Some Comments on the Proposed Style Revision of the Federal Rules of Evidence

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The Advisory Committee and its stylistic consultants on the Style Subcommittee of the Standing Committee – referred to in this comment for the sake of simplicity as the Revisers – must be commended for an excellent job in their work on the Preliminary Draft of the Proposed Style Revision of the Federal Rules of Evidence. In many important respects, the proposed revisions represent a significant improvement in the clarity, precision and elegance with which the original rules were drafted, most of them decades ago. But there is room for improvement, as the following comments illustrate. I have divided them into three sections, beginning roughly with the most important. Part I of this Comment describes some substantive changes that were unintentionally made by the revisers despite their best efforts to the contrary. Part II lists just some of the worst redundancies that were retained (or in some cases added) in the proposed revisions. And Part III describes some of the many archaic, awkward, and ungrammatical phrases and cross-references that were retained or added in the proposed revisions.

This list is, sadly, not complete. I have enjoyed working on this project as a courtesy to the Advisory Committee, but my unusually busy schedule in recent months has not allowed me enough time to review all of the Committee's proposed changes. (I am not getting paid for my work on this, after all.) I have not yet even taken the briefest glance, for example, at the proposed changes to Evidence Rules 901-1103. And I have not had enough time to list in this document all of the problems and imperfections that I have noticed, since I am working on this comment right up until the deadline for the submission of public comments. But I have detailed all of the most important suggestions that I have to share for possible improvement on the proposed revisions, and I sincerely hope that these contributions will be of some genuine assistance to the work of the Advisory Committee.

In return for my work on this project I ask one very small favor from the revisers and anyone else who reads this document on the United States Judicial Conference website. Please do not discount the value of these observations or think me guilty of hypocrisy merely because this document presumably contains a few typographical or grammatical errors or redundant clauses. I worked on this by myself, and this document – unlike the proposed Evidence Rules – is not intended for long-term nationwide use. So it would simply be unfair to hold this document to the same rigorous standards of linguistic precision to which I have justifiably subjected the proposed rules.

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I. Substantive Changes Inadvertently Made by the Stylistic Revisions

A. Rule 103(a)

Rule 103(a) presently says that a party may not seek reversal unless a timely objection "appears of record." This language, phrased in the passive tense, does not say who must have made the objection, or whether it must have been made by that same party. Consequently, the federal courts have held that an appellant need only show that an objection was made in the lower court by any party at the trial, reasoning as follows:

> The literal wording of Rule 103(a) does not require that the objection or the offer of proof be made by the party seeking to raise the point on appeal. Unless the identity of the objector somehow affects the admissibility of the evidence, no reason appears why a party should be required to join in the objection or offer of another litigant aligned with him, in order to be able to raise the issue on appeal. 21 Wright & Graham, Federal Practice and Procedure § 5035, n. 26 (West Supp.1981). Accordingly, when one party has made an objection or offer of proof, it should be presumed, unless the contrary appears, that co-parties aligned with him have joined in the objection or offer.

Howard v. Gonzalez, 658 F.2d 352, 355-56 (5th Cir. 1981); *see also United States v. Sanchez-Sotelo*, 8 F.3d 202, 210 (5th Cir. 1993); *United States v. Brown*, 562 F.2d 1144, 1147 n. 1 (9th Cir. 1977); *United States v. Bagby*, 451 F.2d 920, 927 (9th Cir. 1971); *United States v. Lefkowitz*, 284 F.2d 310, 313 n. 1 (2d Cir. 1960).

This rule, allowing a party to seek reversal based on the unsuccessful objection of a co-party, has been justified on the grounds that "in certain situations, it may be redundant and inefficient to require each defendant in a joint trial to stand up individually and make every objection to preserve each error for appeal." *United States v. Pardo*, 636 F.2d 535, 541 (D.C. Cir. 1980). After a defendant's objection is overruled, the failure of a codefendant "to move to suppress the evidence or to object to its introduction should be excused because such a motion or objection would have been a useless formality." *United States v. Love*, 472 F.2d 490, 496 (5th Cir. 1973); *see also Loose v. Offshore Navigation, Inc.*, 670 F.2d 493 (5th Cir. 1982) ("Indeed, it would seem both dilatory and fatuous for each of the parties to stand in turn and voice its 'me-too.'") Thoughtful scholarly commentary agrees that "[w]here one of several parties raises a timely and sufficient objection that the judge overrules, the better rule is that the ground for review is preserved as much for a party who did not object as for one who did." CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, EVIDENCE 7 (4th ed. 2009).

But that would obviously be changed by the proposed revision to Rule 103(a)(1) and (2), which would state, respectively, that "a party" may not seek reversal (in the absence of plain error) unless a timely objection or offer of proof was made at trial by "*the* party." The use of the definite article here can only be construed as a reference to the same party mentioned earlier in the same sentence who is seeking reversal on appeal. That change would make Rule 103 nearly identical to the former language of Federal Rule of Criminal Procedure 30, which stated (until its most recent stylistic revision) that no party may seek reversal based on an alleged error in a jury charge "unless *that party* objects thereto," *United States v. Harris*, 104 F.3d 1465, 1471 (5th Cir. 1997) (quoting former Rule 30; emphasis supplied by the court). This is the precise language that has persuaded the federal courts that an appellant claiming error in a jury instruction – unlike a party seeking reversal based upon an evidentiary ruling under Evidence Rule 103 – "can rely upon the objection of his codefendant only if he joins in the objection." *United States v. Harris*, 104 F.3d 1465, 1471 (5th Cir. 1997); *see also United States v. Ray*, 370 F.3d 1039, 1042-43 & n.3 (10th Cir. 2004), *vacated on other grounds*, 543 U.S. 1109 (2005); *Kenney v. Lewis Revels Rare Coins, Inc.*, 741 F.2d 378, 382 (11th Cir. 1984) (emphasizing the identical "language differences between Fed. R. Evid. 103 and Fed. R. Civ. P. 51, and [the] practical differences between evidentiary objections and exceptions to a jury charge").

The reasoning of these cases in construing the language of Civil Rule 51 and Criminal Rule 30 makes it virtually certain that the courts would construe the proposed revision to Evidence Rule 103 as overturning the well-settled body of law that presently relieves parties from the need to waste precious court time by joining in every unsuccessful objection or offer of proof by a co-party. That would be a significant substantive change in the law, and would exert an immediate and profound impact on the conduct of attorneys at trials of multi-party litigation.

B. Rule 804(a)(1)

Federal Evidence Rule 804(a)(1) presently declares a declarant to be unavailable if the declarant is exempted from testifying by a court ruling "on the ground of privilege." It is difficult to see what the Revisers did not like about that language, which they proposed to revise so that it will only apply to a witness who is exempted "on the ground of *having a* privilege." Those additional two words would narrow the scope of the exception and make a substantive change in the law.

Under well-settled law, a declarant can be unavailable under Rule 804(a)(1) as long as a successful objection to her testimony is made in one of three ways: [1] by that witness herself, or [2] by another party to the case, or [3] even by a nonparty, as long as the individual making the objection is the holder of the privilege or has standing to assert it on

someone else's behalf. The criterion of unavailability is satisfied "if the party against whom a statement is offered claims a privilege that blocks someone from testifying. Thus the offering party can satisfy the unavailability criterion if the other side invokes a privilege to prevent the speaker from testifying." CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, EVIDENCE 936 (4th ed. 2009) (citing cases).

The proposed revision to Rule 804(a)(1) would eliminate the last two of these categories of cases, by making a declarant unavailable only if "the declarant ... is exempted by a court ruling on the ground of *having* a privilege to not testify." There is no sensible way to read that verb as applying to anyone other than the declarant, the only person referred to in the same sentence. The proposed revision requires a showing that the *declarant* possessed – or "had" – the privilege that was asserted to make the declarant unavailable. To try to preserve the sense of the current rule, by reading the proposed revision as merely requiring a showing that *anyone* in the courtroom was "*having* a privilege," would be so ungrammatical as to be out of the question, and would render "*having*" redundant.

This will lead to a definite substantive change in the law. In one recent well-known case, the wife of the accused was deemed "unavailable," and her hearsay statements were therefore admitted against him, after he asserted *his* privilege to her testimony under "the state marital privilege, which generally bars a spouse from testifying without the other spouse's consent." *Crawford v. Washington*, 541 U.S. 36, 40 (2004) (citing Wash. Rev. Code § 5.60.060(1) (1994)).

The Washington state statutory privilege invoked by the husband in *Crawford* provides that "A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner." Wash. Rev. Code § 5.60.060(1). That statute, which also applies to civil cases, would of course not apply to a criminal prosecution tried in federal court, but it would be applicable to a civil diversity case based on identical facts if it were tried in a United States District Court in that state, or the other states that have similar privileges. *E.g.*, Michigan Comp. Laws § 600.2162(1) ("In a civil action or administrative proceeding, a husband shall not be examined as a witness for or against his wife without her consent or a wife for or against her husband without his consent, except as provided in subsection (3)."); *see* Fed. R. Evid. 501 (state law governs privilege questions where the federal court's subject matter jurisdiction is based on diversity of citizenship under 28 U.S.C. § 1332).

Imagine a civil diversity case pending in a state that has a marital privilege like the one on the books in Washington or Michigan, in which the plaintiff wishes to call the wife of the defendant to give testimony against her husband. If he asserts his privilege to keep her from testifying, as the defendant did in *Crawford*, she would clearly be "unavailable" under the current version of Evidence Rule 804, and any hearsay statements made by her out of

court could be used against him under one of the exceptions set forth in Rule 804(b). *United States v. Lilley*, 581 F.2d 182, 187-88 (8th Cir. 1978) (Government's witness was "unavailable as a witness during its case in chief due to [his wife's] invocation of the anti-marital facts privilege"). But that would not be true under the proposed revision to Rule 804(a), which would make a declarant unavailable only if she is exempted from testifying "on the ground of *having* a privilege." (Of course, the privilege asserted by the accused in *Lilley* could no longer be used in that way by the defendant in a criminal trial in federal court, since that privilege is now held only by the spouse of the accused after *Trammel v. United States*, 445 U.S. 40 (1980). But it could easily happen in any civil diversity case tried in any federal court that sits in a state with a statutory privilege like the one employed by the accused in *Crawford*.)

C. Rule 411

In August of 2009, I sent an email to a nationwide listserve of evidence law teachers, including Professor Daniel Capra, the Reporter to the Advisory Committee. In that letter, I pointed out a fairly conspicuous and incontrovertible substantive change that the Committee had unwittingly made in Rule 411. The first sentence of Rule 411 presently provides: "Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully." This language made it clear that the Rule, by design, had two functions, described by the Rule's drafters (in the very first sentence of the Advisory Committee Notes) as rejecting "[1] evidence of liability insurance for the purpose of proving fault, and [2] *absence* of liability insurance as proof of *lack of fault*." The framers of the original rule were concerned to ensure that no party – neither a defendant nor a plaintiff defending himself from a charge of contributory negligence – could ever persuade a judge to let him use his lack of insurance as proof that he would have extra incentive to act carefully and therefore was *not* at fault. Of course, a party claiming a desire to use the evidence in that way would almost certainly be misrepresenting his true intentions, and would be much more likely to hope that such evidence would be misused by the jury for the transparently improper purpose of revising their verdict out of sympathy or pity for the uninsured party. But Rule 411 has always made it plain that such an argument would be categorically rejected regardless of the true intentions or motives of the offering party.

As I pointed out last August, however, the latter of those two purposes was accidentally lost in the proposed amendment to Rule 411, which reads: "Evidence that a person did *or did not* have liability insurance is not admissible to prove *that* the person acted negligently or otherwise wrongfully." By changing *whether* to *that*, this proposed amendment would no longer forbid a party from trying to use his lack of insurance as proof that he had extra incentive to act carefully and therefore was not at fault. There is no way this language

could be read to forbid a party from trying to prove that he did *not* act negligently or carelessly. (Some might mistakenly think me naïve for supposing that such evidence – if it were no longer forbidden by FRE 411 – would often get past an objection under Rule 403. I know that such evidence would rarely be admitted by any judge for that purpose. But it might be admitted on rare occasions if not for the prohibition in Rule 411, as the framers of this rule evidently assumed, and this is a substantive change in the scope of the rule.)

The Minutes of the November 2009 Meeting of the Advisory Committee on Evidence Rules indicate that the Committee had some skepticism toward the importance of the point that I brought to their attention, which they reportedly regarded as involving a "farfetched hypothetical." According to those minutes, the Committee, in order "to avoid any contention that a substantive change had been made," nonetheless "tentatively approved" my suggestion to reject this proposed change in the Rule and to restore it to its original language. If the Committee is indeed not yet certain about the importance or the wisdom of my suggestion, I respectfully submit that the consequences of this substantive change are by no means fanciful or insubstantial. Here, for example, are the first four sentences in the chapter on Rule 411 in one of the finest evidence treatises on the market:

> Evidence that a person carried ***or failed to carry*** liability insurance is not admissible on the issue of whether the person acted negligently or wrongfully on a particular occasion. This Rule bars the evidence, for example, when it is offered by a plaintiff against the defendant on the theory that because the defendant was insured the defendant was probably careless. ***Evidence is likewise excluded when offered by the defendant to show that the defendant lacked adequate insurance and therefore had every incentive to be careful.*** No matter who offers the evidence of the presence ***or absence*** of insurance, if it is offered on the issue of negligence it is excluded.

2 S. SALTZBURG, M. MARTIN, & D. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL 411-2 (9th ed. 2009). I have italicized the portions of this paragraph that will need to be deleted by Professor Capra and his co-authors in the next edition of their treatise if neither he nor I can persuade the Advisory Committee or the Judicial Conference to adopt my recommendation, which the Committee has as yet only tentatively approved.

In addition, the Advisory Committee should be apprised that my concern has in fact played out in the real world, where parties have indeed attempted to circumvent the rule by disclosing to the jury that they carried no liability insurance or less insurance than the jury would have been likely to suspect. *E.g., Reed v. General Motors Corp.*, 773 F.2d 660 (5th Cir. 1985) (reversible error for defense to disclose that it had very limited insurance); *Williams v. Bell*, 606 S.E.2d 436 (N.C. App. 2005) (evidence that defendant had no personal insurance

covering liability for boating accident could only serve to induce the jury to decide the case on improper grounds); *Cook Inv. Co. v. Seven-Eleven Coffee Shop, Inc.*, 841 P.2d 333 (Colo. App. 1992) (statement that any judgment against hotel would come out of sole owner's pocket should not have been permitted in jury trial); *Sioux v. Powell*, 647 P.2d 861 (Mont. 1982) (admission of evidence that plaintiff was not insured was reversible error); *Scallon v. Hooper*, 293 S.E.2d 843 (N.C. App. 1982) (defendant's argument that he would be legally obligated to pay the verdict improperly revealed that defendant was not protected by liability insurance); *St. Louis Southwestern Ry. Co. v. Gregory*, 387 S.W.2d 27 (Tex. 1965) (statement during voir dire by defense counsel that "there is no insurance here" was inappropriate); *Rendo v. Schermerhorn*, 263 N.Y.S.2d 743, (N.Y. App.Div. 1965) (statement in defense summation that if plaintiffs recovered large sum defendants would be required to work for the rest of their lives was obvious reference to defendants' lack of insurance coverage and prejudicial error); *Miller v. Alvey*, 207 N.E.2d 633 (Ind. 1965) (defendant's failure to carry insurance is inadmissible as irrelevant and improperly tending to arouse sympathy for the defendant); *Miller v. Staton*, 394 P.2d 799 (Wash. 1964) (defense counsel's closing argument to jury that every dime of award, if any, would come out of pockets of defendant tavern owners was improper); *King v. Starr*, 260 P.2d 351 (Wash. 1953) (deliberate reference by defendants' counsel to the fact that defendants carried no insurance was improper). And even if the substantive change that I pointed out in Rule 411 is not the most significant substantive change made by the Committee (as I have shown, it is not), that is hardly a respectable defense for an amendment that was supposedly justified by nothing more than an intent to clarify and refine the stylistic elegance of the rule.

D. A Few Assorted Less Significant and Possible Substantive Changes

The three changes listed above are surely the most significant substantive changes that were unwittingly made by the proposed stylistic revisions, and they are all beyond any reasonable dispute. There are several other imperfections in the proposed rules that may or may not result in a substantive change in the law, because of ambiguous phrasing that could be interpreted in at least one fashion that would amount to a change in the law. Here are just a few examples.

- Rule 611(b) provides that a cross-examination should normally be limited to the subject matter of the direct examination and "matters affecting the credibility of *the* witness," in what is an obvious reference to the witness being cross-examined. The proposed revision would change that to "matters affecting *a* witness's credibility." This replacement of the definite article serves no obvious benefit, and would plainly broaden (at least very slightly) the scope of cross-examination, by giving the cross-examiner the right to ask questions that go beyond the scope of the direct examination as long as they relate to the credibility of *any* witness at the trial – for

example, by asking a witness questions that might be useful for the impeachment of someone else who has already testified.

- Rule 801(d)(2) grants a right to use otherwise inadmissible hearsay if it is offered "against a party," as long as it was made by that party or his agents. The proposed revision, for no apparent reason, would evidently narrow its scope to statements "offered against an *opposing* party." The word *opposing* in this context can be interpreted in one of two ways. If it means "any party in the case other than the party offering the hearsay," it is entirely redundant. On the other hand, if it is interpreted by the courts to mean only those parties whose names are listed on the other side of the *v.* in the caption of the case, then it would no longer allow (for example) a defendant to offer a statement against his co-defendant. That would be a substantive change in the rule, and not an unlikely interpretation – since it would evidently be the only way to read this word in a manner that would not make it redundant. Either way this word is a mistake.

- Rule 803(22) presently applies with perfect clarity to a judgment of conviction "*adjudging* a person guilty a crime punishable by death or imprisonment in excess of one year." That makes it clear that the rule only applies to a person who was *convicted* of a felony, and not to one who was merely *charged* with a felony but convicted of a lesser offense. But that clarity is mightily obscured in the awkward and unnatural language of the proposed revision to this rule, which would apply to a judgment of conviction if "the *judgment* was *for* [a felony.]" Proposed Rule 803(22)(B). What does that mean? In the fairly common cases in which a person is charged with a felony but is convicted of a misdemeanor following a plea bargain, we could fairly say that the judgment of conviction represented the disposition of the felony. Would it be more appropriate in such a case to say that it was a "judgment ... *for* a felony" or a judgment ... *for* a misdemeanor"? It is hard to say for sure, because nobody experienced in federal criminal practice would ever use *either* of those phrases to describe a judgment, but the former construction is much more consistent with the well-settled linguistic convention that "[a] person is *convicted of* a crime or *convicted for* the act of committing a crime." Bryan Garner, A Dictionary of Modern Legal Usage 222 (2d ed. 1995). That would also be a plausible construction of this rule in light of its well-known theoretical justification, since one could plausibly argue that any man charged with a felony has special incentive and procedural opportunities to defend himself vigorously regardless of whether he eventually resolves that felony charge by pleading to a misdemeanor. If any courts construe this proposed rule in that way, as seems quite likely, it would amount to a significant substantive change in the scope of this hearsay exception. To eliminate that risk, proposed rule 803(22)(B) must be reworded to make it closer to the

wording of the present version of the rule, ideally to say "the judgment was one adjudging a person guilty" of a felony.

II. Redundant Phrases Retained or Added in the Proposed Style Revisions

A. "Testifying *as a witness*."

Rules 605 and 606(a), respectively, define when a judge or a juror may "testify *as a witness*" at a trial. Proposed Rule 804(b)(1)(A) refers to "testimony that ... was given *as a witness* at a trial, hearing, or lawful deposition." Same problem. Proposed Rule 806 speaks of situations in which "the declarant had testified *as a witness*."

In the context of any reference to testimony and testifying, *as a witness* is always redundant. There is no other way to testify except as a witness, and "witnesses" are those who "bear testimony." *Crawford v. Washington*, 541 U.S. 36, 51 (2004). That is why proposed Rule 601 does not suffer from any lack of clarity even though it speaks only of when a person "is competent *to be* a witness," with no mention that such a role might entail testifying.

Worse yet, the phrase "testifying as a witness" is misleading, since it is not used in *many* other rules – for example, Rule 606(b), which defines when a juror or another individual may "testify" at a post-trial inquiry into a verdict. This omission misleadingly suggests that perhaps Rule 606(b), unlike 606(a), is somehow concerned with a different sort of testimony that jurors might give but *not* "as a witness." That is false.

The same redundancy, by the way, also infects proposed Rule 602, which refers to "testimony by an expert *witness*." Even if "expert witness" were not always redundant as the phrase is used in these rules, as I explain below, there is never a need to say *witness* when we are explicitly alluding to an expert who is giving testimony.

B. "Unavailable *as a witness*."

Evidence Rule 804(a) defines five situations in which a declarant is "unavailable *as a witness*," and Rule 804(b) then outlines five kinds of hearsay that are admissible if the declarant is "unavailable *as a witness*." Here as well, the words "as a witness" are useless surplusage and clarify nothing – which is why the original drafters of Rule 804 correctly understood that they could be safely omitted from the title of the rule. The proposed style revision unfortunately preserves the phrase in both rules, and then makes matters worse by adding this patent redundancy to the *title* of Rule 804. (At the same time, paradoxically,

the revisers wisely *deleted* that same phrase from the end of Rule 804(b)(6). It makes no sense to add it to the title of a rule at the same title it is deleted from the text.)

Rule 804(a) and (b) should be shortened simply to describe cases in which a declarant is "unavailable" for one of the five reasons set forth in Rule 804(a). The five reasons listed there – for example, privilege, refusal to testify, death – make it perfectly plain that the rule is concerned entirely with whether someone might be unavailable to testify. Nobody would ever be confused in any way by the deletion of the three words "as a witness" from both the text and title of proposed Rule 804. Try reading the rule aloud without those words and you will see.

C. "Expert *witnesses.*"

The present evidence rules, in a pattern that can only be described as haphazard, refer many times to "experts" (for example, Rules 701, 702, 703, and 705), and just as often to "expert *witnesses*" (for example, Rules 602, 704(b), 706, and 803(18)), even though it is perfectly obvious that all of those rules are talking about the exact same people. Of course the experts under discussion in all of those rules are being proposed for use as *witnesses*; that is why they are being discussed in the Rules of Evidence. The redundancy is especially acute in a few rules where the context makes it especially explicit that there is nothing else that we could possibly be talking about but someone who is also a witness – for example, Rule 602's reference to "*testimony* by an expert witness," and Rule 704(b)'s provision as to when an "expert witness" may testify to "an opinion" on certain topics, and Rule 803(18)'s reference to learned treatises shown to "an expert witness *upon cross-examination.*"

Unfortunately, the drafters of the proposed style revisions have made this pattern even more random. In a number of cases, they have sensibly shortened "expert witness" to "expert," as they did for example at many points in the text of Rule 706. But more often they left "expert witness" unchanged, as they did in Rules 602, 704(b), and 803(18), and the titles of Rules 703 and 705. And sometimes they changed "expert" to "expert witness" – for example, in the title of Rules 702 and 706, at the same time they made the reverse switch in most of the text of Rule 706!

I have a much better proposal. Every reference in the Evidence Rules to an "expert *witness*" should be shortened to "expert." Nothing will be lost in the translation. I promise.

D. The right to object "*at that time.*"

When a judge calls or questions a witness, proposed rule 614(c) states that a party may object "*either at that time or* at the next opportunity when the jury is not present." We could really all get along quite nicely without the first five words of that clause. Of course

any party may *always* object to *any* development at trial "at that time." That always goes without saying. The entire point behind Rule 614(c) is to clarify the much less obvious and vastly more important point that the unhappy party may *also* object the next time the jury is absent. If the rule were amended, as it should be, to delete the words "*either at that time or*," not one lawyer or judge in a million would mistakenly infer that the rule was therefore intended to forbid a simultaneous objection (that would be unheard of), or to *require* the objecting party to wait until the jury has left to room. And even in the extremely unlikely event that a lawyer was confused enough to make that mistake, there would be no harm done and no prejudice to any party, since that lawyer would merely wait a little longer than he might have preferred before objecting – which would leave him less likely to alienate the judge and jurors, and still leave him in full compliance with the requirements of Rule 614 for preserving the point for appeal.

E. "*Both* statements ... *together*."

Proposed Rule 410(b)(1) describes a situation in which the court is presented with two statements and "in fairness *both* statements ought to be considered *together*." This redundancy is not found in the current version of the same rule. The phrase *both statements* here would be much better replaced with "*the statements*," because of course "both ... together" is always redundant. There is no way that only *one* of two statements could be "considered together." *See* BRYAN GARNER, A DICTIONARY OF MODERN LEGAL USAGE 115 (2d ed. 1995) ("Several wordings with *both* cause redundancies," such as "both ... each other" and "both concurrently").

F. "*Evidence of* a *final* judgment of conviction."

Proposed Rule 803(22) contains two redundancies in its first line. It provides a hearsay exception for "*evidence of* a *final* judgment of conviction."

The words "*evidence of*" are unhelpful and redundant – which is why they do not appear in the two dozen other exceptions in Rule 803. The very next section of the Rule, for example, contains a hearsay exception for "*A judgment* that is admitted to prove a matter of personal, family, or general history." There is no sensible reason why Rule 803 should contain two consecutive exceptions for "*Evidence of* a judgment" and "A judgment."

Also redundant is the phrase "*final* judgment of conviction," which does not appear anywhere else in the Federal Rules of Evidence or Criminal Procedure. (It is noteworthy that Proposed Evidence Rule 609 refers nine times to a "conviction" without once using the word *final*. As the Revisers have correctly observed, it is not ideal for the same thing to be described two different ways in the Evidence Rules, which could easily lead to the unintended implication that different meanings were intended.)

There is no such thing as a "final judgment of conviction," at least not the way the Advisory Committee means to use the phrase. Lawyers who specialize in civil litigation often refer to "final orders" and "final judgments," as a way of distinguishing them from the many interlocutory rulings of a similar nature in a civil case – for example, an order dismissing one of several claims in the case. See, e.g., Fed. R. Civ. P. 54(b) (defining when a court "may direct entry of a *final* judgment as to one or more, but fewer than all" of the claims in a case). But it is a bit silly to describe a judgment in a criminal case as a "*final* judgment of conviction." If by *final* one means (as Rule 803(22) does) the conviction entered at the end of the case, then *final* goes without saying, and no lawyer experienced in criminal work would use such a phrase. There are no interlocutory or provisional convictions in the American legal system or any other free society. This is why the phrase *final judgment* appears ten times in the Federal Rules of Civil Procedure, but not once in the Federal Rules of Criminal Procedure – even though the Criminal Rules speak more than ten times of a conviction, and four times of a "judgment of conviction." *See* Fed. R. Crim. P. 32(k)(1), 58(g)(1), 58(g)(2)(B), and 58(g)(3). Evidence Rule 609, which refers nearly a dozen times to criminal convictions, does not once call them "final." This is presumably also why Bryan Garner offers a definition of "final judgment" in his general treatise on legal terminology, *A Dictionary of Modern Legal Usage* (2d ed. 1995), but quite sensibly does not even mention the phrase in his more recent dictionary on criminal law terms, *A Handbook of Criminal Law Terms* (2000).

It is true that in the unrelated context of postconviction relief, the law sometimes refers to "the date on which [a] judgment of conviction becomes final," 28 U.S.C. § 2255(f)(1), which generally refers to the date when all direct appeals have been exhausted. *Clay v. United States*, 537 U.S. 522, 527 (2003) ("Here, the relevant context is postconviction relief, a context in which finality has a long-recognized, clear meaning: Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."). But that has nothing to do with the intentions of those who drafted Rule 803(22), which explicitly declares that "The pendency of an appeal [from the judgment of conviction] may be shown but does not affect admissibility." Since the rule plainly applies to judgments of conviction that have not yet become "final," as the Supreme Court sometimes uses that term in the context of postconviction relief, it is especially undesirable for Rule 803(22) to use that term.

G. "Judgment of a *Previous* Conviction."

Rule 803(22), the same rule that begins with a reference to a "*final* judgment of conviction," contains another equally obvious redundancy in its title: "Judgment of *a Previous* Conviction." The adjective *previous* here is meaningless and adds absolutely nothing to the rule. (The revisers instinctively seemed to have perceived this, because the word *previous*

is not used in the text of the rule, just as *final* does not appear in its title – and neither of those words is used anywhere in Rule 609, which also addresses the admissibility of a judgment of conviction. This clearly proves my point that neither adjective is helpful here, much less necessary.)

Lawyers are notoriously fond of using the words *prior* and *previous* as often as possible, almost always in contexts where the words are meaningless redundancies. It is true that the words are sometimes helpful; for example, when a man is charged as a felon in possession in a firearm, it makes sense for a prosecutor to tell the grand jury or the judge that the accused *had* (note the past tense!) several "prior convictions" at the time of his arrest. "This clarifies that those convictions, all of them necessarily dating from some point before today – that *always* goes without saying – also occurred before he was arrested with a gun." James J. Duane, *Prior Convictions and Tuna Fish*, THE SCRIBES JOURNAL OF LEGAL WRITING 160, 161 (1998-2000).

The word *previous* in the phrase "*previous* conviction" is meaningless redundancy when it is used, as it is in the title of Rule 803(22), to mean "a conviction that was entered at some point before the moment in time when it was later offered at some trial." And the phrase is not merely innocent harmless fun. When the jurors at a criminal trial hear the prosecutor and the judge talk about the admission under Rule 803(22) of the fact that the accused had something called "a *previous* conviction," the unmistakable implication will seem to be that they are talking about a conviction other than the one we are expecting or hoping the jury will be returning at this trial.

H. "*Prior* Statements"

As I pointed out above, the words *previous* and *prior* are always unhelpful and unnecessary when they are used merely to mean "at some point before *today*." That always goes without saying, because the Evidence Rules are of course never concerned with evidence of events from the future.

The Evidence Rules use the word *prior* about a half dozen times with respect to statements by a witness. The proposed rules continue that tradition, and indeed have multiplied the number of times that word appears in the rules, and every time the word is redundant.

For example, proposed rules 408(a) and 613(b) continue the tradition of referring to something widely known in the profession as impeachment of a witness with evidence of the witness's "*prior* inconsistent statement." Of course those are *prior* statements; no witness this side of the Looking-Glass has ever been impeached with his statements from the future. The title of proposed Rule 613 also talks about a "Witness's *Prior* Statement,"

and Rule 613(a) describes the questioning of a witness "about the witness's *prior* statement."

I will be the first to concede that this sort of talk is extremely common among members of the legal profession. Indeed, I would understand why some might think I am proposing here a change in what the Advisory Committee has called a "sacred phrase." But it bears emphasis just the same that the word *prior* is unnecessary in all these contexts.

As radical as this statement may sound, especially to those of us who have spent decades reading and writing about the Federal Rules of Evidence, I can prove that it is true to any reader with an open mind: *Just take a few moments and read Federal Rule of Criminal Procedure 26.2!* This rule, which was very skillfully drafted, is titled "Producing a Witness's *Statement*." It is concerned, just as Evidence Rule 613(b) is, with the discoverability and admissibility of statements that were made by a witness before trial and that might arguably conflict with the testimony of the witness at trial. Rule 26.2 refers twenty times to them as "statements," without once using the words *prior* or *previous*. And yet the rule is perfectly easy to read and follow, without any trace of ambiguity or complexity. There is no reason why Rule 408 and 613 cannot be written with the same elegance and simplicity.

The Advisory Committee, instead of deleting these gratuitous uses of *prior*, actually used it in a few extra places. The definition of hearsay (talk about a sacred phrase) in Proposed Rule 801(c) would now define hearsay as "a *prior* statement – one that the declarant does not make while testifying at the current trial or hearing" offered to prove its truth. Assuming that this represents an improvement on the former version of the definition, which seems dubious, the word *prior* here is again redundant and slightly misleading, because it may seem to suggest to some readers that we are talking about "the *first* statement, the one that was *prior to* the current statement being made on the witness stand by someone who is telling us about the first one." And that is not always true. The hearsay rule is frequently violated by the offer of an exhibit that consists of a written statement, in which case it seems particularly incongruous and awkward to describe that statement as a *prior* statement. (And if *prior* were really helpful or necessary in proposed Rule 801(c), then why does the word appear in proposed Rule 801(d)(1) but not proposed Rule 801(d)(2)?) My recommendation: This committee should follow the very sensible lead of those who drafted Criminal Rule 26.2, and should replace every mention of "prior statements" with "statements."

I. "*Subsequent* measures"

Rule 407 is titled "*Subsequent* Remedial Measures." The first word of this title is redundant – indeed, it is as redundant as "*Prior Preventative* Measures" would be – because you cannot *remedy* anything, by definition, until after the fact.

I could understand that the Advisory Committee might not be willing to tamper with the title of such a well-settled and venerable legal concept, which could fairly be described as a "sacred phrase." But even if *subsequent* must be preserved in the title of this rule, it surely is not necessary in the text of proposed Rule 407, which reads:

> When measures are taken that would have made an *earlier* injury or harm less likely to occur, evidence of the *subsequent* measures is not admissible to prove negligence [among other matters].

The use of the word *earlier* here makes it explicit that the remedial measures are taken after some injury or harm; calling the measures *subsequent* is overkill. Rearranging the order of these words only slightly, we see that it is discussing "measures ... *subsequent* [to] ... an *earlier* injury or harm."

J. "*Furnishing*, promising to pay, or offering to pay."

Proposed Rule 409 discusses evidence of "*furnishing, promising* to pay, or offering to pay" medical or similar expenses. Promising and offering are redundant, for a promise is simply one way to make an offer. *Furnish* is sometimes useful as a synonym for *give* or *deliver* (as it is used, for example, in Rule 408(a)(1), which speaks about the "furnishing of valuable consideration"). Bryan Garner, A DICTIONARY OF MODERN LEGAL USAGE 378 (2d ed. 1995). But *furnish* is not being used that way in Rule 409, and is in fact archaic and terribly clumsy as a synonym for *paying*. Nobody still alive today – not even a lawyer – says "I will furnish your medical bills" when they mean that they are willing to *pay* them.

This Rule would be simpler, clearer, and would sound far more up-to-date if it were shortened to refer simply to evidence of "*paying or offering to pay*" medical or hospital bills.

K. Preventing a Witness "From *Attending or* Testifying."

Both proposed Rules 804(a) (in its final sentence) and 804(b)(5) describe a situation in which a person makes some declarant unavailable "in order to prevent the declarant from *attending or* testifying." The good news is that revisers did not add "as a witness" at the end of these clauses (which confirms my point that this phrase is not really necessary in the title of Rule 804.) But the revisers unfortunately preserved the rule's redundant reference to a party who tries to prevent a witness from either *attending* or testifying at a trial – and the former possibility adds nothing to the meaning of the rule. Read literally, this language plainly suggests that a criminal defendant might be guilty of "Forfeiture by Wrongdoing" – and thereby open the door to the admission against him of statements made out of court by some witness – even if he knew that she was neither scheduled to nor planning on

testifying at his trial and was merely planning to attend and watch it in silence, as long as he injured or threatened or bribed her to stay away because he did not even want her to *attend* the hearing. That would be absurd, of course, and would almost never happen. But that is precisely why the language of this clause is absurd, and why Rules 804(a) and 804(b)(5) should both be shortened to refer instead to a party who prevents a witness "from testifying." That would be shorter, simpler, and would make it clear that those Rules apply regardless of whether he tried to prevent the witness from *attending*, which is not really relevant in this context in any event.

L. Assorted Redundant Intensifiers

The Revisers sensibly eliminated many redundant intensifiers, "expressions that attempt to add emphasis but instead state the obvious and create negative implications for other rules." But the revisers did not go nearly far enough.

For example, Rule 609(d) presently limits the admissibility of juvenile adjudications to situations in which "*the court is satisfied that admission in evidence*" is necessary for a fair trial. In a major improvement, the proposed version of rule 609(d)(4) would shorten that simply to "admitting the evidence." That is much better. For there is never any need to explicitly recite that the standard required by some rule applies only when "the court is satisfied that" the test is met, a phrase that could have been inserted just as unhelpfully in every sentence in the rules.

But the Committee should have gone a little further here, and also deleted the word *admitting,* and opted instead for a rule that applies as long as the "the evidence" is necessary for a fair trial. If a piece of evidence is necessary for a fair trial, it goes without saying that we are contemplating its *admission.*

And similar examples of useless intensifiers abound throughout the Evidence Rules, many of which have not yet been deleted in the proposed revisions. Here are just a few examples:

- Proposed Rule 615(b) describes an officer or a party who has been "designated as the party's representative *by its attorney.*" Those last three words go without saying. Who else would do it? It is understood that every rule in the book identifies things we expect parties to do through their attorneys if they are represented by counsel. The rule should just say "designated by the party as its representative."

- Proposed Rule 615(c) describes a witness "whose presence *a party shows to be* essential" to its case. Much better would be simply: "whose presence *is* essential."

Every rule in the book is understood as specifying requirements that are to be satisfied by the parties.

- Rule 615 also specifies when the court "must *order* witnesses *excluded*." Better and simpler would be: "must *exclude* witnesses" (or "the witnesses," if you prefer). Nobody who has ever spent any time in a courtroom would ever be confused by such a simplification into suspecting that the rule required the judge to leave the bench and physically escort the witnesses from the room herself.

- Rule 706(d) says that a court "may *authorize* disclosure" to the jury that an expert was appointed by the court. It would be simpler and more direct – and much more accurate – to simply say that the court "*may disclose*" those facts to the jury. Anyone who has spent a significant amount of time in federal courthouses knows that every judge, when given a choice between telling the jury about such a fact and letting the lawyers do it, will always choose to do it herself. (Besides, what is lost in the translation? The change I propose here would not deceive anyone into thinking that a district judge had therefore been stripped of the power to let the lawyers make the disclosure.)

- The Evidence Rules contain countless references to "evidence of" some fact. Rule 412(a), perhaps reflecting its origin as a piece of Congressional legislation, is the only rule in the book that speaks of instead about "evidence *offered to prove*" some fact. Even in its revised version, proposed Rule 412(a) and (c) refer to "evidence *offered to prove* that a victim engaged in other sexual behavior," "evidence *offered to prove* a victim's sexual predisposition," and "evidence *offered to prove* a victim's sexual behavior or sexual predisposition." This gratuitous phrase, which appears in no other evidence rule, is unhelpful. Much better would simply be "evidence that a victim" engaged in certain conduct, or "evidence of a victim's sexual predisposition."

- Proposed Rule 415 applies "[i]n a civil case involving a claim *for relief* based on a party's *alleged* sexual assault or child molestation." That is a major improvement on the current rule (there is no need to say "a claim for damages of other relief), but it could be better and even shorter: "In a civil case involving a claim of sexual assault or child molestation by a party, ..."

- The first sentence of Rule 602 ends with a reference to evidence "that the witness has personal knowledge of the matter." That is fine. But those words are followed immediately by a sentence that begins with a reference to "[e]vidence to prove personal knowledge." It is awkward and unnecessary to use that phrase in two consecutive clauses; the second sentence of the rule would read more clearly if it simply began "*Such evidence* may consist of the witness's own testimony."

- Proposed Rule 412 has been sensibly simplified by replacing all references to "alleged victim" with "victim," and then adding a new section 412(d) which defines victim to mean an alleged victim. That is a nice touch. But curiously, Proposed Rule 404(a)(2)(B) still refers to "an *alleged crime* victim's" character trait, just as proposed Rule 404(a)(2)(C) still speaks about an "*alleged* victim." *Crime* is redundant here, since the reference appears in a section titled "Exceptions in a criminal case," and *alleged* is also not helpful. Here is a better idea: shorten Rule 404(a)(2) to refer merely to the character of the "*victim*," and then move the definitional section of Proposed Rule 412(d) to Proposed Rule 101(b), where it will more naturally fit alongside the other definitions set forth there. This will clarify that the word *victim* in every Federal Rule of Evidence includes an alleged victim.

- The phrase "in evidence" appears only three times in the Proposed Rules, and in each context those two words are meaningless. Rule 612(b) refers to a statement that a party desires "to introduce *in evidence*," 801(c) speaks of a statement "that a party offers *in evidence*," and Rule 806 refers to a statement "admitted *in evidence*." There are countless other occasions when the proposed rules refer to evidence that is offered or introduced or admitted without any mention of the gratuitous "in evidence."

M. *Co*-conspirator.

Proposed FRE 801(d)(2)(E) refers to statements offered against a party and made "by the party's *co*-conspirator." That should say instead "conspirator," which means the same thing. My reasons for this suggestion consist of the following simple and compelling considerations, all of them indisputable:

- You cannot conspire with yourself, just as you cannot be a partner by yourself.
- That is why, as Bryan Garner has correctly observed, you would never say that someone is a (or my) "copartner." A DICTIONARY OF MODERN LEGAL USAGE 223 (2d ed. 1995). It is as silly as "fellow classmate" or "co-brother."
- *Conspirator* is just another way of saying "partner in crime."
- *A priori*, there is obviously no inherent reason (other than perhaps the arbitrary dogmatism of convention) why one can refer to another as "his partner" or "his partner in crime," but never "his conspirator," which means the same thing.

Despite all these indisputable points, *co-conspirator* was once regarded as serving a necessary function by suggesting a point of comparison, because "[I]t is used only where we would otherwise say *fellow conspirator*, as in *his co-conspirator* (where we would not, indeed could not, say *his conspirator*)." Bryan Garner, A DICTIONARY OF MODERN LEGAL USAGE

164 (2d ed. 1995). But even if one concedes for the sake of argument, as I shall gladly do, that this was an accurate description of linguistic convention in 1995, this *ipse dixit* is simply no longer true. Consider this compelling data. The phrase "*his [or her]* conspirator," (or alleged conspirator), has now appeared:

- ***1,207 times in American newspapers and periodicals*** (this is the total number of documents you generate in the Westlaw database ALLNEWS on today's date when you run the following search: <"defendant's conspirator" "defendant's alleged conspirator" "his conspirator" "their conspirator" "her conspirator" "his alleged conspirator" "her alleged conspirator" "their alleged conspirator">. The quotations ensure that you are not picking up any cases which used a phrase such as *his co-conspirator*.)

- ***In 303 published judicial opinions*** by some state or federal court (run the same search in the Westlaw database ALLCASES)

- ***In 88 opinions by the United States Court of Appeals,*** which are among the best written and most carefully edited opinions in the American legal system (run the same search in the Westlaw database CTA)

Here are just three examples from three particularly renowned masters of legal writing:

- **Chief Judge Alex Kozinski:** "Though Lococo's plea agreement admits he joined a conspiracy to distribute crack, Lococo also struck language from that agreement that would have admitted knowledge that ***his conspirators*** converted the powder he sold them into crack." *United States v. Lococo*, 514 F.3d 860, 863 n.1 (9th Cir. 2008).

- **Judge Richard Posner:** "By communicating his withdrawal to the other members of the conspiracy, a conspirator might so weaken the conspiracy, or so frighten ***his conspirators*** with the prospect that he might go to the authorities in an effort to reduce his own liability, as to undermine the conspiracy." *United States v. Paladino*, 401 F.3d 471, 479-80 (7th Cir. 2005).

- **Judge Frank Easterbrook:** "Montano contends that the district court erred by attributing to him three kilograms of cocaine from the uncompleted transaction with the undercover officer, because -given his lack of prior drug dealing and his limited relationship with ***his conspirators*** - the completion of the deal was not reasonably foreseeable to him." *United States v. Vega-Montano*, 341 F.3d 615, 618 (7th Cir. 2003).

On the basis of this data –perhaps especially the usage among the U.S. Court of Appeals – I respectfully contend that settled and sophisticated modern American usage now allows us to speak naturally and correctly of a defendant and *"his conspirator."* Can we really say with confidence that over 300 judges could be wrong about such a thing?

(Don't bother checking to see if "his conspirator" has now become as common as "his co-conspirator." I didn't check and am sure that it hasn't, and probably never will until the Advisory Committee leads the way. "His *co*-conspirator" is the way lawyers have been training each other to speak and write for a very long time, and old habits die hard. But that doesn't mean it is correct, much less necessary, to speak that way.)

III. Archaic and Awkward Phrases Retained or Added in the Proposed Style Revisions

A. *Relevancy.*

Rule 104(a) refers to situations in which the *"relevancy"* of evidence is conditioned on some fact, a word that has been retained in the proposed style revisions. That archaic word is rarely used by modern writers of note, and has become a useless variant of *relevance.* The latter version is a shorter three-syllable version and is now "preferred" in both American and British English. Bryan Garner, A DICTIONARY OF MODERN LEGAL USAGE 750 (2d ed. 1995). Garner correctly points out that "*Relevancy* was the predominant form in American and British writings on evidence of the 19th century, but now *relevance* is more common except in Scotland." *Id.* The admitted popularity of relevancy 100 years ago is scarce warrant for its continued use today.

The justices of the Supreme Court agree. In the past decade since the dawn of the new millennium in January 2000, the justices of the Supreme Court of the United States have only used the word *relevancy* only once in a judicial opinion, and that was a hastily drawn order by a single justice on an expedited application. *Associated Press v. Dist. Ct.*, 542 U.S. 1301, 1303 (2004) (opinion in chambers by Breyer, J.) (During that same ten-year period, the word *relevancy* appeared only four other times in an opinion by any justice of the Supreme Court, but only when the Court was quoting someone else who had used that word, usually long before the year 2000.) During that same ten-year period, a computerized search reveals that the justices used the word *relevance* literally hundreds of times in a total of 160 different cases. Indeed, even when citing and paraphrasing what the Evidence Rules Advisory Committee has written about "relevancy," the Supreme Court of the United States – in a unanimous opinion – recently took the liberty of replacing that word with its more contemporary variant:

> ***Relevance*** and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad *per se* rules. See Advisory Committee's Notes on Fed. Rule Evid. 401, 28 U.S.C.App., p. 864 ("***Relevancy*** is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case").

Sprint/United Management Co. v. Mendelsohn, 128 S.Ct. 1140, 1147 (2008) (emphasis added). This Committee should take the sensible lead of that unanimous Court and replace *relevancy* in Rule 104(a) with *relevance*.

B. Witnesses *Take* Oaths; They Do Not *Give* Them.

Proposed Rule 603 would provide that "Before testifying, a witness must *give* an oath or affirmation to testify truthfully." Proposed Rule 604 likewise would require an interpreter to "*give* an oath or affirmation to make a true translation." Both rules should be changed to say "*take* an oath."

By extremely well-settled linguistic convention, witnesses and others who voluntarily undertake a solemn public obligation are always said to "*take* an oath or affirmation," not to *give* it. The point is so clearly established that it is hard to imagine where the Revisers got any contrary impression. That is the view of Bryan Garner, who correctly notes that "A courtroom witness typically *takes* [an assertory] oath," and that a judicial oath is "an oath *taken* in the course of a judicial proceeding, esp. in open court." BLACK'S LAW DICTIONARY 1101 (8th ed. 2004). It is also the usage that is consistently adopted by the Supreme Court of the United States; a Westlaw search turns up over 400 Supreme Court cases that refer to an oath *taken* by a judge or a witness or a juror. *E.g., Smith v. Spevack*, 130 S.Ct. 676, 685 (2010) (describing the oath that "the jurors had taken to uphold the law"); *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252, 2267 (2009) (all judges "take an oath" to uphold the Constitution) (Roberts, C.J., dissenting). It is the language consistently adopted in the Federal Rules of Criminal and Appellate Procedure, *e.g.* FED. R. CRIM. P. 6(a)(2) (an alternate juror "*takes* the same oath" as other jurors); FED. R. APP. P. 45(a)(1) (the clerk of the court must "*take* the oath and post any bond required by law"); at no point in any of the other federal rules is any witness said to *give* an oath. Finally, this is the usage that is most consistent with the equally well-settled convention that the party who places the witness under oath is said to "administer" – or to *give* – the oath. *E.g.*, FED. R. CIV. P. 28(a)(1)(A) (depositions must be taken before an official who is authorized to "administer oaths"). It makes no sense to say that a court clerk *administers* an oath to a witness who at the same time *gives* the oath – unless perhaps the witnesses is giving it right back?

C. "You Are *Entitled* to Whatever I Decide to Give You."

In *Alice's Adventures in Wonderland*, at the trial of Alice, the Mad Hatter and the King share the following exchange:

> "I believe that I am entitled to something for my time," mumbled the Hatter as he began to rise from the witness stand.
> "You are *entitled*," said the King with rising anger, "to whatever *I* shall choose to give you, and not one shilling more or less!"

The passage is so delightfully absurd because it reveals that the King truly has no idea what it means to be *entitled* – or to have a *right* – to something. A "right" to whatever someone else unilaterally chooses to give you is, in truth, no right at all.

Unfortunately, the same phrasing is found in proposed Rule 706(c), which says that a court-appointed expert "is *entitled* to whatever reasonable compensation the court allows." That is not a rule of law; it is a punch line. An expert who will receive only what the court chooses to give him is obviously not "entitled" to anything at all.

It would be much more accurate to state that "The expert *shall receive* whatever reasonable compensation the court allows." But even that is a little misleading, of course, because proposed Rule 706(a) states "the court may only appoint someone who consents to act." So no expert will be forced to settle for less compensation than he or she desires.

So an even better improvement would be to replace the opening line of Rule 706(c) with: "The expert *shall receive* whatever reasonable compensation *is agreed upon between the court and the expert.*" And then the line in proposed Rule 706(a) can be deleted as superfluous.

By the way, the lines quoted above from *Alice's Adventures in Wonderland* were made up by me. But be honest: didn't you think for a moment that they were really from that book (at least until you noticed how similar they were to Rule 706)? That proves my point.

D. 28 U.S.C. § 3500.

Rule 612(a), which describes a party's right to insist upon production of writings used to refresh recollection, begins with the archaic cross-reference: "[u]nless *18 U.S.C. § 3500* provides otherwise in a criminal case." This reference has not been changed in the proposed stylistic revision.

18 U.S.C. § 3500, the so-called *Jencks* statute, was enacted in 1957 and has not been amended since 1970, during the Nixon administration. For all practical purposes it has been a dead letter since it was intentionally superseded in 1979 – just a few years after the adoption of the Federal Rules of Evidence – by the adoption of Federal Rule of Criminal Procedure 26.2, which was specifically enacted in order to:

> ... place in the criminal rules the substance of what is now 18 U.S.C. § 3500 (the *Jencks* Act). Underlying this and certain other additions to the rules contemplated by S. 1437 [95th Cong., 1st Sess. (1977)], is the notion that provisions which are purely procedural in nature should appear in the Federal Rules of Criminal Procedure rather than in Title 18.

1979 Advisory Committee Note to Federal Rule of Criminal Procedure 26.2.

From the moment it was enacted more than three decades ago, Criminal Rule 26.2 has always been more up-to-date than § 3500. For example, Rule 26.2 was written partially in response to, and represented a codification of, the holding in *United States v. Nobles*, 422 U.S. 225 (1975), governing the discovery of statements prepared by *defense* witnesses, a subject which to this day is still not even mentioned in § 3500. Indeed, in the three decades since Rule 26.2 was enacted, that rule has been amended *four* times to keep it current with the law – while § 3500 has not been amended once.

Evidence Rule 612 should be amended to delete the embarrassingly archaic and obsolete cross-reference to § 3500, and should instead read: "[u]nless *Federal Rule of Criminal Procedure 26.2* provides otherwise in a criminal case..."

In one sense, it must be conceded that this change could be described as something analogous to a substantive change, since Criminal Rule 26.2 is not identical to provisions of § 3500 (because, for example, only the former applies to defense witnesses). But that is not quite correct, since Rule 26.2 has actually governed the production of witness statements in criminal cases for more than thirty years and shall continue to do so regardless of whether Evidence Rule 612 says so or not.

This change in Rule 613 will serve two equally compelling functions. It will immediately bring up-to-date Rule 613's cross-reference for criminal cases by citing to the Rule that much more accurately summarizes the current law with respect to the *Jencks* doctrine (which § 3500 has not done since the *Nobles* case was decided in 1975). And it will also allow Rule 613 to effectively incorporate by reference all future changes and amendments in Criminal Rule 26.2.

E. "A *Natural* Person."

The Advisory Committee has unfortunately preserved the reference in Rule 615 to "a *natural* person." That phrase does not appear anywhere else in the Rules of Evidence – and does not appear even once in the current Federal Rules of Civil, Criminal, and Appellate Procedure. That is a fairly sure sign we are discussing what is surely the most archaic word in the book.

There are very rare cases where "natural person" is necessary to distinguish human beings from juristic persons, but Rule 615 is not one of them. Presently that Rule forbids the exclusion from the courtroom of (among others):

> (a) a party who is a natural person;
> (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;

These two clauses could be very greatly improved and easily combined into a single clause as follows:

> (a) a party, or – in the case of a party that is not a human being – an officer or employee designated as its representative;

F. "*On* the introduction."

Rule 104(b) allows a judge to admit certain "evidence ... *upon*, or subject to, the introduction of evidence" sufficient to demonstrate its relevance to the case. The revisers propose to replace *upon* with *on*, so that the rule will instead allow a judge to admit "evidence ... *on* ... the introduction" of certain facts. This proposed change makes the sentence *less* grammatical. It is true, as the revisers obviously realize, that *upon* is a formal word that is "usually unnecessary in place of *on*," Bryan Garner, A DICTIONARY OF MODERN LEGAL USAGE 904 (2d ed. 1995). But not always. As Bryan Garner correctly points out, "*upon* is quite justifiable," and sometimes necessary, "when it introduces a condition or event." *Id.* That is exactly what it does in Rule 104(b). It would be simply ungrammatical (not to mention confusing) for a judge to say, as proposed Rule 104(b) does, that "I will admit this evidence *on* the introduction of evidence sufficient to support a finding."

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