Advisory Committee on Evidence Rules
Washington, D.C.
April 22-23, 1996

I. Opening Remarks of the Chair, Including Oral Report on Rules 413-415 and Approval of the Minutes of the May 4-6, 1995 Meeting in New York City

II. Consideration of Proposed Amendments and Existing Rules Published for Public Comment

- A. Rule 103
- B. Rule 407
- C. Rule 801
- D. Rule 804
- E. Rule 807
- F. Rules 803 and 806, and Tentative Decision Not To Amend 24 Rules

III. New Suggestions Submitted on Rules Containing Proposed Amendments Published for Public Comment

IV. New Suggestions Submitted on Rules Not Published for Comment

V. Next Meeting

ADVISORY COMMITTEE ON EVIDENCE RULES

Chair:

Honorable Ralph K. Winter, Jr.
United States Circuit Judge
Audubon Court Building
55 Whitney Avenue
New Haven, Connecticut 06511

Area Code 203
782-3682

FAX-203-782-3686

Members:

Honorable Jerry E. Smith
United States Circuit Judge
12621 United States Courthouse
515 Rusk Avenue
Houston, Texas 77002-2698

Area Code 713
250-5101

FAX-713-250-5719

Honorable Fern M. Smith
United States District Judge
United States District Court
P.O. Box 36060
450 Golden Gate Avenue
San Francisco, California 94102

Area Code 415
522-4120

FAX-415-522-2184

Honorable Milton I. Shadur
United States District Judge
United States District Court
219 South Dearborn Street, Room 2388
Chicago, Illinois 60604

Area Code 312
435-5766

FAX-312-663-9114

Honorable James T. Turner
United States Court
of Federal Claims
717 Madison Place, NW
Washington, D.C. 20005

Area Code 202
219-9574

FAX-202-219-9997

Honorable Ann K. Covington
Chief Justice, Supreme Court of Missouri
P.O. Box 150
Supreme Court Building
High and Washington Streets
Jefferson City, Missouri 65102

Area Code 314
751-3570

FAX-314-751-7161

Dean James K. Robinson
Wayne State University Law School
468 West Ferry
Detroit, Michigan 48202

Area Code 313
577-3933

FAX-313-577-5478

Professor Kenneth S. Broun
University of North Carolina
School of Law
CB #3380, Van Hecke-Wettach Hall
Chapel Hill, North Carolina 27599

Area Code 919
962-4112 (a.m.)
and
968-2714 (p.m.)
FAX-919-962-1277

ADVISORY COMMITTEE ON EVIDENCE RULES (CONTD.)

Gregory P. Joseph, Esquire Fried, Frank, Harris, Shriver & Jacobson One New York Plaza New York, New York 10004-1980	Area Code 212 859-8052 FAX-212-859-8584
John M. Kobayashi, Esquire Kobayashi & Associates, P.C. 1775 Sherman Street, Suite 2100 Denver, Colorado 80203	Area Code 303 861-2100 FAX-303-861-1944
Fredric F. Kay, Esquire Federal Public Defender 97 East Congress Suite 130 Tucson, Arizona 85701-1716	Area Code 602 620-7065 FAX-602-620-7055
Assistant Attorney General for the Criminal Division (ex officio) Mary F. Harkenrider, Esquire Counsel, Criminal Division U.S. Department of Justice, Room 2212 Washington, D.C. 20530	Area Code 202 514-2419 FAX-202-514-0409

Liaison Members:

Honorable David S. Doty United States District Judge 609 United States Courthouse 110 South 4th Street Minneapolis, Minnesota 55401	Area Code 612 348-1929 FAX-612-348-1820
Honorable David D. Dowd, Jr. United States District Judge United States District Court 510 Federal Building 2 South Main Street Akron, Ohio 44308	Area Code 216 375-5834 FAX-216-375-5628

Reporter:

Professor Margaret A. Berger Brooklyn Law School 250 Joralemon Street Brooklyn, New York 11201	Area Code 718 780-7941 FAX-718-780-0375

Secretary:

Peter G. McCabe Secretary, Committee on Rules of Practice and Procedure Washington, D.C. 20544	Area Code 202 273-1820 FAX-202-273-1826

JUDICIAL CONFERENCE RULES COMMITTEES

Chairs

Honorable Alicemarie H. Stotler
United States District Judge
751 West Santa Ana Boulevard
Santa Ana, California 92701
Area Code 714-836-2055
FAX 714-836-2062

Honorable James K. Logan
United States Circuit Judge
100 East Park, Suite 204
P.O. Box 790
Olathe, Kansas 66061
Area Code 913-782-9293
FAX 913-782-9855

Honorable Paul Mannes
Chief Judge, United States
Bankruptcy Court
6500 Cherrywood Lane, Rm. 385A
Greenbelt, Maryland 20770
Area Code 301-344-8047
FAX 301-344-0385

Hon. Patrick E. Higginbotham
United States Circuit Judge
13E1 United States Courthouse
1100 Commerce Street
Dallas, Texas 75242
Area Code 214-767-0793
FAX 214-767-2727

Honorable D. Lowell Jensen
United States District Judge
United States Courthouse
1301 Clay Street, 4th Floor
Oakland, California 94612
Area Code 510-637-3550
FAX 510-637-3555

Honorable Ralph K. Winter, Jr.
United States Circuit Judge
Audubon Court Building
55 Whitney Avenue
New Haven, Connecticut 06511
Area Code 203-782-3682
FAX 203-782-3686

Reporters

Prof. Daniel R. Coquillette
Boston College Law School
885 Centre Street
Newton Centre, MA 02159
Area Code 617-552-8650,4393
FAX-617-576-1933

Professor Carol Ann Mooney
University of Notre Dame
Law School
Notre Dame, Indiana 46556
Area Code 219-631-5866
FAX 219-631-6371

Professor Alan N. Resnick
Hofstra University
School of Law
Hempstead, New York 11550
Area Code 516-463-5930
FAX 516-481-8509

Professor Edward H. Cooper
University of Michigan
Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215
Area Code 313-764-4347
FAX 313-763-9375

Prof. David A. Schlueter
St. Mary's University of
San Antonio School of Law
One Camino Santa Maria
San Antonio, Texas 78284
Area Code 210-431-2212
FAX 210-436-3717

Prof. Margaret A. Berger
Brooklyn Law School
250 Joralemon Street
Brooklyn, New York 11201
Area Code 718-780-7941
FAX 718-780-0375

DRAFT

ADVISORY COMMITTEE ON EVIDENCE RULES

Minutes of the Meeting of May 4 and 5, 1995

New York, New York

The Advisory Committee on the Federal Rules of Evidence met on May 4 and 5, 1995 at the federal courthouse in Foley Square in the Southern District of New York.

The following members of the Committee were present:
Circuit Judge Ralph K. Winter, Jr., Chair
Circuit Judge Jerry E. Smith
District Judge David S. Doty
District Judge Fern M. Smith
Federal Claims Judge James T. Turner
Dean James K. Robinson
Professor Kenneth S. Broun
Gregory P. Joseph, Esq.
Fredric F. Kay, Esq.
John M. Kobayashi, Esq.
Mary F. Harkenrider, Esq., and Roger Pauley, Esq., Department of Justice
Professor Margaret A. Berger, Reporter
Chief Judge Covington and Judge Shadur were unable to attend.

Also present were:
Honorable Alicemarie H. Stotler, Chair, Committee on Rules of Practice and Procedure
Professor Daniel R. Coquillette, Reporter, Committee on Rules of Practice and Procedure
Circuit Judge C. Arlen Beam
Peter G. McCabe, Esq., Secretary, Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Administrative Office
Paul Zingg, Esq., Administrative Office

Judge Winter called the meeting to order at 8:30 a.m. He reported to the Committee on a number of developments.

The Standing Committee. Judge Winter informed the Committee that the Standing Committee had voted to send out the amendments to Rules 103 and 407 for public comment. He also reported that some members of the Standing Committee feared that the amendment to Rule 103 might prove a trap for lawyers, and had expressed a preference for a default rule that would relieve the losing attorney from having to renew the motion at trial. A motion to revise the amendment accordingly was defeated, but it was agreed that the Committee Note to Rule 103 would indicate that such an

alternate version had been considered and rejected.

Congress. Judge Winter reported that he met with a number of persons on the Hill with regard to Rules 413-415. Staff counsel to Senator Biden indicated that the Democrats would have no objection to the Evidence Committee redraft. Judge Winter also met with four Republican staffers and suggested to them that admissibility should be limited to conduct resulting in a conviction. He reported that the House side had been surprisingly receptive. The Senate staffers acknowledged that the Evidence Committee draft might well be an improvement on the congressional version but that a revision of Rules 413-415 could not be accomplished through the Crime Bill. If at all, the Committee's draft would have to be presented as a technical amendment at the request of Congress; it might possibly pass "on consent." The House might perhaps hold hearings. Although Judge Winter was somewhat encouraged by these meetings, he thought that at this time there was less than a 50% chance that Congress would take any action to modify Rules 413-415.

At these meetings, Judge Winter also discussed the congressional initiative to amend Rule 702. He reported that he had advised the participants that the Committee viewed Daubert as a good decision with great potential and that an attempt to codify the opinion at this point would create problems. The Committee agreed that it would be unwise to react to each congressional proposal to amend a rule of evidence by submitting its own preferred redraft. The Committee decided to take no action on Rule 702 at this time.

The Committee then returned to its consideration of the hearsay rule.

Rule 803(4). The Committee agreed to recommend not amending Rule 803(4).

Rule 801(d)(2). At the previous meeting, the Committee had directed the Reporter to prepare a draft of Rule 801(d)(2)(E) that would deal with issues raised by the Supreme Court's decision in Bourjaily v. United States, and to also consider the effect of Bourjaily on Rules 801(d)(2)(C) and (D). The Reporter presented a number of alternate proposals for either amending each of the subdivisions separately or for language that would apply to all three.

The Committee then engaged in an extensive discussion. Professor Saltzburg, who had not been at the previous meeting, urged the Committee to codify pre-Bourjaily practice as the better rule. Professor Broun also expressed reservations about codifying any part of Bourjaily and extending its doctrine to civil cases. Dean Robinson suggested a corroboration requirement, such as appears in Rule 804(b)(3,) instead of an independent

evidence requirement. Mr. Kobayashi was in favor of a requirement that would explicitly require the trial judge to examine the evidence offered pursuant to Rule 104(a) to establish the requisite preliminary facts and to make a finding as to whether the conditions for the exception are satisfied.

The Committee voted on three alternative approaches to Rule 801(d)(2)(E):

1. To not amend the rule - 3 votes
2. To add an independent evidence requirement - 7 votes
3. To codify the common law rule requiring that the statement must be set aside in making the preliminary - 2 votes.

The Committee decided not to draft the amendment in terms of corroboration but rather to specifically state that the statement could be considered but would not suffice in the absence of some independent evidence. The Committee then voted to extend this approach to subdivisions (C) and (D). It also agreed that it would review and vote on the text of the proposed amendment as well as the accompanying Committee Note at the next day's meeting.

The Committee also discussed whether a personal knowledge requirement should be added to either Rule 801(d)(2)(C) or Rule 801(d)(2)(D). The Committee declined to do so. Members of the Committee suggested that it was not unfair to shift to the opponent the burden of explaining to jurors how probative value was affected by the absence of personal knowledge, and that in some cases in which the declarant clearly lacked personal knowledge Rule 403 might be used to exclude the evidence.

Rule 803(3). The Committee had asked the Reporter to prepare a memorandum on the Hillmon doctrine, directed to the question of whether the Rule ought to be amended to prohibit evidence of declarant's intent to commit a future act when the act could not be performed without the participation of the party against whom the evidence is offered. The prime example that has disturbed some commentators is the homicide victim's statement that he or she is intending to meet the defendant. After discussion, the Committee decided not to amend the rule.

Rule 803(8). The Committee first discussed whether to amend the rule to state explicitly that evidence which would be barred by subdivisions (B) and (C) when offered against an accused may be admissible pursuant to another hearsay exception, or whether to adopt the reasoning of a Second Circuit opinion, United States v. Oates, 560 F.2d 45 (2d Cir. 1977), that barred such evidence absolutely. The Committee discussed the Reporter's memorandum about how the Circuits are handling this issue. It appears that routine evidence of governmental activity, such as recording license plate numbers, that falls literally within the

prohibitions of subdivisions (B) and (C) is admitted by most circuits pursuant to Rule 803(5). Furthermore, the circuits also admit some evidence barred by Rule 803(8) pursuant to Rule 803(6) when the declarant is available to testify. These cases do not suggest that the courts are permitting the government to put in crucial aspects of its case through hearsay testimony. The Committee concluded that there was no need to amend the rule.

The Committee then discussed whether Rule 803(8)(B) should be amended to permit a criminal defendant to offer against the government evidence which falls within the scope of the exception. Rule 803(8)(C) specifically provides that the evidence made admissible by that provision is admissible "against the Government in criminal cases." The omission in Rule 803(8)(B) may have occurred as a drafting error when Congress revised the rule. The few cases that have considered the issue have allowed the defendant to introduce evidence that otherwise satisfies subdivision (B). Consequently, the Committee saw no need to amend the provision.

Waiver by misconduct. The Committee next considered whether it should codify the generally recognized principle, that hearsay statements become admissible on a waiver by misconduct notion when the defendant deliberately causes the declarant's unavailability. The Committee debated a number of issues: the degree to which defendant must have participated in procuring the declarant's unavailability; the burden of proof that the government must meet in proving the defendant's misconduct; the consequences of a waiver finding; and the appropriate rule of evidence in which to place such a provision. The Committee agreed that codifying the waiver doctrine was desirable as a matter of policy in light of the large number of witnesses who are intimidated or incapacitated so that they do not testify. Consequently, the Committee chose a version of the rule that would not require having to show that the defendant actively participated in procuring the declarant's unavailability. Acquiescence will suffice. In addition, the Committee rejected imposing a "clear and convincing" burden of proof on the prosecution, as is required in the Fifth Circuit, in favor of the usual preponderance of the evidence standard used in connection with preliminary questions under Rule 104(a) even when a constitutional rule is at issue. The federal circuits other than the Fifth, currently use a preponderance standard with regard to finding waiver by misconduct.

The Committee agreed that the consequence of a finding of waiver is that the declarant's hearsay statement becomes admissible to the extent that it would have been admissible had the declarant testified at trial. For example, hearsay contained in the hearsay statement is not admissible unless it satisfies some other hearsay exception, the declarant must have had personal knowledge, and the evidence may be subject to exclusion

under Rule 403.

The Committee debated at length where to place this new exception. Some members of the Committee argued in favor of Rule 801 because subdivision (d) of that rule contains a number of provisions that are distinct from the traditional class exceptions dealt with in Rules 803 and 804. Furthermore, statements admissible on a waiver theory resemble admissions in being admissible only against the defendant and not against the world. On the other hand, other members were concerned that placement in the rule containing admissions would suggest that a personal knowledge requirement does not apply. In addition, the unavailable declarant is the subject of Rule 804.

In the course of discussing appropriate placement of the waiver principle, some members also expressed concern that adding the provision to Rule 804 would upset that rule's numbering scheme. The new provision clearly would have to appear before the residual exception in subdivision (b)(5) which is entitled, "Other exceptions." On the other hand, numbering the new provision "(b)(5)" would require renumbering the residual exception as "(b)(6)." This possibility disturbed some members of the Committee who felt that this would cause problems with computerized searches. Furthermore, the Committee realized that this renumbering problem would arise whenever a new exception was added to either Rule 803 or 804. Judge Winter suggested that the two residual exceptions should be combined and moved into a new Rule 807. No change in meaning would be intended by this transfer; it would be done solely to leave room for new exceptions and to minimize the impact on computer research when a new exception is added. The Committee adopted this suggestion.

Mr. McCabe then informed the Committee that when a provision is moved out of a Federal Rule its number is not reassigned to new material that is added to the rule from which it was removed. The Committee agreed that (b)(5) should remain blank in Rule 804 and that the waiver provision would be numbered Rule 804(b)(6).

Rule 804(b)(1). The Reporter had been asked to advise the Committee about judicial interpretations of the "predecessor in interest" provision. The Reporter informed the Committee of a number of cases, particularly in the Sixth Circuit, that hold that the provision is satisfied when the party against whom the evidence was offered at the first proceeding had a similar motive and opportunity to cross-examine as the party against whom the evidence is now being offered. Such an interpretation essentially renders superfluous the "predecessor in interest" provision. This approach has, however, been utilized almost exclusively in asbestos cases to admit deposition testimony given by the medical director of one manufacturer against a different manufacturer. It appears likely that the evidence could have been admitted instead pursuant to the residual hearsay exception.

A second possible issue that arises with regard to the "predecessor in interest" requirement is whether it applies in a criminal case. Dictum in one circuit suggests that under specialized circumstances such evidence might be admitted against a criminal defendant, and there is some uncertainty expressed in the cases as to whether evidence may be offered against the government as a "predecessor in interest." There is no indication, however, that these cases are causing problems for the courts or litigants.

The Committee agreed not to amend Rule 804(b)(1).

Rule 804(b)(3). The Reporter had been asked to look at cases construing the corroboration requirement for exculpatory declarations against interest. The Committee was particularly interested in determining if the requirement was being interpreted too rigidly, and if a similar provision ought to be added for inculpatory statements. The Reporter distributed a number of recent cases to the Committee, and the Committee concluded that the corroboration requirement did not seem to be causing difficulties. Furthermore, in light of the Supreme Court's recent opinion in Williamson v. United States, 114 S.Ct. 2431 (1994), which restricted the use of inculpatory declarations against interest, the Committee saw no need to extend the corroboration requirement to inculpatory declarations at this time.

Articles 9 and 10. The Committee had asked the Reporter to consider a number of issues with regard to these two articles. The Committee agreed that the definition of "writings and recordings" that appears in Rule 1001(1) does not have to be added to Article 9. Rule 901(b) which specifically states that it is illustrating and not limiting methods of authentication is sufficiently flexible to deal with all of the items covered by the Rule 1001 definition.

The Committee also agreed that the certification requirement provided for foreign business records in 18 U.S.C. §3502(a) ought not to be extended to domestic records. In the case of domestic records, litigants will invariably handle authentication issues by stipulation except in instances in which a problem exists. When there is a problem and the witnesses are available in the United States they ought to be produced; allowing authentication by certification would be inappropriate.

Two issues were presented with regard to Rule 1006. 1) whether the rule should be clarified to state that summaries satisfying the rule will ordinarily be sent to the jury room, and 2) whether the text should be amended to explain that Rule 1006 does not apply to summaries that recapitulate evidence that has otherwise been admitted. The Committee decided not to propose an amendment to Rule 1006.

Rule 104. The Committee had determined not to consider possible amendments to Rule 104 until it was finished with its survey of the articles of the Federal Rules of Evidence other than Article 5. Now that the Committee had completed that agenda, it agreed that no amendment to Rule 104 was required.

Rape counselor privilege. The Crime Bill required the Judicial Conference to report to the Attorney General on the advisability of enacting a rape counselor privilege for the federal courts. A subcommittee consisting of Judge Fern Smith, Professor Broun, Ms. Harkenrider, Mr. Joseph and the Reporter analyzed rape counselor provisions that are presently in effect in twenty-four states. After a conference call among members of the subcommittee, Mr. Joseph drafted a qualified privilege that contained those features that the subcommittee considered least objectionable.[1] No one on the subcommittee, however, was in favor of recommending that a rape counselor privilege ought to be enacted for the federal courts. The Committee agreed with the subcommittee. In particular, members thought it would be inappropriate to have a rape counselor privilege as the only specifically codified privilege. especially in light of the case load of the federal courts which rarely includes rape cases.

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[1] It provided:

> (a) Sexual assault counselors may not be compelled to testify about any opinion or information received from or about the victim without the consent of the victim. However, a counselor may be compelled to identify or disclose information if the court determines that the public interest and the need for the information substantially outweigh any adverse effect on the victim, the treatment relationship, and the treatment services if disclosure occurs.
>
> (b) "Sexual assault counselor" for the purpose of this rule means a licensed medical professional, a licensed psychotherapist, or a person who has undergone at least [20 - 40] hours of counseling training and works under the direction of a supervisor in an organization or institution, or a division of an organization or institution, whose primary purpose is to render advice, counseling, or assistance to victims of sexual assault.

An alternate version of subdivision (a) was also suggested:

> A victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made to a sexual assault counselor unless the court determines that the public interest and the need for the information substantially outweigh any adverse effect on the victim, the treatment relationship, and the treatment services if disclosure occurs.

Consequently, no recommendation to enact a rape counselor privilege will be made.

Review of proposed amendments and notes. Before the Committee adjourned, the amendments and proposed Committee Note to Rule 801(d)(2) and 804(b)(6) were distributed. The Committee unanimously voted to send them to the Standing Committee. The Committee also approved combining and transferring the text of the residual exceptions in Rule 803(24) and 804(b)(5), and directed the Reporter to add a Committee Note stating that no change in meaning was intended.

Respectfully submitted,

Margaret A. Berger
Professor of Law
Reporter

Agenda Item 3A

April 8, 1996

To: Members, Advisory Committee on the Federal Rules of Evidence

From: Margaret A. Berger, Reporter

Re: Comments on Proposed Amendments

This memorandum summarizes the comments that were received about possible amendments to the Federal Rules of Evidence. The discussion is organized as follows: Part I reviews responses to the amendments proposed by the Committee; Part II examines additional suggestions, unrelated to the Committee's proposals, for amending the rules discussed in Part I; Part III reports on recommendations for amending rules not presently under consideration by the Committee.

I Comments on the Proposed Amendments. The reaction to each proposed amendment is summarized, as are the principal arguments of the commentators. All suggestions for alternative language are set forth. The number in parentheses following the author's name is the identification number assigned the comment by the Rules Committee Support Office. (Comments EV19 and EV23 are identical comments submitted by different members of the Federal Magistrate Judges Association.)

Rule 103(e).

Summary. The Committee received 19 comments with regard to the proposed amendment, not counting comments from members of the Evidence Committee, comments from members of the Standing Committee, or comments made by Professor Friedman at the public hearing. The commentators agree that a uniform default rule ought to be codified, but disagree on how it should be formulated. Eight comments supported the Committee's formulation, and eleven supported an opposite default rule. Since there was no controversy about the need for a rule, I am only abstracting comments that relate to the substance of the rule.

Comments supporting the proposed rule.

The Commercial and Federal Litigation Section of the New York State Bar Association (EV24) found that the proposed amendment "makes sense."

> Where the court feels renewal at trial would serve no purpose, it retains the option to make clear that its pretrial ruling is final, thereby relieving the parties of any obligation to revisit the issue. By otherwise requiring the renewal of pretrial proffers or objections at the appropriate time during the trial, the proposed rule provides the trial judge a "last clear chance" to avoid error and to make evidentiary decisions in the context of all trial developments to that point.

The Section pointed out that its "last clear chance" concern is particularly relevant in districts in which the magistrate judge rules on pretrial motions so that the district judge has no occasion to consider evidentiary rulings prior to trial. Furthermore, it found the proposed rule consistent with current practice by careful trial attorneys.

The Federal Magistrate Judges Association (EV10, EV22) supported the proposed rule because it would provide trial judges an opportunity to correct pretrial error before it is subjected to scrutiny on appeal. The Association suggests that the Advisory Committee Note indicate the

provision is not intended to override or modify Fed.R.Civ.P. 72(a) or (b) or 28 U.S.C. §636 with respect to appeals and review of pretrial decisions by magistrate judges.

The proposed version of Rule 103(e) was also endorsed by the Seventh Circuit Bar Association (EV23) as it "clarifies existing procedure [and] adds certainty to the litigation process;" the Executive Committee of the Litigation Section of the State Bar of California (EV39); the Federal Legislation and Procedures Committee of the Arkansas Bar Association (EV21); the ABA Section of Intellectual Property Law (EV33) and Frank E. Tolbert, Esq. (EV3) of Logansport, Ind.

While the Federal Bar Association (EV34) recommended the Committee's version with limited reservations, because it "provides judges with a straightforward and easily applied uniform rule," the chair of one of its sections expressed a personal preference for the competing default rule.

Comments endorsing the reverse formulation.

Two federal judges criticized the Committee's formulation.

Judge Prentice H. Marshall (EV13) suggested the following amendment:

> "A.[sic] Pretrial objection to or proffer of evidence need not be renewed at trial unless the court states on the record that it must be."

Judge Marshall objected to the Committee's proposed amendment on a number of grounds: 1. it fails to encourage pretrial objections or proffers; 2. in-trial objections "are an anathema;" 3. the proposed amendment denigrates the mandatory in limine motion practice prescribed by Fed.R.Civ.P 26(a)(3) -- "why are trial counsel burdened with pretrial objections if they must renew them at trial?"

Judge Edward R. Becker (EV15) also questioned the proposed change: 1. it will make more work for trial judges; 2. the "escape hatch" in the proposed rule will lead to satellite legislation, and 3. the proposal contravenes Fed.R.Civ.P. 46 which provides that formal exceptions to a court's rulings are unnecessary.

A number of attorneys objected to the Committee's default formulation. J. Houston Gordon, Esq. of Covington, Tenn. (EV5) thought the rule change would prolong litigation.

Mike Milligan, Esq. of El Paso, Texas (EV7) argued that counsel lose face when they have to raise a losing issue before the jury, and that this formulation supports "the Judiciary's tendency to make preservation of error difficult." He added that he didn't "expect anybody but trial lawyers to be on my side of this issue."

Daniel A. Ruley of Steptoe & Johnson, Parkersburg, W.Va. (EV18) questioned whether the proposed rule is "another trap for an unwary lawyer."

The American Intellectual Property Law Association (EV25) used much the same language in expressing its opposition to the proposed rule. It also deemed the necessity of having to re-raise fully briefed and carefully decided issues a waste of time, and expressed fears that the "context clearly demonstrates" exception is an open invitation to secondary litigation.

The National Association of Railroad Trial Counsel's Executive Committee (EV28) commented that "the changes would complicate and disrupt existing in limine procedures because all rulings made prior to trial will have to be revisited at the trial itself. This does not appear to promote judicial economy or efficiency." The Tort & Insurance Practice Section of the American Bar Association (EV38) opposed the change because 1. the finality of pretrial rulings shortens trials, and 2. the proposed amendment does not clarify matters because of the provision

making a pretrial ruling final if "the context clearly demonstrates." The Kansas Association of Criminal Defense Lawyers (EV17) feared 1. that counsel might forget to renew an objection (leading to move ineffective assistance of counsel claims); 2. that if counsel has to make an objection, jurors will wonder why counsel is seeking to hide evidence; 3. that the rule will prove burdensome with regard to Fourth and Fifth Amendment objections, and 4. that the proposed rule is contrary to the spirit of Fed.R.Crim.Pro. 12(b).

The reverse formulation was also supported by the State Bar of Arizona (EV29), concerned that uncertainty about a ruling's finality will produce non-uniformity and appeals; the National Association of Criminal Defense Lawyers (NACDL) (EV36) and Professor Bruce Comely French (EV16).

Professor Myrna Raeder, writing on behalf of a group of evidence professors who favor the reverse formulation, (EV35) pointed out that judges have the option of telling lawyers that they must renew an objection at trial; that litigants can be warned that the ruling is final unless evidence introduced at trial substantially contradicts the in limine showing, and that a pro forma renewal creates an unnecessary technical hurdle to appellate review. She suggested the underlined changes in language:

> A pretrial objection to or proffer of evidence does not have to be renewed at trial, unless the court states on the record, or the context clearly demonstrates, that a ruling on the objection or proffer is not final.

Public hearing, Professor Richard Friedman expressed concern that the proposed rule would become a trap for lawyers who forget to mouth the right words, or that the "context" language would get a lot of use, in which case little will have been accomplished.

Rule 103. Rulings on Evidence

* * * * *

(e) Effect of Pretrial Ruling. A pretrial objection to or proffer of evidence must be timely renewed at trial unless the court states on the record, or the context clearly demonstrates, that a ruling on the objection or proffer is final.

COMMITTEE NOTE

Since the Federal Rules of Evidence became effective, litigants have increasingly relied on pretrial motions to raise issues about the admissibility of evidence. As enacted, Rule 103 did not specifically address whether a losing party had to renew its objection or offer of proof at trial in order to preserve an issue for appeal.

Subdivison (e) has been added in order to clarify differing approaches that spell uncertainty for litigants and create unnecessary work for the appellate courts. See, e.g., United States v. Vest, 842 F.2d 1319, 1325 (1st Cir.) (absence of objection at trial is "fatal"), cert. denied, 488 U.S. 965 (1988); Allison v. Ticor Title Ins. Co., 979 F.2d 1187, 1200 (7th Cir. 1992) ("the law in this circuit is that an unsuccessful motion in limine does preserve the issue for appeal"); American Home Assurance Co. v. Sunshine Supermarket, Inc., 753 F.2d 321, 324 (3d Cir. 1985) ("test is whether an objection at trial would have been more in the nature of a formal exception or in the nature of a timely objection calling the court's attention to a matter it need consider."); Palmerin v. City of Riverside, 794 F.2d 1409, 1411 (9th Cir. 1986) (circuit's position is "unclear").

Subdivision (e) states as a default rule that counsel for the losing party must renew any pretrial objection or proffer at trial. Renewal is not required if "the court states on the record, or the

context clearly demonstrates," the finality of the pretrial ruling. Counsel bears the responsibility for obtaining the requisite ruling or renewing the objection and bears the risk of waiving an appealable issue if these procedures are not followed. The Committee considered but rejected an alternative general rule that would not require renewal of a motion at trial.

Rule 103(e) does not excuse a litigant from having to satisfy the requirements of Luce v. United States, 469 U.S. 38 (1984) to the extent applicable. In Luce, the Supreme Court held that an accused must testify at trial in order to preserve for appeal any Rule 609 objection to a trial court's ruling on the admissibility of the accused's prior convictions for impeachment. Some circuits have extended the Luce rule beyond the Rule 609 context. See United States v. Weichert, 783 F.2d 23, 25 (2d Cir. 1986) (Rule 608(b)), cert. denied, 479 U.S. 831 (1986); United States v. Sanderson, 966 F.2d 184, 189-90 (6th Cir. 1992) (same); United States v. DiMatteo, 759 F.2d 831, 832-33 (11th Cir. 1985) (per curiam) (same), cert. denied, 474 U.S. 860 (1985); United States v. Griffin, 818 F.2d 97, 105 (1st Cir. 1987) (Rule 403), cert. denied, 484 U.S. 844 (1987).

Agenda Item IIB

RULE 407.

Summary. Three comments objected on policy grounds to extending the exclusionary principle of Rule 407 to product liability cases. The great majority, however, favored the proposed amendment which many termed a "clarification" rather than a "change." The Federal Legislation and Procedures Committee of the Arkansas Bar Association (EV21) pointed out that the amendment would change the law in the Eighth Circuit but expressed no view about the desirability of the amendment.

The proposed revision would also amend the rule to make it clearer that the rule applies only to changes made after the event triggering the lawsuit. A number of submissions proposed extending the rule so as to exclude evidence of changes made before the event. While these recommendations were made primarily with regard to product liability actions, in which the proposals would bar changes made after a sale, some of the suggestions received would apply to negligence cases as well.

We also received a couple of negative comments about the restyling of the second sentence in Rule 407.

Comments favoring the explicit extension of Rule 407 to product liability litigation. As noted above, many of the

commentators who endorsed the amendment commented that it codifies existing state law. Approval was voiced by judges: Edward R. Becker (EV15), Prentice Marshall (EV13) and the Federal Magistrate Judges Association (EV19 and EV22); by members of the bar: Daniel V. Flatten, Mehaffy & Weber, Beaumont, Texas (EV6), Leon Karelitz, Esq. Raton, N.M. (EV2), J. Houston Gordon, Covington, Tenn. (EV5), Richard C. Watters, Miles, Sears & Eanni, Fresno, California (EV4), Frank E. Tolbert, Esq. of Logansport, Ind. (EV3); and by a number of organizations: Commercial and Federal Litigation Section of the New York State Bar Association (EV24), Federal Bar Association (EV33), ABA Section of Intellectual Property Law (EV34), the Seventh Circuit Bar Association (EV23) and The Product Liability Advisory Council (EV26).

Comments opposing the extension of the rule to product liability litigation. The Association of Trial Lawyers of America (ATLA) (EV32) submitted the most extensive objections to the proposed amendment. ATLA opposed the revision on two principal grounds: 1. disagreements among circuits should be allowed to run their course and be resolved, if necessary, by the Supreme Court of the United States; 2. the exclusionary rule is a bad rule for product liability cases because negligence is not an issue and post-conduct behavior is therefore far less significant; no

empirical evidence exists that anybody has ever made a safety-related change because of the subsequent remedial measure rule; often subsequent repair evidence is the only evidence available to a plaintiff to prove feasibility since much of the evidence on feasible alternative designs resides in defendants' file cabinets; this amendment would make plaintiffs susceptible to summary judgment motions long before a litigation would reach the stage where feasibility could be controverted thereby making applicable the exception in the second sentence of Rule 407, and consequently the amended rule is outcome-determinative. Others who urged that the public would be better served by a rule permitting proof of subsequent remedial measures in products liability cases are Joseph D. Jamil, Esq. of Houston, Texas. (EV8) and Brent W. Coon. Esq. of Beaumont, Texas (EV12).

Comments on adding "injury or harm allegedly caused by" before "event". The Committee proposed adding these words to Rule 407 in order to promote clarity and uniformity. Rule 407 currently provides for the exclusion of evidence of remedial measures taken "after an event ... which, if taken previously, would have made the event less likely to occur. . ." Every circuit other than the Third interprets "event" in both instances as meaning the incident which gave rise to the lawsuit; the Third Circuit interprets "after the

event" as meaning the incident that put the product into circulation, such as manufacture or sale. Although a number of the commentators noted the close inter- relationship between the changes they recommended and the substantive law, they did not discuss the Rules Enabling Act.

John A.K. Grunert, Campbell & Associates, Boston, Mass. (EV14) criticized the additions before the word "event" as unnecessary and leading to problems. He believes that ambiguities have been dispelled through judicial decisions and that the amendment will lead to "the same uncertainty and factual difficulty that the so-called 'discovery rule' and 'successive harms' rule have created with respect to statute of limitations defenses." Furthermore, he thinks the rule "should apply only to remedial measures taken after the alleged tortfeasor knew or should have known of the "injury or harm." He suggests substituting:

> When, after the first occurrence of injury or harm for which damages or other forms of relief are sought in the litigation, measures have been taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a breach of warranty, a defect in a product, or a need for a warning or instruction.

Professor David Leonard of Loyola Law School in Los Angeles (EV30) found "ill-advised" the Advisory Committee's resolution of when the rule applies. He believes that a manufacturer will hesitate to make design changes after the plaintiff purchased the product but before the plaintiff's injury if the evidence would be admissible. He suggests that the same reasoning applies in non-product cases. For instance, the landlord who knows that someone fell on the steps might be reluctant to make the steps less slippery if the prior repair is usable in a subsequent slip-and-fall case. Professor Leonard recommends:

> If the rule's primary goal is to encourage the taking of safety precautions . . . a better approach would be to apply the exclusionary principle to all cases in which admission might materially affect the decision whether to repair, regardless of whether the measure was taken before or after the accident in question. While a rule requiring the judge to make such a factual finding would not be perfect, it would reach results more in accordance with the rule's purpose in a greater number of cases than would the current proposal.

The Product Liability Advisory Council (PLAC) (EV26) recommended amending the rule to apply to any product line changes made after the sale of the product and before the event occurs leading to the litigation. PLAC's argument is: "Regardless of when a manufacturer makes a product safer, that change represents a social good that the courts should welcome, reward and encourage." PLAC suggested a revision substantially along these lines:

When, after an injury or harm allegedly caused by an event or after the sale of a product involved in a subsequent event that allegedly causes an injury or harm, measures are taken ~~[which]~~ that, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, [or] culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction ~~[in connection with the event. This rule does not require the exclusion of]~~. Evidence of subsequent measures may be ~~[when]~~ offered for another purpose, such as impeachment or - if controverted - ~~[proving]~~ proof of ownership, control, or feasibility of precautionary measures~~[, if controverted, or impeachment]~~.

A student note, which will appear in 45 The American University Law Review, by Thais L. Richardson, (EV27) who also testified at the public hearing, likewise urges moving the protection of Rule 407 further back in time in products liability actions because most jurisdictions have a state-of-the-art statute that holds manufacturers responsible only for the standards known at the time of sale or distribution, so that the proposed rule is inconsistent with substantive law. At the public hearing, Gregory Joseph suggested that in that case the evidence of subsequent measures would be irrelevant.

Ms. Richardson's proposed amendment reads as follows:

Rule 407. Subsequent Remedial Measures

(a) In an action based upon a theory of negligence and in which ~~When, after an event,~~ measures ~~are~~ were taken ~~which~~ after the event giving rise to the action that, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove

negligence or culpable conduct.

(b) In an action based on a theory of products liability in which measures were taken after the event that put into the stream of commerce the product that causes personal injury or property damage and that, if taken previously, would have made the personal injury or property damage less likely to occur, evidence of the subsequent remedial measure is not admissible to prove a defect in a product, a defect in a product's design, or a need for a warning or instruction.

(c) ~~This rule does not require the exclusion of~~ Evidence of subsequent remedial measures may be ~~when~~ offered for ~~another purpose, such as~~ impeachment or, if controverted, ~~proving~~ proof of ownership, control, or feasibility of precautionary measures~~, if controverted or impeachment~~.

Restyling. Two comments were received objecting to the restyling of the second sentence.

John A. K. Grunert, Esq., Boston, Mass. (EV14) wrote: "There does not seem to be any real need for the proposed changes to the wording of the second sentence of Rule 407. There seems to be no change in substance, the present language is clear, and I believe most people still consider use of dashes (as in "- if controverted -") to be less than ideal English." Professor Michael H. Hoffheimer of the University of Mississippi Law School (EV11) questions the change of "which" to "that." "Since the change neither effects a change in meaning nor clarifies any ambiguity, both common sense and basic rules of drafting dictate that the language stand as it is." He attributes the change to a usage promoted by Fowler earlier this century which "has acquired

canonical status among law student editors" but "has never worked itself into good, literate English." Furthermore, he questions whether the new "that" in Rule 407 introduces a restrictive clause; consequently the change "may be a misapplication of Fowler's Rule."

Rule 407. Subsequent Remedial Measures

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

* * * * *

COMMITTEE NOTE

The amendment to Rule 407 makes two changes in the rule. First, the words "an injury or harm allegedly caused by" were added to clarify that the rule applies only to changes made after the occurrence that produced the damages giving rise to the action. Evidence of measures taken by the defendant prior to the "event" do not fall within the exclusionary scope of Rule 407 even if they occurred after the manufacture or design of the product. See Chase v.

General Motors Corp., 856 F.2d 17, 21-22 (4th Cir. 1988).

Second, Rule 407 has been amended to provide that evidence of subsequent remedial measures may not be used to prove "a defect in a product, a defect in a product's design, or a need for a warning or instruction." This amendment adopts the view of a majority of the circuits that have interpreted Rule 407 to apply to products liability actions. See Raymond v. Raymond Corp., 938 F.2d 1518, 1522 (1st Cir. 1991); In re Joint Eastern District and Southern District Asbestos Litigation v. Armstrong World Industries, Inc., 995 F.2d 343, 345 (2d Cir. 1993); Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981), cert. denied, 456 U.S. 960 (1982); Kelley v. Crown Equipment Co., 970 F.2d 1273, 1275 (3d Cir. 1992); Werner v. Upjohn Co., Inc., 628 F.2d 848, 856 (4th Cir. 1980), cert. denied, 449 U.S. 1080 (1981); Grenada Steel Industries, Inc. v. Alabama Oxygen Co., Inc., 695 F.2d 883, 887 (5th Cir. 1983); Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 232 (6th Cir. 1980); Flaminio v. Honda Motor Company, Ltd., 733 F.2d 463, 469 (7th Cir. 1984); Gauthier v. AMF, Inc., 788 F.2d 634, 636-37 (9th Cir. 1986).

Although this amendment adopts a uniform federal rule, it should be noted that evidence of subsequent remedial measures may be admissible pursuant to the second sentence of Rule 407. Evidence of subsequent measures that is not barred by Rule 407 may still be subject to exclusion on Rule 403 grounds when the dangers of prejudice or confusion substantially outweigh the probative value of the evidence.

Agenda Item IIC

Rule 801(d)(2).

Summary. Considerable support was received for the Committee's recommendation, although a few commentators were unhappy about not restoring the pre-Bourjaily independent evidence requirement, or not otherwise seeking to enhance the reliability of coconspirators' statements.

Comments endorsing the proposed amendment. The amendment was supported by Judge Prentice Marshall (EV13) and the Federal Magistrate Judges Association (EV19, EV22); by members of the Bar: Leon Karelitz, Raton, N.M. (EV2), J. Houston Gordon, Covington, Tenn. (EV5), and numerous organizations: the Federal Legislation and Procedures Committee, Arkansas Bar Association (EV21); the Seventh Circuit Bar Association (EV23); the Commercial and Federal Litigation Section of the New York State Bar Association (EV24); the State Bar of Arizona (EV29); the Federal Bar Association (EV33); ABA Section of Intellectual Property Law (EV34).

Comments criticizing the proposed amendment. Judge Edward R. Becker (EV15) thinks the amendment ought to restore the independent evidence requirement that applied prior to Bourjaily. He argues that the Supreme Court's decision was "an exercise in the jurisprudence of 'plain meaning,'" and attributes the omission of an independent evidence requirement to a drafting oversight because

he knows of no evidence that the drafters of the rules intended its abolition. According to Judge Becker, the independent evidence requirement is essential so as not to vitiate the rule's agency rationale, and to ensure reliability as the admissibility of coconspirators statements does not rest on a trustworthiness rationale.

The National Association of Criminal Defense Lawyers (NACDL) (EV36) would prefer to repudiate Bourjaily, but states that it supports the Committee's amendment if this suggestion is rejected. NACDL points out that concerns about the reliability of coconspirator statements have been exacerbated by the Sentencing Guidelines' harsh penalties and incentives for cooperation. NACDL also states that the extension of the bootstrapping rule to other forms of vicarious admissions makes matters worse in 'white collar" criminal cases arising in a business setting. In lieu of the proposed amendment, NACDL suggests adding the following language to Rule 801(d)(2):

> Notwithstanding Rule 104(a), the court may not consider the contents of a statement offered under subparagraph (E) in determining under Rule 104(b) whether sufficient evidence has been introduced to support a finding of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered.

The Kansas Association of Criminal Defense Lawyers (EV17) would also like to restore the independent evidence requirement.

Professor Myrna Raeder of Southwestern University School of Law (EV37) objects to the proposed amendment on the ground that it fails to assure the reliability of coconspirators statements. She notes that it is the rare case in which absolutely no other evidence exists, but that it is not unusual for such evidence to be problematic. She suggests that some type of additional reliability check is warranted, either by requiring independent evidence or additional foundational requirements, as was proposed in a draft prepared several years ago by the Committee on Rules of Criminal Procedure and Evidence of the American Bar Association's Criminal Justice Section. The draft provided:

RULE 808

(Statement by a Co-Conspirator)

a. A statement is not excluded by the hearsay rule if:

(1) The party who offers it demonstrates that the statement was made:

(A) By a co-conspirator of the party against whom it is offered, and

(B) During the course of and in furtherance of the conspiracy; and

(c) Under circumstances demonstrating that it has adequate indicia of trustworthiness; and

(2) The declarant is produced by the offering party, unless the declarant is unavailable within the meaning of Rule 804(a).

(b) Procedure

(1) The foundational requirements concerning the existence of the conspiracy, the membership in the conspiracy of the party against whom the statement is offered and the trustworthiness of the statement must each be corroborated by facts and circumstances independent of the statement itself;

(2) The foundational requirements set forth in 808(a) shall be established

(A) In a criminal case, by clear and convincing evidence, and

(B) In a civil case, by a preponderance of the evidence; and

(3) The party who intends to introduce any statement pursuant to this rule shall give written notice to the party against whom such evidence will be offered. Such notice shall be given to the adverse party sufficiently in advance of trial or the hearing to provide the adverse party with a fair opportunity to meet it.

Civil cases. The Federal Courts Committee of the Chicago Council of Lawyers (EV20) is opposed to extending the amendment to civil cases. It argues that criminal prosecutions present due process and sixth amendment issues distinct from civil cases, and that in a civil case requiring corroboration by additional evidence might deprive a party of important evidence. It suggests that an additional study be undertaken before the rule is extended to civil cases.

Professor James J. Duane of Regent University Law School (EV31) as part of a lengthy submission on Rule 801(d)(2)(E) which

he is submitting for publication (see further infra) objects to the proposed amendment as codifying pure dictum and citing cases in the Committee note that "contain no reasoning that would be sufficient to plausibly justify an amendment." He predicts that the amendment will have no impact on any cases and "if adopted, will instantly become the most frivolous and trivial of all the Federal Rules of Evidence." He suggests that something could have been said about: 1. the quantity or quality of the additional independent evidence; 2. the source of the independent evidence; 3. requiring each of the three required findings to be supported by independent evidence. He does not offer a draft.

Leon Karelitz, Raton, N.M. (EV2), while in favor of the proposed amendment questions whether the plain language might be read to change the law by permitting the jury to reconsider and decide matters such as the existence of the conspiracy specified in the amendment. He suggests, therefore, adding at the beginning of the proposed amendment: "In determining preliminary questions under Rule 104(a)," the contents, etc. (Reporter's comment: The same issue could, of course, be raised with regard to the foundational facts that the court must find with regard to many hearsay exceptions.)

Public hearing. Professor Richard Friedman in the statement

submitted in connection with his testimony and in his testimony contended that the amendment is unnecessary and violative of the Committee's "If it ain't broke, don't fix it" approach. He also found no need to explicitly extend the reasoning of Bourjaily to agency admissions because he thinks this follows a fortiori. He opposed codifying the issue reserved in Bourjaily because the standard specified of some independent evidence will always be satisfied. He is concerned

> that, by articulating a "not alone sufficient" doctrine, the Rule will press the courts to erect some kind of artificial and unnecessary standard as to what kind of, or how much, independent evidence is necessary. Presumably the case law already pushes them to do that, but the case law is more easily altered than the Rules themselves.

Professor Friedman also questions why the "not alone" standard should not apply to the other elements of the exemption, "such as whether the statement was made in pursuance of the relationship."

Rule 801. Definitions

* * * * *

(d) Statements which are not hearsay.

* * * * *

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

relationship and scope thereof under subparagraph (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subparagraph (E).

COMMITTEE NOTE

Rule 801(d)(2) has been amended in order to respond to three issues raised by Bourjaily v. United States, 483 U.S. 171 (1987). First, the amendment codifies the holding in Bourjaily by stating expressly that a court may consider the contents of a coconspirator's statement in determining "the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered." According to Bourjaily, Rule 104(a) requires these preliminary questions to be established by a preponderance of the evidence.

Second, the amendment resolves an issue on which the Court had reserved decision. It provides that the contents of the declarant's statement do not alone suffice to establish a conspiracy in which the declarant and the defendant participated. The court must consider in addition the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement in making its determination as to each preliminary question. This amendment is in accordance with existing practice. Every court of appeals that has resolved this issue requires some evidence in addition to the contents of the statement. See, e.g., United States v. Beckham, 968 F.2d 47, 51 (D.C.Cir. 1992); United States v. Sepulveda, 15 F.3d 1161, 1181-82 (1st Cir. 1993), cert. denied, 114 S.Ct. 2714 (1994); United States v. Daly, 842 F.2d 1380, 1386 (2d Cir.), cert. denied, 488 U.S. 821 (1988); United States v. Clark, 18 F.3d 1337, 1341-42 (6th Cir.), cert. denied, 115 S.Ct. 152 (1994); United States v. Zambrana, 841 F.2d 1320, 1344-45 (7th Cir. 1988); United States v. Silverman, 861 F.2d 571, 577 (9th Cir. 1988); United States v. Gordon, 844 F.2d 1397, 1402 (9th Cir. 1988); United States v. Hernandez, 829 F.2d 988, 993

(10th Cir. 1987), cert. denied, 485 U.S. 1013 (1988); United States v. Byrom, 910 F.2d 725, 736 (11th Cir. 1990).

Third, the amendment extends the reasoning of Bourjaily to statements offered under subparagraphs (C) and (D) of Rule 801(d)(2). In Bourjaily, the Court rejected treating foundational facts pursuant to the law of agency in favor of an evidentiary approach governed by Rule 104(a). The Advisory Committee believes it appropriate to treat analogously preliminary questions relating to the declarant's authority under subparagraph (C), and the agency or employment relationship and scope thereof under subparagraph (D).

Agenda Item II D

Rule 804(e).

Summary. While a few organizations questioned the need for this rule, commentators generally approved of the proposal in principle. A number of commentators, however, had qualms about various features of the proposed rule which are discussed in more detail below. Objections were raised: 1. that forfeiture rather than waiver more properly expresses the rationale supporting the rule; 2. that the word "acquiesce" is too vague; 3. that the rule should be rewritten to apply only when the defendant's intent is to tamper with a witness; 4. that a higher "clear and convincing" standard should be used; 5. that the prosecution should be required to give defendant advance notice that it intends to use this type of evidence; 6. that the rule should be rewritten so that it is potentially usable against the prosecution.

Comments criticizing aspects of the proposed amendment.

The National Association of Railroad Trial Counsel's Executive Committee (EV28) objected to the word "acquiesce" as "too vague." It suggested instead:

> A statement offered against a party who has engaged, directly or indirectly, in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

The Executive Committee of the Litigation Section of the State Bar of California (EV39) found the language of the proposal,

particularly the word "acquiesce" dangerously vague and accordingly took no position on the proposed amendment.

The Commercial and Federal Litigation Section of the New York State Bar Association (EV24) questioned the need for this amendment; it concluded that the courts have not had any difficulty in dealing with instances in which a party has been guilty of truly improper conduct. The Section fears that codification into a brief rule may encourage satellite litigation, or lead to undesirable expansions of the exception, or a more mechanical approach that will cause a subtle shift away from fashioning remedies to meet the case's particular needs. In addition, the Section believes that the higher clear and convincing standard is more appropriate "[b]ecause the consequences of admission may be severe for the party opposing the statement and because admission on misconduct grounds is in the nature of a penalty or punishment for the alleged misconduct." The Section was also concerned about the proposed rule's use of the words "wrongdoing" and "acquiesced" as "nebulous" and "likely to engender disputes." It asked whether, for instance, the rule would apply to a corporation that refused to produce an employee as a witness in a trial beyond the subpoena power of the court?

Professor Myrna Raeder, on behalf of a group of evidence professor and individuals interested in evidentiary policy, (EV35)

made a number of suggestions. First, the rule should be renamed, "Forfeiture by misconduct," because the concept of knowing waiver in this context is a fiction. Second, the rule should be rewritten so that it would only apply when the defendant is aware that the victim is likely to be a witness in a proceeding. The comment explains that forfeiture analysis turns on fairness rather than trustworthiness. Accordingly, when a party is aware of the pending litigation, and "at some level, knows the nature of the declarant's statements, it would be unfair to exclude the statements when the witness is prevented from testifying by the party." But if the defendant is accused of murdering an individual, and there is no connection to witness tampering, a traditional hearsay exception should be required so as to ensure trustworthy evidence and to discourage persons from manufacturing inculpatory statements from victims in murder cases. Therefore the words "obstruct justice" should be added at line 23 after the words "intended to" and the phrase "in a pending proceeding should be added after the word "witness" at line 24. Third, the phrase "acquiesced in wrongdoing" is too broad a standard. The comment suggested that mere knowledge by the party should not suffice, and that wording is needed to indicate that the party was responsible for the wrongdoing. Perhaps the words "engaged in or directed wrongdoing" should be substituted

at lines 22-23. At the least the comment recommended having the Committee Note indicate that the exception will not apply "unless a plausible possibility existed that had the accused opposed the conduct it would not have occurred." Fourth, the comment suggested that the more stringent "clear and convincing" standard should be used for the preliminary fact determination because the exception is not based on trustworthiness concerns. Finally, the comment advocated adding an advance notice provision because the proposed rule resembles the residual rules and Rule 404(b) in dealing with evidence whose presentation is not necessarily self-evident.

The National Association of Criminal Defense Lawyers (NADCL) (EV36) is opposed to the addition of subparagraph (b)(6). "A rule necessarily allowing the admissibility of untrustworthy, immaterial, inferior quality, and unjust evidence as a sanction for supposed misconduct is strong medicine, which should be more carefully formulated." It objected specifically that "wrongdoing is too vague; the preponderance standard of proof too low; that a notice requirement is needed; and that "forfeiture" should be substituted for "waiver." NADCL further objected to "a party who" instead of "a party that" which would more clearly be potentially applicable to the government when law enforcement agents intimidate potential defense witnesses. NADCL suggested that the more

appropriate remedy is to admit evidence of the wrongdoing as tending to show "consciousness of guilt" by the defendant or consciousness of doubt" by the government, accompanied by an "adverse inference" charge to the jury.

Public hearing. Professor Richard Friedman concurred in some of these criticisms and made a number of additional suggestions in his submitted statement. He too would prefer "forfeiture" rather than "waiver," "a clear and convincing" rather than a "preponderance of the evidence" standard, and is concerned about "acquiescence." He urged that

> it might be best if the Advisory Committee Note indicated that mere knowledge of the conduct, and even satisfaction concerning it, doe not suffice unless there was at least a plausible possibility that if the accused had opposed the conduct the person who engaged in it would not have done so.

Professor Friedman also recommended amending Rule 804(a)(5) by replacing "or (4)" by "(4), or (6)" so that "absence will not in itself be deemed to equal unavailability unless the prosecution has been unable by reasonable means to secure the attendance or testimony of the declarant." Furthermore, he would add at the end of the proposed rule language such as:

> provided, however, that for purposes of this subdivision the declarant shall not be deemed unavailable unless the proponent has taken reasonable steps so that the statement may be presented as fully as practicable in a manner resembling the presentation of live testimony.

For instance, Professor Friedman believes that the prosecution ought to ascertain whether the declarant would testify by closed circuit television or by deposition if the accused has intimidated the declarant so that he or she is unwilling to testify in the accused's presence. At the public hearing, Judge Winter questioned why defendant should be given new discovery rights that do not apply with regard to other hearsay exceptions, and which the courts have not required when holding that waiver occurred.

Professor Friedman thought that the forfeiture rule may be used even when the conduct that rendered a potential witness unable to testify is the same conduct with which the defendant is charged. In other words, Professor Friedman would apply the rule in homicide cases if the victim made an inculpatory statement before she died, and in cases such as United States v. Owens where a blow prevented the victim from testifying fully, and perhaps in child sex abuse cases if the defendant's conduct intimidated the victim from testifying fully. He suggested that if the Committee does not wish the rule to reach so broadly that it ought to replace "intended to" by language such as "primarily motivated by a desire to" or otherwise reformulate the rule so as to provide that the forfeiting conduct must be severable from the conduct at issue. At the public hearing Judge Winter stated that he thought the Committee had

intended to limit the rule "to acts that had some specific intention with regard to the declarant's being a witness."

Professor Friedman would also extend the rule to admit statements by declarants who were intimidated by the defendant's acts before the particular crime with which defendant is charged in this particular case.

Rule 804. Hearsay Exceptions; Declarant Unavailable

* * * * *

(b) Hearsay exceptions

* * * * *

(5) [Abrogated] ~~Other exceptions. -- A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's~~

~~intention to offer the statement and the particulars of it, including the name and address of the declarant.~~

(6) Waiver by misconduct. A statement offered against a party who has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

COMMITTEE NOTE

Subdivision (b)(5). The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

Subdivision (b)(6). Rule 804(b)(6) has been added to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior "which strikes at the heart of the system of justice itself." United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982), on remand, 561 F. Supp. 1114 (E.D.N.Y.), aff'd, 722 F.2d 13 (2d Cir. 1983), cert. denied, 467 U.S. 1204 (1984).

Every circuit that has resolved the question has recognized the principle of waiver by misconduct, although the tests for determining whether there is a waiver have varied. See, e.g., United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992); United States v. Potamitis, 739 F.2d 784, 789 (2d Cir.), cert. denied, 469 U.S. 918 (1984); Steele v. Taylor, 684 F.2d 1193, 1199 (6th Cir. 1982), cert. denied, 460 U.S. 1053 (1983); United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979), cert. denied, 449 U.S. 840 (1980); United States v. Carlson, 547 F.2d 1346, 1358-59 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977). The foregoing cases apply a preponderance of the evidence standard. Contra United States v. Thevis, 665 F.2d 616, 631 (5th Cir.) (clear and convincing standard), cert. denied, 459 U.S. 825 (1982).

The usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage.

Agenda Item II E

Rule 807. All who commented on combining the residual exceptions into one rule approved except Professor Bruce Comely French (EV16) who is opposed to the residual exceptions and to renumbering the rules. He suggested that if the residual exceptions are retained a style such as (24a) or (5a) should be used in order to avoid the research problem occasioned by the new designation system.

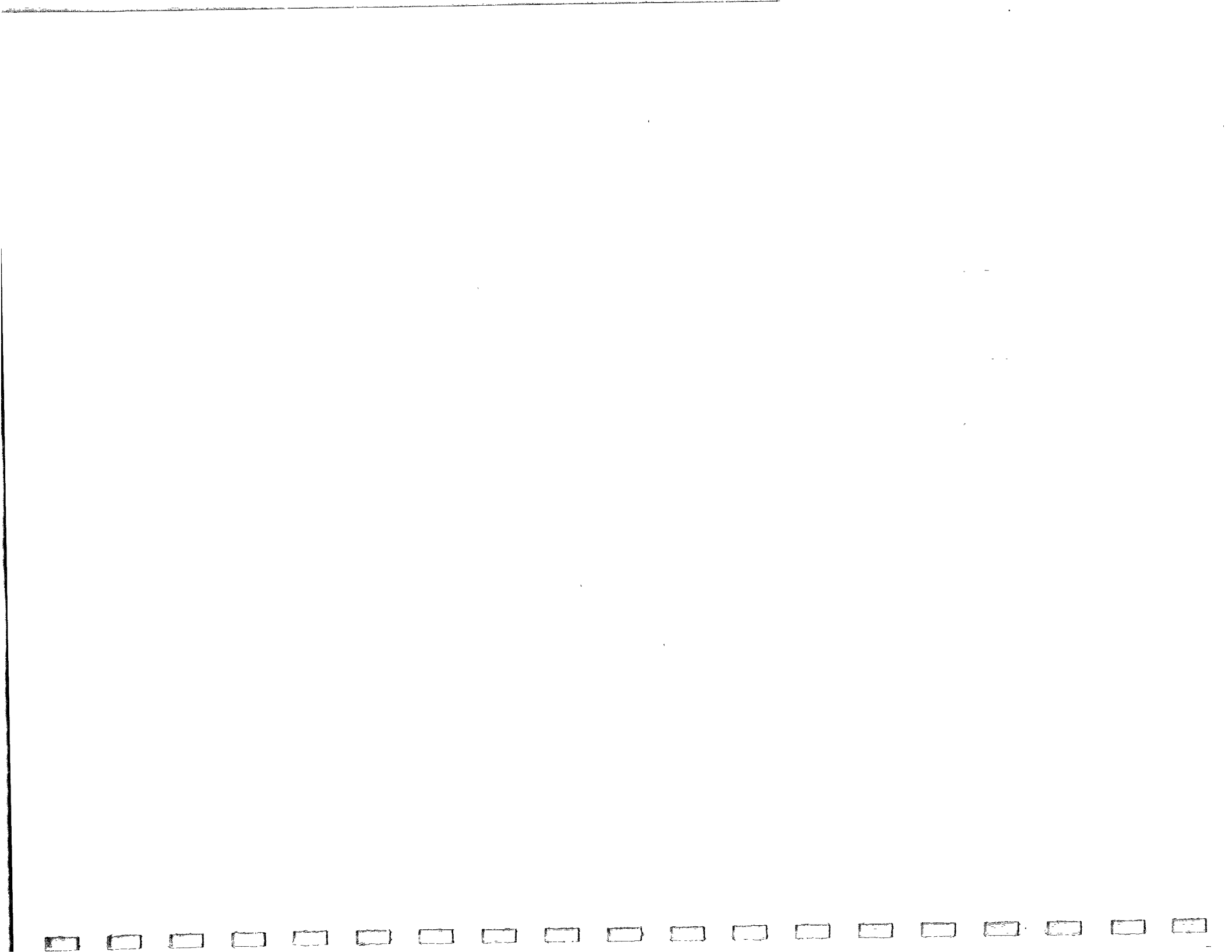
Rule 807. ~~Other Exceptions~~ Residual Exception*

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

** Although Rule 807 is new, it consists of contents of former Rules 803(24) and 804(5). For comparison purposes, the matter underlined and lined through is based on the two former rules.

COMMITTEE NOTE

The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.



Agenda Item IIF

No negative comments were received on the proposed amendments to Rules 803 and 806, and the tentative decision not to amend 24 rules.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

* * * * *

(24) [Abrogated] ~~Other exceptions. -- A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.~~

COMMITTEE NOTE

The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

Rule 806. Attacking and Supporting Credibility of Declarant

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

COMMITTEE NOTE

The amendment is technical. No substantive change is intended.

SPECIAL REQUEST FOR COMMENTS ON CERTAIN FEDERAL RULES OF EVIDENCE

Since its inception in 1992, the Advisory Committee on the Federal Rules of Evidence has been engaged in a comprehensive review of all the Evidence Rules, and it has now completed an initial assessment.

Supplementing its 1994 decisions, the Advisory Committee has now reached tentative decisions not to amend the rules listed below. The Committee's philosophy has been that an amendment to a Rule should not be undertaken absent a showing either that it is not working well in practice or that it embodies a policy decision believed by the Committee to be erroneous. Any amendment will create uncertainties as to interpretation and sometimes unexpected problems in practical application. The trial bar and bench are familiar with the Rules as they presently exist and extensive changes might affect trials adversely for some time to come. Finally, amendments that seek to provide guidance for every conceivable situation that may arise would entail complexities that might make the rules difficult to apply in practice.

The Advisory Committee is keenly aware, however, that the bar, the bench, and the public do not follow its deliberations with care. As a result, the Committee has not had much input from outside even though it is engaged in a comprehensive review of each Rule. The Advisory Committee has therefore asked the Committee on Rules of Practice and Procedure to take the unusual step of publishing for public comment the Advisory Committee's tentative decisions not to amend certain rules. The Advisory Committee hopes that this step will cause those who believe that certain rules should be amended to communicate their concerns to the Committee.

The Advisory Committee has tentatively decided not to amend the following Rules of Evidence.

Rule 103(a), (b), (c), (d)	Rulings on Evidence
Rule 104.	Preliminary Questions
Rule 408.	Compromise or Offers to Compromise
Rule 411.	Liability Insurance
Rule 801(a), (b), (c), (d)(1)	Definitions

Agenda Item III

II Additional Comments on Rules Currently Under Consideration.

Rule 103(a). Judge Becker (EV15) proposes that the Committee should endeavor to resolve circuit splits about the meaning of harmless error. He states that while a number of circuits apply a "more probably than not untainted by the error approach," other circuits apply a higher standard in both civil and criminal cases, holding that errors "are not harmless unless it is 'highly probable' that they did not affect a party's substantial rights." Judge Becker acknowledges that "the standard of review is not ordinarily a matter within the scope of the Federal Rules," but believes that it would be useful for the Committee to study the matter and to formulate a revised rule or at least a policy statement.

Professor Myrna Raeder (EV37) urged the Committee to reject the holding of Luce v. United States, 469 U.S. 38 (1984) which requires the accused to testify in order to preserve an objection to a pretrial ruling. She argues that Luce creates a tactical dilemma for defendants who fail to testify because they fear that the jury will misuse their criminal histories for a propensity inference rather than for impeachment. She suggested that fears that it is speculative whether defendant would have

testified can be addressed by requiring counsel to make a good faith offer that defendant will testify in case the ruling is favorable.

Rule 407. Judge Martin Feldman of the Eastern District of Louisiana (EV1) expressed concern lest the impeachment exception to Rule 407 "lead to serious abuses by virtue of attempts by counsel to avoid the doctrinal thrust of Rule 407 under the guise of offering evidence of subsequent remedial measures as impeachment." He recommended amending the rule to specify that impeachment is "a permissible use only where the party against whom such evidence is being offered makes credibility an issue by denying that a subsequent remedial measure would have somehow avoided the incident as issue." (Reporter's Note: The reported cases indicate that judges are interpreting the exception narrowly and are not permitting end-runs against the policy expressed in Rule 407 in the guise of impeachment.)

Rule 801. Professor James J. Duane of Regent University (EV31) submitted a lengthy commentary entitled, Some Thoughts on How the Hearsay Exception for Statements by Conspirators Should -- And Should Not -- Be Amended, which he hopes will be published. He makes the following suggestions: 1. The word conspirator should be used instead of coconspirator, which "is

always redundant, serves no useful function, and ought to be unceremoniously drummed out of the English language." 2. The rule should be rewritten to substitute "conspirator of the party" for "conspirator of a party" because the provision's plain-meaning is that a statement may be offered against any defendant in a multi-party criminal case (even one who was not a member of the conspiracy), as long as it was made by someone who was in a conspiracy with at least one of the other defendants. Professor Duane concedes that no one has ever construed the rule in this manner, but suggests that the Court's plain-meaning jurisprudence could lead to this result.

Rule 807. Judge Becker thinks that the Committee should propose a redraft of the notice requirement because there is a circuit split in how rigidly it is applied. Judge Becker suggests that the redraft should provide for more flexibility.

Professor Myrna Raeder, on behalf of a group of evidence professor and individuals interested in evidentiary policy (EV37), finds that consolidation of the two residual exceptions into one rule provides a welcome restructuring, but argues that the residuals are being overused by prosecutors. She urges the Committee to consider tightening the residual exception in criminal cases and notes two additional reasons for revisiting the rule.

First, the rule was enacted prior to the Supreme Court's decision in Idaho v. Wright, 497 U.S. 805 (1990), which clarified the meaning of corroboration for confrontation clause analysis. Cases indicate that some courts confuse what is required to establish trustworthiness for hearsay and confrontation clause purposes, particularly since the constitutional standard does not apply in civil cases. Second, the forfeiture exception if adopted will provide prosecutors with additional flexibility in criminal cases. Consequently, Professor Raeder suggests that the Committee reconsider whether the same evidentiary standard should be used for civil and criminal cases.

The National Association of Criminal Defense Lawyers (NADCL) (EV36) proposes a full study of "the excessive invocation of these residual exceptions by the courts." After study, it suggests narrowing the wording to make it less easy to invoke the rule as a vehicle for admitting "near miss" hearsay evidence that does not satisfy traditional exceptions.

Agenda Item IV

III Proposals for Amending Rules Not Presently Under Consideration.

Rule 803(3). Judge Becker (EV15) notes the split in the circuits about the so-called Hillmon problem -- whether a statement of intent by a declarant is admissible when the action of someone other than the declarant is involved. He suggests that the scrutiny of the Committee would be helpful. (Reporter's comment: The Committee discussed this issue at length and voted not to suggest an amendment.)

The structure of Article VIII. Judge Becker expressed the hope that the Committee would revisit the classification of prior statements and admissions as "non-hearsay" exemptions. He finds the logic of this organization confusing to the bar. He recognizes "that this would be an ambitious project but perhaps the Committee will have time for it "down the road" in between what seems to be the never-ending task of correcting Congressional mischief with the evidence rules.

Rule 803(8)(C). John A. K. Grunert, Esq. of Boston, Mass.(EV14) suggested amending this rule to take account of the practical impossibility of the opponent meeting the burden of showing that the proffered official report is untrustworthy. Mr. Grunert believes this "is a serious and growing problem" because:

1. it is an obvious fiction that government officials issue only accurate, objective documents; the reports often reflect political agendas and are not relied upon except when analogous to 803(6) reports; 2. state and federal statutes and regulations often make it impossible for litigants to investigate effectively the trustworthiness of an official report because of their inability to determine who authored the report, the immunity for officials, and confidentiality statutes.

Mr. Grunert suggests:

1. shifting the burden of proof to the proponent to show trustworthiness, and/or 2. providing that the report is not admissible upon a showing either that it is untrustworthy or that the opponent "could not with due diligence obtain information reasonably necessary to evaluate its trustworthiness."

Rule 804(b)(2). Mike Milligan, Esq., El Paso, Tex. (EV7) suggests extending the rule to former administrative proceedings, at least those like trials before an EEOC judge with live testimony and a verbatim transcript.

New exception to Rule 804. Surrogate Judge Eugene A. Burdick, Williston, North Dakota (EV10) proposes a new exception to Rule 804:

Statement of declarant implicating defendant.

> A statement made by the declarant which implicates the defendant in criminal behavior harmful to the declarant or in which the declarant apprehends such behavior by the defendant.

Judge Burdick thinks that this exception is as strong as the other Rule 804 exceptions "which were developed out of necessity and with an eye to the safety factor." (Reporter's comment. This might be termed a post-O.J. Simpson response. I know of a number of law review articles that are in the works that will be making similar proposals. Even if such an exception were adopted, the question of whether the statement would be barred by Rule 404(a) or admissible pursuant to Rule 404(b) would remain.)

Rule 1101. The National Association of Criminal Defense Lawyers (NACDL) proposes amending Rule 1101 to provide that the evidence rules would apply in full to detention hearings, to ancillary proceedings in criminal forfeiture, and to all stages of civil forfeiture trials.

Detention hearings. NACDL notes that the present provision in the rules providing that rules of evidence (other than privileges) do not apply in "proceedings with respect to release on bail or otherwise," has been confirmed by the 1984 Bail Reform Act which states that the rules of evidence do not apply at a detention hearing and does not mention privileges. NACDL claims that

detention before trial is now commonplace in federal court, and that innocent persons, with no prior history of violence or flight, who are eventually acquitted have spent a year or more in jail on the basis of unreliable hearsay evidence provided by agents testifying to other agents' reports summarizing investigatory witness interviews.

Forfeiture hearings. NACDL raises two issues with regard to forfeiture proceedings: 1. Rule 1101 should be clarified so that courts apply the rules of evidence to all stages of civil forfeiture trials; 2. Rule 1101 should be amended so as to provide that the rules of evidence apply to "ancillary hearings" in criminal forfeiture cases under 21 U.S.C. § 853(n), which governs claims by third parties against property ordered forfeited in a criminal case. NACDL quotes extensively from a dissenting opinion by Judge Beam in United States v. Twelve Thousand, Three Hundred Ninety Dollars, 956 F.2d 801, 812 (8th Cir. 1992) in which he concluded that "the government need not establish [its case] by a preponderance of the evidence, but the facts adopted would have to meet the requirements of the federal rules of evidence."

NACDL urges the Committee to exercise its powers under the supersession clause of the Rules Enabling Act to amend Rule 1101(b) to read

. . . criminal cases and proceedings (including detention hearings and ancillary proceedings in criminal forfeiture cases)

NACDL further urges the Committee to amend Rule 1101(e) by striking the phrase "actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581-1624), or under the Anti-Smuggling Act (19 U.S.C. 1701-1711)" and substituting therefor:

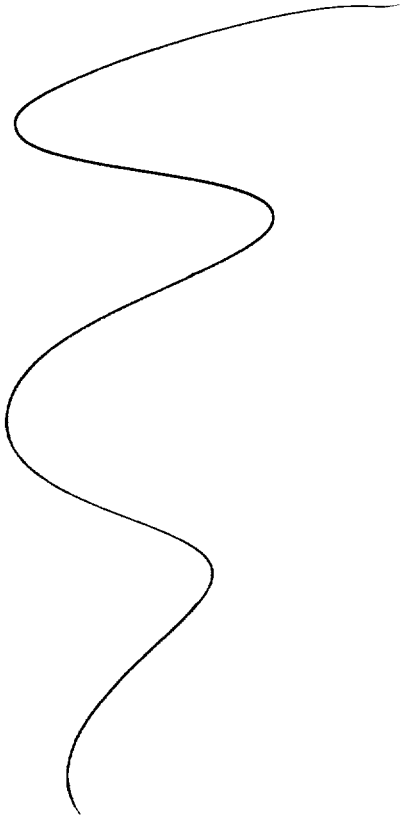
all stages of the trial of actions for fines, penalties, or forfeitures;

Supplemental

Agenda

Book

Materials



[Congressional Record: April 15, 1996 (House)]
[Page H3305-H3338]
From the Congressional Record Online via GPO Access [wais.access.gpo.gov]

CONFERENCE REPORT ON S. 735, TERRORISM PERVENTION ACT

Mr. HYDE submitted the following conference report and statement on the Senate bill (S. 735) to prevent and punish acts of terrorism, and for other purposes:

Conference Report (H. Rept. 104-518)

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 735), to prevent and punish acts of terrorism, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the ``Antiterrorism and Effective Death Penalty Act of 1996''.

SEC. 2. TABLE OF CONTENTS.

The table of contents of this Act is as follows:

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TITLE I--HABEAS CORPUS REFORM

SEC. 101. FILING DEADLINES.

Section 2244 of title 28, United States Code, is amended by adding at the end the following new subsection:

``(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

``(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

``(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

``(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

``(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

``(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.''.

SEC. 102. APPEAL.

Section 2253 of title 28, United States Code, is amended to read as follows:

``Sec. 2253. Appeal

``(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for

the circuit in which the proceeding is held.

••(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to

[[Page H3307]]

test the validity of such person's detention pending removal proceedings.

••(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

••(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

••(B) the final order in a proceeding under section 2255.

••(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

••(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).''.

SEC. 103. AMENDMENT OF FEDERAL RULES OF APPELLATE PROCEDURE.

Rule 22 of the Federal Rules of Appellate Procedure is amended to read as follows:

••Rule 22. Habeas corpus and section 2255 proceedings

••(a) Application for the Original Writ.--An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application shall be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge shall not be permitted. The applicant may, pursuant to section 2253 of title 28, United States Code, appeal to the appropriate court of appeals from the order of the district court denying the writ.

••(b) Certificate of Appealability.--In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c) of title 28, United States Code. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of

appeals. If an appeal is taken by a State or its representative, a certificate of appealability is not required.''.

SEC. 104. SECTION 2254 AMENDMENTS.

Section 2254 of title 28, United States Code, is amended--

(1) by amending subsection (b) to read as follows:

``(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

``(A) the applicant has exhausted the remedies available in the courts of the State; or

``(B)(i) there is an absence of available State corrective process; or

``(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

``(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

``(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.'';

(2) by redesignating subsections (d), (e), and (f) as subsections (e), (f), and (g), respectively;

(3) by inserting after subsection (c) the following new subsection:

``(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

``(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

``(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'';

(4) by amending subsection (e), as redesignated by paragraph (2), to read as follows:

``(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

``(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

``(A) the claim relies on--

``(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

``(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

``(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for

constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.''; and

(5) by adding at the end the following new subsections:

``(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

``(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.''.

SEC. 105. SECTION 2255 AMENDMENTS.

Section 2255 of title 28, United States Code, is amended--

(1) by striking the second and fifth undesignated paragraphs; and

(2) by adding at the end the following new undesignated paragraphs:

``A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

``(1) the date on which the judgment of conviction becomes final;

``(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

``(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

``(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

``Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

``A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

``(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

``(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.''.

SEC. 106. LIMITS ON SECOND OR SUCCESSIVE APPLICATIONS.

(a) Conforming Amendment to Section 2244(a).--Section

2244(a) of title 28, United States Code, is amended by striking ''and the petition'' and all that follows through ''by such inquiry.'' and inserting '', except as provided in section 2255.''.

(b) Limits on Second or Successive Applications.--Section 2244(b) of title 28, United States Code, is amended to read as follows:

''(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

''(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

''(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

''(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

''(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

''(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

''(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

''(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

''(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

''(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

''(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.''.

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SEC. 107. DEATH PENALTY LITIGATION PROCEDURES.

(a) Addition of Chapter to Title 28, United States Code.--Title 28, United States Code, is amended by inserting after chapter 153 the following new chapter:

''CHAPTER 154--SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES

''Sec.
''2261. Prisoners in State custody subject to capital sentence;

••Sec. 2261. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment

••(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

••(b) This chapter is applicable if a State establishes by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.

••(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record--

••(1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

••(2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

••(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

••(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

••(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254. This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

••Sec. 2262. Mandatory stay of execution; duration; limits on stays of execution; successive petitions

**"(a) Upon the entry in the appropriate State court of record of an order under section 2261(c), a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under section 2254. The application shall recite that the State has invoked the post-conviction review procedures of this chapter and that the scheduled execution is subject to stay.

**"(b) A stay of execution granted pursuant to subsection (a) shall expire if--

**"(1) a State prisoner fails to file a habeas corpus application under section 2254 within the time required in section 2263;

**"(2) before a court of competent jurisdiction, in the presence of counsel, unless the prisoner has competently and knowingly waived such counsel, and after having been advised of the consequences, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254; or

**"(3) a State prisoner files a habeas corpus petition under section 2254 within the time required by section 2263 and fails to make a substantial showing of the denial of a Federal right or is denied relief in the district court or at any subsequent stage of review.

**"(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the filing of a second or successive application under section 2244(b).

**"Sec. 2263. Filing of habeas corpus application; time requirements; tolling rules

**"(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

**"(b) The time requirements established by subsection (a) shall be tolled--

**"(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

**"(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and

**"(3) during an additional period not to exceed 30 days, if--

**"(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and

**"(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

**"Sec. 2264. Scope of Federal review; district court adjudications

**(a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is--

**(1) the result of State action in violation of the Constitution or laws of the United States;

**(2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or

**(3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.

**(b) Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it.

**Sec. 2265. Application to State unitary review procedure

**(a) For purposes of this section, a 'unitary review' procedure means a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack. This chapter shall apply, as provided in this section, in relation to a State unitary review procedure if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel.

**(b) To qualify under this section, a unitary review procedure must include an offer of counsel following trial for the purpose of representation on unitary review, and entry of an order, as provided in section 2261(c), concerning appointment of counsel or waiver or denial of appointment of counsel for that purpose. No counsel appointed to represent the prisoner in the unitary review proceedings shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

**(c) Sections 2262, 2263, 2264, and 2266 shall apply in relation to cases involving a sentence of death from any State having a unitary review procedure that qualifies under this section. References to State 'post-conviction review' and 'direct review' in such sections shall be understood as referring to unitary review under the State procedure. The reference in section 2262(a) to 'an order under section 2261(c)' shall be understood as referring to the post-trial order under subsection (b) concerning representation in the unitary review proceedings, but if a transcript of the trial proceedings is unavailable at the time of the filing of such an order in the appropriate State court, then the start of the 180-day limitation period under section 2263 shall be deferred until a transcript is made available to the prisoner or counsel of the prisoner.

**Sec. 2266. Limitation periods for determining applications and motions

**(a) The adjudication of any application under section 2254 that is subject to this chapter, and the adjudication of any motion under section 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters.

**(b)(1)(A) A district court shall render a final determination and enter a final judgment on any application for a writ of habeas corpus brought under this chapter in a capital case not later than 180 days after the date on which the application is filed.

**(B) A district court shall afford the parties at least 120 days in which to complete all actions, including the preparation of all pleadings and briefs, and if necessary, a hearing, prior to the submission of the case for decision.

**(C)(i) A district court may delay for not more than one additional 30-day period beyond the period specified in subparagraph (A), the rendering of a determination of an application for a writ of habeas corpus if the court issues a written order making a finding, and stating the reasons for the finding, that the ends of justice that would be served by allowing the delay outweigh the best interests of the public and the applicant in a speedy disposition of the application.

**(ii) The factors, among others, that a court shall consider in determining whether a delay in the disposition of an application is warranted are as follows:

**(I) Whether the failure to allow the delay would be likely to result in a miscarriage of justice.

[[Page H3309]]

**(II) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate briefing within the time limitations established by subparagraph (A).

**(III) Whether the failure to allow a delay in a case that, taken as a whole, is not so unusual or so complex as described in subclause (II), but would otherwise deny the applicant reasonable time to obtain counsel, would unreasonably deny the applicant or the government continuity of counsel, or would deny counsel for the applicant or the government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

**(iii) No delay in disposition shall be permissible because of general congestion of the court's calendar.

**(iv) The court shall transmit a copy of any order issued under clause (i) to the Director of the Administrative Office of the United States Courts for inclusion in the report under paragraph (5).

**(2) The time limitations under paragraph (1) shall apply to--

**(A) an initial application for a writ of habeas corpus;

**(B) any second or successive application for a writ of habeas corpus; and

**(C) any redetermination of an application for a writ of habeas corpus following a remand by the court of appeals or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

**(3)(A) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution,

to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

**(B) No amendment to an application for a writ of habeas corpus under this chapter shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b).

**(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

**(B) The State may enforce a time limitation under this section by petitioning for a writ of mandamus to the court of appeals. The court of appeals shall act on the petition for a writ of mandamus not later than 30 days after the filing of the petition.

**(5)(A) The Administrative Office of United States Courts shall submit to Congress an annual report on the compliance by the district courts with the time limitations under this section.

**(B) The report described in subparagraph (A) shall include copies of the orders submitted by the district courts under paragraph (1)(B)(iv).

**(c)(1)(A) A court of appeals shall hear and render a final determination of any appeal of an order granting or denying, in whole or in part, an application brought under this chapter in a capital case not later than 120 days after the date on which the reply brief is filed, or if no reply brief is filed, not later than 120 days after the date on which the answering brief is filed.

**(B)(i) A court of appeals shall decide whether to grant a petition for rehearing or other request for rehearing en banc not later than 30 days after the date on which the petition for rehearing is filed unless a responsive pleading is required, in which case the court shall decide whether to grant the petition not later than 30 days after the date on which the responsive pleading is filed.

**(ii) If a petition for rehearing or rehearing en banc is granted, the court of appeals shall hear and render a final determination of the appeal not later than 120 days after the date on which the order granting rehearing or rehearing en banc is entered.

**(2) The time limitations under paragraph (1) shall apply to--

**(A) an initial application for a writ of habeas corpus;

**(B) any second or successive application for a writ of habeas corpus; and

**(C) any redetermination of an application for a writ of habeas corpus or related appeal following a remand by the court of appeals en banc or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

**(3) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

**(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

**(B) The State may enforce a time limitation under this section by applying for a writ of mandamus to the Supreme Court.

**(5) The Administrative Office of United States Courts shall submit to Congress an annual report on the compliance

by the courts of appeals with the time limitations under this section.''.

(b) Technical Amendment.--The part analysis for part IV of title 28, United States Code, is amended by adding after the item relating to chapter 153 the following new item:

°°154. Special habeas corpus procedures in capital cases 2261.''.

(c) Effective Date.--Chapter 154 of title 28, United States Code (as added by subsection (a)) shall apply to cases pending on or after the date of enactment of this Act.

SEC. 108. TECHNICAL AMENDMENT.

Section 408(q) of the Controlled Substances Act (21 U.S.C. 848(q)) is amended by amending paragraph (9) to read as follows:

°°(9) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under paragraph (10). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.''.

TITLE II--JUSTICE FOR VICTIMS

Subtitle A--Mandatory Victim Restitution

SEC. 201. SHORT TITLE.

This subtitle may be cited as the °°Mandatory Victims Restitution Act of 1996''.

SEC. 202. ORDER OF RESTITUTION.

Section 3556 of title 18, United States Code, is amended--

(1) by striking °°may'' and inserting °°shall''; and

(2) by striking °°sections 3663 and 3664.'' and inserting °°section 3663A, and may order restitution in accordance with section 3663. The procedures under section 3664 shall apply to all orders of restitution under this section.''.

SEC. 203. CONDITIONS OF PROBATION.

Section 3563 of title 18, United States Code, is amended--

(1) in subsection (a)--

(A) in paragraph (3), by striking °°and'' at the end;

(B) in the first paragraph (4) (relating to conditions of probation for a domestic crime of violence), by striking the period and inserting a semicolon;

(C) by redesignating the second paragraph (4) (relating to conditions of probation concerning drug use and testing) as paragraph (5);

(D) in paragraph (5), as redesignated, by striking the period at the end and inserting a semicolon; and

Brooklyn Law School

Margaret A. Berger
Professor of Law

April 18, 1996

To: Members, Advisory Committee on the Federal Rules of Evidence

From: Margaret A. Berger, Reporter

Re: Miscellaneous Comments Received

This memo deals with a number of suggestions that were received before or after the public comment period.

Rule 103. The Federal Rules of Evidence Committee of the American College of Trial Lawyers (EV40) supported the proposed amendment adding a new subdivision (e) to Rule 103. Michael A. Cooper, Esq. explained on behalf of the Committee:

> We are of the view that a major benefit of Proposed Rule 103(e) is that it is likely to stimulate counsel to inquire of the Court -- or stimulate the Court sua sponte to remark -- on the record whether a pretrial ruling is final. We consider this notice function of the proposal to be quite valuable.

The Committee conceded that the converse formulation of the rule would equally serve a notice function. The Committee preferred the approach of the proposal, however, because docket pressures cause enormous variations in the amount of time that judges devote to evidentiary issues prior to trial.

> Consequently, unless the record or context plainly reflects that the Court intends its pretrial decision to be final, the interests of justice, in our opinion, are better served by requiring reconsideration of the issue at trial. It is only at trial that the Court is thoroughly versed in the context in which the evidence is offered.

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The Committee disagreed with criticisms that the proposed amendment would cause litigants to lose their right to appeal unless they uttered talismanic words at trial. It found the obligation imposed not "unreasonable," particularly since it "arises only where the Court's statements or the context indicate that the issue has not been definitively resolved."

Rule 611. District Judge Robert B. Propst of the Northern District of Alabama recommended that "members of the Committee make a specific study of cross-examination and direction examination of witnesses as it relates to asking leading question." The judge explained that "[t]he rule, as written, seems to suggest to most lawyers that they are permitted to testify and then say "Correct? Right?' etc." The judge asked to be advised if the committee believes that he has discretion under the rule as written to restrict such questioning.

Rule 704. Professor Thomas R. Mason of the University of Mississippi suggested that Rule 704 ought to be amended so as to to clarify that only opinions on ultimate factual issues are admissible. He writes:

> [The comments to the rule] suggest that experts were not to express opinions in which the legal rules/definitions, on which the jury will be instructed, are applied to the facts of the case. Nevertheless the bald language of the rule has encouraged lawyers to push to the limits and resulted in many unnecessary appeals based on trial rulings on opinions involving the law.

Rule 806. Professor Margaret Meriwether Cordray of Capital University Law School submitted an article, Evidence Rule 806 and the Problem of Impeaching the Nontestifying Declarant, which has

been published in the Ohio State Law Journal. In this article she suggests amendments to Rule 806 that would better enable a party to impeach a hearsay declarant. She analyzes the problems that arise because the impeachment rules are specifically designed for use against testifying witnesses, and makes a number of specific suggestions.

LUCE *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 83–912. Argued October 3, 1984—Decided December 10, 1984

During his trial in Federal District Court on federal drug charges, petitioner moved to preclude the Government from using a prior state conviction to impeach him if he testified. Petitioner made no commitment to testify if the motion were granted and no proffer as to what his testimony would be. The District Court denied the motion *in limine*, ruling that the prior conviction fell within the category of permissible impeachment evidence under Federal Rule of Evidence 609(a). Petitioner did not testify, and the jury returned guilty verdicts. The Court of Appeals affirmed, holding that since petitioner did not testify, it would not consider petitioner's contention that the District Court abused its discretion in denying his motion *in limine* without making a finding, as required by Rule 609(a)(1), that the probative value of the prior conviction outweighed its prejudicial effect.

Held: To raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify. To perform the weighing of the prior conviction's probative value against its prejudicial effect, as required by Rule 609(a)(1), the reviewing court must know the precise nature of the defendant's testimony, which is unknowable when, as here, the defendant does not testify. Any possible harm flowing from a district court's *in limine* ruling permitting impeachment by a prior conviction is wholly speculative. On the record in this case, it is conjectural whether the District Court would have allowed the Government to impeach with the prior conviction. Moreover, when the defendant does not testify, the reviewing court has no way of knowing whether the Government would have sought so to impeach, and cannot assume that the trial court's adverse ruling motivated the defendant's decision not to testify. Even if these difficulties could be surmounted, the reviewing court would still face the question of harmless error. If *in limine* rulings under Rule 609(a) were reviewable, almost any error would result in automatic reversal, since the reviewing court could not logically term "harmless" an error that presumptively kept the defendant from testifying. Requiring a defendant to testify in order to preserve Rule 609(a) claims enables the reviewing court to determine the impact any erroneous impeachment may have in light of the record as a whole, and

tends to discourage making motions to exclude impeachment evidence solely to "plant" reversible error in the event of conviction. Pp. 41–43.

713 F. 2d 1236, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which all other Members joined, except STEVENS, J., who took no part in the consideration or decision of the case. BRENNAN, J., filed a concurring opinion, in which MARSHALL, J., joined, *post*, p. 43.

James I. Marcus argued the cause and filed a brief for petitioner.

Bruce N. Kuhlik argued the cause *pro hac vice* for the United States. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Trott*, *Deputy Solicitor General Frey*, and *Sara Criscitelli.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to resolve a conflict among the Circuits as to whether the defendant, who did not testify at trial, is entitled to review of the District Court's ruling denying his motion to forbid the use of a prior conviction to impeach his credibility.

I

Petitioner was indicted on charges of conspiracy, and possession of cocaine with intent to distribute, in violation of 21 U. S. C. §§ 846 and 841(a)(1). During his trial in the United States District Court for the Western District of Tennessee, petitioner moved for a ruling to preclude the Government from using a 1974 state conviction to impeach him if he testified. There was no commitment by petitioner that he would testify if the motion were granted, nor did he make a proffer to the court as to what his testimony would be. In opposing the motion, the Government represented that the conviction was for a serious crime—possession of a controlled substance.

The District Court ruled that the prior conviction fell within the category of permissible impeachment evidence

under Federal Rule of Evidence 609(a).[1] The District Court noted, however, that the nature and scope of petitioner's trial testimony could affect the court's specific evidentiary rulings; for example, the court was prepared to hold that the prior conviction would be excluded if petitioner limited his testimony to explaining his attempt to flee from the arresting officers. However, if petitioner took the stand and denied any prior involvement with drugs, he could then be impeached by the 1974 conviction. Petitioner did not testify, and the jury returned guilty verdicts.

II

The United States Court of Appeals for the Sixth Circuit affirmed. 713 F. 2d 1236 (1983). The Court of Appeals refused to consider petitioner's contention that the District Court abused its discretion in denying the motion *in limine*[2] without making an explicit finding that the probative value of the prior conviction outweighed its prejudicial effect. The Court of Appeals held that when the defendant does not testify, the court will not review the District Court's *in limine* ruling.

Some other Circuits have permitted review in similar situations;[3] we granted certiorari to resolve the conflict. 466 U. S. 903 (1984). We affirm.

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[1] Rule 609(a) provides:

"General Rule.—For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment."

[2] "*In limine*" has been defined as "[o]n or at the threshold; at the very beginning; preliminarily." Black's Law Dictionary 708 (5th ed. 1979). We use the term in a broad sense to refer to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.

[3] See, *e. g.*, *United States* v. *Lipscomb*, 226 U. S. App. D. C. 312, 332, 702 F. 2d 1049, 1069 (1983) (en banc); *United States* v. *Kiendra*, 663 F. 2d

III

It is clear, of course, that had petitioner testified and been impeached by evidence of a prior conviction, the District Court's decision to admit the impeachment evidence would have been reviewable on appeal along with any other claims of error. The Court of Appeals would then have had a complete record detailing the nature of petitioner's testimony, the scope of the cross-examination, and the possible impact of the impeachment on the jury's verdict.

A reviewing court is handicapped in any effort to rule on subtle evidentiary questions outside a factual context.[4] This is particularly true under Rule 609(a)(1), which directs the court to weigh the probative value of a prior conviction against the prejudicial effect to the defendant. To perform this balancing, the court must know the precise nature of the defendant's testimony, which is unknowable when, as here, the defendant does not testify.[5]

Any possible harm flowing from a district court's *in limine* ruling permitting impeachment by a prior conviction is wholly speculative. The ruling is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer. Indeed even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to

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349, 352 (CA1 1981); *United States* v. *Fountain*, 642 F. 2d 1083, 1088 (CA7), cert. denied, 451 U. S. 993 (1981); *United States* v. *Toney*, 615 F. 2d 277, 279 (CA5), cert. denied, 449 U. S. 985 (1980). The Ninth Circuit allows review if the defendant makes a record unequivocally announcing his intention to testify if his motion to exclude prior convictions is granted, and if he proffers the substance of his contemplated testimony. See *United States* v. *Cook*, 608 F. 2d 1175, 1186 (1979) (en banc), cert. denied, 444 U. S. 1034 (1980).

[4] Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the district court's inherent authority to manage the course of trials. See generally Fed. Rule Evid. 103(c); cf. Fed. Rule Crim. Proc. 12(e).

[5] Requiring a defendant to make a proffer of testimony is no answer; his trial testimony could, for any number of reasons, differ from the proffer.

alter a previous *in limine* ruling. On a record such as here, it would be a matter of conjecture whether the District Court would have allowed the Government to attack petitioner's credibility at trial by means of the prior conviction.

When the defendant does not testify, the reviewing court also has no way of knowing whether the Government would have sought to impeach with the prior conviction. If, for example, the Government's case is strong, and the defendant is subject to impeachment by other means, a prosecutor might elect not to use an arguably inadmissible prior conviction.

Because an accused's decision whether to testify "seldom turns on the resolution of one factor," *New Jersey* v. *Portash*, 440 U. S. 450, 467 (1979) (BLACKMUN, J., dissenting), a reviewing court cannot assume that the adverse ruling motivated a defendant's decision not to testify. In support of his motion a defendant might make a commitment to testify if his motion is granted; but such a commitment is virtually risk free because of the difficulty of enforcing it.

Even if these difficulties could be surmounted, the reviewing court would still face the question of harmless error. See generally *United States* v. *Hasting*, 461 U. S. 499 (1983). Were *in limine* rulings under Rule 609(a) reviewable on appeal, almost any error would result in the windfall of automatic reversal; the appellate court could not logically term "harmless" an error that presumptively kept the defendant from testifying. Requiring that a defendant testify in order to preserve Rule 609(a) claims will enable the reviewing court to determine the impact any erroneous impeachment may have had in light of the record as a whole; it will also tend to discourage making such motions solely to "plant" reversible error in the event of conviction.

Petitioner's reliance on *Brooks* v. *Tennessee*, 406 U. S. 605 (1972), and *New Jersey* v. *Portash*, *supra*, is misplaced. In those cases we reviewed Fifth Amendment challenges to state-court rulings that operated to dissuade defendants from testifying. We did not hold that a federal court's prelimi-

nary ruling on a question not reaching constitutional dimensions—such as a decision under Rule 609(a)—is reviewable on appeal.

However, JUSTICE POWELL, in his concurring opinion in *Portash*, stated essentially the rule we adopt today:

> "The preferred method for raising claims such as [petitioner's] would be for the defendant to take the stand and appeal a subsequent conviction . . . . Only in this way may the claim be presented to a reviewing court in a concrete factual context." 440 U. S., at 462.

We hold that to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify. Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE STEVENS took no part in the consideration or decision of this case.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring.

I join the opinion of the Court because I understand it to hold only that a defendant who does not testify at trial may not challenge on appeal an *in limine* ruling respecting admission of a prior conviction for purposes of impeachment under Rule 609(a) of the Federal Rules of Evidence. The Court correctly identifies two reasons for precluding appellate review unless the defendant testifies at trial. The careful weighing of probative value and prejudicial effect that Rule 609(a) requires of a district court can only be evaluated adequately on appeal in the specific factual context of a trial as it has unfolded. And if the defendant declines to testify, the reviewing court is handicapped in making the required harmless-error determination should the district court's *in limine* ruling prove to have been incorrect.

I do not understand the Court to be deciding broader questions of appealability *vel non* of *in limine* rulings that do not involve Rule 609(a). In particular, I do not read the Court's quotation of JUSTICE POWELL's concurring opinion in *New Jersey* v. *Portash*, 440 U. S. 450, 462 (1979), see *ante*, at 43, as intimating a determination with respect to a federal court's *in limine* ruling concerning the constitutionality of admitting immunized testimony for impeachment purposes. In that case, and others in which the determinative question turns on legal and not factual considerations, a requirement that the defendant actually testify at trial to preserve the admissibility issue for appeal might not necessarily be appropriate. The appellate court's need to frame the question in a concrete factual context would be less acute, and the calculus of interests correspondingly different, than in the Rule 609(a) case the Court decides today.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

MEMORANDUM

TO: L. Ralph Mecham,
Director

FROM: Michael Blommer,
Assistant Director

Daniel A. Cunningham,
Legislative Counsel

DATE: April 17, 1996

RE: The "Antiterrorism and Effective Death Penalty Act of 1996," S. 735: Summary of Conference Report Provisions Affecting the Judiciary

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I. Purpose.

This memorandum briefly summarizes the principal provisions of the Conference Report on the "Antiterrorism and Effective Death Penalty Act of 1996," S. 735 ("Conference Report"), which have a significant impact upon the federal judiciary. It does not include a summary of the habeas corpus reform measures included in the bill. Those provisions are discussed in a separate memorandum prepared by Karen Kremer and Mark Braswell.

The Conference Report has been approved by the Conference Committee. It is anticipated that both the House and the Senate will vote on the bill in the next two days. The Report has been filed in the House, and it is likely to go before the Rules Committee today with floor action tomorrow. Senate floor consideration of the Report began yesterday.

II. Provisions Having an Impact on the Federal Judiciary.

Title II, Subtitle A. Mandatory Victim Restitution. This sweeping provision will require a federal court to impose mandatory restitution, without consideration of the defendant's ability to pay (and without consideration of the costs to the Department of Justice ("DOJ") and the judiciary of their collection efforts), in any case in which an identifiable victim or victims has suffered physical or pecuniary loss from an offense that is:

(a) a crime of violence (as defined in 18 U.S.C. § 16),
(b) an offense against property (including any offense committed by fraud or deceit), or
(c) a crime related to tampering with consumer products (18 U.S.C §1365)

The provision also expands beyond current law the definitions of "victim" who may seek restitution and "harm" for which the victim may be compensated. This provision also requires Pretrial Services Officers to administer significant aspects of the victim notification process, designed to determine an accurate amount of damages and ensuring the rights of the victims to participate in such determination. Under the Senate-passed version (the version upon which this Conference Report language was based), these duties were assigned to the DOJ . This change was made shortly before final approval of the Conference Report.

As originally introduced in the House and the Senate, the mandatory restitution provisions were even more sweeping than the provision contained in the Conference Report. Additionally, the DOJ pushed Congress to make it even "tougher" than introduced. However, the Senate particularly responded to concerns expressed by the judiciary and modified the bill in ways that limit somewhat the impact upon the federal courts.

§ 235. Closed Circuit Televised Proceedings for Victims of Crime. This provision requires a federal trial court, in any criminal trial where the venue is changed out of the state in which the case was originally brought and more than 350 miles from the location in which those proceedings originally would have taken place, to order closed circuit televising of the proceedings back to that original location. This televised coverage is to be provided for viewing by such persons the court determines have a compelling interest in doing so and are otherwise unable to do so by reason of inconvenience and expense caused by the change of venue. The provision takes effect nothwithstanding any provision of the Federal Rules of Criminal Procedure to the contrary.

The provision does contain a rather unusual "sunset" mechanism. The section provides that the Judicial Conference may promulgate and issue rules, or amend existing rules, to "effectuate the policy addressed by this section." Upon the implementation of such rules, this closed circuit televising provision shall cease to be effective.

In its original form, this provision would have prohibited the use of appropriated funds to carry out the purposes of this section, instead requiring the AO to accept private donations to cover the costs of the closed circuit televising. The final version provides the AO "may" accept donations to cover the cost. The original provision would also have required the Judicial Conference to study "the policy addressed by this section" and issue rules thereon. The Conferees modified the provision in response to suggestions made on behalf of the Judicial Conference.

§ 401. Alien Terrorist Removal. This provision creates an alien terrorist removal court. It would be composed of five sitting United States district judges, designated by the Chief Justice of the United States, and it would be modeled upon the special court created by the Foreign Intelligence Surveillance Act. Use of the court would be available to the DOJ when DOJ can certify that the alien is a terrorist and that removal of the alien under Title II of the Immigration and Nationality Act would "pose a risk to the national security of the United States." Under the procedures for this court, the judge could review certain classified information in chambers. The

DOJ would have to prepare an unclassified summary of the evidence sufficient, to the satisfaction of the court, to enable the alien to prepare a defense. Ultimately, the judge would determine whether the DOJ has proven, by a preponderance of the evidence, that the alien is a terrorist and should be removed. The alien, or the Attorney General, would be given the right to appeal the court's decision to the United States Court of Appeals for the District of Columbia and to petition the Supreme Court for a writ of certiorari.

§ 441. Criminal Alien Removal. This section contains provisions related to the deportation of criminal aliens that were passed by the Senate in 1993, but not included in any bills enacted into law. Under current law, aliens who commit aggravated felonies can be deported. this provision would expand the definition of an aggravated felony to include transporting people for prostitution, serious bribery, counterfeiting or forgery, serious trafficking in stolen vehicles, trafficking in counterfeit immigration documents, and obstruction of justice, perjury or bribing a witness. The provision also streamlines deportation of criminal aliens after they serve their sentences.

§ 818 Authorization for Appropriations for the Federal Judiciary. Under this provision, there would be authorized for appropriation for the judiciary $41 million from the "Crime Trust Fund," over four years (FY 1997 - 2000), to help meet the increased demands for judicial branch activities, including supervised release, and pretrial and probation services, resulting from enactment of this bill. This matches an authorization for appropriation of $41 million to the DOJ for the hiring of additional Assistant United States Attorneys and for increased security at courthouses and other federal facilities.

This authorization for appropriation is an improvement over the authorization originally contained in the Senate version of the bill (no such authorizations were provided under the House version). The Senate version provided only $20 million over five years to the AO (the DOJ received $100 million to hire AUSAs and for increased security measures under that version). The Conferees modified this provision in response to suggestions made on behalf of the Judicial Conference.

§ 903. Representation Fees in Criminal Cases (the "Bryant Amendment"). This provision, sponsored by Representative Ed Bryant (R-TN), would affect representation fees in capital cases, either trials or appeals, in criminal cases in several respects. First, it would amend 18 U.S.C. § 3006A to require that information specifying the amounts paid, on behalf of indigent defendants, to defense counsel and for expert and investigative services, be made available to the public. This disclosure provision is likely to have minimal effect upon the federal judiciary, as it has been held that there is a first amendment right to obtain information on Criminal Justice Act ("CJA") expenditures, provided that premature release would not prejudice potential jurors or otherwise impair a defendant's right to a fair trial. Additionally, guidelines promulgated by the Judicial Conference encourage the disclosure of CJA information (so long as certain constitutional, privacy and privilege issues are given due consideration).

Second, this provision amends Section 408(q)(10) of the Controlled Substances Act (21 U.S.C. § 848(q)(10)) to set the compensation for court-appointed attorneys in capital cases at a rate of not more than $125 per hour for in-court and out-of-court time. Previously, no rate of compensation was set by statute in such cases. This provision contains a "CPI escalator" that would authorize the Judicial Conference to increase the rate of compensation in the future under certain, specified mechanisms.

Finally, the provision amends Section 408(q)(10) to place a $7,500 "cap" on fees and expenses paid for investigative and expert services in capital cases. Previously, no expense "cap" was set by statute in such cases. The section provides for a "waiver" mechanism modeled after a similar provision in the CJA, whereby such expenses can exceed the $7,500 amount if the excess payment is certified by the court (or the United States Magistrate Judge) as necessary to provide fair compensation for services of an unusual character or duration and the amount of the excess payment is approved by the chief judge of the circuit.

As originally introduced, this measure did not contain a "CPI escalator" for court-appointed attorney compensation, it capped investigative and expert services in capital cases at $1,000, and provided no waiver mechanism for the court to allow payment above $1,000. The Conferees modified the provision in response to suggestions made on behalf of the Judicial Conference.

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

April 18, 1996

To: The Evidence Committee
Hon. Jerry E. Smith
Hon. Milton I. Shadur
Hon. Ann K. Covington
Prof. Kenneth S. Broun
Frederic F. Kay, Esq.
Mary F. Harkenrider, Esq.
Hon. Fern M. Smith
Hon. James T. Turner
Dean James K. Robinson
Gregory P. Joseph, Esq.
John M. Kobayashi, Esq.

cc: Hon. David S. Doty
Hon. C. Arlen Beam
Peter G. McCabe
Prof. Daniel Coquillette
John Rabiej
Hon. David D. Dowd, Jr.
Prof. Margaret A. Berger
Hon. Alicemarie H. Stotler
Roger A. Pauley, Esq.

From: Ralph K. Winter, Chair

Jim Turner has been kind enough to send me a copy of a subsequent letter from Bill Wilson regarding Rule 103. I don't believe I ever received it, but it should be included with the materials sent earlier.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF ARKANSAS
600 W. CAPITOL, ROOM 149
LITTLE ROCK, ARKANSAS 72201
(501) 324-6863
FAX (501) 324-6869

BILL WILSON
JUDGE

RECEIVED
JAN 16 1996
CHAMBERS OF
JUDGE TURNER

January 11, 1996

Re: Proposed Changes to FRE 103(e)

The Honorable James T. Turner
United States Court of Federal Claims
717 Madison Place, N.W.
Washington, D.C. 20005

Dear Jim:

Many thanks for sending me a copy of your January 2, 1996 letter to Judge Winter.

What I would like to do is withdraw what I have said on the subject and adopt your letter, across the board.

What I believe, and attempted to state in a rough-hewn manner, you have written in a most scholarly, clear way.

Kudos,

Wm. R. Wilson, Jr.

cc: The Honorable Ralph K. Winter, Jr.
Mr. Alan W. Perry
Professor Margaret A. Berger
Professor Stephen A. Saltzburg

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
APPELLATE RULES

PAUL MANNES
BANKRUPTCY RULES

PATRICK E. HIGGINBOTHAM
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

April 15, 1996

To: The Evidence Committee
Hon. Jerry E. Smith
Hon. Milton I. Shadur
Hon. Ann K. Covington
Prof. Kenneth S. Broun
Frederic F. Kay, Esq.
Mary F. Harkenrider, Esq.
Hon. Fern M. Smith
Hon. James T. Turner
Dean James K. Robinson
Gregory P. Joseph, Esq.
John M. Kobayashi, Esq.

cc: Hon. David S. Doty
Hon. C. Arlen Beam
Peter G. McCabe
Prof. Daniel Coquillette
John Rabiej
Hon. David D. Dowd, Jr.
Prof. Margaret A. Berger
Hon. Alicemarie H. Stotler
Roger A. Pauley, Esq.

From: Ralph K. Winter, Chair

Earlier, I undertook to initiate a correspondence with certain members of this Committee, the Reporter, and two members of the Standing Committee, concerning the proposed amendment to Rule 103. I am faxing to you the results of that undertaking.

See you in Washington.

To: Hon. James Turner
Hon. William R. Wilson, Jr.
Alan W. Perry, Esquire
Professor Margaret Berger
Professor Stephen Saltzburg

From: Ralph K. Winter

Re: Proposed Amendment to Evidence Rule 103

We seem to be the persons most concerned about the proposed amendment to Rule 103. Because the Evidence Committee has been noticeably unable to provoke public comment on its work and this is a topic that would benefit from discussion, I want to suggest that the six of us exchange memoranda setting out our views on the proposed amendment and, if appropriate, a substitute. When our dialogue is completed, I will have the memoranda circulated among the various members and regular attendees of the Evidence Committee.

Let me start by setting out what I believe to be the thinking of the Committee majority. (Experience strongly suggests that Jim Turner will ably represent the minority.) Margaret informed the Committee that there is presently a conflict among the circuits as to whether a pre-trial ruling by a district court denying an objection to, or proffer of, evidence must be renewed at trial in order to preserve the issue for appeal. The Committee believed that a default rule was in order to eliminate the uncertainty that might trap some unwary counsel. It chose as a default rule a requirement that a denied objection or proffer "must be timely renewed at trial unless the

court states on the record, or the context clearly demonstrates, that a ruling on the objection or proffer is final."

The Committee was attempting to distinguish between pre-trial rulings that would not be affected by events at trial and those that might. For example, a court might hold in a pre-trial ruling that contract language unambiguously favored the plaintiff and that extrinsic evidence was inadmissible. If the case then proceeded to trial on the issue of damages, the proffer of extrinsic evidence need not be renewed under the Committee rule.

However, many pre-trial rulings on evidence might be affected by the state of the record at trial. For example, evidence regarding the credibility of a witness depends on the witness's testimony. Many relevance rulings and the balancing of probative value and unfair prejudice also turn on the record at trial.

Pre-trial rulings are thus often made on the basis of expectations as to what the evidence at trial will be. Where those expectations are inaccurate, even in ostensibly minor ways, the calculus of decision may be altered, and the Committee believed that in such cases the loser of the pre-trial ruling ought to bear the burden of raising the matter at trial. Particularly where there have been lengthy pre-trial proceedings, the district judge may well not recollect the precise nature of the ruling or recognize the altered

circumstances that might affect the decision. If so, a pre-trial ruling would not be reconsidered sua sponte.

The Committee's discussion expressly drew upon Luce v. United States, 469 U.S. 38 (1984), where the Supreme Court unanimously held that a pre-trial ruling denying a motion to exclude a prior conviction under Rule 609 was not preserved for appeal because the defendant was not called as a witness. The theory of that case is that the pre-trial ruling was not final because it was subject to modification based on the evidence at trial.

However, I am very concerned by the view expressed at the Standing Committee meeting by Bill Wilson and Alan Perry that the default rule adopted by the Committee is a trap because many lawyers will not anticipate that the objection need be renewed. Bill and Alan are wise in the ways of trial courts and lawyers, and, if they are right, then the Committee has achieved the opposite of what it intended.

However, the opposite default rule -- an objection or proffer "need not be renewed at trial unless the court states on the record, or the context clearly demonstrates, that a ruling on the objection or proffer is not final" is not without problems. Does it overrule Luce? If so, do we want to? Is non-finality as easily determinable from "the context" as finality?

Moreover, we all agree -- I hope -- that a proper proffer

or objection must be made in the district court to preserve the issue for appeal. The opposite default rule will lead to appellate squabbles as to whether the evidence at trial was what was expected at the time of the pre-trial ruling. These will not be easily resolved. Reconstructing what the parties and the court anticipated at the time of the pre-trial ruling is a daunting task in many cases. This is also a trap for the unwary. A lawyer who thinks that no renewed proffer or objection need be made based on the opposite default rule and gets nailed by an appellate ruling that the court was not sufficiently aware of the likely state of the record at the time of the pre-trial ruling will feel well and truly bushwhacked.

There may also be a sandbagging problem with the opposite default rule. Lawyers who think a trial is going badly may well not renew an objection or proffer that might be granted in order to get error in the record.

Anyway, although I am very concerned by Bill and Alan's apprehensions about the Committee's proposals, I continue to feel on balance that it is the safer course.

August 30, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
600 W. CAPITOL, ROOM 149
LITTLE ROCK, ARKANSAS 72201
(501) 324-6863
FAX (501) 324-6869

BILL WILSON
JUDGE

September 25, 1995

Re: FRE 103

The Honorable Ralph K. Winter, Jr.
Audubon Court Building
55 Whitney Avenue
New Haven, CT 06511

Dear Judge Winter:

Thank you very much for your memo of August 30, 1995.

After reading your thoughtful memo, and reflecting on it, I think I may feel a change of mind coming on. Before, however, accepting salvation and redemption, I want to hear from Alan. Perhaps a booster shot from him will cause me to be "steady as she goes."

Let us take an example which arises often. The defendant in a job discrimination case wants to put the EEOC findings into evidence. The plaintiff files a motion in limine. At a pre-trial hearing the Court rules the EEOC letter admissible. Unless we do something, many, if not most, practitioners would never think to object again when this document is offered at trial. Often the exhibits will be considered the morning of trial, before the jury is selected. Obviously, under the current proposal -- and under current law -- plaintiff's lawyer should ask that her objection be noted (I always loved to say "please note my objection, and save my exception" even though exceptions were long ago declared unnecessary -- saving my exception made me feel better).

This may not be a good example since the appellate court is apt to uphold the trial court whichever may be ruling on this issue, and irregardless of what kind of objection was made and re-made.

Although I am leaning toward your thinking, isn't there something we could do to help avoid a default when, in fairness, there ought not to be one? I'm having a hard time thinking of language which would help without gutting the proposal.

I always tell the lawyers after a pre-trial ruling that, to the extent that I have the authority to do so, I hold that their objection is reserved and preserved; but, to be safe on appeal, they probably should approach the bench and object again when the

evidence is offered. Then, if I think of it, I'll call the lawyers to the bench a time or two and invite them to "do the necessary" as they see fit to tighten up their record. I do not like defaults generally, and I really don't like them when there is really nothing but an inadvertent failure to renew a point already made. There may be some sandbagging, but better this, than a party losing an important point for appeal because her lawyer, in the heat of battle, forgot to say, "Your Honor, I object again to the pre-trial ruling which admits Exhibit A."

Furthermore, I dislike the spirit, if not the letter, of the holding in Luce v. United States, 469 U.S. 38 (1984). While that case was pending before the Supreme Court, I represented a white collar defendant who wanted to testify, but the district court ruled that, if he did, he could be cross-examined about a civil judgment in an unrelated case (ruling that the civil judgment was tantamount to a criminal conviction). As far as I know this ruling stands alone in common law jurisprudence; but, even though I stated on the record that my client would testify (and gave considerable details of his expected testimony), the Eighth Circuit held we did preserve our record because my client didn't testify (so he could have been eviscerated by cross examination about an inadmissible civil judgment). Please put this little fulmination under "not letting go" because it is not exactly on our point.

Let me say once more that I may be coming around to your way of thinking (I think); but isn't there something we could do to help the party where error really ought, in fairness, be preserved by a clear pre-trial ruling even though her counsel forgot to object at trial. Could it be drafted it so as to suggest that the circuit courts should be less cold-blooded than they tend to be on lawyer error -- in this narrow instance (i.e., where an adverse pre-trial ruling had been made).

I am aware that in the general order of things we want finality in trials. But, on the other hand, I have too often seen appellate courts affirm on a true narrow technicality, when a reasonably good record was made in the trial court; and when justice called for a reversal.

Obviously I need help from you and the carbon copy addressees who are better craftsmen and draftsmen than I.

Cordially,

Bill

Wm. R. Wilson, Jr.

cc: The Honorable James Turner
Mr. Alan W. Perry
Professor Margaret Berger
Professor Stephen Saltzburg

UNITED STATES COURT OF FEDERAL CLAIMS
717 MADISON PLACE, NW
WASHINGTON, DC 20005

(202) 219-9574

CHAMBERS OF
JAMES T. TURNER
JUDGE

FACSIMILE: (202) 219-9997

January 2, 1996

The Honorable Ralph K. Winter, Jr.
United States Circuit Judge
Audubon Court Building
55 Whitney Avenue, 6th Floor
New Haven, CT 06510

Re: Proposed change to FRE 103(e)

Dear Ralph:

Thank you for the opportunity to debate in writing the merits of the proposed change to Rule 103(e) well in advance of our decisive vote. We share the feeling that any resolution of the debate has significant long-range ramifications for the bench, the bar and the litigating public, especially *pro se* litigants.

All are agreed that certainty concerning finality *vel non* is needed (given the conflicting appellate opinions) and that the end of Rule 103 is the right place to declare the policy. The disagreement among committee members and other interested persons is over the policy to be adopted. The committee draft states a policy of presumed non-finality of pretrial evidentiary rulings.

One way to frame the issue is whether pretrial evidence rulings should be treated differently from every other kind of pretrial ruling. An on-the-record ruling on a motion to dismiss, for summary judgment, on a discovery matter, striking a pleading, etc. is final for appeal purposes.[1] The committee proposal would create an exception to this natural and orderly way of doing business and require the losing party (on the pretrial evidentiary

[1] Throughout this letter, references to motions are intended to mean pretrial motions unless otherwise indicated. Rulings on such motions should be understood to be on the record after due notice and opportunity for argument. I presume that both sides of the controversy over proposed Rule 103(e) posit a pretrial evidentiary ruling which would be final for purposes of appeal if it dealt with a non-evidentiary matter.

ruling)[2] to keep this anomaly in mind and raise again at trial a matter which had been addressed and ruled upon, presumably after due consideration. I urge uniformity.

The committee proposal would be unfairly wasteful of the parties' resources. Suppose a party made a proffer of evidence and lost. Suppose that his reason for making a pretrial proffer was that presentation of the evidence would require ten witnesses and voluminous documentation. Further suppose that at trial he renewed his motion (as the draft would require) and won. Should he, in anticipation of the possibility of a different and favorable ruling, have all of the evidence available for presentation at trial. If he assumed that the ruling would be the same (after all, the requirement in 95% of the situations would be merely a formality to preserve appeal rights) and thus appeared at trial without having gone to the significant expense of assembling the evidence, should the trial, in fairness, be delayed and disrupted while the party gathers the evidence he reasonably thought had been excluded. The unfairness of the committee proposal works both ways (it at least has that virtue). The original winning respondent would reasonably assume that he had no occasion to bring to trial evidence to rebut the evidence which had been ruled inadmissible. Under the committee draft, would prudence (and avoidance of malpractice) require that the respondent's lawyer have the rebuttal evidence ready anyway? Resources of the litigants could be put to better use.

When lawyers and *pro se* litigants prepare their cases for trial, should they be put to the trouble of preparing for the unlikely event of a reversal with respect to a matter for which they already have a favorable ruling. What of the witnesses who may be subpoenaed for trial or whose depositions might be taken merely because the cautious lawyer (whether having won or lost on the motion) feels the need to be prepared for a different ruling at trial. Query whether this is consistent with the "just, speedy, and inexpensive determination of every action."

Further, the committee proposal would unnecessarily consume the time and energy of other participants in a trial. Presumably, the committee draft is not suggesting frivolous motions or mere

---

[2] Throughout this letter, the terms "winning party" and "losing party" are used with respect to the pretrial evidentiary ruling rather than with respect to the ultimate trial disposition.

formalities; presumably the committee expects the trial judge to conscientiously reconsider the matter he has already ruled upon. What of the juries whose time and the public's money is whiled away while matters, dealt with pretrial largely to expedite trials and save juror and witness time, are reconsidered.

What is the policy vindicated by the uncertainty and potential expense and disruption the committee draft would cause. The one I hear expressed is convenience of appellate judges. Important as this is, far fewer than 50% of judgments are appealed in the federal system, yet the committee draft would require otherwise unnecessary action in potentially every case. In any event, appellate litigants have a duty to include in the appendix all portions of the record relevant to a ground of appeal. *See* Rule 30(a) & (b), Fed. R. App. P. It is the litigant's duty to marshal all his arguments on a given matter, together with record citations, at the appropriate juncture.

What about the *pro se* litigant on the losing side of a motion who mistakenly assumes that the ruling of a federal trial judge is worthy of respect. He will simply lose his right to appeal the potentially prejudicial pretrial ruling merely because he failed to renew a motion already fully considered and ruled upon. Yet his disagreement with the ruling, as with every other adverse ruling before and during trial, should, in fairness, be presumed.

As a matter of policy in litigation, "magic" words should be avoided. They breed interpretive litigation and typically result in unfairness to the uninitiated who nonetheless have a right to access the public courts. Even worse is having finality *vel non* of a pretrial ruling determined on appeal by whether the "context clearly demonstrates" that the ruling was final.

A pretrial ruling which addresses both an evidentiary matter and a non-evidentiary one (e.g., striking a portion of a pleading) would be final to the extent it dealt with the non-evidentiary matter but not final with respect to the evidentiary portion. This is not desirable; court rules should dispel confusion, not create it.

As a policy matter, it is a mistake to encourage, indeed require, parties not to accept as final a ruling by a trial judge. We should be encouraging exactly the opposite. The committee draft would create a climate in which pretrial evidentiary rulings would not be taken as seriously as other rulings.

In rebuttal to points in your letter favoring the committee proposal, I offer two general comments:

1. The points asserted may be summarized as concern that pretrial rulings on evidence might be affected by testimony and exhibits at trial, particularly if the rulings pertain to credibility of witnesses, relevance, probative value or prejudice. To these concerns I have two reactions:

a. In the real-world litigation context, I suspect that most parties are not going to waste time making, and most trial judges are not going to waste time addressing, evidentiary motions *in limine* which will plainly require a trial context before they can be satisfactorily resolved. (Summary judgment motions furnish a non-evidentiary example involving similar resource concerns.)

b. When such a motion is made and addressed, the trial judge will ordinarily make it plain that the pretrial "ruling" is without prejudice or merely preliminary for the very reason that a fair and proper decision will require a trial context.

2. Concerning *Luce v. United States*, 469 U.S. 38 (1984), I do not consider the case relevant to our present debate. In my view, the holding is one pertaining, not to finality of a pretrial evidentiary ruling, but to *standing* of a non-testifying criminal defendant to ground an appeal on an adverse (and deficient) Rule 609(a)(1) ruling. The Supreme Court's holding would have been the same on the standing issue if the Rule 609(a) ruling had been made at trial.

In summary, the committee draft should be rejected for two reasons:

1. It encourages parties not to accept as final a trial court's rulings in one category (but only one) of matter. This is an anomaly and bad policy.

2. It is unfair both because of the expenditure of resources it will encourage in anticipation of a contrary ruling at trial and because it is a trap for the unwary.

I urge abandonment of the committee's current draft and substitution of the following:

(e) Pretrial rulings.-- A pretrial ruling upon an objection to or proffer of evidence, made on the record and after opportunity for argument, shall be final to the same extent as if made at trial. Nothing in this paragraph shall preclude a party from seeking reconsideration of a pretrial evidence ruling on the basis of changed circumstances.

In any event, any version of Rule 103(e) that we adopt should have its own paragraph title to preserve consistency with 103(a) through (d). I suggest "Pretrial rulings.--".

Again, thank you for this opportunity. I look forward to our next meeting.

Very truly yours,

James T. Turner
Judge

cc: The Honorable William R. Wilson, Jr.
Alan W. Perry, Esquire
Professor Margaret A. Berger
Professor Stephen A. Saltzburg

VIA FACSIMILE ONLY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

CHAMBERS OF
MILTON I. SHADUR
SENIOR JUDGE

CHICAGO, ILLINOIS 60604

January 9, 1996

Honorable Ralph K. Winter, Jr.
United States Circuit Judge
Audubon Court Building
55 Whitney Avenue, 6th Floor
New Haven CT 06510

Re: Proposed change to FRE 103(e)

Dear Ralph:

Jim Turner was good enough to fax me a copy of his January 2 letter to you about Rule 103(e). Although Jim has framed his objections in material part in terms of the pro se litigant (who would almost certainly be uninformed as to the need to renew his or her pretrial objections at trial), I feel very strongly that the objections apply with real force to the represented party as well.

We do regularly indulge the presumption that lawyers are fully informed about everything that the law requires (a necessary presumption if we are to preserve an objective rather than a subjective approach to legal problems). But whenever we deal with a default rule--one that applies in the absence of the parties' action or of the parties' agreement--it seems to me that we ought to adopt one that is as close as possible to people's normal expectations. If not, we will by definition maximize rather than minimize the prospect that unwary or uninformed persons will find themselves trapped by an unexpected result. And because any rule that we might adopt will work for the informed person, who will simply adhere to it (that seems to me to be the legal equivalent of the Coase Theorem), I believe that a reasonable degree of solicitude for the unwary or uninformed is a legitimate consideration for a committee such as ours.

Having said that, let me elaborate a bit on the merits. In my experience, motions on evidentiary matters are rarely submitted for a decision in limine unless their disposition is likely to have a real impact on the movant's planning or strategy for trial. When I hold my pretrial conference with counsel in any case to discuss their proposed draft of the final pretrial order ("FPTO")--a detailed document that follows the completion of discovery and establishes the game plan for trial (see the enclosed photocopy of the instructions for the FPTO in our District Court, to the drafting of which I must plead guilty)--I

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

CHAMBERS OF
MILTON I. SHADUR
SENIOR JUDGE

CHICAGO, ILLINOIS 60604

always remind the lawyers that their objections to exhibits (all of which must be identified in the FPTO, else they are waived[1]) will be addressed in the course of trial, at a time when they may be judged in context, unless the objections are made the subject of a motion in limine. As you might expect, the only issues that are then raised before trial are those whose resolution will have a material effect on the calling of witnesses, the preparation of witnesses' testimony, the scope of cross-examination of other witnesses, the trial sequence, or like matters.

When I then do get the parties' submissions and rule on their motions in limine--whether orally or in writing--everyone's normal expectation is that the matter is resolved. Requiring a renewal of such motions at trial is precisely the reverse of those normal expectations, and is hence a potential source of mischief. And I'm not at all comfortable with the proposed rule's imposition of a saving provision that applies if the court states the finality of its ruling on the record (sometimes judges are forgetful too) or with the proposed rule's amorphous reference to what "the context clearly demonstrates." Again whatever form of rule that we choose to adopt will do the job for the fully cognizant practitioner. But if we are to establish a default rule, as we certainly ought to do to eliminate the uncertainty and lack of uniformity in the decided cases, I concur in Jim's views.

Best personal regards.

Sincerely,

Milton I. Shadur

MIS:wb

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[1] Indeed, this provides a good example of the point I made earlier about the unreality of assuming a universal degree of familiarity with all operative rules or requirements. Even though the instructions for our FPTO form specifically say that non-objected-to exhibits are received in evidence, there are a lot of lawyers who come to the pretrial conference having submitted a proposed FPTO, yet are unaware of the need to "speak now or forever hold your peace" as to any objections to admissibility.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Plaintiff[1],	)	
v.	)	Civil Action No.
Defendant.	)	Judge [*Insert name of assigned judge*]

FINAL PRETRIAL ORDER

This matter having come before the court at a pretrial conference held pursuant to Fed. R. Civ. P. ("Rule") 16, and [*insert name, address and telephone number*] having appeared as counsel for plaintiff(s) and [*insert name, address and telephone number*] having appeared as counsel for defendant(s), the following actions were taken:

(1) This is an action for [*insert nature of action, e.g., breach of contract, personal injury*] and the jurisdiction of the court is invoked under [*insert citation of statute) on which jurisdiction based*]. Jurisdiction is (not) disputed.[2]

(2) The following stipulations and statements were submitted and are attached to and made

[1] Singular forms are used throughout this document. Plural forms should be used as appropriate. Where a third-party defendant is joined pursuant to Rule 14(a), the Order may be suitably modified. In such cases, the caption and the statement of parties and counsel shall be modified to reflect the joiner.

[2] In diversity cases or other cases requiring a jurisdictional amount in controversy, the Order shall contain either a stipulation that $50,000 is involved or a brief written statement citing evidence supporting the claim that such sum could reasonably be awarded.

a part of this Order:[3]

(a) a comprehensive stipulation or statement of all uncontested facts, which will become a part of the evidentiary record in the case (and which, in jury trials, may be read to the jury by the court or any party);[4]

(b) an agreed statement or statements by each party of the contested issues of fact and law and a statement or statements of contested issues of fact or law not agreed to;

(c) except for rebuttal exhibits, schedules in the form set out in the attached Schedule (c) of—

(1) all exhibits (all exhibits shall be marked for identification before trial), including documents, summaries, charts and other items expected to be offered in evidence and

(2) any demonstrative evidence and experiments to be offered during trial;[5]

---

[3] If it does not appear that the case will be reached for trial in the immediate future, or if active settlement discussions are in progress, the court may defer asterisked (*) requirements until shortly before the trial date. See items (i), (j), (k), and (l). On motion of any party or on the court's own motion, any requirements of this Order (including one or more of the asterisked requirements) may be waived entirely.

[4] Counsel for plaintiff has the responsibility to prepare the initial draft of a proposed stipulation dealing with allegations in the complaint. Counsel for any counter-, cross- or third-party complainant has the same responsibility to prepare a stipulation dealing with allegations in that party's complaints. If the admissibility of any uncontested fact is challenged, the party objecting and the grounds for objection must be stated.

[5] Items not listed will not be admitted unless good cause is shown. Cumulative documents, particularly x-rays and photos, shall be omitted. Duplicate exhibits shall not be scheduled by different parties, but may be offered as joint exhibits. All parties shall stipulate to the authenticity of exhibits whenever possible, and this Order shall identify any exhibits whose authenticity has not been stipulated to and specific reasons for the party's failure so to stipulate. As the attached Schedule (c) form indicates, non-objected-to exhibits are received in evidence by operation of this Order, without any need for further foundation testimony. Copies of exhibits shall be made available to opposing counsel and a bench book of exhibits shall be prepared and delivered to the court at the start of the trial unless excused by the court. If the trial is a jury trial and counsel desires to display exhibits to the members of the jury, sufficient copies of such exhibits must be made available so as to provide each juror with a copy, or alternatively, enlarged photographic copies or projected copies should be used.

(d) a list or lists of names and addresses of the potential witnesses to be called by each party, with a statement of any objections to calling, or to the qualifications of, any witness identified on the list;[6]

(e) stipulations or statements setting forth the qualifications of each expert witness in such form that the statement can be read to the jury at the time the expert witness takes the stand;[7]

(f) a list of all depositions, or portions thereof, to be read into evidence and statements of any objections thereto;[8]

(g) an itemized statement of special damages;[9]

(h) waivers of any claims or defenses that have been abandoned by any party;

(i)* for a jury trial, each party shall provide the following:

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[6] Each party shall indicate which witnesses *will* be called in the absence of reasonable notice to opposing counsel to the contrary, and which *may* be called as a possibility only. Any witness not listed will be precluded from testifying absent good cause shown, except that each party reserves the right to call such rebuttal witnesses (who are not presently identifiable) as may be necessary, without prior notice to the opposing party.

[7] Only one expert witness on each subject for each party will be permitted to testify absent good cause shown. If more than one expert witness is listed, the subject matter of each expert's testimony shall be specified.

[8] If any party objects to the admissibility of any portion, both the name of the party objecting and the grounds shall be stated. Additionally, the parties shall be prepared to present to the court, at such time as directed to do so, a copy of all relevant portions of the deposition transcript to assist the court in ruling *in limine* on the objection. All irrelevant and redundant material including all colloquy between counsel shall be eliminated when the deposition is read at trial. If a video deposition is proposed to be used, opposing counsel must be so advised sufficiently before trial to permit any objections to be made and ruled on by the court, to allow objectionable material to be edited out of the film before trial.

[9] If the case involves personal injuries or employment discrimination, a special Pretrial Memorandum form available from the court's minute clerk or secretary shall also be filed with this Order.

(i) trial briefs except as otherwise ordered by the court;[10]

(ii) one set of marked proposed jury instructions, verdict forms and special interrogatories, if any;[11] and

(iii) a list of the questions the party requests the court to ask prospective jurors in accordance with Fed.R.Civ.P. 47(a);

(j)* for a non-jury trial, each partyshall provide proposed *Findings of Fact and Conclusions of Law* in duplicate (see guidelines available from the court's minute clerk or

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[10] (*Note: The use of the asterisk (*) is explained in Footnote 3.*) No party's trial brief shall exceed 15 pages without prior approval of the court. Trial briefs are intended to provide full and complete disclosure of the parties' respective theories of the case. Accordingly, each trial brief shall include statements of—

(a) the nature of the case,
(b) the contested facts the party expects the evidence will establish,
(c) the party's theory of liability or defense based on those facts and the uncontested facts,
(d) the party's theory of damages or other relief in the event liability is established, and
(e) the party's theory of any anticipated motion for directed verdict.

The brief shall also include citations of authorities in support of each theory stated in the brief. Any theory of liability or defense that is not expressed in a party's trial brief will be deemed waived.

[11] *Agreed* instructions shall be presented by the parties whenever possible. Whether agreed or unagreed, each marked copy of an instruction shall indicate the proponent and supporting authority and shall be numbered. All objections to tendered instructions shall be in writing and include citations of authorities. Failure to object may constitute a waiver of any objection.

In diversity and other cases where Illinois law provides the rules of decision, use of Illinois Pattern Instructions ("IPI") as to all issues of substantive law is required. As to all other issues, and as to all issues of substantive law where Illinois law does not control, the following pattern jury instructions shall be used in the order listed, e.g., an instruction from (c) shall be used only if no such instruction exists in (a) or (b):

(a) the pattern jury instructions adopted by this Court and included with the materials appended to the *Standing Order*;
(b) the Seventh Circuit pattern jury instructions (Currently the only such instructions are Federal Criminal Jury Instructions which have limited potential applicability to civil cases.); or,
(c) any pattern jury instructions published by a federal court. (Care should be taken to make certain substantive instructions on federal questions conform to Seventh Circuit case law.)

At the time of trial, an unmarked original set of instructions and any special interrogatories (on 8 1/2" x 11" sheets) shall be submitted to the court; to be sent to the jury room after being read to the jury. Supplemental requests for instructions during the course of the trial or at the conclusion of the evidence will be granted solely as to those matters that cannot be reasonably anticipated at the time of presentation of the initial set of instructions.

secretary);[12]

(k) a statement summarizing the history and status of settlement negotiations, indicating whether further negotiations are ongoing and likely to be productive ;

(l) a statement that each party has completed discovery, including the depositions of expert witnesses (unless the court has previously ordered otherwise). Absent good cause shown, no further discovery shall be permitted;[13] and

(m) subject to full compliance with all the procedural requirements of local General Rule 12 K, all motions *in limine* should be filed on or before the time for the filing of this Order. Any briefs in support of and responses to such motions shall be filed pursuant to a briefing schedule set by the court.

(3) Trial of this case is expected to take [*insert the number of days trial expected to take*] days. It will be listed on the trial calendar, to be tried when reached.

(4) [*Indicate the type of trial by placing an X in the appropriate box*]

Jury ☐ Non-jury ☐

(5) The parties recommend that [*indicate the number of jurors recommended*][14] jurors be selected at the commencement of the trial.

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[12] These shall be separately stated in separately numbered paragraphs. Findings of Fact should contain a detailed listing of the relevant material facts the party intends to prove. They should not be in formal language, but should be in simple narrative form. Conclusions of Law should contain concise statements of the meaning or intent of the legal theories set forth by counsel.

[13] If this is a case in which (contrary to the normal requirements) discovery has not been completed, this Order shall state what discovery remains to be completed by each party.

[14] Fed.R.Civ.P. 48 specifies that a civil jury shall consist of not fewer than six nor more than twelve jurors.

(6) The parties [*insert "agree" or "do not agree" as appropriate*] that the issues of liability and damages [*insert "should" or "should not" as appropriate*] be bifurcated for trial. On motion of any party or on motion of the court, bifurcation may be ordered in either a jury or a non-jury trial.

(7) [*Pursuant to 28 U.S.C. § 636(c), parties may consent to the reassignment of this case to a magistrate judge who may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case. Indicate below if the parties consent to such a reassignment.*]

☐ The parties consent to this case being reassigned to a magistrate judge for trial.

(8) This Order will control the course of the trial and may not be amended except by consent of the parties and the court, or by order of the court to prevent manifest injustice.

(9) Possibility of settlement of this case was considered by the parties.

_____

United States District Judge[15]

Date: _____

[*Attorneys are to sign the form before presenting it to the court.*]

_____ _____

Attorney for Plaintiff Attorney for Defendant

[15] Where the case has been reassigned on consent of parties to a magistrate judge for all purposes, the magistrate judge will, of course, sign the final pretrial order.

Schedule (c)

Exhibits[1]

1. The following exhibits were offered by plaintiff, received in evidence and marked as indicated:

[*State identification number and brief description of each exhibit.*]

2. The following exhibits were offered by plaintiff and marked for identification. Defendant(s) objected to their receipt in evidence on the grounds stated:[2]

[*State identification number and brief description of each exhibit. Also state briefly the ground of objection, such as competency, relevancy or materiality, and the provision of Fed. R. Evid. relied upon. Also state briefly plaintiff's(s') response to the objection, with appropriate reference to Fed. R. Evid.*]

3. The following exhibits were offered by defendant(s), received in evidence and marked as indicated:

[*State identification number and brief description of each exhibit.*]

4. The following exhibits were offered by defendant(s) and marked for identification. Plaintiff(s) objected to their receipt in evidence on the grounds stated:[3]

[*State identification number and brief description of each exhibit. Also state briefly the ground of objection, such as competency, relevancy or materiality, and the provision of Fed. R. Evid. relied upon. Also state briefly defendant's response to the objection,*

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[1] As in the Final Pretrial Order form, references to "plaintiff" and "defendant" are intended to cover those instances where there are more than one of either.

[2] Copies of objected-to exhibits should be delivered to the court with this Order, to permit rulings *in limine* where possible.

[3] See footnote 2.

with appropriate reference to Fed. R. Evid.]