business records, absence of business records, and public records. Those exceptions in original form set forth admissibility requirements and then provided that a record meeting those requirements was admissible despite the fact it is hearsay "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The rules do not specifically state which party has the burden of showing trustworthiness or untrustworthiness. The amendments clarify that the opponent has the burden of showing that the proffered record is untrustworthy. The reasons for the amendment are: 1) to resolve a conflict in the case law by providing a uniform rule; 2) to clarify a possible ambiguity in the rule as it was originally adopted and as restyled; and 3) to provide a result that makes the most sense, as imposing a burden of proving trustworthiness on the proponent is unjustified given that the proponent must establish that all the other admissibility requirements of these rules are met — requirements that tend to guarantee trustworthiness in the first place.

The Committee discussed the slight differences among the committee notes for Rules 803(6)-(8). A member suggested that the Committee consider deleting the second paragraph (i.e. "The opponent, in meeting its burden . . .") of the note accompanying Rule 803(8) as redundant of the note set out for Rule 803(6). The Reporter opposed deleting the second paragraph from the note for Rule 803(8). He described the practical differences between the three rules and detailed why a tailored note for each was preferable. He noted that when enacted, the Rules and Committee notes will be read and applied separately, not together, and so there was no risk of redundancy. He also noted that it was important to state that an opponent, in meeting its burden of showing untrustworthiness, need not produce evidence — that sometimes argument is sufficient. And deleting such an important provision from the note to Rule 803(8) but retaining it in Rule 803(6) could mislead lawyers and courts to think that the opponent *does* have to provide evidence to show that a record offered under Rule 803(8) is untrustworthy. The Committee's consultant on privileges echoed the need for a more thorough note for each rule. Judge Fitzwater asked the Committee to revisit the issue, if necessary, at its Spring 2013 meeting, following the close of the public comment period.

V. *Crawford* Developments — Presentation on *Williams v. Illinois*

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

The *Crawford* digest this time around provided a special focus on the Supreme Court's Confrontation Clause case from last term — *Williams v. Illinois* — and its impact on the Federal Rules of Evidence. Paul Shechtman, Ken Broun and the Reporter engaged in a roundtable discussion on the meaning of *Williams* — a case that was decided 4-1-4 with the deciding vote by Justice Thomas based on an analysis with which all other members of the Court disagreed. The speakers all concluded — as did the Committee — that the result of *Williams* is so murky that it will take the courts some time to figure out its impact on the relationship between the Confrontation Clause and the Federal Rules of Evidence. Accordingly, the Committee determined that it would be inappropriate at this time to propose any amendments designed to prevent one or more of the Federal Rules from being applied in violation of the Confrontation Clause.

The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

VII. Symposium on Technology and the Federal Rules of Evidence

The Evidence Rules Committee is sponsoring a symposium on whether the Evidence Rules should be amended to accommodate technological advances in the presentation of evidence. This Symposium is intended to follow the same process as the previous symposia on the Restyling and Rule 502. The Committee will invite outstanding members of the bench, bar and legal academia to make presentations, and the proceedings will be published in a law review. This symposium will take place on the morning before the Fall 2013 meeting of the Committee.

The Reporter invited suggestions from the members for symposium panelists. Members identified a handful of judges and law professors, but resolved to continue the search for potential panelists leading up to the symposium.

VIII. Privilege Project

Professor Broun, the Committee's consultant on privileges, presented his analysis of the journalist's privilege. This presentation is part of Professor Broun's continuing work to develop an article on the federal common law of privileges. Professor Broun's work, when it is published, will neither represent the work of the Committee nor suggest explicit nor implicit approval by the Standing Committee or the Advisory Committee.

Professor Broun asked for Committee input on whether attempting to write the text of a journalist privilege under federal law was a worthwhile effort, in light of the conflict in the cases and lack of consensus as to whether such a privilege even exists. The DOJ representative expressed a preference not to develop a survey rule because the Justice Department does not believe there is a journalist's privilege rooted in the First Amendment. A member observed that defining who is a journalist will prove to be a significant drafting obstacle given the use of blogs, just as attempts to define who is a media defendant for purposes of libel law has created a morass of conflicting case law.

Committee members expressed gratitude to Professor Broun for keeping the Committee apprised of developments in the area of privileges, but did not request that he perform further research or drafting regarding the journalist's privilege.

IX. Next Meeting

The Spring 2013 meeting of the Committee is scheduled for Friday, May 3, in Miami, Florida.

Respectfully submitted,

Benjamin Robinson
Daniel J. Capra

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 3-4, 2013
Cambridge, Massachusetts

Draft Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Cambridge, Massachusetts, on Thursday and Friday, January 3 and 4, 2013. The following members were present:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esq.
Roy T. Englert, Jr., Esq.
Gregory G. Garre, Esq.
Judge Marilyn L. Huff
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Larry D. Thompson, Esq.
Judge Richard C. Wesley
Judge Diane P. Wood

The Department of Justice was represented at various points at the meeting by Acting Assistant Attorney General Stuart F. Delery, Elizabeth J. Shapiro, Esq., and Allison Stanton, Esq.

Deputy Attorney General James M. Cole, Judge Neil M. Gorsuch, and Judge Jack Zouhary were unable to attend.

Also participating were former member Judge James A. Teilborg; Professor Geoffrey C. Hazard, Jr., consultant to the committee; and Peter G. McCabe, Administrative Office Assistant Director for Judges Programs. The committee's style consultant, Professor R. Joseph Kimble, participated by telephone.

On Thursday afternoon, January 3, Judge Sutton moderated a panel discussion on civil litigation reform initiatives with the following panelists: Judge John G. Koeltl, a member of the Advisory Committee on Civil Rules and Chair of its Duke Conference subcommittee; Rebecca Love Kourlis, Executive Director of the Institute for the Advancement of the American Legal System at the University of Denver and a former justice of the Colorado Supreme Court; Dr. Emery G. Lee, III, Senior Research Associate in the Research Division of the Federal Judicial Center; and Judge Barbara B. Crabb, U.S. District Court for the Western District of Wisconsin.

Providing support to the Standing Committee were:

Professor Daniel R. Coquillette	The Committee's Reporter
Jonathan C. Rose	The Committee's Secretary and Chief, Rules Committee Support Office
Benjamin J. Robinson	Deputy Rules Officer
Julie Wilson	Rules Office Attorney
Andrea L. Kuperman (by telephone)	Chief Counsel to the Rules Committees
Joe Cecil	Research Division, Federal Judicial Center

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Steven M. Colloton, Chair
Professor Catherine T. Struve, Reporter (by telephone)
Advisory Committee on Bankruptcy Rules —
Judge Eugene R. Wedoff, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Troy A. McKenzie, Associate Reporter
Advisory Committee on Civil Rules —
Judge David G. Campbell, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter
Advisory Committee on Criminal Rules —

Judge Reena Raggi, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Chief Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Sutton opened the meeting by noting the extraordinary service to the rules committees by his predecessor Judge Mark Kravitz, which would be further commemorated at the committee's dinner in the evening. He praised Judge Kravitz's extraordinary ten years of service on both the Civil Rules Advisory Committee and the Standing Committee. Judge Kravitz served as chair of both committees.

Judge Sutton specifically called attention to the commendation of Judge Kravitz in Chief Justice Roberts's year-end report and asked that the following paragraph from that report be included in the minutes:

> On September 30, 2012, Mark R. Kravitz, United States District Judge for the District of Connecticut, passed away at the age of 62 from amyotrophic lateral sclerosis—Lou Gehrig's Disease. We in the Judiciary remember Mark not only as a superlative trial judge, but as an extraordinary teacher, scholar, husband, father, and friend. He possessed the temperament, insight, and wisdom that all judges aspire to bring to the bench. He tirelessly volunteered those same talents to the work of the Judicial Conference, as chair of the Committee on Rules of Practice and Procedure, which oversees the revision of all federal rules of judicial procedure. Mark battled a tragic illness with quiet courage and unrelenting good cheer, carrying a full caseload and continuing his committee work up until the final days of his life. We shall miss Mark, but his inspiring example remains with us as a model of patriotism and public service.

Chief Justice John G. Roberts, Jr., 2012 Year-End Report on the Federal Judiciary 11 (2012).

Judge Sutton reported that at its September 2012 meeting, the Judicial Conference approved without debate all fifteen proposed rules changes forwarded to it by the committee for transmittal to the Supreme Court. Assuming approval by the Court and no action by Congress to modify, defer, or delay the proposals, the amendments will become effective on December 1, 2013.

APPROVAL OF MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of its last meeting, held on June 11 and 12, 2012, in Washington, D.C.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professors Cooper and Marcus presented the report of the advisory committee, as set forth in Judge Campbell's memorandum of December 5, 2012 (Agenda Item 3). Judge Campbell presented several action items, including the recommendation to publish for comment amendments to Rules 37(e), 6(d), and 55(c). Judge Campbell also presented the advisory committee's recommendation to adopt without publication an amendment to Rule 77(c)(1).

Amendment for Final Approval

FED. R. CIV. P. 77(c)(1) – CROSS REFERENCE CORRECTION

The proposed amendment to Rule 77(c)(1) corrects a cross-reference to Rule 6(a) that should have been changed when Rule 6(a) was amended in 2009 as part of the Time Computation Project. Before those amendments, Rule 6(a)(4)(A) defined "legal holiday" to include 10 days set aside by statute, and Rule 77(c)(1) incorporated that definition by cross-reference.

As a result of the 2009 Time Computation amendment, the Rule's list of legal holidays remained unchanged, but became Rule 6(a)(6)(A). However, through inadvertence, the cross-reference in Rule 77(c) was not addressed at that time. The proposed amendment corrects the cross-reference.

The committee unanimously by voice vote approved the proposed amendment for final approval by the Judicial Conference without publication.

Amendments for Publication

FED. R. CIV. P. 37(e)

Judge Campbell first gave a short history behind the drafting of the proposed new Rule 37(e). He stated that the subject of the rule had been extensively considered at a mini-conference, as well as in numerous meetings of the advisory committee and conference calls of the advisory committee's discovery subcommittee. There was wide

agreement that the time had come for developing a rules-based approach to preservation and sanctions.

The Civil Rules Committee hosted a mini-conference in Dallas in September 2011. Participants in that mini-conference provided examples of extraordinary costs assumed by litigants, and those not yet involved in litigation, to preserve massive amounts of information, as a result of the present uncertain state of preservation obligations under federal law. In December 2011, a subcommittee of the House Judiciary Committee held a hearing on the costs of American discovery that focused largely on the costs of preservation for litigation.

The discovery subcommittee of the advisory committee had agreed for some time that some form of uniform federal rule regarding preservation obligations and sanctions should be established. The subcommittee initially considered three different approaches: (1) implementing a specific set of preservation obligations; (2) employing a more general statement of preservation obligations, using reasonableness and proportionality as the touchstones; and (3) addressing the issue through sanctions. The subcommittee rejected the first two approaches. The approach that would set out specific guidance was rejected because it would be difficult to set out specific guidelines that would apply in all civil cases, and changing technology might quickly render such a rule obsolete. The more general approach was rejected because it might be too general to provide real guidance. The subcommittee therefore opted for a third approach that focuses on possible remedies and sanctions for failure to preserve. This approach attempts to specify the circumstances in which remedial actions, including discovery sanctions, will be permitted in cases where evidence has been lost or destroyed. It should provide a measure of protection to those litigants who have acted reasonably in the circumstances.

After an extensive and wide ranging discussion of the proposed new Rule 37(e), the committee approved it for publication in August 2013, conditioned on the advisory committee reviewing at its Spring 2013 meeting the major points raised at this meeting. Judge Campbell agreed that the advisory committee would address concerns raised by Standing Committee members and make appropriate revisions in the draft rule and note for the committee's consideration at its June 2013 meeting.

During the course of the committee's discussion, the following concerns were expressed with respect to the current draft of proposed new Rule 37(e) and its note:

Displacement of Other Laws

One committee member expressed concern about the statement in the note that the amended rule "*displaces* any other law that would authorize imposing litigation sanctions in the absence of a finding of wilfulness or bad faith, including state law in diversity

cases." (emphasis added).

The member pointed out that use of the term "displace" could be read as a possible effort to preempt on a broad basis state or federal laws or regulations requiring the preservation of records in different contexts and for different purposes, such as tax, banking, professional, or antitrust regulation. Judge Campbell stated that there had been no such intent on the part of the advisory committee. The advisory committee had been focused on establishing a uniform federal standard solely for the preservation of records for litigation in federal court (including cases based on diversity jurisdiction). The advisory committee intended to preserve any separate state-law torts of spoliation.

Judge Campbell believed the draft committee note could be appropriately clarified to make clear that the proposed rule on preservation sanctions had no application beyond the trial of cases. A committee member noted that a statutory requirement of records preservation for non-trial purposes should not require a litigant to make greater preservation efforts for trial discovery purposes than would otherwise be required by the amended rule.

Use of the Term "Sanction"

Another participant noted that the word "sanction" has particularly adverse significance in most contexts when applied to the conduct of a lawyer. In some jurisdictions, this might require reporting an attorney to the board of bar overseers. Thus, in using the term "sanction," he urged that the advisory committee differentiate between its use when referring to the actions permitted under the rule in response to failures to preserve and its broader application to the general area of professional responsibility.

"Irreparable Deprivation"

Several committee members raised concerns about proposed language that would allow for sanctions if the failure to preserve "irreparably deprived a party of any meaningful opportunity to present a claim or defense." These members stated that this language could potentially eliminate most of the rule's intended protection for the innocent and routine disposition of records. Also, as a matter of style and precise expression, one committee member preferred substitution of the word "adequate"for the word "meaningful."

Acts of God

Another concern was whether the proposed draft of Rule 37(e) would permit the imposition of sanctions against an innocent litigant whose records were destroyed by an "act of God." The accidental destruction of records because of flooding during the recent

Hurricane Sandy was offered as a hypothetical example. Judge Campbell agreed that a literal reading of the current draft might lead to imposition of sanctions as the result of a blameless destruction of records resulting from such an event. Both he and Professor Cooper agreed that the question of who should bear the loss in an "act of God" circumstance was an important policy issue for the advisory committee to revisit at its spring meeting.

Preservation of Current Rule 37(e) Language

The Department of Justice and several committee members also recommended retention of the language of the current Rule 37(e), which protects the routine, good-faith operation of an electronic information system. Andrea Kuperman's research showed that the current rule is rarely invoked. But the Department of Justice argued that in its experience, the presence of the Rule 37(e) has served as a useful incentive for government departments to modernize their record-keeping practices.

Expanded Definition of "Substantial Prejudice"

The Department also urged that the term "substantial prejudice in the litigation"—a finding required under the draft proposal in order to impose sanctions for failure to preserve—be given further definition. It suggested that "substantial prejudice" should be assessed both in the context of reliable alternative sources of the missing evidence or information as well as in the context of the materiality of the missing evidence to the claims and defenses involved in the case. The Department and several committee members suggested that publication for public comment might be helpful to the committee in developing its final proposed rule.

By voice vote, the committee preliminarily approved for publication in August 2013 draft proposed Rule 37(e) on the condition that the advisory committee would review the foregoing comments and make appropriate revisions in the proposed draft rule and note for approval by the Standing Committee at its June 2013 meeting.

FED. R. CIV. P. 6(d) – CLARIFICATION OF "3 DAYS AFTER SERVICE"

Professor Cooper reviewed the advisory committee's proposed amendment to Rule 6(d), which provides an additional 3 days to act after certain methods of service. The purpose of the amendment is to foreclose the possibility that a party who must act within a specified time after making service could extend the time to act by choosing a method of service that provides the added time.

Before Rule 6(d) was amended in 2005, the rule provided an additional 3 days to

respond when service was made by various described means. Only the party being served, not the party making the service, had the option of claiming the extra 3 days. When Rule 6(d) was revised in 2005 for other purposes, it was restyled according to the conventions adopted for the Style Project, allowing 3 additional days when a party must act within a specified time "after service." This could be interpreted to cover rules allowing a party to act within a specified time after making (as opposed to receiving) service, which is not what the advisory committee intended. For example, a literal reading of present Rule 6(d) would allow a defendant to extend from 21 to 24 days the Rule 15(a)(1)(A) period to amend once as a matter of course by choosing to serve the answer by any of the means specified in Rule 6(d). Although it had not received reports of problems in practice, the advisory committee determined that this unintended effect should be eliminated by clarifying that the extra 3 days are available only to the party receiving, as opposed to making, service.

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

FED. R. CIV. P. 55(c) – APPLICATION TO "FINAL" DEFAULT JUDGMENT

Professor Cooper explained that the proposed amendment to Rule 55(c), the rule on setting aside a default or a default judgment, addresses a latent ambiguity in the interplay of Rule 55(c) with Rules 54(b) and 60(b) that arises when a default judgment does not dispose of all claims among all parties to an action. Rule 54(b) directs that the judgment is not final unless the court directs entry of final judgment. Rule 54(b) also directs that the judgment "may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Rule 55(c) provides simply that the court "may set aside a default judgment under Rule 60(b)." Rule 60(b) in turn provides a list of reasons to "relieve a party . . . from a final judgment, order, or proceeding . . . ."

A close reading of the three rules together establishes that relief from a default judgment is limited by the demanding standards of Rule 60(b) only if the default judgment is made final under Rule 54(b) or when there is a final judgment adjudicating all claims among all parties.

Several cases, however, have struggled to reach the correct meaning of Rule 55(c), and at times a court may fail to recognize the meaning. The proposed amendment clarifies Rule 55(c) by adding the word "final" before "default judgment."

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

Information Items

Judge Campbell reported on several information items that did not require committee action at this time.

DUKE CONFERENCE SUBCOMMITTEE WORK

A subcommittee of the advisory committee formed after the advisory committee's May 2010 Conference on Civil Litigation held at Duke University School of Law ("Duke Conference subcommittee") is continuing to implement and oversee further work on ideas resulting from that conference. Judge Campbell and Judge Koeltl (the Chair of the Duke Conference subcommittee) presented to the committee a package of various potential rule amendments developed by the subcommittee that are aimed at reducing the costs and delays in civil litigation, increasing realistic access to the courts, and furthering the goals of Rule 1 "to secure the just, speedy, and inexpensive determination of every action and proceeding." This package of amendments has been developed though countless subcommittee conference calls, a mini-conference held in Dallas in October 2012, and discussions during advisory committee meetings. The discussions that have occurred will guide further development of the rules package, with a goal of recommending publication of this package for public comment at the committee's June 2013 meeting.

An important issue at the Duke Conference and in the work undertaken since by the Duke Conference subcommittee has been the principle that discovery should be conducted in reasonable proportion to the needs of the case. In an important fraction of the cases, discovery still seems to run out of control. Thus, the search for ways to embed the concept of proportionality successfully in the rules continues.

Current sketches of possible amendments to parts of Rule 26 exemplify this effort and include the following proposals:

Rule 26

* * * * *

(b) Discovery Scope and Limits.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense <u>and proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties'</u>

resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information [within this scope of discovery]{sought} need not be admissible in evidence to be discoverable. ~~— including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~ * * *

(2) *Limitations on Frequency and Extent.*

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions, ~~and~~ interrogatories, requests [to produce][under Rule 34], and requests for admissions, or on the length of depositions under Rule 30. ~~By order or local rule, the court may also limit the number of requests under Rule 36.~~

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery ~~otherwise allowed by these rules or by local rule~~ if it determines that: * * *

(iii) the ~~burden or expense of the~~ proposed discovery is outside the scope permitted by Rule 26(b)(1) ~~outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.~~

* * * * *

(c) Protective Orders

(1) *In General.* * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; * * *

The drafts are works in progress and will be revisited by the advisory committee at its spring meeting.

FED. R. CIV. P. 84 AND FORMS

Judge Campbell further reported that the subcommittee of the advisory committee formed to study Rule 84 and associated forms is inclined to recommend abrogating Rule 84. This inclination follows months of gathering information about the general use of the forms and whether they provide meaningful help to attorneys and pro se litigants. The advisory committee is evaluating the subcommittee's inclination and intends to make a recommendation to the committee concerning the future of Rule 84 at the June 2013 meeting. If Rule 84 is abrogated, forms will still remain available through other sources, including the Administrative Office. Although forms developed by the Administrative Office do not go through the full Enabling Act process, the subcommittee would likely recommend that the advisory committee plan to work with the Administrative Office in drafting and revising forms for use in civil actions.

The committee briefly discussed the feasibility of appointing a liaison member of the civil rules advisory committee to the Administrative Office forms committee. Several members of the committee praised the prior work of the Administrative Office forms committee, particularly its ready responsiveness to current judicial and litigant needs. Its flexibility and responsiveness to rapidly changing requirements were favorably compared to the more cumbersome process imposed by the Rules Enabling Act. Peter McCabe, who chairs the Administrative Office forms committee, expressed the willingness of that committee to respond to the needs of the civil rules advisory committee.

No significant concern was raised by the committee about the potential abrogation of Rule 84.

MOTIONS TO REMAND

Judge Campbell reported on a proposal from Jim Hood, Attorney General of Mississippi, to require automatic remand in cases in which a district court takes no action on a motion to remand within thirty days. Attorney General Hood also proposed that the removing party be required to pay expenses, including attorney fees, incurred as a result of removal when remand is ordered. While the advisory committee was sympathetic to the problems created by federal courts failing to act timely on removal motions, it did not believe the subject fell within the jurisdiction of the rules committees. Both subject matter jurisdiction and the shifting of costs from one party to another on removal and remand are governed by federal statutes enacted by Congress and not by rules promulgated under the Rules Enabling Act. Judge Sutton has conveyed the advisory committee's response to Attorney General Hood.

PANEL ON CIVIL LITIGATION REFORM PILOT PROJECTS

Four panelists covered the topics outlined below.

Selected Federal Court Reform Projects

Judge Koeltl outlined five litigation reform projects that the Duke Conference subcommittee is following. These include:

a. A set of mandatory initial discovery protocols for employment discrimination cases was developed as part of the work resulting from the Duke Conference. These protocols were developed by experienced employment litigation lawyers and have so far been adopted by the Districts of Connecticut and Oregon.

b. A set of proposals embodied in a pilot project in the Southern District of New York to simplify the management of complex cases.

c. A Southern District of New York project to manage section 1983 prisoner abuse cases with increased automatic discovery and less judicial involvement. The project's goal is to resolve these types of cases within 5.5 months using judges as sparingly as possible through the use of such devices as specific mandatory reciprocal discovery, mandatory settlement demands, and mediation.

d. A project in the Seventh Circuit inspired by Chief Judge James F. Holderman that seeks to expedite and limit electronic discovery. The project emphasizes concepts of proportionality and cooperation among attorneys. One specific innovation, Judge Koeltl noted, was the mandatory appointment of a discovery liaison by each litigant.

e. The expedited trial project being implemented in the Northern District of California. This project provides for shortened periods for discovery and depositions and severely limits the duration of a trial. The goal is for the trial to occur within six months after discovery limits have been agreed upon. Judge Koeltl acknowledged, however, that this entire procedure is an "opt in" one, and so far no litigant has "opted" to use it. As a result, the entire project is now under review to determine what changes will make it more appealing to litigants.

State Court Pilot Projects

Justice Kourlis presented a summary of information compiled by the Institute for the Advancement of the American Legal System on state court pilot projects. She said

these projects fell into three basic categories, all with the common purpose of increasing access to the courts for all types of litigants. The three basic categories were:

a. Different rules for different types of cases

One category of pilot projects attempts to resolve issues of costs and delay by establishing different sets of rules for different types of cases, such as for complex (e.g., business) cases and simple cases amenable to short, summary, and expedited ("SES") procedures. Complex case programs are currently underway in California and Ohio. In those projects, the emphasis appears to be on close judicial case management, frequent conferences, and cooperation by counsel. Substantial prior experience in complex business cases by participating judges appears to have contributed to the success of the projects.

SES programs for simple cases are currently underway in California, Nevada, New York, Oregon, and Texas. These programs emphasize streamlined discovery, strict adherence to tight trial deadlines, and, in at least one state, mandatory participation by litigants whose cases fall under a $100,000 damages limit.

b. Proportionality in Discovery

A number of states have launched projects to achieve this objective. These projects have involved local rule changes to expedite and limit the scope of discovery, more frequent and earlier conferences with judges, and more active judicial case management to achieve proportionate discovery and encourage attorney cooperation.

c. Active Judicial Case Management

This third category of state projects overlaps with the first two categories. Some examples of the techniques employed include: (i) the assignment of a case to a single judicial officer from start to finish; (ii) early and comprehensive pretrial conferences; and (iii) enhanced judicial involvement in pretrial discovery disputes before the filing of any written motions.

A "Rocket Docket" Court

Judge Crabb gave a succinct presentation on the benefits of her "rocket docket" court (the Western District of Wisconsin) and how such a court can effectively manage its docket. She explained that litigants value certainty and predictability, and that the best way to achieve these goals is to set a firm trial date. Given her court's current case volume, the goal is to complete a case within twelve to fifteen months after it is filed. Judge Crabb explained that this management style achieves transparency, simplicity, and

service to the public.

Once a case is filed in the Western District of Wisconsin, a magistrate judge promptly holds a comprehensive scheduling conference. At this conference, a case plan is developed and discovery dates are fixed. Although this court usually will not change pre-trial discovery deadlines, it will do so on application of both parties if the ultimate trial date is not jeopardized.

In Judge Crabb's district, the magistrate judges are always available for telephone conferences on motions or other pretrial disputes, but they do not seek to actively manage cases. The litigants know that they have a firm trial date and can be relied upon to seek judicial intervention whenever it is necessary. In Judge Crabb's view, this "rocket docket" approach permits both the rapid disposition of a high volume of cases and maintenance of high morale of the court staff.

Federal Judicial Center Statistical Observations on Discovery

Dr. Lee of the Federal Judicial Center then gave a short presentation on statistical observations about discovery. He noted that the Center's research shows that the cost of discovery is a problem only in a minority of cases. Indeed, various statistical analyses lead him to conclude that the problem cases are a small subset of the total number of cases filed and involve a rather small subset of difficult lawyers.

Dr. Lee cited a multi-variant analysis done in 2009 and 2010 for the Duke Conference. In that study, the Federal Judicial Center found that the costly discovery cases have several common factors:

1. High stakes for the litigants (either economic or non-economic);
2. Factual complexity;
3. Disputes over electronic discovery; and
4. Rulings on motions for summary judgment.

Other interesting statistical observations of the study included the fact that on average a 1% increase in the economic value of the case leads to a .25% increase in its total discovery cost. Other discovery surveys indicate that almost 75% of lawyers on average believe that discovery in their cases is proportionate and that the other side is sufficiently cooperative. Only in a small minority of the cases—approximately 6%—are lawyers convinced that discovery demands by the opposing side are highly unreasonable.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton and Professor Struve presented the report of the advisory committee, as set forth in Judge Colloton's memorandum of December 5, 2012 (Agenda Item 6). There were no action items for the committee.

Information Items

SEALING AND REDACTION OF APPELLATE BRIEFS

Judge Colloton reported that the advisory committee had decided not to proceed with a proposal to implement a national uniform standard for sealing or redaction of appellate briefs. He explained that the circuits take varying approaches to sealing and redaction on appeal. During the advisory committee's discussions, several members had expressed support for the approach of the Seventh Circuit, where sealed items in the record on appeal are unsealed after a brief grace period unless a party seeks the excision of those items from the record or moves to seal them on appeal. This approach is based on the belief that judicial proceedings should be open and transparent. However, members also noted that each circuit currently seems satisfied with its own approach to sealed filings.

Given the division of opinion among the circuits, the advisory committee ultimately decided there was no compelling reason to propose a rule amendment on the topic of sealing on appeal. However, its members believed that each circuit might find it helpful to know how other circuits handle such questions; therefore, shortly after its meeting, Judge Sutton, in one of his last acts as the chair of the advisory committee, wrote to the chief judge and clerk of each circuit to summarize the concerns that have been raised about sealed filings, the various approaches to those filings in different circuits, and the rationale behind the approach of the Seventh Circuit.

MANUFACTURED FINALITY

The advisory committee also revisited the topic of "manufactured finality," which occurs when parties attempt to create an appealable final judgment by dismissing peripheral claims in order to secure appellate review of the central claim. A review of circuit practice found that virtually all circuits agree that an appealable final judgment is created when all peripheral claims are dismissed with prejudice. Many circuits also agree that an appealable final judgment is not created when a litigant dismisses peripheral claims without prejudice, although some circuits take a different view. But less uniformity exists for handling middle ground attempts to "manufacture" finality. For example, there is disagreement in the circuits as to whether an appealable judgment results if the appellant conditionally dismisses the peripheral claims with prejudice by

agreeing not to reassert the peripheral claims unless the appeal results in reinstatement of the central claim. A joint civil-appellate rules subcommittee was appointed to review whether "manufactured finality" might be addressed in the federal rules. On initial examination, members had divergent views.

Before last fall's advisory committee meeting, the Supreme Court accepted for review *SEC v. Gabelli*, 653 F.3d 49 (2nd Cir. 2011), *cert. granted*, 133 S.Ct. 97 (2012). The Second Circuit's jurisdiction in that case rested on "conditional finality." Since the Court might clarify this issue in that case, the advisory committee decided to await the Court's decision before deciding how to proceed.

LENGTH LIMITS FOR BRIEFS

The advisory committee is considering whether to overhaul the treatment of filing-length limits in the Appellate Rules. The 1998 amendments to the Appellate Rules set the length limits for merits briefs by means of a type-volume limitation, but Rules 5, 21, 27, 35, and 40 still set length limits in terms of pages for other types of appellate filings. Members have reported that the page limits invite manipulation of fonts and margins, and that such manipulation wastes time, disadvantages opponents, and makes filings harder to read. The advisory committee intends to consider whether the type-volume approach should be extended to these other types of appellate filings.

CLASS ACTION OBJECTORS

Finally, the advisory committee has received correspondence about so-called "professional" class action objectors who allegedly file specious objections to a settlement and then appeal the approval of the settlement with the goal of extracting a payment from class action attorneys in exchange for withdrawing their appeals. One proposed solution would amend Rule 42 to require court approval of voluntary dismissal motions by class action objectors, together with a certification by an objector that nothing of value had been received in exchange for withdrawing the appeal. Another proposed solution would require an appeal bond from class action objectors sufficient to cover the costs of delay caused by appeals from denials of non-meritorious objections. Judge Colloton suggested that collaboration with the Civil Rules Advisory Committee would likely be required to determine both the scope of and possible remedies for this problem.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professor Beale presented the report of the advisory committee, as set forth in Judge Raggi's memorandum of November 26, 2012 (Agenda Item 8). As the committee's fall meeting in Washington was canceled as a result of Hurricane Sandy,

there were no action items for the committee.

Information Items

Judge Raggi reported that on the agenda for the advisory committee's Fall 2012 meeting and now high on the agenda for its Spring 2013 meeting is a Department of Justice proposal to amend Rule 4 to permit effective service of summons on a foreign organization that has no agent or principal place of business within the United States. The Department argues that its proposed change is necessary in order to prevent evasion of service by organizations committing offenses within the United States.

Judge Raggi also reported on the status of the proposed amendments to Rule 12, the rule addressing pleadings and pretrial motions. The proposed amendments were published for public comment in August 2011. The amendments clarify which motions must be raised before trial and the consequences if the motions are not timely filed. Numerous comments were received, including detailed objections and suggestions from various bar organizations. The committee's reporters prepared an 80-page analysis of these comments. In its consideration of the comments, the Rule 12 subcommittee reaffirmed the need for the amendment, but concluded that the public comments warranted several changes in its proposal. With those changes, the subcommittee has recommended to the advisory committee that an amended proposal be approved and transmitted to the Standing Committee for its approval. The advisory committee's consideration of the Rule 12 subcommittee's report will take place at its Spring 2013 meeting. Judge Raggi expressed her appreciation for the extended attention already devoted by Judge Sutton to the committee's work on Rule 12.

REPORT OF THE ADVISORY COMMITTEE ON RULES OF EVIDENCE

Judge Fitzwater and Professor Capra delivered the report of the advisory committee, as set forth in Judge Fitzwater's memorandum of November 26, 2012 (Agenda Item 4). There were no action items for the committee.

Information Items

SYMPOSIUM ON FED. R. EVID. 502

Professor Capra reported on a symposium the advisory committee hosted in conjunction with its Fall 2012 meeting. The purpose of the symposium was to review the current use (or lack of use) of Rule 502 (on attorney-client privilege and work product and waiver of those protections) and to discuss ways in which the rule can be better known and understood so that it can fulfill its original purposes of clarifying and limiting

waiver of privilege and work product protection, thereby reducing delays and costs in litigation. Panelists included judges, lawyers, and academics with expertise and experience in the subject matter of the rule, some of whom are also veterans of the rulemaking process. The symposium proceedings and a model Rule 502(d) order will be published in the March 2013 issue of the *Fordham Law Review*.

The panel attributed much of the lack of use of Rule 502 as a device to aid in pre-production review to a simple lack of knowledge of the rule by practitioners and judges. Part of this absence of knowledge was attributed to the rule's location in the rules of evidence as opposed to the rules of civil procedure. Various suggestions on promotion of the rule's visibility, including a model Rule 502 order, education through Federal Judicial Center classes and a possible informational letter to chief district judges, are in the process of being implemented or developed.

PROPOSED AMENDMENTS TO FED. R. EVID. 801(d)(1) AND 803(6)-(8)

A published proposed amendment to Rule 801(d)(1), the hearsay exemption for certain prior consistent statements, provides that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. This proposal has been the subject of only one public comment so far. Proposed amendments to Rule 803(6)-(8)—the hearsay exemptions for business records, absence of business records, and public records—would clarify that the opponent has the burden of showing that the proffered record is untrustworthy. No comments have been received yet on this proposal.

SYMPOSIUM ON TECHNOLOGY AND THE FEDERAL RULES OF EVIDENCE

Judge Fitzwater reported that the advisory committee is planning to convene a symposium to highlight the intersection of the evidence rules and emerging technologies and to consider whether the evidence rules need to be amended in light of technological advances. The symposium will be held in conjunction with the advisory committee's Fall 2013 meeting at the University of Maine School of Law in Portland.

These presentations concluded the first day of the meeting of the Standing Committee.

FRIDAY, JANUARY 4, 2013

REPORT ON PACE OF RULEMAKING

Benjamin Robinson gave a brief presentation on the timing and pace of federal rulemaking over the past thirty years. Judge Sutton had requested the report, noting that at various times in the past both the Federal Judicial Center and the committee have tackled this subject. He specifically pointed to the Easterbrook-Baker "self-study" report by the Standing Committee, 169 F.R.D. 679 (1995), contained in the agenda book.

Mr. Robinson presented a series of charts that demonstrated that over the past thirty years there have been several peaks and valleys in the pace of federal rulemaking. The charts demonstrated that the peaks were caused by legislative activity and to a lesser extent by several rules restyling projects.

For example, bankruptcy legislation in the mid-1980s created the occasion in 1987 for 117 bankruptcy rule changes. Similarly, bankruptcy legislation created the occasion for 95 bankruptcy rule changes in 1991. Additional bankruptcy legislation in 2005 produced a total of 43 bankruptcy rules amendments in 2008. The civil and evidence rules restyling projects also have required a considerable number of rule changes.

Mr. Robinson's presentation initiated a broader discussion of the timing and pace of rulemaking by committee members.

Judge Sutton stated that he had placed this matter on the agenda in part to sensitize the Standing Committee to the work required by the Supreme Court on rule amendments.

At one point during the discussion, Judge Sutton advanced a theoretical proposal that perhaps rule changes could be made every two years instead of every year. For example, the civil and appellate rules committees could group their proposed changes in the even years, while the criminal, evidence, and bankruptcy rules committees could group their proposed changes in the odd years. Judge Sutton noted that such a scheme would have the advantage of predictability both for the Supreme Court and for the bar as to what types of rule changes could be expected in a particular year.

Judge Sutton asked for comments from several of those present, in particular, participants who have had extensive experience over the years in the rulemaking process. Several points emerged during the discussion. First, there is no question that the Supreme Court is very aware of the burden that the rulemaking process places upon it. Chief Justices Burger and Rehnquist were particularly conscious of it. Also, the current rules

calendar places a heavy burden on the Court in that the rule proposals arrive in the spring when the Court is busiest. However, no one argued that seeking a legislative change in the calendar made any sense. Instead, the idea was advanced that the Rules Committees could target the March meeting of the Judicial Conference for its major proposals, rather than the September meeting. This would mean that the rule changes could go to the Court at a more convenient time, such as late summer before its annual session begins on October 1. However, a correlative disadvantage would be the overall extension in the length of time required for a proposed amendment to the rules to be adopted.

Experienced observers pointed out that much of the timing of rulemaking is dictated by external factors such as legislation or decided cases. While the timing of such projects as the restyling of the evidence and civil rules might be discretionary, the need for new rules created by legislation or other external events often is not. All participants appeared to agree that keeping the Supreme Court involved in the rulemaking process is most important to its integrity and standing. Thus, all agreed at a minimum that greater sensitivity to the needs and desires of the Court as to the timing of proposed rules changes is highly advisable.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff, Professor Gibson, and Professor McKenzie presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum of December 5, 2012 (Agenda Item 7). The report covered four major subjects: (1) revisions to the official forms for individual debtors; (2) a mini-conference on home mortgage forms and rules; (3) the development of a Chapter 13 form plan and related rule amendments; and (4) electronic signature issues.

DRAFTS OF REVISED OFFICIAL FORMS FOR INDIVIDUAL DEBTORS

Judge Wedoff first reported on the restyled Official Bankruptcy Forms for individual debtors. These forms are the initial product of the forms modernization project, a multi-year endeavor of the advisory committee, working in conjunction with the Federal Judicial Center and the Administrative Office. The dual goals of the forms modernization project are to improve the official bankruptcy forms and to improve the interface between the forms and available technology.

In August 2012, the first nine forms were published for public comment. To date, few comments have been received; however, the advisory committee expects to receive more comments before the February 15, 2013, deadline, and it will review those comments before seeking approval at the June meeting to publish the following eighteen remaining forms for individual debtor cases that have not yet been published:

Forms To Be Considered in June

- Official Form 101—Voluntary Petition for Individuals Filing for Bankruptcy
- Official Form 101AB—Your Statement About an Eviction Judgment Against You – Parts A and B
- Official Form 104—List in Individual Chapter 11 Cases of Creditors Who Have the 20 Largest Unsecured Claims Against You Who are not Insiders
- Official Form 106 – Summary—A Summary of Your Assets and Liabilities and Certain Statistical Information
- Official Form 106A—Schedule A: Property
- Official Form 106B—Schedule B: Creditors Who Hold Claims Secured by Property
- Official Form 106C—Schedule C: Creditors Who Have Unsecured Claims
- Official Form 106D—Schedule D: The Property You Claim as Exempt
- Official Form 106E—Schedule E: Executory Contracts and Unexpired Leases
- Official Form 106F—Schedule F: Your Codebtors
- Official Form 106 – Declaration—Declaration About an Individual Debtor's Schedules
- Official Form 107—Your Statement of Financial Affairs for Individuals Filing for Bankruptcy
- Official Form 112—Statement of Intention for Individuals Filing Under Chapter 7
- Official Form 119—Bankruptcy Petition Preparer's Notice, Declaration and Signature
- Official Form 121—Your Statement About Your Social Security Numbers
- Official Form 318—Discharge of Debtor in a Chapter 7 Case
- Official Form 423—Certification About a Financial Management Course
- Official Form 427—Cover Sheet for Reaffirmation Agreement

In anticipation of seeking publication in June, Judge Wedoff gave the committee an extensive preview of each of the above forms and took under advisement specific committee member comments on each of them with a plan to incorporate these comments in the preparation of the advisory committee's ultimate proposals.

MINI-CONFERENCE ON HOME MORTGAGE FORMS AND RULES

Judge Wedoff reported on a successful mini-conference held by the advisory committee on September 19, 2012, to explore the effectiveness of the new rules and forms concerning the impact of home mortgage rules and reporting requirements for chapter 13 cases, which went into effect on December 1, 2011. The mini-conference reflected a general acceptance of the disclosure requirements of the new rules, but pointed out various specific difficulties that will likely require some subsequent fine-tuning either

by the advisory committee or through case-law development.

CHAPTER 13 FORM PLAN AND RELATED RULE AMENDMENTS

Professor McKenzie reported on the advisory committee's development of a national form plan for chapter 13 cases. The working group presented a draft of the form plan for preliminary review at the advisory committee's Fall 2012 meeting. The group also proposed amendments to Bankruptcy Rules 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, specifically to require use of the national form plan and to establish the authority needed to implement some of the plan's provisions.

The advisory committee discussed the proposed form and rules amendments and accepted the working group's suggestion that the drafts be shared with a cross-section of interested parties to obtain their feedback on the proposals. Professor McKenzie reported that a mini-conference on the draft plan and proposed rule amendments was scheduled to take place in Chicago on January 18, 2013. The working group will make revisions based on the feedback received at the mini-conference and then present the model plan package to both the consumer issues and forms subcommittees for their consideration. The subcommittees will report their recommendations to the advisory committee at its Spring 2013 meeting. If a chapter 13 form plan and related rule amendments are approved at that meeting, the advisory committee will request that they be approved for publication in August 2013 at the June meeting of the Standing Committee.

CONSIDERATION OF ELECTRONIC SIGNATURE ISSUES

The last item of Judge Wedoff's report was an update on the advisory committee's consideration (at the request of the forms modernization project) of a rule establishing a uniform procedure for the treatment and preservation of electronic signatures. The advisory committee has requested Dr. Molly Johnson of the Federal Judicial Center to gather information on existing practices regarding the use of electronic signatures by nonregistered individuals and requirements for retention of documents with handwritten signatures. Her findings will be available by the end of this year and will be reported to the advisory committee at its Spring 2014 meeting.

NEXT MEETING

The Standing Committee will hold its next meeting in Washington, D.C., on June 3 and 4, 2013.

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Proposed Amendment to Evidence Rule 801(d)(1)(B)
Date: April 1, 2013

Last year the Committee approved the release for public comment of a proposed amendment to Evidence Rule 801(d)(1)(B). The Standing Committee then voted unanimously to release the proposal for public comment. The proposal provides that prior consistent statements are admissible under the hearsay exemption — as affirmative, substantive evidence — whenever they predate a witness's motive to falsify or otherwise rehabilitate a witness's credibility. The basic justifications for the proposal are: 1) there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements; and 2) the current rule is fatally confusing because it grants substantive effect to certain prior consistent statements that rehabilitate, but not to others — even though the end result is that all rehabilitative consistent statements will be heard by the jury — and the necessary jury instruction is impossible to follow.

The Committee received only six public comments on the Rule, and only three of those comments were new. The three old ones were: a letter from the Public Defender that was identical to the letter sent to and considered by the Committee when it approved the rule for public comment; and letters from Bill Hangley and Judge Joan Ericksen, former members of the Committee who voted against the amendment — and spoke against it — when it was approved by the Committee for public comment.

This memorandum is in three parts. Part One provides background on the proposed amendment and its release for public comment. Part Two sets forth the public comments received and considers whether those comments justify changing, or scrapping, the proposed rule. Part Three contains two separate versions of the proposed amendment, to be evaluated in light of the public comment: one in which the text is unchanged but the Committee Note is modified; and the other in which the text is amended to specify the purposes for which prior consistent statements may be offered, and a Committee Note to explain that approach.

I. Background on the Proposed Amendment to Rule 801(d)(1)(B)[1]

The proposed amendment to Rule 801(d)(1)(B) as released for public comment, provides as follows:

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 801(d)(1)(B)

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

*** * ***

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

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

* * *

(B) is consistent with the declarant's testimony and

(i) 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

(ii) otherwise rehabilitates the declarant's credibility as a witness;

* * *

The proposed Committee Note as released for public comment provides as follows:

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[1]. This material is mostly taken from previous memos to the Committee. I thought it appropriate to include it for orientation of the new members and to refresh recollection of the veterans.

Committee Note

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

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not provide for admissibility of, for example, consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it include consistent statements that would be probative to rebut a charge of faulty recollection. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

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

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. The amendment does not make any consistent statement admissible that was not admissible previously — the only difference is that all prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

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

The Rule states that only those prior consistent statements that are offered to rebut a charge of fabrication, motive, or influence can be used substantively — i.e., for the truth of the statement as opposed to rehabilitation of a witness's credibility. But many prior consistent statements could be offered for other kinds of rebuttal, such as to explain an inconsistency or to respond to a charge of faulty recollection. As Justice Scalia observed in his concurring opinion in *Tome v. United States*: "Only the premotive-statement limitation [in the existing rule] makes it rational to admit a prior corroborating statement to rebut a charge of recent fabrication or improper motive, but not to rebut a charge that the witness' memory is playing tricks."

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

However, to be admitted *substantively*, in the absence of some other hearsay exception, a prior consistent statement must rebut a charge of recent fabrication or improper influence or motive and must (under *Tome v. United States,* 513 U.S. 150 (1995)) have been made before the motive to fabricate arose. Where a consistent statement is admissible for rehabilitative purposes such as to explain an inconsistency, and yet is not admissible as substantive evidence under Rule 801(d)(1)(B), the adversary is entitled to a limiting instruction on the appropriate use of the evidence. *See, e.g.,*

United States v. Castillo, 14 F.3d 802 (2nd Cir. 1994) (a prior consistent statement can be offered to rehabilitate the witness's credibility even though it is not admissible under Rule 801(d)(1)(B); however, a limiting instruction must be given and the prosecutor cannot abrogate "the court's limiting instructions by improperly arguing the truth of the hearsay testimony" during opening and closing arguments).

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

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

An example of the lack of practical effect in the Rule 801(d)(1)(B) substantive/credibility distinction is *United States v. White*, 11 F.3d 1446 (8th Cir. 1993). Prior consistent statements were offered not to rebut a charge of improper motive, but to explain away an apparent inconsistency. The court noted that the rehabilitative statements "were admissible when accompanied by a limiting instruction," but they were not admissible for their truth under Rule 801(d)(1)(B) because they did not precede any motive that the witness might have had to fabricate his trial testimony. So the court held that the trial court erred in admitting the statements without a limiting instruction. But the error was by definition harmless because the prior consistent statements were "duplicative" of the witness's testimony at trial. Thus, as Judge Bullock points out in an article on the subject, distinctions between substantive and nonsubstantive use of prior consistent statements "are normally distinctions without practical meaning." Frank W. Bullock, Jr. & Steven Gardner, *Prior Consistent Statements and the Premotive Rule*, 24 Fla. St. U. L. Rev. 509, 540 (1997). This is why Judge Bullock advocates that "the Federal Rules should explicitly provide that all prior consistent statements, when admissible to rehabilitate, are admissible as substantive evidence." Id.

In terms of the hearsay rule, there is no reason to distinguish between prior consistent statements that rebut an attack on motive, and prior consistent statements that explain an inconsistency or rebut an attack of faulty recollection. There is nothing about a pre-motive prior consistent statement that makes it more reliable, in hearsay terms, than a prior consistent statement that rehabilitates on another ground. The justifications for the hearsay exemption in Rule 801(d)(1)(B), according to the Committee Note, are that 1) the declarant is on the stand subject to cross-examination about the prior statement, and 2) the adversary has opened the door by attacking

the witness's credibility. Those same rationales apply to *any* consistent statement that is admissible to rehabilitate an attack on credibility. Thus, the distinction in treatment between prior consistent statements covered by Rule 801(d)(1)(B) and those not covered appears to make no sense in terms of the hearsay rule or any other evidentiary consideration. As Professor Liesa Richter notes in her public comment on the proposed amendment (12-EV-004): "Based upon the stated rationale for permitting the hearsay exemption in existing Rule 801(d)(1)(B), there is no reason to limit the hearsay exemption to one type of rehabilitative prior consistent statement alone."

Case Law Inconsistency

The Reporter's previous memo on the subject indicated that most circuits have held that prior consistent statements that do not fall within Rule 801(d)(1)(B) are nonetheless admissible when they properly rehabilitate credibility — and the opponent is entitled to a meaningless limiting instruction that such statements are admissible only for credibility purposes and not for their truth. *See, e.g.*, *United States v. Stover*, 329 F.3d 859 (D.C. Cir. 2003):

> Consistent statements may be introduced for reasons other than their truth. Suppose a witness testifies on direct examination to fact X and then on cross-examination is asked about his statement, made sometime before trial, suggesting that he believed not-X. Could the party who called the witness ask him to verify his prior consistent statements * * * ? We think the answer is yes, and so do other courts of appeals. *See United States v. Simonelli*, 237 F.3d 19, 26-27 (1st Cir. 2001); *United States v. Ellis*, 121 F.3d 908 (4th Cir. 1997); *United States v. Pierre*, 781 F.2d 329, 331-33 (2d Cir. 1986); *United States v. Harris*, 761 F.2d 394, 399-400 (7th Cir. 1985). * * * These prior statements would not be offered for the truth of the matter asserted - fact X - and therefore would not need to satisfy Rule 801(d)(1)(B). They would be introduced to show that the witness did not give statements on direct that were inconsistent with what he had said before. * * * The prior statements would be admissible on this basis because of the cross-examination. They would be relevant, under Fed.R.Evid. 401, to a matter of consequence – namely, that the witness made inconsistent statements about fact X, which would tend to undermine his credibility. * * *
>
> Here, the only prior statements the Government introduced on redirect that clarified an apparent inconsistency were those concerning whether Ouaffai knew drug dealers other than Harrison. These statements were properly admitted (though not on the ground the District Court recited). The rest of Ouaffai's prior statements were not targeted at rebutting the inconsistencies probed during cross-examination, but served only to show that most of Ouaffai's testimony on direct examination was consistent with his earlier statements. It thus was error to admit them. See FED. R. EVID. 402.

Importantly, the *Stover* court found that Rule 401 permits relevant rehabilitation but that some of the consistent statements offered by the government were simply replications and not relevant to

rebut inconsistencies. Those statements were found improperly admitted because they were inadmissible to rehabilitate the witness. Thus, the court was not about to hold that all prior consistent statements are admissible for rehabilitation purposes. *See also United States v. Simonelli*, 237 F.3d 19, 27 (1st Cir. 2001) ("where prior consistent statements are not offered for their truth but for the limited purpose of rehabilitation, Rule 801(d)(1)(B) and its concomitant restrictions do not apply"; but noting that certain prior consistent statements were improperly admitted because the government "was just presenting again the testimony it presented on direct, this time through the testimony about statements to the grand jury.").

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

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

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

> Svetlana testified that she and Miller attempted to penetrate the KGB on behalf of the FBI. After the government had used the sidebar to impeach Svetlana's testimony that Miller had never shown nor given her a classified document, Miller sought to introduce seven prior statements of Svetlana to rehabilitate her [to explain the apparent inconsistency].
>
> Federal Rule of Evidence 801(d)(1)(B) provides that prior statements are admissible if they are (1) consistent with a witness' trial testimony and (2) offered to rebut a charge of recent fabrication or improper influence or motive. In this circuit, rehabilitative prior statements are admissible as substantive evidence under Rule 801(d)(1)(B) only if they were made before the witness had a motive to fabricate. The district court refused to admit Svetlana's prior statements because they were all made after her arrest, a time when she clearly had a motive to fabricate. Miller argues that this decision was incorrect because, even if the statements were inadmissible as *substantive* evidence under Rule 801(d)(1)(B), they should have been admitted for the limited purpose of rehabilitating the witness' impeached credibility. When introduced for that limited purpose, argues Miller, the statements are not hearsay because they are not being offered for the truth of the matter asserted. The government responds by arguing that the requirement of no motive to fabricate applies regardless of whether the statements are being introduced only for a limited purpose.

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

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

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

* * *

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

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

> This does not imply that we disagree with the result in either *Brennan* or *Harris*. Although we do not believe that prior consistent statements may be admitted for rehabilitation apart from Rule 801(d)(1)(B), we do not agree with the very strict manner in which those cases apply the requirement of no motive to fabricate. Indeed, the *Harris* and *Brennan* courts seem to have created an end run around Rule 801(d)(1)(B) in order to blunt the apparent harshness of the requirement. For example, in *Brennan*, the Second Circuit first concluded that the prior consistent statements made by a government witness (Mr. Bruno) before a grand jury were inadmissible under Rule 801(d)(1)(B) because Mr. Bruno's fear of prosecution gave him a reason to fabricate. The court then went on to conclude, however, that the statements were admissible for the limited purpose of rehabilitation. Bruno had been impeached with other statements he made during his grand jury testimony, and the court therefore concluded that the consistent statements were admissible because they helped to "amplif[y] and clarif[y]" the alleged inconsistent statements, and because they helped to "cast doubt . . . on whether the impeaching statement[s] [were] really inconsistent with the trial testimony." 798 F.2d at 589. *See also Harris*, 761 F.2d at 400 (despite presence of motive to fabricate, which barred admission under Rule 801(d)(1)(B), government was permitted to rehabilitate witness with consistent statements made during same interview as allegedly inconsistent ones; statements were relevant to "whether the impeaching statements really were inconsistent within the context of the interview"); *United States v. Pierre*, 781 F.2d 329, 333 (2d Cir. 1986) (prior consistent statement that is inadmissible as substantive evidence under Rule 801(d)(1)(B) is admissible for limited purpose of rehabilitation where it "tends to cast doubt on whether the prior inconsistent statement was made or on whether the impeaching statement is really inconsistent with the trial testimony" or where it "will amplify or clarify the allegedly inconsistent statement.").
>
> We believe that these cases interpret the requirement of no motive to fabricate too strictly. The requirement should not be applied as a rigid *per se* rule barring all such prior consistent statements under Rule 801(d)(1)(B), without regard to other surrounding circumstances that may give them significant probative value. Indeed, our conclusion that the requirement emerges from the relevancy concerns of Rules 402 and 403 implies that trial judges should consider motivation to fabricate as simply one of several factors to be considered in determining relevancy-albeit a very crucial factor. Thus, the trial judge must evaluate whether, in light of the potentially powerful motive to fabricate, the prior consistent statement has significant "probative force bearing on credibility apart from mere repetition." *Pierre,* 781 F.2d at 333. This determination rests in the trial judge's sound discretion.

The meaning of the above passage is unclear. It could mean that the Ninth Circuit will admit as substantive evidence all of the consistent statements that other courts find admissible for rehabilitation only. In other words, statements that rebut a charge of inconsistency (as opposed to a motive to fabricate) are admissible *as substantive evidence* because of the court's expansive construction of the term "motive to fabricate." This construction is indicated by the court's statement

that the prior consistent statements were not admissible *under Rule 801(d)(1)(A)* because "Svetlana's prior statements in no way help to explain or amplify the inconsistent statement with which she was impeached."

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

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

Conclusion on the Case Law

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

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

In sum, an amendment to Rule 801(d)(1)(B), designed to eliminate the difference between rehabilitative and substantive use of prior consistent statements, might have the benefit of clearing up the confusing and apparently contradictory case law.

Federal Judicial Center Survey

During the process of considering an amendment to Rule 801(d)(1)(B), the Committee sought the assistance of the FJC to assess whether federal judges saw a need to amend the rule. The survey included an early draft of the proposed amendment to Rule 801(d)(1)(B), which simply provided that prior consistent statements were admissible under the hearsay exception whenever they were otherwise admissible for rehabilitation.

The FJC survey, as might have been predicted, shows that Federal judges are not of one mind about a proposed amendment that would allow any prior consistent statement otherwise admissible for rehabilitation to also be admissible as substantive evidence. The basic conclusions are as follows:

- Most judges were in favor of an amendment that would exempt prior consistent statements from the hearsay rule when they are admissible to rehabilitate the witness's credibility.

- Most judges believe that more prior consistent statements will be admitted under the amendment than under existing law.

- Most judges are in favor of more prior consistent statements being admitted.

One unexpected benefit of the FJC survey was drafting advice. A respondent judge suggested that the proposed amendment should retain the traditional language covering prior consistent statements when offered to rebut a charge of recent fabrication or improper motive. Retaining that language — and adding an additional subdivision to cover other forms of rehabilitation — would tend to assure judges that the existing law on rehabilitating bad motive (specifically the pre-motive requirement) would be retained. The Committee made the suggested change in the version of the amendment that was submitted for public comment.

II. Review of Public Comment

The public comment on the proposed amendment, while very sparse, was essentially negative. Four of the comments suggested that the amendment be rejected outright. Two of the comments suggested material amendments to the text.

The comments are often repetitive so this section will address the basic points raised without going line by line through each public comment.

A. Argument #1: The language "otherwise rehabilitates" is fuzzy and will lead to wholesale admission of prior consistent statements.

The best statement of this argument comes from the Magistrate Judges' Association, (12-EV-003):

> The FMJA is concerned that, despite the Advisory Committee's stated purpose, the proposed revision to Rule 801(d)(1)(B) significantly undermines the rule against bolstering a witness and opens the door to the admission of self-serving consistent statements as substantive evidence. The language of the revision contains no limitation as to the type of evidence admissible as long as it "otherwise rehabilitates" the witness's credibility. That broad language conceivably would make admissible any prior consistent statement, and potentially, the repeated incantation of a prior consistent statement, as substantive evidence.

Similar concerns are expressed by the Public Defender, Judge Ericksen, NACDL, and Bill Hangley. These comments showed a lack of confidence in having Rule 403 as the only protection against admission of prior consistent statements that are not really rehabilitative but offered only to bolster the witness's credibility.

Reporter's Comment:

On the question whether the rule will lead to more prior consistent statements being admitted, there is not much to say that hasn't been said at four previous Committee meetings. As written, the rule does not make a single prior consistent statement admissible that is not admissible already. The only thing it does is treat currently admissible prior consistent statements in the same way ---- they are admissible both to rehabilitate and for whatever substantive effect they might have. The concern that Rule 403 is an insufficient protection against admission of prior consistent statements is one that has to be directed to *existing* law, and not to the amendment. Under existing law, Rule 403 *is* the rule that is used to exclude prior consistent statements that insufficiently probative for rehabilitation. *See, e.g., United States v. Simonelli,* 237 F.3d 19 (1st Cir. 2001) (prior consistent statements that explained an inconsistency were properly admitted to rehabilitate a witness, but prior consistent statements that simply bolstered the testimony should have been excluded under Rule 403); *United States v. Al-Moayad,* 545 F.3d 139 (2nd Cir. 2008) (prior

consistent statements had no rebutting force other than to repeat what the witness had previously said and so would not have been admissible to rehabilitate under Rule 403); *United States v. Casoni*, 950 F.2d 892, 905 (3rd Cir. 1991) ("we do not believe the district court abused its discretion in admitting evidence of Gabler's prior consistent statements to Guida for the purpose of buttressing Gabler's credibility despite the provisions of Rule 403."). The current amendment by its terms — and specifically in the Committee Note — makes no change to the existing protections provided by Rule 403 against admitting prior consistent statements that are insufficiently probative for rehabilitation.

But one senses from the comments a lack of confidence that the terms of the rule and the statements of intent in the Committee Note will be taken to heart, and that courts will start admitting prior consistent statement that would be excluded under current law as impermissibly bolstering — despite the fact that Rule 403 would apply in the same way it always has to regulate impermissible bolstering. Part of the concern in the comments is that the operative language in the amendment— "otherwise rehabiliates" — is vague and sounds permissive. It is for the Committee to determine whether that language will be used by courts as a smokescreen to permit more frequent admission of prior consistent statements.

Alternative Draft of Amendment to Rule 801(d)(1)(B) in response to concerns of more frequent admission of prior consistent statements:

If the Committee is concerned, in light of the comments, that the language "otherwise rehabilitates" is insufficient to regulate the admissibility of prior consistent statements, then one possible solution is to amend the provision to specify, with some particularity, the kinds of uses that are permitted. Thus, the suggestion of the Magistrate Judges' Association to allay their concern is that the revision "specifically state limits to the expansion of what types of rehabilitation evidence are admissible — for example, to rebut a charge of faulty recollection * * * ." That kind of change would essentially transfer some of the language from the Committee Note — where the permissible uses of prior consistent statements are identified — to the text.

What follows is the proposed amendment to Rule 801(d)(1)(B), but revised to specifically state the permissible purposes for which prior consistent statements may be offered to rehabilitate a witness.

Note: This version has already been vetted for style by Joe Kimble.

The proposed alternative version begins on the next page, for formatting purposes. It is redlined from the existing rule (not the rule released for public comment).

A possible Committee Note to this proposal is set forth later, in Part Three of this memo.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 801(d)(1)(B)

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

* * *

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

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

* * *

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant:

(i) recently fabricated ~~it~~ the testimony or acted from a recent improper influence or motive in so testifying;

(ii) made a prior statement inconsistent with the testimony; or

(iii) has a faulty memory.

* * *

Reporter's Comment on possible revision:

This revision would seem to address the concern that the amendment will lead to undue expansion of admissibility of prior consistent statements. It is clear that the two additional reasons specified for admitting prior consistent statements are valid reasons for rehabilitation — as evidenced by the case law. *See, e.g., United States v. Stover,* 329 F.3d 859 (D.C. Cir. 2003) (prior statement was not admissible to rebut a charge of improper motive, but it was admissible to clarify an inconsistency); *United States v. Mercado-Irrizarry,* 404 F.3d 497 (1st Cir. 2005) (same); *United States v. Denton,* 246 F.3d 784 (6th Cir. 2001) (same); *United States v. Harris,* 761 F.2d 394 (7th Cir. 1985) (same); *United States v. Hoover,* 543 F.3d 448 (8th Cir. 2008) (same); *Tome v. United States, supra* (Scalia, J., concurring) (prior consistent statements may be admissible to rebut a charge that the witness's memory was "playing tricks" on him). Since there are only three avenues for rehabilitation specified by the revised proposal, it would appear that a proponent could not argue that the consistent statement that does not fall within those purposes is admissible simply because it somehow rehabilitates a witness.

One possible downside of the amendment is that a case may arise where a consistent statement actually *does* rehabilitate a witness — but not for any of the three specified reasons set forth in the rule. If the court does find such a statement to be admissible for rehabilitation, then the court would be obligated to give the problematic jury instruction that the proposed amendment is trying to avoid.

But the response to this concern is that it is unlikely to arise very often, if at all. One remote possibility is that a court could find that a prior consistent statement rebutted a charge of bad motive even though the statement was made *after* the motive to falsify arose. That possibility was raised by Justice Breyer, who dissented in *Tome.* But it bears noting that Justice Breyer never came up with an example in which a statement that post-dated a motive would in fact be probative rebuttal of that motive; and even if such a statement was somehow probative, it could well be excluded under Rule 403 because the probative value would have to be balanced by the real risk that the jury would use the statement just for its repetitive value, i.e., simply to bolster the credibility of the witness. I found *no* reported case permitting rehabilitative use of prior consistent statements made after a motive to falsify when offered to rebut the charge of bad motive. All of the cases on rehabilitation outside Rule 801(d)(1)(B) appear to be about explaining inconsistencies.

Thus, even if there could be a situation in which a prior consistent statement might be rehabilitative and yet not covered by the language of the rule as revised, it can be anticipated that the examples will be quite infrequent. The effect of the proposed revision, then, will be to substantially (if not completely) limit the need to instruct on prior consistent statements admissible only for rehabilitation. And to the extent that the proposal is not absolutely comprehensive, that cost could be considered outweighed by the benefit of using specific language — rather than the open-ended "otherwise rehabilitates" — to prevent an expanding use of prior consistent statements.

It is of course for the Committee to determine whether: 1) the concerns expressed in the

public comment about more frequent admission of prior consistent statements needs to be addressed; and 2) whether the proposed revision sufficiently addresses those concerns.

B. Argument #2: Prior consistent statements should, if anything, be subject to the same standards as prior inconsistent statements.

The NACDL and Bill Hangley suggest that substantive use of prior consistent statements should be governed by the same terms as prior *inconsistent* statements under Rule 801(d)(1)(A): that is, they should be admissible only if made under oath at a formal proceeding. They argue that there is no reason to distinguish between consistent and inconsistent statements because jury instructions as to both are confusing, and guarantees of reliability as to both kinds of statements are necessary before they should be admitted as substantive evidence.

Reporter's Comment:

Adopting the NACDL proposal would essentially render Rule 801(d)(1)(B) unuseable, and would exacerbate the problem that the Committee sought to address in proposing the amendment, i.e, that jury instructions as to prior consistent statements admissible only for rehabilitation are impossible to follow. Prior consistent statements given under oath would rarely be probative of anything other than repetitiveness. Out of the more than two dozen circuit court cases involving prior consistent statements offered for rehabilitation, only two have involved prior consistent statements that were made formally under oath.[2] Thus, if the rule proposed by the NACDL were adopted, the problem addressed by the rule released for public comment would go unremedied in most cases.

On the other hand, the NACDL proposal would appear to allow impermissible bolstering so long as the witness's consistent statement was made under oath at a formal proceeding. In a criminal case the government could admit all prior consistent testimony made by a witness at a different trial or at the grand jury, without having to wait for the witness to be attacked, and without having to show proper rehabilitation. All that replicative testimony would simply be admissible because it was given under oath at a formal proceeding. That makes no sense.

Beyond the fact that the NACDL proposal does not solve the problem addressed by the amendment, it can be argued that it has a faulty premise, i.e., that prior consistent and inconsistent statements should be treated the same. The most obvious difference is that substantive use of prior inconsistent statements *makes* a difference. Prior consistent statements replicate a witness's testimony and therefore add little or nothing to the substantive evidence that is reviewed for legal sufficiency. As Judge Friendly stated: "It is not entirely clear why the Advisory Committee felt it

[2]. Those cases are *United States v. Simonelli*, 237 F.3d 19 (1st Cir. 2001), and *United States v. Brennan*, 798 F.2d 581 (2nd Cir. 1986).

necessary to provide for admissibility of certain prior consistent statements as affirmative evidence" because the difference between substantive and rehabilitative use is ephemeral. *United States v. Rubin*, 609 F.2d 51, 70, n.4 (2nd Cir. 1979) (concurring). In contrast, the distinction between substantive and impeachment use of prior inconsistent statements can be critical, especially of course in close cases — the witness's testimony is not being replicated and the prior inconsistent statement might be the sole affirmative proof that the proponent has to prove a particular fact. Given the possible importance of substantive use of the evidence, it made some sense for Congress — concerned about reliability — to revise the Advisory Committee draft by providing that prior inconsistent statements could only be admissible substantively if made under oath at a formal proceeding.[3] In sum, there is a reason for difference in treatment between prior consistent and inconsistent statements when it comes to use for substantive purposes.

Second, even in terms of use for credibility, it is obvious that prior consistent statements and prior inconsistent statements serve completely different purposes. They are also quite often made under different circumstances. They are essentially opposites and so it makes little sense to automatically conclude that they should be governed by the same admissibility standards.

Finally, whatever can be said about the merits of the NACDL proposal, the fundamental point is that it is simply a different amendment. It is addressed to different concerns and regulates different problems.

C. Argument #3: Confusing jury instructions are not limited to Rule 801(d)(1)(B)

Several of the commenters (NACDL, Hangley, Ericksen) make the argument that the rule is misguided in trying to do away with a jury instruction that is impossible to follow. They point out that other instructions are hard to follow as well — such as the instruction with respect to prior inconsistent statements offered solely to impeach; prior bad acts offered for a not-for-character purpose; and prior convictions offered to impeach a witness's character for truthfulness.

Reporter's Comment:

It is certainly true that a number of instructions that must be given under the Federal Rules of Evidence are difficult for jurors to follow. But it is a fallacy to argue that a rule should not be amended to fix a problem because other rules have a similar problem. Problems are often fixed rule by rule, as that is often more prudent than trying to solve a problem common to certain rules all at once. Certainly an amendment to a particular rule has never been rejected because it fails to solve

[3]. The Advisory Committee proposal provided for substantive admissibility of *all* prior inconsistent statements. See Capra, *Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification* at 17 (Federal Judicial Center 1998) (noting that the House Committee on the Judiciary proposed the under oath/formal proceeding requirement because, among other things, those requirements "provide firm additional assurances of the reliability of the prior statement.").

other possible problems in other Federal Rules.

More importantly, limiting instructions ordinarily come with the territory. The basic premise of the Federal Rules is that they are purpose-driven: the same piece of evidence may be admissible if offered for one purpose but inadmissible if offered for another. And when that occurs, the remedy is a limiting instruction under Rule 105, unless the risk of unfair prejudice (remaining after the instruction) substantially outweighs the probative value of the evidence as offered for the permissible purpose — in which case the evidence is entirely excluded under Rule 403. Limiting instructions are necessary because exclusion of all evidence that possibly could be used for an impermissible purpose would severely and unduly restrict the evidence that would be admitted at a trial. That is to say, permissible uses of evidence are *important* and the benefits of admitting such evidence presumptively outweigh the cost of jury confusion and incomprehension.

In that respect — importance — the instruction addressed by the proposed amendment to Rule 801(d)(1)(B) is different from the other instructions cited by the commentators. To illustrate: the instruction given for prior bad acts allows the jury to consider evidence for motive, intent, etc. — these are important purposes, and they are distinct from the impermissible inference of character that is the subject of the instruction. Likewise with prior inconsistent statements made under oath at a formal proceeding — the use for substantive evidence is *important* for reasons expressed above, and that use is distinct from use for credibility. In contrast, again for reasons already expressed, the distinction between substantive and rehabilitative use of prior consistent statements has little if any importance in the context of the trial, because the witness has already provided the substantive evidence by the trial testimony. Whatever extra is added by a prior consistent statement is directed to the credibility of the witness's testimony — and that is a jury question, not a question of the substantive sufficiency of evidence. Given the essential lack of importance in distinguishing between substantive and credibility use of consistent statements, the costs of confusing the jury and wasting time with a useless instruction are arguably not justified. Thus, there is an argument that eliminating the need for an instruction as to consistent statements can be distinguished from the case for retaining instructions in other areas.

D. Argument: The proposal is inconsistent with *Tome*

Professor Liesa Richter (12-EV-007) agrees that it is useful to treat all prior consistent statements similarly, and to that extent supports the proposed amendment. She finds "the rationale for the proposed change compelling"and "in keeping with the policies behind the rule." But she argues that the proposal as released for public comment "has the potential to deliver a mixed message about the future of the Supreme Court's decision in *Tome v. United States.*" Her point is that it is "theoretically possible" that a consistent statement might be admissible to rehabilitate a witness from a charge of bad motive even though the statement was made after the motive arose.[4]

[4]. This is the same argument made by Justice Breyer in *Tome* and it is interesting that neither Justice Breyer nor Professor Richter provides an actual case in which this "theoretical possibility" has arisen. This is not surprising, because the chance that a consistent statement —

If that theoretical possibility were to actually occur, the first subdivision of the proposal would not allow the statement to be admitted, because it retains the *Tome* pre-motive requirement. But the second subdivision could be used because the statement, by hypothesis, "otherwise rehabilitates" the witness.[5]

Reporter's comment:

The proposed amendment is clearly designed to retain the *Tome* pre-motive requirement for attacks on a witness's motive, while allowing substantive treatment of consistent statements offered to explain an inconsistency or rebut a charge of faulty memory. The proposal was *not* designed to overrule *Tome.* The Committee changed the initial draft of the Rule (after receiving suggestions from judges in the FJC survey) precisely because it wished to retain the *Tome* pre-motive requirement. If the Committee is of the view that the *Tome* pre-motive requirement should be rejected, then the proposed amendment would need to be reconsidered on the merits and the Committee should resurrect the initial draft of the proposed amendment, which broadly provided that a consistent statement would be exempt from the hearsay rule whenever it rehabilitates the witness. As the Committee specifically decided to amend that original proposal to add the *Tome* language, the rest of the discussion proceeds from the premise that the *Tome* pre-motive requirement should be retained for statements offered to rebut a charge of recent fabrication or bad motive.

Professor Richter's concern — that subdivision (ii) will be used to undermine the *Tome* pre-motive requirement — is hopefully answered by the words "*otherwise* rehabilitates." That is supposed to be read to mean some form of rehabilitation *other than* rebutting a charge of bad motive. As Professor Richter reads it, the rule wouldn't make any sense. Why codify the pre-motive requirement in subdivision (i) only to render the requirement a nullity in subdivision (ii)?

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made under a motive to falsify — is in fact probative enough for rehabilitation to withstand the risk of impermissible bolstering under Rule 403 would indeed seem "theoretical." How does a statement made under a bad motive rebut a charge of bad motive?

The Public Defender (12-EV-002) crafts a hypothetical in which drugs are found in a car; the driver is prosecuted while the passenger is not; and the passenger testifies that neither of them knew about the drugs. The Public Defender opines that a consistent statement by the passenger at the time of arrest would be admissible for rehabilitation, but not under Rule 801(d)(1)(B) because the passenger made it under a motive to falsify. But the Public Defender cites no case so holding and it is difficult to see how that statement rehabilitates, because it was in fact made under a motive to falsify. The fact that it might have been a different motive (at that time to escape prosecution, at trial to exculpate his friend) doesn't make it rehabilitative.

[5]. Judge Ericksen makes a similar argument — that subdivision (i) will become meaningless because every litigant will simply seek to invoke the broad "otherwise rehabilitates" language of subdivision (ii).

That said, if the Committee does see some ambiguity in the relationship between subdivisions (i) and (ii), there are two possible ways to address it.

One possibility is to change the Committee Note, which might provide as follows:

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

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not provide for admissibility of~~, for example,~~ consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it ~~include~~ cover consistent statements that would be probative to rebut a charge of faulty recollection. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

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

The amendment retains the requirement set forth in *Tome v. United States*, 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication or improper influence or motive must have been made before the alleged fabrication or alleged improper influence or motive arose. The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness, such as inconsistency and faulty memory.

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. The amendment does not make any consistent statement admissible that was not admissible previously — the only difference is that ~~all~~ more prior consistent statements ~~otherwise~~ already admissible for rehabilitation are now admissible substantively as well.

Reporter's Comment on possible change to the Committee Note.

First, in any case, the Reporter recommends that the citation to Judge Bullock's article should be deleted. Judge Bullock's article might be considered by some to be an invitation to reject the *Tome* pre-motive limitation on prior consistent statements offered to rebut a charge of recent fabrication or bad motive — he seems to argue for such a result in one part of his article. Therefore, the Committee might consider deleting the reference to that article in the Committee Note. And if the article is deleted the citation to the *Simonelli* case should probably be deleted as well because the two citations go together. It should be noted that the Standing Committee would approve of the deletion of the reference to the article without regard to the merits. The Standing Committee has for several years been telling Reporters to keep Committee Notes short and to delete references to cases and articles.

Second, the addition to the Committee Note, regarding the *Tome* rule, does seem to raise the cross-purposes in preserving the *Tome* pre-motive limitation and yet seeking to extend the original rule to its logical conclusion — that any consistent statement admissible for rehabilitation should also be admissible substantively.

It seems like the only clear way to work out these cross-purposes is to change the *text* of the rule to make clear that the *Tome* pre-motive rule is retained and the extension provided by the amendment is for *other specific* forms of rehabilitation, i.e., to explain an inconsistency and to rebut a charge of faulty memory. That is to say, the proposed changes to the text (and Committee Note) discussed above under Argument #1 provide a possible solution to the concern about the future of the *Tome* rule as well. That revision retains the *Tome* requirement and extends substantive effect to two designated forms of rehabilitation. The downside of that proposal, as discussed above, is that it may not be completely comprehensive ---- it is theoretically possible that a prior consistent statement might rehabilitate but would not receive substantive effect because it is not within the categories for rehabilitation designated in the rule. But for reasons expressed above, that downside

appears to be theoretical. And the upside of the proposal is: 1) it will extend substantive effect to virtually all the consistent statements that are currently offered as proper rehabilitation; and 2) it retains the *Tome* limitation and deletes the allegedly fuzzy "otherwise rehabilitates" language, thus providing assurance that the rule is not an open invitation to admitting rafts of prior consistent statements.

III. The Two Models for the Proposed Amendment, in Light of the Public Comment*:*

Below are two models for the proposed amendment in light of the public comment, both set out above and replicated here for ease of reference. Model One is simply the rule as issued for public comment, with possible changes to the Committee Note that 1) delete the reference to the Bullock article and case law and 2) address the retention of the *Tome* pre-motive requirement. The second model deletes the "otherwise rehabilitates" language from the text and specifies the two additional forms of rehabilitation that will receive substantive effect.

Again it should be noted that both of the models retain the *Tome* pre-motive requirement when the attack on the witness is for bad motive. If the Committee wishes to reconsider whether the pre-motive requirement should be retained, then the proposed amendment should probably be withdrawn for further consideration because abrogating the pre-motive requirement constitutes a shift in intent from the rule as issued for public comment.

Model One: Amendment as issued for public comment with changes to Committee Note clarifying intent regarding the *Tome* pre-motive requirement:

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 801(d)(1)(B)

Rule 801. Definitions That Apply to This Article; Exclusions from

Hearsay

*** * ***

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

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

* * *

(B) is consistent with the declarant's testimony and

(i) 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

(ii) otherwise rehabilitates the declarant's credibility as a witness;

* * *

Committee Note

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

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior

consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not provide for admissibility of~~, for example,~~ consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it ~~include~~ cover consistent statements that ~~would be~~ are probative to rebut a charge of faulty recollection. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

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

The amendment retains the requirement set forth in *Tome v. United States*, 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication or improper influence or motive must have been made before the alleged fabrication or alleged improper influence or motive arose. The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness, such as inconsistency and faulty memory.

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. The amendment does not make any consistent statement admissible that was not admissible previously — the only difference is that ~~all~~ more prior consistent statements ~~otherwise~~ already admissible for rehabilitation are now admissible substantively as well.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

The Committee Note was changed to clarify that the amendment retained the requirement set forth in *Tome v. United States*, 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication or improper influence or motive must have been made before the alleged fabrication or alleged improper influence or motive arose.

SUMMARY OF PUBLIC COMMENTS

(Set forth below under Model #2; summary is the same for either model).

Model Two: Amending the text to specify the forms of rehabilitation permitted (with corresponding changes to the Committee Note).

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 801(d)(1)(B)

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

* * *

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

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

* * *

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant:

(i) recently fabricated ~~it~~ the testimony or acted from a recent improper influence or motive in so testifying;

(ii) made a prior statement inconsistent with the testimony; or

(iii) has a faulty memory.

* * *

Committee Note

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

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not provide for admissibility of consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it cover consistent statements that are probative to rebut a charge of faulty memory. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

The amendment retains the requirement set forth in *Tome v. United States,* 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication or improper influence or motive must have been made before the alleged fabrication or alleged improper influence or motive arose. The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness — specifically the charges of inconsistency and faulty memory.

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent

statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. The amendment does not make any consistent statement admissible that was not admissible previously — the only difference is that more prior consistent statements already admissible for rehabilitation are now admissible substantively as well.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

The text of the proposed amendment was changed, responding to a suggestion from the Federal Magistrate Judges Association, to specify the two additional forms of rehabilitation that would be covered by the hearsay exemption. The Committee Note was modified to explain the change in text.

SUMMARY OF PUBLIC COMMENTS

Hon. Joan Ericksen, (12-EV-001) opposes the proposed amendment as released for public comment on the ground that it is not needed and may lead to unintended consequences.

The Federal Public Defender (12-EV-002) opposes the proposed amendment as released for public comment on the ground that it is "unnecessary and would actually be counterproductive" because it would allow for admission of more prior consistent statements and would "change the dynamics at the trial."

The Federal Magistrate Judges Association (12-EV-003) "is concerned that, despite the Advisory Committee's stated purpose, the proposed revision significantly undermines the rule against bolstering a witness and opens the door to the admission of self-serving consistent statements as substantive evidence." The FMJA suggests that "the revision specifically state limits to the expansion of what types of rehabilitation evidence are admissible — for example, to rebut a charge of faulty recollection — or that the Rule not be changed at all."

Professor Liesa Richter (12-EV-004) states that "[a]mending Rule 801(d)(1)(B) to include prior consistent statements used to rehabilitate impeaching attacks other than attacks on

motivation is completely consistent with the stated reason for the original hearsay exemption" and "advances the development of clear and rational evidentiary policies that can be administered efficiently and uniformly." Professor Richter argues, however, that the proposal as issued for public comment could be read to undermine the limitation on admitting prior consistent statements established in *Tome v. United States*, 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication or improper influence or motive must have been made before the alleged fabrication or alleged improper influence or motive arose. The proposed amendment as issued for public comment was revised with the intent to address that concern.

The National Association of Criminal Defense Lawyers (12-EV-005) contends that prior consistent statements should be subject to the same admissibility requirements as those applicable to prior inconsistent statements under Rule 801(d)(1)(A), i.e., they should be admissible as substantive evidence only when made under oath and subject to cross-examination. The NACDL also contends that the words "otherwise rehabilitates" — as used in the proposed amendment as released for public comment — are "fatally ambiguous."

William T. Hangley, Esq. (12-EV-006) objects to the proposed amended because it would lead to greater admissibility of prior consistent statements, and suggests that more study is required before that result is mandated. He also argues that treating prior consistent statements as substantive is unnecessary because the statement simply replicates testimony that the witness has already given.

TAB 3

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FORDHAM

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Daniel J. Capra Phone: 212-636-6855
Philip Reed Professor of Law e-mail:dcapra@law.fordham.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Possible Amendment to the Trustworthiness Clauses of Rules 803(6)-(8) — New Development at the State Level
Date: April 1, 2013

Evidence Rule 803(6) provides a hearsay exception for records of regularly conducted activity, so long as "neither the source of information nor the method or circumstances of preparation indicate lack of trustworthiness." Rules 803(7) and 803(8) contain the same lack of trustworthiness proviso for absence of business records and public records respectively. At the Spring 2012 meeting the Committee approved proposed amendments for each Rule to be sent to the Standing Committee with the recommendation that they be released for public comment. The Standing Committee, at its June meeting, unanimously voted to release the proposed amendments for public comment.

Only two public comments were received on the proposed amendments. They will be discussed below. At the Spring meeting, the Committee will determine whether the proposed amendments should be sent to the Standing Committee for referral to the Judicial Conference. This memorandum is intended to provide background information to assist the Committee in its task.

The memorandum is in five parts. Part One sets forth the background on the amendments and why the Committee proposed them for release for public comment. Part Two sets forth the conflicting case law on who has the burden with regard to trustworthiness and discusses why, if the rule is to be amended, it should allocate the burden to the opponent — as does the version released for public comment. Part Three discusses whether there is a legitimate concern that the restyling may have shifted the burden to the proponent. Part Four discusses the single public comment to the proposal. Part Five sets forth the proposed amendments, the Committee Notes, and the summary of public comment as it would be sent to the Standing Committee if the Committee approves.

I. Background of the Amendment

When these Rules were being restyled, Professor Kimble proposed a change to the lack-of-trustworthiness clauses. Using 803(6) as an example, and blacklined from the original rule, the first draft of the Restyled Rule provided as follows:

> ***(6) Records of a Regularly Conducted Activity.*** A ~~memorandum, report,~~ record~~, or data compilation, in any form,~~ of an act~~s~~, event~~s~~, condition~~s~~, opinion~~s~~, or diagnose~~is~~; if:
>
> > (A) the record was made at or near the time by~~;~~ – or from information transmitted by~~;~~ – ~~a person~~ someone with knowledge~~;~~ ;
> >
> > (B) the record was ~~if~~ kept in the course of a regularly conducted business activity~~;~~ ~~and~~ ;
> >
> > (C) making the record ~~if it~~ was ~~the~~ a regular practice of that business activity ~~to make the memorandum, report, record or data compilation,~~ ;
> >
> > (D) all ~~as~~ these conditions are shown by the testimony of the custodian or ~~other~~ another qualified witness, or by a certification that complies with Rule 902(b)(11)~~;~~ ~~Rule 902~~ or (12)~~;~~ or with a statute permitting certification~~;~~ ; and
> >
> > **(E) ~~unless~~ the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.**

The blacklined change to the trustworthiness clause clarified that the burden of showing untrustworthiness is on the *opponent* of the evidence. That is, once the proponent showed that the record was regularly kept, contemporanously made, etc., the record would be admitted unless the opponent showed untrustworthy circumstances by a preponderance of the evidence under the terms of Rule 104(a). The restyling was a clarification because the original rule does not explicitly allocate the burden of proof on the issue of trustworthiness.

The Reporter determined that the proposed change to the lack-of-trustworthiness clause was substantive because a few courts had held that the *proponent* has the burden of showing that a business record is trustworthy.[1] Therefore the amendment would change the evidentiary result in at least one federal court — and under the protocol developed for the restyling project it could not be proposed as part of the style package. The Restyled Rule 803(6) as adopted by the Advisory Committee and the Standing Committee therefore provides as follows:

> (6) Records of a Regularly Conducted Activity. A record of an act, event, condition,

[1] That case law is discussed infra.

opinion, or diagnosis if:

> (A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;
>
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
>
> (C) making the record was a regular practice of that activity;
>
> (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
>
> **(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.**

That same basic language is used in Rule 803(7) and (8).[2] The language returns to the passive, ambiguous position of the original rule.

The possible problem with this language is that it may have be read to *shift* the burden of proving trustworthiness to the proponent — which is not only a substantive change but a substantive change for the worse. The Reporter received email correspondence from the Restyling Committee for the State of Texas, suggesting that the restyled rule could be read to allocate the burden to the proponent. The email reads as follows:

> Dear Prof. Capra—
>
> Texas is in the process of restyling its evidence rules to conform as closely as possible to the restyled FRE, and I am chairing the Texas drafting committee. One of our committee members raised an interesting point about restyled Rule 803(6). The restyled rule seems to place on the proponent of the business record the burden of demonstrating that neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness. The former version of Rule 803(6) placed that burden on the opponent of the evidence. The same applies to Rule 803(8). Has this issue been raised within your

[2] The difference is that Rule 803(6) refers to "the method or circumstances of preparation" while the other Rules refer "other circumstances." That difference is found in the original Rules.

Advisory Committee or elsewhere? If so, do you expect that these rules will be rewritten?

s/ Professor Steve Good, Reporter to Restyling Committee on the Texas Evidence Rules.

Here is the response from the Reporter to this Committee:

> Dear Prof. Goode,
>
> The initial restyling draft specifically placed the burden on the opponent, but that would have been a substantive change because a few courts have placed the burden on the proponent. The restyled rule retains the passive voice, in order to keep the placement of the burden as vague as it was under the original rule.
>
> I am attaching a report to the committee explaining the issue and proposing that the restyled rule be amended to specifically put the burden on the opponent. The Committee ultimately decided that no change was necessary.

Here is Professor Goode's response:

> Thanks very much. I understand the difficulty the Committee confronted here given the existence of a few cases placing the burden on the proponent. For what it's worth, however, I will relate that *everyone on our committee viewed the restyled version as placing the burden on the proponent*. While I appreciate that the passive voice of the restyled 803(6)(E) doesn't foreclose arguments about the burden, the tenor of the language is certainly different. This may be one of the places where it will be interesting to see how courts react to the restyling: Will the directive that no substantive change is intended prevail over an argument that a change in the text has actually produced such a change?
>
> Again, many thanks for your prompt reply.

(Emphasis in the original).

At its Spring 2012 meeting, the Committee unanimously decided that an amendment to the trustworthiness clauses of Rules 803(6)-(8) would be appropriate and advisable, for two reasons: 1) the amendment would rectify a conflict in the case law on who has the burden of showing trustworthiness/untrustworthiness; and 2) the amendment would rectify what at least the Texas

Committee saw as a substantive change from the original — a change which would be inadvertent if it did result. The Committee further determined, again unanimously, that the uniform rule should require that the *opponent* must show that a record is untrustworthy in order to have it excluded when it satisfies the other admissibility requirements of the rule. That is, the burden on the trustworthiness factor is on the opponent of the evidence.

The text of the proposed amendment to Rule 803(6) as submitted for public comment reads as follows:

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 rule against hearsay, regardless of whether the declarant is available as a witness.

*** * ***

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

- **(A)** the record was made at or near the time by - or from information transmitted by - someone with knowledge;
- **(B)** the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
- **(C)** making the record was a regular practice of that activity;
- **(D)** all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
- **(E)** ~~neither~~ the opponent does not show that the source of information ~~nor~~ or the method or circumstances of preparation indicate a lack of trustworthiness.

* * *

The proposed Committee Note reads as follows:

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification — then the burden is on the opponent to show a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose the burden of proving untrustworthiness on the opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable.

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce

evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

Parallel changes are proposed to Rules 803(6) and (7). All three amendments and Committee Notes, in the form for presentation to the Standing Committee, are set forth in the last section of this memo.

II. Case Law on Allocating Burden of Proving Trustworthiness

A. Cases Imposing Burden on the Opponent.

Almost all of the reported cases impose the burden of proving "lack of trustworthiness" on the opponent of the evidence.

For business records, see, e.g.,

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

In re Japanese Electronics Products Antitrust Litigation, 723 F.2d 238, 291 (3d Cir. 1983), *rev'd in part on other grounds,* 475 U.S. 574 (1986) ("The circumstantial guaranty of trustworthiness for Rule 803(6) is regular recording of regular business activity. The trustworthiness proviso assumes that this guaranty is satisfied, and places on the opponent the burden of overcoming that badge of reliability by showing other reasons for untrustworthiness.").

Dunn ex rel. Albery v. State Farm Mut. Auto. Ins. Co., 264 F.R.D. 266, 274 (E.D. Mich. 2009) ("The proponent of the evidence bears the initial burden of establishing that it meets the requirements of Fed.R.Evid. 803(6); if the proponent satisfies its burden, the opponent bears the burden of demonstrating a reason to exclude the evidence. 2 McCormick on Evidence § 88.");

United States v. Fujii, 301 F.3d 535, 539 (7th Cir. 2002) ("Consequently, because [the opponent] fails to establish that 'the source of information or the method or circumstances of preparation indicate lack of trustworthiness,' see FED. R. EVID. 803(6), we conclude that the district court did not abuse its discretion in admitting check-in and reservation records under Rule 803(6).");

Shelton v. Consumer Products Safety Com'n, 277 F.3d 998, 1010 (8th Cir. 2002) ("The language of Fed.R.Evid. 803(6) parallels the principles we articulated in *Kehm v. Proctor & Gamble Mfg. Co.*, 724 F.2d 613 (8th Cir.1983), where we held that the public records exception assumes

admissibility in the first instance and provides that the party opposing admission has the burden of proving inadmissibility. We therefore apply the same principles to admission of business records that we articulated for admission of public records in *Kehm*, and hold that once the offering party has met its burden of establishing the foundational requirements of the business records exception, the burden shifts to the party opposing admission to prove inadmissibility by establishing sufficient indicia of untrustworthiness.");

Freitag v. Ayers, 468 F.3d 528, 541, n.5 (9th Cir. 2006) ("The district court did not err in admitting the IG's report into evidence at trial. Under the hearsay exceptions for business records, FED. R. EVID. 803(6), and public records, id. 803(8), the report was afforded a presumption of reliability and trustworthiness that the defendants failed to rebut."); and

Barry v. Trustees of the International Ass'n, 467 F. Supp. 2d 91, 106 (D.D.C. 2006) ("The structure of [Rule 803(6)] places the initial burden on the proponent of the document's admission to show that it meets the basic requirements of the rule, and the 'unless' clause then gives the opponent the opportunity to challenge admissibility, albeit now bearing the burden of showing a reason for exclusion.").

For public records, see, e.g.,

Bridgeway Corp. v. Citibank, 201 F.3d 134, 143 (2d Cir. 2000) ("Once a party has shown that a set of factual findings satisfies the minimum requirements of Rule 803(8)(C), the admissibility of such factual findings is presumed. The burden to show 'a lack of trustworthiness' then shifts to the party opposing admission.");

In re Complaint of Nautilus Motor Tanker Co., Ltd, 85 F.3d 105, 113 n.9 (3d Cir. 1996) ("Moreover, we note that public reports are presumed admissible in the first instance and the party opposing their introduction bears the burden of coming forward with enough 'negative factors' to persuade a court that a report should not be admitted.");

Kennedy v. Joy Technologies, Inc., 269 Fed. Appx. 302, 310 (4th Cir. 2008) ("As we recognized in *Zeus Enterprises, Inc. v. Alphin Aircraft, Inc.*, '[t]he admissibility of a public record specified in the rule is assumed as a matter of course, unless there are sufficient negative factors to indicate a lack of trustworthiness.' 190 F.3d 238, 241 (4th Cir.1999) (internal citations omitted). Furthermore, the party opposing the admission of such a report bears the burden of establishing its unreliability. *Ellis v. International Playtex, Inc*., 745 F.2d 292, 301 (4th Cir. 1984).");

Moss v. Ole South Real Estate, Inc., 933 F.2d 1300, 1305 (5th Cir. 1991) ("In light of the presumption of admissibility, the party opposing the admission of the report must prove the report's untrustworthiness.");

Reynolds v. Green, 184 F.3d 589, 596 (6th Cir. 1999) ("Because records prepared by public officials are presumed to be trustworthy, the burden is on the party opposing admission to show that

a report is inadmissible because its sources of information or other circumstances indicated a lack of trustworthiness.");

Klein v. Vanek, 86 F. Supp. 2d 812, 820 (N.D. Ill. 2000) ("If a public officer's finding meets the Rule's threshold requirement that it be a factual finding resulting from an investigation made pursuant to authority granted by law — as is the case here — the burden is on the party opposing admission to show that the finding lacks trustworthiness.");

Boerner v. Brown & Williamson Tobacco Co., 394 F.3d 594, 600-1 (8th Cir. 2005) ("Once the evaluative report is shown to have been required by law and to have included factual findings, the burden is on the party opposing admission to demonstrate untrustworthiness.");

Johnson v. City of Pleasanton, 982 F.2d 350, 352 (9th Cir.1992) ("The trial court is entitled to presume that the tendered public records are trustworthy. If the Johnsons seriously think the documents are untrustworthy, they can challenge them on that ground. When public records are presumed authentic and trustworthy, the burden of establishing a basis for exclusion falls on the opponent of the evidence."); *Sullivan v. Dollar Tree Stores, Inc.*, 623 F.3d 770 (9th Cir. 2010) ("A party opposing the introduction of a public record bears the burden of coming forward with enough negative factors to persuade a court that a report should not be admitted." – DOL report found untrustworthy because it was incomplete (with exhibits not attached); author was unknown; no hearing was held; and it appeared to be an internal draft); and

In re Korean Air Lines Disaster of Sept. 1, 1983, 932 F.2d 1475, 1482 (D.C. Cir. 1991) ("Rule 803(8)(C) 'assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present.' FED.R.EVID. 803 advisory committee note. The burden is on the party disputing admissibility to prove the factual finding to be untrustworthy.").

Rationale:

These cases generally rely on four arguments for imposing the burden of proving untrustworthiness on the opponent:

1) Language in the Advisory Committee Note to Rule 803(8) seems to allocate the burden of proving untrustworthiness to the opponent. The Note states that "the rule, *as in Exception (6), assumes admissibility in the first instance* but with ample provision for escape if sufficient negative factors are present." This sentence is most logically read to mean that if the other admissibility factors are met, the record is *presumed* admissible and the trustworthiness clause is included as a safety valve for opponents to use to overcome that presumption.

2) The language of the original rule pointed toward imposing the burden on the opponent. It said that statements fitting the other requirements are within the rule "*unless* the source of information or the method of circumstances indicate *lack* of trustworthiness." First, the use of "unless" indicates that the requirement is an exception to the basic rule. Second, the use of "lack" indicates that it is an *absence* of trustworthiness that must be shown — certainly the *absence* of trustworthiness is something that the opponent, not the proponent, would want and need to show. Given the way the language is pitched, imposing the burden on the proponent would mean that he would be expected to show the *absence of a lack of trustworthiness* — which is an odd way to state a burden, to say the least.

3) The case law relies on statements of treatise-writers, all of whom state that it is the opponent's burden to show lack of trustworthiness. *See, e.g.,* Weinstein's Federal Evidence § 803.10[2] (Because public records are presumed to be trustworthy, "[t]he burden of proof concerning the admissibility of public records is on the party opposing their introduction."); Mueller and Kirkpatrick, §450 ("Sound policy suggest that if the offering party shows a business record satisfies the basic requirements, the exception applies and the record is considered trustworthy unless the other side shows it is not."); Saltzburg, Martin and Capra, Federal Rules of Evidence Manual at 803-53 ("[I]f the proponent of the record has shown that the admissibility requirements of the Rule are met, the proponent need not make an independent showing of trustworthiness. It is up to the objecting party to show that particular circumstances render the records unreliable.").

4. Policy arguments support allocating the burden of showing lack of trustworthiness to the opponent. In the context of business records, the admissibility requirements in the Rule are more than enough to establish a presumption of reliability; requiring an extra and independent showing of trustworthiness would improperly limit the scope of the exception. As Mueller and Kirkpatrick put it:

> The basic requirements (regular business with regularly kept record; source with personal knowledge; record made timely; foundation testimony) are enough in the run of cases to justify the conclusion that the record is trustworthy.

Similarly, public records are properly presumed trustworthy because it is the job of the government to maintain trustworthy records. As the court put it in *Ellis v. International Playtex, Inc.,* 745 F.2d 292, 301 (4th Cir. 1984):

> Placing the burden on the opposing party makes considerable practical sense. Most government-sponsored investigations employ well-accepted methodological means of gathering and analyzing data. It is unfair to put the party seeking admission to the test of "re-inventing the wheel" each time a report is offered. * * * It is far more equitable to place that burden on the party seeking to demonstrate why a time-tested and carefully considered presumption is not appropriate.

B. Cases Imposing Burden of Showing Trustworthiness on the Proponent

Some cases either by holding or by dicta state that the proponent has the burden of showing that business and/or public records are trustworthy.

For business records, see, e.g.,

Byrd v. Hunt Tool Shipyards, Inc., 650 F.2d 44, 46 (5th Cir. 1981) ("Under Rule 803(6), the business records exception, it is the duty of the proponent to establish circumstantial guarantees of trustworthiness.") **Note:** There is conflicting case law in this circuit. See *Graef v. Chemical Leaman Corp.*, 106 F.3d 112, 118 (5th Cir. 1997) (stating that the burden of establishing the untrustworthiness of business and public records "is on the opponent of the evidence.").

Equity Lifestyle Properties v. Florida Mowing & Landscape, 556 F.3d 1232, 1244 n.19 (11th Cir. 2009) ("Under Fed.R.Evid. 104(a), in determining that the invoices were admissible [as business records], the district court first had to find as fact that they were trustworthy. See *City of Tuscaloosa v. Harcros Chemicals, Inc*., 158 F.3d 548, 565 (11th Cir.1998).").

For public records, see, .e.g,

United States v. Dowdell, 595 F.3d 50, 72 n.18 (1st Cir. 2010) ("We have not yet considered who should bear the burden in this context, although our default position seems to be that it would be the party seeking admission, *United States v. Bartelho,* 129 F.3d 663, 670 (1st Cir.1997), which in this case is the government.").

It should also be noted that the Supreme Court's language in *Beech Aircraft v. Rainey*, 488 U.S. 153, 169 (1988), could be read in support of imposing the burden on the proponent to prove trustworthiness under Rule 803(8) (and therefore under the substantially identically worded Rule 803(6)). The Court in *Rainey* stated that "the trustworthiness provision requires the court to make a determination as to whether the report, or any portion thereof, *is sufficiently trustworthy to be admitted*." Further, in rejecting the proposition that opinions in public reports were never admissible, the Court declared that "[a]s long as the conclusion is based on a factual investigation *and satisfies the Rule's trustworthiness requirement*, it should be admissible along with other portions of the report." Finally the Court concluded that "[a]s the trial judge in this action determined that certain of the JAG Report's conclusions *were trustworthy*, he rightly allowed them to be admitted into evidence." All of these statements seem to describe the Rule as having a positive trustworthiness requirement. If the Court is reading it that way, it would appear that trustworthiness would be a positive admissibility requirement and thus would be allocated to the proponent.

The Committee was clear in its prior discussions that, on the merits, the Rule should provide that it is the opponent that has the burden of proving untrustworthiness — and not that the proponent has the burden of proving trustworthiness. Allocating the burden to the opponent makes sense for a number of reasons, among them: 1) that result is consistent with the vast majority of case law and the language of the rule; and 2) requiring the proponent to establish that the other admissibility requirements of the rule are met provides a sufficient indication of reliability — if the proponent must show affirmative trustworthiness beyond the other requirements, the business records exception would be of little utility; or alternatively, the courts might start holding that the same factors used to support the rules requirements — e.g., for business records, regular and contemporaneous recording — can also be used to satisfy the trustworthiness requirement, in which case the requirement would become superfluous.

IV. Can the Restyled Rule Fairly Be Read to Allocate the Burden of Showing Trustworthiness to the Proponent?

As stated above, the trustworthiness language of the Restyled Rule provides an exception to the rule against hearsay for "record of an act, event, condition, opinion, or diagnosis if:

* * *

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

This is a change from the original, which stated that a business record fitting the admissibility requirements is admissible

> *unless* the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

The Texas restyling committee was of the view that the change from "unless" to "neither" — together with the listing of admissibility requirements in the restyled rule — shifted the burden to the proponent to show that there is no lack of trustworthiness. Given the fact that everyone on the Texas committee was of the same view, it is hard to conclude that the argument is specious. Looking at the Restyled Rule as a whole, it can be interpreted as setting a list of admissibility requirements — and admissibility requirements are ordinarily for the proponent to meet. There is no differentiation between the trustworthiness requirement and any other requirement, they are all listed together. While it does seem nonsensical to force the proponent to prove the *absence* of a *lack* of trustworthiness, the uniform listing in the Restyled Rule can be reasonably interpreted as stating exactly that. In contrast, under the original rule, the "unless" clause was clearly a separate

consideration from the rest of the rule. It was exceptional, it was a shift in the text of the rule from the admissibility requirements to a separate concern for the court to address.[3]

It should be noted that Judge Hartz expressed the same concern at the Restyling Symposium in 2011 — that the Restyled Rule 803(6) could be read to allocate the trustworthiness burden to the proponent. To say the least, Judge Hartz's view, reached independently from the Texas Committee, shows that the argument is colorable — and one that may be espoused in the future by other state committees and courts when they review the Restyled Rules.

The question is whether the Texas Committee's view is enough — together with the other considerations previously expressed — to justify proposing an amendment. The possible importance of the Texas Committee's view is not only that *courts* might agree with it. What could be equally important is that Texas — and perhaps other states — will be implementing a rule that is *different* from the Federal Rule. One of the goals of restyling — indeed of any amendment to the Federal Rules — is to encourage states to modify their own rules to accord with the improved federal model. It would be unfortunate if the restyling led to variances that are based on disputes over whether the Federal model has made a substantive change.

It should be noted that if the Committee were to propose a change to Rules 803(6)-(8), it would not have to expressly recognize that the change was animated by a concern that the restyling had made a substantive change to the trustworthiness clause. There is no reason at all to make such a concession. The reasons that justified the change as previously considered would appear to be sufficient — to clarify the law and mandate a uniform result, promoting a substantive change the need for which was uncovered by the restyling effort.

IV. Public Comments on the Proposed Amendments

Only two public comments were received on the proposed amendments to Rules 803(6)-(8). The Federal Magistrate Judges Association (12-EV-003) simply states: "The FMJA endorses the proposed amendments." So no further discussion is required.

The National Association of Criminal Defense Lawyers (12-EV-005) does "not oppose" the amendments but asserts that there are "inaccuracies in the Committee Notes that follow the amended rules that require correction." They refer to the following passage in the Committee Note, which on this point is identical for all three rules:

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[3] Any ambiguity in the Restyled Rule could have been eliminated by placing the trustworthiness clause in a hanging paragraph at the end of the rule — but a hanging paragraph is anathema to the restylists.

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification — then the burden is on the opponent to **show a lack of trustworthiness**. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose the burden of **proving untrustworthiness** on the opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable.

NACDL says this language is inconsistent with the text of the rule which says that the opponent must only show an *indication* of a lack of trustworthiness, as opposed to establishing that the evidence is actually untrustworthy. The case law, however, speaks in terms of a burden of proving that the record is actually untrustworthy; and that case law interprets the same language of "indication" in the text of the rule that has always been there. See, e.g., *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1482 (D.C. Cir. 1991) (public records) ("The burden is on the party disputing admissibility to prove the factual finding to be untrustworthy."); *Johnson v. City of Pleasanton*, 982 F.2d 350, 352 (9th Cir.1992) (public records) ("the burden of establishing a basis for exclusion falls on the opponent of the evidence"); *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 600-1 (8th Cir. 2005) (public records) ("Once the evaluative report is shown to have been required by law and to have included factual findings, the burden is on the party opposing admission to demonstrate untrustworthiness."); *Shelton v. Consumer Products Safety Com'n*, 277 F.3d 998, 1010 (8th Cir. 2002) (business records) ("The language of Fed.R.Evid. 803(6) parallels the principles we articulated in *Kehm v. Proctor & Gamble Mfg. Co.*, 724 F.2d 613 (8th Cir.1983), where we held that the public records exception assumes admissibility in the first instance and provides that the party opposing admission has the burden of proving inadmissibility. We therefore apply the same principles to admission of business records that we articulated for admission of public records in *Kehm*, and hold that once the offering party has met its burden of establishing the foundational requirements of the business records exception, the burden shifts to the party opposing admission to prove inadmissibility by establishing sufficient indicia of untrustworthiness.").

That said, the NACDL does have a point that by dropping the textual language referring to circumstances that "indicate" a lack of untrustworthiness, the Committee Note might raise some unnecessary confusion. There is no reason not to track the language of the text in the Committee Note, as that is the language that has already been applied by the courts. Therefore, the Committee may wish to consider the following change to the Committee Notes to Rules 803(6)-(8):

Committee Note to Rule 803(6) with NACDL-suggested revision

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification — then

the burden is on the opponent to show that the source of information or circumstances of preparation indicate a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose the burden of proving indicia of untrustworthiness on the opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable.

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

Committee Note to Rule 803(7) with NACDL-suggested revision

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

Committee Note to Rule 803(8) with NACDL-suggested revision

The Rule has been amended to clarify that if the proponent has established that the record meets the stated requirements of the exception — prepared by a public office and setting out information as specified in the Rule — then the burden is on the opponent to show that the source of information or other circumstances indicate a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. Public records have justifiably carried a presumption of reliability, and it should be up to the opponent to "demonstrate why a time-tested and carefully considered presumption is not appropriate." *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984). The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party

without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

V. Amendments, Committee Notes and Summary of Public Comment

What follows are the proposed amendments to Rules 803(6)-(8), Committee Notes, summary of public comment, and GAP reports (changes made after public comment), in the format for submission to the Standing Committee should the Evidence Rules Committee approve them.

Note: the following material assumes that the NACDL-suggested change to the Note will be made. If the Committee disagrees, then the material that follows will be modified.

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 rule against hearsay, regardless of whether the declarant is available as a witness.

*** * ***

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

(A) the record was made at or near the time by - or from information transmitted by - someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that

complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) ~~neither~~ the opponent does not show that the source of information ~~nor~~ or the method or circumstances of preparation indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification — then the burden is on the opponent to show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose the burden of proving indicia of untrustworthiness on the opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable.

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

In accordance with a public comment, a slight change was made to the Committee Note to better track the language of the rule.

SUMMARY OF PUBLIC COMMENTS

The Federal Magistrate Judges Association (12-EV-003) endorses the proposed amendment.

The National Association of Criminal Defense Lawyers (12-EV-005) states that the text of the amendment is "well-constructed" but suggests that the Committee Note strays from the language of the text in stating that the opponent must prove that a record is untrustworthy. The NACDL suggests that the Committee Note be revised to refer to the opponent's burden to prove that the circumstances of preparation "indicate" a lack of trustworthiness.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(7)

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 rule against hearsay, regardless of whether the declarant is available as a witness.

*** * ***

(7) ***Absence of a Record of a Regularly Conducted Activity.*** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) ~~neither~~ the opponent does not show that the possible source of the information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

* * *

Committee Note

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

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Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(8)

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 rule against hearsay, regardless of whether the declarant is available as a witness.

*** * ***

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

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

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

(B) ~~neither~~ the opponent does not show that the source of information ~~nor~~ or other

circumstances indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established that the record meets the stated requirements of the exception — prepared by a public office and setting out information as specified in the Rule — then the burden is on the opponent to show that the source of information or other circumstances indicate a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. Public records have justifiably carried a presumption of reliability, and it should be up to the opponent to "demonstrate why a time-tested and carefully considered presumption is not appropriate." *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984). The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Rule 902(1) and Indian Tribes
Date: April 1, 2013

Andy Hurwitz, a judge on the Ninth Circuit and a former member of the Committee, sent me an email on March 14, 2013, attaching a case from the Ninth Circuit published that day. The case is *United States v. Alvirez*, #11-10244. Andy's description and comment follows:

> Dan: I thought you might be interested in the attached case, which holds that documents bearing the seal of a federally-recognized Indian tribe are not self-authenticating under FRE 902(1), because tribes are not listed among the various governmental entities in that rule. I don't know if this is correct, but if it stands, it may suggest the need for amendment of the rule. It seems silly to grant self-authentication for the political subdivisions of a State (Boonton??)[1] but not the Navajo Nation.

In *Alvirez*, the defendant was charged with a crime, an element of which was Indian status. That government offered a certificate of Alvirez's enrollment in a tribe — prepared with a seal and issued by the tribe — as proof of this element. The defendant challenged the authenticity of the certificate and the government argued that the certificate was self-authenticating under Rule 902(1). Rule 902(1) provides as follows:

[1] Andy comes from Boonton New Jersey, where I currently live.

Rule 902. Evidence That Is Self-Authenticating[2]

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.

The *Alvirez* court found that a document issued by an Indian tribe could not be self-authenticating under Rule 902(1) and and reversed the conviction. The rationale of the Ninth Circuit in *Alvirez* is set forth in the following passage:

> Alvirez contends that documents issued by Indian Tribes cannot be self-authenticating because the tribes are not political subdivisions as described in Fed. R. Evid. 902(1). * * * We agree.
>
> Authentication is a prerequisite to the admission of evidence, satisfied by establishing that the proferred item is in fact what it purports to be. Authentication establishes the genuineness of evidence and is a special aspect of relevancy. Evidence can be authenticated by presenting testimony from an individual who has sufficient familiarity with the proffered evidence to identify the evidence and inform the court of the circumstances under which the evidence was created. In sum, the individual who authenticates the evidence seeks to convince the court that the proffered evidence is genuinely what it purports to be. However, certain documents are characterized as self-authenticating, requiring no extrinsic evidence of genuineness to be admitted into evidence. Pursuant to Fed. R. Evid. 902(1), self-authentication requires a seal from an entity listed in the rule and a signature of attestation or execution. Fed. R. Evid. 902(1) specifically lists the entities that may issue self-authenticating documents and Indian tribes are not among those listed. See Fed. R. Evid. 902(1) (listing the United States; a State of the United States; a commonwealth, territory, or insular possession of the United States; the Panama Canal Zone; and the Trust

[2] It's interesting to note that the *Alvirez* court quoted and interpreted the pre-restyled rule. That doesn't of course mean that the result would change under the restyled rule. It simply means that the court was not up-to-date because the restyled rules are clearly applicable to this 2013 case.

Territory of the Pacific Islands); *see also United States v. Weiland*, 420 F.3d 1062, 1072 (9th Cir. 2005) (explaining that a party may not circumvent the requirements of authentication when the plain language of a rule lists the requirements necessary for authentication).

The government argues that tribes are "political subdivisions" of the United States and thus captured by the text of Rule 902(1). We disagree. Tribes are "sovereigns or quasi sovereigns," *Kiowa Tribe of Okla. v. Mfg.Tech., Inc.*, 523 U.S. 751, 757 (1998), not one of the political entities into which the federal government is divided, *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.").

The plain language of Rule 902(1) specifically lists the entities that may issue self-authenticating documents. The Rule is not ambiguous and must be applied as written. Because Indian tribes are not listed among the entities that may produce self-authenticating documents, the district court abused its discretion in admitting the Certificate pursuant to Federal Rule of Evidence 902(1) as a self-authenticating document. (Footnotes and some citations omitted).

The *Alvirez* court also stated that the tribe certificate could not be self-authenticating under Rule 902(2). That rule provides for self-authentication of an unsealed public document if it "bears the signature of an officer or employee of an entity named in Rule 902(1)(A), and 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." Because 902(2) refers back to Rule 902(1) for the types of entities that are covered, it shared the same infirmity — Indian tribes are not mentioned.

A quick search did not uncover any case other than *Alvirez* that considers the admissibility of Indian tribe certificates under Rule 902(1).

It should be noted that the gap in Rule 902(1) raised by *Alvirez* is one that probably does not rise to the level of an emergency. Indian tribe certificates can of course be authenticated by in-court testimony. See Rule 901(b)(7) (authenticity of public records may be established by evidence that a document was recorded in a public office and is from the office where items of that kind are kept). Indian tribe certificates can probably even be self-authenticating under the terms of Rule 902(4) (public record certified as correct by the custodian or another person authorized to make the certification). (In *Alvirez* the government conceded that no custodian had provided such a certification and so Rule 902(4) was inapplicable). It should also be noted that there are more than 500 federally-recognized tribes, and some are not organized and formalized to the same degree as,

say, a state government.[3]

On the other hand, it does seem odd, as Andy says, that a record from a little town can be self-authenticating and a document from a sovereign Tribe cannot. As he stated in a follow-up email, the situation seems "unnecessarily denigrating of tribal sovereignty."

If the Committee considers the problem raised in *Alvirez* to be worth considering, the Reporter will prepare a full memorandum on the subject, including language for a possible amendment and Committee Note, for the next meeting.

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[3] In response to the concern that some tribes might not be sufficiently systematic, consider an email that I received from Professor Wenona Sengel of the MSU Law School Indigenous Law and Policy Center:

> As for the concern that tribes have varying degrees of systematic practice, I would suggest that the committee consider the precedent set by the U.S. Department of Homeland Security and the Transportation Security Administration. Both accept tribal documents. The TSA accepts any "Native American Tribal Photo ID" at their airport checkpoints, treating the IDs as acceptable forms of identification just as U.S. passports and foreign-government-issued passports are treated. The Department of Homeland Security also provides that U.S. citizens entering the U.S. by land or sea must present proof of their identity, and it accepts the "current tribal documents" of Native American U.S. citizens as proof of identity and citizenship, provided the document is affixed with a photo.
>
> Given that tribal documents are accepted by federal agencies in areas where national security is paramount, I think that a solid case can be made for including tribes within 902(1)'s scope and giving them parity with the broad array of political subdivisions (including Boonton, NJ) that are covered by the rule.

Professor Sengel, like Judge Hurwitz, suggests that the Committee consider whether Rule 902(1) should be amended to include Indian tribes.

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Daniel J. Capra Phone: 212-636-6855
Philip Reed Professor of Law e-mail:dcapra@law.fordham.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Federal Case Law Development After *Crawford v. Washington* — and After the Confusion of *Williams v. Illinois*
Date: April 1, 2013

The Committee has directed the Reporter to keep it apprised of case law developments after *Crawford v. Washington*. This memo is intended to fulfill that function. The memo describes the Supreme Court and federal circuit case law that discusses the impact of *Crawford* on the Federal Rules of Evidence. It has been modified to have a separate, opening section *Williams v. Illinois*, which throws the Supreme Court's Confrontation Clause jurisprudence in disarray.

The memo is in four parts:

1) Part one is a description of *Williams* and its effect on admitting hearsay under the Confrontation Clause.

2) Part two sets forth all federal and state supreme court cases that have applied *Williams*, as well as some selected state lower court cases. The goal is to see how the courts are trying to figure out what to do in light of *Williams*, so that the Committee might have some indication of whether any part of Article 8 — or Rule 703 — needs to be amended.

3) Part three is essentially the outline (updated) that has been produced in previous agenda books, with subject matter categories and cases set forth by circuit. It has been updated substantially from the last agenda book. And all cases previously set forth in this outline have been re-evaluated in light of *Williams*. Where *Williams* clearly has no effect on the outcome of a case decided before it, it will not be discussed. Where *Williams* probably has an effect or the question is close, that impact will be discussed.

4) Part four is a short discussion of the effect of *Williams* on rulemaking.

I. *Williams v. Illinois*

In *Williams v. Illinois*, 132 S.Ct. 2221 (2012), the Court brought substantial uncertainty to how courts are supposed to regulate hearsay offered against an accused under the Confrontation Clause. The case involved an expert who used testimonial hearsay as part of the basis for her opinion; but the splintered opinions in *Williams* create confusion not only for how and whether experts may use testimonial hearsay, but more broadly about how some of the hearsay exceptions square with the confrontation clause bar on testimonial hearsay.

The facts are as follows: Williams was tried for rape in a bench trial. When the victim was brought to the hospital, doctors took a blood sample and vaginal swabs for a sexual-assault kit. The police eventually sent these samples to a private laboratory, Cellmark, for DNA testing. Cellmark prepared a DNA profile and sent it back to the police. At the time the Cellmark report was prepared, the rapist was still at-large (that fact turns out to be important). Then Lambatos, a forensic specialist for the State Police, conducted a computer search to see if the Cellmark profile matched any profiles in the state DNA database. The computer showed a match with Williams's profile, which had been produced by the state lab from a sample of Williams's blood that had been taken in an unrelated arrest. At trial, there was in-court testimony that a swab was taken from the victim and that there was semen on it. There was in court testimony that after the semen test, the sample was stored in the lab. There was in-court testimony that the defendant's DNA profile was prepared from a blood sample after a previous arrest. There was in-court testimony that the defendant's DNA profile was added into the DNA database. And finally, there was in-court testimony from the expert that the profiles of the semen swab and the blood sample matched.

Two things that were not shown by in-court testimony was that the swab sample went from the police to Cellmark, and that they were sent back from Cellmark along with the profile, to the police. But the defendant did not challenge these two facts as they were proven by shipping manifests that were admitted as business records. (This is important because the court as early as Crawford found that business records are not testimonial because they are prepared for a non-litigative purpose. Indeed if they are prepared for a litigation purpose they are not admissible as business records, per Palmer v. Hoffman.) So what exactly was the confrontation question in Williams? No witness from Cellmark was called to testify to the preparation of the profile from the sample taken from the victim. Instead the state offered Lambatos as an expert witness in forensic biology and DNA analysis. She testified about the general process of DNA testing, and how profiles are matched based on a unique genetic code. She further testified that Cellmark was an accredited crime lab. Finally she testified that, based on her own comparison of the two DNA profiles, there was a match. The expert relied on Cellmark's assertion, in its report, that the sample tested is the one that the police sent it, and not another sample. The Cellmark report was neither admitted into evidence nor shown to the factfinder, i.e., the judge. Lambatos did not quote or read from the report. But she did testify on cross-examination that she relied on the DNA profile produced by Cellmark to reach her conclusion of a match — specifically that she relied on Cellmark's assertion that the profile it made was based on the vaginal swab from the victim that police sent to the lab.

Williams argued that his right to confrontation was violated because the person or persons who prepared the Cellmark report did not testify that the swab sent to them was the one that was analyzed in the report. The government argued that 1) under Illinois Rule 703 — substantively identical to Federal Rule 703 for present purposes — an expert is allowed to rely on inadmissible hearsay; 2) the Cellmark report was not itself entered into evidence; 3) Lambatos was testifying to her own opinion, not that of Cellmark, so she was the "witness" against Williams for purposes of the Confrontation Clause; and 4) Williams had a full opportunity to thoroughly cross-examine Lambatos. Williams was convicted and the Illinois court affirmed on the ground that the Cellmark report was never offered into evidence and therefore nobody at Cellmark was a witness against Williams — the Illinois court reasoned that the Cellmark report was not offered for its truth but only "to show the underlying facts and data Lambatos used before rendering an expert opinion."

The Supreme Court affirmed the conviction, but beyond that fact there is nothing clear about the result in *Williams.* Here is the scorecard of Justices in Williams:

The Alito Opinion:

Four members of the Court in a plurality opinion ---- Justice Alito, joined by the Chief Justice and Justices Kennedy and Breyer — found no Confrontation violation on two independent grounds:

1. Justice Alito agreed with the Rule 703-based analysis of the Illinois Courts — i.e., that the Cellmark report was never offered for truth and never entered into evidence, and so its preparer was not a witness against him. Justice Alito also noted that the distinction between using the Cellmark report for its truth and use only as the basis of an expert opinion is one that can easily be made by a judge in a bench trial, as was the instant case. (Whether that means that the Rule 703 analysis *only* works in bench trials is one of the post-*Williams* mysteries. The best answer would appear to be that the plurality would also accept the Rule 703 analysis in a jury trial at least if there is a good limiting instruction.).

2. Justice Alito also set forth an independent ground for decision: even if the Cellmark report had been offered for truth, the Confrontation Clause was not violated because the report was not "testimonial" within the meaning of *Crawford*. The test for testimoniality previously employed, most recently in *Michigan v. Bryant,* (set forth infra in Part III under excited utterances) is whether the "primary motive" for making the statement was to have it used in a criminal prosecution. Justice Alito declared that the Cellmark report did not trigger the "primary motive" test, because the "primary motive" for preparing the report was not to use it at trial *against a particular individual*, i.e., *Williams*. This was so because at the time the report was prepared, nobody knew who the perpetrator was. Thus the view from Justice Alito is that the primary motive test of testimoniality is dependent on whether the statement targeted *a particular person*, with the primary intent of having that statement used in a criminal prosecution of that particular person. For Justice Alito, the test is not satisfied if the statement is made only for use in some unidentified criminal prosecution.

The Kagan Opinion:

Four members of the Court in a dissenting opinion — Justice Kagan, joined by Justices Scalia, Ginsburg and Sotomayor — disagreed sharply with both premises of Justice Alito's opinion:

1) As to the Rule 703-based analysis, Justice Kagan stated that it was a "subterfuge" to say that it was only the expert's opinion (and not the underlying report) that was admitted against Williams. She reasoned that where the expert relies on a report, the expert's opinion is useful only if the report itself is true. Therefore, according to Justice Kagan, the argument that the Cellmark report was not admitted for its truth rests on an artificial distinction that cannot satisfy the right to confrontation. While she recognized that Rule 703 rests on the very distinction she rejected, her response was that an Evidence Rule cannot define an accused's right to confrontation.

2) As to Justice Alito's "targeting the individual" test of testimoniality, Justice Kagan declared that it was not supported by the Court's prior cases defining testimoniality in terms of primary motive. Her test of "primary motive" is whether the statement was prepared primarily for the purpose of *any* criminal prosecution, which the Cellmark report clearly was. [1]

The Thomas Opinion:

Justice Thomas was the tiebreaker. He essentially agreed completely with Justice Kagan's critique of Justice Alito's two grounds for affirming the conviction, i.e., that the Rule 703 analysis was an artifice and that the "primary motive" test is not limited to statements that target a particular individual. But Justice Thomas concurred in the judgment because he had his own reason for affirming the conviction. In his view, the use of the Cellmark report for its truth did not offend the Confrontation Clause because that report was not sufficiently "formalized." He tried to explain that the Cellmark report

> lacks the solemnity of an affidavit of deposition, for it is neither a sworn nor a certified declaration of fact. Nowhere does the report attest that its statements accurately reflect the DNA testing processes used or the results obtained. . . . And, although the report was introduced at the request of law enforcement, it was not the product of any sort of formalized

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[1] Justice Breyer wrote a concurring opinion. He argued that rejecting the Rule 703 analysis would end up requiring the government to call every person who had anything to do with a forensic test — a result he found untenable. He also re-raised many of the arguments of the dissenters in *Melendez-Diaz.* Finally, he set forth several possible approaches to permitting/limiting experts' reliance on lab reports, some of which he found "more compatible with *Crawford* than others" and some of which "seem more easily considered by a rules committee" than the Court.

The problem of course with consideration of these alternatives by a rules committee is that if the Confrontation Clause bars these approaches, the rules committee is just wasting its time. And given the uncertainty of *Williams*, it is fair to state that none of the approaches listed by Justice Breyer are clearly constitutional.

dialogue resembling custodial interrogation.

In Justice Thomas's view, a hearsay statement cannot be testimonial unless it is equivalent to a formal affidavit or certificate, as it was those types of formal documents that the Confrontation Clause was historically meant to regulate.

Fallout from Williams:

It must be noted that *eight* members of the Court rejected Justice Thomas's view that testimoniality is defined by whether a statement is sufficiently formal as to constitute an affidavit or certification. As Justice Kagan stated, "Justice Thomas's approach grants constitutional significance to minutia." Yet if a court is counting Justices, it appears that it will often be necessary for the government to comply with the rather amorphous standards for "informality" established by Justice Thomas. Thus, if the government offers hearsay that would be testimonial under the Kagan view of "primary motive" but not under the Alito view, then the government may have to satisfy the Thomas requirement that the hearsay is not tantamount to a formal affidavit. Similarly, if the government proffers an expert who relies on testimonial hearsay, but the declarant does not testify, then the government would appear to have to establish that the hearsay is not tantamount to a formal affidavit — this is because five members of the court rejected the argument that the confrontation clause is satisfied so long as the testimonial hearsay is used only as the basis of the expert's opinion. (Moreover, there is some confusion raised in Justice Alito's opinion about whether the distinction set forth in Rule 703 — between hearsay that is admitted and hearsay that is used only as the basis for an expert opinion — will work as well in a jury trial as it does in a trial before the judge, who can more easily understand such a nuance.)

In the end Justice Thomas's formality requirement may not be much of a bar to the government after *Williams.* As Justice Kagan noted, it is possible that the government could satisfy the Thomas view "with the right kind of language" in any forensic or other report. That is, don't call the report a "certificate," don't use the word "affidavit," and use a private lab. Obviously the courts will need to struggle with the Thomas view of "formality" in the post-*Williams* landscape.

It should be noted that much of the post-*Crawford* landscape is unaltered by *Williams*. For example, take a case in which a victim has just been shot. He makes a statement to a neighbor "I've just been shot by Bill. Call an ambulance." Surely that statement — admissible against the accused as an excited utterance — satisfies the Confrontation Clause on the same grounds after *Williams* as it did before. Such a statement is not testimonial because even under the Kagan view, it was not made with the primary motive that it would be used in a criminal prosecution. And *a fortiori* it satisfied the less restrictive Alito view. Thus Justice Thomas's "formality" test is not controlling, but even if it were, such a statement is not tantamount to an affidavit and so Justice Thomas would find no constitutional problem with its admission. See *Michigan v. Bryant*, 131 S.Ct. 1143, 1167 (2011) (Thomas, J., concurring) (excited utterance of shooting victim "bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate.").

Similarly, there is extensive case law allowing admission of testimonial statements on the ground that they are not offered for their truth — for example a statement is offered to show the background of a police investigation, or offered to show that the statement is in fact false. That case law appears unaffected by *Williams.* As will be discussed further below, while both Justice Thomas and Justice Kagan reject the not-for-truth analysis in the context of expert reliance on hearsay, they both distinguish that use from admitting a statement for a *legitimate* not-for-truth purpose. Moreover, both approve of the language in *Crawford* that the Confrontation Clause "does not bar the use of testimonial statements offered for purposes other than establishing the truth of the matter asserted." And they both approve of the result in *Tennessee v. Street,* 471 U.S. 409 (1985), in which the Court held that the Confrontation Clause was not violated when an accomplice confession was admitted only to show that it was different from the defendant's own confession. For the Kagan-Thomas camp, the question will be whether the testimonial statement is offered for a purpose as to which its probative value is not dependent on the statement being true — and that is the test that is essentially applied by the lower courts in determining whether statements ostensibly offered for a not-for-truth purpose are consistent with the Confrontation Clause.

II. Post-*Williams* Cases in the Lower Courts, Federal and State

What is remarkable so far is how many lower court cases after *Williams* are simply treating the Alito-Rule 703 analysis as the law — i.e., if an expert relies on a report that contains testimonial hearsay, there is no confrontation clause violation so long as the report itself is not admitted and the expert comes to her own conclusion. Most courts are spending little or no effort to parse through all the Justice Thomas formality requirements.

Those courts that don't just ignore the Thomas formality requirements either recognize them in passing or simply evade *Williams* entirely by relying on harmless error, no plain error, etc. Relatively few cases really go through all the opinions in *Williams* as a basis for coming to a conclusion on the admissibility of an expert's testimony.

As to the dispute over the "primary motive" test, the early indications are that the Alito view is being considered controlling by most courts (even though Justice Thomas and the four in the Kagan camp disagree with it). That is, the working definition for testimoniality, at least in most of the early post-*Williams* cases, is whether the statement was made with the primary motive that it be used against a targeted individual.

What follows are short descriptions of the post-*Williams* lower court cases:

1. Rule 703 Analysis:

A. Federal Court Decisions

Finding no plain error with a combination of the Rule 703 analysis and the Thomas formality analysis: *United States v. Pablo*, 625 F.3d 1285 (10th Cir. 2010), on remand for reconsideration under Williams, 696 F.3d 1280 (10th Cir. 2012): an expert relied on a lab test, which was not admitted into evidence. The Court evaluated the impact of *Williams* as follows, applying the plain error standard:

> it appears that five Justices would affirm the district court in this case, albeit with different Justices relying on different rationales as they did in *Williams*. The four-Justice plurality in *Williams* likely would determine that Ms. Snider's testimony was not offered for the truth of the matter asserted in Ms. Dick's report, but rather was offered for the separate purpose of evaluating Ms. Snider's credibility as an expert witness per Fed.R.Evid. 703; and therefore that the admission of her testimony did not offend the Confrontation Clause. Meanwhile, although Justice Thomas likely would conclude that the testimony was being offered for the truth of the matter asserted, he likely would further determine that the testimony was nevertheless constitutionally admissible because the appellate record does not show that the report was certified, sworn to, or otherwise imbued with the requisite "solemnity" required for the statements therein to be considered " ' testimonial' for purposes of the Confrontation Clause." Since Ms. Dick's report is not a part of the appellate record, we naturally cannot say that it plainly would meet Justice Thomas's solemnity test. In sum, it is not clear or obvious under current law that the district court erred in admitting Ms. Snider's testimony, so reversal is unwarranted on this basis.

Adoption of the Rule 703 not-for-truth analysis: *Boone v. Sullivan*, 2012 WL 6970843 (C.D. Cal.): The court found no confrontation violation where a supervisor was allowed to testify to a DNA test after having made an independent review, and another expert was permitted to rely on an analysts having lifted a fingerprint, where the expert conducted his own comparison. The court stated: "Recently, the Supreme Court has acknowledged that '[u]nder settled evidence law, an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true' and that this form of testimony 'does not violate the Confrontation Clause because that provision has no application to out-of-court statements that are not offered to prove the truth of the matter asserted.'" (quoting from the Alito opinion in *Williams*). ***See also Brown v. Small*, 2012 WL 7170434 (C.D. Cal.):** No confrontation violation where an expert testified on the basis of an autopsy report, quoting from Alito opinion: "the defendant has the opportunity to cross-examine the expert about any statements that are offered for their truth. Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause.").

Adoption of the Rule 703 not-for-truth analysis: *United States v. Kantengwa*, 2012 WL 4591891 (D. Mass.): Moving for a new trial on convictions for lying on visa and asylum applications, the defendant argued that the trial court had erred in allowing a historian to testify to an account of the Rwandan genocide. The defendant claimed that the historian relied on the research of others in violation of the Confrontation Clause. But the court cited *Williams* and stated that expert testimony does not violate the Confrontation Clause when the expert provides his own opinion even if he relies on testimonial hearsay.

Adoption of the Rule 703 not-for-truth analysis: *Goins v. Smith*, 2012 WL 3023306 (N.D. Ohio): In a habeas proceeding, the petitioner challenged the trial testimony of an expert who relied on a DNA test. The court invoked the plurality opinion in *Williams* and stated that under the Confrontation Clause "a testifying expert may assume the truth of an out-of-court statement."

Adoption of the Rule 703 not-for-truth analysis: *Evans v. King,* 2012 WL 4128682 (D.Minn.): The court relied solely on the Alito/Rule 703 analysis to reject a claim that the Confrontation Clause was violated by an expert's reliance on a testimonial report. "Evans appears to claim that because [the expert] did not conduct the gunshot residue test personally, admission of his testimony violated Evans's right to confrontation. This argument has no merit. Neither United States Supreme Court precedent nor the state and federal rules of evidence require that an expert personally conduct the study or test about which he or she testifies. *Williams v. Illinois.* [quote from Alito opinion]."

Adoption of the Rule 703 not-for-truth analysis: *Jake v. McDonald,* 2012 WL 3862455 (E.D.Cal.): There was no confrontation violation where a sexual assault examination report was used as the basis for expert testimony. Quoting from the Alito opinion, the court states:

> the Supreme Court has acknowledged that "Under settled evidence law, an expert may express an opinion that is based on facts that the experts assumes, but does not know, to be true" and that this form of testimony "does not violate the Confrontation Clause because that provision has no application to out-of-court statements that are not offered to prove the truth of the matter asserted."

The Court also noted in a footnote that the sexual assault report was not formalized in the nature of a certificate.

B. State Supreme Court Decisions

Adoption of the Rule 703 not-for-truth analysis: *State v. Joseph,* 230 Ariz. 296, 283 P.3d 27 (Ariz. 2012): The court found no confrontation violation when an expert relied on a doctor's report about the cause of death. It stated as follows:

> [E]xpert testimony that discusses reports and opinions of another is admissible under Arizona Rule of Evidence 703 if the expert reasonably relied on these matters in reaching his own conclusion. See *Williams v. Illinois*, 132 S.Ct. 2221, 2228 (2012) ("Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause.") (plurality opinion). Similarly, testimony regarding an autopsy photograph is not hearsay when offered to show the basis of the testifying expert's opinion and not to prove the truth of prior reports or opinions.

The trial court did not err in permitting Dr. Keen to testify about the basis for his conclusions regarding Tommar's injuries and cause of death. Dr. Keen's testimony did not exceed its permissible scope, and he did not offer any matters contained in Dr. Kohlmeier's autopsy report to show their truth**.**

Rejection of the Rule 703 not-for-truth analysis: *Martin v. State,* 2013 WL 427287 (Del.): A blood test showed that the defendant was driving under the influence of PCP. The analyst was not called to testify. Instead, the Chief Forensic Toxicologist, who managed the lab, testified. She explained that the laboratory conducted an initial and confirmatory screening on Martin's blood sample. She conducted an independent review of the test but testified that she did not observe the analyst's work and relied on the analyst to follow the standard operating procedure that she had developed and approves as laboratory manager. The witness detailed how the analyst would have performed a confirmatory screening via gas chromatograph mass spectrometry. The court held that the testimony violated the defendant's right to confrontation. The court noted that "the precise holding of *Williams* is less than clear (and not only to us)." The court distinguished *Williams* as involving a bench trial and stated that the state introduced the "substance" of the analyst's findings during the supervisor's testimony, even though the lab report was not formally admitted into evidence.

Prior case law permitting testimony by supervisor of testing not affected by *Williams: Leger v. State,* 291 Ga. 584, 732 S.E.2d 53 (2012): The supervisor of testing testified to a DNA match. She was presented with the data, interpreted the data, and wrote the report. No certified DNA report was admitted into evidence. The court adhered to its prior case law which held that "the Confrontation Clause does not require the analyst who actually completed the forensic testing used against a defendant to testify at trial." In a footnote discussing *Williams*, the court noted the split votes and stated that "it may not be possible to definitively state the Court's prevailing view on this issue" but concluded that *Williams* did not affect the prior case law in the state providing that an expert can rely on forensic testing by others so long as he forms his own opinion.

Adoption of the Rule 703 not-for-truth analysis: *State v. Jenkins,* 102 So.3d 1063 (Miss. 2012): The court held that admission of a lab report did not violate the defendant's right to confrontation because the testifying witness was the laboratory supervisor, who reviewed the analyst's report for accuracy, and the witness was able to explain the types of tests that were performed and the analysis that was conducted. The witness had "intimate knowledge" about the report and "reached his own conclusion that the subject tested was cocaine." The court found that *Williams* "has no bearing on the case at hand because we do not dispute that the forensic report at issue is testimonial."

Confrontation Clause violated where report is admitted into evidence: *Connors v. State,* 92 So.3d 676 (Miss. 2012) (Admission of forensic reports — a toxicology report and a ballistics report — violated the right to confrontation; the court notes that the case is not affected by

Williams, which it clearly is not; under any view, admission of the report itself, without an expert testifying, violates *Melendez-Diaz.*).

Adoption of the Rule 703 not-for-truth analysis: *State v. Lopez*, 45 A.3d 1 (R.I. 2012): The defendant challenged the expert's use of a DNA test prepared by Cellmark, when the person who prepared the test did not testify. The expert was a Cellmark supervisor. The court rejected the confrontation claim relying specifically on a Rule 703 analysis — because the expert reached his own opinion and the DNA test was not introduced into evidence, it was the expert who was the "witness" against the defendant, not the analyst who conducted the test:

> Quartaro was the preeminent testifying witness. He testified as to his own conclusions; he did not act as a conduit of the opinions of, or parrot the data produced by, other analysts. Cf. *United States v. Ramos–Gonzalez*, 664 F.3d 1, 5 (1st Cir.2011) ("Where an expert witness employs her training and experience to forge an independent conclusion, albeit on the basis of inadmissible evidence, the likelihood of a Sixth Amendment infraction is minimal. * * * Where an expert acts merely as a well-credentialed conduit for testimonial hearsay, however, the cases hold that her testimony violates a criminal defendant's right to confrontation."). * * * [T]he fact that Quartaro used data produced from the work of other analysts to form his final, independent conclusions did not bestow upon defendant the constitutional right to confront each and every one of those subordinate analysts. * * * Accordingly, we hold that in this case, where defendant had ample opportunity to confront Quartaro—the witness who undertook the critical stage of the DNA analysis, supervised over and had personal knowledge of the protocols and process of all stages involved in the DNA testing, reviewed the notes and data produced by all previous analysts, and testified to the controls employed by the testing lab to safeguard against the possibility of testing errors—the Confrontation Clause was satisfied.

As to *Williams*, the court simply relied on the result reached by the plurality:

> Our determination is further buttressed by the recent decision of *Williams v. Illinois*, 132 S.Ct. 2221 (2012), in which a plurality of the United States Supreme Court held that an independent DNA expert—who had no connection to the testing laboratory or knowledge of its procedures, and who took no part in the DNA testing nor in the formulation of the DNA report—was permitted to testify concerning the substance of the DNA report.

C. Selected State Lower Court Decisions

Adoption of the Rule 703 not-for-truth analysis: *People v. Viera,* 2012 WL 2899343 (Cal.App. 2 Dist.)): The defendant argued that DNA testimony of an expert violated his right to confrontation as it was based in part on lab work of a nontestifying technician**.** The court rejected the argument:

> [T]o the extent a portion of Ms. Bach's testimony was based in part on the laboratory work of the nontestifying technician who performed the extraction, as an expert, her testimony could properly include reference to hearsay matters upon which she relied in performing her work and rendering her opinion without offending the confrontation clause. *Williams v. Illinois.*

***Accord, People v. Magana*, 2012 WL 3039756 (Cal.App. 4 Dist.)** (citing *Williams* for the proposition that " the Confrontation Clause has no application to out-of-court statements that are not offered to prove the truth of the matter asserted, including expert testimony where [the] witness expresses an opinion based on facts made known to [the] expert.")**; *People v. Martinez*, 2012 WL 3983766 (Cal.App. 4 Dist.)** ("it is permissible for an expert witness to base his opinion on out-of-court statements that would otherwise be inadmissible under the hearsay rule" because the statements are not being admitted for their substantive truth, but rather as foundational evidence for the expert's opinions, and therefore their admission does not violate the confrontation clause. (*Williams v. Illinois* (2012)"); ***People v. Hamilton*, 2012 WL 3089371 (Cal. 4th App.)** ("The United States Supreme Court recently confirmed that "modern rules of evidence continue to permit experts to express opinions based on facts about which they lack personal knowledge." *Williams v. Illinois*. An expert's testimony concerning a report prepared by a third party does not violate the Confrontation Clause when the report was not admitted into evidence.").

Adoption of the Rule 703 not-for-truth analysis: *McMullen v. State*, 2012 WL 2688713 (Ga.App.)): The defendant argued that an expert's report on blood should have been excluded because he relied in part on a testimonial lab report. The court rejected the argument, relying solely on the Alito/Rule 703/not-for-truth analysis:

> [T]he trial court did not err in allowing the testimony of the expert witness even though he did not actually perform the testing procedure himself. It is well established that an expert may base his opinion on data collected by others and that his or her lack of personal knowledge does not mandate the exclusion of the opinion but, rather, presents a jury question as to the weight which should be assigned the opinion. Moreover, because the expert personally viewed and analyzed the data which formed the basis of the expert opinion about which he testified, he was not acting as a mere "surrogate," but rather had a substantial personal connection to the scientific test at issue. It follows then, that the expert witness's testimony did not violate McMullen's Sixth Amendment confrontation right. *Williams.* ***Accord Crosby v. State*, 735 S.E.2d 588 (Ga. App. 2012).**

Adherence to the Rule 703 not-for-truth analysis: *People v. Negron*, 2012 WL 478181 (Ill. App.): In a burglary prosecution, the government offered an expert who used a DNA report to conclude that the defendant was the burglar. The expert testified that she performed the technical review of the documentation of the documentation that was generated during the analysis and also reviewed the final data of the samples. But neither the report nor the underlying documentation was admitted into evidence. The court found no error, relying on *People v. Williams* — the decision reviewed by the Supreme Court in *Williams.* The defendant argued that the Supreme Court had

rejected the Illinois Supreme Court's analysis in *Williams*, but the court did not agree. It relied exclusively on Justice Alito's analysis that the Confrontation Clause is not violated when an expert relies on testimonial hearsay and that hearsay is not itself offered for its truth. The court stated:

> We find the United States Supreme Court's holding in *Williams* dispositive of this issue. The DNA comparison report related by Pineda was offered to explain the assumptions of her opinion that the DNA found inside the Uriarte home matched defendant's DNA and not for the truth of the matter asserted.

Adoption of the Rule 703 not-for-truth analysis: *Littleton v. State*, 2012 WL 3292443 (Mo.App. E.D.)): The court found no confrontation violation in an expert's reliance on a lab report where the expert reached his own conclusion and the report was not introduced as evidence. It stated as follows:

> Had Karr's testimony merely recited the findings presented in the laboratory report, we would have Confrontation Clause concerns as Karr would be testifying as to findings made by a technician who was not available to the accused for cross-examination. But such is not the case here. * * * Karr specifically testified that the conclusions she made regarding the DNA found in Galbreath's vehicle were independent of the findings of the technician who drafted the laboratory report, and of the report itself. As recently noted by the U.S. Supreme Court, the Confrontation Clause, as interpreted in *Crawford*, bars only testimonial statements by declarants who are not subject to cross-examination. *Williams v. Illinois*.

Adoption of the Rule 703 not-for-truth analysis: *State v. Francis*, 2012 WL 3166604 (N.J.Super.A.D.): A Cellmark DNA test was prepared by an analyst not produced for trial, but a "technical reviewer" who independently reviewed the data testified as an expert. The court found no confrontation violation, relying *solely* on the Alito-Rule 703 view; no mention at all was made of the Thomas formality test:

> [D]efendant argues that his Sixth Amendment confrontation rights were violated because Word testified instead of Clifton. However, in a recent decision, *Williams v. Illinois*, 132 S.Ct. 2221 (2012), the Supreme Court of the United States confirmed that the Confrontation Clause is not violated where a DNA expert testifies to her own independent conclusions, based on information from a DNA testing laboratory. In other words, the Court's decision confirmed the continuing viability of Rule 703 of the Federal Rules of Evidence and N.J.R.E. 703, both of which permit an expert witness to testify to the expert's own independent conclusions, even if the expert relied on inadmissible hearsay documents in reaching those conclusions. Consequently, we find no error, plain or otherwise, in the admission of Word's testimony.

Accord *State v. Bussey*, 2012 WL 3628772 (N.J. Super. A.D.) (no error in admitting expert's testimony based on lab results "because Maxwell had independently evaluated and supervised all aspects of the test.").

Adoption of the Rule 703 not-for-truth analysis: *People v. Rogers*, 2013 WL 388042 (N.Y. 4th Dept.): The court rejected the defendant's argument that expert testimony at his trial violated his right to confrontation: "Those experts relied on an autopsy report and DNA paternity report, respectively, but the actual reports were not admitted into evidence. 'Out-of-court statements that are related by an expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause.'" [quoting from the Alito opinion in *Williams*]. ***See also People v. Rios*, 2013 WL 149864 (N.Y. 1st Dept.)** ("A fair reading of the analyst's testimony establishes that she made her own independent comparison between defendant's DNA profile and the DNA recovered from semen stains on the victim's underwear. * * * [T]he reports of the nontestifying analysts never reached the jury. The witness testified about the other analysts's tests only to explain the basis for her own opinion, which was the only statement offered for the truth of the matter asserted.").

Adoption of the Rule 703 not-for-truth analysis: *State v. Harris*, 729 S.E.2d 99 (N.C. App. 2012): Expert testimony on the significance of DNA results, conducted by an analyst not produced for trial, did not violate the right to confrontation. First, there was no error when the test itself was conducted by a trainee but testified to by the supervisor who stood over her shoulder. Second, testimony on the significance of the results, based on statistical information prepared by others, was not a violation because the expert could use this information as the basis of expert testimony. *Williams* is then cited for the following proposition:

> Williams v. Illinois,132 S.Ct. 2221 (2012) (upholding admissibility of testimony regarding DNA analysis based upon work performed by an outside laboratory despite the prosecution's failure to present testimony from an analyst employed by the outside laboratory).

Adoption of the Rule 703 not-for-truth analysis: *State v. Jamerson*, 2012 WL 5333412 (Tex. App.): The court held that the admission of a lab report did not violate the defendant's right to confrontation where the testimony was provided by the technical reviewer who "was familiar with each step of the complex testing process and performed her own analysis of the data to compare with [the analyst's] to confirm that [the analyst's] contention was correct." The court cited *Williams* for the proposition that "under the right circumstances, a trial court does not violate the Confrontation Clause by admitting a DNA report into evidence based on the testimony of an independent DNA expert with no connection to the testing laboratory or knowledge of its procedures and who did not take part in the testing or the formulation of the report."

Confrontation Clause violation where the lab report is introduced into evidence: *Hall v. State*, 2012 WL 3174130 (Tex.App.-Dallas): The court held that the state could not avoid a confrontation violation by arguing that an expert relied on a testimonial lab report, when the testimonial lab report was actually admitted into evidence. The court distinguished *Williams* as a case in which the lab report was never entered into evidence. The court also distinguished *Williams*

as a case where the report was prepared before the defendant was arrested, and so it was not testimonial. In contrast, the lab report in this case was specifically targeted toward the defendant, who had been arrested.

> **Note: While the court in *Hall* finds a confrontation violation, in fact the court treats the Alito view — as to both Rule 703 and primary motive — completely controlling. The facts of the case and the use of the lab test are distinguished from the use found permissible by Justice Alito in *Williams.***

Adoption of the Rule 703 not-for-truth analysis: *State v. Doerflinger*, 2012 WL 4055338 (Wash. App.): In an assault case, the court found that a radiologist's report about a nasal fracture was not testimonial because it was made while the victim was being treated, and not solely for purposes of litigation. Moreover, the report was only used by an expert, and the court cited *Williams* as support in the following passage:

> In *Williams v. Illinois*, the Court held that out-of-court statements testified to by an expert solely for the purpose of explaining the assumptions upon which the expert opinion rests fall outside the scope of the confrontation clause. * * * The Court further noted that the report was produced before a suspect was even identified, and was not sought for the purpose of obtaining evidence to be used against the defendant, but for the purpose of finding a rapist who was on the loose.

2. Primary Motive Analysis:

A. Federal Court Decisions

Distinguishing the Alito Primary Motive Analysis: *United States v. Cameron,* 699 F.3d 621 (1st Cir. 2012): This is a complex decision with a lot of analysis, not all related to the Alito primary motive test. The entire case discussion is included under the headnote, "Cases on Records after *Melendez-Diaz, infra.*

Primary motive test not met where statements were made to an undercover informant to set up a drug transaction: *Brown v. Epps,* 686 F.3d 281 (5th Cir. 2012): This case is discussed more fully under "informal statements" in Part Three, infra. The court held that statements "unknowingly made to an undercover officer, confidential informant, or cooperating witness are not testimonial in nature because the statements are not made under circumstances which would lead an objective witness to reasonably believe that the statements would be available for later use at trial."
The case was decided after *Williams,* but the court did not rely on it, because statements setting up a drug deal with a confidential informant are definitely not testimonial under either of the "primary motive" tests posited in *Williams.*

Primary motive test not met where caller reports an ongoing crime to 911: *United States v. Polidore,* 690 F.3d 705 (5th Cir. 2012): In a drug trial, the defendant objected that a 911 call from a bystander to a drug transaction — together with questions from the 911 operators— was testimonial. This case is discussed more fully in Part Three under present sense impressions. The court held that the report from the bystander was not testimonial because the primary purpose of his statements was to request police assistance in stopping an ongoing crime and to provide the police with the requisite information to achieve that objective. The caller's "purpose [was] not to provide a solemn declaration for use at trial, but to bring to an end an ongoing [drug trafficking crime]," *Williams v. Illinois,* 132 S.Ct. 2221, 2243 (2012) (citing *Bryant,* 131 S.Ct. at 1155). The court did not refer to the fight over the primary motive test in *Williams* but it appears that the court's analysis comports with both versions of the primary motive test — the statement was targeted at a particular individual but even so, its primary motive was to get the police to respond to an ongoing crime rather than to prepare a statement for trial.

Adoption of the Alito Primary Motive Analysis: *Benjamin v. Harrington,* 2012 WL 3248256 (C.D.Cal.)*:* The defendant argued that expert testimony in partial reliance on a lab report violated his right to confrontation. The court found no error, because the report was prepared before the defendant was arrested and thus he was not an adversarial target at the time. The court relied on the Alito plurality opinion and its test of "primary motive." The court also notes in passing that the report was not a certified document or affidavit.

B. State Supreme Court Decisions

Factual observations in autopsy reports are not testimonial because the primary purpose was not to prepare them for trial: *People v. Dungo,* 55 Cal.4th 608, 286 P.3d 442 (2012): At the defendant's murder trial, a forensic pathologist testifying for the prosecution described to the jury objective facts about the condition of the victim's body as recorded in the autopsy report and accompanying photographs. The court noted that the expert did not testify to the conclusions reached in the autopsy report, only to objective facts: the hemorrhages in the victim's eyes and neck organs, the purple color of her face, the absence of any natural disease causing death, the fact that she had bitten her tongue shortly before death, and the absence of any fracture of the hyoid bone. Those observations in the autopsy report were not testimonial. The court explained as follows:

> The preparation of an autopsy report is governed by California's Government Code section 27491, which requires a county coroner to "inquire into and determine the circumstances, manner, and cause" of certain types of death. Some of these deaths (such as deaths from alcoholism, "sudden infant death syndrome," and "contagious disease") result from causes unrelated to criminal activities, while other deaths (such as deaths resulting from "criminal abortion," deaths by "known or suspected homicide," and "deaths associated with a known or alleged rape") result from the commission of a crime. With respect to all of the statutorily specified categories of death, however, the scope of the coroner's statutory duty to investigate is the same, regardless of whether the death resulted from criminal activity.
>
> The usefulness of autopsy reports, including the one at issue here, is not limited to criminal investigation and prosecution; such reports serve many other equally important purposes. For example, the decedent's relatives may use an autopsy report in determining whether to file an action for wrongful death. And an insurance company may use an autopsy report in determining whether a particular death is covered by one of its policies. Also, in certain cases an autopsy report may satisfy the public's interest in knowing the cause of death, particularly when (as here) the death was reported in the local media. In addition, an autopsy report may provide answers to grieving family members.
>
> In short, criminal investigation was not the primary purpose for the autopsy report's description of the condition of Pina's body; it was only one of several purposes. The presence of a detective at the autopsy and the statutory requirement that suspicious findings be reported to law enforcement do not change that conclusion. The autopsy continued to serve several purposes, only one of which was criminal investigation. The autopsy report itself was simply an official explanation of an unusual death, and such official records are ordinarily not testimonial.

Avoiding the conflict over the primary motive test by finding a report to be insufficiently formalized: *People v. Lopez,* 54 Cal.4th 569, 286 P.3d 469 (Cal.2012): The court

held that admission of a lab report indicating alcohol in the defendant's blood did not violate the right to confrontation. It found it unnecessary to determine the primary motivation for preparing the report, because the Justices in *Williams* could not agree on the proper test to apply. It also noted that unlike *Williams,* some of the information in the report was admitted for its truth and so the Alito Rule 703 not-for-truth analysis was inapplicable. Nonetheless the court found the report properly admitted because "the critical portions of that report were not made with the requisite degree of formality or solemnity to be considered testimonial" and that other parts of the report were simply machine-generated printouts and so not hearsay. On formality, the court explained as follows:

> The notation in question does not meet the high court's requirement that to be testimonial the out-of-court statement must have been made with formality or solemnity. Although here laboratory analyst Peña's initials appear on the same line that shows defendant's name and laboratory assistant Constantino's initials appear at the top of the page to indicate that he entered the notation that defendant's blood sample was given laboratory No. 070–7737, neither Constantino nor Peña signed, certified, or swore to the truth of the contents of page one of the report. The chart shows only numbers, abbreviations, and one-word entries under specified headings. Thus, the notation on the chart linking defendant's name to blood sample 070–7737 is nothing more than an informal record of data for internal purposes, as is indicated by the small printed statement near the top of the chart: "for lab use only." Such a notation, in our view, is not prepared with the formality required by the high court for testimonial statements.

Autopsy reports are not testimonial under either of the primary motive tests in *Williams: People v. Leach,* 980 N.E.2d 570 (Ill. 2012): The court concluded that "whichever definition of primary purpose is applied, the autopsy report in the present case was not testimonial because it was (1) not prepared for the primary purpose of accusing a targeted individual or (2) for the primary purpose of providing evidence in a criminal case." The defendant argued that the report was testimonial because the doctor was performing an autopsy at the police's request in the middle of a criminal investigation into a violent death where a suspect had been arrested for homicide. But the court disagreed, noting the following:

> 1. The medical examiner's office is not a law enforcement agency and even if the doctor knew or suspected that his report in this case would likely be used in a future criminal trial, his function was not "the production of evidence for use at trial." Even when the police suspect foul play and the medical examiner's office is aware of this suspicion, "an autopsy might reveal that the deceased died of natural causes and, thus, exonerate a suspect."
>
> 2. Although the police discovered the body and arranged for transport, there was no evidence that the autopsy was done "at the specific request of the police."

3. While it is true that an autopsy report might eventually be used in litigation of some sort, "these reports are not usually prepared for the sole purpose of litigation. A finding of accidental death may eventually lead to claims of product liability, medical malpractice, or other tort. A finding of suicide may become evidence in a lawsuit over proceeds of a life insurance policy. Similarly, a finding of homicide may be used in a subsequent prosecution of the accused killer. But the primary purpose of preparing an autopsy report is not to accuse 'a targeted individual of engaging in criminal conduct' (*Williams*) or to provide evidence in a criminal trial. An autopsy report is prepared in the normal course of operation of the medical examiner's office, to determine the cause and manner of death, which, if determined to be homicide, could result in charges being brought."

4. "[T]he autopsy report was not certified or sworn in anticipation of its being used as evidence; it was merely signed by the doctor who performed the autopsy. Thus, the autopsy report would not be deemed testimonial by Justice Thomas, because it lacks the formality and solemnity of an affidavit, deposition, or prior sworn testimony."

5. Nothing in the report directly linked defendant to the crime. "Only when the autopsy findings are viewed in light of defendant's own statement to the police is he linked to the crime. In short, the autopsy sought to determine how the victim died, not who was responsible, and, thus, Dr. Choi was not defendant's accuser."

6. Because a prosecution for murder may be brought years or even decades after the autopsy was performed and the report prepared, "these reports should be deemed testimonial only in the unusual case in which the police play a direct role (perhaps by arranging for the exhumation of a body to reopen a "cold case") and the purpose of the autopsy is clearly to provide evidence for use in a prosecution. The potential for a lengthy delay between the crime and its prosecution could severely impede the cause of justice if routine autopsies were deemed testimonial merely because the cause of death is determined to be homicide."

Primary motive test not met where report is prepared before a crime occurs: *People v. Nunley,* 491 Mich. 686, 821 N.W.2d 642 (2012): The defendants were charged with driving with a suspended license, an element of which was that the state sent them notice that their license was suspended. The trial court admitted certificates of mailing a license suspension. The defendants argued that the certificates of mailing were testimonial, but the court disagreed, because the primary motivation for the certificate was not for use in a criminal prosecution.

[T]he evidence at issue in this case was not prepared as a result of a criminal investigation or created after the commission of the crime. Rather, the DOS generates certificates of mailing contemporaneously with the notices that are mailed to drivers whose licenses have been suspended or revoked. Again, under no circumstances could the drivers whose licenses have been suspended or revoked be charged with DWLS before having received the notice

> of the suspension or revocation. In our view, the distinction makes all the difference in the world because the certificate was not and could not have been created in anticipation of a prosecution because no crime had yet occurred.

The court notes in a footnote that the certificate satisfies both versions of the primary motive test bandied about in *Williams*:

> We note that our analysis is consistent with the reasoning of both the lead opinion and the dissenting opinion from the United States Supreme Court's recent plurality decision in *Williams.* Consistently with the reasoning of the lead opinion, the primary purpose of the certificate of mailing was not to accuse a targeted individual of engaging in criminal conduct. Instead, because the certificate is necessarily generated before the commission of any crime, there is no one to accuse of criminal conduct. Further, consistently with the reasoning of the dissenting opinion, the primary purpose of the certificate of mailing was not to produce evidence for a later criminal prosecution. * * * [T]he circumstances here would not lead an objective witness to reasonably believe that the certificate of mailing would be available for use at a later trial because no crime had been committed at the time the certificate was generated and no investigatory procedure had begun.

Autopsy report is testimonial under Kagan-Thomas views in *Williams*: *State v. Navarette,* 2013 WL 399142 (N.M.): The court counted the votes in *Williams* and held that testimony about an autopsy report violated the Confrontation Clause even though the report was not admitted into evidence. The autopsy report was prepared without a suspect in mind, and it was used as the basis for an expert's conclusions. But the court held that the report was prepared with the primary motivation of use in a criminal case (under the Kagan-Thomas view) and that the Rule 703 analysis would not work (against under the Kagan-Thomas view). The court noted that the autopsy report was performed as part of a homicide investigation, with two police officers in attendance.

Routine records regarding calibration of breathalyzers are not testimonial under the Alito primary motive test: *People v. Pealer,* 2013 WL 598046 (N.Y.): The court found that records of routine calibration of breathalyzer machines were not testimonial. The court pointed out, among other things, that these records were not prepared to target a particular individual, and cited in support Justice Alito's opinion on the "target" test of primary motive in *Williams.* The court also reasoned as follows:

> It may reasonably be inferred that the primary motivation for examining the breathalyzer was to advise the Penn Yan police department that its machine was adequately calibrated and operating properly. The testing of the machine was performed by employees of the Division of Criminal Justice Services, an executive agency that is independent of law enforcement agencies, whose task was to ensure the reliability of such machines — not to secure evidence for use in any particular criminal proceeding. The fact that the scientific test results and the observations of the technicians might be relevant to future prosecutions of unknown

defendants was, at most, an ancillary consideration when they inspected and calibrated the machine.

> Relatedly, it is also significant that, as with an autopsy report or a graphical DNA report * * * the breathalyzer testing certificates do not directly inculpate defendant or prove an essential element of the charges against him. All three records simply reflected objective facts that were observed at the time of their recording in order to establish that the breathalyzer would produce accurate results, rather than to prove some past event. At their core, these documents should be viewed as business records which, as a class, are generally deemed nontestimonial.

Autopsy report is testimonial, rejecting Alito's "targeted individual" primary motive test: *State v. Kennedy*, 735 S.E.2d 905 (W.Va. 2012): The court viewed *Williams* "with caution" and held that it could not fairly be read to supplant the primary motive test previously endorsed by the Court. The court found an autopsy report to be testimonial because use in judicial proceedings was one of its statutorily defined purposes. The court also noted that an expert's reliance on the autopsy report violated the confrontation clause "to the extent he merely reiterated the contents of the autopsy report." In contrast, where the expert relied on independently formed opinions, the Confrontation Clause was not violated.

C. Selected State Lower Court Decisions

Primary motive test not met where report is prepared before a crime occurs: *State v. Shivers*, 280 P.3d 635 (Ariz. App. 2012) : In a case involving failure to comply with a protective order, service of the order was proved at trial by a certificate of service. The court found the certificate to be non-testimonial on grounds similar to the warrant of deportation cases, (infra in Part Three) i.e., the primary purpose was administrative and at the time of the preparation there was no crime yet.

> The Declaration was created and filed with the court to serve administrative purposes as required by statute and would have been created regardless whether Shivers later violated the Order. Shivers was not being investigated for violating the Order at the time the Declaration was created and filed, and neither law enforcement nor the prosecution requested its creation. A reasonable person taking into account all surrounding circumstances would conclude the Declaration primarily served a contemporaneous administrative purpose rather than a prosecutorial one. *Bryant*, 131 S.Ct. at 1155. Although the possibility existed the Declaration could be used in a later prosecution if Shivers violated the Order, the Declaration remains nontestimonial because its purpose at the time of creation was not prosecutorial.

The court notes the fight over the primary motivation test in *Williams* but states as follows:

> The dissenting justices did not disavow the primary purpose test but criticized the plurality's description of it as including an inquiry whether the speaker intended to target a particular person. We need not wade into the choppy waters left in the wake of *Williams'* discussion of the primary purpose test; applying any iteration of the test, we conclude the primary purpose of the Declaration was administrative rather than prosecutorial.

Finding the target test in question after *Williams*; but ruling that under any view, certificates that breathalyzers are in working order do not fit the primary motivation test *Jones v. State,* 982 N.E.2d 417 (Ind. App. 2013): The court held that admitting a certificate that a breathalyzer was in working order did not violate the defendant's right to confrontation, because their primary purpose was not for use in a criminal prosecution. The court stated: "although certificates of inspection are kept on file by the court clerk and may be duplicated for use in court, their primary purpose is to ensure that certain breath test equipment is in good operating condition in compliance with Ind.Code § 9-30-6-5." In the course of its discussion, the court distanced itself from previous authority that had relied on the rationale that the certificates were not prepared with a specific suspect in mind. That factor — the targeting factor — was found by the court to be in question due to the Thomas and Kagan opinions for five Justices in *Williams.*

3. Avoiding Williams

Avoiding *Williams* by finding no plain error: *United States v. Garvey,* 688 F.3d 881 (7th Cir. 2012): The defendant argued that his right to confrontation was violated when an expert relied on a testimonial lab test to conclude that he was found with narcotics. The court noted that it had previously found such a process to be constitutional under a Rule 703 not-for-truth analysis, but that in *Williams* the Supreme Court had left "significant confusion" about whether such a procedure comported with the Confrontation Clause. The court avoided the issue because "even if Garvey can establish plain error, he cannot demonstrate that the error affected his substantial rights."

***Williams* kerfuffle avoided because the expert did not rely on a lab report to establish any contested fact: *State v. Deadwiller,* 2012 WL 2742198 (Wis.App.)**: The court found it did not have to rely on *Williams* because the State did not rely on a testimonial lab report to establish any fact:

> We need not parse in any great detail the philosophical underpinnings of the various opinions in *Williams* because although they disagreed as to their rationale, five justices agreed at the core that the outside laboratory's report was not testimonial. This conclusion

> governs this case, and we do not have to delve beyond this core to analyze whether, as Justice Alito's lead opinion concludes in part, that the outside laboratory's report was not relied on for its truth (with which five justices disagreed), or whether, as Justice Alito seems to indicate, the analysis might have been more far-ranging if Williams's trial had been to a jury rather than to a judge, although he also notes that he does "not suggest that the Confrontation Clause applies differently depending on the identity of the factfinder. Instead, our point is that the identity of the factfinder makes a big difference in evaluating the likelihood that the factfinder mistakenly based its decision on inadmissible evidence." This discourse on possible foundational gradations does not apply here because, as we have seen, the State laid more than a sufficient foundation for the jury to conclude that the semen recovered from Kristina S. and Chantee O. was sent to Orchid Cellmark, and that Orchid Cellmark's profiles were consistent with approved DNA-analysis standards. * * * [U]nlike the situation to which Justices Alito and Kagan referred to in *Williams*, the jury here did not have to rely on Witucki's testimony for it to conclude beyond a reasonable doubt that the semen samples sent to Orchid Cellmark were those recovered from Kristina S. and Chantee.

4. Facts Identical to Williams:

Lab report essentially identical to that in Williams: *State v. Bolden,* 2012 WL 5275488 (La.): The court stated that it would read *Williams* "no more broadly than the particular circumstances that led the convergence of the votes of five Justices to uphold the judgment of the Illinois appellate courts affirming the defendant's conviction and that are substantically similar to those in the present case. The court summarized as follows:

> No error under the Confrontation Clause occurs when a DNA expert testifies that in his or her opinion the DNA profile developed from a sample taken from defendant matches the DNA profile developed by other, non-testifying technicians from biological samples taken from the victim of a sexual assault if: the tests on the victim's samples were conducted before the defendant was identified as an assailant or suspect; the tests are conducted by an accredited laboratory; and the report of the test results itself is not introduced as a certified declaration of fact by the accredited laboratory.

***See also United States v. Gutierrez,* 2012 WL 5348698 (C.D. Cal.)** (State courts did not unreasonably apply federal law when lab report was made under the same conditions as approved by the result in *Williams*: the report was offered only as the basis of an expert's opinion, it was not a formalized statement, and it was produced before any suspect was identified).

***Williams* controls because the report is substantively identical to that approved in *Williams*: *Commonwealth v. Tassone*, 2013 WL 310229 (Mass. App.):** The court held that expert testimony about a lab report did not violate the defendant's right to confrontation. The court found that the case was controlled by *Williams* because 1) "the expert in this case did not testify to the truth of the underlying analyses any more than the expert in *Williams"* and so it would satisfy the *Williams* plurality; and 2) the report was no more formal than the report found to be non-testimonial by Justice Thomas in *Williams*. The defendant argued that the Cellmark report in this case was in fact more formal than that in *Williams,* but the court disagreed:

> In each case the report was signed by two people who are described as having "reviewed" the analysis. To be sure, in the instant case one of them is called "analyst," the other "technical reviewer." By contrast, in the *Williams* case the two "reviewers" were identified as two directors of the laboratory. Nonetheless, where the certificate states only that these two people reviewed the analysis and not that either of them performed it, we see no material difference with respect to the testimonial nature of the report here as that concept was articulated by Justice Thomas in *Williams.*

III. Cases Defining "Testimonial" Hearsay, Arranged By Subject Matter

"Admissions" — Hearsay Statements by the Defendant

Defendant's own hearsay statement was not testimonial: *United States v. Lopez,* 380 F.3d 538 (1st Cir. 2004): The defendant blurted out an incriminating statement to police officers after they found drugs in his residence. The court held that this statement was not testimonial under *Crawford.* The court declared that "for reasons similar to our conclusion that appellant's statements were not the product of custodial interrogation, the statements were also not testimonial." That is, the statement was spontaneous and not in response to police interrogation.

Note: The *Lopez* court had an easier way to dispose of the case. Both before and after *Crawford,* an accused has no right to confront *himself*. If the solution to confrontation is cross-examination, as the Court in *Crawford* states, then it is silly to argue that a defendant has the right to have his own statements excluded because he had no opportunity to cross-examine himself. *See United States v. Hansen,* 434 F.3d 92 (1st Cir. 2006) (admission of defendant's own statements does not violate *Crawford*); *United States v. Orm Hieng,* 679 F.3d 1131 (9th Cir. 2012): "the Sixth Amendment simply has no application [to the defendant's own hearsay statements] because a defendant cannot complain that he was denied the opportunity to confront himself."

Defendant's own statements, reporting statements of another defendant, are not testimonial under the circumstances: *United States v. Gibson,* 409 F.3d 325 (6th Cir. 2005): In a case involving fraud and false statements arising from a mining operation, the trial court admitted testimony from a witness that Gibson told him that another defendant was planning on doing something that would violate regulations applicable to mining. The court recognized that the testimony encompassed double hearsay, but held that each level of hearsay was admissible as a statement by a party-opponent. Gibson also argued that the testimony violated *Crawford.* But the court held that Gibson's statement and the underlying statement of the other defendant were both casual remarks made to an acquaintance, and therefore were not testimonial.

Bruton — Testimonial Statements of Co-Defendants

Bruton* line of cases not applicable unless accomplice's hearsay statement is testimonial: *United States v. Figueroa-Cartagena, 612 F.3d 69 (1st Cir. 2010): The defendant's codefendant had made hearsay statements in a private conversation that was taped by the government. The statements

directly implicated both the codefendant and the defendant. At trial the codefendant's statements were admitted against him, and the defendant argued that the *Bruton* line of cases required severance. But the court found no *Bruton* error, because the hearsay statements were not testimonial in the first place. The statements were from a private conversation so the speaker was not primarily motivated to have the statements used in a criminal prosecution. The court stated that the "*Bruton/Richardson* framework presupposes that the aggrieved co-defendant has a Sixth Amendment right to confront the declarant in the first place."

Bruton* line of cases not altered by *Crawford*: *United States v. Lung Fong Chen, 393 F.3d 139, 150 (2d Cir. 2004)**:** The court held that a confession of a co-defendant, when offered only against the co-defendant, is regulated by *Bruton,* not *Crawford*: so that the question of a Confrontation violation is dependent on whether the confession is powerfully incriminating against the non-confessing defendant. If the confession does not directly implicate the defendant, then there will be no violation if the judge gives an effective limiting instruction to the jury. *Crawford* does not apply because if the instruction is effective, the co-defendant is not a witness "against" the defendant within the meaning of the Confrontation Clause.

Bruton* protection limited to testimonial statements: *United States v. Berrios, 676 F.3d 118 (3rd Cir. 2012): "[B]ecause *Bruton* is no more than a byproduct of the Confrontation Clause, the Court's holding in *Davis* and *Crawford* likewise limit *Bruton* to testimonial statements. Any protection provided by *Bruton* is therefore only afforded to the same extent as the Confrontation Clause, which requires that the challenged statement qualify as testimonial. To the extent we have held otherwise, we no longer follow those holdings." ***See also United States v. Shavers,*** 693 F.3d 363 (3rd Cir. 2012) (admission of non-testifying co-defendant's inculpatory statement did not violate *Bruton* because it was made casually to an acquaintance and so was non-testimonial; the statement bore "no resemblance to the abusive governmental investigation tactics that the Sixth Amendment seeks to prevent."

The defendant's own statements are not covered by *Crawford,* but *Bruton* remains in place to protect against admission against a non-confessing co-defendant: *United States v. Ramos-Cardenas,* 524 F.3d 600 (5th Cir. 2008): In a multiple-defendant case, the trial court admitted a post-arrest statement by one of the defendants, which indirectly implicated the others. The court found that the confession could not be admitted against the other defendants, because the confession was testimonial under *Crawford.* But the court found that *Crawford* did not change the analysis with respect to the admissibility of a confession against the confessing defendant; nor did it displace the case law under *Bruton* allowing limiting instructions to protect the non-confessing defendants under certain circumstances. The court elaborated as follows:

> [W]hile *Crawford* certainly prohibits the introduction of a codefendant's out-of-court testimonial statement against the other defendants in a multiple-defendant trial, it does not signal a departure from the rules governing the admittance of such a statement against the speaker-defendant himself, which continue to be provided by *Bruton, Richardson* and *Gray.*

In this case, the court found no error in admitting the confession against the codefendant who made it. As to the other defendants, the court found that the reference to them in the confession was vague, and therefore a limiting instruction was sufficient to assure that the confession would not be used against them. Thus, the *Bruton* problem was resolved by a limiting instruction.

Bruton* and its progeny survive *Crawford* — co-defendant's testimonial statements were not admitted "against" the defendant in light of limiting instruction: *United States v. Harper, 527 F.3d 396 (5th Cir. 2008): Harper's co-defendant made a confession, but it did not directly implicate Harper. At trial the confession was admitted against the co-defendant and the jury was instructed not to use it against Harper. The court recognized that the confession was testimonial, but held that it did not violate Harper's right to confrontation because the co-defendant was not a witness "against" him. The court relied on the post-*Bruton* case of *Richardson v. Marsh*, and held that the limiting instruction was sufficient to protect Harper's right to confrontation because the co-defendant's confession did not directly implicate Harper and so was not as "powerfully incriminating" as the confession in *Bruton.* The court concluded that because "the Supreme Court has so far taken a 'pragmatic' approach to resolving whether jury instructions preclude a Sixth Amendment violation in various categories of cases, and because *Richardson* has not been expressly overruled, we will apply *Richardson* and its pragmatic approach, as well as the teachings in *Bruton.*"

Statement admitted against co-defendant only does not implicate *Crawford: Mason v. Yarborough,* 447 F.3d 693 (9th Cir. 2006): A non-testifying codefendant confessed during police interrogation. At the trial of both defendants, the government introduced only the fact that the codefendant confessed, not the content of the statement. The court first found that there was no *Bruton* violation, because the defendant's name was never mentioned — *Bruton* does not prohibit the admission of hearsay statements of a non-testifying codefendant if the statements implicate the defendant only by inference and the jury is instructed that the evidence is not admissible against the defendant. For similar reasons, the court found no *Crawford* violation, because the codefendant was not a "witness against" the defendant. "Because Fenton's words were never admitted into evidence, he could not 'bear testimony' against Mason."

Co-Conspirator Statements

Co-conspirator statement not testimonial: ***United States v. Felton,*** 417 F.3d 97 (1st Cir. 2005): The court held that a statement by the defendant's coconspirator, made during the course and in furtherance of the conspiracy, was not testimonial under *Crawford.* **Accord** ***United States v. Sanchez-Berrios,*** 424 F.3d 65 (1st Cir. 2005) (noting that *Crawford* "explicitly recognized that statements made in furtherance of a conspiracy by their nature are not testimonial."). ***See also United States v. Turner,*** 501 F.3d 59 (1st Cir. 2007) (conspirator's statement made during a private conversation were not testimonial);***United States v. Ciresi,*** 697 F.3d 19 (1st Cir. 2012) (statements admissible as coconspirator hearsay under Rule 801(d)(2)(E) are "by their nature" not testimonial because they are "made for a purpose other than use in a prosecution.") .

Surreptitiously recorded statements of coconspirators are not testimonial: ***United States v. Hendricks,*** 395 F.3d 173 (3rd Cir. 2005): The court found that surreptitiously recorded statements of an ongoing criminal conspiracy were not testimonial within the meaning of *Crawford* because they were informal statements among coconspirators. **Accord** ***United States v. Bobb,*** 471 F.3d 491 (3rd Cir. 2006) (noting that the holding in *Hendricks* was not limited to cases in which the declarant was a confidential informant).

Statement admissible as coconspirator hearsay is not testimonial: ***United States v. Robinson***, 367 F.3d 278 (5th Cir. 2004): The court affirmed a drug trafficker's murder convictions and death sentence. It held that coconspirator statements are not "testimonial" under *Crawford* as they are made under informal circumstances and not for the purpose of creating evidence. ***Accord United States v. Delgado,*** 401 F.3d 290 (5th Cir. 2005); ***United States v. Olguin,*** 643 F.3d 384 (5th Cir. 2011). ***See also United States v. King,*** 541 F.3d 1143 (5th Cir. 2008) ("Because the statements at issue here were made by co-conspirators in the furtherance of a conspiracy, they do not fall within the ambit of *Crawford's* protection"). Note that the court in *King* rejected the defendant's argument that the co-conspirator statements were testimonial because they were "presented by the government for their testimonial value." Accepting that argument would mean that all hearsay is testimonial. The court observed that *"Crawford's* emphasis clearly is on whether the statement was 'testimonial' at the time it was made."

Statement by an anonymous coconspirator is not testimonial: ***United States v. Martinez,*** 430 F.3d 317 (6th Cir. 2005). The court held that a letter written by an anonymous coconspirator during the course and in furtherance of a conspiracy was not testimonial under *Crawford* because they were not made with the intent that they would be used in a criminal investigation or prosecution. ***See also United States v. Mooneyham,*** 473 F.3d 280 (6th Cir. 2007) (statements made by coconspirator in furtherance of the conspiracy are not testimonial because the one making them "has no awareness or expectation that his or her statements may later be used at a trial"; the fact that the statements were made to a law enforcement officer was irrelevant because the officer was

undercover and the declarant did not know he was speaking to a police officer); ***United States v. Stover,*** 474 F.3d 904 (6th Cir. 2007) (holding that under *Crawford* and *Davis*, "co-conspirators' statements made in pendency and furtherance of a conspiracy are not testimonial" and therefore that the defendant's right to confrontation was not violated when a statement was properly admitted under Rule 801(d)(2)(E)); ***United States v. Damra,*** 621 F.3d 474 (6th Cir. 2010) (statements made by a coconspirator "by their nature are not testimonial").

Coconspirator statements made to an undercover informant are not testimonial: *United States v. Hargrove,* 508 F.3d 445 (7th Cir. 2007): The defendant, a police officer, was charged with taking part in a conspiracy to rob drug dealers. One of his coconspirators had a discussion with a potential member of the conspiracy (in fact an undercover informant) about future robberies. The defendant argued that the coconspirator's statements were testimonial, but the court disagreed. It held that "*Crawford* did not affect the admissibility of coconspirator statements." The court specifically rejected the defendant's argument that *Crawford* somehow undermined *Bourjaily*, noting that in both *Crawford* and *Davis*, "the Supreme Court specifically cited *Bourjaily* — which as here involved a coconspirator's statement made to a government informant — to illustrate a category of nontestimonial statements that falls outside the requirements of the Confrontation Clause."

Statements by a coconspirator during the course and in furtherance of the conspiracy are not testimonial: *United States v. Lee,* 374 F.3d 637 (8th Cir. 2004): The court held that statements admissible under the coconspirator exemption from the hearsay rule are by definition not testimonial. As those statements must be made during the course and in furtherance of the conspiracy, they are not the kind of formalized, litigation-oriented statements that the Court found testimonial in *Crawford.* The court reached the same result on co-conspirator hearsay in ***United States v. Reyes,*** 362 F.3d 536 (8th Cir. 2004); ***United States v. Singh,*** 494 F.3d 653 (8th Cir. 2007); and ***United States v. Hyles,*** 521 F.3d 946 (8th Cir. 2008) (noting that the statements were not elicited in response to a government investigation and were casual remarks to co-conspirators)**.**

Statements in furtherance of a conspiracy are not testimonial: *United States v. Allen,* 425 F.3d 1231 (9th Cir. 2005): The court held that "co-conspirator statements are not testimonial and therefore beyond the compass of *Crawford's* holding." ***See also United States v. Larson,*** 460 F.3d 1200 (9th Cir. 2006) (statement from one conspirator to another identifying the defendants as the source of some drugs was made in furtherance of the conspiracy; conspiratorial statements were not testimonial as there was no expectation that the statements would later be used at trial).

Statements admissible under the co-conspirator exemption are not testimonial: *United States v. Townley,* 472 F.3d 1267 (10th Cir. 2007): The court rejected the defendant's argument that

hearsay is testimonial under *Crawford* whenever "confrontation would have been required at common law as it existed in 1791." It specifically noted that *Crawford* did not alter the rule from *Bourjaily* that a hearsay statement admitted under Federal Rule 801(d)(2)(E) does not violate the Confrontation Clause. ***Accord United States v. Ramirez,*** 479 F.3d 1229 (10th Cir. 2007) (statements admissible under Rule 801(d)(2)(E) are not testimonial under *Crawford*).

Statements made during the course and in furtherance of the conspiracy are not testimonial: ***United States v. Underwood,*** 446 F.3d 1340 (11th Cir. 2006): In a drug case, the defendant argued that the admission of an intercepted conversation between his brother Darryl and an undercover informant violated *Crawford*. But the court found no error and affirmed. The court noted that the statements "clearly were not made under circumstances which would have led [Daryl] reasonably to believe that his statement would be available for use at a later trial. Had Darryl known that Hopps was a confidential informant, it is clear that he never would have spoken to her in the first place." The court concluded as follows:

> Although the foregoing discussion would probably support a holding that the evidence challenged here is not "testimonial," two additional aspects of the *Crawford* opinion seal our conclusion that Darryl's statements to the government informant were not "testimonial" evidence. First, the Court stated: "most of the hearsay exceptions covered statements that by their nature were not testimonial -- for example, business records or statements in furtherance of a conspiracy." Also, the Court cited *Bourjaily v. United States*, 483 U.S. 171 (1987) approvingly, indicating that it "hew[ed] closely to the traditional line" of cases that *Crawford* deemed to reflect the correct view of the Confrontation Clause. In approving *Bourjaily*, the *Crawford* opinion expressly noted that it involved statements unwittingly made to an FBI informant. * * * The co-conspirator statement in *Bourjaily* is indistinguishable from the challenged evidence in the instant case.

See also United States v. Lopez, 649 F.3d 1222 (11th Cir. 2011): co-conspirator's statement, bragging that he and the defendant had drugs to sell after a robbery, was admissible under Rule 801(d)(2)(E) and was not testimonial, because it was merely "bragging to a friend" and not a formal statement intended for trial.

Cross-Examination

Cross-examination of prior testimony was adequate even though defense counsel was found ineffective on other grounds: *Rolan v. Coleman,* 680 F.3d 311 (3rd Cir. 2012): The habeas petitioner argued that his right to confrontation was violated when he was retried and testimony from the original trial was admitted against him. The prior testimony was obviously testimonial under *Crawford.* The question was whether the witness — who was unavailable for the second trial — was adequately cross-examined at the first trial. The defendant argued that cross-examination could not have been adequate because the court had already found defense counsel to be inadequate at that trial (by failing to investigate a self-defense theory and failing to call two witnesses). The court, however, found the cross-examination to be adequate. The court noted that the state court had found the cross-examination to be adequate — that court found "baseless" the defendant's argument that counsel had failed to explore the witness's immunity agreement. Because the witness had made statements before that agreement was entered into that were consistent with his in-court testimony, counsel could reasonably conclude that exploring the immunity agreement would do more harm than good. The court of appeals concluded that "[t]here is no Supreme Court precedent to suggest that Goldstein's cross-examination was inadequate, and the record does not support such a conclusion. Consequently, the Superior Court's finding was not contrary to, or an unreasonable application of, *Crawford.*"

Declarations Against Penal Interest (Including Accomplice Statements to Law Enforcement)

Accomplice's jailhouse statement admissible as a declaration against interest and accordingly was not testimonial: *United States v. Pelletier,* 666 F.3d 1 (1st Cir. 2011): The defendant's accomplice made hearsay statements to a jailhouse buddy, indicating among other things that he had smuggled marijuana for the defendant. The court found that the statements were properly admitted as declarations against interest. The court noted specifically that the fact that the accomplice made the statements "to fellow inmate Hafford, rather than in an attempt to curry favor with police, cuts in favor of admissibility." For similar reasons, the hearsay was not testimonial under *Crawford.* The court stated that the statements were made "not under formal circumstances, but rather to a fellow inmate with a shared history, under circumstances that did not portend their use at trial against Pelletier."

Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: *United States v. Saget,* 377 F.3d 223 (2nd Cir. 2004) (Sotomayor, J.): The defendant's accomplice spoke to an undercover officer, trying to enlist him in the defendant's criminal scheme.

The accomplice's statements were admitted at trial as declarations against penal interest under Rule 804(b)(3), as they tended to implicate the accomplice in a conspiracy. After *Williamson v. United States,* hearsay statements made by an accomplice to a law enforcement officer while in custody are not admissible under Rule 804(b)(3) when they implicate the defendant, because the accomplice may be currying favor with law enforcement. But in the instant case, the accomplice's statement was not barred by *Williamson,* because it was made to an undercover officer—the accomplice didn't know he was talking to a law enforcement officer and therefore had no reason to curry favor by implicating the defendant. For similar reasons, the statement was not testimonial under *Crawford*—it was not the kind of formalized statement to law enforcement, prepared for trial, such as a "witness" would provide. ***See also United States v. Williams***, 506 F.3d 151 (2d Cir. 2007): Statement of accomplice implicating himself and defendant in a murder was admissible under Rule 804(b)(3) where it was made to a friend in informal circumstances; for the same reason the statement was not testimonial. The defendant's argument about insufficient indicia of reliability was misplaced because the Confrontation Clause no longer imposes a reliability requirement. ***Accord United States v. Wexler,*** 522 F.3d 194 (2nd Cir. 2008) (inculpatory statement made to friends admissible under Rule 804(b)(3) and not testimonial).

Intercepted conversations were admissible as declarations against penal interest and were not testimonial: *United States v. Berrios,* 676 F.3d 118 (3rd Cir. 2012): Authorities intercepted a conversation between criminal associates in a prison yard. The court held that the statements were non-testimonial, because neither of the declarants "held the objective of incriminating any of the defendants at trial when their prison yard conversation was recorded; there is no indication that they were aware of being overheard; and there is no indication that their conversation consisted of anything but casual remarks to an acquaintance." A defendant also lodged a hearsay objection, but the court found that the statements were admissible as declarations against interest. The declarants unequivocally incriminated themselves in acts of carjacking and murder, as well as shooting a security guard, and they mentioned the defendant "only to complain that he crashed the getaway car."

Accomplice statement made to a friend, admitting complicity in a crime, was admissible as a declaration against interest and was not testimonial: *United States v. Jordan,* 509 F.3d 191 (4th Cir. 2007): The defendant was convicted of murder while engaged in a drug-trafficking offense. He contended that the admission of a statement of an accomplice was error under the Confrontation Clause and the hearsay rule. The accomplice confessed her part in the crime in a statement to her roommate. The court found no error in the admission of the accomplice's statement. It was not testimonial because it was made to a friend, not to law enforcement. The court stated: "To our knowledge, no court has extended *Crawford* to statements made by a declarant to friends or associates." The court also found the accomplice's statement properly admitted as a declaration against interest. The court elaborated as follows:

> Here, although Brown's statements to Adams inculpated Jordan, they also subject *her* to criminal liability for a drug conspiracy and, be extension, for Tabon's murder. Brown made

the statements to a friend in an effort to relieve herself of guilt, not to law enforcement in an effort to minimize culpability or criminal exposure.

Accomplice's statements to the victim, in conversations taped by the victim, were not testimonial: *United States v. Udeozor,* 515 F.3d 260 (4th Cir.2008): The defendant was convicted for conspiracy to hold another in involuntary servitude. The evidence showed that the defendant and her husband brought a teenager from Nigeria into the United States and forced her to work without compensation. The victim also testified at trial that the defendant's husband raped her on a number of occasions. On appeal the defendant argued that the trial court erroneously admitted two taped conversations between the victim and the defendant. The victim taped the conversations surreptitiously in order to refer them to law enforcement. The court found no error in admitting the tapes. The conversations were hearsay, but the husband's statements were admissible as declarations against penal interest, as they admitted wrongdoing and showed an attempt to evade prosecution. The defendant argued that even if admissible under Rule 804(b)(3), the conversations were testimonial under *Crawford*. He argued that a statement is testimonial if the *government's* primary motivation is to prepare the statement for use in a criminal prosecution — and that in this case, the victim was essentially acting as a government agent in obtaining statements to be used for trial. But the court found that the conversation was not testimonial because the husband did not know he was talking to anyone affiliated with law enforcement, and the *husband's* primary motivation was not to prepare a statement for any criminal trial. The court observed that the "intent of the police officers or investigators is relevant to the determination of whether a statement is 'testimonial' only if it is first the case that a person in the position of the declarant reasonably would have expected that his statements would be used prosecutorially."

Note: This case was decided before *Michigan v. Bryant, infra,* but it consistent with the holding in *Bryant* that the primary motive test considers the motivation of all the parties to a communication.

Accomplice's confessions to law enforcement agents were testimonial: *United States v. Harper,* 514 F.3d 456 (5th Cir. 2008): The court held that confessions made by the codefendant to law enforcement were testimonial, even though the codefendant did not mention the defendant as being involved in the crime. The statements were introduced to show that the codefendant owned some of the firearms and narcotics at issue in the case, and these facts implicated the defendant as well. The court did not consider whether the confessions were admissible under a hearsay exception — but they would not have been admissible as a declaration against interest, because *Williamson* bars confessions of cohorts made to law enforcement.

Accomplice's statements to a friend, implicating both the accomplice and the defendant in the crime, are not testimonial: *Ramirez v. Dretke,* 398 F.3d 691 (5th Cir. 2005): The defendant was convicted of murder. Hearsay statements of his accomplice were admitted against him. The

accomplice made statements both before and after the murder that directly implicated both himself and the defendant. These statements were made to the accomplice's roommate. The court found that these statements were not testimonial under *Crawford*: "There is nothing in *Crawford* to suggest that 'testimonial evidence' includes spontaneous out-of-court statements made outside any arguably judicial or investigatorial context."

Declaration against penal interest, made to a friend, is not testimonial: *United States v. Franklin,* 415 F.3d 537 (6th Cir. 2005): The defendant was charged with bank robbery. One of the defendant's accomplices (Clarke), was speaking to a friend (Wright) some time after the robbery. Wright told Clarke that he looked "stressed out." Clarke responded that he was indeed stressed out, because he and the defendant had robbed a bank and he thought the authorities were on their trail. The court found no error in admitting Clarke's hearsay statement against the defendant as a declaration against penal interest, as it disserved Clark's interest and was not made to law enforcement officers in any attempt to curry favor with the authorities. On the constitutional question, the court found that Clarke's statement was not testimonial under *Crawford:*

> Clarke made the statements to his friend by happenstance; Wright was not a police officer or a government informant seeking to elicit statements to further a prosecution against Clarke or Franklin. To the contrary, Wright was privy to Clarke's statements only as his friend and confidant.

The court distinguished other cases in which an informant's statement to police officers was found testimonial, on the ground that those other cases involved accomplice statements knowingly made to police officers, so that "the informant's statements were akin to statements elicited during police interrogation, i.e., the informant could reasonably anticipate that the statements would be used to prosecute the defendant."

See also United States v. Gibson, 409 F.3d 325 (6th Cir. 2005) (describing statements as nontestimonial where "the statements were not made to the police or in the course of an official investigation, nor in an attempt to curry favor or shift the blame."); ***United States v. Johnson,*** 440 F.3d 832 (6th Cir. 2006) (statements by accomplice to an undercover informant he thought to be a cohort were properly admitted against the defendant; the statements were not testimonial because the declarant didn't know he was speaking to law enforcement, and so a person in his position "would not have anticipated that his statements would be used in a criminal investigation or prosecution of Johnson.").

Statement admissible as a declaration against penal interest is not testimonial: *United States v. Johnson,* 581 F.3d 320 (6th Cir. 2009): The court held that the tape-recorded confession of a coconspirator describing the details of an armed robbery, including his and the defendant's roles, was properly admitted as a declaration against penal interest. The court found that the

statements tended to disserve the declarant's interest because "they admitted his participation in an unsolved murder and bank robbery." And the statements were trustworthy because they were made to a person the declarant thought to be his friend, at a time when the declarant did not know he was being recorded "and therefore could not have made his statement in order to obtain a benefit from law enforcement." Moreover, the hearsay was not testimonial, because the declarant did not know he was being recorded or that the statement would be used in a criminal proceeding against the defendant.

Accomplice confession to law enforcement is testimonial, even if redacted: *United States v. Jones,* 371 F.3d 363 (7th Cir. 2004): An accomplice's statement to law enforcement was offered against the defendant, though it was redacted to take out any direct reference to the defendant. The court found that even if the confession, as redacted, could be admissible as a declaration against interest (a question it did not decide), its admission would violate the Confrontation Clause after *Crawford*. The court noted that even though redacted, the confession was testimonial, as it was made during interrogation by law enforcement. And because the defendant never had a chance to cross-examine the accomplice, "under *Crawford*, no part of Rock's confession should have been allowed into evidence."

Declaration against interest made to an accomplice who was secretly recording the conversation for law enforcement was not testimonial: *United States v. Watson,* 525 F.3d 583 (7th Cir. 2008): After a bank robbery, one of the perpetrators was arrested and agreed to cooperate with the FBI. She surreptitiously recorded a conversation with Anthony, in which Anthony implicated himself and Watson in the robbery. The court found that Anthony's statement was against his own interest, and rejected Watson's contention that it was testimonial. The court noted that Anthony could not have anticipated that the statement would be used at a trial, because he did not know that the FBI was secretly recording the conversation. It concluded: "A statement unwittingly made to a confidential informant and recorded by the government is not testimonial for Confrontation Clause purposes."

Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: *United States v. Manfre,* 368 F.3d 832 (8th Cir. 2004): An accomplice made a statement to his fiancee that he was going to burn down a nightclub for the defendant. The court held that this statement was properly admitted as a declaration against penal interest, as it was not a statement made to law enforcement to curry favor. Rather, it was a statement made informally to a trusted person. For the same reason, the statement was not testimonial under *Crawford*; it was a statement made to a loved one and was "not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks."

Accomplice statements to cellmate are not testimonial: *United States v. Johnson,* 495 F.3d 951 (8th Cir. 2007): The defendant's accomplice made statements to a cellmate, implicating

himself and the defendant in a number of murders. The court found that these hearsay statements were not testimonial, as they were made under informal circumstances and there was no involvement with law enforcement.

Jailhouse confession implicating defendant was admissible as a declaration against penal interest and was not testimonial: *United States v. Smalls,* 605 F.3d 765 (10th Cir. 2010): The court found no error in admitting a jailhouse confession that implicated a defendant in the murder of a government informant. The statements were not testimonial because they were not made with "the primary purpose * * * of establishing or proving some fact potentially relevant to a criminal prosecution." The fact that the statements were made in a conversation with a government informant did not make them testimonial because the declarant did not know he was being interrogated, and the statement was not made under the formalities required for a statement to be testimonial. Finally, the statements were properly admitted under Rule 804(b)(3), because they implicated the declarant in a serious crime committed with another person, there was no attempt to shift blame to the defendant, and the declarant did not know he was talking to a government informant and therefore was not currying favor with law enforcement.

Declaration against interest is not testimonial: *United States v. U.S. Infrastructure, Inc.*, 576 F.3d 1195 (11th Cir. 2009): The declarant, McNair, made a hearsay statement that he was accepting bribes from one of the defendants. The statement was made in private to a friend. The court found that the statement was properly admitted as a declaration against McNair's penal interest, as it showed that he accepted bribes from an identified person. The court also held that the hearsay was not testimonial, because it was "part of a private conversation" and no law enforcement personnel were involved.

Excited Utterances, 911 Calls, Etc.

911 calls and statements to responding officers may be testimonial, but only if the primary purpose is to establish or prove past events in a criminal prosecution: *Davis v. Washington* and *Hammon v. Indiana,* 547 U.S. 813 (2006): In companion cases, the Court decided whether reports of crime by victims of domestic abuse were testimonial under *Crawford*. In *Davis*, the victim's statements were made to a 911 operator while and shortly after the victim was being assaulted by the defendant. In *Hammon,* the statements were made to police, who were conducting an interview of the victim after being called to the scene. The Court held that the statements in *Davis* were not testimonial, but came to the opposite result with respect to the statements in *Hammon*. The Court set the dividing line for such statements as follows:

> Without attempting to produce an exhaustive classification of all conceivable statements – or even all conceivable statements in response to police interrogation – as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The Court defined testimoniality by whether the *primary motivation* in making the statements was for use in a criminal prosecution.

Pragmatic application of the emergency and primary purpose standards: *Michigan v. Bryant,* 131 S.Ct. 1143 (2011): The Court held that the statement of a shooting victim to police, identifying the defendant as the shooter — and admitted as an excited utterance under a state rule of evidence — was not testimonial under *Davis* and *Crawford.* The Court applied the test for testimoniality established by *Davis*— whether the primary motive for making the statement was to have it used in a criminal prosecution — and found that in this case such primary motive did not exist. The Court noted that *Davis* focused on whether statements were made to respond to an emergency, as distinct from an investigation into past events. But it stated that the lower court had construed that distinction too narrowly to bar, as testimonial, essentially all statements of past events. The Court made the following observations about how to determine testimoniality when statements are made to responding police officers:

> 1. The primary purpose inquiry is objective. The relevant inquiry into the parties' statements and actions is not the subjective or actual purpose of the particular parties, but the purpose that reasonable participants would have had, as ascertained from the parties' statements and actions and the circumstances in which the encounter occurred.
>
> 2. As *Davis* notes, the existence of an "ongoing emergency" at the time of the encounter is among the most important circumstances informing the interrogation's "primary purpose." An emergency focuses the participants not on proving past events potentially relevant to later criminal prosecution, but on ending a threatening situation. But there is no categorical distinction between present and past fact. Rather, the question of whether an emergency exists and is ongoing is a highly context-dependent inquiry. An assessment of whether an emergency threatening the police and public is ongoing cannot narrowly focus on whether the threat to the first victim has been neutralized, because the threat to the first responders and public may continue.
>
> 3. An emergency's duration and scope may depend in part on the type of weapon involved; in *Davis* and *Hammon* the assailants used their fists, which limited the scope of

the emergency — unlike in this case where the perpetrator used a gun, and so questioning could permissibly be broader.

4. A victim's medical condition is important to the primary purpose inquiry to the extent that it sheds light on the victim's ability to have any purpose at all in responding to police questions and on the likelihood that any such purpose would be a testimonial one. It also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.

5. Whether an ongoing emergency exists is simply one factor informing the ultimate inquiry regarding an interrogation's "primary purpose." Another is the encounter's informality. Formality suggests the absence of an emergency, but informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent.

6. The statements and actions of *both* the declarant and interrogators provide objective evidence of the interrogation's primary purpose. Looking to the contents of both the questions and the answers ameliorates problems that could arise from looking solely to one participant, because both interrogators and declarants may have mixed motives.

Applying all these considerations to the facts, the Court found that the circumstances of the encounter as well as the statements and actions of the shooting victim and the police objectively indicated that the interrogation's "primary purpose" was "to enable police assistance to meet an ongoing emergency." The circumstances of the interrogation involved an armed shooter, whose motive for and location after the shooting were unknown and who had mortally wounded the victim within a few blocks and a few minutes of the location where the police found him. Unlike the emergencies in *Davis* and *Hammon*, the circumstances presented in *Bryant* indicated a potential threat to the police and the *public*, even if not the victim. And because this case involved a gun, the physical separation that was sufficient to end the emergency in *Hammon* was not necessarily sufficient to end the threat.

The Court concluded that the statements and actions of the police and victim objectively indicated that the primary purpose of their discussion was not to generate statements for trial. When the victim responded to police questions about the crime, he was lying in a gas station parking lot bleeding from a mortal gunshot wound, and his answers were punctuated with questions about when emergency medical services would arrive. Thus, the Court could not say that a person in his situation would have had a "primary purpose" "to establish or prove past events potentially relevant to later criminal prosecution." For their part, the police responded to a call that a man had been shot. They did not know why, where, or when the shooting had occurred; the shooter's location; or anything else about the crime. They asked exactly the type of questions necessary to enable them "to meet an ongoing emergency" — essentially, who shot the victim and where did the act occur. Nothing in the victim's responses indicated to the police that there was no emergency or that the emergency had ended. The informality suggested that their primary purpose was to address what they considered to be an ongoing emergency — apprehending a suspect with a gun — and the

circumstances lacked the formality that would have alerted the victim to or focused him on the possible future prosecutorial use of his statements.

Justice Sotomayor wrote the majority opinion for five Justices. Justice Thomas concurred in the judgment, adhering to his longstanding view that testimoniality is determined by whether the statement is the kind of formalized accusation that was objectionable under common law — he found no such formalization in this case. Justices Scalia and Ginsburg wrote dissenting opinions. Justice Kagan did not participate.

911 call reporting drunk person with an unloaded gun was not testimonial: *United States v. Cadieux,* 500 F.3d 37 (1st Cir. 2007): In a felon-firearm prosecution, the trial court admitted a tape of a 911 call, made by the daughter of the defendant's girlfriend, reporting that the defendant was drunk and walking around with an unloaded shotgun. The court held that the 911 call was not testimonial. It relied on the following factors: 1) the daughter spoke about events "in real time, as she witnessed them transpire"; 2) she specifically requested police assistance; 3) the dispatcher's questions were tailored to identify "the location of the emergency, its nature, and the perpetrator"; and 4) the daughter was "hysterical as she speaks to the dispatcher, in an environment that is neither tranquil nor, as far as the dispatcher could reasonably tell, safe." The defendant argued that the call was testimonial because the daughter was aware that her statements to the police could be used in a prosecution. But the court found that after *Davis*, awareness of possible use in a prosecution is not enough for a statement to be testimonial. A statement is testimonial only if the "primary motivation" for making it is for use in a criminal prosecution.

911 call was not testimonial under the circumstances: *United States v. Brito,* 427 F.3d 53 (1st Cir. 2005): The court affirmed a conviction of firearm possession by an illegal alien. It held that statements made in a 911 call, indicating that the defendant was carrying and had fired a gun, were properly admitted as excited utterances, and that the admission of the 911 statements did not violate the defendant's right to confrontation. The court declared that the relevant question is whether the statement was made with an eye toward "legal ramifications." The court noted that under this test, statements to police made while the declarant or others are still in personal danger are ordinarily not testimonial, because the declarant in these circumstances "usually speaks out of urgency and a desire to obtain a prompt response." In this case the 911 call was properly admitted because the caller stated that she had "just" heard gunshots and seen a man with a gun, that the man had pointed the gun at her, and that the man was still in her line of sight. Thus the declarant was in "imminent personal peril" when the call was made and therefore it was not testimonial. The court also found that the 911 operator's questioning of the caller did not make the answers testimonial, because "it would blink reality to place under the rubric of interrogation the single off-handed question asked by the dispatcher — a question that only momentarily interrupted an otherwise continuous stream of consciousness."

911 call — including statements about the defendant's felony status—was not testimonial: ***United States v. Proctor,*** 505 F.3d 366 (5th Cir. 2007): In a firearms prosecution, the court admitted a 911 call from the defendant's brother (Yogi), in which the brother stated that the defendant had stolen a gun and shot it into the ground twice. Included in the call were statements about the defendant's felony status and that he was probably on cocaine. The court held that the entire call was nontestimonial. It applied the "primary purpose" test and evaluated the call in the following passage:

> Yogi's call to 911 was made immediately after Proctor grabbed the gun and fired it twice. During the course of the call, he recounts what just happened, gives a description of his brother, indicates his brother's previous criminal history, and the fact that his brother may be under the influence of drugs. All of these statements enabled the police to deal appropriately with the situation that was unfolding. The statements about Proctor's possession of a gun indicated Yogi's understanding that Proctor was armed and possibly dangerous. The information about Proctor's criminal history and possible drug use necessary for the police to respond appropriately to the emergency, as it allowed the police to determine whether they would be encountering a violent felon. Proctor argues that the emergency had already passed, because he had run away with the weapon at the time of the 911 call and, therefore, the 911 conversation was testimonial. It is hard to reconcile this argument with the facts. During the 911 call, Yogi reported that he witnessed his brother, a felon possibly high on cocaine, run off with a loaded weapon into a nightclub. This was an ongoing emergency — not one that had passed. Proctor's retreat into the nightclub provided no assurances that he would not momentarily return to confront Yogi * * *. Further, Yogi could have reasonably feared that the people inside the nightclub were in danger. Overall, a reasonable viewing of the 911 call is that Yogi and the 911 operator were dealing with an ongoing emergency involving a dangerous felon, and that the 911 operator's questions were related to the resolution of that emergency.

See also United States v. Mouzone, 687 F.3d 207 (5th Cir. 2012) (911 calls found non-testimonial as "each caller simply reported his observation of events as they unfolded"; the 911 operators were not attempting to "establish or prove past events"; and "the transcripts simply reflect an effort to meet the needs of the ongoing emergency").

911 call, and statements made by the victim after police arrived, are excited utterances and not testimonial: ***United States v. Arnold,*** 486 F.3d 177 (6th Cir. 2007) (en banc): In a felon-firearm prosecution, the court admitted three sets of hearsay statements made by the daughter of the defendant's girlfriend, after an argument between the daughter (Tamica) and the defendant. The first set were statements made in a 911 call, in which Tamica stated that Arnold pulled a pistol on her and is "fixing to shoot me." The call was made after Tamica got in her car and went around the corner from her house. The second set of statements occurred when the police arrived within minutes; Tamica was hysterical, and without prompting said that Arnold had pulled a gun and was

trying to kill her. The police asked what the gun looked like and she said "a black handgun." At the time of this second set of statements, Arnold had left the scene. The third set of statements was made when Arnold returned to the scene in a car a few minutes later. Tamica identified Arnold by name and stated "that's the guy that pulled the gun on me." A search of the vehicle turned up a black handgun underneath Arnold's seat.

The court first found that all three sets of statements were properly admitted as excited utterances. For each set of statements, Tamica was clearly upset, she was concerned about her safety, and the statements were made shortly after or right at the time of the two startling events (the gun threat for the first two sets of statements and Arnold's return for the third set of statements).

The court then concluded that none of Tamica's statements fell within the definition of "testimonial" as developed by the Court in *Davis*. Essentially the court found that the statements were not testimonial for the very reason that they were excited utterances — Tamica was upset, she was responding to an emergency and concerned about her safety, and her statements were largely spontaneous and not the product of an extensive interrogation.

911 call is non-testimonial*: United States v. Thomas,* 453 F.3d 838 (7th Cir. 2006): The court held that statements made in a 911 call were non-testimonial under the analysis provided by the Supreme Court in *Davis/Hammon*. The anonymous caller reported a shooting, and the perpetrator was still at large. The court analyzed the statements as follows:

> [T]he caller here described an emergency as it happened. First, she directed the operator's attention to Brown's condition, stating "[t]here's a dude that just got shot . . .", and ". . . the guy who shot him is still out there." Later in the call, she reiterated her concern that ". . . [t]here is somebody shot outside, somebody needs to be sent over here, and there's somebody runnin' around with a gun, somewhere." Any reasonable listener would know from this exchange that the operator and caller were dealing with an ongoing emergency, the resolution of which was paramount in the operator's interrogation. This fact is evidenced by the operator's repeatedly questioning the caller to determine who had the gun and where Brown lay injured. Further, the caller ended the conversation immediately upon the arrival of the police, indicating a level of interrogation that was significantly less formal than the testimonial statement in *Crawford*. Because the tape-recording of the call is nontestimonial, it does not implicate Thomas's right to confrontation.

See also United States v. Dodds, 569 F.3d 336 (7th Cir. 2009) (unidentified person's identification of a person with a gun was not testimonial: "In this case, the police were responding to a 911 call reporting shots fired and had an urgent need to identify the person with the gun and to stop the shooting. The witness's description of the man with a gun was given in that context, and we believe it falls within the scope of *Davis*.").

911 calls and statements made to officers responding to the calls were not testimonial:

United States v. Brun, 416 F.3d 703 (8th Cir. 2005): The defendant was charged with assault with a deadly weapon. The police received two 911 calls from the defendant's home. One was from the defendant's 12-year-old nephew, indicating that the defendant and his girlfriend were arguing, and requesting assistance. The other call came 20 minutes later, from the defendant's girlfriend, indicating that the defendant was drunk and had a rifle, which he had fired in the house and then left. When officers responded to the calls, they found the girlfriend in the kitchen crying; she told the responding officers that the defendant had been drunk, and shot his rifle in the bathroom while she was in it. All three statements (the two 911 calls and the girlfriend's statement to the police) were admitted as excited utterances, and the defendant was convicted. The court affirmed. The court had little problem in finding that all three statements were properly admitted as excited utterances, and addressed whether the admission of the statements violated the defendant's right to confrontation after *Crawford*. The court first found that the nephew's 911 call was not "testimonial" within the meaning of *Crawford*, as it was not the kind of statement that was equivalent to courtroom testimony. It had "no doubt that the statements of an adolescent boy who has called 911 while witnessing an argument between his aunt and her partner escalate to an assault would be emotional and spontaneous rather than deliberate and calculated." The court used similar reasoning to find that the girlfriend's 911 call was not testimonial. The court also found that the girlfriend's statement to the police was not testimonial. It reasoned that the girlfriend's conversation with the officers "was unstructured, and not the product of police interrogation."

> **Note: The court's decision in *Brun* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon* and then *Bryant*, but the analysis appears consistent with that of the Supreme Court. It is true that in *Hammon* the Court found statements by the victim to responding police officers to be testimonial, but that was largely because the police officers engaged in a structured interview about past criminal activity; in *Brun* the victim spoke spontaneously in response to an emergency. And the Court in *Davis/Hammon* acknowledged that statements to responding officers are non-testimonial if they were directed more toward dealing with an emergency than toward investigating or prosecuting a crime. The *Brun* decision is especially consistent with the pragmatic approach to finding an emergency (and to the observation that emergency is only one factor in the primary motive test) that the Court found in *Michigan v. Bryant.***

Excited utterance not testimonial under the circumstances, even though made to law enforcement: *Leavitt v. Arave*, 371 F.3d 663 (9th Cir. 2004): In a murder case, the government introduced the fact that the victim had called the police the night before her murder and stated that she had seen a prowler who she thought was the defendant. The court found that the victim's statement was admissible as an excited utterance, as the victim was clearly upset and made the statement just after an attempted break-in. The court held that the statement was not testimonial under *Crawford*. The court explained as follows:

Although the question is close, we do not believe that Elg's statements are of the kind with which *Crawford* was concerned, namely, testimonial statements. * * * Elg, not the police, initiated their interaction. She was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home. Thus, we do not believe that the admission of her hearsay statements against Leavitt implicate the principal evil at which the Confrontation Clause was directed: the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.

Note: The court's decision in *Leavitt* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon*, but the analysis appears consistent with that of the Supreme Court. The Court in *Davis/Hammon* acknowledged that statements to responding officers are non-testimonial if they are directed toward dealing with an emergency rather than prosecuting a crime. It is especially consistent with the pragmatic approach to applying the primary motive test established in *Michigan v. Bryant.*

Expert Witnesses

Confusion over expert witnesses testifying on the basis of testimonial hearsay: *Williams v. Illinois,* 132 S.Ct. 2221 (2012): This case is fully set forth in Part One. To summarize, the confusion is over whether an expert can, consistently with the Confrontation Clause, rely on testimonial hearsay so long as the hearsay is not explicitly introduced for its truth and the expert makes an independent judgment, i.e., is not just a conduit for the hearsay. That practice is permitted by Rule 703. Five members of the Court rejected the use of testimonial hearsay in this way, on the ground that it was based on an artificial distinction. But the plurality decision by Justice Alito embraces this Rule 703 analysis. At this early stage, the answer appears to be that an expert can rely on testimonial hearsay so long as it is not in the form of an affidavit or certificate — that proviso would then get Justice Thomas's approval. But as seen above, most of the lower courts after *Williams* at least so far appear to treat the Alito opinion as controlling — that is, the use of testimonial hearsay by an expert is permitted without regard to its formality, so long as the expert makes an independent conclusion and the hearsay itself is not admitted into evidence.

Expert's reliance on testimonial hearsay does not violate the Confrontation Clause: *United States v. Henry,* 472 F.3d 910 (D.C. Cir. 2007): The court declared that *Crawford* "did not involve expert witness testimony and thus did not alter an expert witness's ability to rely on (without repeating to the jury) otherwise inadmissible evidence in formulating his opinion under Federal Rule of Evidence 703. In other words, while the Supreme Court in *Crawford* altered Confrontation Clause precedent, it said nothing about the Clause's relation to Federal Rule of Evidence 703." ***See also United States v. Law,*** 528 F.3d 888 (D.C. Cir. 2008)**:** Expert's testimony about the typical practices of narcotics dealers did not violate *Crawford*. While the testimony was based on interviews

with informants, "Thomas testified based on his experience as a narcotics investigator; he did not relate statements by out-of-court declarants to the jury."

> **Note: These opinions from the D.C. Circuit precede *Williams* and are questionable if you count the votes in *Williams.* But these cases are quite consistent with the Alito opinion in *Williams* and as stated above, lower courts at this early stage appear to be treating the Alito opinion as controlling on an expert's reliance on testimonial hearsay.**

Confrontation Clause violated where expert does no more that restate the results of a testimonial lab report: *United States v. Ramos-Gonzalez,* 664 F.3d 1 (1st Cir. 2011): In a drug case, a lab report indicated that substances found in the defendant's vehicle tested positive for cocaine. The lab report was testimonial under *Melendez-Diaz,* and the person who conducted the test was not produced for trial. The government sought to avoid the *Melendez-Diaz* problem by calling an expert to testify to the results, but the court found that the defendant's right to confrontation was nonetheless violated, because the expert did not make an independent assessment, but rather simply restated the report. The court explained as follows:

> Where an expert witness employs her training and experience to forge an independent conclusion, albeit on the basis of inadmissible evidence, the likelihood of a Sixth Amendment infraction is minimal. Where an expert acts merely as a well-credentialed conduit for testimonial hearsay, however, the cases hold that her testimony violates a criminal defendant's right to confrontation. See, e.g., *United States v. Ayala*, 601 F.3d 256, 275 (4th Cir.2010) ("[Where] the expert is, in essence, ... merely acting as a transmitter for testimonial hearsay," there is likely a Crawford violation); *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir.2009) (same); *United States v. Lombardozzi*, 491 F.3d 61, 72 (2d Cir.2007) ("[T]he admission of [the expert's] testimony was error ... if he communicated out-of-court testimonial statements ... directly to the jury in the guise of an expert opinion."). In this case, we need not wade too deeply into the thicket, because the testimony at issue here does not reside in the middle ground.
>
> The government is hard-pressed to paint Morales's testimony as anything other than a recitation of Borrero's report. On direct examination, the prosecutor asked Morales to "say what are the results of the test," and he did exactly that, responding "[b]oth bricks were positive for cocaine." This colloquy leaves little room for interpretation. Morales was never asked, and consequently he did not provide, his independent expert opinion as to the nature of the substance in question. Instead, he simply parroted the conclusion of Borrero's report. Morales's testimony amounted to no more than the prohibited transmission of testimonial hearsay. While the interplay between the use of expert testimony and the Confrontation Clause will undoubtedly require further explication, the government cannot meet its Sixth Amendment obligations by relying on Rule 703 in the manner that it was employed here.

Note: Whatever *Williams* may mean, the court's analysis in *Ramon-Gonzalez* surely remains valid. Five members of the *Williams* Court rejected the proposition that an expert can rely *at all* on testimonial hearsay even if the expert testifies to his own opinion. And even Justice Alito cautions that an expert may not testify if he does nothing more than parrot the testimonial hearsay.

Expert's reliance on out-of-court accusations does not violate *Crawford*, unless the accusations are directly presented to the jury*: United States v. Lombardozzi,* 491 F.3d 61 (2nd Cir. 2007): The court stated that *Crawford* is inapplicable if testimonial statements are not used for their truth, and that "it is permissible for an expert witness to form an opinion by applying her expertise because, in that limited instance, the evidence is not being presented for the truth of the matter asserted." The court concluded that the expert's testimony would violate the Confrontation Clause "only if he communicated out-of-court testimonial statements . . . directly to the jury in the guise of an expert opinion." The court found any error in introducing the hearsay statements directly to be harmless. ***See also United States v. Mejia,*** 545 F.3d 179 (2nd Cir. 2008) (violation of Confrontation Clause where expert directly relates statements made by drug dealers during an interrogation).

Note: These opinions from the 2nd Circuit precede *Williams* and are questionable if you count the votes in *Williams.* But these cases are quite consistent with the Alito opinion in *Williams* and as stated above, most lower courts at this early stage appear to be treating the Alito opinion as controlling on an expert's reliance on testimonial hearsay.

Expert reliance on printout from machine does not violate *Crawford*: *United States v. Summers,* 666 F.3d 192 (4th Cir. 2011): The defendant objected to the admission of DNA testing performed on a jacket that linked him to drug trafficking. The court first considered whether the Confrontation Clause was violated by the government's failure to call the FBI lab employees who signed the internal log documenting custody of the jacket. The court found no error in admitting the log, because chain-of-custody evidence had been introduced by the defense and therefore the defendant had opened the door to rebuttal. The court next considered whether the Confrontation Clause was violated by testimony of an expert who relied on DNA testing results by lab analysts who were not produced at trial. The court again found no error. It emphasized that the expert did his own testing, and his reliance on the report was limited to a "pure instrument read-out." The court stated that "[t]he numerical identifiers of the DNA allele here, insofar as they are nothing more than raw data produced by a machine" should be treated the same as gas chromatograph data, which the courts have held to be non-testimonial.

Note: The holding that expert reliance on an instrument readout does not violate *Crawford* appears unaffected by *Williams* because the printout is not hearsay. At the least it can be said that *Williams* says nothing about whether machine output is testimony.

Expert reliance on confidential informants in interpreting coded conversation does not violate *Crawford: United States v. Johnson,* 587 F.3d 625 (4th Cir. 2009): The court found no error in admitting expert testimony that decoded terms used by the defendants and coconspirators during recorded telephone conversations. The defendant argued that the experts relied on hearsay statements by cooperators to help them reach a conclusion about the meaning of particular conversations. The defendant asserted that the experts were therefore relying on testimonial hearsay. The court stated that experts are allowed to consider inadmissible hearsay as long as it is of a type reasonably relied on by other experts — as it was in this case. It stated that "[w]ere we to push *Crawford* as far as [the defendant] proposes, we would disqualify broad swaths of expert testimony, depriving juries of valuable assistance in a great many cases." The court recognized that it is "appropriate to recognize the risk that a particular expert might become nothing more than a transmitter of testimonial hearsay." But in this case, the experts never made reference to their interviews, and the jury heard no testimonial hearsay. "Instead, each expert presented his independent judgment and specialized understanding to the jury." Because the experts "did not become mere conduits" for the testimonial hearsay, their consideration of that hearsay "poses no *Crawford* problem." ***Accord United States v. Ayala,*** 601 F.3d 256 (4th Cir. 2010) (no violation of the Confrontation Clause where the experts "did not act as mere transmitters and in fact did not repeat statements of particular declarants to the jury."). ***Accord United States v Palacios,*** 677 F.3d 234 (4th Cir. 2012): Expert testimony on operation of a criminal enterprise, based in part on interviews with members, did not violate the Confrontation Clause because the expert "did not specifically reference" any of the testimonial interviews during his testimony, and simply relied on them as well as other information to give his own opinion.

> **Note: These opinions from the 4th Circuit precede *Williams* and are questionable if you count the votes in *Williams.* (You would have to go back to determine whether the statements relied upon are sufficiently "formalized" to constitute testimony under the Thomas view.) But these cases are quite consistent with the Alito opinion in *Williams* and as stated above, most lower courts at this early stage appear to be treating the Alito opinion as controlling on an expert's reliance on testimonial hearsay.**

Expert reliance on printout from machine and another expert's lab notes does not violate *Crawford*: *United States v. Moon,* 512 F.3d 359 (7th Cir. 2008): The court held that an expert's testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because "data is not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone." Moreover, the expert's reliance on another expert's lab notes did not violate *Crawford* because the court concluded that an expert is permitted to rely on hearsay (including testimonial hearsay) in reaching his conclusion. The court noted that the defendant could "insist that the data underlying an expert's testimony be admitted, see Fed.R.Evid. 705, but by offering the evidence themselves defendants would waive any objection under the Confrontation Clause." The court observed that the notes of the chemist, evaluating the data from the machine, were testimonial and

should not have been independently admitted, but it found no plain error in the admission of these notes.

Note: The court makes two holdings in *Moon*. The first is that expert reliance on a machine output does not violate *Crawford* because the machine is not a witness. That holding appears unaffected by *Williams* — at least it can be said that *Williams* says nothing about whether machine output is testimony. The second holding, that an expert's reliance on lab notes he did not prepare, is at the heart of *Williams*. It would appear that such a practice would be permissible even after *Williams* because 1) four Justices in *Williams* adopt the Rule 703 not-for-truth analysis (and most courts so far are saying it is controlling without more); and 2) in any case, lab "notes" are not certificates or affidavits so they do not appear to be the kind of formalized statement that Justice Thomas finds to be testimonial.

Expert reliance on drug test conducted by another does not violate *Melendez-Diaz: United States v. Turner,* 591 F.3d 928 (7th Cir. 2010): At the defendant's drug trial, the government called a chemist to testify about the tests conducted on the substance seized from the defendant — the tests indicating that it was cocaine. The defendant objected that the witness did not conduct the tests and was relying on testimonial statements from other chemists, in violation of *Crawford*. The court found no error, emphasizing that no statements of the official who actually tested the substance were admitted at trial, and that the witness unequivocally established that his opinions about the test reports were his own. ***See also United States v. Thornton,*** 642 F.3d 599 (7th Cir. 2011) (no error in allowing expert to testify to the place of manufacture of ammunition as he was relying on records prepared by manufacturers in the course of business).

Note: The Supreme Court vacated the decision in *Turner* and remanded for reconsideration in light of *Williams*. So *Turner* can no longer be relied on. Whether the Confrontation Clause is violated under the facts of *Turner* should probably depend on whether the lab report was sufficiently "formal" as to be tantamount to an affidavit or certificate under the Thomas view. It should be noted, however, that most courts so far after *Williams* have relied solely on the Alito/Rule 703 analysis to uphold expert testimony that relied on testimonial hearsay.

Avoiding the confusion wrought by *Williams*: *United States v. Garvey,* 688 F.3d 881 (7th Cir. 2012): The court recognized that the facts of the case mirrored the facts of *Turner*, immediately above: an expert testified that substances were narcotics, relying on a testimonial lab test, but the test itself was not admitted into evidence. The court noted that the Supreme Court in *Willliams* had left "significant confusion" about whether such a procedure comported with the Confrontation Clause. The court avoided the issue because "even if Garvey can establish plain error, he cannot demonstrate that the error affected his substantial rights."

Expert's reliance on report of another law enforcement agency did not violate the right to confrontation: *United States v. Huether,* 673 F.3d 789 (8th Cir. 2012): In a trial on charges of sexual exploitation of minors, an expert testified in part on the basis of a report by the National Center for Missing and Exploited Children. In this *pre-Williams* case, the court found no confrontation violation because the NCMEC report was not introduced into evidence and the expert drew his own conclusion and was not a conduit for the hearsay.

> **Note: The result in *Huether* probably withstands *Williams,* because even if Thomas's formality view is controlling, the NCMEC report did not appear to have the degree of formality that would trigger Justice Thomas's ire. That makes five votes for the result reached by the *Huether* court. And as noted, post-*Williams* most courts appear to be relying *solely* on the Alito/Rule 703 analysis.**

Expert's reliance on notes prepared by lab technicians did not violate the Confrontation Clause: *United States v. Pablo,* 625 F.3d 1285 (10th Cir. 2010), ***on remand for reconsideration under Williams,* 696 F.3d 1280 (10th Cir. 2012)**: The defendant was tried for rape and other charges. Two lab analysts conducted tests on the rape kit and concluded that the DNA found at the scene matched the defendant. The defendant complained that the lab results were introduced through the testimony of a forensic expert and the lab analysts were not produced for cross-examination. In the original appeal the court found no plain error, reasoning that the notes of the lab analysts were not admitted into evidence and were never offered for their truth. To the extent they were discussed before the jury, it was only to describe the basis of the expert's opinion — which the court found to be permissible under Rule 703. The court observed that "[t]he extent to which an expert witness may disclose to a jury otherwise inadmissible testimonial hearsay without implicating a defendant's confrontation rights * * * is a matter of degree." According to the court, if an expert "simply parrots another individual's testimonial hearsay, rather than conveying her own independent judgment that only incidentally discloses testimonial hearsay to assist the jury in evaluating her opinion, then the expert is, in effect, disclosing the testimonial hearsay for its substantive truth and she becomes little more than a backdoor conduit for otherwise inadmissible testimonial hearsay." In this case the court, applying the plain error standard, found insufficient indication that the expert had operated solely as a conduit for testimonial hearsay.

***Pablo* was vacated for reconsideration in light of *Williams*. On remand, the court once again affirmed the conviction.** The Court stated that "we need not decide the precise mandates and limits of *Williams,* to the extent they exist." The Court noted that five members of the *Williams* Court "might find" that the expert's reliance on the lab test was for its truth. But "we cannot say the district court plainly erred in admitting Ms. Snider's testimony, as it is not plain that a majority of the Supreme Court would have found reversible error with the challenged admission." The court explained as follows in a parsing of *Williams:*

> On the contrary, it appears that five Justices would affirm the district court in this case, albeit with different Justices relying on different rationales as they did in Williams. The four-Justice plurality in *Williams* likely would determine that Ms.

> Snider's testimony was not offered for the truth of the matter asserted in Ms. Dick's report, but rather was offered for the separate purpose of evaluating Ms. Snider's credibility as an expert witness per Fed.R.Evid. 703; and therefore that the admission of her testimony did not offend the Confrontation Clause. Meanwhile, although Justice Thomas likely would conclude that the testimony was being offered for the truth of the matter asserted, he likely would further determine that the testimony was nevertheless constitutionally admissible because the appellate record does not show that the report was certified, sworn to, or otherwise imbued with the requisite "solemnity" required for the statements therein to be considered " ' testimonial' for purposes of the Confrontation Clause." Since Ms. Dick's report is not a part of the appellate record, we naturally cannot say that it plainly would meet Justice Thomas's solemnity test. In sum, it is not clear or obvious under current law that the district court erred in admitting Ms. Snider's testimony, so reversal is unwarranted on this basis.

The *Pablo* court on remand concluded that " the manner in which, and degree to which, an expert may merely rely upon, and reference during her in-court expert testimony, the out-of-court testimonial conclusions in a lab report made by another person not called as a witness is a nuanced legal issue without clearly established bright line parameters, particularly in light of the discordant 4–1–4 divide of opinions in *Williams*."

Forfeiture

Constitutional standard for forfeiture — like Rule 804(b)(6) — requires a showing that the defendant acted wrongfully with the intent to keep the witness from testifying: *Giles v. California,* 554 U.S. 353 (2008): The Court held that a defendant does not forfeit his constitutional right to confront testimonial hearsay unless the government shows that the defendant engaged in wrongdoing *designed to keep the witness from testifying at trial*. Giles was charged with the murder of his former girlfriend. A short time before the murder, Giles had assaulted the victim, and she made statements to the police implicating Giles in that assault. The victim's hearsay statements were admitted against the defendant on the ground that he had forfeited his right to rely on the Confrontation Clause, by murdering the victim. The government made no showing that Giles murdered the victim with the intent to keep her from testifying. The Court found an intent-to-procure requirement in the common law, and therefore, under the historical analysis mandated by *Crawford*, there is necessarily an intent-to-procure requirement for forfeiture of confrontation rights. Also, at one point in the opinion, the Court in dictum stated that "statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment," are not testimonial — presumably because the primary motivation for making such statements is for something other than use at trial.

Murder of witness by co-conspirators as a sanction to protect the conspiracy against testimony constitutes forfeiture of both hearsay and Confrontation Clause objections: *United States v. Martinez,* 476 F.3d 961 (D.C. Cir. 2007): Affirming drug and conspiracy convictions, the court found no error in the admission of hearsay statements made to the DEA by an informant involved with the defendant's drug conspiracy. The trial court found by a preponderance of the evidence that the informant was murdered by members of the defendant's conspiracy, in part to procure his unavailability as a witness. The court of appeals affirmed this finding — rejecting the defendant's argument that forfeiture could not be found because his co-conspirators would have murdered the informant anyway, due to his role in the loss of a drug shipment. The court stated that it is "surely reasonable to conclude that anyone who murders an informant does so intending *both* to exact revenge *and* to prevent the informant from disclosing further information and testifying." It concluded that the defendant's argument would have the "perverse consequence" of allowing criminals to avoid forfeiture if they could articulate more than one bad motivation for disposing of a witness. Finally, the court held that forfeiture under Rule 804(b)(6) by definition constituted forfeiture of the Confrontation Clause objection. It stated that *Crawford* and *Davis* "foreclose" the possibility that the admission of evidence under Rule 804(b)(6) could nonetheless violate the Confrontation Clause.

Retaliatory murder of witnesses who testified against the accused in a prior case is not a forfeiture in the trial for murdering the witnesses: *United States v. Henderson,* 626 F.3d 626 (6th Cir. 2010): The defendant was convicted of bank robbery after two people (including his accomplice) testified against him. Shortly after the defendant was released from prison, the two witnesses were found murdered. At the trial for killing the two witnesses, the government offered statements made by the victims to police officers during the investigation of the bank robbery. These statements concerned their cooperation and threats made by the defendant. The trial judge admitted the statements after finding by a preponderance of the evidence that the defendant killed the witnesses. That decision, grounded in forfeiture, was made before *Giles* was decided. On appeal, the court found error under *Giles* because "Bass and Washington could not have been killed, in 1996 and 1998, respectively, to prevent them from testifying against [the defendant] in the bank robbery prosecution in 1981." Thus there was no showing of intent to keep the witnesses from testifying, as *Giles* requires for a finding of forfeiture. The court found the errors to be harmless.

Grand Jury, Plea Allocutions, Etc.

Grand jury testimony and plea allocution statement are both testimonial: *United States v. Bruno,* 383 F.3d 65 (2nd Cir. 2004): The court held that a plea allocution statement of an accomplice was testimonial, even though it was redacted to take out any direct reference to the defendant. It noted that the Court in *Crawford* had taken exception to previous cases decided by the Circuit that had admitted such statements as sufficiently reliable under *Roberts*. Those prior cases have been overruled by *Crawford.* The court also noted that the admission of grand jury testimony was error as it was clearly testimonial after *Crawford*. **See *also United States v. Becker,*** 502 F.3d

122 (2nd Cir. 2007) (plea allocution is testimonial even though redacted to take out direct reference to the defendant: "any argument regarding the purposes for which the jury might or might not have actually considered the allocutions necessarily goes to whether such error was harmless, not whether it existed at all"); ***United States v. Snype,*** 441 F.3d 119 (2nd Cir. 2006) (plea allocution of the defendant's accomplice was testimonial even though all direct references to the defendant were redacted); ***United States v. Gotti,*** 459 F.3d 296 (2nd Cir. 2006) (redacted guilty pleas of accomplices, offered to show that a bookmaking business employed five or more people, were testimonial under *Crawford*); ***United States v. Al-Sadawi,*** 432 F.3d 419 (2nd Cir. 2005) (*Crawford* violation where the trial court admitted portions of a cohort's plea allocution against the defendant, even though the statement was redacted to take out any direct reference to the defendant).

Grand jury testimony is testimonial: *United States v. Wilmore,* 381 F.3d 868 (9th Cir. 2004): The court held, unsurprisingly, that grand jury testimony is testimonial under *Crawford*. It could hardly have held otherwise, because even under the narrowest definition of "testimonial" (i.e., the specific types of hearsay mentioned by the *Crawford* Court) grand jury testimony is covered within the definition.

Implied Testimonial Statements

Testimony that a police officer's focus changed after hearing an out-of-court statement impliedly included accusatorial statements from an accomplice and so violated the defendant's right to confrontation: *United States v. Meises,* 645 F.3d 5 (1st Cir. 2011): At trial an officer testified that his focus was placed on the defendant after an interview with a cooperating witness. The government did not explicitly introduce the statement of the cooperating witness. On appeal, the defendant argued that the jury could surmise that the officer's focus changed because of an out-of-court accusation of a declarant who was not produced at trial. The government argued that there was no confrontation violation because the testimony was all about the actions of the officer and no hearsay statement was admitted at trial. But the court agreed with the defendant and reversed the conviction. The court noted that it was irrelevant that the government did not introduce the actual statements, because such statements were effectively before the jury in the context of the trial. The court stated that "any other conclusion would permit the government to evade the limitations of the Sixth Amendment and the Rules of Evidence by weaving an unavailable declarant's statements into another witness's testimony by implication. The government cannot be permitted to circumvent the Confrontation Clause by introducing the same substantive testimony in a different form."

Statements to law enforcement were testimonial, and right to confrontation was violated even though the statements were not stated in detail at trial: *Ocampo v. Vail,* 649 F.3d 1098 (9th Cir. 2011): In a murder case, an officer testified that on the basis of an interview with

Vazquez, the police were able to rule out suspects other than the defendant. Vazquez was not produced for trial. The state court found no confrontation violation on the ground that the officer did not testify to the substance of anything Vazquez said. But the court found that the state court unreasonably applied *Crawford* and reversed the district court's denial of a grant of habeas corpus. The statements from Vazquez were obviously testimonial because they were made during an investigation of a murder. And the court held that the Confrontation Clause bars not only quotations from a declarant, but also any testimony at trial that conveys the substance of a declarant's testimonial hearsay statement. It reasoned as follows:

> Where the government officers have not only "produced" the evidence, but then condensed it into a conclusory affirmation for purposes of presentation to the jury, the difficulties of testing the veracity of the source of the evidence are not lessened but exacerbated. With the language actually used by the out-of-court witness obscured, any clues to its truthfulness provided by that language — contradictions, hesitations, and other clues often used to test credibility — are lost, and instead a veneer of objectivity conveyed.
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> * * *
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> Whatever locution is used, out-of-court statements admitted at trial are "statements" for the purpose of the Confrontation Clause * * * if, fairly read, they convey to the jury the substance of an out-of-court, testimonial statement of a witness who does not testify.

Informal Circumstances, Private Statements, etc.

Private conversations and casual remarks are not testimonial: *United States v. Malpica-Garcia,* 489 F.3d 393 (1st Cir. 2007): In a drug prosecution, the defendant argued that testimony of his former co-conspirators violated *Crawford* because some of their assertions were not based on personal knowledge but rather were implicitly derived from conversations with other people (e.g., that the defendant ran a protection racket). The court found that if the witnesses were in fact relying on accounts from others, those accounts were not testimonial. The court noted that the information was obtained from people "in the course of private conversations or in casual remarks that no one expected would be preserved or later used at trial." There was no indication that the statements were made "to police, in an investigative context, or in a courtroom setting."

Informal letter found reliable under the residual exception is not testimonial: *United States v. Morgan,* 385 F.3d 196 (2nd Cir. 2004): In a drug trial, a letter written by the co-defendant was admitted against the defendant. The letter was written to a boyfriend and implicated both the defendant and the co-defendant in a conspiracy to smuggle drugs. The court found that the letter was

properly admitted under Rule 807, and that it was not testimonial under *Crawford.* The court noted the following circumstances indicating that the letter was not testimonial: 1) it was not written in a coercive atmosphere; 2) it was not addressed to law enforcement authorities; 3) it was written to an intimate acquaintance; 4) it was written in the privacy of the co-defendant's hotel room; 4) the co-defendant had no reason to expect that the letter would ever find its way into the hands of the police; and 5) it was not written to curry favor with the authorities or with anyone else. These were the same factors that rendered the hearsay statement sufficiently reliable to qualify under Rule 807.

Informal conversation between defendant and undercover informant was not testimonial under *Davis: United States v. Burden,* 600 F.3d 204 (2nd Cir. 2010): Appealing RICO and drug convictions, the defendant argued that the trial court erred in admitting a recording of a drug transaction between the defendant and a cooperating witness. The defendant argued that the statements on the recording were testimonial, but the court disagreed and affirmed. The defendant's part of the conversation was not testimonial because he was not aware at the time that the statement was being recorded or would be potentially used at his trial. As to the informant, "anything he said was meant not as an accusation in its own right but as bait."

> **Note: Other courts, as seen in the "Not Hearsay" section below, have come to the same result as the Second Circuit in *Burden,* but using a different analysis: 1) admitting the defendant's statement does not violate the confrontation clause because it is his own statement and he doesn't have a right to confront himself; 2) the informant's statement, while testimonial, is not offered for its truth but only to put the defendant's statements in context — therefore it does not violate the right to confrontation because it is not offered as an accusation**

Statements made to an undercover informant setting up a drug transaction are not testimonial: *Brown v. Epps,* 686 F.3d 281 (5th Cir. 2012)**:** The court found no error in the state court's admission of an intercepted conversation between the defendant, an accomplice, and an undercover informant. The conversation was to set up a drug deal. The court held that statements "unknowingly made to an undercover officer, confidential informant, or cooperating witness are not testimonial in nature because the statements are not made under circumstances which would lead an objective witness to reasonably believe that the statements would be available for later use at trial." The court elaborated further:

> The conversations did not consist of solemn declarations made for the purpose of establishing some fact. Rather, the exchange was casual, often profane, and served the purpose of selling cocaine. Nor were the unidentified individuals' statements made under circumstances that would lead an objective witness reasonably to believe that they would be available for use at a later trial. To the contrary, the statements were furthering a criminal enterprise; a future trial was the last thing the declarants were anticipating. Moreover, they were unaware that their conversations were being preserved, so they could not have predicted that their statements might subsequently become "available" at trial. The

unidentified individuals' statements were * * * not part of a formal interrogation about past events—the conversations were informal cell-phone exchanges about future plans—and their primary purpose was not to create an out-of-court substitute for trial testimony. * * * No witness goes into court to proclaim that he will sell you crack cocaine in a Wal–Mart parking lot. An "objective analysis" would conclude that the "primary purpose" of the unidentified individuals' statements was to arrange the drug deal. (Quoting *Bryant*). Their purpose was not to create a record for trial and thus is not within the scope of the Confrontation Clause. We conclude that the statements were nontestimonial.

Note: This case was decided after *Williams*, but is not affected by that case. Statements setting up a drug deal with a confidential informant are definitely not testimonial under either of the "primary motive" tests posited in *Williams*.

Statements made by a victim to her friends and family are not testimonial: *Doan v. Carter*, 548 F.3d 449 (6th Cir. 2008): The defendant challenged a conviction for murder of his girlfriend. The trial court admitted a number of statements from the victim concerning physical abuse that the defendant had perpetrated on her. The defendant argued that these statements were testimonial but the court disagreed. The defendant contended that under *Davis* a statement is nontestimonial only if it is in response to an emergency, but the court rejected the defendant's "narrow characterization of nontestimonial statements." The court relied on the statement in *Giles v. California* that "statements to friends and neighbors about abuse and intimidation * * * would be excluded, if at all, only by hearsay rules." ***See also United States v. Boyd,*** 640 F.3d 657 (6th Cir. 2011) (statements were non-testimonial because the declarant made them to a companion; stating broadly that "statements made to friends and acquaintances are non-testimonial").

Suicide note implicating the declarant and defendant in a crime was testimonial under the circumstances: *Miller v. Stovall,* 608 F.3d 913 (6th Cir. 2010): A former police officer involved in a murder wrote a suicide note to his parents, indicating he was going to kill himself so as not go to jail for the crime that he and the defendant committed. The note was admitted against the defendant. The court found that the note was testimonial and its admission against the defendant violated his right to confrontation, because the declarant could "reasonably anticipate" that the note would be passed on to law enforcement — especially because the declarant was a former police officer.

Note: The court's "reasonable anticipation" test appears to be a broader definition of testimoniality than that applied by the Supreme Court in *Davis* and especially *Bryant*. The Court in *Davis* looked to the "primary motivation" of the speaker. In this case, the "primary motivation" of the declarant was probably to explain to his parents why he was going to kill himself, rather than to prepare a case against the defendant. So the case appears wrongly decided.

Statements made by an accomplice to a jailhouse informant are not testimonial: *United States v. Honken,* 541 F.3d 1146 (8th Cir. 2008): When the defendant's murder prosecution was pending, the defendant's accomplice (Johnson) was persuaded by a fellow inmate (McNeese) that Johnson could escape responsibility for the crime by getting another inmate to falsely confess to the crime — but that in order to make the false confession believable, Johnson would have to disclose where the bodies were buried. Johnson prepared maps and notes describing where the bodies were buried, and gave it to McNeese with the intent that it be delivered to the other inmate who would falsely confess. In fact this was all a ruse concocted by McNeese and the authorities to get Johnson to confess, in which event McNeese would get a benefit from the government. The notes and maps were admitted at the defendant's trial, over the defendant's objection that they were testimonial. The defendant argued that Johnson had been subjected to the equivalent of a police interrogation. But the court held that the evidence was not testimonial, because Johnson didn't know that he was speaking to a government agent. It explained as follows:

> Johnson did not draw the maps with the expectation that they would be used against Honken at trial * * * . Further, the maps were not a "solemn declaration" or a "formal statement." Rather, Johnson was more likely making a casual remark to an acquaintance. We simply cannot conclude Johnson made a "testimonial" statement against Honken without the faintest notion that she was doing so.

See also United States v. Spotted Elk, 548 F.3d 641 (8th Cir. 2008) (private conversation between inmates about a future course of action is not testimonial).

Statement from one friend to another in private circumstances is not testimonial: *United States v. Wright,* 536 F.3d 819 (8th Cir. 2008): The defendant was charged with shooting two people in the course of a drug deal. One victim died and one survived. The survivor testified at trial to a private conversation he had with the other victim, before the shootings occurred. The court held that the statements of the victim who died were not testimonial. The statements were made under informal circumstances to a friend. The court relied on the Supreme Court's statement in *Giles v. California* that "statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment," are not testimonial.

Accusatory statements in a victim's diary are not testimonial: *Parle v. Runnels*, 387 F.3d 1030 (9th Cir. 2004): In a murder case, the government offered statements of the victim that she had entered in her diary. The statements recounted physical abuse that the victim received at the hand of the defendant. The court held that the victim's diary was not testimonial, as it was a private diary of daily events. There was no indication that it was prepared for use at a trial.

Private conversation between mother and son is not testimonial: *United States v. Brown,* 441 F.3d 1330 (11th Cir. 2006): In a murder prosecution, the court admitted testimony that the defendant's mother received a phone call, apparently from the defendant; the mother asked the caller

whether he had killed the victim, and then the mother started crying. The mother's reaction was admitted at trial as an excited utterance. The court found no violation of *Crawford.* The court reasoned as follows:

> We need not divine any additional definition of "testimonial" evidence to conclude that the private conversation between mother and son, which occurred while Sadie Brown was sitting at her dining room table with only her family members present, was not testimonial. The phone conversation Davis overheard obviously was not made under examination, was not transcribed in a formal document, and was not made under circumstances leading an objective person to reasonably believe the statement would be available for use at a later trial. Thus, it is not testimonial and its admission is not barred by *Crawford*. (Citations omitted).

Interpreters

Interpreter is not a witness but merely a language conduit and so testimony about interpreter's translation does not violate *Crawford*: *United States v. Orm Hieng,* 679 F.3d 1131 (9th Cir. 2012): At the defendant's drug trial, an agent testified to inculpatory statements the defendant made through an interpreter. The interpreter was not called to testify, and the defendant argued that admitting the interpreter's statements violated his right to confrontation. The court found that the interpreter had acted as a "mere language conduit." The court noted that in determining whether an interpreter acts as a language conduit, a court must undertake a case-by-case approach, considering factors such as " which party supplied the interpreter, whether the interpreter had any motive to lead or distort, the interpreter's qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements as translated." The court found that these factors cut in favor of the lower court's finding that the interpreter had acted as a language conduit. Because the interpreter was only a conduit, the witness against the defendant was not the interpreter, but rather himself. The court concluded that when it is the defendant whose statements are translated, "the Sixth Amendment simply has no application because a defendant cannot complain that he was denied the opportunity to confront himself." ***See also United States v. Romo-Chavez,*** 681 F.3d 955 (9th Cir. 2012): Where an interpreter served only as a language conduit, the defendant's own statements were properly admitted under Rule 801(d)(2)(A), and the confrontation clause was not violated because the defendant was his own accuser and he had no right to cross-examine himself.

Interrogations, Etc.

Formal statement to police officer is testimonial: *United States v. Rodriguez-Marrero,* 390 F.3d 1 (1st Cir. 2004): The defendant's accomplice gave a signed confession under oath to a

prosecutor in Puerto Rico. The court held that any information in that confession that incriminated the defendant, directly or indirectly, could not be admitted against him after *Crawford.* Whatever the limits of the term "testimonial," it clearly covers sworn statements by accomplices to police officers.

Accomplice's statements during police interrogation are testimonial: *United States v. Alvarado-Valdez,* 521 F.3d 337 (5th Cir. 2008): The trial court admitted the statements of the defendant's accomplice that were made during a police interrogation. The statements were offered for their truth — to prove that the accomplice and the defendant conspired with others to transport cocaine. Because the accomplice had absconded and could not be produced for trial, admission of his testimonial statements violated the defendant's right to confrontation.

Identification of a defendant, made to police by an incarcerated person, is testimonial: *United States v. Pugh,* 405 F.3d 390 (6th Cir. 2005): In a bank robbery prosecution, the court found a *Crawford* violation when the trial court admitted testimony from a police officer that he had brought a surveillance photo down to a person who was incarcerated, and that person identified the defendant as the man in the surveillance photo. This statement was testimonial under *Crawford* because "the term 'testimonial' at a minimum applies to police interrogations." The court also noted that the statement was sworn and that a person who "makes a formal statement to government officers bears testimony." ***See also United States v. McGee***, 529 F.3d 691 (6th Cir. 2008) (confidential informant's statement identifying the defendant as the source of drugs was testimonial).

Accomplice statement to law enforcement is testimonial: *United States v. Nielsen,* 371 F.3d 574 (9th Cir. 2004): Nielsen resided in a house with Volz. Police officers searched the house for drugs. Drugs were found in a floor safe. An officer asked Volz who had access to the floor safe. Volz said that she did not but that Nielsen did. This hearsay statement was admitted against Nielsen at trial The court found this to be error, as the statement was testimonial under *Crawford*, because it was made to police officers during interrogation. The court noted that even the first part of Volz's statement — that she did not have access to the floor safe — violated *Crawford* because it provided circumstantial evidence that Nielsen did have access.

Statement made by an accomplice after arrest, but before formal interrogation, is testimonial: *United States v. Summers,* 414 F.3d 1287 (10th Cir. 2005): The defendant's accomplice in a bank robbery was arrested by police officers. As he was walked over to the patrol car, he said to the officer, "How did you guys find us?" The court found that the admission of this statement against the defendant violated his right to confrontation under *Crawford.* The court explained as follows:

> Although Mohammed had not been read his *Miranda* rights and was not subject to formal interrogation, he had nevertheless been taken into physical custody by police officers. His question was directed at a law enforcement official. Moreover, Mohammed's statement * * * implicated himself and thus was loosely akin to a confession. Under these circumstances, we find that a reasonable person in Mohammed's position would objectively foresee that an inculpatory statement implicating himself and others might be used in a subsequent investigation or prosecution.

Statements made by accomplice to police officers during a search are testimonial: *United States v. Arbolaez,* 450 F.3d 1283 (11th Cir. 2006): In a marijuana prosecution, the court found error in the admission of statements made by one of the defendant's accomplices to law enforcement officers during a search. The government argued that the statements were offered not for truth but to explain the officers' reactions to the statements. But the court found that "testimony as to the details of statements received by a government agent . . . even when purportedly admitted not for the truthfulness of what the informant said but to show why the agent did what he did after he received that information constituted inadmissible hearsay." The court also found that the accomplice's statements were testimonial under *Crawford*, because they were made in response to questions from police officers.

Joined Defendants

Testimonial hearsay offered by another defendant violates *Crawford* where the statement can be used against the defendant: *United States v. Nguyen,* 565 F.3d 668 (9th Cir. 2009): In a trial of multiple defendants in a fraud conspiracy, one of the defendants offered statements he made to a police investigator. These statements implicated the defendant. The court found that the admission of the codefendant's statements violated the defendant's right to confrontation. The statements were clearly testimonial because they were made to a police officer during an interrogation. The court noted that the confrontation analysis "does not change because a co-defendant, as opposed to the prosecutor, elicited the hearsay statement. The Confrontation Clause gives the accused the right to be confronted with the witnesses against him. The fact that Nguyen's co-counsel elicited the hearsay has no bearing on her right to confront her accusers."

Judicial Findings and Judgments

Judicial findings and an order of judicial contempt are not testimonial: *United States v. Sine,* 493 F.3d 1021 (9th Cir. 2007): The court held that the admission of a judge's findings and order of criminal contempt, offered to prove the defendant's lack of good faith in a tangentially related fraud case, did not violate the defendant's right to confrontation. The court found "no reason to believe that Judge Carr wrote the order in anticipation of Sine's prosecution for fraud, so his order was not testimonial."

See also United States v. Ballesteros-Selinger, 454 F.3d 973 (9th Cir. 2006) (holding that an immigration judge's deportation order was nontestimonial because it "was not made in anticipation of future litigation").

Law Enforcement Involvement

Police officer's count of marijuana plants found in a search is testimonial: *United States v. Taylor,* 471 F.3d 832 (7th Cir. 2006): The court found plain error in the admission of testimony by a police officer about the number of marijuana plants found in the search of the defendant's premises. The officer did not himself count all of the plants; part of his total count was based on a hearsay statement of another officer who assisted in the count. The court held that the officer's hearsay statement about the amount of plants counted was clearly testimonial as it was an evaluation prepared for purposes of criminal prosecution.

Social worker's interview of child-victim, with police officers present, was the functional equivalent of interrogation and therefore testimonial: *Bobadilla v. Carlson,* 575 F.3d 785 (8th Cir. 2009): The court affirmed the grant of a writ of habeas after a finding that the defendant's state conviction for child sexual abuse was tainted by the admission of a testimonial statement by the child-victim. A police officer arranged to have the victim interviewed at the police station five days after the alleged abuse. The officer sought the assistance of a social worker, who conducted the interview using a forensic interrogation technique designed to detect sexual abuse. The court found that "this interview was no different than any other police interrogation: it was initiated by a police officer a significant time after the incident occurred for the purpose of gathering evidence during a criminal investigation." The court stated that the only difference between the questioning in this case and that in *Crawford* was that "instead of a police officer asking questions about a suspected criminal violation, he sat silent while a social worker did the same." But the court found that this was "a distinction without a difference" because the interview took place at the police station, it was recorded for use at trial, and the social worker utilized a structured, forensic method of interrogation at the behest of the police. Under the circumstances, the social worker "was simply acting as a surrogate interviewer for the police."

Statements made by a child-victim to a forensic investigator are testimonial: *United States v. Bordeaux,* 400 F.3d 548 (8th Cir. 2005): In a child sex abuse prosecution, the trial court admitted hearsay statements made by the victim to a forensic investigator. The court reversed the conviction, finding among other things that the hearsay statements were testimonial under *Crawford.* The court likened the exchange between the victim and the investigator to a police interrogation. It elaborated as follows:

> The formality of the questioning and the government involvement are undisputed in this case. The purpose of the interview (and by extension, the purpose of the statements) is disputed, but the evidence requires the conclusion that the purpose was to collect information for law enforcement. First, as a matter of course, the center made one copy of the videotape of this kind of interview for use by law enforcement. Second, at trial, the prosecutor repeatedly referred to the interview as a 'forensic' interview . . . That [the victim's] statements may have also had a medical purpose does not change the fact that they were testimonial, because *Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial.
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> **Note: The court's statement that multi-purpose statements might be testimonial is surely correct, but it must be narrowed in light of the Supreme Court's subsequent decision in *Bryant.* There, the Court declared that it would find a hearsay statement to be testimonial only if the *primary* purpose was to prepare a statement for criminal prosecution.**

See also United States v. Eagle, 515 F.3d 794 (8th Cir. 2008) (statements from a child concerning sex abuse, made to a forensic investigator, are testimonial). ***Compare United States v. Peneaux,***

432 F.3d 882 (8th Cir. 2005) (distinguishing *Bordeaux* where the child's statement was made to a treating physician rather than a forensic investigator, and there was no evidence that the interview resulted in any referral to law enforcement: "Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial."); ***United States v. DeLeon,*** 678 F.3d 317 (4th Cir. 2012) (discussed below under "medical statements" and distinguishing *Bordeaux* and *Bobodilla* as cases where statements were essentially made to law enforcement officers and not for treatment purposes).

Machines

Printout from machine is not hearsay and therefore does not violate *Crawford*: *United States v. Washington,* 498 F.3d 225 (4th Cir. 2007): The defendant was convicted of operating a motor vehicle under the influence of drugs and alcohol. At trial, an expert testified on the basis of a printout from a gas chromatograph machine. The machine issued the printout after testing the defendant's blood sample. The expert testified to his interpretation of the data issued by the machine — that the defendant's blood sample contained PCP and alcohol. The defendant argued that *Crawford* was violated because the expert had no personal knowledge of whether the defendant's blood contained PCP or alcohol. He read *Crawford* to require the production of the lab personnel who conducted the test. But the court rejected this argument, finding that the machine printout was not hearsay, and therefore its use at trial by the expert could not violate *Crawford* even though it was prepared for use at trial. The court reasoned as follows:

> The technicians could neither have affirmed or denied independently that the blood contained PCP and alchohol, because all the technicians could do was to refer to the raw data printed out by the machine. Thus, the statements to which Dr. Levine testified in court . . . did not come from the out-of-court technicians [but rather from the machine] and so there was no violation of the Confrontation Clause. . . . The raw data generated by the diagnostic machines are the "statements" of the machines themselves, not their operators. But "statements" made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause.

The court noted that the technicians might have needed to be produced to provide a chain of custody, but observed that the defendant made no objection to the authenticity of the machine's report.

> **Note: The result in *Washington* appears unaffected by *Williams,* as the Court in *Williams* had no occasion to consider whether a machine output can be testimonial hearsay.**

See also United States v. Summers, 666 F.3d 192 (4th Cir. 2011): (expert's reliance on a "pure instrument read-out" did not violate the Confrontation Clause because such a read-out is not "testimony").

Printout from machine is not hearsay and therefore does not violate *Crawford*: *United States v. Moon,* 512 F.3d 359 (7th Cir. 2008): The court held that an expert's testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because "data is not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone."

Electronic tabulation of phone calls is not a statement and therefore cannot be testimonial hearsay: *United States v. Lamons,* 532 F.3d 1251 (11th Cir. 2008): Bomb threats were called into an airline, resulting in the disruption of a flight. The defendant was a flight attendant accused of sending the threats. The trial court admitted a cd of data collected from telephone calls made to the airline; the data indicated that calls came from the defendant's cell phone at the time the threats were made. The defendant argued that the information on the cd was testimonial hearsay, but the court disagreed, because the information was entirely machine-generated. The court stated that "the witnesses with whom the Confrontation Clause is concerned are *human* witnesses" and that the purposes of the Confrontation Clause "are ill-served through confrontation of the machine's human operator. To say that a wholly machine-generated statement is unreliable is to speak of mechanical error, not mendacity. The best way to advance the truth-seeking process * * * is through the process of authentication as provided in Federal Rule of Evidence 901(b)(9)." The court concluded that there was no hearsay statement at issue and therefore the Confrontation Clause was inapplicable.

Medical/Therapeutic Statements

Statements by victim of abuse to treatment manager of Air Force medical program were admissible under Rule 803(4) and non-testimonial: *United States v. DeLeon,* 678 F.3d 317 (4th Cir. 2012): The defendant was convicted of murdering his eight-year-old son. Months before his death, the victim had made statements about incidents in which he had been physically abused by the defendant as part of parental discipline. The statements were made to the treatment manager of an Air Force medical program that focused on issues of family health. The court found that the statements were properly admitted under Rule 803(4) and (essentially for that reason) were non-testimonial because their primary purpose was not for use in a criminal prosecution of the defendant. The court noted that the statements were not made in response to an emergency, but that emergency was only one factor under *Bryant.* The court also recognized that the Air Force program "incorporates reporting requirements and a security component" but stated that these factors were not sufficient to render statements to the treatment manager testimonial. The court explained why the "primary motive" test was not met in the following passage:

> We note first that Thomas [the treatment manager] did not have, nor did she tell Jordan [the child] she had, a prosecutorial purpose during their initial meeting. Thomas was not employed as a forensic investigator but instead worked * * * as a treatment manager. And there is no evidence that she recorded the interview or otherwise sought to memorialize Jordan's answers as evidence for use during a criminal prosecution. * * * Rather, Thomas used the information she gathered from Jordan and his family to develop a written treatment plan and continued to provide counseling and advice on parenting techniques in subsequent meetings with family members. * * * Thomas also did not meet with Jordan in an interrogation room or at a police station but instead spoke with him in her office in a building that housed * * * mental health service providers.
>
> Importantly, ours is also not a case in which the social worker operated as an agent of law enforcement. * * * Here, Thomas did not act at the behest of law enforcement, as there was no active criminal investigation when she and Jordan spoke. * * * An objective review of the parties' actions and the circumstances of the meeting confirms that the primary purpose was to develop a treatment plan — not to establish facts for a future criminal prosecution. Accordingly, we hold that the contested statements were nontestimonial and that their admission did not violate DeLeon's Sixth Amendment rights.

Statement admitted under Rule 803(4) are presumptively non-testimonial: *United States v. Peneaux,* 432 F.3d 882 (8th Cir. 2005): "Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial."

Miscellaneous

Statement of an accomplice made to his attorney is not testimonial: *Jensen v. Pliler,* 439 F.3d 1086 (9th Cir. 2006): Taylor was in custody for the murder of Kevin James. He confessed the murder to his attorney, and implicated others, including Jensen. After Taylor was released from jail, Jensen and others murdered him because they thought he talked to the authorities. Jensen was tried for the murder of both James and Taylor, and the trial court admitted the statements made by Taylor to his attorney (Taylor's next of kin having waived the privilege). The court found that the statements made by Taylor to his attorney were not testimonial, as they "were not made to a government officer with an eye toward trial, the primary abuse at which the Confrontation Clause was directed." Finally, while Taylor's statements amounted to a confession, they were not given to a police officer in the course of interrogation.

Non-Testimonial Hearsay and the Right to Confrontation

Clear statement and holding that *Crawford* overruled *Roberts* even with respect to non-testimonial hearsay: *Whorton v. Bockting*, 549 U.S. 406 (2007): The habeas petitioner argued that testimonial hearsay was admitted against him in violation of *Crawford.* His trial was conducted ten years before *Crawford*, however, and so the question was whether *Crawford* applies retroactively to benefit habeas petitioners. Under Supreme Court jurisprudence, a new rule is applicable on habeas only if it is a "watershed" rule that is critical to the truthseeking function of a trial. The Court found that *Crawford* was a new rule because it overruled *Roberts.* It further held that *Crawford* was not essential to the truthseeking function; its analysis on this point is pertinent to whether *Roberts* retains any vitality with respect to non-testimonial hearsay. The Court declared as follows:

> *Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the Confrontation Clause, not because the Court reached the conclusion that the overall effect of the *Crawford* rule would be to improve the accuracy of fact finding in criminal trials. Indeed, in *Crawford* we recognized that even under the *Roberts* rule, this Court had never specifically approved the introduction of testimonial hearsay statements. Accordingly, it is not surprising that the overall effect of *Crawford* with regard to the accuracy of fact-finding in criminal cases is not easy to assess.
>
> With respect to *testimonial* out-of-court statements, *Crawford* is more restrictive than was *Roberts*, and this may improve the accuracy of fact-finding in some criminal cases. Specifically, under *Roberts*, there may have been cases in which courts erroneously determined that testimonial statements were reliable. But see 418 F.3d at 1058 (O'Scannlain, J., dissenting from denial of rehearing en banc) (observing that it is unlikely that this occurred "in anything but the exceptional case"). *But whatever improvement in reliability Crawford produced in this respect must be considered together with Crawford's elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under Roberts, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under Crawford, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.* (Emphasis added).

One of the main reasons that *Crawford* in not retroactive (the holding) is that it is not essential to the accuracy of a verdict. And one of the reasons *Crawford* is not essential to accuracy is that, with respect to non-testimonial statements, *Crawford* conflicts with accurate factfinding because it lifts all constitutional reliability requirements imposed by *Roberts.* Thus, if hearsay is non-testimonial, there is no constitutional limit on its admission.

Not Offered for Truth

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford,* as they were admitted to provide context for the defendant's own statements: *United States v. Hansen,* 434 F.3d 92 (1st Cir. 2006): After a crime and as part of cooperation with the authorities, the father of an accomplice surreptitiously recorded his conversation with the defendant, in which the defendant admitted criminal activity. The court found that the father's statements during the conversation were testimonial under *Crawford* — as they were made specifically for use in a criminal prosecution. But their admission did not violate the defendant's right to confrontation. The defendant's own side of the conversation was admissible as a statement of a party-opponent, and the father's side of the conversation was admitted not for its truth but to provide context for the defendant's statements. *Crawford* does not bar the admission of statements not offered for their truth. ***Accord United States v. Walter,*** 434 F.3d 30 (1st Cir. 2006) (*Crawford* "does not call into question this court's precedents holding that statements introduced solely to place a defendant's admissions into context are not hearsay and, as such, do not run afoul of the Confrontation Clause."). ***See also Furr v. Brady,*** 440 F.3d 34 (1st Cir. 2006) (the defendant was charged with firearms offenses and intimidation of a government witness; an accomplice's confession to law enforcement did not implicate *Crawford* because it was not admitted for its truth; rather, it was admitted to show that the defendant knew about the confession and, in contacting the accomplice thereafter, intended to intimidate him).

Note: Five members of the Court in *Williams* disagreed with Justice Alito's analysis that the Confrontation Clause was not violated because the testimonial lab report was never admitted for its truth. The question from *Williams* is whether those five Justices are opposed to *any* use of the not-for-truth analysis in answering Confrontation Clause challenges. The answer is apparently that their objection to the not-for truth analysis in *Williams* does not extend to situations in which (in their personal view) the statement has a *legitimate* not-for-truth purpose. Thus, Justice Thomas distinguishes the expert's use of the lab report from the prosecution's admission of an accomplice's confession in *Tennessee v. Street,* where the confession "was not introduced for its truth, but only to impeach the defendant's version of events." In *Street* the defendant challenged his confession on the ground that he had been coerced to copy Peele's confession. Peele's confession was introduced not for its truth but only to show that it differed from Street's. For that purpose, it didn't matter whether it was true. Justice Thomas stated that "[u]nlike the confession in *Street,* statements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose" because "to use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true." Justice Kagan in her opinion essentially repeats Justice Thomas's analysis and agrees with his distinction between legitimate and illegitimate use of the "not-for-truth" argument. Both Justices Kagan and Thomas agree with the Court's statement in *Crawford* that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Both would simply add the proviso that the not-for-truth use must be *legitimate* or *plausible.*

It follows that the cases under this "not-for-truth" headnote are probably unaffected by *Williams,* as they largely permit admission of testimonial statements as offered "not-for-truth" only when that purpose is legitimate, i.e., *only when the statement is offered for a purpose as to which it is relevant regardless of whether it is true or not.*

Statements by informant to police officers, offered to prove the "context" of the police investigation, probably violate *Crawford,* but admission is not plain error: *United States v. Maher,* 454 F.3d 13 (1st Cir. 2006): At the defendant's drug trial, several accusatory statements from an informant (Johnson) were admitted ostensibly to explain why the police focused on the defendant as a possible drug dealer. The court found that these statements were testimonial under *Crawford*, because "the statements were made while the police were interrogating Johnson after Johnson's arrest for drugs; Johnson agreed to cooperate and he then identified Maher as the source of drugs. . . . In this context, it is clear that an objectively reasonable person in Johnson's shoes would understand that the statement would be used in prosecuting Maher at trial." The court then addressed the government's argument that the informant's statements were not admitted for their truth, but to explain the context of the police investigation:

> The government's articulated justification — that any statement by an informant to police which sets context for the police investigation is not offered for the truth of the statements and thus not within *Crawford* — is impossibly overbroad [and] may be used not just to get around hearsay law, but to circumvent *Crawford's* constitutional rule. . . . Here, Officer MacVane testified that the confidential informant had said Maher was a drug dealer, even though the prosecution easily could have structured its narrative to avoid such testimony. The . . . officer, for example, could merely say that he had acted upon "information received," or words to that effect. It appears the testimony was primarily given exactly for the truth of the assertion that Maher was a drug dealer and should not have been admitted given the adequate alternative approach.

The court noted, however, that the defendant had not objected to the admission of the informant's statements. It found no plain error, noting among other things, the strength of the evidence and the fact that the testimony "was followed immediately by a sua sponte instruction to the effect that any statements of the confidential informant should not be taken as standing for the truth of the matter asserted, i.e., that Maher was a drug dealer who supplied Johnson with drugs."

Accomplice statements purportedly offered for "context" were actually admitted for their truth, resulting in a Confrontation Clause violation: *United States v. Cabrera-Rivera,* 583 F.3d 26 (1st Cir. 2009): In a robbery prosecution, the government offered hearsay statements that accomplices made to police officers. The government argued that the statements were not offered for their truth, but rather to explain how the government was able to find other evidence in the case. But the court found that the accusations were not properly admitted to provide context. The government at trial emphasized the details of the accusations that had nothing to do with leading the government to other evidence; and the government did not contend that one of the accomplice's

confessions led to any other evidence. Because the statements were testimonial, and because they were in fact offered for their truth, admission of the statements violated *Crawford.*

Note: The result in *Cabrera-Rivera* is certainly unchanged by *Williams.* The prosecution's was not offering the accusations for any *legitimate* not-for-truth purpose.

Statements offered to provide context for the defendant's part of a conversation were not hearsay and therefore could not violate the Confrontation Clause: *United States v. Hicks,* 575 F.3d 130 (1st Cir. 2009): The court found no error in admitting a telephone call that the defendant placed from jail in which he instructed his girlfriend how to package and sell cocaine. The defendant argued that admission of the girlfriend's statements in the telephone call violated *Crawford.* But the court found that the girlfriend's part of the conversation was not hearsay and therefore did not violate the defendant's right to confrontation. The court reasoned that the girlfriend's statements were admissible not for their truth but to provide the context for understanding the defendant's incriminating statements. The court noted that the girlfriend's statements were "little more than brief responses to Hicks's much more detailed statements."

Accomplice's confession, when offered to explain why police did not investigate other suspects and leads, is not hearsay and therefore its admission does not violate *Crawford: United States v. Cruz-Diaz,* 550 F.3d 169 (1st Cir. 2008): In a bank robbery prosecution, defense counsel cross-examined a police officer about the decision not to pursue certain investigatory opportunities after apprehending the defendants. Defense counsel identified "eleven missed opportunities" for tying the defendants to the getaway car, including potential fingerprint and DNA evidence. In response, the officer testified that the defendant's co-defendant had given a detailed confession. The defendant argued that introducing the cohort's confession violated his right to confrontation, because it was testimonial under *Crawford.* But the court found the confession to be not hearsay — as it was offered for the not-for-truth purpose of explaining why the police conducted the investigation the way they did. Accordingly admission of the statement did not violate *Crawford.*

The defendant argued that the government's true motive was to introduce the confession for its truth, and that the not-for-truth purpose was only a pretext. But the court disagreed, noting that the government never tried to admit the confession until defense counsel attacked the thoroughness of the police investigation. Thus, introducing the confession for a not-for-truth purpose was proper rebuttal. The defendant suggested that "if the government merely wanted to explain why the FBI and police failed to conduct a more thorough it could have had the agent testify in a manner that entirely avoided referencing Cruz's confession" — for example, by stating that the police chose to truncate the investigation "because of information the agent had." But the court held that this kind of sanitizing of the evidence was not required, because it "would have come at an unjustified cost to the government." Such generalized testimony, without any context, "would not have sufficiently rebutted Ayala's line of questioning" because it would have looked like one more cover-up. The court concluded that "[w]hile there can be circumstances under which Confrontation Clause concerns prevent the admission of the substance of a declarant's out-of-court statement where a less

prejudicial narrative would suffice in its place, this is not such a case." ***See also United States v. Diaz,*** 670 F.3d 332 (1st Cir. 2012)(testimonial statement from one police officer to another to effect an arrest did not violate the right to confrontation because it was not hearsay: "The government offered Perez's out-of-court statement to explain why Veguilla had arrested [the defendant], not as proof of the drug sale that Perez allegedly witnesses. Out-of-court statements providing directions from one individual to another do not constitute hearsay.").

False alibi statements made to police officers by accomplices are testimonial, but admission does not violate the Confrontation Clause because they are not offered for their truth: *United States v. Logan,* 419 F.3d 172 (2nd Cir. 2005): The defendant was convicted of conspiracy to commit arson. The trial court admitted statements made by his coconspirators to the police. These statements asserted an alibi, and the government presented other evidence indicating that the alibi was false. The court found no Confrontation Clause violation in admitting the alibi statements. The court relied on *Crawford* for the proposition that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than proving the truth of the matter asserted." The statements were not offered to prove that the alibi was true, but rather to corroborate the defendant's own account that the accomplices planned to use the alibi. Thus "the fact that Logan was aware of this alibi, and that [the accomplices] actually used it, was evidence of conspiracy among [the accomplices] and Logan."

> **Note: The *Logan* court reviewed the defendant's Confrontation Clause argument under the plain error standard. This was because defense counsel at trial objected on grounds of hearsay, but did not make a specific Confrontation Clause objection.**

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford,* as they were admitted to provide context for the defendant's statements: *United States v. Paulino,* 445 F.3d 211 (2nd Cir. 2006): The court stated: "It has long been the rule that so long as statements are not presented for the truth of the matter asserted, but only to establish a context, the defendant's Sixth Amendment rights are not transgressed. Nothing in *Crawford v. Washington* is to the contrary."

> **Note: This typical use of "context" is not in question after *Williams*, because the focus is on the defendant's statements and not on the truth of the declarant's statements. Use of context could be *illegitimate* however if the focus is in fact on the truth of the declarant's statements. See, e.g., *United States v. Powers* from the Sixth Circuit, infra.**

Co-conspirator statements made to government officials to cover-up a crime (whether true or false) do not implicate *Crawford* because they were not offered for their truth: *United States v. Stewart,* 433 F.3d 273 (2nd Cir. 2006)**:** In the prosecution of Martha Stewart, the government introduced statements made by each of the defendants during interviews with

government investigators. Each defendant's statement was offered against the other, to prove that the story told to the investigators was a cover-up. The court held that the admission of these statements did not violate *Crawford,* even though they were "provided in a testimonial setting." It noted first that to the extent the statements were false, they did not violate *Crawford* because "*Crawford* expressly confirmed that the categorical exclusion of out-of-court statements that were not subject to contemporaneous cross-examination does not extend to evidence offered for purposes other than to establish the truth of the matter asserted." The defendants argued, however, that some of the statements made during the course of the obstruction were actually true, and as they were made to government investigators, they were testimonial. The court observed that there is some tension in *Crawford* between its treatment of co-conspirator statements (by definition not testimonial) and statements made to government investigators (by their nature testimonial), where truthful statements are made as part of a conspiracy to obstruct justice. It found, however, that admitting the truthful statements did not violate *Crawford* because they were admitted not for their truth, but rather to provide context for the false statements. The court explained as follows:

> It defies logic, human experience and even imagination to believe that a conspirator bent on impeding an investigation by providing false information to investigators would lace the totality of that presentation with falsehoods on every subject of inquiry. To do so would be to alert the investigators immediately that the conspirator is not to be believed, and the effort to obstruct would fail from the outset. * * * The truthful portions of statements in furtherance of the conspiracy, albeit spoken in a testimonial setting, are intended to make the false portions believable and the obstruction effective. Thus, the truthful portions are offered, not for the narrow purpose of proving merely the truth of those portions, but for the far more significant purpose of showing each conspirator's attempt to lend credence to the entire testimonial presentation and thereby obstruct justice.

> **Note: Offering a testimonial statement to prove it is false is a typical and presumably legitimate not-for-character purpose and so would appear to be unaffected by *Williams.* That is, to the extent five (or more) members of the Court apply a distinction between legitimate and illegitimate not-for-truth usage, offering the statement to prove it is false is certainly on the legitimate side of the line. It is one of the clearest cases of a statement not being offered to prove that the assertions therein are true. Of course, the government must provide independent evidence that the statement is in fact false.**

Accomplice statements to police officer were testimonial, but did not violate the Confrontation Clause because they were admitted to show they were false: *United States v. Trala,* 386 F.3d 536 (3rd Cir. 2004): An accomplice made statements to a police officer that misrepresented her identity and the source of the money in the defendant's car. While these were accomplice statements to law enforcement, and thus testimonial, their admission did not violate *Crawford,* as they were not admitted for their truth. In fact the statements were admitted because they were false. Under these circumstances, cross-examination of the accomplice would serve no

purpose. ***See also United States v. Lore,*** 430 F.3d 190 (3rd Cir. 2005) (relying on *Trala*, the court held that grand jury testimony was testimonial, but that its admission did not violate the Confrontation Clause because the self-exculpatory statements denying all wrongdoing "were admitted because they were so obviously false.").

Confessions of other targets of an investigation were testimonial, but did not violate the Confrontation Clause because they were offered to rebut charges against the integrity of the investigation: *United States v. Christie,* 624 F.3d 558 (3rd Cir. 2010): In a child pornography investigation, the FBI obtained the cooperation of the administrator of a website, which led to the arrests of a number of users, including the defendant. At trial the defendant argued that the investigation was tainted because the FBI, in its dealings with the administrator, violated its own guidelines in treating informants. Specifically the defendant argued that these misguided law enforcement efforts led to unreliable statements from the administrator. In rebuttal, the government offered and the court admitted evidence that twenty-four other users confessed to child pornography-related offenses. The defendant argued that admitting the evidence of the others' confessions violated the hearsay rule and the Confrontation Clause, but the court rejected these arguments and affirmed. It reasoned that the confessions were not offered for their truth, but to show why the FBI could believe that the administrator was a reliable source, and therefore to rebut the charge of improper motive on the FBI's part. As to the confrontation argument, the court declared that "our conclusion that the testimony was properly introduced for a non-hearsay purpose is fatal to Christie's *Crawford* argument, since the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."

Accomplice's testimonial statement was properly admitted for impeachment purposes, but failure to give a limiting instruction was error: *Adamson v. Cathel,* 633 F.3d 248 (3rd Cir. 2011): The defendant challenged his confession at trial by arguing that the police fed him the details of his confession from other confessions by his alleged accomplices, Aljamaar and Napier. On cross-examination, the prosecutor introduced those confessions to show that they differed from the defendant's confession on a number of details. The court found no error in the admission of the accomplice confessions. While testimonial, they were offered for impeachment and not for their truth and so did not violate the Confrontation Clause. However, the trial court gave no limiting instruction, and the court found that failure to be error. The court concluded as follows:

> Without a limiting instruction to guide it, the jury that found Adamson guilty was free to consider those facially incriminating statements as evidence of Adamson's guilt. The careful and crucial distinction the Supreme Court made between an impeachment use of the evidence and a substantive use of it on the question of guilt was completely ignored during the trial.
>
> **Note: The use of the cohort's confessions to show differences from the defendant's confession is precisely the situation reviewed by the Court in *Tennessee v. Street.* As noted above, while five Justices in *Williams* rejected the "not-for-truth" analysis as**

applied to expert reliance on testimonial statements, all of the Justices approved of that analysis as applied to the facts of *Street.*

Statements made in a civil deposition might be testimonial, but admission does not violate the Confrontation Clause if they are offered to prove they are false: *United States v. Holmes,* 406 F.3d 337 (5th Cir. 2005): The defendant was convicted of mail fraud and conspiracy, stemming from a scheme with a court clerk to file a backdated document in a civil action. The defendant argued that admitting the deposition testimony of the court clerk, given in the underlying civil action, violated his right to confrontation after *Crawford*. The clerk testified that the clerk's office was prone to error and thus someone in that office could have mistakenly backdated the document at issue. The court considered the possibility that the clerk's testimony was a statement in furtherance of a conspiracy, and noted that coconspirator statements ordinarily are not testimonial under *Crawford*. It also noted, however, that the clerk's statement "is not the run-of-the-mill co-conspirator's statement made unwittingly to a government informant or made casually to a partner in crime; rather, we have a co-conspirator's statement that is derived from a formalized testimonial source — recorded and sworn civil deposition testimony." Ultimately the court found it unnecessary to determine whether the deposition testimony was "testimonial" within the meaning of *Crawford* because it was not offered for its truth. Rather, the government offered the testimony "to establish its *falsity* through independent evidence." ***See also United States v. Acosta,*** 475 F.3d 677 (5th Cir. 2007) (accomplice's statement offered to impeach him as a witness — by showing it was inconsistent with the accomplice's refusal to answer certain questions concerning the defendant's involvement with the crime — did not violate *Crawford* because the statement was not admitted for its truth and the jury received a limiting instruction to that effect).

Informant's accusation, offered to explain why police acted as they did, was testimonial but it was not hearsay, and so its admission did not violate the Confrontation Clause: *United States v. Deitz,* 577 F.3d 672 (6th Cir. 2009): The court found no error in allowing an FBI agent to testify about why agents tailed the defendant to what turned out to be a drug transaction. The agent testified that a confidential informant had reported to them about Deitz's drug activity. The court found that the informant's statement was testimonial — because it was an accusation made to a police officer — but it was not hearsay and therefore its admission did not violate Deitz's right to confrontation. The court found that the testimony "explaining why authorities were following Deitz to and from Dayton was not plain error as it provided mere background information, not facts going to the very heart of the prosecutor's case." The court also observed that "had defense counsel objected to the testimony at trial, the court could have easily restricted its scope." ***See also United States v. Davis***, 577 F.3d 660 (6th Cir. 2009): A woman's statement to police that she had recently seen the defendant with a gun in a car that she described along with the license plate was not hearsay — and so even though testimonial did not violate the defendant's right to confrontation — because it was offered only to explain the police investigation that led to the defendant and the defendant's conduct when he learned the police were looking for him.

Statement offered to prove the defendant's knowledge of a crime was non-hearsay and so did not violate the accused's confrontation rights: *United States v. Boyd,* 640 F.3d 657 (6th Cir. 2011): A defendant charged with being an accessory after the fact to a carjacking and murder had confessed to police officers that his friend Davidson had told him that he had committed those crimes. At trial the government offered that confession, which included the underlying statements of Boyd. The defendant argued that admitting Davidson's statements violated his right to confrontation. But the court found no error because the hearsay was not offered for its truth: "Davidson's statements to Boyd were offered to prove Boyd's knowledge [of the crimes that Davidson had committed] rather than for the truth of the matter asserted."

Informant's statements were not properly offered for "context," so their admission violated *Crawford*: *United States v. Powers,* 500 F.3d 500 (6th Cir. 2007): In a drug prosecution, a law enforcement officer testified that he had received information about the defendant's prior criminal activity from a confidential informant. The government argued on appeal that even though the informant's statements were testimonial, they did not violate *Crawford*, because they were offered "to show why the police conducted a sting operation" against the defendant. But the court disagreed and found a *Crawford* violation. It reasoned that "details about Defendant's alleged prior criminal behavior were not necessary to set the context of the sting operation for the jury. The prosecution could have established context simply by stating that the police set up a sting operation." ***See also United States v. Hearn***, 500 F.3d 479 (6th Cir.2007) (confidential informant's accusation was not properly admitted for background where the witness testified with unnecessary detail and "[t]he excessive detail occurred twice, was apparently anticipated, and was explicitly relied upon by the prosecutor in closing arguments").

Admitting informant's statement to police officer for purposes of "background" did not violate the Confrontation Clause: *United States v. Gibbs,* 506 F.3d 479 (6th Cir. 2007): In a trial for felon-firearm possession, the trial court admitted a statement from an informant to a police officer; the informant accused the defendant of having firearms hidden in his bedroom. Those firearms were not part of the possession charge. While this accusation was testimonial, its admission did not violate the Confrontation Clause, "because the testimony did not bear on Gibbs's alleged possession of the .380 Llama pistol with which he was charged." Rather, it was admitted "solely as background evidence to show why Gibbs's bedroom was searched."

Admission of the defendant's conversation with an undercover informant does not violate the Confrontation Clause, where the undercover informant's part of the conversation is offered only for "context": *United States v. Nettles,* 476 F.3d 508 (7th Cir. 2007): The defendant made plans to blow up a government building, and the government arranged to put him in contact with an undercover informant who purported to help him obtain materials. At trial, the court admitted a recorded conversation between the defendant and the informant. Because the informant

was not produced for trial, the defendant argued that his right to confrontation was violated. But the court found no error, because the admission of the defendant's part of the conversation was not barred by the Confrontation Clause, and the informant's part of the conversation was admitted only to place the defendant's part in "context." Because the informant's statements were not offered for their truth, they did not implicate the Confrontation Clause.

The *Nettles* court did express some concern about the breadth of the "context" doctrine, stating "[w]e note that there is a concern that the government may, in future cases, seek to submit based on 'context' statements that are, in fact, being offered for their truth." But the court found no such danger in this case, noting the following: 1) the informant presented himself as not being proficient in English, so most of his side of the conversation involved asking the defendant to better explain himself; and 2) the informant did not "put words in Nettles's mouth or try to persuade Nettles to commit more crimes in addition to those that Nettles had already decided to commit." ***See also United States v. Tolliver,*** 454 F.3d 660 (7th Cir. 2006) (statements of one party to a conversation with a conspirator were offered not for their truth but to provide context to the conspirator's statements: "*Crawford* only covers testimonial statements proffered to establish the truth of the matter asserted. In this case, . . . Shye's statements were admissible to put Dunklin's admissions on the tapes into context, making the admissions intelligible for the jury. Statements providing context for other admissible statements are not hearsay because they are not offered for their truth. As a result, the admission of such context evidence does not offend the Confrontation Clause because the declarant is not a witness against the accused."); ***United States v. Bermea-Boone***, 563 F.3d 621 (7th Cir. 2009): A conversation between the defendant and a coconspirator was properly admitted; the defendant's side of the conversation was a statement of a party-opponent, and the accomplice's side was properly admitted to provide context for the defendant's statements: "Where there is no hearsay, the concerns addressed in *Crawford* do not come in to play. That is, the declarant, Garcia, did not function as a witness against the accused."; ***United States v. York,*** 572 F.3d 415 (7th Cir. 2009) (informant's recorded statements in a conversation with the defendant were admitted for context and therefore did not violate the Confrontation Clause: "we see no indication that Mitchell tried to put words in York's mouth"); ***United States v. Hicks,*** 635 F.3d 1063 (7th Cir. 2011): (undercover informant's part of conversations were not hearsay, as they were offered to place the defendant's statements in context; because they were not offered for truth their admission did not violate the defendant's right to confrontation); ***United States v. Gaytan,*** 649 F.3d 573 (7th Cir. 2011) (undercover informant's statements to the defendant in a conversation setting up a drug transaction were clearly testimonial, but not offered for their truth: "Gaytan's responses ['what you need?' and 'where the loot at?'] would have been unintelligible without the context provided by Worthen's statements about his or his brother's interest in 'rock'"; the court noted that there was no indication that the informant was "putting words in Gaytan's mouth"); ***United States v. Foster,*** 701 F.3d 1142 (7th Cir. 2012) ("Here, the CI's statement regarding the weight [of the drug] was not offered to show what the weight *actually* was * * * but rather to explain the defendant's acts and make his statements intelligible. The defendant's statement to 'give me sixteen fifty' (because the original price was 17) would not have made sense without reference to the CI's comment that the quantity was off. Because the statements were admitted only to prove context, *Crawford* does not require confrontation."); ***United States v. Ambrose,*** 668 F.3d 943 (7th Cir. 2012) (conversation between two crime family members about actions of a cooperating witness were not offered for their

truth but rather to show that information had been leaked; because the statements were not offered for their truth, there was no violation of the right to confrontation).

> **Note: The concerns expressed in *Nettles* about possible abuse of the "context" usage are along the same lines as those expressed by Justices Thomas and Kagan in *Williams,* when they seek to distinguish legitimate and illegitimate not-for-truth purposes. If the only relevance of the statement requires the factfinder to assess its truth, then the statement is not being offered for a legitimate not-for-truth purpose.**

Police report offered for a purpose other than proving the truth of its contents is properly admitted even if it is testimonial: *United States v. Price,* 418 F.3d 771 (7th Cir. 2005): In a drug conspiracy trial, the government offered a report prepared by the Gary Police Department. The report was an "intelligence alert"identifying some of the defendants as members of a street gang dealing drugs. The report was found in the home of one of the conspirators. The government offered the report at trial to prove that the conspirators were engaging in counter-surveillance, and the jury was instructed not to consider the accusations in the report as true, but only for the fact that the report had been intercepted and kept by one of the conspirators. The court found that even if the report was testimonial, there was no error in admitting the report as proof of awareness and counter-surveillance. It relied on *Crawford* for the proposition that the Confrontation Clause does not bar the use of out-of-court statements "for purposes other than proving the truth of the matter asserted."

Accusation offered not for truth, but to explain police conduct, was not hearsay and did not violate the defendant's right to confrontation: *United States v. Dodds,* 569 F.3d 336 (7th Cir. 2009): Appealing a firearms conviction, the defendant argued that his right to confrontation was violated when the trial court admitted a statement from an unidentified witness to a police officer. The witness told the officer that a black man in a black jacket and black cap was pointing a gun at people two blocks away. The court found no confrontation violation because "the problem that *Crawford* addresses is the admission of hearsay" and the witness's statement was not hearsay. It was not admitted for its truth — that the witness saw the man he described pointing a gun at people — but rather "to explain why the police proceeded to the intersection of 35th and Galena and focused their attention on Dodds, who matched the description they had been given." The court noted that the trial judge did not provide a limiting instruction, but also noted that the defendant never asked the court to do so and that the lack of an instruction was not raised on appeal. ***See also United States v. Taylor,*** 569 F.3d 742 (7th Cir. 2009): An accusation from a bystander to a police officer that the defendant had just taken a gun across the street was not hearsay because it was offered to explain the officers' actions in the course of their investigation — "for example, why they looked across the street * * * and why they handcuffed Taylor when he approached." The court noted that absent "complicating circumstances, such as a prosecutor who exploits nonhearsay statements for their truth, nonhearsay testimony does not present a confrontation problem." The court found no "complicating circumstances" in this case.

Note: The Court's reference in *Taylor* to the possibility of exploiting a not-for-truth purpose unfairly runs along the same lines as those expressed by Justice Thomas and Kagan in *Williams.*

Testimonial statement was not legitimately offered for context or background and so was a violation of *Crawford: United States v. Adams,* 628 F.3d 407 (7th Cir. 2010): In a narcotics prosecution, statements made by confidential informants to police officers were offered against the defendant. For example, the government offered testimony from a police officer that he stopped the defendant's car on a tip from a confidential informant that the defendant was involved in the drug trade and was going to by crack. A search of the car uncovered a large amount of money and a crack pipe. The government offered the informant's statement not for the truth of the assertion but as "foundation for what the officer did." The trial court admitted the statement and gave a limiting instruction. But the court of appeals found error, though harmless, because the informant's statements "were not necessary to provide any foundation for the officer's subsequent actions." It explained as follows:

> The CI's statements here are different from statements we have found admissible that gave context to an otherwise meaningless conversation or investigation. [cites omitted] Here the CI's accusations did not counter a defense strategy that police officers randomly targeted Adams. And, there was no need to introduce the statements for context — even if the CI's statements were excluded, the jury would have fully understood that the officer searched Adams and the relevance of the items recovered in that search to the charged crime.

See also United States v. Walker, 673 F.3d 649 (7th Cir. 2012): (confidential informant's statements to the police — that he got guns from the defendant — were not properly offered for context but rather were testimonial hearsay: "The government repeatedly hides behind its asserted needs to provide 'context' and relate the 'course of investigation.' These euphemistic descriptions cannot disguise a ploy to pin the two guns on Walker while avoiding the risk of putting Ringswald on the stand. * * * A prosecutor surely knows that hearsay results when he elicits from a government agent that 'the informant said he got this gun from X' as proof that X supplied the gun."); ***Jones v. Basinger,*** 635 F.3d 1030 (7th Cir. 2011) (accusation made to police was not offered for background and therefore its admission violated the defendant's right to confrontation; the record showed that the government encouraged the jury to use the statements for their truth).

Note: *Adams, Walker* and *Jones* are all examples of illegitimate use of not-for-truth purposes and so finding a Confrontation violation in these cases is quite consistent with the analysis of not-for-truth purposes in the Thomas and Kagan opinions in *Williams.*

Statements by confidential informant included in a search warrant were testimonial and could not be offered at trial to explain the police investigation: ***United States v. Holmes,*** 620 F.3d 836 (8th Cir. 2010): In a drug trial, the defendant tried to distance himself from a house where the drugs were found in a search pursuant to a warrant. On redirect of a government agent — after

defense counsel had questioned the connection of the defendant to the residence — the trial judge permitted the agent to read from the statement of a confidential informant. That statement indicated that the defendant was heavily involved in drug activity at the house. The government acknowledged that the informant's statements were testimonial, but argued that the statements were not hearsay, as they were offered only to show the officer's knowledge and the propriety of the investigation. But the court found the admission to be error. It noted that informants' statements are admissible to explain an investigation "only when the propriety of the investigation is at issue in the trial." In this case, the defendant did not challenge the validity of the search warrant and the propriety of the investigation was not disputed. The court stated that if the real purpose of admitting the evidence was to explain the officer's knowledge and the nature of the investigation, "a question asking whether someone had told him that he had seen Holmes at the residence would have addressed the issue * * * without the need to go into the damning details of what the CI told Officer Singh." ***Compare United States v. Brooks,*** 645 F.3d 971 (8th Cir. 2011) ("In this case, the statement at issue [a report by a confidential informant that Brooks was selling narcotics and firearms from a certain premises] was not offered to prove the truth of the matter asserted — that is, that Brooks was indeed a drug and firearms dealer. It was offered purely to explain why the officers were at the multi-family dwelling in the first place, which distinguishes this case from *Holmes.* In *Holmes,* it was undisputed that officers had a valid warrant. Accordingly less explanation was necessary. Here, the CI's information was necessary to explain why the officers went to the residence without a warrant and why they would be more interested in apprehending the man on the stairs than the man who fled the scene. Because the statement was offered only to show why the officers conducted their investigation in the way they did, the Confrontation Clause is not implicated here."). ***See also United States v. Shores,*** 700 F.3d 366 (8th Cir. 2012) (confidential informant's accusation made to police officer was properly offered to prove the propriety of the investigation: "From the early moments of the trial, it was clear that Shores would be premising his defense on the theory that he was a victim of government targeting.").

Accusatory statements offered to explain why an officer conducted an investigation in a certain way are not hearsay and therefore admission does not violate *Crawford: United States v. Brown,* 560 F.3d 754 (8th Cir. 2009): Challenging drug conspiracy convictions, one defendant argued that it was error for the trial court to admit an out-of-court statement from a shooting victim to a police officer. The victim accused a person named "Clean" who was accompanied by a man named Charmar. The officer who took this statement testified that he entered "Charmar" into a database to help identify "Clean" and the database search led him to the defendant. The court found no error in admitting the victim's statement, stating that "it is not hearsay when offered to explain why an officer conducted an investigation in a certain way." The defendant argued that the purported nonhearsay purpose for admitting the evidence "was only a subterfuge to get Williams' statement about Brown before the jury." But the court responded that the defendant "did not argue at trial that the prejudicial effect of the evidence outweighed its nonhearsay value." The court also observed that the trial court twice instructed the jury that the statement was admitted for the limited purpose of understanding why the officer searched the database for Charmar. Finally, the court held that

because the statement properly was not offered for its truth, "it does not implicate the confrontation clause."

Statement offered as foundation for good faith basis for asking question on cross-examination does not implicate *Crawford: United States v. Spears,* 533 F.3d 715 (8th Cir. 2008): In a bank robbery case, the defendant testified and was cross-examined and asked about her knowledge of prior bank robberies. In order to inquire about these bad acts, the government was required to establish to the court a good-faith basis for believing that the acts occurred. The government's good-faith basis was the confession of the defendant's associate to having taken part in the prior robberies. The defendant argued that the associate's statements, made to police officers, were testimonial. But the court held that *Crawford* was inapplicable because the associate's statements were not admitted for their truth — indeed they were not admitted at all. The court noted that there was "no authority for the proposition that use of an out-of-court testimonial statement merely as the good faith factual basis for relevant cross-examination of the defendant at trial implicates the Confrontation Clause."

> **Note: Query whether the fact that the underlying statements were never admitted into evidence would satisfy Justices Thomas and Kagan in *Williams* — they were unimpressed with the fact that the lab report in that case was never admitted into evidence. They were concerned with the fact that the truth of the report would have to be assumed for the purposes for which it was used by the expert. Relatedly, it would seem that in *Spears* one would have to presume the truth of the confession in order to be able to inquire into the bad act. Accordingly, the result in *Spears* seems questionable if the proper approach to applying *Williams* is to count heads. But as noted above, the courts in the immediate aftermath of *Williams* are mostly treating the Alito opinion — and its reliance on the fact that the report was never admitted into evidence — as controlling.**

Admitting testimonial statements that were part of a conversation with the defendant did not violate the Confrontation Clause because they were not offered for their truth: *United States v. Spencer,* 592 F.3d 866 (8th Cir. 2010): Affirming drug convictions, the court found no error in admitting tape recordings of a conversation between the defendant and a government informant. The defendant's statements were statements by a party-opponent and admitting the defendant's own statements cannot violate the Confrontation Clause. The informant's statements were not hearsay because they were admitted only to put the defendant's statements in context.

Statement offered to prove it was false is not hearsay and so did not violate the Confrontation Clause: *United States v. Yielding,* 657 F.3d 688 (8th Cir. 2011): In a fraud prosecution, the trial court admitted the statement of an accomplice to demonstrate that she used a false cover story when talking to the FBI. The court found no error, noting that "the point of the

prosecutor's introducing those statements was simply to prove that the statements were made so as to establish a foundation for later showing, through other admissible evidence, that they were false." The court found that the government introduced other evidence to show that the declarant's assertions that a transaction was a loan were false. The court cited *Bryant* for the proposition that because the statements were not hearsay, their admission did not violate the Confrontation Clause.

Statements not offered for truth do not violate the Confrontation Clause even if testimonial: *United States v. Faulkner,* 439 F.3d 1221 (10th Cir. 2006): The court stated that "it is clear from *Crawford* that the [Confrontation] Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement." ***See also United States v. Mitchell,*** 502 F.3d 931 (9th Cir. 2007) (information given by an eyewitness to a police officer was not offered for its truth but rather "as a basis" for the officer's action, and therefore its admission did not violate the Confrontation Clause).

Accomplice's confession, offered to explain a police officer's subsequent conduct, was not hearsay and therefore did not violate the Confrontation Clause: *United States v. Jiminez,* 564 F.3d 1280 (11th Cir. 2009): The court found no plain error in the admission of an accomplice's confession in the defendant's drug conspiracy trial. The police officer who had taken the accomplice's confession was cross-examined extensively about why he had repeatedly interviewed the defendant and about his decision not to obtain a written and signed confession from him. This cross-examination was designed to impeach the officer's credibility and suggest that he was lying about the circumstances of the interviews and about the defendant's confession. In explanation, the officer stated that he approached the defendant the way he did because the accomplice had given a detailed confession that was in conflict with what the defendant had said in prior interviews. The court held that in these circumstances, the accomplice's confession was properly admitted to explain the officer's motivations, and not for its truth. Accordingly its admission did not violate the Confrontation Clause, even though the statement was testimonial.

> **Note**: **The court assumed that the accomplice's confession was admitted for a proper, not-for-truth purpose, even though there was no such finding on the record, and the trial court never gave a limiting instruction. Part of the reason for this deference is that the court was operating under a plain error standard. The defendant at trial objected only on hearsay grounds, and this did not preserve any claim of error on confrontation clause grounds. The concurring judge noted, however, "that the better practice in this case would have been for the district court to have given an instruction as to the limited purpose of Detective Wharton's testimony" because "there is no assurance, and much doubt, that a typical jury, on its own, would recognize the limited nature of the evidence."**

See also United States v. Augustin, 661 F.3d 1105 (11th Cir. 2011) (no confrontation violation where declarant's statements "were not offered for the truth of the matters asserted, but rather to provide context for [the defendant's] own statements").

Present Sense Impression

911 call describing ongoing drug crime is admissible as a present sense impression and not testimonial under *Bryant*: United States v. Polidore, 690 F.3d 705 (5th Cir. 2012): In a drug trial, the defendant objected that a 911 call from a bystander to a drug transaction — together with answers to questions from the 911 operators— was testimonial and also admitted in violation of the rule against hearsay. On the hearsay question, the court found that the bystander's statements in the 911 call were admissible as present sense impressions, as they were made while the transaction was ongoing. As to testimoniality, the court held that the case was unlike the 911 call cases decided by the Supreme Court, as there was no ongoing emergency — rather the caller was simply recording that a crime was taking across the street, and no violent activity was occurring. But the court noted that under *Bryant* an ongoing emergency is relevant but not dispositive to whether statements about a crime are testimonial. Ultimately the court found that the caller's statements were not testimonial, reasoning as follows:

> [A]lthough the 911 caller appeared to have understood that his comments would start an investigation that could lead to a criminal prosecution, the primary purpose of his statements was to request police assistance in stopping an ongoing crime and to provide the police with the requisite information to achieve that objective. Like a statement made to resolve an ongoing emergency, the caller's "purpose [was] not to provide a solemn declaration for use at trial, but to bring to an end an ongoing [drug trafficking crime]," *Williams v. Illinois*, 132 S.Ct. 2221, 2243 (2012) (citing *Bryant*, 131 S.Ct. at 1155), even though the crime did not constitute an ongoing emergency. The 911 caller simply was not acting as a witness; he was not testifying. What he said was not a weaker substitute for live testimony at trial. In other words, the caller's statements were not ex parte communications that created evidentiary products that aligned perfectly with their courtroom analogues. No witness goes into court to report that a man is currently selling drugs out of his car and to ask the police to come and arrest the man while he still has the drugs in his possession. [most internal quotations and citations omitted].
>
> **Note: This case was decided after *Williams* (and cites *Williams*) but the court did not refer to the fight over the primary motive test in *Williams*. It appears, however, that the court's analysis comports with both versions of the primary motive test — the statement was targeted at a particular individual, but its primary motive was to get the police to respond to an ongoing crime rather than to prepare a statement for trial.**

Present sense impression, describing an event that occurred months before a crime, is not testimonial: *United States v. Danford,* 435 F.3d 682 (7th Cir. 2005): The defendant was convicted of insurance fraud after staging a fake robbery of his jewelry store. At trial, one of the employees testified to a statement made by the store manager, indicating that the defendant had asked the manager how to disarm the store alarm. The defendant argued that the store manager's statement was testimonial under *Crawford*, but the court disagreed. The court stated that "the conversation between [the witness] and the store manager is more akin to a casual remark than it is to testimony in the *Crawford*-sense. Accordingly, we hold that the district court did not err in admitting this testimony under Fed.R.Evid. 803(1), the present-sense impression exception to the hearsay rule."

Present-sense impressions of DEA agents during a buy-bust operation were safety-related and so not testimonial. *United States v. Solorio*, 669 F.3d 943 (9th Cir. 2012): Appealing from a conviction arising from a "buy-bust" operation, the defendant argued that hearsay statements of DEA agents at the scene — which were admitted as present sense impressions — were testimonial and so should have been excluded under *Crawford.* The court disagreed. It stated that the statements were made in order to communicate observations to other agents in the field and thus assure the success of the operation, "by assuring that all agents involved knew what was happening and enabling them to gauge their actions accordingly." Thus the statements were not testimonial because the primary purpose for making them was not to prepare a statement for trial but rather to assure that the arrest was successful and that the effort did not escalate into a dangerous situation. The court noted that the buy-bust operation "was a high-risk situation involving the exchange of a large amount of money and a substantial quantity of drugs" and also that the defendant was visibly wary of the situation.

> **Note: This case was decided before *Williams,* but it would appear to satisfy both the Alito and the Kagan version of the "primary motive" test. Both tests agree that a statement cannot be testimonial unless the primary motive for making it is to have it used in a criminal prosecution. The difference is that Justice Alito provides another qualification — the statement is testimonial only if it was made to be used in the *defendant's* criminal prosecution. In *Solorio* the first premise was not met — the statements were made for safety and coordination purposes, and not primarily for use in any criminal prosecution.**

Records, Certificates, Etc.

Reports on forensic testing by law enforcement are testimonial: *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009): In a drug case, the trial court admitted three "certificates of analysis" showing the results of the forensic tests performed on the seized substances. The

certificates stated that "the substance was found to contain: Cocaine." The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health. The Court, in a highly contentious 5-4 case, held that these certificates were "testimonial" under *Crawford* and therefore admitting them without a live witness violated the defendant's right to confrontation. The majority noted that affidavits prepared for litigation are within the core definition of "testimonial" statements. The majority also noted that the only reason the certificates were prepared was for use in litigation. It stated that "[w]e can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose — as stated in the relevant state-law provision — was reprinted on the affidavits themselves."

The implications of *Melendez-Diaz* — beyond requiring a live witness to testify to the results of forensic tests conducted primarily for litigation — are found in the parts of the majority opinion that address the dissent's arguments that the decision will lead to substantial practical difficulties. These implications are discussed in turn:

1. In a footnote, the majority declared in dictum that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records." Apparently these are more like traditional business records than records prepared primarily for litigation, though the question is close — the reason these records are maintained, with respect to forensic testing equipment, is so that the tests conducted can be admitted as reliable. At any rate, the footnote shows some flexibility, in that not every record involved in the forensic testing process will necessarily be found testimonial.

2. The dissent argued that forensic testers are not "accusatory" witnesses in the sense of preparing factual affidavits about the crime itself. But the majority rejected this distinction, declaring that the text of the Sixth Amendment "contemplates two classes of witnesses — those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. Contrary to respondent's assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." This statement raises questions about the reasoning of some lower courts that have admitted autopsy reports and other certificates after *Crawford* — these cases are discussed below.

3. Relatedly, the defendant argued that the affidavits at issue were nothing like the affidavits found problematic in the case of Sir Walter Raleigh. The Raleigh affidavits were a substitute for a witness testifying to critical historical facts about the crime. But the majority responded that while the ex parte affidavits in the Raleigh case were the paradigmatic confrontation concern, "the paradigmatic case identifies the core of the right to confrontation, not its limits. The right to confrontation was not invented in response to the use of the ex parte examinations in Raleigh's Case." Again, some lower courts after *Crawford* had distinguished between ministerial affidavits on collateral matters from Raleigh-type ex parte affidavits; this reasoning is in conflict with *Melendez-Diaz*.

4. The majority noted that cross-examining a forensic analyst may be necessary because "[a]t least some of that methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination." This implies that if the evidence is nothing but a machine print-out, it will not run afoul of the Confrontation Clause. As discussed earlier in this Outline, a number of courts have held that machine printouts are not hearsay at all — because a machine can't make a "statement" — and have also held that a machine's output is not "testimony" within the meaning of the Confrontation Clause. This case law appears to survive the Court's analysis in *Melendez-Diaz* — and the later cases of *Bullcoming* and *Williams* do not touch the question of machine evidence.

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

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

7. As counterpoint to the argument about prior practice allowing certificates authenticating records, the *Melendez-Diaz* majority cited a line of cases about affidavits offered to prove the *absence* of a public record.

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

This passage should probably be read to mean that any use of Rule 803(10) in a criminal case is prohibited. But the Court did find that a notice-and-demand provision would satisfy the Confrontation Clause because if, after notice, the defendant made no demand to produce, a waiver could properly be found. Accordingly, the Committee proposed an amendment to Rule 803(10) that added a notice-and-demand provision. That amendment was approved by the Judicial Conference and if all goes well it will become effective December 1, 2013.

Admission of a testimonial forensic certificate through the testimony of a witness with no personal knowledge of the testing violates the Confrontation Clause under *Melendez-Diaz: Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011): The Court reaffirmed the holding in *Melendez-Diaz* that certificates of forensic testing prepared for trial are testimonial, and held further that the Confrontation Clause was not satisfied when such a certificate was entered into evidence through the testimony of a person who was not involved with, and had no personal knowledge of, the testing procedure. Judge Ginsburg, writing for the Court, declared as follows:

> The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.

Lower Court Cases on Records and Certificates Decided Before Melendez-Diaz

Certification of business records under Rule 902(11) is not testimonial: *United States v. Adefehinti,* 519 F.3d 319 (D.C. Cir. 2007): The court held that a certification of business records under Rule 902(11) was not testimonial even though it was prepared for purposes of litigation. The court reasoned that because the underlying business records were not testimonial, it would make no sense to find the authenticating certificate testimonial. It also noted that Rule 902(11) provided a procedural device for challenging the trustworthiness of the underlying records: the proponent must give advance notice that it plans to offer evidence under Rule 902(11), in order to provide the opponent with a fair opportunity to challenge the certification and the underlying records. The court stated that in an appropriate case, "the challenge could presumably take the form of calling a certificate's signatory to the stand. So hedged, the Rule 902(11) process seems a far cry from the threat of *ex parte* testimony that *Crawford* saw as underlying, and in part defining, the Confrontation Clause." In this case, the Rule 902(11) certificates were used only to admit documents that were acceptable as business records under Rule 803(6), so there was no error in the certificate process.

Note: While 902(11) may still be viable after *Melendez-Diaz,* some of the rationales used by the *Adefehinti* court are now suspect. First, the *Melendez-Diaz* Court rejects the argument that the certificate is not testimonial just because the underlying records are nontestimonial. Second, the argument that the defendant can challenge the affidavit by calling the signatory is questionable because the *Melendez-Diaz* majority rejected the government's argument that any confrontation problem was solved by allowing the defendant to call the analyst. In response to that argument, Justice Scalia stated that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses."

The *Melendez-Diaz* Court held that the Confrontation Clause would not bar the government from imposing a basic notice-and-demand requirement on the defendant. That is, the state could require the defendant to give a pretrial notice of an intent to challenge the evidence, and only then would the government have to produce the witness. But while Rule 902(11) does have a notice and procedure, there is no provision for a demand for production of government production of a witness.

It can be argued that 902(11) is simply an authentication provision, and that the *Melendez-Diaz* majority stated, albeit in dicta, that certificates of authenticity are not testimonial. But the problem with that argument is that the certificate does more than establish the genuineness of the business record.

Despite all these concerns, the lower courts *after Melendez-Diaz* have rejected Confrontation Clause challenges to the use of Rule 902(11) to self-authenticate business records. See the cases discussed under the next heading — cases on records after *Melendez-Diaz*.

Warrant of deportation is not testimonial: ***United States v. Garcia***, 452 F.3d 36 (1st Cir. 2006): In an illegal reentry case, the defendant argued that his confrontation rights were violated by the admission of a warrant of deportation. The court disagreed, finding that the warrant was not testimonial under *Crawford*. The court noted that every circuit considering the matter has held "that defendants have no right to confront and cross-examine the agents who routinely record warrants of deportation" because such officers have no motivation to do anything other than "mechanically register an unambiguous factual matter."

Note: Other circuits before Melendez-Diaz reached the same result on warrants of deportation. See, e.g., United States v. Valdez-Matos, 443 F.3d 910 (5th Cir. 2006) (warrant of deportation is non-testimonial because "the official preparing the warrant had no motivation other than mechanically register an unambiguous factual matter"); ***United States v. Torres-Villalobos,*** 487 F.3d 607 (8th Cir. 2007) (noting that warrants of deportation "are produced under circumstances objectively indicating that their primary purpose is to maintain records concerning the movements of aliens and to ensure compliance with orders of deportation, not to prove facts for use in future criminal prosecutions."); ***United States v. Bahena-Cardenas,*** 411 F.3d 1067 (9th Cir. 2005) (a warrant of deportation is non-testimonial "because it was not made in anticipation of litigation, and because it is simply a routine, objective, cataloging of an unambiguous factual matter."); ***United States v. Cantellano,*** 430 F.3d 1142 (11th Cir. 2005) (noting that a warrant of deportation s recorded routinely and not in preparation for a criminal trial").

Note: Warrants of deportation still satisfy the Confrontation Clause after *Melendez-Diaz*. Unlike the forensic analysis in that case, a warrant of deportation is prepared for regulatory purposes and is clearly not prepared for the illegal reentry litigation, because by definition the crime has not been committed at the time it's prepared. As seen below, post-*Melendez-Diaz* courts have found warrants of deportation to be non-testimonial. And as seen in Part One above, the courts after *Williams* have found similar records to be non-testimonial, i.e., records prepared before a crime occurred, such as notices of license suspension and certificates of service of an order of protection.

Proof of absence of business records is not testimonial: ***United States v. Munoz-Franco,*** 487 F.3d 25 (1st Cir. 2007): In a prosecution for bank fraud and conspiracy, the trial court admitted

the minutes of the Board and Executive Committee of the Bank. The defendants did not challenge the admissibility of the minutes as business records, but argued that it was constitutional error to allow the government to rely on the absence of certain information in the minutes to prove that the Board was not informed about such matters. The court rejected the defendants' confrontation argument in the following passage:

> The Court in *Crawford* plainly characterizes business records as "statements that by their nature [are] not testimonial." 541 U.S. at 56. If business records are nontestimonial, it follows that the absence of information from those records must also be nontestimonial.
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> **Note: This analysis appears unaffected by *Melendez-Diaz,* as no certificate or affidavit is involved and the record itself was not prepared for litigation purposes.**

Autopsy report found not testimonial: *United States v. Feliz,* 467 F.3d 227 (2d Cir. 2006): Affirming racketeering convictions, the court found no error in the admission of autopsy reports offered to prove the manner and the cause of death of nine victims. The court held that the autopsy reports were properly admitted as both business records under Rule 803(6) and as public records under Rule 803(8). The court concluded that to be admissible under either of these exceptions, the record could not be testimonial within the meaning of *Crawford*. Put another way, the court declared that if a record were testimonial, it could not by definition meet the admissibility requirements of either exception. With respect to business records, the court noted that Rule 803(6) cannot be used to admit a record that is prepared primarily for purposes of litigation. So by definition to be admissible under Rule 803(6) the record cannot be testimonial within the meaning of *Crawford* and *Davis*. The court recognized that a medical examiner may anticipate that an autopsy report might later on be used in a criminal case. But the court stated that mere anticipation of use in litigation was not enough to make the record testimonial. It noted that the Supreme Court had not embraced such a broad definition of "testimonial" but rather defines testimonial as requiring a "primary motivation" for use in litigation. With respect to Rule 803(8), the court observed that the rule "excludes documents prepared for the ultimate purpose of litigation, just as does Rule 803(6)." The court also reasoned that an extreme application of the term "testimonial" would impose unnecessary burdens on the government without a corresponding gain in the truth-seeking process. The court noted the "practical difficulties" of proving cause and manner of death if the report is found inadmissible:

> Years may pass between the performance of the autopsy and the apprehension of the perpetrator. This passage of time can easily lead to the unavailability of the examiner who prepared the report. Moreover, medical examiners who regularly perform hundreds of autopsies are unlikely to have any independent recollection of the autopsy at issue in a particular case and in testifying invariably rely entirely on the autopsy report. Unlike other forensic tests, an autopsy cannot be replicated by another pathologist. Certainly it would be against society's interest to permit the unavailability of the medical examiner who prepared the report to preclude the prosecution of a homicide case.

Note: The court's emphasis on a practical result is problematic under the majority's analysis in *Melendez-Diaz.* The dissenters in *Melendez-Diaz* argued vehemently that requiring live testimony of the analyst would be impractical and would impose substantial and sometimes insurmountable obligations on the government. The majority's response was that it had no authority to consider burdens, because the certificate was testimonial and admission of testimonial hearsay in the absence of cross-examination violates the Confrontation Clause.

This does not mean, however, that autopsy reports are automatically testimonial after *Melendez-Diaz.* The forensic report in *Melendez-Diaz* was prepared *solely* for litigation and so fit squarely within the Court's definition of "testimonial." Under *Davis*, it is not enough that a report might foreseeably be used in a litigation — use in litigation has to be the *primary purpose* of the report. Under that test, a good argument can still be made that many autopsy reports are not testimonial. The question is likely to turn upon the degree of law enforcement involvement in the preparation of the autopsy report — that appears to be the focus of the autopsy report cases issued after *Melendez-Diaz* (those cases are discussed below).

See also the post-*Williams* state cases on autopsy reports discussed above, all of which have found the reports to be non-testimonial because they are prepared for other purposes in addition to use at a criminal trial. *And see Vega v. Walsh,* 669 F.3d 123 (2nd Cir. 2012) (in a habeas case, state court's determination that autopsy report was not testimonial was not an unreasonable application of federal law: "although autopsies are often used in criminal prosecutions, they are also prepared for numerous other reasons-including the determination of cause of death when there is no anticipation of use of the autopsy in any kind of court proceeding").

Business records are not testimonial: *United States v. Jamieson,* 427 F.3d 394 (6th Cir. 2005): In a prosecution involving fraudulent sale of insurance policies, the government admitted summary evidence under Rule 1006. The underlying records were essentially business records. The court found that admitting the summaries did not violate the defendant's right to confrontation. The underlying records were not testimonial under *Crawford* because they did not "resemble the formal statement or solemn declaration identified as testimony by the Supreme Court." ***See also United States v. Baker,*** 458 F.3d 513 (6th Cir. 2006) ("The government correctly points out that business records are not testimonial and therefore do not implicate the Confrontation Clause concerns of *Crawford*.").

Note: The court's analysis of business records appears unaffected by *Melendez-Diaz,* because the records were not prepared primarily for litigation and no certificate or affidavit was prepared for use in the litigation.

Post office box records are not testimonial: ***United States v. Vasilakos***, 508 F.3d 401 (6th Cir. 2007): The defendants were convicted of defrauding their employer, an insurance company, by setting up fictitious accounts into which they directed unearned commissions. The checks for the commissions were sent to post office boxes maintained by the defendants. The defendants argued that admitting the post office box records at trial violated their right to confrontation. But the court held that the government established proper foundation for the records through the testimony of a postal inspector, and that the records were therefore admissible as business records; the court noted that "the Supreme Court specifically characterizes business records as non-testimonial."

Note: The court's analysis of business records is unaffected by *Melendez-Diaz.*

Drug test prepared by a hospital with knowledge of possible use in litigation is not testimonial; certification of that business record under Rule 902(11) is not testimonial: ***United States v. Ellis,*** 460 F.3d 920 (7th Cir. 2006): In a trial for felon gun possession, the trial court admitted the results of a drug test conducted on the defendant's blood and urine after he was arrested. The test was conducted by a hospital employee named Kristy, and indicated a positive result for methamphetamine. At trial, the hospital record was admitted without a qualifying witness; instead, a qualified witness prepared a certification of authenticity under Rule 902(11). The court held that neither the hospital record nor the certification were testimonial within the meaning of *Crawford* and *Davis* — despite the fact that both records were prepared with the knowledge that they were going to be used in a prosecution.

As to the medical reports, the *Ellis* court concluded as follows:

> While the medical professionals in this case might have thought their observations would end up as evidence in a criminal prosecution, the objective circumstances of this case indicate that their observations and statements introduced at trial were made in nothing else but the ordinary course of business. * * * They were employees simply recording observations which, because they were made in the ordinary course of business, are "statements that by their nature were not testimonial." *Crawford*, 541 U.S. at 56.

Note: *Ellis* is cited by the dissent in *Melendez-Diaz* (not a good thing for its continued viability), and the circumstances of preparing the toxic screen in *Ellis* are certainly similar to those in *Melendez-Diaz.* That said, toxicology tests conducted by *private* organizations may be found nontestimonial if it can be shown that law enforcement was not involved in or managing the testing. The *Melendez-Diaz* majority emphasized that the forensic analyst knew that the test was being done for a prosecution, as that information was right on the form. Essentially, after *Melendez-Diaz,* the less the tester knows about the use of the test, and the less involvement by the government, the better for admissibility. Primary motive for use in a prosecution is obviously less likely to be found if the tester is a private organization.

As to the certification of business record, prepared under Rule 902(11) specifically to qualify the medical records in this prosecution, the *Ellis* court similarly found that it was not testimonial because the records that were certified were prepared in the ordinary course, and the certifications were essentially ministerial. The court explained as follows:

> As should be clear, we do not find as controlling the fact that a certification of authenticity under 902(11) is made in anticipation of litigation. What is compelling is that *Crawford* expressly identified business records as nontestimonial evidence. Given the records themselves do not fall within the constitutional guarantee provided by the Confrontation Clause, it would be odd to hold that the foundational evidence authenticating the records do. We also find support in the decisions holding that a CNR is nontestimonial. A CNR is quite like a certification under 902(11); it is a signed affidavit attesting that the signatory had performed a diligent records search for any evidence that the defendant had been granted permission to enter the United States after deportation.
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> The certification at issue in this case is nothing more than the custodian of records at the local hospital attesting that the submitted documents are actually records kept in the ordinary course of business at the hospital. The statements do not purport to convey information about Ellis, but merely establish the existence of the procedures necessary to create a business record. They are made by the custodian of records, an employee of the business, as part of her job. As such, we hold that written certification entered into evidence pursuant to Rule 902(11) is nontestimonial just as the underlying business records are. Both of these pieces of evidence are too far removed from the "principal evil at which the Confrontation Clause was directed" to be considered testimonial.
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> **Note: As discussed in the treatment of *Melendez-Diaz* earlier in this outline, the fact that the certificate conveys no personal information about Ellis is not dispositive, because the information imparted is being used against Ellis. Moreover, the certificate is prepared exclusively for use in litigation. On the other hand, as discussed above, Rule 902(11) might well be upheld as a rule simply permitting the authentication of a record.**
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> **Note: Two circuits have held that the reasoning of *Ellis* remains sound after *Melendez-Diaz,* and that 902(11) certificates are not testimonial. *See United States v. Yeley-Davis,*** 632 F.3d 673 (10th Cir. 2011), and ***United States v. Johnson***, 688 F.3d 494 (8th Cir. 2012), both infra.

Odometer statements, prepared before any crime of odometer-tampering occurred, are not testimonial: *United States v. Gilbertson,* 435 F.3d 790 (7th Cir. 2006): In a prosecution for odometer-tampering, the government proved its case by introducing the odometer statements prepared when the cars were sold to the defendant, and then calling the buyers to testify that the mileage on the odometers when they bought their cars was substantially less than the mileage set forth on the odometer statements. The defendant argued that introducing the odometer statements

violated *Crawford*. He contended that the odometer statements were essentially formal affidavits, the very kind of evidence that most concerned the Court in *Crawford*. But the court held that the concern in *Crawford* was limited to affidavits prepared for trial as a testimonial substitute. This concern did not apply to the odometer statements. The court explained as follows:

> The odometer statements in the instant case are not testimonial because they were not made with the respective declarants having an eye towards criminal prosecution. The statements were not initiated by the government in the hope of later using them against Gilbertson (or anyone else), nor could the declarants (or any reasonable person) have had such a belief. The reason is simple: each declaration was made *prior* to Gilbertson even engaging in the crime. Therefore, there is no way for the sellers to anticipate that their statements regarding the mileage on the individual cars would be used as evidence against Gilbertson for a crime he commits in the future.
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> **Note: this result is unaffected by *Melendez-Diaz* as the records clearly were not prepared for purposes of litigation — the crime had not occurred at the time the records were prepared.**

Tax returns are business records and so not testimonial: *United States v. Garth,* 540 F.3d 766 (8th Cir. 2008): The defendant was accused of assisting tax filers to file false claims. The defendant argued that the her right to confrontation was violated when the trial court admitted some tax returns of the filers. But the court found no error. The tax returns were business records, and the defendant made no argument that they were prepared for litigation, "as is expected of testimonial evidence."

Note: this result is unaffected by *Melendez-Diaz.*

Certificate of a record of a conviction found not testimonial: *United States v. Weiland,* 420 F.3d 1062 (9th Cir. 2006): The court held that a certificate of a record of conviction prepared by a public official was not testimonial under *Crawford*: "Not only are such certifications a 'routine cataloguing of an unambiguous factual matter,' but requiring the records custodians and other officials from the various states and municipalities to make themselves available for cross-examination in the countless criminal cases heard each day in our country would present a serious logistical challenge without any apparent gain in the truth-seeking process. We decline to so extend *Crawford*, or to interpret it to apply so broadly."

> ***Note:*** **The reliance on burdens in countless criminal cases is precisely the argument that was rejected in *Melendez-Diaz.* Nonetheless, certificates of conviction may still be found non-testimonial, because the *Melendez-Diaz* majority states, albeit in dicta, that a certificate is not testimonial if it does nothing more than authenticate another document.**

Absence of records in database is not testimonial; and drug ledger is not testimonial: ***United States v. Mendez,*** 514 F.3d 1035 (10th Cir. 2008): In an illegal entry case, an agent testified that he searched the ICE database for information indicating that the defendant entered the country legally, and found no such information. The ICE database is "a nation-wide database of information which archives records of entry documents, such as permanent resident cards, border crossing cards, or certificates of naturalization." The defendant argued that the entries into the database (or the asserted lack of entries in this case) were testimonial. But the court disagreed, because the records "are not prepared for litigation or prosecution, but rather administrative and regulatory purposes." The court also observed that Rule 803(8) tracked *Crawford* exactly: a public record is admissible under Rule 803(8) unless it is prepared with an eye toward litigation or prosecution; and under *Crawford*, "the very same characteristics that preclude a statement from being classified as a public record are likely to render the statement testimonial."

Mendez also involved drug charges, and the defendant argued that admitting a drug ledger with his name on it violated his right to confrontation under *Crawford.* The court also rejected this argument. It stated first that the entries in the ledger were not hearsay at all, because they were offered to show that the book was a drug ledger and thus a "tool of the trade." As the entries were not offered for truth, their admission could not violate the Confrontation Clause. But the court further held that even if the entries were offered for truth, they were not testimonial, because "[a]t no point did the author keep the drug ledger for the *primary purpose* of aiding police in a criminal investigation, the focus of the *Davis* inquiry." (emphasis the court's). The court noted that it was not enough that the statements were relevant to a criminal prosecution, otherwise "any piece of evidence which aids the prosecution would be testimonial."

> **Note: Both holdings in the above case survive *Melendez-Diaz.* The first holding is about the absence of public records — records that were not prepared in testimonial circumstances. If that absence had been proved by a *certificate,* then the Confrontation Clause, after *Melendez-Diaz,* would have been violated. But the absence was proved by a testifying agent. The second holding states the accepted proposition that business records admissible under Rule 803(6) are, for that reason, non-testimonial. Drug ledgers in particular are absolutely not prepared for purposes of litigation.**

Lower Court Cases on Records and Certificates After Melendez-Diaz

Letter describing results of a search of court records is testimonial after *Melendez-Diaz: United States v. Smith,* 640 F.3d 358 (D.C. Cir. 2011): To prove a felony in a felon firearm case, the government admitted a letter from a court clerk stating that "it appears from an examination of the files in this office" that Smith had been convicted of a felony. Each letter had a seal and a signature by a court clerk. The court found that the letters were testimonial. The clerk did not merely authenticate a record, rather he created a record of the search he conducted. The letters were clearly prepared in anticipation of litigation — they "respond[ed] to a prosecutor's question with an answer."

> **Note: The analysis in *Smith* provides more indication that certificates of the absence of a record are testimonial after *Melendez-Diaz.* The clerk's letters in *Smith* are exactly like a CNR; the only difference is that they report on the presence of a record rather than an absence.**
>
> **Note: The case also highlights the question of whether a certificate qualifying a business record under Rule 902(11) is testimonial under *Melendez-Diaz.* The letters did not come within the narrow "authentication" exception recognized by the *Melendez-Diaz* Court because they provided "an interpretation of what the record contains or shows." Arguably 902(11) certificates do just that. But because the only Circuit Court cases on the specific subject of Rule 902(11) certificates find that they are *not* testimonial, there is certainly no call at this point to propose an amendment to Rule 902(11).**

Autopsy reports generated through law enforcement involvement found testimonial after *Melendez-Diaz: United States v. Moore,* 651 F.3d 30 (D.C. Cir. 2011): The court found autopsy reports to be testimonial. The court emphasized the involvement of law enforcement in the generation of the autopsy reports admitted in this case:

> The Office of the Medical Examiner is required by D.C.Code § 5–1405(b)(11) to investigate "[d]eaths for which the Metropolitan Police Department ["MPD"], or other law enforcement agency, or the United States Attorney's Office requests, or a court orders investigation." The autopsy reports do not indicate whether such requests were made in the instant case but the record shows that MPD homicide detectives and officers from the Mobile Crimes Unit were present at several autopsies. Another autopsy report was supplemented with diagrams containing the notation: "Mobile crime diagram (not [Medical Examiner]—use for info only)." Still another report included a "Supervisor's Review Record" from the MPD Criminal Investigations Division commenting: "Should have indictment re John Raynor for this murder." Law enforcement officers thus not only observed the autopsies, a fact that would have signaled to the medical examiner that the autopsy might bear on a criminal investigation, they participated in the creation of reports. Furthermore, the autopsy reports were formalized in signed documents titled "reports."

> These factors, combined with the fact that each autopsy found the manner of death to be a homicide caused by gunshot wounds, are "circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Melendez–Diaz*, 129 S.Ct. at 2532 (citation and quotation marks omitted).

In a footnote, the court emphasized that it was *not* holding that all autopsy reports are testimonial:

> Certain duties imposed by the D.C.Code on the Office of the Medical Examiner demonstrate, the government suggests, that autopsy reports are business records not made for the purpose of litigation. It is unnecessary to decide as a categorical matter whether autopsy reports are testimonial, and, in any event, it is doubtful that such an approach would comport with Supreme Court precedent. See *Melendez–Diaz*, 129 S.Ct. at 2532; cf. *Michigan v. Bryant*, —— U.S. ——, 131 S.Ct. 1143, 1155–56, 179 L.Ed.2d 93 (2011).

Finally, the court rejected the government's argument that there was no error because the expert witness simply relied on the autopsy reports in giving independent testimony. In this case, the autopsy reports were clearly entered into evidence.

State court did not unreasonably apply federal law in admitting autopsy report as non-testimonial: *Nardi v. Pepe,* 662 F.3d 107 (1st Cir. 2011): The court affirmed the denial of a habeas petition, concluding that the state court did not unreasonably apply federal law in admitting an autopsy report as non-testimonial. The court reasoned as follows:

> Abstractly, an autopsy report can be distinguished from, or assimilated to, the sworn documents in *Melendez–Diaz* and *Bullcoming*, and it is uncertain how the Court would resolve the question. We treated such reports as not covered by the Confrontation Clause, *United States v. De La Cruz*, 514 F.3d 121, 133–34 (1st Cir.2008), but the law has continued to evolve and no one can be certain just what the Supreme Court would say about that issue today. However, our concern here is with "clearly established" law when the SJC acted. * * * That close decisions in the later Supreme Court cases extended *Crawford* to new situations hardly shows the outcomes were clearly preordained. And, even now it is uncertain whether, under its primary purpose test, the Supreme Court would classify autopsy reports as testimonial.

Immigration interview form was not testimonial: *United States v. Phoeun Lang,* 672 F.3d 17 (1st Cir. 2012): The defendant was convicted of making false statements and unlawfully applying for and obtaining a certificate of naturalization. The defendant argued that his right to confrontation was violated because the immigration form (N-445) on which he purportedly lied contained verification checkmarks next to his false responses — thus the contention was that the verification checkmarks were testimonial hearsay of the immigration agent who conducted the interview. But

the court found no error. The court concluded that the form was not "primarily to be used in court proceedings." Rather it was a record prepared as "a matter of administrative routine, for the primary purpose of determining Lang's eligibility for naturalization." For essentially the same reasons, the court held that the form was admissible under Rule 803(8)(A)(ii) despite the fact that the rule appears to exclude law enforcement reports. The court distinguished between "documents produced in an adversarial setting and those produced in a routine non-adversarial setting for purposes of Rule 803(8)(A)(ii)." The court relied on the passage in *Melendez-Diaz* which declared that the test for admissibility or inadmissibility under Rule 803(8) was the same as the test of testimoniality under the Confrontation Clause, i.e., whether the primary motive for preparing the record was for use in a criminal prosecution.

Note: This case was decided before *Williams,* but it would appear to satisfy both the Alito and the Kagan version of the "primary motive" test. Both tests agree that a statement cannot be testimonial unless the primary motive for making it is to have it used in a criminal prosecution. The difference is that Justice Alito provides another qualification — the statement is testimonial only if it was made to be used in the *defendant's* criminal prosecution. In *Phoeun Lang* the first premise was not met — the statements were made for administrative purposes, and not primarily for use in any criminal prosecution.

Certain records of internet activity sent to law enforcement found testimonial: *United States v. Cameron*, 699 F.3d 621 (1st Cir. 2012): In a child pornography prosecution, the court held that admission of certain business records violated the defendant's right to Confrontation Clause. The evidence principally at issue related to accounts with Yahoo. Yahoo received an anonymous report that child pornography images were contained in a Yahoo account. Yahoo sent a report—called a "CP Report" — to the National Center for Missing and Exploited Children (NCMEC) listing the images being sent with the report, attaching the images, and listing the date and time at which the image was uploaded and the IP Address from which it was uploaded. NCMEC in turn sent a report of child pornography to the Maine State Police Internet Crimes Against Children Unit (ICAC), which obtained a search warrant for the defendant's computers. The government introduced testimony of a Yahoo employee as to how certain records were kept and maintained by the company, but the government did not introduce the Image Upload Data indicating the date and time each image was uploaded to the Internet. The government also introduced testimony by a NCMEC employee explaining how NCMEC handled tips regarding child pornography. The court held that admission of various data collected by Yahoo and Google automatically in order to further their business purposes was proper, because the data was contained in business records and was not testimonial for Sixth Amendment purposes. The court held, 2-1, that the reports Yahoo prepared and sent to NCMEC were different and were testimonial because there was strong evidence that the primary purpose of the reports was to prove past events that were potentially relevant to a criminal prosecution. The court relied on the following considerations to conclude that the CP Reports were testimonial: 1) they referred to a "suspect" screen name, email address, and IP address — and Yahoo did not treat its customers as "suspects" in the ordinary course of its business; 2) before a CP Report

is created, someone in the legal department at Yahoo has to determine that an account contained child pornography images; 3) Yahoo did not simply keep the reports but sent them to NCMEC, which was under the circumstances an agent of law enforcement, because it received a government grant to accept reports of child pornography and forward them to law enforcement. The government argued that Confrontation was not at issue because the CP Reports contained business records that were unquestionably nontestimonial, such as records of users' IP addresses. But the court responded that the CP Reports were themselves statements. The court noted that "[i]f the CP Reports simply consisted of the raw underlying records, or perhaps underlying records arranged and formatted in a reasonable way for presentation purposes, the Reports might well have been admissible."

The government also argued that the CP Reports were not testimonial under the Alito definition of primary motive in *Williams*. Like the DNA reports in *Williams*, the CP Reports were prepared at a time when the perpetrator was unknown and so they were not targeted toward a particular individual. The court distinguished *Williams* by relying on a statement in the Alito opinion that at the time of the DNA report, the technicians had "no way of knowing whether it will turn out to be incriminating or exonerating." In contrast, when the CP Reports were prepared, Yahoo personnel knew that they were incriminating: "Yahoo's employees may not have known *whom* a given CP Report might incriminate, but they almost certainly were aware that a Report would incriminate *somebody."*

Finally, the court held that the NCMEC reports sent to the police were testimonial, because they were statements independent of the CP Reports, and they were sent to law enforcement for the primary purpose of using them in a criminal prosecution. One judge, dissenting in part, argued that the connection between an identified user name, the associated IP address, and the digital images archived from that user's account all existed well before Yahoo got the anonymous tip, were an essential part of the service that Yahoo provided, and thus were ordinary business records that were not testimonial.

> **Note: *Cameron* does not explicitly hold that business records admissible under Rule 803(6) can be testimonial under *Crawford.* The court notes that under *Palmer v. Hoffman*, 318 U.S. 109 (1943), records are not admissible as business records when they are calculated for use in court. *Palmer* is still good law under Rule 803(6), as the Court recognized in *Melendez-Diaz.* The *Cameron* court noted that the Yahoo reports were subject to the same infirmity as the records found inadmissible in *Hoffman:* they were not made for business purposes, but rather for purposes of litigation.**
>
> **It should also be noted that the Court's attempt to distinguish the Alito primary motive test is weak. The court relies on one sentence in Justice Alito's analysis, but the gravamen of that analysis is that there was no primary motive because the lab was not targeting a known individual. That is the same with the Yahoo CP reports.**

Business records are not testimonial: *United States v. Bansal,* 663 F.3d 634 (3rd Cir. 2011): In a prosecution related to a controlled substance distribution operation, the trial court

admitted records kept by domestic and foreign businesses of various transactions. The court rejected the claim that the records were testimonial, stating that "the statements in the records here were made for the purpose of documenting business activity, like car sales and account balances, and not for providing evidence to law enforcement or a jury."

Admission of purported drug ledgers violated the defendant's confrontation rights where the proof of authenticity was the fact that they were produced by an accomplice at a proffer session: *United States v. Jackson,* 625 F.3d 875 (5th Cir. 2010), amended 636 F.3d 687 (5th Cir. 2011): In a drug prosecution, purported drug ledgers were offered to prove the defendant's participation in drug transactions. An officer sought to authenticate the ledgers as business records but the court found that he was not a "qualified witness" under Rule 803(6) because he had no knowledge that the ledgers came from any drug operation associated with the defendant. The court found that the only adequate basis of authentication was the fact that the defendant's accomplice had produced the ledgers at a proffer session with the government. But because the production at the proffer session was unquestionably a testimonial statement — and because the accomplice was not produced to testify — admission of the ledger against the defendant violated his right to confrontation under *Crawford.*

> ***Note:*** **The *Jackson* court does *not* hold that business records are testimonial. The reasoning is muddled, but the best way to understand it is that the evidence used to *authenticate* the business record — the cohort's production of the records at a proffer session — was testimonial.**

Records of sales at a pharmacy are business records and not testimonial under *Melendez-Diaz: United States v. Mashek,* 606 F.3d 922 (8th Cir. 2010): The defendant was convicted of attempt to manufacture methamphetamine. At trial the court admitted logbooks from local pharmacies to prove that the defendant made frequent purchases of pseudoephedrine. The defendant argued that the logbooks were testimonial under *Melendez-Diaz,* but the court disagreed and affirmed his conviction. The court first noted that the defendant probably waived his confrontation argument because at trial he objected only on the evidentiary grounds of hearsay and Rule 403. But even assuming the defendant preserved his confrontation argument, "*Melendez-Diaz* does not provide him any relief. The pseudoephedrine logs were kept in the ordinary course of business pursuant to Iowa law and are business records under Federal Rule of Evidence 803(6). Business records under Rule 803(6) are not testimonial statements; *see Melendez-Diaz,* 129 S.Ct. At 2539-40 (explaining that business records are typically not testimonial))." ***Accord, United States v. Ali,*** 616 F.3d 745 (8th Cir. 2010) (business records prepared by financial services company, offered as proof that tax returns were false, were not testimonial, as "*Melendez-Diaz* does not apply to the HSBC records that were kept in the ordinary course of business.").

Rule 902(11) authentication was not testimonial: *United States v. Thompson,* 686 F.3d 575 (8th Cir. 2012): To prove unexplained wealth in a drug case, the government offered and the

court admitted a record from the Iowa Workforce Development Agency showing no reported wages for Thompson's social security number during 2009 and 2010. The record was admitted through an affidavit of self-authentication offered pursuant to Rule 902(11). The court found that the earnings records themselves were non-testimonial because they were prepared for administrative purposes. As to the exhibit itself, the court stated that "[b]ecause the IWDA record itself was not created for the purpose of establishing or proving some fact at trial, admission of a certified copy of that record did not violate Thompson's Confrontation Clause rights." The court emphasized that "[b]oth the majority and dissenting opinions in *Melendez–Diaz* noted that a clerk's certificate authenticating a record—or a copy thereof—for use as evidence was traditionally admissible even though the certificate itself was testimonial, having been prepared for use at trial." It concluded that "[t]o the extent Thompson contends that a copy of an existing record or a printout of an electronic record constitutes a testimonial statement that is distinguishable from the non-testimonial statement inherent in the original business record itself, we reject this argument." ***See also United States v. Johnson***, 688 F.3d 494 (8th Cir. 2012) (certificates of authenticity presented under Rule 902(11) are not testimonial, and the notations on the lab report by the technician indicating when she checked the samples into and out of the lab did not raise a confrontation question because they were offered only to establish a chain of custody and not to prove the truth of any matter asserted).

Prior conviction in which the defendant did not have the opportunity to cross-examine witnesses cannot be used in a subsequent trial to prove the facts underlying the conviction: *United States v. Causevic,* 636 F.3d 998 (8th Cir. 2011): The defendant was charged with making materially false statements in an immigration matter — specifically that he lied about committing a murder in Bosnia. To prove the lie at trial, the government offered a Bosnian judgment indicating that the defendant was convicted in absentia of the murder. The court held that the judgment was testimonial to prove the underlying facts, and there was no showing that the defendant had the opportunity to cross-examine the witnesses in the Bosnian court. The court distinguished proof of the *fact* of a conviction being entered (such as in a felon-firearm prosecution), as in that situation the public record is prepared for recordkeeping and not for a trial. In contrast the factual findings supporting the judgment were obviously generated for purposes of a criminal prosecution.

> **Note: The statements of facts underlying the prior conviction are testimonial under both versions of the primary motive test contested in *Williams.* They meet the Kagan test because they were obviously prepared for purpose of — indeed as part of — a criminal prosecution. And they meet the Alito proviso because they targeted the specific defendant against whom they were used at trial.**

Affidavit that birth certificate existed was testimonial: *United States v. Bustamante,* 687 F.3d 1190 (9th Cir. 2012): The defendant was charged with illegal entry and the dispute was whether he was a United States citizen. The government contended that he was a citizen of the Philippines but could not produce a birth certificate, as the records had been degraded and were poorly kept. Instead it produced an affidavit from an official who searched birth records in the Phillipines as part of the investigation into the defendant's citizenship by the Air Force 30 years earlier. The affidavit

stated that birth records indicated that the defendant was born in the Philippines and the affidavit purported to transcribe the information from the records. The court held that the affidavit was testimonial under *Melendez-Diaz* and reversed the conviction. The court distinguished this case from cases finding that birth records and certificates of authentication are not testimonial:

> Our holding today does not question the general proposition that birth certificates, and official duplicates of them, are ordinary public records "created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial." *Melendez–Diaz*, 129 S.Ct. at 2539–40. But Exhibit 1 is not a copy or duplicate of a birth certificate. Like the certificates of analysis at issue in Melendez–Diaz, despite being labeled a copy of the certificate, Exhibit 1 is "quite plainly" an affidavit. It is a typewritten document in which Salupisa testifies that he has gone to the birth records of the City of Bacolod, looked up the information on Napoleon Bustamante, and summarized that information at the request of the U.S. government for the purpose of its investigation into Bustamante's citizenship. Rather than simply authenticating an existing non-testimonial record, Salupisa created a new record for the purpose of providing evidence against Bustamante. The admission of Exhibit 1 without an opportunity for cross examination therefore violated the Sixth Amendment.

Government concedes a *Melendez-Diaz* error in admitting affidavit on the absence of a public record: *United States v. Norwood,* 603 F.3d 1063 (9th Cir. 2010): In a drug case, the government sought to prove that the defendant had no legal source for the large amounts of cash found in his car. The trial court admitted an affidavit of an employee of the Washington Department of Employment Security, which certified that a diligent search failed to disclose any record of wages reported for the defendant in a three-month period before the crime. On appeal, the government conceded that the affidavit was erroneously admitted in light of the intervening decision in *Melendez-Diaz.* (The court found the error to be harmless).

CNR is testimonial but a warrant of deportation is not: *United States v. Orozco-Acosta,* 607 F.3d 1156 (9th Cir. 2010): In an illegal reentry case, the government proved removal by introducing a warrant of deportation under Rule 803(8), and it proved unpermitted reentry by introducing a certificate of non-existence of permission to reenter (CNR) under Rule 803(10). The trial was conducted and the defendant convicted before *Melendez-Diaz.* On appeal, the government conceded that introducing the CNR violated the defendant's right to confrontation because under *Melendez-Diaz* the record is testimonial. The court in a footnote agreed with the government's concession, stating that its previous cases holding that CNRs were not testimonial were "clearly inconsistent with *Melendez-Diaz*" because like the certificates in that case, a CNR is prepared solely for purposes of litigation. In contrast, however, the court found that the warrant of deportation was properly admitted even under *Melendez-Diaz.* The court reasoned that "neither a warrant of removal's sole purpose nor even its primary purpose is use at trial." It explained that a warrant of removal must be prepared in every case resulting in a final order of removal, and only a "small fraction of these warrants are used in immigration prosecutions." The court concluded that "*Melendez-Diaz* cannot be read to establish that the mere possibility that a warrant of removal —

or, for that matter, any business or public record — could be used in a later criminal prosecution renders it testimonial under *Crawford*." The court found that the error in admitting the CNR was harmless and affirmed the conviction.

Documents in alien registration file not testimonial: *United States v. Valdovinos-Mendez,* 641 F.3d 1031 (9th Cir. 2011): In an illegal re-entry prosecution, the defendant argued that admission of documents from his A-file violated his right to Confrontation. The court held that the challenged documents — a Warrant of Removal, a Warning to Alien ordered Deported, and the Order from the Immigration Judge — were not testimonial. They were not prepared with the primary motive of use in a criminal prosecution, because at the time they were prepared the crime of illegal reentry had not occurred.

Social Security application was not testimonial as it was not prepared under adversarial circumstances: *United States v. Berry*, 683 F.3d 1015 (9th Cir. 2012): The court affirmed the defendant's conviction for social security fraud for taking money paid for maintenance of his son while the defendant was a representative payee. The trial judge admitted routine Social Security Administration records showing that the defendant applied for benefits on behalf of the son. The defendant argued that an SSA application was tantamount to a police report and therefore the record was inadmissible under Rule 803(8) and also that its admission violated his right to confrontation. The court disagreed, reasoning "that a SSA interviewer completes the application as part of a routine administrative process" and such a record is prepared for each and every request for benefits. "No affidavit was executed in conjunction with preparation of the documents, and there was no anticipation that the documents would become part of a criminal proceeding. Rather, every expectation was that Berry would use the funds for their intended purpose." The court quoted Melendez–Diaz for the proposition that "[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." The court concluded as follows:

> [N]o reasonable argument can be made that the agency documents in this case were created solely for evidentiary purposes and/or to aid in a police investigation. Importantly, no police investigation even existed when the documents were created. * * * Because the evidence at trial established that the SSA application was part of a routine, administrative procedure unrelated to a police investigation or litigation, we conclude that the district court did not abuse its discretion by admitting the application under Fed.R.Evid. 803(8), and no constitutional violation occurred.

Affidavits authenticating business records and foreign public records are not testimonial: *United States v. Anekwu,* 695 F.3d 967 (9th Cir. 2012): In a fraud case, the government authenticated foreign public records and business records by submitting certificates of

knowledgeable witnesses. This is permitted by 18 U.S.C. § 3505 for foreign records and Rule 902(12) for foreign business records. The court found that the district court did not commit plain error in finding that the certificates were not testimonial. The certificates were not themselves substantive evidence but rather a means to authenticate records. The court relied on the 10th Circuit's decision in *Yeley-Davis*, immediately below, and on the statement in *Melendez-Diaz* that certificates that do no more than authenticate other records are not testimonial.

Records of cellphone calls kept by provider as business records are not testimonial, and Rule 902(11) affidavit authenticating the records is not testimonial: *United States v. Yeley-Davis,* 632 F.3d 673 (10th Cir. 2011): In a drug case the trial court admitted cellphone records indicating that the defendant placed calls to coconspirators. The foundation for the records was provided by an affidavit of the records custodian that complied with Rule 902(11). The defendant argued that both the cellphone records and the affidavit were testimonial. The court rejected both arguments and affirmed the conviction. As to the records, the court found that they were not prepared "simply for litigation." Rather, the records were kept for Verizon's business purposes, and accordingly were not testimonial. As to the certificate, the court relied on pre-*Melendez-Diaz* cases such as *United States v. Ellis, supra*, which found that authenticating certificates were not the kind of affidavits that the Confrontation Clause was intended to cover. The defendant responded that cases such as *Ellis* had been abrogated by *Melendez-Diaz*, but the court disagreed:

> If anything, the Supreme Court's recent opinion supports the conclusion in *Ellis.* * * * Justice Scalia expressly described the difference between an affidavit created to provide evidence against a defendant and an affidavit created to authenticate an admissible record: "A clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but could not do what the analysts did here: create a record for the sole purpose of providing evidence against a defendant." Id. at 2539. In addition, Justice Scalia rejected the dissent's concern that the majority's holding would disrupt the long-accepted practice of authenticating documents under Rule 902(11) and would call into question the holding in *Ellis*. See *Melendez-Diaz*, 129 S.Ct. at 2532 n. 1 ("Contrary to the dissent's suggestion, ... we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the ... authenticity of the sample ... must appear in person as part of the prosecution's case."); see also id. at 2547 (Kennedy, J., dissenting) (expressing concern about the implications for evidence admitted pursuant to Rule 902(11) and future of *Ellis*). The Court's ruling in *Melendez-Diaz* does not change our holding that Rule 902(11) certifications of authenticity are not testimonial.

See also United States v. Keck, 643 F.3d 789 (10th Cir. 2011): Records of wire-transfer transactions were not testimonial because they "were created for the administration of Moneygram's affairs and not the purpose of establishing or proving some fact at trial. And since the wire-transfer data are not testimonial, the records custodian's actions in preparing the exhibits [by cutting and pasting the data] do not constitute a Confrontation Clause violation."

Immigration forms containing biographical data, country of origin, etc. are not testimonial: *United States v. Caraballo,* 595 F.3d 1214 (11th Cir. 2010): In an alien smuggling case, the trial court admitted I-213 forms prepared by an officer who found aliens crammed into a small room in a boat near the shore of the United States. The forms contained basic biographical information, and were used at trial to prove that the persons were aliens and not admittable. The defendant argued that the forms were inadmissible hearsay and also testimonial. The court of appeals found no error. On the hearsay question, the court held that the forms were properly admitted as public records — the exclusion of law enforcement records in Rule 803(8) did not apply because the forms were routine and nonadversarial documents requested from every alien entering the United States. Nor were the forms testimonial, even after *Melendez-Diaz.* The court distinguished *Melendez-Diaz* in the following passage:

> Like a Warrant of Deportation * * * (and unlike the certificates of analysis in *Melendez-Diaz*), the basic biographical information recorded on the I-213 form is routinely requested from every alien entering the United States, and the form itself is filled out for anyone entering the Untied States without proper immigration papers. * * * Rose gathered that biographical information from the aliens in the normal course of administrative processing at the Pembroke Pines Border Patrol Station in Pembroke Pines, Florida. * * *
>
> The I-213 form is primarily used as a record by the INS for the purpose of tracking the entry of aliens into the United States. This routine, objective cataloging of unambiguous biographical matters becomes a permanent part of every deportable/inadmissible alien's A-File. It is of little moment that an incidental or secondary use of the interviews underlying the I-213 forms actually furthered a prosecution. The Supreme Court has instructed us to look only at the *primary* purpose of the law enforcement officer's questioning in determining whether the information elicited is testimonial. The district court properly ruled that the primary purpose of Rose's questioning of the aliens was to elicit routine biographical information that is required of every foreign entrant for the proper administration of our immigration laws and policies. The district court did not violate Caraballo's constitutional rights in admitting the smuggled aliens's redacted I-213 forms.

Summary charts of admitted business records is not testimonial: *United States v. Naranjo,* 634 F.3d 1198 (11th Cir. 2011): In a prosecution for concealing money laundering, the defendant argued that his confrontation rights were violated when the government presented summary charts of business records. The court found no error. The bank records and checks that were the subject of the summary were business records and "[b]usiness records are not testimonial." And "[s]ummary evidence also is not testimonial if the evidence underlying the summary is not testimonial."

Autopsy reports prepared as part of law enforcement are found testimonial under *Melendez-Diaz: United States v. Ignasiak,* 667 F.3d 1217 (11th Cir. 2012): In a prosecution against a doctor for health care fraud and illegally dispensing controlled substances, the court held that the

admission of autopsy reports of the defendant's former patients were testimonial under *Melendez-Diaz.* The court relied heavily on the fact that the autopsy reports were filed from an arm of law enforcement. The court reasoned as follows:

> We think the autopsy records presented in this case were prepared "for use at trial." Under Florida law, the Medical Examiners Commission was created and exists within the Department of Law Enforcement. Fla. Stat. § 406.02. Further, the Medical Examiners Commission itself must include one member who is a state attorney, one member who is a public defender, one member who is sheriff, and one member who is the attorney general or his designee, in addition to five other non-criminal justice members. Id. The medical examiner for each district "shall determine the cause of death" in a variety of circumstances and "shall, for that purpose, make or have performed such examinations, investigations, and autopsies as he or she shall deem necessary or as shall be requested by the state attorney." Fla. Stat. § 406.11(1). Further, any person who becomes aware of a person dying under circumstances described in section § 406.11 has a duty to report the death to the medical examiner. Id. at § 406.12. Failure to do so is a first degree misdemeanor. Id.
>
> * * *
>
> In light of this statutory framework, and the testimony of Dr. Minyard, the autopsy reports in this case were testimonial: "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." As such, even though not all Florida autopsy reports will be used in criminal trials, the reports in this case are testimonial and subject to the Confrontation Clause.

State of Mind Statements

Statement admissible under the state of mind exception is not testimonial: *Horton v. Allen*, 370 F.3d 75 (1st Cir. 2004): Horton was convicted of drug-related murders. At his state trial, the government offered hearsay statements from Christian, Horton's accomplice. Christian had told a friend that he was broke; that he had asked a drug supplier to front him some drugs; that the drug supplier declined; and that he thought the drug supplier had a large amount of cash on him. These statements were offered under the state of mind exception to show the intent to murder and the motivation for murdering the drug supplier. The court held that Christian's statements were not "testimonial" within the meaning of *Crawford*. The court explained that the statements "were not ex parte in-court testimony or its equivalent; were not contained in formalized documents such as affidavits, depositions, or prior testimony transcripts; and were not made as part of a confession resulting from custodial examination. . . . In short, Christian did not make the statements under circumstances in which an objective person would reasonably believe that the statement would be available for use at a later trial."

Testifying Declarant

Cross-examination sufficient to admit prior statements of the witness that were testimonial: *United States v. Acosta,* 475 F.3d 677 (5th Cir. 2007): The defendant's accomplice testified at his trial, after informing the court that he did not want to testify, apparently because of threats from the defendant. After answering questions about his own involvement in the crime, he refused on direct examination to answer several questions about the defendant's direct participation in the crime. At that point the government referenced statements made by the accomplice in his guilty plea. On cross-examination, the accomplice answered all questions; the questioning was designed to impeach the accomplice by showing that he had a motive to lie so that he could receive a more lenient sentence. The government then moved to admit the accomplice's statements made to qualify for a safety valve sentence reduction — those statements directly implicated the defendant in the crime. The court found that statements made pursuant to a guilty plea and to obtain a safety valve reduction were clearly testimonial. However, the court found no error in admitting these statements, because the accomplice was at trial subject to cross-examination. The court noted that the accomplice admitted making the prior statements, and answered every question he was asked on cross-examination. While the cross-examination did not probe into the underlying facts of the crime or the accomplice's previous statements implicating the defendant, the court noted that "Acosta could have probed either of these subjects on cross-examination." The accomplice was therefore found sufficiently subject to cross-examination to satisfy the Confrontation Clause.

Crawford* inapplicable where hearsay statements are made by a declarant who testifies at trial: *United States v. Kappell, 418 F.3d 550 (6th Cir. 2005): In a child sex abuse prosecution, the victims testified and the trial court admitted a number of hearsay statements the victims made to social workers and others. The defendant claimed that the admission of hearsay violated his right to confrontation under *Crawford.* But the court held that *Crawford* by its terms is inapplicable if the hearsay declarant is subject to cross-examination at trial. The defendant complained that the victims were unresponsive or inarticulate at some points in their testimony, and therefore they were not subject to effective cross-examination. But the court found this claim foreclosed by *United States v. Owens,* 484 U.S. 554 (1988). Under *Owens,* the Constitution requires only an opportunity for cross-examination, not cross-examination in whatever way the defendant might wish. The defendant's complaint was that his cross-examination would have been more effective if the victims had been older. "Under *Owens,* however, that is not enough to establish a Confrontation Clause violation."

Admission of testimonial statements does not violate the Confrontation Clause because declarant testified at trial — even though the declarant did not recall making the statements: *Cookson v. Schwartz,* 556 F.3d 647 (7th Cir. 2009): In a child sex abuse prosecution, the trial court admitted the victim's hearsay statements accusing the defendant. These statements were testimonial. The victim then testified at trial, describing some incidents perpetrated by the defendant. But the victim could not remember making any of the hearsay statements that had previously been admitted. The court found no error in admitting the victim's testimonial hearsay, because the victim had been subjected to cross-examination at trial. The defendant argued that the victim was in effect unavailable because she lacked memory. But the court found this argument was foreclosed by *United States v. Owens,* 484 U.S. 554 (1988). The court noted that the defendant in this case was better off than the defendant in *Owens* because the victim in this case "could remember the underlying events described in the hearsay statements."

Witness's reference to statements made by a victim in a forensic report did not violate the Confrontation Clause because the declarant testified at trial: *United States v. Charbonneau,* 613 F.3d 860 (8th Cir. 2010): Appealing from child-sex-abuse convictions, the defendant argued that it was error for the trial court to allow the case agent to testify that he had conducted a forensic interview with one of the victims and that the victim identified the perpetrator. The court recognized that the statements by the victim may have been testimonial. But in this case the victim testified at trial. The court declared that "*Crawford* did not alter the principle that the Confrontation Clause is satisfied when the hearsay declarant, here the child victim, actually appears in court and testifies in person."

Statements of interpreter do not violate the right to confrontation where the interpreter testified at trial: *United States v. Romo-Chavez*, 681 F.3d 955 (9th Cir. 2012): The court held that even if the translator of the defendant's statements could be thought to have served as a witness against the defendant, there was no confrontation violation because the translator testified at trial. "He may not have remembered the interview, but the Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. All the Confrontation Clause requires is the ability to cross-examine the witness about his faulty recollections."

Statements to police officers implicating the defendant in the conspiracy are testimonial, but no confrontation violation because the declarant testified: *United States v. Allen,* 425 F.3d 1231 (9th Cir. 2005): The court held that a statement made by a former coconspirator to a police officer, after he was arrested, identifying the defendant as a person recruited for the conspiracy, was testimonial. There was no error in admitting this statement, however, because the declarant testified at trial and was cross-examined. ***See also United States v. Lindsey,*** 634 F.3d 541 (9th Cir. 2011) ("Although Gibson's statements to Agent Arbuthnot qualify as testimonial statements, they do not offend the Confrontation Clause because Gibson himself testified at trial and was cross-examined by Lindsey's counsel.").

Admitting hearsay accusation did not violate the right to confrontation where the declarant testified and was subject to cross-examination about the statement: *United States v. Pursley*, 577 F.3d 1204 (10th Cir. 2009): A victim of a beating identified the defendant as his assailant to a federal marshal. That accusation was admitted at trial as an excited utterance. The victim testified at trial to the underlying event, and he also testified that he made the accusation, but he did not testify on either direct or cross-examination *about* the statement. The defendant argued that admitting the hearsay statement violated his right to confrontation. The court assumed arguendo that the accusation was testimonial — even though it had been admitted as an excited utterance. But even if it was testimonial hearsay, the defendant's confrontation rights were not violated because he had a full opportunity to cross-examine the victim about the statement. The court stated that the defendant's "failure to seize this opportunity demolishes his Sixth Amendment claim." The court observed that the defendant had a better opportunity to confront the victim "than defendants have had when testifying declarants have indicated that they cannot remember their out-of-court statements. Yet, courts have found no Confrontation Clause violation in that situation."

Statement to police admissible as past recollection recorded is testimonial but admission does not violate the right to confrontation: *United States v. Jones*, 601 F.3d 1247 (11th Cir. 2010): Affirming firearms convictions, the court held that the trial judge did not abuse discretion in admitting as past recollection recorded a videotaped police interview of a 16-year-old witness who sold a gun to the defendant and rode with him to an area out of town where she witnessed the defendant shoot a man. The court also rejected a Confrontation Clause challenge. Even though the videotaped statement was testimonial, the declarant testified at trial — as is necessary to qualify a record under Rule 803(5) — and was subject to unrestricted cross-examination.

IV. Suggestions for Rulemaking

In light of the confusion wrought by *Williams* it would be problematic to propose any rule that would attempt to implement the "teachings" of that case. It will take at least a few years of lower court case law, and probably another Supreme Court opinion or two, to resolve the four major disputes left by *Williams,* specifically:

1. How is the "primary motive" test of testimoniality defined?

2. What is the relationship of the Confrontation Clause and testimonial statements that are not offered for truth?

3. Should the protection of the Confrontation Clause be limited to statements that are formalized in the nature of affidavits and certificates?

4. Under what circumstances, if any, can a government expert rely on testimonial hearsay under Rule 703?

Accordingly, it would not appear to make sense to propose amendments to the hearsay exceptions — or to Rule 703 — to try to square those rules with the moving target that is Confrontation. But certainly the Committee should continue to monitor developments. For example, if there comes a time when it is clear that an expert cannot constitutionally rely on testimonial hearsay, an amendment to Rule 703 could well be useful and important.

It should be noted that the Committee has already considered — after receiving an extensive memo from the Reporter — whether to propose other amendments to the Rules in light of *Crawford* and *Melendez-Diaz.* The Committee has rejected a proposal to add a reference to the right to confrontation, or to the limits on "testimonial" hearsay, in Rules 801, 803, 804 and 807 — on the ground that some generic reference would be of little use to courts and litigants. And the Committee has also rejected a proposal to amend Rule 902(11), on the ground that any question as to the constitutionality of that provision in criminal cases has not been clearly determined.

The only proposal that has been submitted to respond to *Crawford* and its progeny is the addition of a notice-and-demand procedure to Rule 803(10). The Committee found that proposal to be justified because it was *clear* that Rule 803(10) was unconstitutional as applied after *Melendez-Diaz*. There appears to be no such clarity at this point with respect to any other Evidence Rule

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University School of Law

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

Daniel J. Capra Phone: 212-636-6855
Philip Reed Professor of Law e-mail:dcapra@law.fordham.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Symposium on the Challenges of Electronic Evidence and the Federal Rules
Date: April 1, 2013

The Evidence Rules Committee is sponsoring a symposium on whether the Evidence Rules should be amended to accommodate technological advances in the presentation of evidence. This symposium will take place on the morning Friday, October 11, before the Fall, 2013 meeting of the Committee. The Symposium, as well as the later Committee meeting, will be held at the University of Maine School of Law.

We have already signed up a number of outstanding contributors:

- Hon. Lee Rosenthal, S.D. Tex., former Chair of the Standing Committee.

- Hon. Shira Scheindlin, S.D.N.Y., who has written a number of opinions on electronic evidence and has a casebook on the subject.

- Hon. John Woodcock, D. Me., a member of the Advisory Committee and an author of a number of opinions on electronic evidence.

- Hon. Paul Grimm, D. Md., whose opinion in *Lorraine* is a primer for handling electronic evidence under the Federal Rules.

- Professor Jeff Bellin, William and Mary Law School, who has written an article on the relationship between the present sense impression and Twitter entries;

- Ken Withers of the Sedona Conference, who is a noted expert in the field.

- Professor Dierdre Smith, University of Maine Law School, who has written in the area.
- Greg Joseph, Law Offices of Gregory Joseph, New York City, who speaks widely on these

issues.

We plan to invite techies from Google, Facebook, etc. to make presentations as well, and we plan to include more lawyers on the panel with experience in the area.

The Symposium proceedings will be published in the Fordham Law Review.

The Chair and Reporter welcome all ideas from Committee members regarding the Symposium, including especially suggestions for panel participants and subject matter.

TAB 7

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Memorandum To: Advisory Committee on Evidence Rules

From: Ken Broun, Consultant

Re: Privilege Project

Date: April 12, 2013

Following are drafts of two survey rules prepared as part of my ongoing project to draft survey rules setting forth my analysis of the law of privilege in the federal courts. The survey rules attached are the Cleric Communications Privilege and the Trade Secrets Privilege. The latter is very short – there is not much law on the issue. The privilege simply calls for a balancing test between the need for the information and the interests of the trade secrets holder. Nevertheless, my thought is to include such a survey rule in the final product because it was included in the Proposed Federal Rules.

With the completion of these two privileges, I am finished with many of the more important privileges included in the Proposed Rules. Survey rules have been prepared for the Attorney-Client, Psychotherapist-Patient, Marital Communications, Spousal Testimony, Cleric Communications, and Trade Secrets privileges. Although the commentaries will not be as extensive as that included with most of the rules already prepared, I intend to draft survey rules with regard to the remaining privileges proposed with the original Federal Rules of Evidence. These are: Required Reports, Political Vote, Secrets of State and Official Information, and Identity of Informer. I also intend to prepare separate survey rules dealing with waive of privilege by voluntary disclosure (Proposed Rule 511), privileged matter disclosed under compulsion or without opportunity to claim privilege (Proposed Rule 512) and comment upon or inference from claim of privilege; instruction (Proposed Rule 513). Based on the advice I received from the Committee at our Fall meeting, I will not include the material I drafted dealing with the a journalist privilege.

Cleric Communications Privilege Survey Rule

(a) Definitions. As used in this rule:

(1) A "cleric" is a minister, priest, rabbi or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting the cleric.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General rule of privilege. [A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to the cleric in the cleric's professional capacity as spiritual adviser.]
[The cleric communications privilege may be invoked with respect to a confidential communication by an individual to a cleric in the cleric's professional capacity as spiritual adviser.]

(c) Who may claim the privilege. The privilege under this rule may be claimed by an individual or the individual's guardian or conservator, or the individual's personal representative if the individual is deceased. [The individual who was the cleric at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.] [Both the cleric and the person communicating with the cleric have the authority to claim the privilege.]

COMMENTARY

In general

All fifty states and the District of Columbia have statutes that protect certain communications between individuals and clergy members. States differ in terms of who constitutes a cleric, who holds the privilege and what types of communications are covered. More than thirty states track Uniform Rule of Evidence 505 (Appendix). *See* R. Michael Cassidy, *Sharing Secrets: Is It (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?,* 44 Wm. & Mary L. Rev. 1627 (2003). The rules have various titles, including Clergy-Penitent Privilege, Priest-Penitent Privilege, Communications to Clergymen (used in proposed Federal Rule 506) and Religious Privilege (used in Uniform Rule of Evidence 505). The survey rule adopts the term Cleric Communications Privilege as the most descriptive of the privilege.

Not surprisingly, there are relatively few federal cases dealing with religious privileges. However, all federal courts dealing with the issue have at least noted the existence of a privilege. The privilege was recognized prior to the proposed federal rules, *see Mullen v. U.S.,* 263 F.2d 275, 280 (D.C. Cir. 1958). Concurring Judge Fahy stated:

> Sound policy – reason and experience – concedes to religious liberty a rule of evidence that a clergyman shall not disclose on a trial the secrets of a penitent's confidential confession to him, at least absent the penitent's consent. Knowledge so acquired in the performance of a spiritual function as indicated in this case is not to be transformed into evidence to be given to the whole world. As Wigmore points out, such a confidential communication meets all the requirements that have rendered communications between husband and wife and attorney and client privileged and incompetent. The benefit of preserving these confidences inviolate overbalances the possible benefit of permitting litigation to prosper at the expense of the tranquility of the home, the integrity of the professional relationship, and the spiritual rehabilitation of a penitent. The rules of evidence have always been concerned not only with truth but with the manner of its ascertainment.

A privilege for Communications to Clergymen was part of the proposed Federal Rules of Evidence, Proposed Fed. R. Evid. 506 (Appendix). Since the adoption of Fed. R. Evid. 501, the federal courts have consistently found the existence of a Religious Privilege under the principles of the common law. The leading case is *In re Grand Jury Investigation,* 918 F.2d 374 (3d Cir. 1990). In finding the existence of the privilege in that case, Judge Becker noted (918 F.2d at 381):

> The history of the proposed Rules of Evidence reflects that the clergy-communicant rule was one of the least controversial of the enumerated privileges, merely defining a long-recognized principle of

> American law. Although most of the nine privileges set forth in the proposed rules were vigorously attacked in Congress, the privilege covering communications to members of the clergy was not. S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 333 (4th ed. 1986). Indeed, virtually every state has recognized some form of clergy-communicant privilege. The inclusion of the clergy-communicant privilege in the proposed rules, taken together with its uncontroversial nature, strongly suggests that the privilege is, in the words of the Supreme Court "indelibly ensconced" in the American common law. *United States v. Gillock,* 445 U.S. 360, 368, 100 S. Ct. at 1191 (1980).

The recognition of the existence of the privilege has not always resulted in the application of the privilege in the case before the court. *See, e.g., U.S. v. Luther,* 481 F.2d 429 (9th Cir. 1973) (corporation would not be clergyman covered by the privilege); *U.S. v. Gordon,* 493 F.Supp. 822 (N.D.N.Y., 1980) (conversation involving business transactions was not of the kind protected by the privilege). In diversity cases, the federal courts – consistent with Fed. R. Evid. 501 – have applied the applicable state rule. *E.g., Cox v. Miller,* 296 F.3d 89 (2d Cir. 2002) (New York law); *Ellis v. U.S.,* 922 F.Supp. 539 (D. Utah 1996) (Utah law).

Although early American cases dealing with this privilege confined its application to penitential communications "in the course of discipline enjoined by the church" to which the communicant belongs, modern cases have expanded the rule to any confidential communication to a member of the clergy in his or her professional character as a spiritual advisor. *See* discussion in 1 McCormick, Evidence § 76.2 (7th ed. 2013) and, *e.g., In re Grand Jury Investigation,* 918 F.2d 374, 385 (3d Cir. 1990) (Lutheran minister; no inquiry with regard to church doctrine); *In re Verplank,* 329 F. Supp. 433 (C.D. Cal. 1971) (minister and others providing draft counseling).

A few writers have argued that the religious privilege statutes violate the First Amendment's religious clauses, *see, e.g.* Jane E. Mayes, *Striking Down the Clergyman-Communicant Privilege Statutes: Let Free Exercise of Religion Govern,* 62 Ind.L.J. 397 (1986) (arguing that the privilege should be applied by the judiciary on a case-by-case basis); Rena Durrant, *Where There's Smoke, There's Fire (And Brimstone): Is It Time to Abandon the Clery-Penitent Privilege?,* 39 Loy.L.A.L.Rev. 1339 (2006) (arguing that the privilege violates the Establishment Clause). However, no court has seriously questioned the constitutionality of either a state religious privilege statute or the court recognized privilege in the federal courts. *See also* R. Michael Cassidy, *Sharing Secrets: Is It (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?,* 44 Wm. & Mary L. Rev. 1627 (2003), where the author assumes the constitutionality of the existing privilege laws and argues that even a statute that distinguishes in the application of the privilege among various religions would not violate First Amendment.

This survey rule is based on Proposed Fed.R.Evid. 506 and current Uniform Rule of Evidence 505, which is largely consistent with the proposed rule. Because of the

scarcity of federal authority, I have filled in with language from those rules where there is an absence of federal authority.

(1) A "cleric" is a minister, priest, rabbi or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting the cleric.

The language of this section is taken from Proposed Federal Rule 506. Uniform Rule 505 adds the term "accredited Christian Science Practitioner." The exclusion of that term is not meant as an indication that such persons would not be included. Rather, the term is not included because such persons are only one of a large number of clerics who are not ministers, priests or rabbis. For example, *Scott v. Hammock,* 133 F.R.D. 610 (D. Utah 1990) (applying the Utah statute to protect confidential communications with a Bishop of the LDS church); *Eckmann v. Board of Education,* 106 F.R.D. 70 (E.D.Mo. 1985) (Catholic nun). Other clerics, such as Muslim imams, would clearly be included. The possibilities of variations on the title of the cleric are simply too great to extend the illustrations further than the language of the Proposed Federal Rule.

(2)A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

The language of this section is taken from both the Proposed Federal and Uniform rules.

In the leading case of *In re Grand Jury Investigation,* 918 F.2d 374, 384 (3d Cir. 1990), the court stated:

> We believe that the privilege should apply to protect communications made (1) to a clergyperson (2) in his or her spiritual and professional capacity (3) with a reasonable expectation of confidentiality. As is the case with the attorney-client privilege, the presence of third parties, if essential to and in furtherance of the communication, should not void the privilege.

In that case, the court remanded the matter for a determination of whether all of the parties present at the time of the communication were essential to and were in furtherance of the communication. The court noted that the fact that some of the individuals were not related by blood or marriage would not necessarily defeat the privilege. (918 F.2d at 386).

See also *U.S. v. Wells,* 446 F.2d 2 (2d Cir. 1971) (letter to priest not privileged where the letter requested priest to get in touch with an FBI agent; no intent for the communication to be kept in confidence); *Cox v. Miller,* 296 F.3d 89 (2d Cir. 2002) (applying N.Y. law; no privilege in communications to AA members where communications not in confidence)

(b) General rule of privilege. [A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to the cleric in the cleric's professional capacity as spiritual adviser.]

[The cleric communications privilege may be invoked with respect to a confidential communication by an individual to a cleric in the cleric's professional capacity as spiritual adviser.]

The first alternative to the general rule of privilege is based on Uniform Rule 505 and is consistent with Proposed Federal Rule 506. It assumes that only the person communicating with the cleric has the right to claim the privilege. The second alternative assumes that both the person communicating and the cleric have the right to claim the privilege. The possibility that both the individual and the cleric have the right to claim the privilege is discussed in connection with part (c) of the rule.

The case law is consistent with the language of either alternative. *See U.S. v. Dub,* 820 F.2d 886 (7th Cir. 1987) (conversations with minister not privileged where they related to defendant's efforts to relieve himself from paying income taxes; not spiritual confidences); *United States v. Gordon,* 493 F. Supp. 822 (N.D.N.Y. 1980) (conversation with priest employed by defendant's company related to business relationships and were not privileged); *In re Verplank,* 329 F.Supp. 433 (C.D. Cal. 1971); *Ellis v. United States,* 922 F.Supp. 539 (D. Utah 1996) (applying Utah law; accounts given to church officials with regard to deaths by drowning on a church field trip not privileges where purpose was to obtain an account of the trip in order to handle media inquiries and to address needs of family members; not a confession or personal counseling session). *See also U. S. v. Luther,* 481 F.2d 429 (9th Cir. 1973) (communication to a corporation [the Bible Institute of the Air, Inc.] could not be within the privilege).

(c) Who may claim the privilege. The privilege under this rule may be claimed by an individual or the individual's guardian or conservator, or the individual's personal representative if the individual is deceased. [The individual who was the cleric at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.] [Both the cleric and the person communicating with the cleric have the authority to claim the privilege.]

States are split on issue of who holds the privilege. Some provide that the privilege belongs only to the communicant, others provide that it belongs to the clergy member and still others hold that it belongs to both. 1 McCormick on Evidence, § 76.2 (7th ed. 2013). A few authors have argued that a failure to place the privilege in

the hands of the cleric may violate the First Amendment where the cleric's religious dictate prevents him or her from testifying. *See* Ronald J. Colombo, *Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege,* 73 N.Y.U.L. Rev. 225 (1998); Michael J. Mazza, *Should Clergy Hold the Priest-Penitent Privilege,* 82 Marq. L. Rev. 171 (1998). Failure to permit the cleric to claim the privilege where the communicant has waived it may force a cleric of some faiths, especially the Catholic church, to violate the dictates of their church. On the other hand, there would seem to be little likelihood of a violation of the Establishment Clause if the rule gives the cleric of any faith the right to claim the privilege.

There is scant federal authority on the issue. One federal case holds that the privilege belongs to the cleric and is not waived by the communicant filing a lawsuit that implicated the communication. *Eckmann v. Board of Education of Hawthorn School Dist. No. 17,* 106 F.R.D. 70 (E.D. Mo. 1985). *See also Mockaitis v. Harcleroad,* 104 F.3d 1522 (9th Cir. 1997) (law enforcement's taping of a confession to a Catholic priest was a violation of the Fourth Amendment because of the priest's reasonable expectation of privacy and the priest's right to free exercise of his religion) *But see Ellis v. United States,* 922 F.Supp. 539 (D. Utah 1996) (applying Utah law; the privilege belongs to the communicant but can be claimed by the cleric on the communicant's behalf). The issue simply isn't raised in most cases because both the cleric and the communicant assert the privilege.

In light of the dearth of authority on the issue, this survey rule provides two alternatives. The first, authorizing only the communicant to claim the privilege, is based on the language of Uniform Rule 505 and is consistent with Proposed Federal Rule 506. The second, authorizing both the communicant and the cleric to claim the privilege, is based on the *Eckmann* case and takes into account the constitutional concerns expressed in the Colombo and Mazza articles cited above.

Other issues

At least two other issues have been raised with regard to the religious privilege that have not been dealt with in the rule. These issues are not included because of an absence of federal case authority or language in either Proposed Federal Rule 506 or Uniform Rule 505.

R. Michael Cassidy makes a convincing case for a dangerous person exception to the religious privilege in his article, *Sharing Secrets: Is It (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?,* 44 Wm. & Mary L. Rev. 1627 (2003). Such an exception is discussed at length in connection with the survey rule on the psychotherapist-patient exception. Future developments may call for the issue to be addressed in the federal courts.

Similarly, the relationship between the religious privilege and statutes that require mandatory reporting of child sexual abuse has been explored by some legal writers. *See* Rena Durrant, *Where There's Smoke, There's Fire (And Brimstone): Is It Time of*

Abandon the Clergy-Penitent Privilege?, 39 Loy. L.A. L. Rev. 1339 (2006); Christopher R. Pudelski, *The Constitutional Fate of Mandatory Reporting Statutes and the Clergy-Communicant Privilege in a Post-Smith World,* 98 Nw. U. L. Rev. 703 (2004). The issue may be a significant one in the future. Again however, the absence of case law or language in the Proposed or Uniform Rule dictates against an attempt to raise the issue in a survey rule.

APPENDIX

PROPOSED FEDERAL RULE 506 (NOT ENACTED)

Rule 506. **Communications to Clergymen**

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

(1) A "clergyman" is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) **General rule of privilege**. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as a spiritual adviser.

(c) **Who may claim the privilege**. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege on behalf of the person. His authority so to do is presumed in the absence of evidence to the contrary.

UNIFORM RULE OF EVIDENCE 505

Rule 505. Religious Privilege

(a) Definitions. In this rule:
(1) "Cleric" means a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the individual consulting the cleric.

(2) A communication is "confidential" if it is made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General rule of privilege. An individual has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the individual to a cleric in the cleric's professional capacity as spiritual adviser.

(c) Who may claim the privilege. The privilege under this rule may be claimed by an individual or the individual's guardian or conservator, or the individual's personal representative if the individual is deceased. The individual who was the cleric at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

Trade Secrets survey rule

A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. If disclosure is directed, the court shall take such protective measures as the interest of the holder of the privilege and of the parties and the interests of justice require.

Commentary

This survey rule is taken directly from Uniform Rule 507, which, in turn, is virtually identical to Proposed Federal Rule 508.

Although there is much law on trade secrets generally, there are few cases on the existence of a trade secrets privilege. There is no absolute trade secrets privilege, but rather the law provides for limited protection. As stated in 8A Wright & Miller, Federal Practice and Procedure, § 2043, "It is well settled that there is no absolute privilege for trade secrets and similar confidential information; the protection afforded is that if the information sought is shown to be relevant and necessary, proper safeguards will attend disclosure.

The guideline for the federal courts in dealing with trade secrets during the discovery process is set forth in Fed.R.Civ.Pro. 26 (c)(1)(G), which recognizes the qualified authority of the Courts to issue protective orders for "good cause" to protect "a trade secret, or other confidential research, development or commercial information" from revelation or to provide of a specific manner of revelation. The commentary to Rule 26 notes that "[t]he courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure."

The protection set forth in Fed.R.Civ.Proc. 26 (c)(1)(G) covers only issues that arise during discovery, while the privilege governs all disclosures of trade secrets including disclosures at trial. However, the Advisory Committee's Note to Proposed Rule 508, dealing with the privilege generally, contains language similar to that in Rule 26:

> The need for accommodation between protecting trade secrets, on the one hand, and eliciting facts required for full and fair presentation of a case, on the other hand, is apparent. Whether disclosure should be required depends upon a weighing of the competing interests involved against the background of the total situation, including consideration of such factors as the dangers of abuse, good faith, adequacy of protective measures, and the availability of other means of proof.

See also 81 Wright & Miller, Federal Practice and Procedure, § 2042: "It is well settled that there is no absolute privilege for trade secrets and similar confidential information; the protection afforded is that if the information sought is shown to be relevant and necessary proper safeguards will attend disclosure."

The Advisory Committee Note traces the qualified privilege back at least to *E.I. DuPont De Nemours Powder Co. v. Masland,* 244 U.S. 100 (1917)(opinion by Justice Holmes) (judge has discretion to order disclosure of trade secrets).

The case law since the time of the proposal of Rule 508 supports the commentary to both Fed.R.Civ.Pro. 26 and Proposed Rule 508. For example, in *Centurion Industries, Inc. v. Warren Steurer and Assocs.,* 665 F.2d 323 (10th Cir 1981), the Tenth Circuit Court of Appeals approved the "carefully fashioned" order protecting against improper disclosure of a trade secret. The court stated (665 F.2d at 325-26):

> There is no absolute privilege for trade secrets and similar confidential information. To resist discovery under rule 26 (c)(7)[the former rule number for what is now Rule 26 (c)(1)(G)], a person must first establish that the information sought is a trade secret and then demonstrate that its disclosure might be harmful. If these requirements are met, the burden shifts to the party seeking discovery to establish that the disclosure of trade secrets is relevant and necessary to the action. The district court must balance the need for the trade secrets against the claim of injury resulting from disclosure.

See also U.S. v. Hsu, 155 F.3d 189 (3d Cir. 1998) (court may make such orders as necessary and appropriate to preserve the confidentiality of trade secrets during criminal prosecutions); *Coca-Cola Bottling Co. v. Shreveport, Inc. v. Coca-Cola Co.,* 107 F.R.D. 288 (D. Del. 1985) (court concluded that the need for disclosure outweighed harm to the company).

Definition of Trade Secret

In the hearings on the Proposed Federal Rules, the main criticism of the Trade Secrets Privilege rule was its failure to provide a definition of trade secrets. *See* Imwinkelried, The New Wigmore, § 9.2.2. Although there are few cases actually applying the privilege set out in Proposed Rule 508, the courts in other contexts have had little problem in referring to common sources such as the Restatement of Torts or in the widely adopted Uniform Trade Secret Act. In most instances, the federal courts relying on those definitions have been dealing with state claims involving trade secrets law and the application of state trade secret law. *See, e.g.,* Uniform Trade Secrets Act: *Maxpower Corp. v. Abraham*, 557 F. Supp. 2d 955 (W.D. Wis. 2008); *Fireworks Spectacular, Inc. v. Premier Pyrotechnics, Inc.*, 86 F. Supp. 2d 1102 (D. Kan. 2000); Restatement: *Fishkin v. Susquehanna Partners, G.P.*, 563 F. Supp. 2d 547 (E.D.Pa. 2008); *Ahlert v. Hasbro, Inc.*, 325 F. Supp. 2d 509 (D.N.J. 2004),

Restatement of Torts § 757, comment b provides:

> *b. Definition of trade secret.* A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of a new policy or for bringing out a new model or the like. A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management."

Uniform Trade Secret Act, § 1(4) provides:

> "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
> (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
> (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Definition of terms

There have been few federal cases seeking to define the various terms under the privilege. For a thorough analysis of all of the terms used *see* Wright & Miller, Federal Practice and Procedure, §§ 5642-52.

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-----Original Message-----
From: Judge_Judith_Wizmur@njb.uscourts.gov
[mailto:Judge_Judith_Wizmur@njb.uscourts.gov]
Sent: Wednesday, April 10, 2013 9:45 AM
To: dcapra@law.fordham.edu
Subject: Electronic Signatures

Dear Dan,

As we discussed, the Advisory Committee on Bankruptcy Rules seeks the advice of the Advisory Committee on Evidence Rules regarding a proposed rule that would permit the use of electronic signatures of individuals who are not registered users of CM/ECF without requiring the retention of the original document bearing a handwritten signature.

The proposal would add a section to Fed.R.Bankr.P. 5005(a). In particular, Rule 5005(a)(3) would confirm that the user name and password of a registered CM/ECF user has the same force and effect as a written signature. As to non-registered individuals, it is proposed that "a scanned or otherwise electronically replicated copy of the signature page of the document bearing the individual's original signature shall be electronically filed with the document as part of a single electronic filing." Retention of the original signature would not be required.

At the meeting of the Bankruptcy Rules Committee last week, the Committee approved the proposed rule, as revised, for submission to the Standing Committee, with a recommendation for publication in August 2013. The Committee also agreed that the Advisory Committee on Evidence Rules should be consulted on the impact of the proposed rule on evidentiary concerns.

Attached is the memorandum considered by the Bankruptcy Rules Committee in connection with this issue. The proposed version of Rule 5005(a)(3) that appears in the memo was revised at our meeting in various ways.

The latest version is attached to this transmission. Appendix A of the memorandum is a report drafted for the Committee by Dr. Molly Johnson of the Federal Judicial Center, which surveys both bankruptcy and district courts on procedures now employed around the country regarding electronic signatures and retention requirements.

If you would like to have this material sent in another form, please let me know. We appreciate the willingness of the Evidence Rules Committee to consider this issue at its next meeting.

With best regards,
Judy Wizmur

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON TECHNOLOGY AND CROSS BORDER INSOLVENCY

RE: ELECTRONIC SIGNATURES OF PERSONS OTHER THAN FILING ATTORNEYS

DATE: MARCH 13, 2013

The Subcommittee was asked to consider the advisability of proposing a national bankruptcy rule that would permit the use of electronic signatures of debtors and other individuals who are not registered users of CM/ECF, without requiring the retention of the original document bearing a handwritten signature. Currently the use of electronic signatures in bankruptcy courts is governed by local rules. Bankruptcy Rule 5005(b)(2) provides in part that a "court may by local rule permit or require documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes."

Many of the local rules that deal with electronic signatures are based on Model Rules for Electronic Case Filing that were approved by the Judicial Conference of the United States ("JCUS") in 2001 and modified in 2003. The model rules were recommended by the Committee on Court Administration and Case Management ("CACM"), which developed them along with members of the Committee on Information Technology and the Standing Committee. The introduction to the model rules explains that courts are "free to adapt the provisions of these model rules as they choose."

Two of the model rules relate to signatures on electronically filed documents. Model Rule 8 (Signatures) provides that the "user log-in and password required to submit documents to the Electronic Filing System serve as the Filing User's signature on all electronic documents filed with the court. . . . for any . . . purpose for which a signature is required in connection with proceedings before the court." Regarding the signature of an individual without a CM/ECF user log-in and password (a "non-Filing User,") Rule 8 states that an electronically filed document should represent the signature by "a 's/' and the name typed in the space where a signature would otherwise appear, or as a scanned image."

Model Rule 7 (Retention Requirements) imposes a duty on a Filing User to maintain in paper form any electronically filed document that required the original signature of someone other than the Filing User. The Commentary to the rule states without further elaboration that, "because electronically filed documents do not include original, handwritten signatures, it is necessary to provide for retention of certain signed documents in paper form in case they are needed as evidence in the future." The rule does not specify the retention period, but instead leaves that decision up to each district.

Many bankruptcy courts today have local rules that require the attorney (Filing User) to preserve original documents bearing the debtor's (non-Filing User's) signature for a specified period of time. The retention periods vary. A few bankruptcy courts do not require retention of the original document so long as the attorney submits a declaration manually signed by the debtor attesting to the truth of the information electronically filed or, in other courts, files a scanned image of the signature page with the debtor's original signature.

Concerns Raised About the Retention Requirement

This issue of the retention of documents that are filed electronically with the debtor's signature was initially brought to the Advisory Committee by the Forms Modernization Project. It raised the issue in response to concerns expressed by debtors' attorneys about their need to retain petitions, schedules, and other individual-debtor filing documents that will be lengthier in the proposed restyled format. Representatives of the Department of Justice also expressed concerns about the retention of original documents by debtors' attorneys and the lack of uniformity regarding the retention period. The Department made a recommendation to the Next Gen's Additional Stakeholders Functional Requirements Group that documents bearing wet signatures, signed under penalty of perjury, be retained by the clerk of court for five years—the statute of limitations for fraud and perjury proceedings—unless a national rule were adopted declaring that electronic copies of such documents in the court's ECF system constitute legally sufficient best evidence in the absence of an original signed document.

After the fall 2012 meeting, the Advisory Committee received a copy of a memorandum from the chair of CACM to the chair of the Standing Committee that requested the Standing Committee to "explore creating a federal rule regarding electronic signatures and the retention of paper documents containing original signatures." CACM suggested three possible approaches to the issue:

- Its preference is the promulgation of a national rule specifying that an electronic signature in the CM/ECF system is *prima facie* evidence of a valid signature. Under this proposal, the burden would be placed on persons opposing the validity of the signature to prove with appropriate evidence that an electronic signature was not valid.

- The second approach would be to require courts to retain copies of all originally-signed, paper documents that are electronically filed. According to CACM, this method would address problems with law firms retaining such records, but would require a substantial amount of work for the courts.
- According to CACM, a third alternative would be a policy option. CACM could ask JCUS to specify the retention period for original documents containing the signature of a non-Filing User.. CACM noted, however, that such a policy would not address the problems for external users because of lack of uniformity in local rules, and it would not encourage the reliance on electronic signatures.

Dr. Johnson's Report on Local Rules and Procedures

At the request of the Committee, Dr. Molly Johnson of the Federal Judicial Center collected and reviewed local bankruptcy rules regarding signatures of debtors on documents that are filed electronically and requirements for the retention of original documents bearing a non-Filing User's signature. For a point of comparison, she also reviewed local district court rules regarding signatures by non-Filing Users and related retention requirements. In connection with her report, Dr. Johnson reviewed a recent Office of Management and Budget document on the use of electronic signatures in federal transactions and solicited the views of interested parties about possible rule changes that would eliminate retention requirements. Dr. Johnson's report is attached as an appendix to these materials.

Dr. Johnson found that the vast majority of bankruptcy courts and almost all district courts require the retention, usually by the filing attorney, of the signed original of electronically filed documents bearing a non-Filing User's handwritten signature. Of the few courts that do not

require retention, some require a declaration signed by the non-Filing User to be filed, and a smaller number allow a scanned signature to be treated as an original signature.

Feedback from U.S. Trustees, chapter 7 case trustees, and the Executive Office of U.S. Attorneys[1] indicated a preference for handwritten signatures affixed to original documents, rather than purely electronic signatures and an accompanying declaration, but recognized that scanned images of signatures may also be workable. They expressed concern about whether a debtor's declaration would be persuasive evidence that the debtor saw all of the relevant documents or knew which documents were covered by the declaration.

Dr. Johnson noted that a recent report issued at the request of the Office of Management and Budget, the General Services Administration, and Federal Chief Information Officers set forth the following five requirements for legally binding electronic signatures in federal organization transactions:

1) The signer must use an acceptable electronic form of signature.
2) The electronic form of signature must be executed or adopted by the signer with the intent to sign the electronic record (that is, to indicate approval of the information contained in the electronic record).
3) The electronic signature must be attached to or associated with the electronic record being signed.
4) There must be a means to identify and authenticate a particular person as the signer.
5) There must be a means to preserve the integrity of the signed record.[2]

[1] The Department of Justice's Executive Office for U.S. Attorneys ("EOUSA") was unwilling to provide written feedback concerning the possible options being considered, preferring instead to withhold its comments until a proposed rule is published. The report, however, contains some feedback that Dr. Johnson was able to gain through informal conversations with EOUSA staff.

[2] Office of Management and Budget, Use of Electronic Signatures in Federal Organization Transactions, Version 2.0 (Jan. 25, 2013).

The Subcommittee's Deliberations and Recommendation

During its conference call on December 28, 2012, the Subcommittee considered a preliminary version of Dr. Johnson's report and discussed possible options for a national rule that would eliminate retention requirements. Based on its discussions, the Subcommittee tentatively expressed support for a rule that would allow the scanned image of the signature of a debtor to be treated as a valid signature without the need for retention of the original hand-signed document by the court or the attorney.

At the January 2013 meeting of the Standing Committee, Judge Wedoff explained the approach that the Subcommittee was considering. No objections were raised to the continued consideration of a bankruptcy rule along these lines.

The Subcommittee continued its discussion of the treatment of electronic signatures during its conference call on February 26. It reviewed a draft of an amendment to Rule 5005 that would allow scanned signatures of debtors and other non-Filing Users to be treated the same as written signatures without requiring the retention of hard copies of documents. The amended rule would also provide that the user name and password of a registered user of the CM/ECF system would be treated as that individual's signature on electronically filed documents. Some members of the Subcommittee stressed the importance of requiring the scanned signature page to be filed along with the related document, so as to result in a single docket entry. It was noted that the validity of a signature submitted under the amended rule would still be subject to challenge, just as is true for a handwritten signature.

Following its discussions, **the Subcommittee voted to recommend that the Advisory Committee approve for publication the following amendments to Rule 5005.**

Rule 5005. Filing, Electronic Signatures, and Transmittal of Papers

(a) FILING and SIGNATURES.

(1) *Place of Filing*.

* * * * *

(2) *Filing by Electronic Means.* A court may by local rule permit or require documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A document filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules~~, the Federal Rules of Civil Procedure made applicable by these rules,~~ and § 107 of the Code.

(3) *Signatures on Documents Filed by Electronic Means*.

(A) *The Signature of a Registered User*. The user name and password of an individual who is registered to use the court's electronic filing system shall serve as that individual's signature on any electronically filed document. The signature may be used with the same force and effect as a written signature for the purpose of applying these rules and for any other purpose for which a signature is required in proceedings before the court.

(B) *Signature of Other Individuals*. When an individual other than a registered user of the court's electronic filing system is required to sign a document that is filed by electronic means, a scanned copy of the signature page of the document bearing the individual's original signature may be

electronically filed with the document as part of a single electronic filing. For a document filed in compliance with this rule, the original document bearing the individual's original signature need not be retained. A signature submitted in compliance with this provision may be used with the same force and effect as the signature on the original document for the purpose of applying these rules and for any other purpose for which a signature is required in proceedings before the court.

* * * * *

COMMITTEE NOTE

The rule is amended to address the treatment of electronic signatures in documents filed in connection with bankruptcy cases, a matter previously addressed only in local bankruptcy rules. New provisions are added that prescribe the circumstances under which electronic signatures may be treated in the same manner as original handwritten signatures without the need for anyone to retain paper documents with original signatures. The amended rule supersedes any conflicting local rules.

The title of the rule and subdivision (a) are amended to reflect the rule's expanded scope. The reference to "the Federal Rules of Civil Procedure made applicable by these rules" in subdivision (a)(2) is stricken as unnecessary.

Subdivision (a)(3) is added to address the effect of signatures in documents that are electronically filed. Subparagraph (A) applies to persons who are registered users of a court's electronic filing system. It adopts as a national rule the practice that previously existed in virtually all districts. The user name and password of an individual who is registered to use the CM/ECF system are treated as that person's signature for all documents that are electronically filed. That signature may then be treated the same as a written signature for purposes of the Bankruptcy Rules and for any other purpose for which a signature is required in court proceedings.

Subparagraph (B) applies to the signatures of persons who are not registered users of the court's electronic filing system. When the signature of a debtor or other individual who is not a registered user of CM/ECF is required on a document—such as a petition, schedule, or declaration—the document may be filed electronically along with a scanned image of the signature page bearing the individual's handwritten signature. The document will then be stored

electronically by the court, with neither the court nor the filing attorney required to retain a paper copy. This amendment, which changes the practice that previously existed in many districts, was prompted by several concerns: the lack of uniformity of retention periods required by local rules, the burden placed on lawyers and courts to retain a large volume of paper, and potential conflicts of interest imposed on lawyers who were required to retain documents that could be used as evidence against their clients. If scanned signature pages are filed in accordance with this rule, the electronically filed signature may be treated the same as a written signature for purposes of the Bankruptcy Rules and for any other purpose for which a signature is required in court proceedings.

Just as the validity of a handwritten signature may be challenged in court proceedings, nothing in this rule prevents a challenge to the validity of an electronic signature filed in compliance the rule's provisions.

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APPENDIX 1

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Bankruptcy Court Rules and Procedures Regarding Electronic Signatures of Persons Other than Filing Attorneys

Report to the Subcommittee on Technology
and Cross Border Insolvency
of the Advisory Committee on
Rules of Bankruptcy Procedure

Molly T. Johnson

The Federal Judicial Center

REVISED

February 22, 2013

Executive Summary

At the request of the Advisory Committee, we collected and reviewed local bankruptcy rules regarding signatures of non-registrants of CM/ECF (e.g., debtors) and requirements for retention of documents bearing original handwritten ("wet") signatures of non-registrants. We also reviewed district court rules regarding signatures and retention, reviewed an OMB document on the use of electronic signatures in federal transactions, and solicited the views of interested parties regarding potential rules changes in these areas.

Findings include:

- The vast majority of bankruptcy courts (85/93) require the filing attorney to retain hard copy documents bearing non-registrant's signatures, although retention periods and the times from which they begin running vary widely;
- Of courts that do not require retention of hard copy documents, most require a declaration to be filed that is signed under penalty of perjury by the person whose signature is required on the documents, attesting to the truth and accuracy of information contained in those documents. Depending on the court, the declaration form is retained either by the filing attorney or the Clerk of Court. Other variations include whether the attorney must also sign the declaration; when the declaration is signed relative to the filing of the documents to which it refers; whether the declaration is retained in hard copy form or as a scanned image; and the exact attestations the signer makes in signing the declaration;
- Four courts do not require retention of hard copy documents (at least under some circumstances) and also do not have a declaration procedure.
- District courts generally have retention requirements in both civil and criminal cases. Our research did not reveal any district courts that allow a declaration to be filed without requiring retention of hard copies of signature-bearing documents.
- United States Trustees and Chapter 7 case trustees responding to our inquiry expressed concern about doing away with hard copy retention requirements because of difficulty that could cause with subsequent prosecutions. Some suggested, however, that requiring a scanned image of the relevant signature(s), as opposed to a purely electronic ("/s/Name") signature would address that problem.
- Informal feedback from the Executive Office of U.S. Attorneys indicated that hard copy signatures are thought to serve an important evidentiary function, particularly in jury trials, in prosecutions for fraud or related crimes. Although hard copy signatures are preferable, a scanned image of a signature might be "workable." Those responding expressed some concern about a declaration option, noting that having a signature on a declaration in lieu of the filed documents could leave ambiguity as to whether the signer saw all of the relevant documents or knew which ones were covered by the declaration.
- A number of federal agencies are also grappling with the issue of electronic signatures. In a report issued on January 25, 2013 (earlier versions of which were available in 2012) at the request of the Office of Management and Budget (OMB), the General Services Administration (GSA) and Federal Chief Information Officers (CIO) Council enumerated the following requirements for legally binding electronic signatures in federal organization transactions: 1) A person (i.e., the signer) must use an acceptable electronic **form of signature**; 2) the electronic form of signature must be executed or adopted by a person with

the **intent to sign** the electronic record; 3) the electronic form of **signature must be attached to or associated with the electronic record** being signed; 4) there must be a means to **identify and authenticate** a particular person as **the signer**; and 5) there must be a means to preserve the **integrity of the signed record** (emphases in original).

I. Introduction and Background

At the fall 2011 meeting of the Advisory Committee, the Subcommittee on Forms suggested that the Advisory Committee develop national rules regarding documents containing signatures of persons other than registered CM/ECF users ("non-registrants"). Specifically, such rules could govern the circumstances under which bankruptcy courts can accept documents electronically signed by non-registrants, and requirements for attorneys to retain documents containing the original ("wet") signatures that correspond to the electronically-filed documents. The Model Rules addressing these issues leave much to the discretion of individual courts, and practices vary widely.[1] After discussion, the Advisory Committee Chair referred the issue to the Subcommittee on Technology and Cross-Border Insolvency ("Technology Subcommittee") to consider potential rules changes relating to these issues.

There are important considerations both in support of and against requiring original handwritten signatures of non-registrants and requiring the attorneys to retain the hard copy documents with original signatures. The existence of a hard copy document bearing the original signature of a person attesting to the truth of information within the document has been seen as necessary to pursuing later criminal prosecutions based on fraud or other bankruptcy-related crimes. It also has been used as the basis for determining pivotal bankruptcy-related issues (e.g., challenges to a debtor's ability to receive a discharge under 11 U.S.C. § 727(a)(4)(A) may be met with the claim that the debtor never signed the document providing the basis for the challenge, or did not sign the version of the document that was filed). On the other hand, this practice has raised concerns about attorneys being required to retain and produce documents that could ultimately incriminate their clients, and has also been seen as burdensome for attorneys in terms of storage capacity. The new forms produced by the Bankruptcy Forms Modernization Project will generally be longer when printed than the prior forms, increasing the potential storage burden on attorneys and law firms if retention of hard copies is required.

At the spring 2012 Advisory Committee meeting, the Technology Subcommittee recommended that a national rule be developed, and presented two options for consideration. One option would require that an electronically-filed document signed by someone other than the filer be accompanied by a separate declaration, bearing an original signature, in which the signer attests to the truth and validity of the information provided in the electronically-filed document. The court would retain the declaration in electronic form, and the filing attorney would not be required to retain the hard copy documents with original signatures. This procedure is similar to one currently in use in the U.S. Bankruptcy Court for the Northern District of Illinois.

The second option would amend the rules to provide that any petition or other document electronically filed and verified, signed, or subscribed in a manner that is consistent with technical standards that the Judicial Conference of the United States establishes must be treated for all purposes (including penalties for perjury) in the same manner as though signed or subscribed.

[1] See Memorandum from Elizabeth Gibson, Reporter, to the Subcommittee on Technology and Cross Border Insolvency re: Electronic Signatures of Persons Other Than Filing Attorneys (July 31, 2012) for a discussion of the Model Rule provisions.

Rather than engaging in a discussion of the merits of these two options, at the spring 2012 meeting the Advisory Committee, at the recommendation of the Technology Subcommittee, suggested that the Chair consult with the Chair of the Standing Committee to determine if other rules advisory committees should be involved in the consideration of these issues. After being consulted, the Standing Committee chair indicated that the Advisory Committee should proceed on its own at this point in determining whether to develop national bankruptcy rules on signatures and retention requirements. Thus, the matter was referred back to the Technology Subcommittee for consideration of specific potential national rules on this topic.

After discussion, the Technology Subcommittee determined that for several reasons the first option mentioned above – i.e., the "declaration" option – would likely be preferable to the second option. Before making a final recommendation, however, the Subcommittee asked the Federal Judicial Center to (1) gather information about procedures currently in place in the bankruptcy courts to deal with signature and retention issues, (2) obtain input from prosecutors and other interested parties about their experiences with different local procedures on these issues and about their views on potential rules changes, and (3) determine how district courts handle signature and retention issues.

The Advisory Committee learned after its fall 2012 meeting that the Judicial Conference Committee on Court Administration and Case Management ("CACM") has also expressed preferences about national rules relating to signatures of non-registrants. In an August 20, 2012 letter to then-Standing Committee Chair Judge Mark Kravitz, Judge Julie Robinson, Chair of CACM, set forth recommendations from CACM regarding national rules on this issue. The Committee's preferred approach would be to implement a national rule specifying that an electronic signature in the CM/ECF system is *prima facie* evidence of a valid signature. The second approach would require courts, rather than attorneys, to retain hard copies of documents bearing "wet" signatures of non-registrants. The third, and least-favored, approach mentioned by Judge Robinson was to establish national rules regarding retention periods for hard-copy documents, rather than leaving this to each court's local rules.

The questions addressed in this report include:

1) How does each bankruptcy court currently handle electronic filing of documents bearing signatures of non-registrants?
2) For courts that require retention of documents bearing original signatures of non-registrants, who retains the documents, and for how long are they required to be retained?
3) How many courts require separate declarations to be signed and filed that attest to the truth of information in electronically-filed documents? How is the declaration procedure implemented in different courts?
4) How do district courts currently handle the issue of signatures of non-registrants?
5) What are the views of prosecutors, U.S. Trustees, and case trustees regarding potential rule changes concerning signatures of non-registrants and retention requirements?

An earlier version of this report was discussed by the Subcommittee in a conference call on December 28, 2012. During that call, members of the Subcommittee discussed various options for handling electronic signatures in bankruptcy cases, noting the need to balance the burden of requiring retention of hard copies against the loss of evidentiary power in subsequent prosecutions if the hard copies are not retained. At the conclusion of the call, the Subcommittee tentatively endorsed

the idea of requiring pages bearing the non-registered user's signature to be scanned, and having those scanned images filed along with the (electronic) documents to which they relate.

At the January 3rd meeting of the Judicial Conference Standing Committee on Rules of Practice and Procedure, Judge Wedoff, Chair of the Advisory Committee on Bankruptcy Rules, summarized the information reviewed by the Subcommittee and the direction favored by the Subcommittee at this point. The Standing Committee did not provide any specific direction or feedback.

II. Local Bankruptcy Court Rules on Signatures and Retention

To determine how each bankruptcy court addresses signatures of non-registrants and retention requirements, we searched court websites to find the local rules or procedures that address these issues. When the relevant procedures could not be found on the website, or where provisions were unclear, we contacted the Clerk of Court's office for information. The table in Appendix A (p. 18) summarizes the provisions in each court.[2]

According to our website search, more than one-third of the bankruptcy courts (38) have provisions on these issues both in a local bankruptcy rule (normally either L.B.R. 5005 or 9011) and in an Administrative Procedures document, General Order, or other non-rules mechanism. The rest of the courts that address these issues use only a local rule (26 courts) or only one of the non-rules-based approaches (29). About one-quarter of the courts had local forms to implement some of the procedures, particularly those requiring a signed and filed declaration in which the non-registrant attests to the truth and validity of electronically-filed documents (see discussion below).

a. Retention Requirements for Original Signatures

Almost all bankruptcy courts (85) require the filing attorney to retain documents with original signatures of non-registrants for a specified period of time. In fifty-seven courts, the retention period runs from the time the case is closed; in eight courts it runs from the time the appeals period ends[3]; and in nine courts the period runs from the later of case closing or the appeals period. Three courts run the retention period from the time of filing, and three do not specify when the retention period begins. The remaining courts that have a retention period (5) use a combination of time periods, such as 5 years from filing or the completion of appeals, whichever is later (Nevada). The bankruptcy courts that do not specify any retention period are Pennsylvania-Middle;

[2] All bankruptcy courts had their local rules on the court's website. It is possible some courts had administrative procedures or other non-rules documents that were not on the website, but we were able to find provisions covering electronic signatures of non-registrants and retention issues for each court, either on the website or through communication with the Clerk of Court's office.

[3] Most courts that specify the appeals period in their retention requirements refer to the expiration of the maximum allowable time for appeals.

Tennessee-Middle; Illinois-Northern; Minnesota; Alaska; New Hampshire; New Mexico; and Wisconsin-Western.[4]

The most frequent retention period (used in 29 courts), irrespective of the triggering event, is 5 years, corresponding to the statute of limitations for bankruptcy fraud. The next-most-frequent retention periods are 2 years (16 courts), 1 year (11 courts), and 3 years (10 courts). The range of retention periods is from 0 years (e.g., retention only required until the case is closed) to 7 years.

In courts with retention requirements, generally the filing attorney must retain hard copies of the signature-bearing documents; however, a few courts with retention requirements do not require the retention to be of hard copy documents. For example, in the Eastern District of Wisconsin, as an alternative to retaining a hard copy of a signed document, the filer may have the original document scanned, digitized, and stored electronically if a form Verification of Signature and Designation of Electronic Counterpart as Original is signed and filed.[5] In Hawaii, Local Bankruptcy Rule 5005(4)(f) provides that in lieu of an originally signed document, an ECF User "may produce the document's scanned image with the digital file's 'date modified' information attached." Both the Eastern District of Washington and the Eastern District of Virginia allow the filer to retain either a hard copy of the signed document or a copy made "in the ordinary course of business."[6]

In a small number of courts, the retention requirement applies only in certain circumstances. For example, in the Eastern District of California, retention is required only if the filed document contains an "/s/Name" signature form or a software-generated signature rather than a scanned original signature.[7]

Courts that require signed documents to be retained universally put the burden of retention on the filing attorney. Where a court allows a declaration to be retained in lieu of retention of the signed original documents, sometimes the filing attorney retains the declaration form, and sometimes the Clerk's Office retains it (see discussion of declaration procedures below).

b. Declaration Procedures

As mentioned in the introduction to this report, the Technology Subcommittee expressed an initial preference for developing a national rule that would allow bankruptcy courts to accept a signed declaration attesting to the truth of the information in documents filed and signed by the debtor or other non-registrant, but requested more information about declaration procedures currently in existence.

Our review of local bankruptcy rules indicates that thirty-two bankruptcy courts require a declaration to be signed by the debtor under penalty of perjury, attesting to the truth of information contained in documents filed at the beginning of a bankruptcy case. Twenty-five of these courts have

[4] Although Wisconsin-Western does not specify a retention requirement or time period, the Administrative Procedures for the court indicate that, upon request, original signed documents must be provided, and that "for evidentiary purposes the parties are encouraged to retain the original documents in their records."
[5] L.R. 5005.1(b) (U.S. Bankruptcy Court, Eastern District of Wisconsin).
[6] L.B.R. 5005-3(f)(2)(B) (U.S. Bankruptcy Court for the Eastern District of Washington); CM/ECF Policy 7(A) (U.S. Bankruptcy Court for the Eastern District of Virginia).
[7] L.B.R. 9004-1 (U.S. Bankruptcy Court for the Eastern District of California).

the attorney file a signed declaration *in addition to* requiring retention of hard copy documents; the remaining seven courts accept the signed declaration without requiring the attorney to retain the original signed documents. Provisions about declarations, and the declaration forms themselves, vary along the following dimensions: whether they are signed only by the debtor (non-registrant) or also by the filing attorney; what the debtor (and attorney, if applicable) is attesting to; when the declaration must be signed relative to the filing of the related documents; the form in which the declaration is transmitted to the court (e.g., scanned image vs. hard copy); and the documents to which the declaration form relates (e.g., many courts have separate declaration forms for the petition and accompanying schedules and statements vs. documents filed later in the case).

1. Declaration filed in addition to retention of hard copy documents

Of the courts that require a signed declaration to be filed in addition to requiring attorneys to retain hard copies of the documents bearing original signatures of non-registrants, some require the declaration to be filed in hard copy format (e.g., all of the Texas bankruptcy districts; Arizona; Michigan-Western; Virgin Islands), while others allow the declaration to be filed as an imaged document (e.g., Massachusetts; Louisiana-Western). Some of the districts provide that the Clerk of Court's office will retain the filed declaration (e.g., the Texas bankruptcy districts; Illinois-Northern; Louisiana-Middle), while others require the filing attorney to retain the original declaration form in addition to the originals of other filed documents (e.g., Massachusetts; Nevada). For more information on each court's procedures, see Appendix A.

Our research indicated that at least two bankruptcy courts, Colorado and Vermont, previously required a declaration form to be filed in addition to having attorneys retain the documents, but have changed their procedures to no longer require the declaration form to be filed. Bradford Bolton, Clerk of the U.S. Bankruptcy Court for the District of Colorado, explained the court's decision to do away with the declaration requirement as follows:

> We found that it was a lot of extra effort for minimal benefit to accept and scan the original paper Form 21 Declaration when counsel was already required to retain the forms with wet signatures in their offices for two years. Mr. Greg Garvin, Assistant U. S. Trustee for Colorado, advised that after doing some discovery with likely ignorers of the rules, his office concluded that there were very few occasions (one or two) where counsel could not locate the debtor's original signature. As a result of Mr. Garvin's inquiries, attorneys began paying more attention to the rule and he was not concerned that there was not a duplicate signature in the court records.
>
> We believe that it would be a burdensome, duplicative and unproductive step backwards to require filing or submission of the Form 21 Declarations with the Court. In addition, the judges concluded that it would demonstrate a fundamental distrust of attorneys following the rules of document retention. Going forward, the reduction of future appropriations forces the court to continue to find ways of eliminating work with questionable necessity or benefit in promoting effective case administration and dispute resolution. Eliminating filing and storage of the Form 21 Declaration was one of many changes we initiated, and continue to initiate, in an effort to work smarter and save our resources for more critical priorities.[8]

Thomas Hart, Clerk of the U.S. Bankruptcy Court for the District of Vermont, provided this explanation for the court's decision to drop the declaration requirement as follows:

> We initially enacted the rule requiring Declarations regarding Electronic Filings ("DREFs") primarily to create a record that would help with fraud prosecutions and we did not anticipate imposing this requirement would be a significant burden on the bar. At the time of the recent rule revision, we verified that neither the US Trustee

[8] Personal communication via email from Bradford Bolton to Molly Johnson, December 10, 2012.

> nor the US Attorney had actually used the DREFs in any fraud prosecutions, and also determined that it was a significant burden to debtors' attorneys to obtain and file the DREFs. So, on balance the court decided there was not a compelling reason to continue to impose this burden on the debtors' bar, that the DREFs were not accomplishing the intended goal, and there are sufficient other safeguards in place to limit, detect and prosecute any fraud arising from electronic filings.[9]

Conversely, the U.S. Bankruptcy Court for the Eastern District of Louisiana does not have a declaration requirement under its current local rules, but proposed new Local Rule 1008 requires the filing of a declaration form, which would be maintained by the Clerk of Court's office in hard copy form.[10]

2. Declaration filed with no requirement for attorney to retain signed hard copy documents

Because so few bankruptcy courts have no retention requirement in conjunction with their declaration provision, and because this procedure is specifically of interest to the Subcommittee, we will describe here each district's provisions. The full provisions for these courts and any related forms can be found in Appendix B (p. 41).

District of Alaska. For all petitions, lists, schedules, and statements requiring the signature of the debtor(s) that are filed electronically, Local Bankruptcy Rule 5005-4(c)(2) requires that the filing attorney prepare and file a Declaration Re: Electronic Filing, bearing the original signature(s) of the debtor(s) and debtors' attorney(s). The declaration must be signed before the petition is filed, and filed conventionally with the court within 14 days of the electronic filing of the petition. The declaration is signed under penalty of perjury, and in it the debtor declares that the information given to the attorney is true and correct and that the debtor consents to the attorney sending the documents to the bankruptcy court electronically.

District of Minnesota. Pursuant to Local Bankruptcy Rule 9011(4)(d), when an original signature of a debtor, joint debtor, or authorized individual is required on a document, Filing Users can either submit the electronic document with a scanned image of the signature page signed by the debtor(s), or a scanned image of the Form ERS Signature Declaration. The Signature Declaration is signed under penalty of perjury, and declares that the person signing the declaration has provided true and correct information to the attorney; that the information provided in the "Debtor Information Pages" submitted when the case is commenced electronically is true and correct; that if no social security number is provided, it is because the debtor doesn't have one; and that the debtor consents to the attorney electronically filing the documents together with a scanned image of the Signature Declaration.

District of New Hampshire. According to Administrative Order 5005-4(d)(3), when a document is electronically filed that contains an original signature under oath, other than that of the Filing User, a paper copy of the court's form Declaration of Electronic Filing must be submitted to the Court within 7 days. The declaration must be signed under oath and have an attached copy of the

[9] Personal communication via email from Thomas Hart to Molly Johnson, December 18, 2012.
[10] Proposed new Local Rule 1008-1 (U.S. Bankruptcy Court for the Eastern District of Louisiana); personal communication via email from Brian Richoux, Clerk of the U.S. Bankruptcy Court for the Eastern District of Louisiana, December 10, 2012.

Notice of Electronic Filing for the document to which it refers, including the electronic document stamp. The clerk retains all Declarations of Electronic Filing that are submitted to the court "as part of the clerk's duty to maintain records." The declaration form is signed by both the petitioner and the attorney. In it, the petitioner declares under penalty of perjury, among other things, that the information he or she gave the attorney and other information contained in the petition, statements and schedules, or amendments thereof is true and correct to the best of petitioner's belief. The attorney signing the declaration certifies that the debtor signed the declaration and authorized the attorney to file the petition and schedules, that the attorney gave the debtor a copy of the petition and schedules being electronically filed, and that the petition and schedules identified in the accompanying Notice of Electronic Filing fully and accurately reflect the information given to the attorney by the Debtor. Failure to file the signed original of the declaration is grounds for dismissal of the case.

District of New Mexico. Local Rule 5005-4.2 provides that "Any paper physically signed, and filed electronically or filed in paper form, and thereafter converted to an electronic document by the clerk, has the same force and effect as if the individual signed a copy of the paper. Verified papers signed electronically shall be treated for all purposes (both civil and criminal, including penalties for perjury) as if they had been physically signed or subscribed." In addition, Local Rule 9011-2 provides that "The Court will treat a duplicate signature as an original signature." The district has separate declaration/signature forms for the Petition and for Schedules and the Statement of Financial Affairs filed after the petition. For any other subsequent filings requiring a verified signature, the filing attorney must craft his/her own signature page, or prepare a form Debtor's Unsworn Declaration Under Penalty of Perjury.

Northern District of Illinois. Section II.C. of the Administrative Procedures for the Case Management/Electronic Case Filing System for the U.S. Bankruptcy Court for the Northern District of Illinois provides that when a bankruptcy petition is filed electronically, it must be accompanied by a form Declaration Regarding Electronic Filing. The declaration must contain the original signature of the person whose signature is required on the document to which the declaration relates, and must be submitted in a form that can be accurately scanned. The declaration forms serve "as the required signature(s) on the petition and all other documents filed contemporaneously with the petition that must be signed by the debtor(s) or the representative of a non-individual debtor." A similar declaration is required for documents filed after the petition that require signatures of non-filers.

Northern District of West Virginia. The Local Bankruptcy Rules for the Northern District of West Virginia provide different options for handling the issue of signatures of non-registered CM/ECF Users. One option is for the filing user to submit a scanned PDF showing the actual signature(s) of those executing the document. When this option is used, there is apparently no retention requirement for the filing attorney. The second option, in the case of documents signed by a debtor, is for the debtor's attorney to retain an original signed copy of the court's form Declaration Re: Electronic Filing for a period of 7 years from the date it was filed. Local Bankruptcy Rule 5005-4.08 provides that "The existence of a scanned pdf signature or a properly executed Declaration Re: Electronic Filing …and debtor's testimony at the Section 341 meeting of creditors are prima facie evidence of the existence, authenticity, and validity of the signatures on the original petition, schedules, and statement of affairs."

The declaration form for West Virginia-Northern is signed by both the petitioner and his or her attorney. The petitioner declares that he or she consents to the electronic filing; acknowledges

having reviewed the information in the petition and schedules; and under penalty of perjury, declares that that information is correct. The attorney declares that the petitioner signed the declaration before the petition and other documents were filed.

Eastern District of Wisconsin. Under Local Bankruptcy Rule 5005.1, as an alternative to retaining hard copy documents for 5 years, the filer may have the original document, including any original signature, scanned and digitized, with the 5-year retention period then applied to the scanned document rather than the original. The scanned document is deemed a counterpart that is intended by the person executing it to have the same effect as an original if that person signs and files in the case a Verification of Signature and Designation of Electronic Counterpart as Original. This document is signed by the debtor(s) under penalty of perjury and declares that any documents executed or issued by the signer and maintained by the filer in electronic format are intended to be a counterpart and have the same effect as an original pursuant to Fed.R.Evidence 1001(3).

c. Courts with no declaration procedure or retention requirements

Four bankruptcy courts – the Eastern District of California, the Middle District of Pennsylvania, the Middle District of Tennessee, and the District of Columbia – have at least some situations in which they do not require retention of hard copy documents and also do not require a signed declaration to be filed.

Eastern District of California. Under Local Bankruptcy Rule 9004-1(c), retention of hard copy documents is required only if an "/s/Name" or software-generated electronic signature is used. Retention is apparently not required if the filer submits a scanned copy of the originally-signed document or a scanned copy of the signature page.

Middle District of Pennsylvania. The Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means do not mention a retention requirement and do not provide a declaration procedure. Clerk of Court Terry Miller confirmed that neither of these requirements exists in the court. He speculated that perhaps these were seen as unnecessary because the malpractice insurance companies might require attorneys to retain hard copies of signature-bearing documents, but this has not been verified.

Middle District of Tennessee. Clerk of Court Matt Loughney confirmed that the court is "silent" on the document-retention issue, even though the local United States Trustee's office has asked for such a requirement. When asked if there had ever been problems with respect to prosecutions, he relayed this story:

> In the one case with a signature issue there was never any criminal referral. The debtor claimed he never signed his bankruptcy schedules and thus was not responsible for "failing" to disclose an asset. The attorney produced a blanket release signed by the debtor that said he was giving the attorney permission [to] file anything on his behalf. The judge agreed with the attorney and found the debtor did fail to disclose and revoked the discharge.[11]

[11] Personal communication via email from Matt Loughney to Molly T. Johnson, December 10, 2012.

District of Columbia. Under the Court's Administrative Procedures for CM/ECF, §II.B.4, the five-year retention requirement does not apply to a document that is filed with a scanned image of the original signature.

III. Local District Court Rules on Signatures and Retention[12]

During the Advisory Committee's discussion of the signature and retention issue at the September 2012 meeting, a question was raised about how district courts handle these issues when documents are filed electronically. To answer this question, we reviewed district court provisions for electronic filing of both civil and criminal cases. Appendix C (p. 57) contains a table summarizing each district's provisions.

The majority of district courts have a rule that applies the same procedures to the filing of documents with signatures of non-filing CM/ECF Users in both civil and criminal cases. Virtually all districts require retention of original documents bearing wet signatures of non-filing users[13], and generally the filing attorney is the one who must retain the documents. For documents filed in criminal cases only, several districts require the U.S. Attorney's Office to retain the original document. Other districts require certain documents, particularly those filed in criminal cases, to be retained by the Clerk's Office.

As with bankruptcy courts, the length of the required retention period, and the time from which it begins running, vary widely across district courts. The length of retention periods ranges from 35 days to six years, and most district procedures begin the retention period at the expiration of the appeal period or following final resolution of the case.

Our research did not reveal any district court procedures similar to the signature declaration form used in the U.S. Bankruptcy Court for the Northern District of Illinois and under consideration by the Subcommittee.

IV. Opinions on Alternative National Approaches to Signature and Retention Requirements in Bankruptcy Cases

The primary rationale for requiring attorneys to retain hard copies of documents bearing original signatures is to preserve evidence for any subsequent criminal prosecutions involving bankruptcy fraud or other bankruptcy-related crimes. To further inform the Subcommittee about implications of changing the national rules on these issues, we solicited input from the Executive Office of U.S. Attorneys, the Executive Office of U.S. Trustees, and the National Association of Bankruptcy Trustees, a national organization for Chapter 7 trustees.

[12] Marie Leary, Research Associate at the Federal Judicial Center, conducted the research and analysis for this section.
[13] The only minor exception is found in the Eastern District of Wisconsin's Electronic Case Filing Policies and Procedures Manual, Section II.C.2.b, which provides that if the original document contains the signature of a criminal defendant, a third-party custodian, a United States Marshal, an officer from the U.S. Probation Office, or some other federal officer or agent, then the Clerk of Court's office will scan the document, upload it into ECF, and dispose of the hard copy.

In our outreach to these groups, we asked for their opinions of several alternative ways in which the national rules could address signature and retention issues. The options presented included some previously considered by this Subcommittee as well as options that were endorsed by CACM in its letter to the Standing Committee Chair. The following are the alternatives on which we asked for input:

A: Adopt a national rule specifying that an electronic signature of a non-registered user in the CM/ECF system is *prima facie* evidence of a valid signature. Under this proposal, the original document with a manual ("wet") signature would not have to be retained, and persons challenging the validity of a signature would have the burden of proving that the signature was not valid.

B: Adopt a national rule requiring that courts, rather than attorneys, retain copies of all originally-signed paper documents that are filed electronically.

C: Adopt a national rule requiring that the petitioner or other non-registered user who has signed a document file a one-page Declaration, under penalty of perjury, that (1) the information he/she has given to the filing attorney is true and correct; (2) petitioner (or other signer) has reviewed the documents being filed that bear his/her signature; and (3) the documents are true and correct. The signed original of the Declaration would be filed with the Clerk's Office. The Clerk's Office would retain the original Declaration (Option C1) or scan the Declaration and discard the hard copy (Option C2). Under either of these options, the filing attorney is not required to retain hard copies of the signed documents or the Declaration.

D: Adopt a national rule specifying the retention period for hard copy documents with manual signatures. Under this option, attorneys would continue to retain signed documents, but the retention period would be consistent across districts.

In addition to soliciting general reactions to these proposals, we also asked each group to share any experiences they had with bankruptcy cases, especially fraud prosecutions, in districts that had a version of that procedure.

a. Feedback from Executive Office of U.S. Attorneys

Staff at the Executive Office of U.S Attorneys sent our inquiry regarding the various electronic signature options to bankruptcy fraud prosecutors, and also tried to solicit input from others within the Department of Justice who prosecute fraud and related criminal cases. Because of the small number of responses received and other considerations, EOUSA declined to provide written input. However, we were able to obtain some feedback through informal conversations with staff. Because of the limited number of people on which this feedback is based, it should not be taken as representative of the views of federal prosecutors in general.

According to EOUSA staff, prosecutors who responded to our inquiry expressed a strong preference that debtors be required to affix handwritten signatures to all documents. While a paper original of the signature is considered best from an evidentiary standpoint, a scanned image of the handwritten signature was seen as potentially "workable." One issue raised was whether handwriting experts can perform analysis on scanned signatures, but this was not seen as the only way to surmount the evidentiary hurdle of proving someone actually signed a document in question. If case trustees check signatures at a 341 meeting, for example, their testimony could be an indicator of the reliability of a signature.

The prosecutors responding to our inquiry indicated they would be opposed to a rule that relied on an electronic "system" (e.g., a PIN number) as the signature. This would be particularly problematic in jury trials, because many jurors would not have experience with this type of electronic verification. It was seen as reasonable to put the burden on debtor's counsel to scan handwritten signatures and file the scanned signature pages with the related electronic documents.

With respect to the "Declaration" option under consideration by the Subcommittee, prosecutors raised the concern that this procedure is vulnerable to the assertion that the Declarant was not clear about which documents were covered by the Declaration or did not see all of the referenced documents. Staff members with whom we spoke in the EOUSA were unable to uncover any instances of bankruptcy fraud prosecutions that had taken place in districts with the Declaration procedure in place with no hard copy retention requirement, so there is no record on how difficult it is to establish these issues.

b. Feedback from Executive Office of U.S. Trustees

Lisa Tracy of the Executive Office for United States Trustees solicited input from each regional United States Trustee regarding potential national rules changes and any experience they had with wet signature issues in their respective local practices. In this section we summarize the feedback she received; her complete memorandum to us, including a table of potential rules change options preferred by her respondents, can be found in Appendix D (p. 83).

Overall, of the 18 U.S. Trustees responding to the inquiry, 15 indicated that Option "D" (a national rule setting a uniform retention period for documents with wet signatures) was their first preference, and for the remaining three it was their second preference. Two respondents favored Option "B" (requiring courts, rather than attorneys, to retain the documents bearing wet signatures), and one favored Option "A" (a rule stating that an electronic signature was prima facie evidence of a valid signature). Three respondents indicated that their second-most-favored option was "C" (the Declaration option). A table of all ranked responses can be found at the end of Appendix D.

In explaining their support for the alternative involving adoption of a national rule specifying the retention period for documents with wet signatures of non-registrants, several U.S. Trustees suggested that this would be the least disruptive alternative, since most courts already have retention requirements in place. Those who supported this alternative also indicated that the requiring hard copies to be retained significantly advances their mandate to prevent fraud and abuse in the bankruptcy system. Some of the U.S. Trustees who favored this approach also thought it would be helpful to require non-registrants, especially those appearing pro se, to electronically submit a scanned pdf copy of the original signature page of a filed document.

The U.S. Trustees responding to Ms. Tracy's inquiry expressed concern about proposed alternatives that would not require retention of hard copy documents bearing "hand" signatures, whether wet (original) or a copy. Specifically, their concern was that without such signatures, criminal prosecutors might not have enough evidence to prosecute cases of bankruptcy fraud or other bankruptcy-related crimes. Some U.S. Trustees reported anecdotally that in some jurisdictions prosecutors will decline to prosecute cases in which documents with a party's hand signature are unavailable.

Some U.S. Trustees also expressed the concern that, in the absence of a requirement for documents with a party's hand signature to be retained, they could be compromised in their ability to combat abusive conduct in bankruptcy cases. For example, they reported that in some cases challenges to a debtor's ability to receive a discharge under 11 U.S.C. §727(a)(4)(A) have been met with the claim that the debtor never signed the document providing the basis for the challenge, or signed a different version of the document. Such claims are much more difficult to refute in the absence of the signed document.

c. Feedback from National Association of Bankruptcy Trustees (NABT)

Raymond Obuchowski, Esq. distributed our inquiry to the full membership of the National Association of Bankruptcy Trustees (NABT), an organization of Chapter 7 trustees. We received responses from seven trustees. Their full responses are set forth in Appendix E (p. 87), and summarized here. Because of the small number of responses, they probably should not be interpreted as representative of the full membership.

Three trustees indicated that they favored some form of the declaration option; all three of those who did are from districts that have a declaration procedure (Illinois-Northern; Minnesota; and Massachusetts). Others, however, pointed out problems with the declaration option. Two indicated that some attorneys have debtors sign the declaration form before the petition and other documents are prepared, sometimes even at the first meeting. They also noted instances where a declaration was filed with no date on it.

None of the responding trustees endorsed option "A," under which an electronic signature is considered prima facie evidence of a valid signature. They mentioned instances in which attorneys fail to have their clients review documents that have been prepared. If a debtor did not agree to having his or her electronic signature put on a document, he or she has no way of proving that the signature is not valid. As one responding trustee said:

> "Unfortunately, there is an attorney in my district [who] does not think his clients need to review the petition, schedules, financial affairs before filing and sign these documents with a wet signature. I have reported his practice to the US Trustee with proof. If no retention is required, you will be telling this attorney that his practice of not having his clients review and sign documents is OK."

From the other side, as one trustee pointed out, requiring original signatures from debtors makes it more difficult for them to claim that their attorney put erroneous information in the petition or other documents without their knowledge.

Several of the responding trustees made suggestions about other possible rules changes, including:

- Have all wet signature pages scanned and e-filed, with a national retention period for the wet signatures (e.g., 3 years);
- Require debtors to initial every page of the petition (including amendments) before filing, without requiring hard copy retention;

- Allow a scanned digital copy of the petition and other signed documents to be filed, without a retention requirement ("it's highly unlikely that attorneys will forge their client's signatures");
- Allow any retained document to be a scanned copy with a blue ink signature (the trustee who suggested this accepts these at 341 meetings);

V. OMB Report on Use of Electronic Signatures in Federal Organization Transactions

On January 25, 2013, the General Services Administration and the Federal Chief Information Officers (CIO) Council published Version 2.0 of a report entitled "The Use of Electronic Signatures in Federal Organization Transactions," which had been requested by the Office of Management and Budget (OMB).[14] This document focuses on the use of electronic signatures for legal signing purposes in the context of electronic transactions. It provides guidance to federal organizations regarding electronic signatures, and particularly compliance of such signatures with the Government Paperwork Elimination Act of 1998 (GPEA), the Electronic Records and Signatures in Global and National Commerce Act (E-SIGN), and the Uniform Electronic Transactions Act (UETA).

Based on the above-mentioned statutes and applicable evidentiary requirements for admissibility, the report's authors concluded that "creating a valid and enforceable signature requires satisfying the following signing requirements":

1) A person (i.e., the signer) must use an acceptable electronic **form of signature**;
2) The electronic form of signature must be executed or adopted by a person with the ***intent to sign*** the electronic record (e.g., to indicate a person's approval of the information contained in the electronic record);
3) The electronic form of ***signature must be attached to or associated with the electronic record*** being signed;
4) There must be a means to ***identify and authenticate*** a particular person as ***the signer;*** and
5) There must be a means to preserve the ***integrity of the signed record.***[15]

The report provides more detail about various ways in which each of these requirements could be implemented. While the OMB report is not binding on federal organizations, its recommendations appear to be relied upon by at least some agencies. For example, on January 22, 2013, the Internal Revenue Service issued an announcement seeking recommendations for electronic signature standards, and proposed that any recommendations include the above-noted "core signing requirements."[16]

[14] The report is available at the following link:
http://www.idmanagement.gov/documents/Use_of_ESignatures_in_Federal_Agency_Transactions_v20_20130125.pdf
[15] Office of Management and Budget, Use of Electronic Signatures in Federal Organization Transactions, Version 2.0 (January 25, 2013) (emphases in original).
[16] Internal Revenue Service Announcement 2013-8 (January 22, 2013).

VI. Conclusion

The vast majority of courts, both bankruptcy and district, currently requires attorneys to retain hard copies of documents bearing original signatures of non-registrants of CM/ECF. Any rules change that does away with such requirements would alter current practice significantly. Given the input from prosecutors, U.S. Trustees and case trustees, it is possible that requiring a scanned image to be retained, rather than a "wet" or hard copy signature, would be more palatable to many, and would take advantage of some of the benefits of current technology. If the Subcommittee proceeds with developing a proposal for submission of a declaration in lieu of retaining hard copies, specific provisions to include within the proposal concern: whether the declaration form is retained by the filing attorney or the Clerk of Court; whether the declaration is retained in hard copy form or as a scanned image; when the declaration is signed relative to the filing of the documents to which it refers; whether the attorney must also sign the declaration; and the exact attestations the signer makes in signing the declaration.

APPENDIX A[17]
Local Bankruptcy Court Procedures on Signatures of Non-Filing Users of CM/ECF and Retention of Signed Documents

Bankruptcy Court/ Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?	Procedures for Filing Declaration
1st Circuit				
Maine Administrative Procedures for Filing, Signing, Maintaining, and Verifying Pleadings and Other Documents in the ECF System	2 years after close of case or expiration of appeals period, whichever is later	Attorney (filer)	No	
Massachusetts Electronic Filing Rules, Rule 7; MLBR Official Local Form 7	5 years after close of case	Attorney retains signed documents and declaration	Yes	Filed as an imaged document; valid for all subsequently-filed documents requiring a signature in the case.
New Hampshire A.O. 5005-4(d)(3) L.B.F. 5005-4A L.B.F. 5005-4B	None	Clerk of Court retains hard copy Declaration	Yes	Paper copy of declaration filed within 7 days of associated document; must attach copy of Notice of Electronic Filing with electronic document stamp

[17] Tae Kim, student intern at the Federal Judicial Center, assisted with the research for this appendix.

Bankruptcy Court/ Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?	Procedures for Filing Declaration
Puerto Rico Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means	2 years after closing of case, unless court orders otherwise	Attorney (filer)	No	
Rhode Island L.B.R. 5005-4(j)	2 years after case is closed	Attorney (filer)	No	
2nd Circuit				
Connecticut Standing Order No. 7; Administrative Procedures for Electronic Case Filing	5 years after conclusion of case	Attorney (filer)	No	
New York-Eastern Administrative Procedures for Electronically Filed Cases	2 years after entry of final order terminating case	Attorney (filer)	No	
New York-Northern Administrative Procedures for Filing, Signing, and Verifying Documents §III	2 years after closing of case and expiration of appeals period unless court orders otherwise	Attorney (filer)	No	
New York – Southern In Re Electronic Means for filing, signing, and verifying documents, Exhibit 1	Later of 2 years or entry of final order terminating case or proceeding	Attorney (filer)	No	

Bankruptcy Court/ Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?	Procedures for Filing Declaration
New York – Western Amended Administrative Procedures for filing, signing, and verifying pleadings and papers electronically	Not less than 5 years after closing of case	Attorney (registered user)	No	
Vermont L.B.R. 1002-1; L.B.R. 9011-1(b) L.B.R. 9011-2(b)	5 years	Attorney or pro se party (all documents requiring original signature)	No[18]	
3rd Circuit				
Delaware L.R. 5005-4	Not less than 2 years from closure or case or proceeding unless otherwise ordered	Attorney (CM/ECF user)	No	
New Jersey L.B.R. 5005-1 Administrative Procedures for Filing, Signing and Verifying Documents by Electronic Means	7 years from dates of closure of case or proceeding in which document is filed	Attorney ("Participant")	No	
Pennsylvania-Eastern L.B.R. 5005 Standing Order MO3-3005 re: Electronic Case Filing (April 1, 2003)	3 years after the main case is closed	Attorney (filing user)	No	

[18] Vermont formerly had a Declaration requirement, but new local rules effective as of October 15, 2012 have omitted this procedure.

Bankruptcy Court/ Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?	Procedures for Filing Declaration
Pennsylvania-Middle L.B.R. 5005-4 Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means.	None specified	N/A	No	
Pennsylvania-Western L.B.R. 5005-7, 5005-15 L.B.F. 1A	Six years from date of case closing	Attorney (Filing User)	Yes	Declaration (Form 1A) filed within 14 days of electronic filing of petition. Certifies that information given to attorney is true and correct. Original executed paper version is filed.
Virgin Islands L.B.R. 5005-1 ECF Procedure #7 L.B.F. 1 and 1A	Six years from date of filing	Attorney (Filing User)	Yes	Declaration (Form 1 or 1A) filed within 15 days of electronic filing of petition. Certifies that information given to attorney is true and correct. Original executed paper version is filed.
4th Circuit				
Maryland L.B.R. 5005-1 L.B.R. 9011-2, 9011-3; Administrative Order 03-02 §9	Three years after case is closed	Attorney or other person responsible for electronic transmission to court	No	

Bankruptcy Court/ Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?	Procedures for Filing Declaration
North Carolina – Eastern L.B.R. 5005-4(7)	Four years after closing of case or proceeding in which document was filed	Attorney (Filing User)	No	
North Carolina – Middle L.B.R. 5005-4(7)	Four years after closing of case or proceeding in which document was filed	Attorney (Filing User)	No	
North Carolina – Western L.B.R. 5005-1(g)	Four years after case is closed	Attorney	No	
South Carolina Operating Order 08-07 – Guidelines for the Filing of Documents	Until case or adversary proceeding is closed and appeals time has expired; if case is dismissed, for 3 years	Attorney or (if no attorney) party originating document	No	
Virginia-Eastern L.B.R. 5005-2 CM/ECF Policy Statement	3 years after closing of case	Attorney (User); may retain imaged copy in lieu of original if does this in ordinary course of business	No	
Virginia-Western L.B.R. 5005-4	3 years after case dismissal or closing, unless otherwise ordered	Attorney (User)	No	
West Virginia – Northern L.B.R. 5005-4.08 L.B.R. 5005-4.09; G.O. 12-01	If electronic (typed) signature is filed, hard copies must be retained until the later of final case disposition or expiration of statute of lims.	Attorney	Yes, if documents with signatures submitted in electronic form other than scanned PDF	

Bankruptcy Court/ Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?	Procedures for Filing Declaration
West Virginia – Southern Administrative Procedures for Electronic Filing	No less than one year from closing of case	Attorney (Registered Filer)	No	
5th Circuit				
Texas – Eastern Appendix 5005 Administrative Procedures for the Filing, Signing and Verifying of Documents by Electronic Means in Texas Bankruptcy Courts	5 years after closing of case or adversary proceeding, unless otherwise ordered by court	Clerk of Court retains paper copy of Declaration; Attorney (Electronic Filer) retains documents bearing original signatures	Yes	Declaration filed in paper format within 5 days of electronically-filed document
Texas – Northern Administrative Procedures for the Filing, Signing and Verifying of Documents by Electronic Means in Texas Bankruptcy Courts	5 years after closing of case or adversary proceeding, unless otherwise ordered by court	Clerk of Court retains paper copy of Declaration; Attorney (Electronic Filer) retains documents bearing original signatures	Yes	Declaration filed in paper format within 5 days of electronically-filed document
Texas-Southern Administrative Procedures for the Filing, Signing and Verifying of Documents by Electronic Means in Texas Bankruptcy Courts	5 years after closing of case or adversary proceeding, unless otherwise ordered by court	Clerk of Court retains paper copy of Declaration; Attorney (Electronic Filer) retains documents bearing original signatures	Yes	Declaration filed in paper format within 5 days of electronically-filed document

Bankruptcy Court/ Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?	Procedures for Filing Declaration
Texas-Western Administrative Procedures for the Filing, Signing and Verifying of Documents by Electronic Means in Texas Bankruptcy Courts	5 years after closing of case or adversary proceeding, unless otherwise ordered by court	Clerk of Court retains paper copy of Declaration; Attorney (Electronic Filer) retains documents bearing original signatures	Yes	Declaration filed in paper format within 5 days of electronically-filed document
Louisiana-Eastern L.R. 9011-4(b)	Not less than 1 year after case is closed; *New proposed L.R. 9011-1(b)(2) says retention for 5 years after case is closed*	Attorney of record or party originating document; *if new rules go into effect, Clerk's Office will retain original Declaration form with signature(s)*	No; *New proposed L.R. 1008-1 requires filing of Declaration Regarding Electronic Filing*	*Under proposed new rule, original Declaration must be filed within 7 days after filing petition*
Louisiana-Middle L.R. 1008-1 Local Forms 2 and 3	No less than 5 years after closing of case or adversary proceeding in which document was filed	Attorney (Electronic Filer); Clerk retains original of Declaration	Yes	Debtor (Form 2) – within 7 days after filing petition; Persons other than debtor (Form 3) – within 5 days of filing document
Louisiana-Western Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means	At least 5 years after case is closed. In adversary proceedings, at least 5 years after time for appeals has expired and adversary proceeding is closed.	Attorney of record or party filing document; Retention of Declaration follows same time periods	Yes	Filed no later than 48 hours following the date the petition was electronically filed. Can be scanned and filed electronically if filer is registered participant, or original may be filed conventionally.

Bankruptcy Court/ Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?	Procedures for Filing Declaration
Mississippi-Northern L.R. 5005-1(a)(2)(A); Administrative Procedures for Electronic Case Filing	Until case or adversary proceeding is closed and all maximum allowable times for appeals have expired	Attorney of record or party originating document	No	
Mississippi-Southern L.R. 5005-1(a)(2)(A); Administrative Procedures for Electronic Case Filing	One year after the case is closed	Attorney (Filer)	No	
6th Circuit				
Kentucky-Eastern Administrative Procedures Manual, II.F.	2 years after closing of case or proceeding or after all time periods for appeals have expired	Attorney (Filing User)	No	
Kentucky-Western L.R. 9011-1	2 years following expiration of time for appeals	Attorney (Filer)	No	
Michigan-Eastern ECF Procedures 10 & 11	5 years after closing of case or adversary proceeding	Attorney (Filer or User)	No	

Bankruptcy Court/ Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?	Procedures for Filing Declaration
Michigan-Western L.B.R. 1008; L.B.R. 9011; ECF Administrative Procedures Exhibit 12 (Declaration RE: Electronic Filing)	5 years from date of filing	Attorney (ECF Filer); Court retains original of Declaration	Yes	Filed separately in paper form within 5 days of petition being filed (Declaration form itself says 7 days); Clerk makes text entry in electronic docket that is has been filed, but it's not available for public viewing
Ohio-Northern L.R. 5005-4; ECF Administrative Procedures Manual	1 year following closing of case	Attorney (user)	Yes	Expected to be mailed to court on the same day as electronic filing of initial document requiring debtor's signature (usually petition); if not received within 7 days of electronic filing, show cause hearing is scheduled.
Ohio-Southern L.B.R. 5005-4; Administrative Procedures for ECF, 7 and 8	Minimum of 2 years from closing of case or proceeding	Attorney (Filer or User)	No	
Tennessee-Eastern L.B.R. 5005-4; Administrative Procedures for ECF	2 years after closing of case	Attorney (filing attorney)	No	
Tennessee-Middle Administrative Procedures for ECF 6.	None		No	

Bankruptcy Court/ Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?	Procedures for Filing Declaration
Tennessee-Western Amended Guidelines for Electronic Filing 5 and 6	5 years after case or proceeding is closed – pages containing original signatures must be retained	Attorney	No	
7th Circuit				
Illinois-Central Third Amended General Order Authorizing Electronic Case Filing	Until all time periods for appeals expire	Attorney (Filing User)	No	
Illinois-Northern L.B.R. 5005-1; Administrative Procedures for the CM/ECF System §II.C.1; Local Form Declarations	None		Yes	Separate Declaration forms for 1) Petition and accompanying documents; and 2) other documents. Must accompany Petition (or other document) but is filed as separate document. Must contain original signature of person whose signature is required on related document and be in a form that can be accurately scanned. Scanned copy of declaration serves as clerk's permanent record.

Bankruptcy Court/ Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?	Procedures for Filing Declaration
Illinois-Southern L.B.R. 5005-3; Electronic Filing Rules 5 and 10	5 years after close of case	Attorney (attorney/participant)	No	
Indiana-Northern L.B.R. 5005-2	At least 3 years following the closing of the case	Attorney (filing attorney)	No	
Indiana-Southern L.B.R. 5005-4; Administrative Policies and Procedures Manual for ECF	2 years after closing of case or as otherwise ordered by the court	Attorney (e-filer)	No	
Wisconsin-Eastern L.B.R. 1008; L.B.R. 5005.1; Form Verification of Signature and Designation of Electronic Counterpart as Original	5 years after close of case unless otherwise ordered by Court	Attorney (filer)	As alternative to retaining hard copy for 5 years, filer may have original document scanned, digitized, and electronically stored for 5 years if Verification of Signature and Designation of Electronic Counterpart as Original is signed and filed.	Verification is filed electronically

Bankruptcy Court/ Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?	Procedures for Filing Declaration
Wisconsin-Western CM/ECF Administrative Procedures §2.D.; Form Declaration re: Electronic Filing	Retention period not specified, but procedures say that upon request, original signed documents must be provided and that "for evidentiary purposes the parties are encouraged to retain the original document in their records."	Not specified for signed documents; Court retains Declaration	Yes	Hard copy of Declaration filed within 5 days of electronic filing of petition. Paper copy retained by Court "in conformity with its normal internal procedures regarding paper files."
8th Circuit				
Arkansas-Eastern L.B.R 5005-4; Administrative Procedures for Electronically Filed Cases and Related Documents §D.6	No less than 3 years after case is closed; procedures specify that retention of documents is "for audit purposes."	Attorney	No	
Arkansas-Western L.B.R 5005-4; Administrative Procedures for Electronically Filed Cases and Related Documents §D.6	No less than 3 years after case is closed; procedures specify that retention of documents is "for audit purposes."	Attorney	No	

Bankruptcy Court/ Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?	Procedures for Filing Declaration
Iowa-Northern L.B.R. 5005-4; Administrative Procedures for Filing, Signing, Verifying, and Maintaining Pleadings and Other Papers in the Electronic Case Filing (ECF) System	5 years after case is closed	Attorney (Filer)	No	
Iowa-Southern CM/ECF E-Filing Manual: Before You File/Preparing Documents for E-Filing	Until appellate period expires	Attorney	No	
Minnesota L.B.R. 5005-1; L.B.R. 9011-4; Form Signature Declaration	None		Yes	When original signature is required, Filing User shall submit either scanned image of Signature Declaration or the electronic document with a scanned image of the signature page signed by debtor
Missouri-Eastern L.B.R. 5005.A.; L.B.R. 9011	2 years after close of case unless Court orders different time period	Attorney (person filing or submitting document)	No	

Bankruptcy Court/ Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?	Procedures for Filing Declaration
Missouri-Western L.B.R. 1007-1.D.; L.B.R. 5005-1; L.B.F. 1007-1.3 (Declaration re: Electronic Filing); CM/ECF Administrative Procedures	Not less than 2 years after case is closed	Attorney	Yes	Filed electronically on the day the original petition is filed electronically (although L.B.R. 1007-1-D says within 7 days). Contains full SSN of debtor; maintained as private entry in court file and cannot be viewed by public.
Nebraska L.B.R. 5005-1; L.B.R. 9011-1; Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means	At least 1 year after case is closed; for adversary proceedings, until after case ends and time for appeal has expired	Attorney of record or party originating document	No	
North Dakota L.B.R. 5005.1; CM/ECF Administrative Procedures	6 years after case is closed	Attorney (Filing User)	No	
South Dakota L.B.R. 5005-4; ECF Administrative Procedures	Not less than 5 years after case is closed, unless Court directs different period	Attorney or limited user	No	

Bankruptcy Court/ Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?	Procedures for Filing Declaration
9th Circuit				
Alaska L.B.R. 5005-4; L.B.F. 37A and 37B	None		Yes; separate forms for individuals and corporations	Declaration must be signed before the Petition is filed and filed conventionally within 14 days of the date the Petition is electronically filed. Rule states that "The declaration constitutes the debtor(s)' original signature for filing purposes."
Arizona L.B.R. 5005(2); Administrative Procedures for Electronically Filed Cases §§2D and 2H; Form Declaration re: Electronic Filing	Longer period of 1 year after case is closed or all appeals are finalized, unless Court orders otherwise	Attorney (attorney or other user)	Yes	Original Declaration filed with clerk after all schedules and statements have been filed electronically, no later than 20 days after petition was filed.
California-Central L.B.R. 5005-4; §3.4 of Court Manual (CM/ECF Procedures); Form ECF Declarations	5 years after closing of case or adversary proceeding in which document is filed	Attorney (attorney or other CM/ECF user electronically filing document)	Yes; separate forms for individuals and corporations	Scanned copy of Declaration to accompany electronically-filed documents

Bankruptcy Court/ Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?	Procedures for Filing Declaration
California-Eastern L.B.R. 9004-1(c)	3 years following close of case – retention only required if "/s/ Name" or software-generated electronic signature is used; apparently not required if filer submits scanned copy of originally signed document or scanned copy of signature page attached to electronic document	Attorney (registered user)	No	
California-Northern L.B.R. 5005-2; ECF Procedures §§8 and 9	5 years after case or adversary proceeding in which the document was filed is closed	Attorney (Registered Participant)	No.	
California-Southern Amended Bankruptcy G.O. 162; Administrative Procedures and Guidelines for EF, §§2b. and 2c, Local Form CSD 1801.	5 years after case is closed or adversary proceeding terminated	Attorney (Registered User)	Yes	Filed electronically providing original debtor(s)' signature in scanned format; filed within 14 days of filing of Petition.

Bankruptcy Court/ Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?	Procedures for Filing Declaration
Guam G.O. 09-00007; Administrative Procedures for the Electronic Filing, Signing, Verifying, and Serving of Bankruptcy Documents	2 years after all time periods for appeals expire	Attorney (ECF Filer)	Yes	Filed in paper form not later than 5 business days after the date of electronic filing of the subject document(s)
Hawaii L.B.R. 5005-4(f); Form Declaration	1 year after case or proceeding is closed; in lieu of originally signed paper document, ECF User may produce the document's scanned image with the digital file's "date modified" information attached.	Attorney (ECF User)	Yes	Paper copy of Declaration with original signature filed within 7 days after the date of the electronic filing of the subject document.
Idaho L.B.R. 5003.1	No less than maximum time to complete any appellate process or the time the case is closed, whichever is later.	Attorney (filing party)	No	When original or amended petition, schedules, and SOFA are filed, attorney must electronically submit scanned pdf copy of original signature page
Montana L.B.R. 1007-1(f). L.B.R. 9011-1(b).	Original signed documents must be retained in paper form for a period of five years after the case is closed.	Attorney (filer)	No	

Bankruptcy Court/ Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?	Procedures for Filing Declaration
Nevada L.B.R. 5005; Electronic Filing Procedures §VIID and XI; L.B.R. 9004; Form NV 5005.2.	Later of 5 years or maximum allowable time to complete appellate process. Declaration must also be retained	Attorney (Filing User)	Yes	Declaration must be signed before documents are electronically filed, and Declaration must be filed within 14 days, either by electronic or conventional means. If Declaration is filed electronically, image of original must be attached to document(s) in PDF format
Oregon L.B.R. 5005-4; Administrative Procedures for ECF system	Later of closing of case or 5 years after filing for documents under FRBP 1008	Attorney (Filing User)	No	
Washington-Eastern L.B.R. 5005-3	Not less than 5 years, maximum allowable time to complete appellate process, or the case or adversary proceeding is closed, whichever is later; retention is of document containing original signature or copy made in the ordinary course of business	Attorney (filing party)	No	

Bankruptcy Court/ Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?	Procedures for Filing Declaration
Washington-Western L.B.R. 5005-1; Administrative Procedures for Filing, Signing and Verifying Pleadings and Papers by Electronic Means	Not less than 5 years	Attorney (attorney of record or party originating document)	No	
10th Circuit				
Colorado Amended Administrative Procedures for Electronic Case Filing §II.D; L.B.F. ECF-2; L.B.R. 5005-4(k).	2 years following expiration of all time periods for appeals after entry to final order terminating case or proceeding.	Attorney (Electronic Filer)	No[19]	
Kansas L.R. 5.4.7; 5.4.8; and 83.8.2. L.B.R. 5005.1(VII). L.B.R. 1007.1(a)(3).	6 years after all time periods for appeals expire	Attorney (Filing User)	Yes	Initial Filings: When filing for bankruptcy petition electronically, counsel must submit Declaration Re: Electronic Filing in lieu of Official Form 21.

[19] The original Administrative Procedures for Colorado (2002) required a Declaration when documents requiring the signature of a debtor were filed, but that provision is not in the amended Administrative Procedures (2007).

Bankruptcy Court/ Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?	Procedures for Filing Declaration
New Mexico L.B.R. 5005-4.2; 5005-4.3; 9011-4; L.B.F. 902, 903; Electronic Filing Procedures	None		Yes	Separate Declaration/signature forms for Petition and Schedules and SOFA filed after petition. For subsequent filings requiring verified signature, attorney must craft own signature page, or prepare Debtor's Unsworn Declaration Under Penalty of Perjury. Documents with debtor signature are electronically filed using scanning technology. L.B.R. 5005-4.2 states that "verified papers filed electronically shall be treated for all purposes (both civil and criminal, including penalties for perjury) as if they had been physically signed or subscribed." L.B.R. 9011-4 states that "The court will treat a duplicate signature as an original signature."
Oklahoma-Eastern L.B.R. 9011-1, 9011-3; CM/ECF Administrative Guide §XI.C.	At least 1 year after case is closed.	Attorney (attorney of record or party originating document)	No	

Bankruptcy Court/ Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?	Procedures for Filing Declaration
Oklahoma-Northern L.B.R. 9011-1; CM/ECF Administrative Guide §XI.C.	At least 1 year after case is closed.	Attorney (attorney of record or party originating document)	No	
Oklahoma-Western General Order: Guidelines for Electronic Case Filing, §§6.E, 10. Form A: Electronic Case Filing System Attorney Registration Form.	1 year after all time periods for appeals from any ruling or decision in bankruptcy case or adversary proceeding have expired	Attorney (Registered Participant)	Yes	Completed form of Declaration Regarding Electronic Filing of Petition and Schedules must be submitted and returned mailed to the court address.
Utah L.B.R. 5005-2; ECF Protocols II.B.5	5 years after all time periods for appeals expire	Attorney (Filing User)	No	
Wyoming ECF Participant Registration Form[20]	Not less than 5 years	Attorney of record or party originating document	No	
11th Circuit				
Alabama-Middle L.B.R. 9011-1(b)(2) L.B.R. 1002-1(2); Local Form 1.	4 years after closing of case (apparently only for documents that can't be filed in scanned form)	Attorney (authorized participant)	Yes	Petitions filed by lawyers shall be accompanied by a Declaration re: Electronic Filing of Petition, Schedules & Statements, on Local Form 1.

[20] Wyoming is not a mandatory ECF court.

Bankruptcy Court/ Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?	Procedures for Filing Declaration
Alabama-Northern Administrative Procedures for Filing, Signing, Retaining, and Verification of Pleadings and Papers in the CM/ECF System II. C. (1).	3 years after closing of case	Attorney (filer)	No	
Alabama-Southern L.B.R. 1007(b)-1	Not less than 6 years from date of case closing	Attorney.	No	
Florida-Middle L.B.R. 5005-2, 9011-4; Declaration for Electronic Filing	4 years after closing of case	Attorney	Yes, for any verified document not containing an original signature	Filed in PDF format, containing image of original signature of party signing the paper
Florida-Northern Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means	4 years after the closing of the case	Attorney (attorney or other registered user); Clerk retains originals in pro se cases	No	
Florida-Southern L.B.R. 1002-1(4), 1007-1(D), 5005-4(c), and 9011-4(c)	5 years from the date of discharge, dismissal of case, or resolution of appeals, whichever is later	Not specified	Yes	Filed with Petition and with schedules or statements filed separately from petition unless they contain an imaged signature

Bankruptcy Court/ Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?	Procedures for Filing Declaration
Georgia-Middle L.B.R. 5005-4(b)(3); Clerk's Instructions §II(c)(3)	1 year after closing of case	Attorney	No	
Georgia-Northern L.B.R. 5005-7(c)(3); CM/ECF Administrative Procedures; L.B.F. 5005-7(c)(3)(B)	1 year after case or proceeding is closed	Attorney (person filing a Verified Paper)	Yes	Declaration in imaged format filed simultaneously with documents referenced
Georgia-Southern Local Bankruptcy Rules for ECF 7	5 years after conclusion of all appeals or expiration of time for filing an appeal, whichever is later	Attorney (filer)	No; but non-filing signatory or party who disputes authenticity of signature must file an objection within 7 days of receiving the Notice of Electronic Filing	
District of Columbia L.B.R. 5005-4; Administrative Order Relating to Electronic Case Filing (July 7, 2011); Administrative Procedures for Filing, Signing, and Verifying Documents by Electronic Means	5 years from filing of document; can be retained in paper form or electronically (scanned signature); retention requirement does not apply to document filed with scanned image of original signature	Attorney (user)	No	

APPENDIX B
Declaration Provisions in Courts Not Requiring Retention of Hard Copy Documents Bearing Signatures of Non-Registrants

District of Alaska

Local Bankruptcy Rule 5005-4 Electronic Case Filing

…(c) **Signatures.**

…..(2) *Debtors.*

[A] For all petitions, lists, schedules and statements requiring the signature of the debtor(s) that are filed electronically, a Declaration Re: Electronic Filing, AK LBF 37A or 37B, as applicable, must be prepared by the participant, bearing the original signatures of the debtor(s) and the attorney for debtor(s).

[B] The declaration constitutes the debtor(s) original signatures for filing purposes.

[C] The original declaration must be:

(i) signed before the petition is filed; and

(ii) filed conventionally with the Bankruptcy Court within fourteen (14) days of the date the petition is electronically filed.

Alaska Local Bankruptcy Form 37A

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ALASKA

In re: **Case No.**
Chapter

DECLARATION RE: ELECTRONIC FILING OF PETITION, SCHEDULES, STATEMENTS, OF 23, AND PLAN IF CHAPTER 11, 12, OR 13 CASE

Debtors.

Part I - Declaration of Petitioner(s)

I [We] _____and_____,the undersigned debtor(s), hereby declare under penalty of perjury that the information given or to be given my [our] attorney and the information provided in the electronically filed petition, statements, schedules, matrix, OF 23 and in my [our] chapter 11, 12 or 13 plan (if this is a case under such chapter) and any amendments thereto, is or will be true and correct. I [We] consent to my [our] attorney sending my [our] petition, statements and schedules (and plan, if applicable) and any amendments thereto, and our OF 23, to the United States Bankruptcy Court electronically. I [We] understand that this Declaration re: Electronic Filing is to be filed with the Clerk not later than 14 days following the date the petition is electronically filed. I [We] understand that failure to file the signed original of this Declaration will result in the dismissal of my [our] case after a hearing on shortened time of no less than five days notice.

[ ] If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7: I am [We are] aware that I [we] may proceed under chapter 7, 11, 12 or 13 of 11 United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7. I [We] request relief in accordance with the chapter specified in this petition.

Dated:

Signed: _____ _____
(Applicant) (Joint Applicant)

Part II - Declaration of Attorney

I **declare under penalty of perjury** that the debtor(s) signed this form before I electronically submitted the petition, schedules, and statements (and chapter 11, 12 or 13 plan, if applicable). Before filing, I will give the debtor(s) a copy of all documents to be filed with the United States Bankruptcy Court, and have followed all other requirements in the most recent ECF System Procedures. I further declare that I have examined or will examine the debtor's petition, schedules, and statements and any amendments thereto, as well as the debtor's OF 23, and, to the best of my knowledge and belief, they are or will be true, correct, and complete. I further declare that I have informed the petitioner(s) that [he or she or they] may proceed under chapter 7, 11, 12 or 13 of Title 11, United States Code, and have explained the relief available under each such chapter. This declaration is based on all information of which I have knowledge.

Dated:

_____
Attorney for Debtor(s)

...II.C. Signatures

II.C.1. Original Non-Attorney Signatures

II.C.1.a. Petitions and Accompanying Documents

When a bankruptcy petition is filed electronically, the petition must be accompanied by a Declaration Regarding Electronic Filing. The Declaration will serve as the required signature(s) on the petition and all other documents filed contemporaneously with the petition that must be signed by the debtor(s) or the representative of a non-individual debtor.

II.C.1.b. Documents Filed After Petition

Except for petition filings covered by subparagraph II.C.1.a., if any document filed electronically, including those documents listed in Fed.R.Bankr.P. 1008, must be signed by a person other than the Registrant filing the document, a Declaration Regarding Electronic Filing signed by each person whose signature is required must accompany the document.

II.C.1.c. Requirements

A Declaration Regarding Electronic Filing must

(a) be in a form approved by the clerk;
(b) be filed as a separate document for docketing, not as an attachment to the document requiring signature;
(c) be dated;
(d) identify the document to which the Declaration relates;
(e) contain an original signature of the person whose signature is required on the document to which the Declaration relates; and
(f) be in a form that can be accurately scanned.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: **Chapter**
Bankruptcy Case No.

Debtors.

DECLARATION REGARDING ELECTRONIC FILING PETITION AND ACCOMPANYING DOCUMENTS

DECLARATION OF PETITIONER(S)

A. [To be completed in all cases]

I (We), _____ and _____ the undersigned debtor(s), corporate officer, partner, or member hereby declare under penalty of perjury that (1) the information I (we) have given my (our) attorney is true and correct; (2) I (we) have reviewed the petition, statements, schedules, and other documents being filed with the petition; and (3) the documents are true and correct.

B. [To be checked and applicable only if the petition is for a corporation or limited liability entity.]

[ ] I, _____, the undersigned, further declare under penalty of perjury that I have been authorized to file this petition on behalf of the debtor.

_____	_____
Printed or Typed Name of Debtor or Representative	Printed or Typed Name of Joint Debtor
_____	_____
Signature of Debtor or Representative	Signature of Joint Debtor
_____	_____
Date	Date

District of Minnesota

Local Bankruptcy Rule 9011-4
Signatures

…(d) ELECTRONIC SIGNATURES – DEBTORS. When an original signature of a debtor, authorized individual or joint debtor is required on the (1) petition, schedules and statements; (2) amendment to petition, schedules and statements; (3) chapter 13 plan; or (4) modified chapter 13 plan, the Filing User shall submit either a scanned image of the Form ERS 1 Signature Declaration signed by the debtor(s) or the electronic document with a scanned image of the signature page signed by the debtor(s). The scanning of documents is governed by Local Rule 9004-1(e).

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

SIGNATURE DECLARATION

Debtor(s). **Case No. _____**

___ PETITION, SCHEDULES & STATEMENTS
___ CHAPTER 13 PLAN
___ SCHEDULES AND STATEMENTS ACCOMPANYING VERIFIED CONVERSION
___ AMENDMENT TO PETITION, SCHEDULES & STATEMENTS
___ MODIFIED CHAPTER 13 PLAN
___ OTHER (Please describe:_____)

I [We], the undersigned debtor(s) or authorized representative of the debtor, **make the following declarations under penalty of perjury:**

- The information I have given my attorney and provided in the electronically filed petition, statements, schedules, amendments, and/or chapter 13 plan, as indicated above, is true and correct;
- The information provided in the "Debtor Information Pages" submitted as a part of the electronic commencement of the above-referenced case is true and correct;
- **[individual debtors only]** If no Social Security Number is included in the "Debtor Information Pages" submitted as a part of the electronic commencement of the above-referenced case, it is because I do not have a Social Security Number;
- I consent to my attorney electronically filing with the United States Bankruptcy Court my petition, statements and schedules, amendments, and/or chapter 13 plan, as indicated above, together with a scanned image of this Signature Declaration and the completed "Debtor Information Pages," if applicable; and
- **[corporate and partnership debtors only]** I have been authorized to file this petition on behalf of the debtor.

Date: _____

X_____ X_____

Signature of Debtor or Authorized Representative

Signature of Joint Debtor

_____ X_____

Printed Name of Debtor or Authorized Representative

Printed Name of Joint Debtor

District of New Hampshire

Administrative Order 5005-4

…(d) Signatures and Declarations Regarding Electronic Filing

… (3) Documents Containing Original Signatures Under Oath Require Submission of Declaration Regarding Electronic Filing. If a document that is electronically filed contains an original signature under oath, other than that of the Filing User, a paper copy of a Declaration Regarding Electronic Filing must be submitted to the Court within seven (7) days. Examples of documents that require the submission of a Declaration Regarding Electronic Filing include petitions, amendments to schedules/statements, affidavits, verified complaints and plans if signed under oath. The Declaration Regarding Electronic Filing must be in the form of LBFs 5005-4A or 5005-4B, must be signed under oath and must have attached to it a copy of the Notice of Electronic Filing for that document, which includes the electronic document stamp. As part of the clerk's duty to maintain records, the clerk shall retain all Declarations Regarding Electronic Filing that are submitted to the Court.

LBF 5005-4A
(Eff. 12/1/09)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. _____-_____-MWV or JMD
_____, Chapter _____
Debtor

Full Social Security No. of Debtor: _____-_____-_____
Full Social Security No. of Joint Debtor:_____-_____-_____

DECLARATION REGARDING ELECTRONIC FILING FOR PETITIONS, SCHEDULES AND AMENDMENTS TO SCHEDULES

PART 1 - Declaration of Petitioner:

I, _____, the undersigned debtor, corporate officer, partner or managing member, hereby declares under penalty of perjury that the information I have given my attorney and the information contained in the petition, statements and schedules, or amendments thereof that are to be electronically filed (the "petition and schedules"), consisting of ___ pages, is true and correct, to the best of my knowledge and belief. I understand that this DECLARATION REGARDING ELECTRONIC FILING is to be submitted to the clerk after the petition and schedules have been filed electronically but, in no event, no later than seven (7) days after the petition and schedules have been filed. I acknowledge receipt of a copy of the petition and schedules that are to be electronically filed.

[ ] [If petitioner is an individual] I am aware that I may proceed under Chapter 7, 11, 12, or 13 of Title 11 of the United States Code, and I understand the relief available under each such chapter. I request relief in accordance with the chapter specified in the petition. I declare under penalty of perjury that the foregoing Social Security number is true and correct.

[ ] [If petitioner is a corporation, partnership or limited liability entity] I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor. The debtor requests relief in accordance with the chapter specified in this petition.

I understand that failure to file the signed original of this DECLARATION is grounds for dismissal of my case pursuant to 11U.S.C. § 707(a)(3).

Date: _____ _____
Authorized Corporate Officer/Partnership Member

Signed:_____ _____
Debtor Joint Debtor (if joint case, both spouses must sign)

Part 2 - Declaration of Attorney:

I declare that, to the best of my knowledge, information and belief, formed after an inquiry reasonable under the circumstances, that the petition and schedules are not being presented for any improper purpose; that the claims, defenses, and other legal contentions therein are warranted and are not frivolous; that the allegations and other factual contentions have, or will have, evidentiary support; and that the denials of factual contentions are warranted. I further certify that the debtor signed this Declaration and authorized me to electronically file the petition and schedules, that I gave the debtor a copy of the petition and schedules that are to be electronically filed, and that the petition and schedules identified in the attached Notice of Electronic Filing from the CM/ECF system fully and accurately reflect the information given to me by
The debtor. I have complied with all other electronic filing requirements. I have informed the individual petitioner that [he and/or she] may proceed under Chapter 7, 11, 12 or 13 of Title 11of the United States Code and have explained the relief available under each such chapter. This declaration is based upon all information of which I have knowledge.

Date: _____ _____
Attorney Signature

_____
Print Name
Address_____
_____
Tel. No._____

NOTE: You must attach the Notice of Electronic Filing as an exhibit.

(FILE ORIGINAL WITH COURT. DO NOT FILE ELECTRONICALLY.)

District of New Mexico

Electronic Filing Procedures

11 Signatures

…

11.2 Verified Signature of Person Other Than Attorney. Documents which require the verified signature of a person other than the electronically filing attorney may be electronically filed utilizing scanning technology. Documents which require the verified signature of the debtor include the petition, schedules, statement of affairs, statement of intent, non-filing spouse certification, reaffirmation agreement, an application to pay filing fee in installments, and amendments to the petition[3].

[3]**Fed. R. Bankr. P. 1008.**

Please carefully review the various debtor signature forms for electronically filed petitions you will find on the Court's Web site (select "Forms," and then click on "Debtor's Signature Pages"). These forms are designed to be used upon the initiation of the case (or filing schedules after a skeleton petition has been filed), not for subsequent or unrelated documents, such as an amendment to the petition or an amended statement of intention. In these instances, you will need to craft your own signature page, use the one produced by your software, or prepare the Debtor's Unsworn Declaration Under Penalty of Perjury (following the form posted on the Court's Website).

Scanning may also be utilized for documents containing verified signatures of other persons, e.g., reaffirmation agreements and affidavits:

". . .an electronically filed affidavit would have to be scanned in so that the required signatures would be visible on the "official" electronic document."

Clark v. Ford Motor Credit Co. (In re Clark), Case No. 7-03-15342 M A, Adv. No. 03-1381 M, docket No. 38, United States Bankruptcy Court, District of New Mexico, August 10, 2004, at www.nmb.uscourts.gov.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re

Debtor(s). No. _____

SIGNATURE PAGE: DECLARATION BY DEBTOR
Schedules and Statement of Financial Affairs Filed **After** Petition

‘

[ ] *[For individual debtor(s)]*

I declare under penalty of perjury that I have read the summary of *schedules (and, if I am an individual debtor whose debts are primarily consumer debts, as defined in 11 U.S.C. section 101(8), the statistical summary of certain liabilities and related data),* the schedules, [consisting of _____ sheets], and the answers contained in the statement of financial affairs and any attachments thereto, and that they are true and correct.

_____ _____
Signature of debtor Date Signature of Joint Debtor Date

[ ] *[Where debtor is not an individual]*

I declare under penalty of perjury that I have read the summary of schedules and the schedules, [consisting of _____ sheets], and the answers contained in the statement of financial affairs and any attachments thereto, and that they are true and correct to the best of my knowledge, information and belief.

_____ _____
Signature of authorized individual Printed name of authorized individual

_____ _____
Title of authorized individual Date

NM LF 903

Eastern District of Wisconsin

LR 5005.1 Retention of Electronically Filed Documents.

(a) Documents which must contain original signatures of the debtor(s) or other entities, including those which are: signed under penalty of perjury; require verification under Fed.R.Bankr.P. 1008; or contain an unsworn declaration as provided in 28 U.S.C. § 1746 must be maintained by the filer of the document for a period of five years after the closing of the case unless the Court orders a different period. On request of the Court or any party in interest, the filer must provide the original documents for review.

(b) As an alternative to maintaining the above referenced documents for a period of five years, the filer may have the original document, including any original signature, scanned, digitized and electronically stored for five (5) years. Such document shall be deemed a counterpart intended by the person executing or issuing it to have the same effect as an original pursuant to Federal Rule of Evidence 1001(3) provided the person or persons executing or issuing the document shall have signed and filed in the case a Verification of Signature and Designation of Electronic Counterpart as Original as set forth in the Appendix to these Rules. On the request of the Court or any party in interest the filer must provide a copy of the electronic document.

UNITED STATES BANKRUPTCY COURT EASTERN DISTRICT OF WISCONSIN

In the Matter of: Chapter

Debtor(s). Case No.

VERIFICATION OF SIGNATURE AND DESIGNATION
OF ELECTRONIC COUNTERPART AS ORIGINAL

I (we), _____ and _____, the undersigned debtor(s), corporate officer, partner or member, hereby declare under penalty of perjury that the signature(s) below are the signature(s) of the debtor(s), corporate officer, partner or member who has signed or will sign any document in this case which is signed under penalty of perjury, requires verification under Fed. R. Bankr. P. 1008 or contains an unsworn declaration under 28 U.S.C. 1746. I (we) do further declare that any of the foregoing documents executed or issued by me (us) which are maintained by the filer thereof in an electronic format pursuant to Local Bankruptcy Rule 5005.1(b) are intended by me (us) to be a counterpart having the same effect as an original pursuant to Fed. R. Evidence 1001(3).

Signature: _____ Signature:_____

Print Name:_____ Print Name:_____
(Debtor or Corporate Officer, Partner, Member) (Joint Debtor)

Date: _____

Attorney Name
Street Address
Suite #
City. State, Zip
Phone No.
FAX No.
E-mail

APPENDIX C

Local District Court Procedures on Signatures of Non-Filing Users of CM/ECF and Retention of Signed Documents

District Court/Civil and Criminal Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?
1st Circuit			
Maine **Civil Cases & Criminal Cases** **Local Civil Rule 10** Form of Pleadings, Motions And Other Papers *See also* **D Maine Local Rules, Appendix IV** *Administrative Procedures Governing The Filing And Service By Electronic Means*, § (h) Signature (same)	For a period of not less than two (2) years after the expiration of the time for filing a timely appeal	Attorney (filer)	No
Massachusetts **Civil Cases & Criminal Cases** **Administrative Procedures for Electronic Case Filing in the United States District Court for the District of Massachusetts*, § M. Signature & § Y. Retention (retention period applies to any document requiring an original signature). *Referenced in Local Rule 5.4(B) *See also Electronic Case Filing CM/ECF User's Manual:* Signatures; Affidavits of Service (same as above)	Until two (2) years after the expiration of the time for filing a timely appeal	Attorney (filer)	No
New Hampshire **Civil Cases & Criminal Cases** **Local Rules Appendix A Supplemental Rules For Electronic Case Filing, Rule 2.7** Signatures on Electronically Filed Documents, (e) Retention of Documents	Until three (3) years after the date of filing or until the conclusion of all appeals in the case, whichever date is later	Attorney (Filing User)	No

District Court/Civil and Criminal Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?
Puerto Rico **Civil & Criminal Cases** **Standing Order No. 1,** In the Matter of Electronic Case Filing, Misc. No. 03-149(HL) (11/24/03), § 8. Retention Requirements (p.7)	Until 5 years after all time periods for appeals expires	Attorney (Filing User)	No
Rhode Island **Civil & Criminal Cases** Lr Gen 307 Document Retention Requirements	Until two years after a final decision has been rendered which disposes of all aspects of the case	Attorney (Filing User)	No
2nd Circuit			
Connecticut **Civil & Criminal Cases** *Electronic Filing Policies And Procedures*, §§ XI. Signatures & XV. Retention of Originals of Documents Requiring Scanning	For a period of five years following the expiration of all time periods for appeals or statutes of limitation	Attorney (filer)	No
New York Eastern **Civil Cases & Criminal Cases** *CM/ECF User's Guide, Introduction*. Note: We were unable to locate a provision specifically addressing retention of non-attorney original signatures.			
New York Northern **Civil Cases & Criminal Cases** *General Order #22 Administrative Procedures for Electronic Case Filing*, Rule 4.8 Document Retention; Rule 6.2 Non-Attorney signature	For a period of not less than sixty days after all dates for appellate review have expired	Attorney (Filing User)	No

District Court/Civil and Criminal Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?
New York Southern **Civil & Criminal Cases** *Electronic Case Filing Rules & Instructions*, Part I.7 Retention Requirements	Until one year after all time periods for appeals expire, except that affidavits, declarations and proofs of service must be maintained in paper form by the Filing User until five years after all time periods for appeals expire	Attorney (Filing User)	No
New York Western **Civil & Criminal Cases** **Administrative Procedures Guide*, Rule 2.g.v. *Referenced in Local Rule 5.1(a)	For a period of five years following the expiration of all time periods for appeals	Attorney (Filing Party)	No
Vermont **Civil & Criminal Cases** **Administrative Procedures For Electronic Case Filing (ECF)*, § (J)(5) Retention of Documents. *Referenced in Local Rule 5(b)	Until two (2) years after the expiration of the time for filing a timely appeal	Attorney (Filing User)	No
3rd Circuit			
Delaware **Civil & Criminal Cases** **Revised Administrative Procedures Governing Filing And Service By Electronic Means*, § (H) Signature *Referenced in Civil Local Rule 5.1(a)	For two (2) years after the expiration of the time for filing a timely appeal	Attorney (Filer)	No

District Court/Civil and Criminal Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?
New Jersey **Civil Cases & Criminal Cases** Civ. Rule 5.2 Electronic Service And Filing Documents, Electronic Case Filing Policies And Procedures, 13. Retention Requirements.	Until one (1) year after all periods for appeals expire	Attorney (ECF Filing User) and/or the firm representing party on whose behalf the document was filed	No
Pennsylvania-Eastern **Civil & Criminal Cases** LR 5.1.2(11) Retention Requirements	Until three (3) years after the time period for appeal expires	Attorney (ECF Filing User)	No
Pennsylvania-Middle **Civil Cases** **ECF User Manual*,* Retention Requirements (p. 12) *See also *Standing Order 04-6 Electronic Case Filing Policies and Procedures*, 10. Retention Requirements (same) *Referenced in LR 5.6	Until one year after all periods for appeals expire	Counsel and/or the firm representing the party on whose behalf the document was filed	No
Criminal Cases *ECF User Manual*, Retention Requirements page 12 *Standing Order 04-6 Electronic Case Filing Policies and Procedures*, 10. Retention Requirements	Until one year after all periods for appeals expire	United States Attorney	No

District Court/Civil and Criminal Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?
Pennsylvania-Western **Civil Cases** *Standing Order 09-2 adopting changes to ECF Policies and Procedures, Case **2:05-mc-186*** *Electronic Case Filing Policies and Procedures*, 10. Retention Requirements (same) *ECF User Manual*, 13. Retention Requirements (same)	Until one year after all periods for appeals expire	Counsel and/or the firm representing the party on whose behalf the document was filed	No
Criminal Cases *Standing Order 09-2 adopting changes to ECF Policies and Procedures, Case **2:05-mc-186*** *Electronic Case Filing Policies and Procedures*, 10. Retention Requirements *ECF User Manual*, 13. Retention Requirements	Until one year after all periods for appeals expire	United States Attorney includes all papers with defendant's original signature	No
Virgin Islands **Civil & Criminal Cases** **Rule 5.4 Electronic Filing,** (g) Retention Requirements	Until five years after all time periods for appeals expire	Filing User	No
4th Circuit			
Maryland **Civil Cases** *Electronic Filing Requirements and Procedures for Civil Cases*, F. Signatures	Until all appeals have been exhausted or the time for seeking appellate review has expired	Attorney (filer)	No
Criminal Cases *Electronic Filing Requirements and Procedures for Criminal Cases*, III.E. Signatures	Until all appeals have been exhausted or the time for seeking appellate review has expired	Attorney (filer)	No

District Court/Civil and Criminal Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?
North Carolina Eastern **Civil and Criminal Cases** **Electronic Case Filing User's Manual,* The Mechanics of Electronic Filing, Signatures. *Referenced in Civil Local Rule 5.1(a)(1) & Criminal Local Rule 49.1	Until 2 years after the expiration of the time for filing a timely appeal of a final judgment or decree, or after receipt by the Clerk of Court of an order terminating the action on appeal	Attorney (filer)	No
North Carolina Middle **Civil Cases & Criminal Cases** **Civil LR 5.3 Electronic Filing Of Documents,** (e) Signatures *See also Electronic Case Filing Administrative Policies And Procedures Manual,* § I. Signatures (same)	Until two (2) years after the expiration of the time for filing a timely appeal of a final judgment or decree, or after receipt by the Clerk of Court of an order terminating the action on appeal	Attorney (filer)	No
North Carolina Western **Civil & Criminal Cases** **Administrative Procedures Governing Filing And Service By Electronic Means,* § II. Electronic Filing And Service of Documents, C. Signatures, 1. Non-Attorney Signature, Generally *Referenced in LCvR 5.2.1(A)	For two years after the expiration of the time for filing a timely appeal of a final judgment or decree, or after receipt by the Clerk of Court of an order terminating the action on appeal	Attorney (filing party)	No
South Carolina **Civil Cases** **Electronic Case Filing Policies and Procedures Manual,* 9. Document Retention Requirements, 10.5 Signatures of Persons Other Than Filing Users *Referenced in L. Civil Rule 5.04	For six (6) years after the time for all appeals has expired or the judgment otherwise becomes final	Attorney (filing user) and/or the firm representing the party on whose behalf the document was filed	No

District Court/Civil and Criminal Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?
South Carolina **Criminal Cases** *Electronic Case Filing Policies and Procedures Manual,* 9. Document Retention Requirements, 10.5 Signatures of Persons Other Than Filing Users	For six (6) years after the time for all appeals has expired or the judgment otherwise becomes final	The Office of the U.S. Attorney or the U.S. Department of Justice	No
Virginia Eastern **Civil & Criminal Cases** *EDVA Electronic Case Filing Policies and Procedures Manual,* Chapter 3 Signatures	For the duration of the case, including any period of appeal	Attorney (filer)	No
Virginia Western			
Civil Cases	None	N/A	No
Criminal Cases *Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means,* Q. Retention	Until two years following the expiration of all appeal periods	U.S. Attorney's Office	No
West Virginia Northern **Civil & Criminal Cases** *An Attorney's Guide To The Court's Administrative Procedures For Electronic Case Filing,* 15.3.Non-Attorney Signature/Multiple Signatures	For a period of not less than sixty days after all dates for appellate review have expired	Attorney (filer)	No
West Virginia Southern **Civil & Criminal Cases** *Administrative Procedures For Electronic Case Filing***,** 14.6 Document Retention & 15.3 Non-Attorney Signatures	For a period of not less than two (2) years after all dates for appellate review have expired	Attorney (filing user)	No

District Court/Civil and Criminal Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?
5th Circuit			
Louisiana Eastern **Civil & Criminal Cases** *Administrative Procedures For Electronic Case Filing,* Rule 7 Retention Requirements, Rule 8 Signatures	Until one year after all time periods for appeals expire	Attorney (Filing User)	No
Louisiana Middle **Civil & Criminal Cases** **Administrative Procedures For Filing, Signing, And Verifying Pleadings And Papers By Electronic Means In Civil And Criminal Cases,* § I. The Electronic Filing System - General Requirements, F. Signatures, 2. Non-Attorney Signatures, Generally. *Referenced in LR 5.5	For 1 year from the expiration of all time periods for appeals	Attorney (Filing User)	No
Louisiana Western **Civil Cases & Criminal Cases** **LR 5.7.07 Retention Requirements**	For 1 year from the expiration of all time periods for appeals	Attorney (Filing User)	No
Mississippi Northern **Civil & Criminal Cases** **Administrative Procedures for Electronic Case Filing,* Electronic Means for Filing, Signing and Verification of Pleadings and Papers, § 3.D. Signatures *Referenced in Local Civil Rule 5(c)	Until all time periods for the appeal have expired	Attorney (filer)	No
Mississippi Southern **Civil & Criminal Cases** **Administrative Procedures for Electronic Case Filing,* Electronic Means for Filing, Signing and Verification of Pleadings and Papers, § 3.D. Signatures *Referenced in Local Civil Rule 5(c)	Until all time periods for the appeal have expired	Attorney (filer)	No

District Court/Civil and Criminal Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?
Texas Eastern **Civil & Criminal Cases** *Electronic Case Files (CM/ECF) User's Manual*, Signatures (page 13).	Unspecified	Attorney (filer)	No
Texas Northern **Civil Cases** **Civil LR 11.1 Electronic Signature.** (d) Requirements for Another Person's Electronic Signature.	For one year after final disposition of case	Attorney (filer)	No
Criminal Cases **Criminal LR 49.5 Electronic Signature.** (d) Requirements for Another Person's Electronic Signature.	Same	Same	No
Texas Southern **Civil & Criminal Cases** **Administrative Procedures for ECF - Civil/Criminal*, 8. Signatures and Retention Requirements, C. Documents containing multiple persons' signatures. *****Referenced in LR5.1.	Until expiration of three years after the time for all appeals in the case	Attorney (filing user)	No
Texas Western **Civil & Criminal Cases** **Administrative Policies and Procedures for Electronic Filing in Civil and Criminal Cases*, § 14 Signatures and Retention Requirements *Referenced in Local Civil Rule CV-5(a)(1).	For one year after final resolution of the action, including any appeal	Attorney (Filing User)	No

District Court/Civil and Criminal Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?
6th Circuit			
Kentucky Eastern and Western **Civil & Criminal Cases** **Amended Electronic Case Filing Administrative Policies And Procedures,* 10. Retention Requirements *See also *ECF User's Manual,* Signatures & Retention Requirements (p. 11, 13) (same) *Referenced in Joint General Order Number 11- 02: In Re: Electronic Case Filing Administrative Policies And Procedures as Amended July, 2011	One year after all periods for appeals expire	by counsel and/or the firm representing the party on whose behalf the document was filed	
Michigan Eastern **Civil & Criminal Cases** **Electronic Filing Policies and Procedures,* R17 Retention Requirements *Referenced in Civil LR 5.1.1(a) (Appendix ECF to Civil Local Rules)	Unspecified	The Court encourages filing users to retain the originals of papers with intrinsic value	No
Michigan Western **Civil Cases** **Local Civil Rule 5.7 Filing and service by electronic means**, (e) Signature, (viii) Evidence of Original Signature	Until one year after the final resolution of the action (including appeal, if any)	Attorney (filer)	No
Criminal Cases **Local Criminal Rule 49.10 Filing and service by electronic means**, (e) Signature, (viii) Evidence of Original Signature	Same	Same	No

District Court/Civil and Criminal Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?
Ohio Northern **Civil & Criminal Cases** **Electronic Filing Policies And Procedures Manual*, 10. Filing Documents Electronically, 17. Retention of Originals of Documents Requiring Scanning (July 26, 2011) *Referenced in Civil Local Rule 5.1(b).	For a period of one year following the expiration of all time periods for direct appeals.	Attorney (filing party)	No
Ohio Southern **Civil Cases** **CM/ECF Attorneys' Manual*, Signatures; Affidavits of Service (p.14) *Referenced in Local Rule 5.1(c).	After the case ends, at least until the time for all appeals have expired	Attorney (filing party)	No
Criminal Cases **Local Criminal Rule 49.1** Serving and Filing Papers	For five years or for the period within which the Clerk would maintain original material under S. D. Ohio Civ. R. 79.2 (six (6) months after final termination of the action), whichever period is longer.	Attorney (filing user)	No
Tennessee Eastern **Civil & Criminal Cases** **Electronic Case Filing Rules And Procedures*, 7. Retention Requirements *Referenced in LR 5.2(e).	One year after all time periods for all appeals expire	Counsel representing the party on whose behalf the document was filed	No

District Court/Civil and Criminal Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?
Tennessee Middle **Civil Cases & Criminal Cases** **Administrative Order No. 167, Administrative Practices and Procedures for Electronic Case Filing (ECF),* 15. Retention Requirements *****Referenced in LR5.03(a)	For one year after all time periods for all appeals expire	Filing user (counsel representing the party on whose behalf the document was filed)	No
Tennessee Western **Civil Cases** **Local Rules, Appendix A Electronic Case Filing Policies And Procedures Manual,** 9. Document Retention Requirements, 10.5 Signatures of Persons Other Than E-Filers	For no less than five (5) years after the time for all appeals has expired or the judgment otherwise becomes final	Attorney (EFiler) and/or the firm representing the party on whose behalf the document was filed	No
Criminal Cases Same	Same	By the Office of the United States Attorney or the United States Department of Justice	No
7th Circuit			
Illinois Central **Civil Cases** **Civil Rule 11.4 Electronic Signatures**, (B) Signatures by Non-Electronic Filers	Until one year after the date that the judgment has become final by the conclusion of direct review or the expiration of the time for seeking such review has passed	Attorney (filing party)	No
Criminal Cases **Criminal Rule 49.10 Electronic Signatures**, (B) Signatures by Non-Electronic Filers.	Same	Same	No

District Court/Civil and Criminal Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?
Illinois Northern **Civil & Criminal Cases** **General Order 2011-24 on Electronic Case Filing*. Part VIII. Retention Requirements for Documents with Signatures of Persons Other Than E-Filers. *Referenced in LR5.2 (a)	4 years after all time periods for appeals expire	Attorney (E-filer)	No
Illinois Southern **Civil & Criminal Cases** *Electronic Filing Rules*, Rule 7 Retention Requirements *See also CM/ECF User's Manual*, 2.1 Retention and Signature Requirements **adds exception**	For 5 years after final resolution of the action, including final disposition of all appeals	Attorney (filer)[21]	
Indiana Northern **Civil Cases** **CM/ECF Civil And Criminal User Manual, Electronic Means for Filing, Signing and Verification of Documents*, II. Electronic Filing And Service Of Documents, E. Signatures *Referenced in N.D. Ind. L.R. 5-1(a).	Unspecified	Attorney (filer)	No
Criminal Cases *CM/ECF Civil And Criminal User Manual, Electronic Means for Filing, Signing and Verification of Documents*, II. Electronic Filing and Service of Documents, E. Signatures	Unspecified	Clerk's Office	No

[21] In the following exceptional instances, a document bearing an original signature(s) is scanned and electronically filed, and the original document is mailed to the Clerk of Court for retention: A. Any affidavit or document containing an oath or a declaration, certification, verification, or statement under the penalty of perjury by any person other than an attorney of record in the case; B. Any document setting forth any stipulation by any person other than an attorney of record in the case; C. Any document containing the signature of a defendant; and D. Certified copies of judgments or orders of other courts.

District Court/Civil and Criminal Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?
Indiana Southern **Civil Cases & Criminal Cases** **Local Rule 5-9 -** Retention of Papers in Cases Filed Electronically	For two years after all deadlines for appeals in the case expire	Attorney (Filing User)	No
Wisconsin Eastern **Civil Cases** *Electronic Case Filing Policies And Procedures Manual*, II.C.2.a. Signatures	Until one year has passed after the time period for appeal expires	Attorney (filer)	No
Criminal Cases *Electronic Case Filing Policies And Procedures Manual*, II.C.2.b. Signatures	until one year has passed after the time period for appeal expires[22]*	Attorney (filer)*	No
Wisconsin Western **Civil Cases & Criminal Cases** **Administrative Procedures For Electronic Case Filing*, IV. General Guidance, E. Signatures *Referenced in LR 5.1	For two (2) years after final resolution of the action, including final disposition of all appeals	Attorney (Filing User)	No
8th Circuit			
Arkansas Eastern & Western **Civil Cases**	None	N/A	No
Criminal Cases **Administrative Policies And Procedures Manual For Criminal Filing*, IV.D. Documents Containing Certain Original Signatures *Referenced in Local Rule 5.1	Unspecified	Clerk's office[23]	

[22] *Exception--If the original document contains the signature of a criminal defendant, a third-party custodian, a U. S. Marshal, an officer from the U.S. Probation Office, or some other federal officer or agent, Clerk's office disposes of document after it is scanned and uploaded to ECF.

[23] Documents in criminal cases containing the signature(s) of a defendant, a grand jury foreperson, a surety, or a third-party custodian shall be filed conventionally. The Clerk's office will scan these original documents into an electronic file and upload them into the System but will maintain the original in a paper file.

District Court/Civil and Criminal Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?
Iowa Northern & Southern **Civil Cases & Criminal Cases** **LR 5.2 Electronic Filing And Electronic Access To Case Files**, i. Original Documents Retained by Lawyer or Party. **Note there is a slight discrepancy in the retention period as stated in LR 5.2 and in the Manual.* *Electronic Case Filing Procedures Manual*, XIV. Retention of Documents, A. Original Documents Retained By Lawyer Or Party	During the pendency of the case and for 5 years after the filing of the document During the pendency of the case	Attorney (filer)	No
Minnesota **Civil Cases** *Electronic Case Filing Procedures Guide*, *Civil Cases* **§** II. Electronic Filing And Service Of Documents, C. Signatures, 2. Non-Attorney/Third Party Signatures, Generally. *(note: These documents should be retained in accordance with the retention rules required by the Eighth Circuit and Federal Circuit).*	Until the case is terminated with finality with no right of appeal or until such later date as the court prescribes* *Source: Federal Circuit Court of Appeals, *Administrative Order Regarding Electronic Case Filing*, ECF-4. CM/ECF Retention Requirements	Filer (certifying attorney's office)	No
Criminal Cases *Electronic Case Filing Procedures Guide*, *Criminal Cases*, § II. Electronic Filing And Service Of Documents, C. Signatures, 2. Non-Attorney/Third Party Signatures, Generally	Until the case is terminated with finality with no right of appeal or until such later date as the court prescribes*	Filer (certifying attorney's office)	No

District Court/Civil and Criminal Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?
Missouri Eastern **Civil & Criminal Cases** **Local Rule 11 - 2.11 Signatures on Electronic Filings.** *See also Administrative Procedures for Case Management/Electronic Case Filing (CM/ECF),* § II.H. Signatures and Appendix D (Sample Form--Verification of Signed Original Document)	During the pendency of the litigation including all possible appeals	Attorney (filer)	Yes; where an electronic document is signed by one other than the filing attorney, the attorney must file a verification attesting to the existence of the signed original document
Missouri Western **Civil Cases** **CM/ECF Civil And Criminal Administrative Procedures Manual,* Signatures: Affidavits of Service, 2. Civil Cases (p.6) *Referenced in Local Civil Rule 5.1	For two (2) years after final resolution of the action, including final disposition of all appeals	Attorney (filer)	No
Criminal Cases *CM/ECF Civil And Criminal Administrative Procedures Manual,* Signatures: Affidavits of Service, 2. Criminal Cases (p.6)	Unspecified	Clerk's Office[24]	No

[24] **Note**: Certain documents that must contain original signatures other than those of a participating attorney or which require either verification or an unsworn declaration under any rule or statute, shall be filed in paper and maintained in the Clerk's Office.

District Court/Civil and Criminal Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?
Nebraska **Civil Cases** **Civil Local Rule 11.1 Signing of Documents.** (2) Nonattorney Signature. (A) Maintenance of Original Document.	Until all time periods for appeal expire	Attorney (filer)	None
Criminal Cases **Criminal Local Rule 49.2 Form of Documents**, (c) Signing Documents, (1) Electronic Filing, (B) Defendant or Non-Attorney Signature, (i) Maintenance of original document.	Same	Same	No
North Dakota **Civil Cases** **Administrative Policy Governing Electronic Filing and Service*, Section X. Signatures (for multiple signatures and affidavits in civil cases) ***** Referenced in Civil Rule 5.1(A)	Until the entry of a final nonappealable judgment, or for two years, whichever is later	Attorney (filing user)	No
Criminal Cases **Administrative Policy Governing Electronic Filing and Service, Section X. Signatures, (F) Defendants in Criminal Cases* (for court forms containing a"/s/," "/s" or "s/" signature block, or a digital image of the signature of a probationer) *****Referenced in Criminal Rule 49.1(A)	Unspecified	United States probation and pretrial services office	No
South Dakota **Civil & Criminal Cases** *Case Management Electronic Case Filing (CM/ECF) User Manual And Administrative Procedures*, Retention Requirements (p.16) **Note:** A document containing the signature of a defendant in a criminal case must be filed in paper form with an original written signature. (Signatures p. 13)	Until five years after all time periods for appeals expire unless the Court directs that it be retained for a different period.	Filer (registered attorney)	No

District Court/Civil and Criminal Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?
9th Circuit			
Alaska **Civil Cases & Criminal Cases** **Electronic Case Filing with CM/ECF, Attorney User's Manual* (page 5 Signatures) *Referenced in Rule 5.3(b)(1)	Unspecified	Attorney (filer)	No
Arizona **Civil Cases & Criminal Cases** **Electronic Case Filing Administrative Policies and Procedures Manual*, § II.C.2 (Non-registered signatories), § II.C.4 (criminal defendants) * Referenced in LRCiv 5.5(a)	For the duration of the case, including any period of appeal	Attorney (filing party)	No
California Central **Civil Cases & Criminal Cases** ***L.R. 5-4.3.4 Signatures.*** (b) Maintenance of Original Hand-signed Documents.	Until one year after final resolution of the action (including the appeal, if any)	Attorney (filer)	No
California Eastern **Civil Cases & Criminal Cases** **Local Rule 131(f)** Non-Attorney's Electronic Signature. **Note: Local Rule 131(h) Electronic Signatures on Certain Documents in Criminal Actions**. Unless the procedure in L.R. 131(f) is followed, the Clerk will scan certain documents in criminal actions that require the signature of a non-attorney, upload them to the CM/ECF system, and except as otherwise provided by administrative procedures, discard the paper documents. The electronically-filed document as it is maintained on the Court's servers shall constitute the official version of that record.	For one year after the exhaustion of all appeals	Attorney (filer)	No

District Court/Civil and Criminal Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?
California Northern **Civil Cases & Criminal Cases** **Civil Local Rule 5-1(i)** Signatures	until one year after the final resolution of the action (including appeal, if any). **Note**: Except for documents signed by a criminal defendant in a criminal case, filer may attach a scanned image of the signature page of the document being electronically filed in lieu of maintaining the paper	Filer (attorney)	No
California Southern **Civil Cases & Criminal Cases** **CM/ECF Administrative Policies and Procedures Manual*, § 2: Electronic Filing and Service of Documents, f. Signatures, 2. Non-Registered Signatories & 3. Criminal Defendants *****Referenced in Civil Rule 5.4(f)	For a period of five years from the date the document is signed, or for one year after the expiration of all time periods for appeal, whichever period is greater	Attorney (filing party)	No
Guam **Civil Cases & Criminal Cases** *Administrative Procedures For The Electronic Filing, Signing, Verifying, And Serving Of Civil And Criminal Documents*, § III. Signatures, C. Retention Requirements	Until two (2) years after all time periods for appeals expire	Attorney (ECF User)	No

District Court/Civil and Criminal Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?
Hawaii **Civil Cases & Criminal Cases** **LR100.5.4. Retention of Documents with Third Party Signatures.** (December 2009) ***See also* Civil Local Rule 10.2(e) Signatures on Declarations and Affidavits (**party and/or attorney must maintain the declaration or affidavit with the original signature). ***Note:** Local Rule contradicts previously enacted Procedural Rule 5.4: CM/ECF Procedural Order February 2006, Rule 5.4 Retention of Documents with Third Party Signatures.	until thirty-five (35) days (five weeks) after expiration of any appeal period. until 30 days after expiration of any appeal period.	Attorney (ECF User)	No
Idaho **Civil Cases & Criminal Cases** **Civil Rule 5.1 Electronic Case Filing,** (e) Retention of Conventionally Signed Documents. *See also for slightly different language in retention period*—**Electronic Case Filing Procedures,** 19. Retention of Conventionally Signed Documents by Parties	For a period of not less than the maximum allowed time to complete any appellate process, or the time the case of which the document is a part, is closed, whichever is later For a period of not less than the maximum allowed time to complete any appellate process, or the time the case or adversary proceeding of which the document is a part, is closed, whichever is later	Attorney (filing party) Attorney (filing party)	No
Montana *Unable to locate a local rule(s), standing order or procedural rule that addresses signatures of non-filing users			

District Court/Civil and Criminal Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?
Nevada **Civil & Criminal Cases** *Special Order #109 In re Authorization For Conversion To Case Management/Electronic Case Filing (CM/ECF),* Electronic Filing Procedures, V. Signatures, C. Non-Filing User Signature & VIII. Retention Requirements	For the duration of the case and any subsequent appeal	Attorney (Filing User)	No
Northern Mariana Islands **Civil Cases** **Appendix A Administrative Procedures for Electronic Filing and Electronic Service,* 10. Document Retention *referenced in **LR 5.1a** - Electronic Filing	until the expiration of the time for filing a timely appeal, and until 30 days after all appeals have been concluded	Attorney (Filing User)	No
Criminal Cases same	until the expiration of the time for filing a timely appeal, and until 30 days after all appeals have been concluded, and in criminal matters until the length of the defendant's criminal sentence (if any) has elapsed	Attorney (Filing User)	No
Oregon **Civil Cases & Criminal Cases** **Civil LR 100-11** Retention Requirements *See also CM/ECF User Manual,* § 4 (same as local rule)	Until the later of the final disposition of the case, including appeal or expiration of the time for appeal; or, the expiration of any relevant statute of limitations	Attorney (Registered User)	No

District Court/Civil and Criminal Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?
Washington Eastern **Civil Cases** *Administrative Procedures for Electronic Case Filing (Civil Cases)* § II.C. 4. Retention of Original Documents (original signatures) (p.14)	Until two years after all time periods for appeals expire	Attorney (filer)	No
Criminal Cases *Administrative Procedures for Electronic Case Filing (Civil Cases)* § II.C. 4. Retention of Original Documents (original signatures) (p.13)	Same	Same	No
Washington Western **Civil & Criminal Cases** *Electronic Filing Procedures For Civil And Criminal Cases*, § Iii. Filing Documents Electronically, L. Signatures and Attorney Appearances (p.9)	For the duration of the case, including any period of appeal	Attorney (Filing party)	No
10th Circuit			
Colorado **Civil Cases** *Electronic Case Filing Procedures (Civil Cases)*, Rule 1.3. D. Filer Required to Maintain Certain Documents.	Until two years after all time periods for appeal expire and all appeals are final	Attorney (filer)	No
Criminal Cases *Electronic Case Filing Procedures (Criminal Cases)*, Rule 1.3. D. Filer Required to Maintain Certain Documents.	Until two years after all time periods for appeal have expired, all appeals are final, or the completion of the sentences of all defendants, whichever is later	Attorney (filer)	No
Kansas **Civil & Criminal Cases** **Civil Local Rule 5.4.7** Retention Requirements **Criminal Local Rule 49.7** Retention Requirements (same)	Until 6 years after all time periods for appeals expire	Attorney (Filing User)	No

District Court/Civil and Criminal Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?
New Mexico **Civil & Criminal Cases** *CM/ECF Administrative Procedures Manual,* Rule 6(c) Retention of Verified Documents.	For not less than (a) one year after the maximum allowed time to complete appellate proceedings, or (b) one year after the case is closed, whichever is later	Attorney (filer)	No
Oklahoma Eastern **Civil & Criminal Cases** **CM/ECF Administrative Guide of Policies & Procedures,* § III.D.3. Non-User Signature *Referenced in LCvR 5.1	Until all appeals have been exhausted or the time for seeking appellate review or any other post-conviction relief has expired	Attorney (filer)	No
Oklahoma Northern **Civil Cases & Criminal Cases** **CM/ECF Administrative Guide Of Policies & Procedures,* XII.C. Non-User Signature. *Referenced in LCvR 5.1 & LCrR49.3 (same)	until all appeals have been exhausted or the time for seeking appellate review has expired	Attorney (filer)	No
Oklahoma Western **Civil Cases & Criminal Cases** **ECF Policies & Procedures Manual,* § II.C.3. Non-Attorney Signature. (August 4, 2009) *Referenced in LCvR 5.1	until all appeals have been exhausted or the time for seeking appellate review has expired	Attorney (filer)	No
Utah **Civil Cases** **District Of Utah CM/ECF and E-filing Administrative Procedures Manual,* § II.A.3. Non-Attorney Signatures. *Referenced in DUCivR 5-1(a)	Until all appeals have been exhausted or the time for seeking appellate review has expired	Attorney (filer)	No

District Court/Civil and Criminal Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?
Utah **Criminal Cases** *District Of Utah CM/ECF and E-filing Administrative Procedures Manual,* § II.A.4. Signatures in Criminal Cases	Unspecified	Clerk	No
Wyoming **Civil & Criminal Cases** **CM/ECF Administrative Procedures Manual,* § II.K. Official Files and Records, iii. Filer Required to Maintain Certain Documents (p. 9)	Until two years after all time periods for appeal expire and all appeals are final	Attorney (filer)	No
11th Circuit			
Alabama Middle **Civil Cases** **Civil Administrative Procedures For Filing, Signing, and Verifying Pleadings and Documents in the District Court Under the Case Management/Electronic Case Files (CM/ECF) System* (Rule II.C.2) *Referenced in M.D. Ala. LR 5.3(b)	Two (2) years after final resolution of the action, including final disposition of all appeals	Attorney (filer)	No
Criminal Cases **Criminal Administrative Procedures For Filing, Signing, and Verifying Pleadings and Documents in the District Court Under the Case Management/Electronic Case Files (CM/ECF) System* (Rule II.C.2) * Referenced in M.D. Ala. LR 5.3(b)	Unspecified time period	Clerk of Court	No
Alabama Northern **Civil Cases** **Civil Administrative Procedures For Filing, Signing, and Verifying Pleadings and Documents in the District Court Under the Case Management/Electronic Case Files (CM/ECF) System* (Rule II.C.2) *****Referenced in LR 5.3	one (1) year after exhaustion of time to appeal final resolution of the action, or issuance of mandate from the Court of Appeals	Attorney (filer)	No, but electronic filing must include a certificate that filer holds the original signature document.

District Court/Civil and Criminal Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?
Alabama Northern **Criminal Cases** **Criminal Administrative Procedures For Filing, Signing, and Verifying Pleadings and Documents in the District Court Under the Case Management/Electronic Case Files (CM/ECF) System* (Rule II.C.2) *****Referenced in LR 5.3	At least one (1) year following the expiration of all time periods for appeals, or resolution of appeals, whichever is later	Attorney (filer)	Same as civil
Alabama Southern **Civil & Criminal Cases** *Administrative Procedure for Filing, Signing, and Verifying Pleadings and Documents by Electronic Means* (Rule II.C.2)	two (2) years after final resolution of the action, including final disposition of all appeals	Attorney (filer)	No
Florida Middle **Civil Cases & Criminal Cases** *Attorney's User Manual Electronic Case Files CM/ECF*	Unspecified	Attorney (filer)	No
Florida Northern[25] **Civil & Criminal Cases** **CM/ECF Attorney's User Guide* (Chapter 9, Documents Requiring Original Signatures) *Note slight discrepancy with Local Rule 5.1(A)(9)	For a period of two years or until the appeal time has expired, whichever is greater	Attorney (filer)	No
Florida Southern **Civil & Criminal Cases** *CM/ECF Administrative Procedures,* § 3, J(2) Documents Requiring Original Signatures	For a period of one year after final resolution of the action, including final disposition of all appeals	Attorney (Filing User)	No

[25] **Local Rule 5.1(A)(9)** electronic filing of a document which contains a statement, declaration, verification, or certificate which is under oath or under penalty of perjury, has the same effect as a paper document with an original signature. By filing such a document, the Filing User certifies that the original signed paper document, signed under oath or penalty of perjury, is in the possession of the Filing User. The Filing User shall make the original document available for inspection and copying upon request by a party or by the Court, and shall retain the original document for two years after the termination of the case.

District Court/Civil and Criminal Local Rule or Procedure	Retention Period for Wet Signatures	Who Retains?	Is Declaration Filed?
Georgia Middle **Civil & Criminal Cases** **CM/ECF Administrative Procedures For Filing, Signing, And Verifying Documents By Electronic Means,* Electronic Signatures (p. 8-9) *Referenced in Local Rule 5.0(a)	For two (2) years after the expiration of the time for filing a timely appeal	Attorney (filer)	No
Georgia Northern **Civil Cases & Criminal Cases** **Standing Order In Re: Electronic Case Filing Standing Order No. 04-01 And Administrative Procedures (App. H-4, #16)* * Referenced in LR 5.1.A(1).	For a period ending two (2) years after expiration of the time for filing a timely appeal	Attorney (filer)	No
Georgia Southern **Civil & Criminal Cases** **Administrative Procedures For Filing, Signing, And Verifying Pleadings And Papers By Electronic Means,* § II.A.1(f)(2) *Referenced in LR 5.5	For at least five (5) years after the conclusion of an appeal or the expiration of the time for filing a timely appeal	Attorney (filer)	No
DC Circuit			
District of Columbia **Civil & Criminal Cases** *Electronic Case Filing User's Manual, Signatures* (p.15)	Unspecified	Attorney (filer)	No

APPENDIX D

MEMORANDUM FROM LISA TRACY, ESQ., EXECUTIVE OFFICE OF U.S. TRUSTEES

MEMORANDUM

To: Dr. Molly Johnson, Senior Research Associate, Federal Judicial Center

Date: December 10, 2012

RE: Request for Input Regarding Use of Electronic Signatures in Bankruptcy Filings by Non-Registered CM/ECF Users

Following the submission of your November 7, 2012, inquiry regarding the use of electronic signatures, the Executive Office for United States Trustees contacted each regional United States Trustee regarding potential changes to the Federal Rules of Bankruptcy Procedure that apply to electronic signatures of non-registered CM/ECF users and solicited their input. Specifically, each United States Trustee was asked to respond to the following questions:

- How, if at all, any proposed alternative would negatively impact your local jurisdiction's current course of practice;
- Whether you have recommendations regarding what the national rule should be; and
- Whether you have experienced any specific wet signature issues in your local practice that, when summarized, would benefit the Federal Judicial Center as it considers this matter.

What follows is a rough summary of the responses received, as well as some additional information gleaned from the United States Trustee's responses that might be pertinent to the inquiry. It is not intended to set forth any official United States Trustee Program position regarding your inquiry, or the various areas of the law your inquiry might affect.

Summary of United States Trustee Responses:

The overwhelming majority of United States Trustees who responded prefer alternative "D" identified in your inquiry.[26] Among other things, the United States Trustees believe that alternative "D" represents the best approach because many Clerks' Offices already have similar requirements in place, so standardizing the practice of specifying a retention period for hand signed documents would be the least disruptive for all parties. Further, United States Trustees supporting alternative "D" believe that the ability to retain hand signed documents significantly advances their office's statutory mandate to prevent, both in the civil and criminal context, fraud and abuse in the bankruptcy system. Finally, certain United States Trustee offices, while favoring alternative "D,"

[26] Alternative "D" would establish a national rule specifying the retention period for hard copy documents with manual signatures.

also believe that it would be helpful to require non-registered CM/ECF users, and in particular individuals appearing on a *pro se* basis, to electronically submit a scanned pdf copy of the original signature page of any corresponding document filed with a court. Suggested retention periods for hand signed documents ranged from one to seven years.

Attached, as Appendix A, is a chart, divided by United States Trustee Program region, indicating the ranked preferences for each alternative identified in your inquiry.

Possible Additional Implications of Proposed Rule:

Based upon the responses received from each United States Trustee, there appears to be a concern that the alternative approaches identified in your inquiry also potentially affect two important areas of interest to the United States Trustee Program. First, there appears to be a concern that criminal prosecutions might be affected. Second, there appears to be a concern that civil enforcement remedies, involving certain parties who may engage in abusive conduct in the course of a bankruptcy case, might be affected. Each concern is discussed below.

1. *Potential Effect on Criminal Prosecutions.*

United States Trustees have a duty to notify United States Attorneys of any action that may constitute a crime under the laws of the United States. 28 U.S.C. § 586(a)(3)(F). Crimes affecting the bankruptcy system include, *inter alia*, making a false oath, false declaration, or false statement, and presenting a false claim. 18 U.S.C. §§ 152(2), (3), and (4). Various documents filed in a bankruptcy case can serve as the vehicle for the commission of these crimes. Accordingly, to the extent the Advisory Committee is considering adopting a rule whereby documents containing a party's hand signature (whether wet or a copy thereof) are not retained, United States Trustees appear concerned that criminal prosecutions might be affected.[27]

A hand signature constitutes a form of proof that a person has read and verified the information contained in a signed document. Absent this proof, some United States Trustees expressed concern that criminal prosecutors may find it difficult to meet their burden of establishing criminal conduct, including intent, in a bankruptcy case. Indeed, anecdotal information provided by United States Trustees indicates that in certain jurisdictions, criminal prosecutors will summarily decline to prosecute even the strongest of cases when documents containing a party's hand signature are not available. Therefore, given the current lack of settled law on the question of the evidentiary effectiveness of an electronic signature,[28] United States Trustees appear concerned that Alternative "A" identified in your inquiry[29] could potentially affect criminal prosecutions arising out of the bankruptcy

[27] We encourage you to contact both the Department's Criminal Division and the United States Attorneys regarding this survey given their obvious expertise in the area of criminal law, and we understand that you may have already done so.

[28] We are aware of only a handful of unpublished trial level decisions on this issue. *See United States v. Hyatt*, No. 06-00260, 2008 WL 616055 at *3 (S.D. Ala. March 3, 2008) (collecting decisions and finding that no evidence of a hand signature is required to establish criminal conduct in a bankruptcy case). We are not aware of any decisions arising out of the Courts of Appeal or the Supreme Court on this issue.

[29] Alternative "A" would establish a national rule specifying that an electronic signature of a non-registered user in the CM/ECF system is *prima facie* evidence of a valid signature.

system.

2. *Potential Effect on Parties Engaged in Abusive Conduct.*

To the extent the Advisory Committee is considering adopting a rule whereby documents containing a party's hand signature (whether wet or a copy thereof) are not retained, United States Trustees appear concerned that the ability to combat abusive conduct in bankruptcy might be affected.

For example, anecdotal information provided by some United States Trustees indicates that in some cases challenges to a debtor's ability to receive a discharge under 11 U.S.C. § 727(a)(4)(A) have been met with the claim that the debtor never signed the document providing the basis for the challenge, or did not sign the version of the document that was filed. Often these claims prove to be without merit once the United States Trustee receives a copy of the document because that copy routinely confirms that the debtor actually signed the document. Under these circumstances, the copy serves as crucial evidence in establishing the debtor's wrongful conduct. However, if such documentary evidence is not available, because its retention is not required, United States Trustees and others would have no method to rebut a debtor's claims that she never signed a document, or did not sign the version of a document that was filed.

Further, in the view of some United States Trustees, the answer to this unnecessary risk cannot lie in specifying that an electronic signature constitutes *prima facie* evidence of a valid signature, as Alternative "A" would do. *Prima facie* evidence can, on occasion, be overcome by convincing testimony. Second, in the event an unscrupulous individual files unauthorized papers on behalf of an unknowing debtor,[30] labeling an electronic signature as *prima facie* evidence of a valid signature would place the unknowing debtor in the position of having to prove that the electronic signature is invalid. In the view of many United States Trustees, neither of these results is satisfactory. Accordingly, for all of these reasons, the United States Trustees appear concerned that Alternative "A" identified in your inquiry might potentially affect the ability to stem abuse in the bankruptcy system.

We hope this summary of the United States Trustees' views regarding potential changes to the Federal Rules of Bankruptcy Procedure that apply to electronic signatures of non-registered CM/ECF users is useful. Please contact us at (202) 307-1399 if you have any questions or if there is any additional information we can provide to assist you.

[30] *See, e.g., Briggs v. Labarge, Jr. (In re Phillips)*, 433 F.3d 1068 (2006) (concluding that attorney who electronically filed chapter 13 bankruptcy petition on client's behalf, without ever speaking with her to make sure that she wanted to file the petition, and without verifying that facts in second petition remained correct, violated Fed. R. Bankr. P. 9011).

Ranked Preferences for Each Alternative
Identified in Inquiry – Divided by United States Trustee Program Region

USTP REGION	ALT. A	ALT. B	ALT. C	ALT. D
1		**1**		**2**
2				**1**
3*				
4				**1**
5		**1**		**2**
6	**1**			**2**
7			**2**	**1**
8*				
9				**1**
10				**1**
11			**2**	**1**
12				**1**
13				**1**
14				**1**
15				**1**
16				**1**
17			**2**	**1**
18				**1**
19				**1**
20*				
21				**1**

* Denotes no response received from the United States Trustee Program region.

Appendix E

Comments from NABT members on Proposed Rule Changes re: Wet Signatures and Retention of Signed Documents

Respondent 1

Dear Ms. Johnson,

I'm responding to your request for comments on handling of electronic signatures forwarded through the NABT. I am a chapter 7 trustee practicing in Massachusetts, and am also the author of Bankruptcy and Secured Lending in Cyberspace, a legal treatise published by West|Thompson on the impact of technology on bankruptcy law and practice.

A. A key problem I see with electronic signatures of non-filers is that in some cases the wet signature either does not exist or has a different date than the related electronic signature. I have even run across a couple of cases where the debtor did not even review the documents containing the signature. For example, in one recent case when the debtors' first case was dismissed due to attorney error, the attorney simply changed the dates on the signed documents and refiled them - three months later. I have another case going on now where the petition was filed on October 18, and the wet signature on the petition is dated October 22.

These kinds of events often go hand in hand with poor representation by counsel. Wet signature requirements play a hand in policing attorney behavior, as well as making sure that the debtors actually review and sign documentation.

Another issue goes to the idea of burden of proof. It's easy to say that the person challenging validity of a signature has the burden of proof, but the person challenging validity is often the person who signed. If they testify that they did not sign, and they did not create the electronic signature themselves (and, of course, they never do - the filer usually does) then absolutely no evidence exists to prove the signature. The evidence will usually come down to testimony and in many cases the only testimony will be that of the signatory.

Finally, a /s/ signature of a non-filer is not, strictly speaking, a proper electronic signature under the UETA or similar statutes because there is no act by the signatory in producing it. All action is taken by a third party. Absent use of a true electronic signature process, the evidence of execution is needed and should be retained.

B. You might consider having the UST hold signature packages instead. I would have to say that the courts, and the UST, are trying to go electronic. This obviously creates an added cost for both debtor's counsel and whomever has to retain the documents.

My suggestion would be a requirement that all wet signature pages be scanned and efiled, with a national retention period for the wet signatures. Preferably a shorter one, within the usual retention periods for attorney case files. Perhaps three years from case closure. The electronic scans should serve as appropriate evidence of execution under the best evidence rule and an indefinite retention period would, of course, apply to the scanned documents.

C. The problems with the declaration of electronic filing as the sole source of execution are as follows:

It often gets signed before other documents. Some attorneys even have debtors sign it when they first visit the attorney. How can you make these declarations before you sign the documents?

They are, more frequently than you might imagine, undated.

Again, there is no advantage to having the court handle originals. A scan really should suffice.

Respondent 2

Option C

Respondent 3

Dear Dr. Johnson,

The real problem with allowing debtors to use electronic signatures is that their attorneys too often abuse this privilege and file things without their client's knowledge. Sadly, many debtors never see or review most documents filed on their dockets by their attorneys, despite the fact that filing these documents is the equivalent of them swearing (via an electronic signature) under penalty of perjury.

This reality creates huge problems for the courts and trustees trying to prevent fraud. In my experience, debtors will always blame their attorneys for any mistakes found in their petitions ("I told my attorney about it but he forgot to list it"). Thus, as it now stands today, all electronic signatures are only, at best, prima facie evidence of a valid signature. Moreover, there is no way for anyone to prove that the wet signature which the attorney has on file actually was signed by the debtor before the documents were submitted. Too often, attorneys will routinely have their clients sign those pages back when the client first fills out an informational packet. The attorney later has a staff person type the contents of that packet into Best Case, which transforms the information into a petition.

That petition is then filed electronically through Best Case, all without the client ever seeing the finished copy he swears is accurate.

Debtors do not understand how the process works and trust their attorneys not to make mistakes. Alternatively, debtors use their attorneys as a convenient scapegoat for explaining why information which should have been disclosed was not hidden intentionally.

As such, all of the approaches (A-D) that you are considering will fail to hold debtors accountable for the contents of their petitions.

The only solution that will work is to have a rule which requires the debtors to initial every page of their petition (including any amendments) before it is filed on ecf. Then there is no way for the debtors to say that they did not mean to file what was filed. Additionally, if the debtors initialed every page, there would be no need for the attorney or the court to keep a wet signature.

Frankly, a digital copy of the petition (scanned and then uploaded on the docket with a person's actual signature or initials) is every bit as good as a wet one; it's highly unlikely that attorneys will forge their clients' signatures. This policy would also be consistent with the contract law principles that debtors already understand—if you sign it, you are accountable for its terms (whether you read it or not!).

The only people who might complain about requiring initials are attorneys who run bankruptcy mills, who are already cutting corners. After all, this would require an attorney to print out and give his clients at least one paper copy of their petitions (which they could keep in case they need them after discharge)—clients would then be responsible for signing the documents and making sure the attorney had one scanned digital copy of each (either returned by the client via email/fax or scanned by the attorney at his office). The attorney could still use Best Case for everything other than filing the petition, which would instead be done by logging into ecf.

While it is necessary/useful for attorneys to use electronic signatures for themselves, nothing good comes from letting debtors do the same. Debtors need a system that forces them to be accountable, not one that makes the attorney responsible for mistakes. The attorney is given this burden of getting real signatures and initials on each page in return for being let off the hook for liability.

It is a fair trade. And it is good for the system, as it will make debtors think hard about what they put on every page of their petitions. Instead of adopting national rules regarding signatures of non-registered CM/ECF users and retention requirements, stop letting non-registered CM/ECF users use electronic signatures. It is unnecessary (they are not repeat players in the system) and fails as evidence.

Those are my thoughts. Hope they are helpful.

Respondent 4

My preferred Option in C, the B, then A. If attorneys retain the wet copy, the period should be no more than 1 year after the case is filed. We scan all bankruptcy cases when the case is closed at the court and shred all paper.

Respondent 5

Ms. Johnson-

I read about your survey and am responding. I am a chapter 7 trustee and have held 341 hearings in approximately 10,000 cases. One current requirement is that I have to verify "wet" signatures.

Provided there is a requirement that the practitioner retain the wet signature as long as the case is open, I would not personally be opposed to destruction of that document once the case is closed. However, it has been my experience that practitioners regularly do not obtain all necessary signatures on documents, and in the event an issue arose whether a debtor actually signed a document or not, it seems to me the debtor's attorney should have to provide the original signature, at least until such time as the case is closed.

I have some attorneys who scan, in color, the blue-inked signatures, and I accept those at 341s. It seems that is another possible option for the retention (in some form) of the document.

Respondent 6

I would like D to be adopted with a one-year retention. Unfortunately, there is an attorney in my district that does not think his clients need to review the petition, schedules, financial affairs before filing and sign these documents with a wet signature. I have reported his practice to the US Trustee with proof. If no retention is required, you will be telling this attorney that his practice of not having his clients review and sign documents is OK.

Respondent 7

I think that option A is problematic because it does not seem to contemplate an original signature somewhere in the chain of documents. However, I do like the concept of not having to maintain an original signature in a file for an extended period of time after a case is closed and believe that filing a document with the Court that contains an original signature should be sufficient.

In Massachusetts, local rules govern electronic filing by registered and non-registered users. Statements under oath by non-registered users must be accompanied by a Declaration of Electronic Filing (sample attached) that is signed manually and contains some, but not all of the information set forth in your option C.(see Rule 7) The local rules also require attorneys to retain the Declaration of Electronic Filing for 5 years. I favor the approach in option A – that the filed Declaration should be sufficient and attorneys should not be required to retain the original so I guess I am advocating a combination of Option A and C. I do not favor option D and I think option B simply shifts the storage problem from the attorneys to the Court.

TAB 8C

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Rule 5005. Filing, Electronic Signatures, and Transmittal of Papers

(a) FILING and SIGNATURES.

(1) *Place of Filing*.

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(2) *Filing by Electronic Means.* A court may by local rule permit or require documents to be filed~~, signed, or verified~~ by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A document filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules~~, the Federal Rules of Civil Procedure made applicable by these rules,~~ and § 107 of the Code.

(3) *Signatures on Documents Filed by Electronic Means.*

(A) *The Signature of a Registered User*. The user name and password of an individual who is registered to use the court's electronic filing system shall serve as that individual's signature on any electronically filed document. The signature may be used with the same force and effect as a written signature for the purpose of applying these rules and for any other purpose for which a signature is required in proceedings before the court.

(B) *Signature of Other Individuals*. When an individual other than a registered user of the court's electronic filing system is required to

sign a document that is filed by electronic means, a scanned or otherwise electronically replicated copy of the signature page of the document bearing the individual's original signature shall be electronically filed with the document as part of a single electronic filing. Once a document has been filed in compliance with this rule, the original document bearing the individual's original signature need not be retained. A signature submitted in compliance with this provision may be used with the same force and effect as a written signature for the purpose of applying these rules and for any other purpose for which a signature is required in proceedings before the court.

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COMMITTEE NOTE

The rule is amended to address the treatment of electronic signatures in documents filed in connection with bankruptcy cases, a matter previously addressed only in local bankruptcy rules. New provisions are added that prescribe the circumstances under which electronic signatures may be treated in the same manner as handwritten signatures without the need for anyone to retain paper documents with original signatures. The amended rule supersedes any conflicting local rules.

The title of the rule and subdivision (a) are amended to reflect the rule's expanded scope. The reference to "the Federal Rules of Civil Procedure made applicable by these rules" in subdivision (a)(2) is stricken as unnecessary.

Subdivision (a)(3) is added to address the effect of signatures in documents that are electronically filed. Subparagraph (A) applies to persons who are registered users of a court's electronic filing system. It adopts as the national rule the practice that previously existed in virtually all districts. The user name and password of an individual who is registered to use the CM/ECF system are treated as that person's signature for all documents that are electronically filed. That signature may then be treated the same as a written signature for purposes of the Bankruptcy Rules and for any other purpose for which a signature is required in court proceedings.

Subparagraph (B) applies to the signatures of persons who are not registered users of the court's electronic filing system. When documents require

the signature of a debtor or other individual who is not a registered user of CM/ECF—such as petitions, schedules, and declarations—, they may be filed electronically along with a scanned or otherwise electronically replicated image of the signature page bearing the individual's actual signature. Those documents will then be stored electronically by the court, and neither the court nor the filing attorney is required to retain paper copies of the filed documents. This amendment, which changes the practice that previously existed in many districts, was prompted by several concerns: the lack of uniformity of retention periods required by local rules, the burden placed on lawyers and courts to retain a large volume of paper, and potential conflicts of interest imposed on lawyers who were required to retain documents that could be used as evidence against their clients. When scanned signature pages are filed in accordance with this rule, the electronically filed signature may be treated the same as a written signature for purposes of the Bankruptcy Rules and for any other purpose for which a signature is required in court proceedings.

Just as someone may challenge in court proceedings the validity of a handwritten signature, nothing in this rule prevents a challenge to the validity of an electronic signature that is filed in compliance the rule's provisions.

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