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ADVISORY COMMITTEE ON EVIDENCE RULES

Charleston, S.C
October 20-21, 1997

ADVISORY COMMITTEE ON EVIDENCE RULES

Agenda for Committee Meeting
Charleston, S.C.
October 20 and 21, 1997

I. Opening Remarks of the Chair.

Including approval of the minutes of the April meeting, and a report on the last meeting of the Standing Committee. The Draft Minutes of the April meeting, and the minutes of the Standing Committee meeting, are included in the agenda book.

II. Evidence Rules Under Review.

A. *Rule 103(e)* (concerning the preservation of objections made in limine). The subcommittee report on this Rule is included in the agenda book.

B. *Rule 615* (concerning sequestration of victims)--Pending legislation in Congress would directly amend Evidence Rule 615 and would require action by the Judicial Conference. The Reporter's memorandum on these matters is included in the agenda book.

C. *Rule 702* (concerning incorporation of the *Daubert* decision). The Reporter's memorandum on this Rule is included in the agenda book. Also included are some background materials on *Daubert* and its progeny.

D. *Rule 404(b)* (concerning proposals in the Omnibus Crime Bill to amend the Rule). The Reporter's memorandum on this Rule is included in the agenda book.

E. *Rule 703* (concerning the use of the Rule as a back door hearsay exception)--the Reporter's memorandum on this Rule is included in the agenda book.

F. *Rules 803(6) and 902* (concerning proof of foundation requirements without the necessity of a testifying witness). The Reporter's memorandum on Rules 803(6) and 902 is included in the agenda book.

III. Other Projects.

A. *Outmoded Advisory Committee Notes.* The Reporter's memorandum, indicating the Rules which were changed by Congress and providing editorial suggestions, is included in the agenda book.

IV. Recent Developments.

A. *Electronic Filing.* A memorandum prepared by the Administrative Office is included in the Agenda Book.

B. *Uniform Rules.* Update report by Professor Whinery.

V. New Issues for the Committee to Pursue.

VI. Next Meeting.

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September 16, 1997
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Item I

ADVISORY COMMITTEE ON EVIDENCE RULES

Draft Minutes of the Meeting of April 14-15, 1997

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence met on April 14th and 15th in the Judicial Conference Center of the Thurgood Marshall Building in Washington, D.C.

The following members of the Committee were present:

Hon. Fern M. Smith, Chair
Hon. Milton I. Shadur
Hon. Jerry E. Smith
Hon. James T. Turner
Professor Kenneth S. Broun
Mary F. Harkenrider, Esq.
Gregory P. Joseph, Esq.
Frederic F. Kay, Esq.
John M. Kobayashi, Esq.
Dean James K. Robinson
Professor Daniel J. Capra, Reporter

Hon. David C. Norton and Hon. Ann K. Covington were unable to attend.

Also present were:

Hon. David S. Doty, Liaison to the Civil Rules Committee
Hon. David D. Dowd, Liaison to the Criminal Rules Committee
Professor Daniel R. Coquillette, Reporter, Standing Committee on Rules of Practice and Procedure
Professor Stephen A. Saltzburg, ABA representative
Professor Leo Whinery, Reporter, Uniform Rules of Evidence Committee
Roger Pauley, Esq., Justice Department
Joe Cecil, Esq., Federal Judicial Center
Joseph F. Spaniol, Jr., Esq., Federal Judicial Center
Peter G. McCabe, Esq., Secretary, Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
Mark Shapiro, Esq., Rules Committee Support Office

Opening Business

The Chair opened the meeting by asking for approval of the minutes of the November, 1996 meeting. Those minutes were unanimously approved. The Chair reported on the Standing Committee meeting of January, 1997, in which the proposal of the Evidence Rules Committee to recommend against the codification of a rape counsellor privilege was considered. This recommendation was unanimously approved by the Standing Committee and ultimately approved by the Judicial Conference.

Omnibus Crime Bill

The Committee considered provisions in the Omnibus Crime Bill of 1997 that would amend Federal Rule of Evidence 404 in two respects: 1. Rule 404(a)(1) would be amended to provide that if the defendant proves a pertinent character trait of the victim, the prosecution can prove a pertinent character trait of the defendant; 2. Rule 404(b) would be amended to add "disposition toward another" to the list of permissible purposes for evidence of uncharged misconduct.

Preliminary discussion was had on the merits of these two proposals. Most members of the Committee agreed conceptually with a rule permitting the prosecution to introduce evidence of the defendant's character, once the defendant introduces evidence of the victim's character. By bringing in character evidence, the defendant has admitted that character is relevant to the case; therefore it makes sense that his own pertinent character traits should be admissible. A minority of the Committee, however, viewed the Congressional proposal as being a misapplication of the "opening the door principle." Concern was also expressed that the provision might be read to permit evidence attacking the defendant's credibility whenever the defendant attacked the victim's credibility.

As to the proposal to amend Rule 404(b), most members of the Committee believed that it is unnecessary to amend the Rule to include "disposition toward another" as a permissible purpose. The list of permissible purposes in the Rule is not intended, nor has it been read, to be exclusive. Adding another purpose to the Rule might create the misimpression that uncharged misconduct evidence could not be admitted unless offered for a purpose specified in the Rule. Further, evidence of disposition toward another would virtually always be admissible to prove intent, identity, or some other not-for-character purpose--therefore no change to the Rule is necessary.

The Committee agreed upon language to be recommended as part of a letter from the Standing Committee to Congress commenting on the Omnibus Crime Control Act. In this language, the Committee states that it has preliminarily reviewed the proposed changes to Rule 404, and that it would appreciate the opportunity to consider them further at the next Committee meeting; it asked that the Congressional proposal be delayed until the Committee has a chance to consider the matter more fully. The Committee agreed to place the substance of the proposed amendments on the agenda for its October, 1997 meeting, with a view to determining whether Rule 404 should be amended, through the rulemaking process, along the lines suggested by the Omnibus Crime Bill proposal. The Reporter was directed to survey the case law on "disposition toward another" evidence, to determine whether there are any cases in which such evidence was erroneously excluded.

Rule 103

At the November, 1996 Committee meeting, a subcommittee was directed to prepare a draft for a new Rule 103(e) to govern *in limine* practice. The subcommittee agreed upon a draft based on Kentucky Rule 103. The draft covered pretrial rulings on admissibility, and provided that objection to a final, on-the-record pretrial ruling was sufficient to preserve error. It also codified *Luce v. United States,* and its progeny. *Luce* held that a defendant must testify at trial to preserve an *in limine* objection to prior convictions offered to impeach the defendant. The *Luce* rule has been extended to other situations in which an advance ruling is conditioned on an occurrence at trial, e.g., the bringing of a defense or the elicitation of certain testimony.

A long discussion ensued on the draft. The following points were made, and the draft changed in response to those points:

1. The rule should deal not only with pretrial motions, but also with motions made at trial in advance of the evidence being offered.

2. The rule should not state that a party "may move" for an in limine hearing, since there are some circumstances (e.g., Criminal Rule 12) in which a party *must* move for an advance ruling to preserve an objection.

3. The rule should not take a position on whether error is preserved when evidence is brought out at trial by the objecting party. The Commentary should state explicitly that while taking the stand is necessary to preserve error under *Luce,* it is not always sufficient.

Committee members also discussed whether it was appropriate to codify *Luce* and its progeny. There was general agreement that *Luce*, and the cases extending it, were sound. It was also agreed, however, that the *Luce* principles should be limited to criminal cases.

Several suggestions for stylistic changes were addressed, and most of them were incorporated into the Rule. The Committee specifically considered the suggested changes from the Style Subcommittee of the Standing Committee. These comments were very helpful, and were adopted unless they resulted in substantive change or were inconsistent with other language used throughout the Evidence Rules.

A motion was made to submit the Rule as amended, and the Advisory Committee comment as amended, to the Standing Committee, with the recommendation that the Rule be published for public comment. The motion passed by a unanimous vote. The approved draft and Advisory Committee Comment are attached to these minutes.

Rule 615

At the request of the Committee, the Reporter submitted a draft of a revised Evidence Rule 615, along with a proposed Advisory Committee Comment. The purpose of the draft was to incorporate two recent legislative developments with respect to victim's rights: 1. the Victim of Crime Bill of Rights, under which a crime victim cannot be excluded from the trial unless his or her testimony would be materially affected by other evidence presented at the trial; 2. the Victim's Rights Clarification Act of 1997, which provides that a victim cannot be excluded from trial on the ground that he or she would testify at a sentencing hearing.

During discussion on the Reporter's draft, some stylistic suggestions were made and adopted, including those suggested by the Style Subcommittee of the Standing Committee on the new language proposed in the Rule. The Committee decided unanimously, however, that no change should be made, stylistic or otherwise, to the existing language in the Rule. It was agreed that any amendment should only be for the purpose of adding language to make the Rule consistent with the recent legislation.

A suggestion was made that the definition of "victim", which the draft Rule incorporates by reference from the Victim's Bill of Rights, should be set forth specifically in the Comment. This proposal was approved by all Committee members.

A proposal was made to add language to the Comment to specify that the sequestration provided for in the Rule concerns courtroom exclusion only, and was not intended to limit the inherent authority of the Trial Judge to impose more stringent requirements on witnesses. It was agreed, however, that the proposed amendment should only address the statutory developments--the rule was not causing problems sufficient to warrant a broader review.

A motion was made to submit the Rule as amended, and the Advisory Committee comment as amended, to the Standing Committee, with the recommendation that the Rule be published for public comment. The motion passed by a unanimous vote. The approved draft and Advisory Committee Comment are attached to these minutes.

Rule 706

At the November, 1996 Committee meeting, the Reporter was instructed to review the case law and commentary under Rule 706 to provide some guidance as to whether that Rule should be amended. With the assistance of Joe Cecil of the Federal Judicial Center, the Reporter prepared a report on several issues that have arisen under the Rule. These issues include: 1) problems of funding in civil cases; 2) difficulties in selecting experts; 3) concerns about ex parte communications and depositions; 4) how to distinguish, if necessary, between the roles of court-appointed witness, special master, and technical adviser; and 5) whether the court-appointed status of the expert should be disclosed to the jury.

After reviewing these issues, the Reporter recommended in a written memorandum that consideration of any amendment to Rule 706 be deferred. Problems existing under Rule 706 do not appear so prevalent as to warrant an amendment at this time. The Chair noted that the Committee on Court Administration and Case Management is overseeing a pilot project on court-appointed experts; Judge Pointer's multidistrict litigation involving breast implant cases has been designated as the pilot project. The Chair suggested, and the Committee agreed, that any consideration of an amendment to Rule 706 should be deferred at least until CACM reported on the pilot project.

The Reporter agreed to keep the Committee updated on any new cases arising under Rule 706, and noted that Joe Cecil of the Federal Judicial Center continues to monitor Rule 706 developments in the context of broader empirical research on expert testimony. John Kobayashi has volunteered to keep the

Evidence Committee, and CACM, if they so desire, informed regarding developments on this issue.

Rules 404(b) and 609--Procedural Aspects

At the November, 1996 meeting, the Reporter was instructed to prepare a draft of proposed amendments adding procedural requirements to Rules 404(b) and 609. The Reporter prepared a draft of these Rules, based on proposals made by the ABA, the Uniform Rules Drafting Committee, and other sources. The Committee discussed these proposals extensively. Most Committee members were of the view that it was unnecessary to add procedural requirements--such as a hearing requirement, on-the-record balancing, articulation of balancing factors, etc.--to two Rules that were already working well under an extensively developed case law. There was also concern that the failure to follow codified procedural requirements might lead to unnecessary reversals.

The Chair pointed out that the Committee should be reluctant to propose an amendment to a Rule unless that Rule was clearly not working or, as in the case of Rule 615, an amendment was necessary to bring a Rule into line with legislative changes.

All but two members of the Committee were against proceeding at this time on an amendment to Rule 404(b) to include procedural provisions. All members were against proceeding with procedural amendments to Rule 609 at this time.

Rule 703

At the November, 1996 meeting, the Reporter was instructed to review the case law and commentary under Rule 703, and to report on whether that Rule was being used as a "back-door" hearsay exception. The Reporter's responsive memorandum concluded that there were some cases in which hearsay had been offered as the basis of an expert's opinion, but without a limiting instruction. The Reporter reviewed some other versions of Rule 703 in the states and in the academic commentary, and provided a working draft for the Committee. The draft set forth a balancing approach, applying the principles of Rule 403.

Several members of the Committee found merit in the approach taken by the draft. They believed that the draft would provide trial judges with important guidance, and that without this guidance, Rule 703 would be used as a blank check to admit all kinds of hearsay. Others thought that the amendment would create problems by forcing parties to call witnesses to provide a

foundation for records that formed the basis of an expert's opinion. The response to that concern was that the Rule only prohibited the disclosure of hearsay information when its probative value in explaining the basis of an expert's opinion was substantially outweighed by the risk that the hearsay would be used for its truth. The Rule would not require all records used by an expert to be established through foundation testimony. Other members contended that all aspects of the amendment could be found in other rules; therefore there was no need to amend Rule 703.

The Chair suggested that given the fact that there was dispute within the Committee on the merits of any amendment to Rule 703; that the Committee must respond to legislative initiatives on Rule 702, presenting issues potentially related to those in Rule 703; and that the Committee had already proposed two amendments to be submitted for public comment, the matter should be taken under advisement and reconsidered at the next meeting. All members of the Committee agreed with this suggestion. A new working draft of Rule 703 will be prepared by the Reporter for the next meeting, taking account of the suggestions for stylistic change made by the Committee during discussion and by the Style Subcommittee of the Standing Committee.

Rule 803(6)

At the November, 1996 meeting, the Reporter was instructed to prepare a draft amendment that would permit the foundation requirements under the business records exception to be established through certification. The Reporter reviewed some state versions permitting proof of business records through certification, and also considered 18 U.S.C. § 3505, which permits the certification of foreign business records in criminal cases. The reporter prepared a draft of Rule 803(6) that would permit proof of business records through certification, as well as two draft amendments to Rule 902 (one for domestic records and one for foreign records), which would be necessary to solve the authentication problem for records that are not introduced through a live witness.

A preliminary vote was taken and six members of the Committee were in favor of the concept of self-authentication of business records, while two were opposed. Discussion ensued on the drafts. Those in favor of the proposal contended that self-authentication will avoid the wasteful process of presenting a qualified witness to give essentially conclusory and perfunctory testimony. Members also noted that the trend in the states is toward permitting certification. Others noted the anomaly under

current law--that foreign business records can be proved through certification in criminal cases, whereas domestic business records cannot be proved through certification in any case.

The Committee members opposed to the proposal were concerned that permitting proof of business records through certification would shift the burden of proof on admissibility from the proponent to the opponent. The response to these concerns was that the protections included in the draft would provide the proponent with more of a real opportunity to attack the trustworthiness of a proffered record than exists under the current law.

At the suggestion of the Chair, a subcommittee was appointed to consider whether language could be added to the draft, which would require foundation through a qualified witness where a legitimate question is raised as to the trustworthiness or authenticity of the record. The Subcommittee members are Greg Joseph, Jim Robinson, Mary Harkenrider, and the Reporter. The proposal of the Subcommittee will be considered at the next Committee meeting.

Amending or Updating the Advisory Committee Notes

The general question of whether Advisory Committee notes can be amended without amending the Rules was raised by several Committee members. There were two possibilities for amendments raised: 1) to amend the original Advisory Notes in the few instances in which they were clearly wrong as written and in the more frequent instances in which the Advisory Committee Draft was substantially changed by Congress; and 2) to add a set of updated Advisory Committee Notes to take account of intervening practice and case law. After some discussion, the latter alternative was rejected by the Committee on the ground that it would constitute a massive project with uncertain results. Discussion thereafter focussed on how and whether the Committee could correct the original Advisory Committee Notes to the extent they were clearly wrong as written or rendered confusing or irrelevant due to Congressional changes in the Advisory Committee Draft.

It was noted that it would be problematic to actually amend the original Advisory Committee Notes, because the Notes were part of a congressional enactment. Moreover, the Notes, even if commenting on a version of the Rule different from that actually promulgated, are important legislative history. The Reporter to the Standing Committee commented that the Standing Committee is reluctant to treat the Advisory Committee Notes as anything other than legislative history. Committee members also pointed out that

the authority of the Advisory Committee comes from the Enabling Act process--so there is no way to act outside it; the statute states that the Rules are to be accompanied with an explanatory note.

Another possibility considered was whether the Reporter should contact all of the publishers of the Federal Rules of Evidence, and provide them with a list, approved by the Committee, of short editorial comments to be placed in those Advisory Committee Notes that are outmoded by legislation or clearly wrong as written. Some publishers might not agree to include these provisions, however. Another possibility discussed was to revive the Federal Judicial Center comments, which state how and whether an Advisory Committee draft was changed by Congress. Again, it is not certain that publishers would agree to include the FJC notes.

After lengthy discussion, a motion was made that the Reporter prepare a list of statements in the original Advisory Committee Notes that are either wrong as written, or that comment on a draft that was materially changed by Congress; and further that the Committee consult the Standing Committee for guidance as to the appropriate course for alerting lawyers and judges about these outmoded and/or inaccurate provisions. This motion was approved with one dissent.

Effect of Automation

John Kobayashi was asked at the November, 1996 meeting to prepare a report on whether the Federal Rules should be amended to take account of technological developments in presenting evidence. He reported at the April meeting that the problems are complex, and he was not at this point sure that a rule could be drafted to cover all potential developments. He noted that the new Maryland rule on computer-generated evidence, which had been distributed to the Committee, was really a rule of procedure, and could not be used as a model for any evidentiary change.

Some members of the Committee suggested amending the definition of "writings and recordings" in Evidence Rule 1001 to make it applicable throughout the Rules, rather than simply to Article 10. It would be critical, however, to make certain that the term "writings and recordings" is used consistently throughout the Rules.

It was resolved that John Kobayashi would submit a written report on whether and how the Rules should be amended to accommodate technological changes; this Report should consider

the possibility of simply applying the Rule 1001 definition to all the Rules.

Circuit Splits

The Committee asked the Reporter to keep it apprised of circuit splits over the interpretation of any Federal Rule of Evidence. The Reporter submitted a memorandum of three circuit splits bearing on evidence that had recently been discussed in circuit court opinions. None of these splits, however, dealt directly with a construction of a Federal Rule of Evidence. One of the splits--over the standard of review for a district court's exclusion of evidence under *Daubert*--is now before the Supreme Court in *Joiner*. It was generally agreed that none of the circuit splits set forth in the memorandum warranted an amendment to any Federal Rule of Evidence at this point.

The Reporter apprised the Committee that a number of recent cases indicated a split in the circuits over the interpretation of Evidence Rule 106. Some courts have held that Rule 106 does not allow the admission of hearsay statements, even if that statement would correct a misimpression arising from the introduction of only part of a record. Other courts have said that hearsay can be introduced insofar as necessary to correct such a misimpression. The Reporter agreed to submit a memorandum on this matter for consideration by the Committee at the next meeting.

Statutes Affecting Admissibility

At the November, 1996 meeting, the Reporter was asked to collect the Federal statutes that bear on admissibility of evidence in Federal courts. It was thought that it could be useful to amend the Federal Rules to incorporate these statutes by reference. The Reporter found over 100 statutes that affected the admissibility of evidence in Federal courts, and was not confident that he had found all such statutes. The Committee unanimously agreed that it would not be practical to amend the Rules to incorporate by reference all the statutes that might affect admissibility in the Federal courts, now and in the future.

Proposed Congressional Amendment to Evidence Rule 702

Congress is considering proposals to amend Evidence Rule

702, purportedly to codify the *Daubert* framework for assessing expert testimony. These proposals were distributed to the Committee and discussed at the meeting. There was general agreement that the proposals--particularly the Senate proposal--imposed such strict requirements that all parties, including the prosecution, could be severely hampered in introducing expert testimony. Expert testimony routinely admitted under current law--such as fingerprint identification and handwriting identification--could possibly be excluded under the Congressional proposals. It was supposed that this was not the intent of the drafters. The conclusion of the Committee was that neither the House nor the Senate provisions accurately codified *Daubert*, and that neither took account of the large body of post-*Daubert* case law.

The congressional proposals also seek to expand the *Daubert* framework beyond scientific expert testimony. While taking no position on the merits of this extention, the Committee unanimously agreed that the congressional proposals would create confusion as to how to delineate between scientific and technical evidence on the one hand, and between technical and non-technical evidence on the other.

Several members noted that Federal Judges and lawyers are expecting the Evidence Rules Committee to deal with the *Daubert* problem, and that it was no longer appropriate, especially in light of Congressional attempts to amend Rule 702, to continue to take a wait and see attitude. The Reporter was directed, by unanimous vote, to prepare a number of alternative draft proposals for an amendment to address the issues created by *Daubert* and its progeny. These alternatives will be considered by the Committee at its next meeting. The Committee also voted unanimously to submit its comments on the proposed legislation to the Standing Committee for possible referral to Congress. The Committee unanimously agreed that it was not, at this point, deciding that Rule 702 should actually be amended.

Forfeiture

Judge Dowd reported that the Criminal Rules Committee had approved an amendment to Criminal Rule 32, providing for comprehensive treatment of forfeiture proceedings. Roger Pauley reported on legislation that would treat forfeiture proceedings as part of sentencing rather than as part of trial, to accord with the Supreme Court's analysis in the recent case of *Libretti v. United States*. The import of both of these developments is that forfeiture proceedings would not be governed by the Federal Rules of Evidence. At its last meeting, the Evidence Rules

Committee discussed the advisability of amending the Federal Rules of Evidence to make them applicable to sentencing proceedings, and decided not to propose such an amendment. No suggestion was made at the April meeting to revisit this decision.

Uniform Rules of Evidence

Professor Leo Whinery, the Reporter for the Uniform Rules of Evidence drafting committee, reported on developments in the drafting process. The drafting committee has now reviewed Tentative Draft #2 of Articles 1-6, and Tentative Draft #1 of Article 8. Professor Whinery noted that Article 3 of the committee's proposal takes a definitional approach to presumptions, distinguishing between substantive and procedural presumptions. He stated that consideration was being given to placing the *Luce* rule in Rule 609; but based on the Evidence Rules Committee's proposal, the Uniform Rules Committee would give thought to whether the *Luce* principle should be applied more broadly and therefore placed in Rule 103. Professor Whinery noted that the Reporters of the Uniform Rules Committee and the Evidence Rules Committee had established a cooperative relationship, and would continue to confer with and assist each other in the future.

Committee Business

The Chair noted with regret that the terms of John Kobayashi and Judge Jerry Smith expire in October, 1997. She thanked them for all their hard work and assistance to the Committee, and invited them to attend the next Committee meeting.

Next Meeting

The Chair announced that the next meeting of the Committee would take place on October 20th and 21st, in Charleston.

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law
Reporter

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Draft Minutes of the Meeting of June 19-20, 1997
Washington, D.C.

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Thursday and Friday, June 19-20, 1997. The following members were present:

Judge Alicemarie H. Stotler, Chair
Judge Frank W. Bullock, Jr.
Judge Frank H. Easterbrook
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte, Esquire
Judge James A. Parker
Alan W. Perry, Esquire
Sol Schreiber, Esquire
Judge Morey L. Sear
Chief Justice E. Norman Veasey
Acting Deputy Attorney General Seth P. Waxman
Judge William R. Wilson

Alan C. Sundberg, Esquire was unable to be present. Mr. Waxman was able to attend the meeting only on June 19. Ian H. Gershengorn, Esquire and Roger A. Pauley, Esquire represented the Department of Justice on June 20.

Supporting the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts: Mark D. Shapiro, senior attorney in that office: and Patricia S. Channon, senior attorney in the Bankruptcy Judges Division of the Administrative Office.

Representing the advisory committees at the meeting were:

Advisory Committee on Appellate Rules -
Judge James K. Logan, Chair
Professor Carol Ann Mooney, Reporter
Advisory Committee on Bankruptcy Rules -
Judge Adrian G. Duplantier, Chair
Professor Alan N. Resnick, Reporter
Advisory Committee on Civil Rules
Judge Paul V. Niemeyer, Chair
Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules
Judge D. Lowell Jensen, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules
Professor Daniel J. Capra, Reporter

Also participating in the meeting were: Joseph F. Spaniol, Jr. and Bryan A. Garner, consultants to the committee; Mary P. Squiers, project director of the local rules project; and James B. Eaglin, acting director of the Research Division of the Federal Judicial Center.

INTRODUCTORY REMARKS

Judge Stotler reported that the Judicial Conference had submitted its final report to the Congress on the Civil Justice Reform Act. She stated that the committee at its January 1997 meeting had been presented with a proposed draft of the Conference's report, prepared by a subcommittee of the Court Administration and Case Management Committee (CACM). The members had expressed a number of serious concerns with the document, which were later conveyed informally to the Administrative Office and CACM. As a result, the final Judicial Conference report was adjusted in several respects. Judge Stotler pointed out that the report included a number of specific recommendations concerning the Federal Rules of Civil Procedure.

Judge Stotler reported that the Judicial Conference at its March 1997 session had approved the committee's recommended changes in the civil and criminal rules to conform them to recent statutory amendments to the Federal Magistrates Act. The changes had been sent to the Supreme Court for action on an expedited basis.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 9-10, 1997.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej presented the report of the Administrative Office (AO), which consisted of: (1) a description of recent legislative activity; and (2) an update on various administrative steps that had been taken to enhance support services to the rules committees. (Agenda Item 3)

He reported that many bills had been introduced in the Congress that would amend the federal rules directly or have a substantial impact on them. He described several of the bills,

covering such diverse matters as grand jury size, scientific evidence, composition of the rules committees, offers of judgment, protective orders, cameras in the courtroom, forfeiture proceedings, and interlocutory appeals of class certification decisions.

Judge Stotler pointed out that Mr. Rabiej and the rules office had prepared written responses to the Congress setting forth the Judiciary's positions on these various legislative initiatives. She emphasized that the AO had prepared the responses in close coordination with the chairs and reporters of the Standing Committee and advisory committees. All the letters had been carefully written and approved, and the judiciary's positions had been formulated under very tight deadlines.

One of the members suggested that it might be productive for individual members of the rules committees to contact their congressional representatives on some of the legislative proposals. Judge Stotler responded that she would be pleased to take advantage of the services of the members.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Eaglin presented an update on the Federal Judicial Center's recent publications, educational programs, and research projects. (Agenda Item 4) Among other things, he reported that the Center was in the process of updating the manual on scientific evidence and hoped to have a new edition ready by the middle of 1998. He also pointed out that the Center was in the process of conducting a detailed survey of 2,000 attorneys to elicit their experiences with discovery practices in the federal courts. The results would be presented to the Advisory Committee on Civil Rules at the committee's September 1997 meeting.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Logan presented the report of the advisory committee, as set forth in his memorandum and attachments of May 27, 1997, and his memorandum of June 10, 1997 (Agenda Item 8).

He reported that the advisory committee had completed its style revision project to clarify and improve the language of the entire body of Federal Rules of Appellate Procedure. It now sought Judicial Conference approval of a package of proposed style and format revisions embracing all 48 appellate rules and Form 4. The comprehensive package had been developed by the committee in accordance with the *Guidelines for Drafting and Editing Court Rules* and with the assistance of the Standing Committee's Style Subcommittee and its style consultant, Bryan A. Garner.

Judge Logan stated that the public comments received in response to the package had not been very numerous, but they were very favorable to the revisions. He noted that judges and legal writing teachers had expressed great praise for the results of the project, and many judges had also commented orally that the revised rules were outstanding. Only one negative comment had been received during the publication period.

Rules With Substantive Changes

FED. R. APP. P. 5 and 5.1

Judge Logan reported that the Standing Committee had tentatively approved proposed consolidation of Rule 5 and Rule 5.1 and revisions to Form 4 at its June 1996 meeting, after the package of rules revisions had been published. Accordingly, these additional changes were published separately in August 1996.

Judge Logan pointed out that Rule 5 governs interlocutory appeals under 28 U.S.C. § 1292(b), while Rule 5.1 governs discretionary appeals from decisions of magistrate judges under authority of 28 U.S.C. § 636(c). The advisory committee had not contemplated making substantive changes in either of these two rules. But when the Advisory Committee on Civil Rules proposed publication of a new Civil Rule 23(f), authorizing discretionary appeals of class certification decisions, the appellate committee concluded that a conforming change needed to be made in the appellate rules. It decided that the best way to amend the rules was to consolidate rules 5 and 5.1 into a single, generic Rule 5 that would govern all present, and all future, categories of discretionary appeals. In late 1996, the Congress enacted the Federal Courts Improvements Act of 1996, which eliminated appeals from magistrate judges to district judges in § 636(c) cases and made Rule 5.1 obsolete.

Judge Logan said that following publication the advisory committee added language to paragraph (a)(3) to specify that the district court may amend its order to permit an appeal "either on its own or in response to a party's motion." It also added the term "oral argument" to the caption of subdivision (b), made other language changes, and included a reference in the committee note to the Federal Court Improvements Act of 1996.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP .P. 22

Judge Logan reported that the Anti-Terrorism and Effective Death Penalty Act of 1996 had amended Rule 22 directly. It also created two statutory inconsistencies. First, it extended the statutory habeas corpus requirements, including the requirement of a certificate of appealability, to proceedings under 28 U.S.C. § 2255. Accordingly, the caption to Rule 22, as

enacted by the statute, was amended to refer to 28 U.S.C. § 2255 proceedings. But the text of the rule made no reference to 28 U.S.C. § 2255. Second, the statute created an inconsistency between 28 U.S.C. § 2253, which provides that a certificate of appealability may be issued by "a circuit justice or judge," and Rule 22(b), which provides that the certificate may be issued by "a district or circuit judge." It was therefore unclear whether the statute authorizes a district judge to issue a certificate of appealability.

Judge Logan said that he had made telephone calls and had sent letters to the Congress when the legislation was pending, pointing to these drafting problems and offering assistance in correcting them. The Congress, however, had not shown interest in correcting the inconsistencies. Following enactment of the statute, additional attempts had been made to ascertain how the Congress would like to have the ambiguities resolved. Again, no direction was received, other than a suggestion that the problem should be resolved by the courts. Through case law development, three circuits have construed the reference in 28 U.S.C. § 2253 to a "circuit justice or judge" to include a district judge. The advisory committee followed that case law in revising the rule.

Judge Logan stated that the advisory committee had worked from the text of Rule 22, as enacted by the Congress, and had made several style improvements in it. It also recommended three substantive changes in subdivision (b) to eliminate the statutory inconsistencies.

1. The rule would be made explicitly applicable to 28 U.S.C. § 2255 proceedings.

2. The rule would allow a certificate of appealability to be issued by "a circuit justice or a circuit or district judge."

3. Since the rule would now govern 28 U.S.C. § 2255 proceedings, the waiver of the need for a certificate of appealability would apply not only when a state or its representative appeals, but also when the United States or its representative appeals.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 26.1

Judge Logan said that Rule 26.1, governing corporate disclosure statements, had been amended only slightly after publication. The advisory committee, for example, substituted the Arabic number "3" for the word "three." The proposal had been coordinated with the Committee on Codes of Conduct.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 27

Judge Logan stated that after publication the advisory committee had made a substantive change in Rule 27, dealing with motion practice. In paragraph (a)(3)(A), the committee provided that "[a] motion authorized by rules 8, 9, 18, or 41 may be granted before the 10-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner." The committee was of the view that if a court acts on these motions, it should so notify the parties.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 28

Judge Logan stated that the advisory committee had made no changes in the rule, dealing with briefs, after publication.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 29

Judge Logan reported that the only significant change made in Rule 29 (brief of an amicus curiae) following publication was to add the requirement that an amicus brief must include the source of authority for filing the brief.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 32

Judge Logan said that following publication the advisory committee had made a few changes in Rule 32, governing the form of briefs.

The committee decided to retain 14-point typeface as the minimum national standard for briefs that are proportionally spaced. It had received many comments from appellate judges that the rule should require the largest typeface possible. But it then ameliorated the rule by giving individual courts the option of accepting briefs with smaller type fonts.

One of the members pointed out that the object of the advisory committee was to have a rule that governed all courts, making it clear that a brief meeting national standards must be accepted in every court of appeals. There was, however, substantial disagreement as to what the specific national standards should be. The compromise selected by the advisory committee was to set forth the minimum standard of 14-point typeface—meeting the needs of judges who want large type—but allowing individual courts to permit the filing of briefs with smaller type if they so chose.

Judge Logan pointed out that the advisory committee had eliminated the typeface distinction between text and footnotes and the specific limitation on the use of boldface. He added that the rule as published had included a limit of 90,000 characters for a brief. The advisory committee discovered, however, that some word processing programs counted spaces as characters, while others did not. Accordingly, the committee eliminated character count in favor of a limit of 14,000 words or 1,300 monofaced lines of text. He pointed out that a 50-page brief would include about 14,000 words.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 35

Judge Logan reported that the advisory committee had made post-publication changes in subdivision (f), dealing with a court's vote to hear a case en banc. He explained that the advisory committee had considered adopting a uniform national rule on voting, but the chief judges of the courts of appeals expressed opposition. There are different local rules in the courts of appeals on such issues as quorum requirements and whether senior judges may vote. The advisory committee decided, accordingly, to let the individual courts of appeals handle their own voting procedures.

Judge Stotler expressed concern about the special committee note to the rule. It would "urge" the Supreme Court to delete the last sentence of the Court's Rule 13.3 (which provides that a suggestion made to a court of appeals for a rehearing en banc is not a petition for rehearing within the meaning of that rule unless so treated by the court of appeals). She said that the note was designed to help practitioners avoid a trap in the rules, but suggested that it might be phrased simply to point out that the last sentence of the Supreme Court's rule might not be needed. Judge Logan responded that it would be better simply to delete the special note.

Judge Stotler also expressed concern that there might be debate or controversy in the Judicial Conference or the Supreme Court over the change in terminology from "in banc" to "en banc." Judge Logan replied that the advisory committee proposed including a special paragraph in the cover letters or memoranda to the Conference and the Court explaining the reasons for the change. He noted, for example, that the committee's research had shown that the Supreme Court

itself had used the term "en banc" 12 times as often in its opinions as it had used "in banc." Similarly, a review of the decisions of the courts of appeals also showed an overwhelming preference for "en banc." He added that the committee believed strongly that the rules revision package should not be held up over this usage and would urge that the package of revisions be approved, regardless of whether the Conference and the Court preferred "en banc" or "in banc."

Judge Logan added that a similar explanation was needed in the cover letters to explain the committee's use of "must," rather than "shall." The advisory committee would elaborate in the letters why it was preferable to follow that style convention, but it would also advise the Conference and the Court not to hold up the package of revisions over this particular usage.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 41

The amended rule provides that the filing of either a petition for rehearing en banc or a motion for a stay of mandate pending petition to the Supreme Court will delay the issuance of the mandate until the court disposes of the petition or motion. Judge Logan reported that the only change made by the advisory committee after publication was to provide that a stay may not exceed 90 days unless the party who obtained the stay files a petition for a writ of certiorari and notifies the clerk of the court of appeals in writing of the filing of the petition.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FORM 4

Judge Logan reported that the proposed revision of Form 4 (in forma pauperis affidavit) had been initiated at the request of the clerk of the Supreme Court, who had commented that the current form did not contain sufficient financial information to meet the needs of the Court. Shortly thereafter, the Congress enacted the Prison Litigation Reform Act of 1996, requiring prisoners filing civil appeals to provide more detailed information for the court to assess their eligibility to proceed in forma pauperis.

Judge Logan stated that the revised form was based in large part on the form used in the in forma pauperis pilot program in the bankruptcy courts. After publication, the advisory committee made two changes: (1) requiring the petitioner to provide employment history only for the last two years; and (2) making the form applicable to appeals of judgments in civil cases.

The committee voted without objection to approve the revised form and send it to the Judicial Conference.

Rules With Style Changes Only

Judge Logan reported that the advisory committee had made no post-publication changes in FED. R. APP. P. 1, 7, 12, 13, 14, 15.1, 16, 17, 19, 20, 33, 37, 38, 42, and 44.

He said that tiny grammatical changes had been made post-publication in FED. R. APP. P. 2, 6, 8, 10, 11, 15, 18, 23, 24, 36, 40, 43, 45, and 48. He also directed the committee's attention to minor changes made in FED. R. APP. P. 3, 4, 9, 21, 25, 26, 30, 31, 34, 39, 46, and 47, and to rule 3.1, which would be abrogated because of recent legislation..

Professor Mooney presented a number of minor style changes suggested by Mr. Spaniol to FED. R. APP. P. 3, 4, 10, 25, and the caption to title IV of the appellate rules.

Mr. Spaniol added that Form 4 was the only form being revised. He suggested that the committee might wish to state expressly in its report that no changes were being made in the other appellate forms (1, 2, 3, and 5). Alternatively, the committee might include the text of these unchanged forms in the package of revisions in the interest of having a complete package of all 48 rules and all five forms. Judge Logan agreed to the latter suggestion. He also agreed with Mr. Spaniol's suggestion that a table of contents be included in the package.

The committee voted without objection to approve the proposed amendments above and send them to the Judicial Conference.

Cover Memorandum

Judge Logan volunteered to prepare a draft communication for the Standing Committee to submit to the Judicial Conference explaining the style revision project and the style conventions followed by the advisory committee. He said that he would include in the communication a discussion of the committee's decisions to use:

1. "en banc" rather than "in banc";

2. "must" rather than "shall";

3. indentations and other format techniques to improve readability; and

4. a side-by-side format to compare the existing rules with the revised rules.

Judge Stotler inquired whether it would be advisable to send an advance copy of the style revision package to the Executive Committee of the Judicial Conference. One of the members responded that the Executive Committee might be asked to place the package on the consent calendar of the Conference.

Judge Stotler also stated that it was important to present the package of revisions to the Supreme Court and the Congress in the side-by-side format. She pointed out that the physical layout of the rules, including indentations, was an integral part of the package. She asked whether the Government Printing Office would print the material in that format. Mr. Rabiej replied that GPO would print the rules in whatever format the Supreme Court approved.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier and Professor Resnick presented the report of the advisory committee, as set forth in Judge Duplantier's memorandum and attachments of May 12, 1997. (Agenda Item 10)

Revised Official Forms for Judicial Conference Approval

Judge Duplantier reported that the advisory committee's project to revise the official bankruptcy forms had been initiated in large part in response to comments from bankruptcy clerks of court that some of the existing forms were difficult for the public to understand and had generated numerous inquiries and requests for assistance. The advisory committee's subcommittee on forms worked on the revisions for about two years, and the package of revised forms attracted more than 200 comments during the publication period. The subcommittee and the full advisory committee made a number of additional changes in the forms as a result of the comments.

Judge Duplantier explained that the main purposes of the advisory committee were to make the forms clearer for the general public and to provide more complete and accurate descriptions of parties' rights and responsibilities. To that end, he said, the committee had to enlarge the typeface and expand the text of certain forms. As a result, some of the forms—such as the various versions of Form 9—will now have to be printed on both back and front sides, adding some cost for processing. The advisory committee, however, was satisfied that the marginal cost resulting from expansion of the forms would be more than offset by reductions in the number of inquiries made to clerks' offices and reductions in the number of documents that contain errors.

Judge Duplantier said that it would be advisable to specify a date for the revised forms to take effect. He pointed out that the revisions in bankruptcy forms normally take effect upon approval by the Judicial Conference. Several persons, however, had suggested to the committee that additional time was needed to phase in the new forms, to print them, to stock them, and to make needed changes in computer programs. Therefore, the advisory committee recommended that the revised forms take effect immediately on approval by the Judicial Conference in September 1997, but that use of them be mandated only on or after March 1, 1998.

FORM 1

Professor Resnick reported that Form 1 (voluntary petition) had been reformatted based on suggestions received during the public comment period. No substantive changes had been made by the advisory committee following publication.

FORM 3

Professor Resnick pointed out that the advisory committee had to make a policy decision with regard to Form 3 (application and order to pay a filing fee in installments). The current form, and rule 1006(b), on which it is based, provide that a debtor who has paid a fee to a lawyer is not eligible to pay the filing fee in installments. Neither the form nor the rule, however, prohibits the debtor from applying for installment payments if fees have been paid to a non-attorney bankruptcy petition preparer.

The advisory committee had received comments during the publication period that the disqualification from paying the filing fee in installments should apply if a debtor has made payments either to an attorney or to a bankruptcy petition preparer. Professor Resnick pointed out, though, that most debtors who apply for installment payments proceed pro se and may be unaware of the disqualification rule. The fiduciary responsibility that an attorney has to advise a debtor about the right to pay the filing fee in installments is not present when a non-attorney preparer assists the debtor.

Therefore, the advisory committee concluded that payment of a fee to a non-attorney bankruptcy petition preparer before commencement of the case should not disqualify a debtor from paying the filing fee in installments. Nevertheless, the bankruptcy petition preparer may not accept any fee *after* the petition is filed until the filing fee is paid in full.

FORM 6

Professor Resnick stated that the advisory committee had made only a technical change in Form 6, Schedule F (creditors holding unsecured nonpriority claims).

FORM 8

Professor Resnick said that no substantive changes had been made after publication in Form 8, the chapter 7 individual debtor's statement of intention regarding the disposition of secured property. He noted that the form had been revised to track the language of the Bankruptcy Code more closely and to clarify that debtors may not be limited to the options listed on the form.

FORM 9

Professor Resnick explained that Form 9 (notice of commencement of case under the Bankruptcy Code, meeting of creditors, and fixing of dates) was used in great numbers in the bankruptcy courts. He pointed out that the advisory committee made a number of changes following publication to refine and clarify the instructions for creditors and to conform them more closely to the provisions of the Bankruptcy Code. He added that the form had been redesigned by a graphics expert and expanded to two pages to make it easier to read.

FORM 10

Professor Resnick said that Form 10 (proof of claim) had been reformatted by a graphics expert. The advisory committee had made additional changes after publication to make the form clearer and more accurate. The revisions make it easier for a claimant to specify the total amount of a claim, the amount of the claim secured by collateral, and the amount entitled to statutory priority.

FORM 14

Professor Resnick said that no substantive changes had been made following publication in Form 14 (ballot for accepting or rejecting [a chapter 11] plan).

FORM 17

Professor Resnick pointed out that revised Form 17 (notice of appeal under § 158(a) or (b) from a judgment, order, or decree of a bankruptcy judge) took account of a 1994 statutory change providing that appeals from rulings by bankruptcy judges are heard by a bankruptcy appellate panel, if one has been established, unless a party elects to have the appeal heard by the district court. He noted that revised Form 17, as published, had included a statement informing the appellant how to exercise the right to have the case heard by a district judge, rather than a bankruptcy appellate panel. Following publication, the advisory committee expanded the statement to inform other parties that they also had the right to have the appeal heard by the district court.

FORM 18

Professor Resnick said that Form 18 (discharge of debtor) had been revised after publication to provide greater clarity. He noted that the instructions, which consist of a plain English explanation of the discharge and its effect, had been moved to the reverse side of the form.

FORMS 20A and 20B

Professor Resnick said that Forms 20A (notice of motion or objection) and 20B (notice of objection to claim) were new. He explained that many parties in bankruptcy cases do not have lawyers. They do not readily understand the nature of the legal documents they receive, such as motion papers and objections to claims. Thus, they do not know what they have to do to protect their rights. The new forms provide plain-English, user-friendly explanations to parties regarding the procedures they must follow to respond to certain motions and objections.

One of the members inquired as to the significance of the dates printed at the top of the forms. Judge Duplantier recommended that the date shown on each form should be the date on which it is approved by the Judicial Conference.

The committee voted without objection to approve all the proposed revisions in the forms and send them to the Judicial Conference, with a recommendation that they become effective immediately, but that use of the amended forms become mandatory only on March 1, 1988.

Rules Amendments for Publication

Judge Duplantier reported that the advisory committee had deferred going forward with minor changes in the rules in order to present the Standing Committee with a single package of proposed amendments. He pointed out that the package included amendments to 16 rules, seven of which dealt with a single situation (FED. R. BANKR. P. 7062, 9014, 3020, 3021, 4001, 6004, and 6006).

FED. R. BANKR. P. 7062, 9014, 3020, 3021, 4001, 6004, and 6006

FED. R. BANKR. P. 7062 incorporates FED. R. CIV. P. 62, which provides that no execution may issue on a judgment until 10 days after its entry. Rule 7062 applies on its face to adversary proceedings, but it is also made applicable to contested matters through Rule 9014.

Professor Resnick explained that Rule 7062 had been amended over the years to make exceptions to the 10-day stay rule for certain categories of contested matters, i.e., those involving time-sensitive situations when prevailing parties have a need for prompt execution of judgments. The advisory committee had pending before it requests for additional exceptions.

The committee decided that it was not appropriate to have a long, and expanding, laundry list of exceptions for contested matters in a rule designed to address adversary proceedings. It decided, instead, to conduct a comprehensive review of all types of contested matters and determine which should be subject to the 10-day stay, taking into account such factors as the need for speed and whether appeals would be effectively mooted unless the order is stayed. As a

result of the review, the advisory committee concluded as a matter of policy that the 10-day stay should *not* apply to contested matters generally, unless a court rules otherwise in a specific case.

Accordingly, the advisory committee decided: (1) to delete the language in Rule 9014 that makes Rule 7062 applicable to contested matters; and (2) to delete the list of specific categories of contested matters in Rule 7062. Thus, as amended, Rule 7062 would apply in adversary proceedings, but not in contested matters.

Professor Resnick added that the advisory committee had decided that there should be four specific exceptions to the general rule against stay of judgments in contested matters. The exceptions should be set forth, not in Rules 7062 or 9014, but in the substantive rules that govern each pertinent category of contested matter. Accordingly, the advisory committee recommended that the following categories of orders be stayed for a 10-day period, unless a court orders otherwise:

1. FED. R. BANKR. P. 3020(e) and 3021 - an order confirming a plan;

2. FED. R. BANKR. P. 4001 - an order granting a motion for relief from the automatic stay under Rule 4001(a)(1);

3. FED. R. BANKR. P. 6004 - an order authorizing the use, sale, or lease of property other than cash collateral; and

4. FED. R. BANKR. P. 6006 - an order authorizing a trustee to assign an executory contract or unexpired lease under 11 U.S.C. § 365(f).

The committee voted without objection to approve the proposed amendments for publication.

FED. R. BANKR. P. 1017

Professor Resnick stated that Rule 1017, governing dismissal or conversion of a case, currently provides that all parties are entitled to notice of a motion by a United States trustee to dismiss a chapter 7 case for failure to file schedules. The advisory committee would revise the rule to provide that only the debtor, the trustee, and other parties specified by the court are entitled to notice. He pointed out that the revision would avoid the expense of sending notices to all creditors.

FED .R. BANKR. P. 1019

Professor Resnick reported that several changes were being proposed in Rule 1019, governing conversion of a case to chapter 7. He said that the revised rule would clarify that a

motion for an extension of time to file a statement of intention regarding collateral must be filed or made orally before the time expires. The amendments would also clarify ambiguities in the rule regarding the method of obtaining payment of claims for administrative expenses. The rule would specify that a holder of such claims must file a timely request for payment under § 503(a) of the Code, rather than a proof of claim, and would set a deadline for doing so. The committee would conform the rule to recent statutory amendments and provide the government a period of 180 days to file a claim.

FED. R. BANKR. P. 2002

Professor Resnick stated that the proposed revisions to Rule 2002(a)(4) would save noticing costs. Under the current rule, notice of a hearing on dismissal of a case for failure of the debtor to file schedules must be sent to every creditor. The rule would be amended to conform with the revised Rule 1017 requiring that notice be sent only to certain parties. The same revision would be made with regard to providing notice of dismissal of a case because of the debtor's failure to pay the prescribed filing fee.

FED. R. BANKR. P. 2003

Professor Resnick noted that Rule 2003(d)(3) governs the election of a chapter 7 trustee. It requires the United States trustee to mail a copy of a report of a disputed election to any party in interest that has requested it. The revised rule would give a party 10 days from the date the United States trustee files the report—rather than 10 days from the date of the meeting of creditors—to file a motion to resolve the dispute.

Professor Resnick pointed out that the Congress had amended the Bankruptcy Code in 1994 to authorize creditors to elect a trustee in a chapter 11 case. The advisory committee then amended Rule 2007.1 to provide procedures for electing and appointing a trustee. The revised rule—scheduled to take effect on December 1, 1997—provides that the election of a chapter 11 trustee is to be conducted in the manner provided in Rule 2003(b)(3) for electing a chapter 7 trustee. The proposed revisions to Rule 2003(d), governing the report of a trustee's election and the resolution of a disputed election, are patterned after newly-revised Rule 2007.1(b)(3).

FED. R. BANKR. P. 4004 and 4007

Professor Resnick said that the advisory committee made companion changes in Rule 4004, governing objections to discharge of the debtor, and Rule 4007, governing complaints to determine the dischargeability of a particular debt. The advisory committee proposed amending these rules to clarify that the deadline for filing a complaint objecting to discharge or dischargeability is 60 days after the first date set for the meeting of creditors, whether or not the meeting is actually held on that date. The committee would also revise both rules to provide that a motion for an extension of time to file a complaint must be filed before the time has expired.

FED. R. BANKR. P. 7001

Professor Resnick explained that Rule 7001, which defines adversary proceedings, would be amended to provide that an adversary proceeding is not necessary to obtain injunctive or other equitable relief if that relief is provided for in a reorganization plan.

FED. R. BANKR. P. 7004

Professor Resnick noted that Rule 7004(e), governing service, provides that service of a summons (which may be by mail) must be made within 10 days of issuance. The proposed revision would carve out an exception by providing that the 10-day limit does not apply if the summons is served in a foreign country.

FED. R. BANKR. P. 9006

Professor Resnick noted that Rule 9006(c)((2), as amended, would prohibit any reduction of the time fixed for filing a request for payment of an administrative expense incurred after commencement of a case and before conversion of the case to chapter 7.

The committee voted without objection to approve all the proposed amendments above for publication.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Niemeyer presented the report of the advisory committee, as set forth in his memorandum of May 21, 1997 (Agenda Item 5).

Amendments for Judicial Conference Approval

FED. R. CIV. P. 23

Judge Niemeyer reported that the advisory committee had studied class actions and mass tort litigation in depth for nearly six years. During the course of that study, it had actively solicited the views of lawyers, judges, and others on every aspect of class litigation. The advisory committee, he said, had concluded that most of the perceived problems affecting class litigation and mass torts simply could not be resolved through the federal rulemaking process. After intense investigation and discussion, the advisory committee published the following five relatively modest proposals to amend Rule 23:

1. Expanding the list of factors that a judge must consider undr Rule 23(b)(3) in determining whether common questions of law or fact predominate over questions

affecting only individual class members and whether a class action is superior to other available methods for adjudicating the controversy;

2. Providing explicit authorization for a judge to certify a settlement class;

3. Requiring a judge to conduct a hearing before approving a settlement;

4. Requiring a judge to make a determination as to class certification "when practicable," rather than "as soon as practicable"; and

5. Authorizing a discretionary, interlocutory appeal of a class certification decision.

Judge Niemeyer stated that the advisory committee had received an enormous volume of responses on the proposed changes to Rule 23 and had conducted three public hearings . He stated that the comments had been very thoughtful and informative, and the debate had been conducted on the highest intellectual and practical level. Following the publication period and the hearings, the committee asked the Administrative Office to collect and publish the statements of lawyers, academics, and others for consideration by the Standing Committee and the advisory committees.

Judge Niemeyer reported that excellent points had been made by commentators on each side of each proposal. In the end, however, it was clear to the advisory committee that there are deep philosophical divisions of opinion on many of the issues. Moreover, the advisory committee had decided that it would have to defer further consideration of settlement class issues until the Supreme Court rendered a decision in *Amchem Products, Inc. v. Windsor.*

He stated that the advisory committee at this time was seeking Judicial Conference approval of only two proposed changes in Rule 23:

1. a new subdivision (f) that would authorize interlocutory appeals, and

2. an amendment to paragraph (c)(1) that would require a court to make a class certification decision "when practicable."

He added that the other proposed changes in the rule had either been withdrawn by the advisory committee or were being deferred for further study.

Rule 23(f) - Interlocutory Appeal

Judge Niemeyer stated that there was a strong consensus within the advisory committee and among the commentators in favor of permitting a court of appeals—in its sole discretion—to take an appeal from a district court order granting or denying class action certification. The

proposal would enable the courts of appeals to develop the law. This change alone, he said, might well prove to be the most effective solution to many of the problems with class actions. He emphasized that the advisory committee believed that appellate review of class action determinations was very beneficial and should not be impeded by the restraints imposed by mandamus and 28 U.S.C. § 1292(b). He added that the appellate review provision was not philosophically connected to any of the other proposed changes in Rule 23. Therefore, it should be separated from the other proposed changes and approved by the Judicial Conference immediately.

Several members pointed out that it was generally not appropriate to proceed with piecemeal changes in a rule, especially when additional changes in a rule are anticipated in the next year or two. But the consensus of the committee was that the proposed interlocutory appeal provision of Rule 23(f) was sufficiently distinct from the other changes in the rule under consideration and of sufficient benefit that it justified an exception to the normal rule.

One of the members said that the change might result in thousands of additional cases in the courts of appeals and add substantial costs to litigants, especially in civil rights cases. But many of the members of the committee, including its appellate judges, stated that the courts of appeals make prompt decisions—usually within a matter of days—on whether to accept an interlocutory appeal. And once they accept an interlocutory appeal, they normally decide it on the merits with dispatch. Several members emphasized that the courts of appeals simply will not take cases that do not appear to have merit. Some judges added that class action decisions were an important area of jurisprudence that could be helped by having more appellate decisions, especially at early stages of litigation before the parties incur great costs and delays.

The committee voted without objection to approve the proposed new Rule 23(f) and send it to the Judicial Conference.

Rule 23(c)(1) - "When practicable"

Some members observed that changing the time frame for the court to make a class action determination from "as soon as practicable" to "when practicable" merely conforms the rule to current practice in the federal courts. They argued that the amendment provides a district judge with needed flexibility to deal with the various categories and conditions of class actions in the district courts. Judge Niemeyer pointed out that district judges already exercise that flexibility without negative consequence, and no adverse comments had been received on the proposal during the public comment period.

Others argued, though, that the proposed amendment would make a significant change in the rule because it could result in district judges delaying their certification decisions. They pointed out that in 1966 the drafters of Rule 23 had made a conscious decision to require the court to make a prompt class certification decision, leaving substantive decisions to be made later

in the case when they would be binding on all parties. It was suggested, too, that the impact of the class certification decision on absentees was a very serious question that needed to be addressed further.

Some members suggested that the proposed amendment be deferred for further consideration by the advisory committee and included eventually with the package of other proposed amendments to Rule 23.

The motion to approve the amendment to Rule 23(c)(1) and send it to the Judicial Conference failed by a voice vote.

Other proposed amendments to Rule 23

Judge Niemeyer reported that the advisory committee had decided not to proceed with proposed new subparagraph (b)(3)(A). It would have added as an additional matter pertinent to the court's findings of commonality and superiority "the practical ability of individual class members to pursue their claims without class certification." He explained that the advisory committee had decided that the benefits to be derived from the change were outweighed by the risk of introducing changes in the rule. The committee also abandoned further action on the proposed amendment to subparagraph (b)(3)(B), which slightly clarified the existing subparagraph (A).

Judge Niemeyer said that the advisory committee had decided to conduct further study on the proposed amendment to subparagraph (b)(3)(C). It would authorize the court to consider the maturity of related litigation involving class members in making its commonality and superiority findings. He pointed out that as a result of public comments, the committee had improved the language of the amendment to read as follows: "the extent and nature of any related litigation and the maturity of the issues involved in the controversy."

Judge Niemeyer advised that the proposed subparagraph (b)(3)(F) would add to the list of matters pertinent to the court's findings "whether the probable relief to individual class members justifies the costs and burdens of class litigation." He said that it had attracted an enormous amount of public comment, and articulate views had been expressed both in favor of and against the proposed amendment. He pointed out that the debate over the amendment had disclosed competing economic interests and basic philosophical differences as to the very purposes of Rule 23 and class actions.

He reported that the advisory committee had not made a final decision as to whether to proceed with the amended Rule 23(b)(3)(F). It would continue to study the matter further and consider five possible options at its next meeting.

He added that the advisory committee had also deferred action on the proposed new paragraph (b)(4), regarding settlement classes, until after Supreme Court action in *Amchem Products, Inc. v. Windsor.*

Judge Niemeyer reported that the advisory committee would consider all remaining class action proposals as part of a package at its October 1997 meeting. He reemphasized that the class action debate had evoked substantial public interest and had disclosed deep philosophical divisions. On the one hand, there had been a great deal of support for amending the rule to eliminate cited abuses in current practices, particularly class actions resulting in insignificant awards for individual, largely uninterested, class members and large fees for attorneys. On the other hand, many commentators argued that class actions, regardless of the monetary value of individual awards, serve vital social purposes.

He added that sentiment had also been expressed in favor of making no additional changes in the rule because: (1) resolution of the perceived problems may well lie beyond the jurisdiction of the rules committees to correct; and (2) the courts of appeals may resolve many of the problems through the development of case law.

Informational Items

Judge Niemeyer reported that the advisory committee was making good progress in its comprehensive study of discovery. It was evaluating the role of discovery in civil litigation, its cost, and its relation to the dispute-resolution process. As part of the review, the committee would consider whether any changes could be made to lessen the cost of discovery while retaining the value of the information obtained.

In addition, he pointed out that both the Civil Justice Reform Act of 1990 and the 1993 amendments to the Federal Rules of Civil Procedure had authorized substantial local court variations in pretrial procedures. He stated that the advisory committee would like to return to greater national uniformity in civil practice as a matter of policy, but it realized the difficulty of gaining acceptance of uniform national rules after several years of local variations.

Judge Niemeyer stated that the advisory committee had planned a major symposium on discovery, to be held in September 1997 at Boston College Law School. Knowledgeable members of the bar and the academic community had been invited to identify and explore issues and make recommendations to the committee. He invited the members of the Standing Committee to attend and participate in the conference.

He reported that the advisory committee had appointed an ad hoc subcommittee to review proposed changes in the admiralty rules. The subcommittee was working closely with the admiralty bar and the Department of Justice. He pointed out that the provisions in the admiralty rules dealing with forfeiture of assets were particularly important since the admiralty rules

govern, by reference, many categories of non-admiralty forfeiture proceedings As part of its drafting process, the subcommittee had concluded that the time limits set forth in the rules for regular admiralty cases should be different from those for other categories of forfeiture cases.

Judge Niemeyer expressed concern that several bills had been introduced in the Congress to legislate forfeiture proceedings. The drafters had not had the benefit of the broad input that the advisory committee and its subcommittee had received from the bar and others. As a result, the bills, among other things, overlooked important distinctions between admiralty proceedings and other types of forfeiture proceedings.

Judge Niemeyer reported that the Civil Rules Committee was studying the inconsistent and misleading provisions governing the timing of the answer to a writ of habeas corpus under Civil Rule 81(a)(2) and Rule 4 of the § 2254 Rules, which was adopted after Rule 81(a)(2) was last amended. Correcting Rule 81 would be directly affected by and dependent on any change in the rules governing § 2254 proceedings involving the timing of the habeas corpus answer. Accordingly, Judge Niemeyer recommended that this topic should be initially addressed by the Criminal Rules Committee. Judge Jensen and Professor Schlueter, chair and reporter, respectively of the Criminal Rules committee agreed to have their committee study the issue.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Jensen presented the report of the advisory committee, as set forth in his memorandum of May 21, 1997 (Agenda Item 6).

Amendments for Judicial Conference Approval

FED. R. CRIM. P. 5.1 AND 26.2

Judge Jensen pointed out that the amendments to Rules 5.1 and 26.2 were companion amendments. Rule 26.2 governs the production of prior statements of a witness once the witness has testified on direct examination. It has been amended several times in recent years to expand its scope to other categories of criminal proceedings besides trials, such as sentencing hearings, detention hearings, and probation revocation hearings. The proposed amendments would extend the rule's application to preliminary examinations conducted under Rule 5.1.

One member raised the possibility that the rule might be read as encompassing a witness at a preliminary examination who has testified previously at a grand jury proceeding. Some members responded that the situation was at most a theoretical possibility, since preliminary examinations are not conducted once a grand jury returns an indictment.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. CRIM. P. 31

Judge Jensen explained that the proposed amendments to Rule 31 would require that polling of a jury be conducted individually. He added, though, that the rule did not require individual polling as to each count.

The chair noticed that the text of the amended rule used "must," rather than "shall." She suggested that the use of "shall" might be more prudent in light of the Supreme Court's concern over making style changes in the rules on a piecemeal basis. Judge Jensen and Professor Schlueter concurred and said that the advisory committee would continue to use "shall" until it was ready to send forward a complete style revision of the entire body of criminal rules.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference

FED. R. CRIM. P. 33

Judge Jensen stated that under the current rule, a motion for a new trial based on newly-discovered evidence must be made within two years after the "final judgment." The proposed amendment, as published, would have established a time period of two years from "the verdict or finding of guilty." During the public comment period, the committee received comments that the proposal would seriously reduce the amount of time available to file a motion for a new trial under some circumstances. Accordingly, the advisory committee decided that an additional year was appropriate, and it set the deadline at three years from the verdict of finding of guilty.

One of the members questioned the use of the word "must" on lines 9 and 12. Following discussion, the consensus of the committee was that the use of "may" in the text of the existing rule should be retained.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference

FED. R. CRIM. P. 35

Judge Jensen pointed out that the proposed amendments to Rule 35(b) would allow a court to aggregate a defendant's pre-sentencing and post-sentencing assistance in determining whether to reduce a sentence to reflect the defendant's "substantial assistance" to the government.

Judge Jensen agreed to a suggestion to delete the comma in line of the text. He did not agree to change the words "subsequent assistance" to "later assistance," because the words "subsequent assistance" are contained in the pertinent statute and have been used in the case law.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference

FED. R. CRIM. P. 43

Judge Jensen explained that the proposed amendment to the rule was intended to provide consistency in the situations when the defendant's presence is required at a resentencing proceeding.

Judge Jensen noted that Rule 35(a) deals with a situation when the sentence has been reversed on appeal and the case remanded for resentencing. This involves a "correction" of the sentence, and the defendant should be present for the resentencing. But a court should be permitted to reduce or correct a sentence under Rule 35(b) or (c) without the defendant being present. Rule 35(b) deals with reduction of a sentence for substantial assistance. Rule 35(c) gives the trial court seven days to correct a sentence for arithmetical, technical, or other clear error. There was also no need to require the presence of the defendant at resentencing hearings conducted under 18 U.S.C. § 3582(c). That statute governs resentencing conducted as a result of retroactive changes in the sentencing guidelines or a motion by the Bureau of Prisons to reduce a sentence based on "extraordinary and compelling reasons." Judge Jensen emphasized, however, that the court retains discretion to require or permit a defendant to attend any of these resentencing proceedings.

The committee voted without objection to approve the proposed amendment and send it to the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 6

Judge Jensen reported that the proposed amendments to the rule addressed two issues. First, under the present rule, necessary interpreters are authorized to be present during grand jury sessions, but not during grand jury deliberations. The proposed amendment would allow an interpreter for a deaf juror to be present while the grand jury is deliberating or voting.

Second, under the present rule, the entire grand jury must be present in the courtroom when an indictment is returned. The proposed amendment would authorize the foreperson or deputy foreperson to return the indictment in open court on behalf of the jury. The amendment would save time, expense, and inconvenience by not requiring the whole grand jury to be transported to the courtroom.

In addition, Judge Jensen reported that legislation had just been introduced in the Congress by Representative Goodlatte, H.R. 1536, that would reduce the size of a grand jury to nine persons, with a minimum of seven needed to return an indictment. He pointed out that the advisory committee had not had the legislation on the agenda of its last meeting. Accordingly, it had not taken a position on its merits. Historically, however, the advisory committee from 1974 to 1977 favored a reduction in the size of the grand jury.

Judge Jensen said that the current legislation had been referred for response to the Judicial Conference's Court Administration and Case Management Committee and Criminal Law Committee. Both committees had considered the measure at their recent meetings and decided to recommend referring the matter to the Advisory Committee on Criminal Rules.

The members agreed that the proposal to reduce the size of grand juries should proceed through the normal Rules Enabling Act process, even though the process takes considerable time and the Congress might resolve the matter sooner by legislation. One member suggested, however, that the issue was potentially controversial and might not be enacted by the Congress. Judge Jensen stated that the advisory committee would consider the matter at its October 1997 meeting, and any proposed amendments to Rule 6 would proceed through the normal public comment process.

Judge Jensen argued that the two changes in Rule 6 recommended by the advisory committee should proceed to immediate publication without awaiting action regarding the size of grand juries. Several members concurred and urged publication of the current amendments.

Some members, however, questioned why the proposed amendment should be limited to interpreters for deaf jurors. And one member questioned the use of the word "deaf," favoring "hearing impaired" as the more appropriate characterization.

Judge Easterbrook moved to strike the word "deaf" from the amendment. The committee approved the motion on a voice vote, with four members opposed.

Judge Jensen and Professor Schlueter responded that the advisory committee was very reluctant to open up the exception by allowing all potential types of interpreters into the grand jury deliberations. Accordingly, it had specifically limited the amendment to interpreters for deaf jurors. One participant suggested that the advisory committee explicitly solicit public comments on whether the proposal should be broadened to cover other groups.

Judge Sear moved for reconsideration of Judge Easterbrook's amendment to strike the word "deaf" from the amendment. The committee approved the motion by voice vote.

On reconsideration, the committee approved Judge Easterbrook's motion by a 6-5 vote. Then it approved without objection the amendments to Rule 5 for publication.

One of the members suggested that the committee note to the rule was inconsistent with the text. He recommended that the advisory committee rewrite the note to Rule 6(d) to notify the public that it was seeking input on the issue of how broad the exception for interpreters should be.

FED. R. CRIM. P. 11

Judge Jensen reported that the first proposed amendment in Rule 11 would merely update the rule by changing the term "defendant corporation" to "defendant organization, as defined in 18 U.S.C. § 18."

The committee voted without objection to approve the proposed amendment for publication.

The second amendment, referred to the advisory committee by the Criminal Law Committee, would add to the Rule 11(c) colloquy a requirement that the court inform the defendant of the terms of any provision in a plea agreement waiving the defendant's right to appeal or collaterally attack the sentence. He said that it was increasingly common for plea agreements to include an agreement by the defendant not to appeal. But the current rule does not require the court to inquire into the waiver of appeal. He suggested that the amendment would provide greater certainty as to the plea the defendant enters.

The committee voted without objection to approve the proposed amendment for publication.

Judge Jensen said that the final proposed changes to the rule govern plea agreements and plea agreement procedures under Rule 11(e). They had been coordinated with the United States Sentencing Commission and the Criminal Law Committee.

He explained that the rule had never been modified to take into account the impact of the sentencing guidelines, which have enlarged the very concept of a sentence and the procedures for reaching a sentence. A court, for example, now must determine whether a particular provision of the guidelines, a policy statement of the commission, or a sentencing factor is applicable in a case. Accordingly, the amendments to Rule 11(e) would recognize that a plea agreement may address not only a particular sentence but also the applicability of a specific sentencing guideline, sentencing factor, or Commission policy statement.

A member suggested that the proposed style change in lines 18-19—from "engage in discussions with a view toward reaching an agreement" to "discuss an agreement"—was inappropriate. He recommended that the language be amended to read "agree that."

Several members expressed concern that the proposed amendment to Rule 11(e)(1)(C) would authorize the defendant and the United States attorney to agree to "facts" that are not established facts. They argued that it would further remove the judge as a check on the integrity of the sentencing process and as a guardian in assuring equal treatment for all defendants. Judge Jensen acknowledged the concern and said that the Sentencing Commission also was aware of potential problems with inappropriate agreements. Nevertheless, the advisory committee and the Commission urged publication and public comment on the matter. Mr. Pauley added that Department of Justice's internal guidelines prohibit prosecutors from agreeing to unestablished facts. It was also pointed out by several members that the ultimate bulwark against abuse is the district judge's authority to reject the plea agreement.

The committee voted without objection to approve the proposed amendments for publication.

FED. R. CRIM. P. 24

Judge Jensen explained that under the present rule, alternate jurors must be discharged when the jury retires to deliberate. The proposed amendments would eliminate this requirement, thereby giving the trial court discretion either to retain or discharge the alternate jurors.

The committee voted without objection to approve the proposed amendments for publication.

FED. R. CRIM. P. 30

Judge Jensen stated that the proposed amendments would permit the trial court, in its discretion, to require or permit the parties to file any proposed instructions before trial.

The committee voted without objection to approve the proposed amendments for publication.

FED. R. CRIM. P. 32.2

Judge Jensen reported that the proposed new Rule 32.2 would consolidate several procedural rules governing the forfeiture of assets in a criminal case. The changes had been motivated in large measure by the Supreme Court's decision in *Libretti v. United States*, 116 S. Ct. 356 (1995), which made it clear that forfeiture is a part of the sentence. The proposed new rule, accordingly, would incorporate forfeiture into the sentencing process. He pointed out that

the rule addressed the problem of third parties whose property rights needed to be protected. It also recognized that forfeiture proceedings are akin to a civil case and, therefore, provided for appropriate discovery.

Judge Jensen said that competing bills had been introduced in the Congress dealing with forfeiture of assets. Judge Stotler added that the bills were replete with references to the federal rules. She said that she had been struck by the fact that the Congress apparently wanted to move quickly on forfeiture legislation, but the subject matter was very complex and not well understood by lawyers and judges. There were already more than 100 forfeiture statutes on the books, and the outcome of the various forfeiture bills in the Congress was uncertain. Judge Stotler pointed out that the rules committees had attempted to deal only with a small part of the forfeiture problem, and she suggested that it would be preferable if the Congress enacted a uniform forfeiture code or simply referred all procedural issues to the rules process.

Judge Jensen responded that the advisory committee's proposal dealt only with criminal forfeiture as a part of sentencing. Mr. Waxman added that it would be desirable to have a concordance between the various statutes and rules and between civil and criminal forfeiture. Nevertheless, he urged that the proposed new Rule 32.2 be published for comment. He stated that forfeiture was a controversial subject, and the Department of Justice preferred to have criminal forfeiture procedures enacted carefully through the Rules Enabling Act process, rather than by legislative happenstance in the Congress.

Some of the members expressed concern over the complexity of the proposed rule and its blending of civil and criminal concepts. They suggested that consideration might be given to drafting a simple rule declaring that the pertinent property was forfeited to the government. Interested third parties, accordingly, would have to file a civil suit to assert their property rights.

The committee voted without objection to approve the proposed new rule for publication.

FED. R. CRIM. P. 54

Judge Jensen explained that the proposed amendment to the rule was technical. It would merely eliminate the reference to the United States District Court for the District of the Canal Zone, which no longer exists.

The committee voted without objection to approve the proposed amendment for publication.

Informational Items

Judge Jensen reported that the advisory committee had received a recommendation from the Federal Magistrate Judges Association that Rule 5(c) be amended to delete its restriction on a magistrate judge continuing a preliminary examination. He said that the advisory committee had concurred with the association on the merits of the proposal, but it concluded that the restriction emanated from the underlying statute, 18 U.S.C. § 3060, on which the rule is based. Therefore, the committee recommended that the Standing Committee ask the Judicial Conference to seek legislation to amend the statute.

Mr. McCabe added that the recommendation of the advisory committee had just been endorsed by the Magistrate Judges Committee of the Judicial Conference

Judge Easterbrook moved to reject the recommendation seeking amendment of 18 U.S.C. § 3060(c) on the grounds that the proposed change should be enacted through the Rules Enabling Act process, relying eventually on operation of the supersession clause. He pointed out that the Supreme Court recently had voided the service provisions in the Suits in Admiralty Act on supersession clause grounds. *Henderson v. United States,* 116 S. Ct. 1638 (1996)

The committee voted without objection to approve the motion.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Professor Capra presented the report of the advisory committee, as set forth in Judge Fern M. Smith's memorandum of May 1, 1997 (Agenda Item 9).

Amendments for Judicial Conference Approval

FED. R. EVID. 615

Professor Capra stated that the proposed amendment to the rule took account of recent statutory changes giving crime victims the right not to be excluded from criminal trials.

Judge Easterbrook expressed concern over incorporating references to specific statutes in the rules. He pointed out that statutes are frequently amended or superseded. Therefore, he argued for a generic reference to categories of persons who may not be excluded from proceedings. **He moved that the following language be added to the end of Rule 615: "(4) a person authorized by statute to be present."** Professor Capra responded that the advisory committee had included a specific statutory reference because it believed that a generic reference might not be strong enough in light of the Congress' express interest and recent actions regarding victims' rights.

The motion was approved by voice vote without objection.

Professor Capra requested that the amendment be approved without publishing for public comment, since it was merely a conforming amendment. One of the members concurred and emphasized that it was very important to move quickly on the proposal because of congressional interest and policy in expanding victims' rights.

The committee voted by voice vote without objection that the proposed amendment was conforming and approved the rule without publication for public comment.

Amendments for Publication

FED. R. EVID. 103

Professor Capra explained that proposed new subdivision (e) addressed the issue of when a party must renew at trial an in limine objection decided adversely to the party. He noted that a version of the proposal had been published once before, but later withdrawn by the advisory committee after public comments had revealed the text to be unclear. The advisory committee then redrafted the rule, patterning it in large part on a Kentucky state court rule. He pointed out that the third sentence of the new subdivision was intended to codify *Luce v. United States,* 469 U.S. 38 (1984), which held that a criminal defendant must testify at trial in order to preserve an objection to the trial court's decision admitting the defendant's prior convictions for purposes of impeachment.

In response to a question from one of the members, Professor Capra stated that the advisory committee had deliberately limited the sentence's application to criminal cases, believing that its extension to civil cases might cause problems.

Judge Easterbrook expressed several objections to the new subdivision and moved to send it back to the advisory committee for further drafting. He argued that, as formulated, the third sentence of the proposed text would apply only when the court's ruling is conditioned on "the testimony of a witness," rather than on the introduction of evidence. He pointed out that, although the *Luce* case involved testimony, the principle on which it rested is not limited to testimony. In other words, there is no logical distinction between testimony and documentary evidence. Therefore, the court's ruling should be conditioned on admissibility, rather than on testimony. In addition, the text of the third sentence implied that the court's ruling itself was conditional. In reality, it is merely dependent on a party's decision to introduce evidence.

He also questioned the formulation of the second sentence of the subdivision, which states that a motion for an advance ruling, when definitively resolved on the record, is sufficient to "preserve error" for appellate review. The implication of the text, he said, was that the movant may preserve the claim for review, but not the opponent. He added that use of the words

"preserve error" was inappropriate, since there is no intent to preserve error. Rather, the language should be recast to state that a party need not make an exception to a particular ruling in order to preserve the right to appeal. Moreover, it is the court's definitive ruling against a party that preserves the right to appeal, not "a motion for an advance ruling."

Several members expressed support for the substance of the proposal. One lawyer-member emphasized that it represented a significant improvement over the earlier draft. **The consensus of the committee, however, was that the subdivision should be returned to the advisory committee for redrafting in light of the comments made during the discussion.**

Informational Items

Professor Capra pointed out that the committee notes to several of the Federal Rules of Evidence contained inaccuracies. The notes had been prepared to support and explain the advisory committee's draft of the rules. But the rules ultimately enacted by the Congress differed in several respects from the committee's version.

He reported, for example, that the advisory committee had reviewed the notes recently and had discovered that references in 21 notes to rules that were not in fact approved by the Congress. In some instances the committee notes were directly contrary to the positions eventually taken by the Congress. Accordingly, the committee notes were a potential trap for unwary attorneys.

He stated that the advisory committee was considering preparing a short list of editorial comments pointing out the discrepancies between the notes and the rules and asking law book publishers to include the comments in their publications of the rules. He explained that the proposed comments would consist of short bullets set forth at each troublesome section of the rules. The members were asked for their initial views of this proposed course of action.

A couple of participants suggested that it might be preferable to inform law book publishers that the committee notes are not meaningful and should no longer be included in their publications. Other participants, however, responded that the notes were a part of the legislative history of the rules and should continue to be made available. Some members suggested that any action that would help clarify the matter for users should be encouraged. Professor Coquillette added that the reporters had agreed to discuss the matter at their working luncheon.

STATUS REPORT ON THE ATTORNEY CONDUCT STUDY

Professor Coquillette reported that he had completed work on the several background studies of attorney conduct that the committee had requested of him. He pointed out that the last two studies—analyzing the case law under FED. R. APP. P. 46 and bankruptcy cases involving

attorney conduct rules—were set forth as Agenda Item 7. He thanked the Federal Judicial Center in general, and Marie Leary in particular, for invaluable assistance in conducting the studies, especially the survey of existing district court practices and preferences. He also thanked Judge Logan and Professor Mooney for their help in compiling the appellate court study and Patricia Channon for her help on the bankruptcy study. He concluded that the committee had now studied attorney conduct in the federal courts in every meaningful way.

Potential Courses of Action

Professor Coquillette suggested that the committee might wish to consider four possible courses of action regarding attorney conduct:

1. Do nothing.

2. Draft a model local rule on attorney conduct that could be adopted voluntarily by the district courts, and possibly by the courts of appeals.

3. Draft a small number of national rules to govern attorney conduct in the areas of primary concern to bench and bar.

4. Draft both a model local rule and uniform national rules.

He stated that the committee had conducted two special conferences on attorney conduct with knowledgeable lawyers, professors, and state bar officials. At the conferences, the participants had expressed a wide range of diverging views on how best to address attorney conduct issues. There was no clear consensus among the participants as to whether conduct matters should be governed by uniform national rules or by local court rules. Nevertheless, the one thing that all the participants agreed upon was that the present system was deficient in several respects and that the rules committees should take some kind of action.

He pointed out that the principal advantage of national rules is that they would set forth a uniform, national standard applicable in all federal courts. National rules, moreover, would have the benefit of public comment and national debate under the Rules Enabling Act process. On the other hand, a model local rule could be adopted more expeditiously and would not have to be submitted to the Congress. He noted that the recent Federal Judicial Center survey had shown that 30% of the courts favored national rules on attorney conduct, while 62% favored a local-rule approach. He added that, to guide the committee's deliberations, he had included in the agenda materials samples of: (1) a model local rule for the courts of appeals; (2) an amended version of FED. R. APP. P. 46; and (3) uniform federal rules of attorney conduct.

The members discussed generally the advantages and disadvantages of each approach. Several members emphasized that all attorneys as a matter of policy should be governed by the

conduct rules of the states in which they are licensed to practice. They added, however, that it might be appropriate to carve out a very limited number of exceptions for federal lawyers that would govern areas where there were overriding federal interests.

Concerns of Federal Lawyers

Mr. Waxman pointed out that federal lawyers face uncertainty in their practice and need, as a minimum, a clear federal law to govern conflicts between jurisdictions. He added that federal law was needed in certain limited situations that impacted on the work of federal attorneys. Chief Justice Veasey responded that the Department of Justice's interest in uniformity was understandable. Nevertheless, state bars also want uniformity for all lawyers in the state. There should not be one set of conduct standards in the state courts and a different standard for the federal courts of that state.

Mr. Waxman was asked which conduct issues were of particular concern to the Department of Justice and federal lawyers. He responded that there were no problems with the rules governing attorney conduct within a court setting. Rather, the Department's concern was limited to areas where state ethical rules reach, or purport to reach, conduct by federal prosecutors and other attorneys conducting investigations outside the court. These include such matters as contacts with represented parties, subpoenas directed to attorneys, and the presentation of exculpatory evidence to grand juries.

Concerns in Bankruptcy Cases

Professor Coquillette explained that attorney conduct in the bankruptcy courts raised certain unique problems. The local rules of the bankruptcy courts generally adopt the rules of the district courts. Nevertheless, actual practice in the bankruptcy courts is very different from that in the district courts. Bankruptcy judges usually look for guidance on matters of attorney conduct to the Bankruptcy Code and to the common law of bankruptcy. There are, he said, serious differences among the bankruptcy courts in applying these laws and a lack of clear and specific conduct case law and guidelines. He recommended that further research be conducted on attorney conduct issues and practices in the bankruptcy courts.

Judge Duplantier reported that the Advisory Committee on Bankruptcy Rules had a subcommittee in place that was considering attorney conduct issues in bankruptcy cases. Professor Resnick stated that contemporary bankruptcy practice—with thousands of creditors and claimants in an individual case—raises a number of specialized conduct issues that may not be addressed adequately by existing state rules or by model local court rules. He pointed out, for example, that the Bankruptcy Code itself defines a "disinterested person," and it requires court approval of certain appointments. The statutory definition, he said, was troublesome and had been interpreted in different ways by the various courts of appeals. He also noted that the advisory committee was considering potential amendments to FED. R. BANKR. P. 2014, which

requires an attorney, or other professional person, to disclose certain information to the court as part of the appointment process.

Committee Action

Professor Hazard moved that the committee begin drafting rules, identifying the problems, and eliciting discussion.

Judge Stotler concluded that there was a consensus among the committee members that work should begin on drafting a set of national rules providing that state law governs attorney conduct in the federal courts except in a few limited areas, such as certain investigatory functions and certain aspects of bankruptcy practice. She asked Professor Coquillette to continue with the work of drafting potential rules and making presentations on attorney conduct issues to the advisory committees.

POSTING LOCAL RULES AND OFFICIAL BANKRUPTCY FORMS ON THE INTERNET

Mr. Rabiej reported that courts are required by statute and rule to send copies of their local rules to the Administrative Office. The AO maintains the rules in loose-leaf binders in its library. They are not readily available to the public.

He stated that the rules office intends to begin posting the local rules on the Internet as a service to public. He added that the office had also proposed posting the official bankruptcy forms on the Internet.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker, chair of the subcommittee, reported that the subcommittee had met with Professor Coquillette and had drafted a short set of proposed guidelines designed to expedite the process of reviewing proposed amendments for style. He pointed out that the advisory committees and their reporters faced extremely short deadlines for completing drafts of proposed amendments and committee notes.

Judge Parker said that the guidelines recommended that drafts be submitted by the respective reporters to the rules office in the AO at least 30 days in advance of an advisory committee meeting. The rules office immediately would send copies to the advisory committee, the style subcommittee, and Mr. Garner, the style consultant. Mr. Garner would then coordinate and consolidate the comments of the style subcommittee within 10 days and return them to the advisory committee reporter.

The reporter would then have 10 days to consider the comments of the style subcommittee, incorporate those he or she deemed appropriate, and return a revised draft to the rules office for transmission to the advisory committee members. Accordingly, the advisory committee members would have the original draft and the suggested style changes at least one week before the committee meeting. After the advisory committee meeting, the reporter would have one week to send a copy of the text and note, as approved by the committee, to the rules office. This would allow the style subcommittee sufficient time before the Standing Committee meeting to make any necessary last-minute changes.

COMMITTEE PRACTICES AND PROCEDURES

Judge Stotler reported that the Executive Committee of the Judicial Conference had requested the committee's views on certain Conference committee practices and procedures. She said that she had responded to an earlier inquiry by stating that there was no need for the rules committees to have liaison members to each of the circuits. Members of the rules committees should represent the system nationally, rather than circuit interests. She added that she proposed to have the committee stand on its previous position.

On the other hand, she emphasized that the use of liaisons between committees of the Judicial Conference had been very useful. She pointed out, for example, that members of the Court Administration and Case Management Committee and the Federal-State Jurisdiction Committee had been invited to attend rules committee meetings and that Judge Easterbrook had been in contact with the chair of the Court Administration and Case Management Committee on matters involving the Civil Justice Reform Act. She stated that the use of liaisons had opened up communications with other committees, and she asked for the committee's endorsement of the increased use of liaisons with other committees.

Mr. Rabiej added that the Executive Committee had asked for the committee's views on the use of subcommittees and the need for face-to-face subcommittee meetings. He pointed out that there was an attempt to reduce the number of subcommittees generally and to restrict their meetings to telephone conferences. He reported that it was the view of the advisory committees that the use of subcommittees was very beneficial and that there was a need for certain in-person subcommittee meetings. Other participants noted that much of the subcommittees' work is conducted by telephone, correspondence, and telefax. They argued strongly, however, that it was essential for the committees to have the flexibility to conduct face-to-face meetings when needed.

REPORT ON MEETING OF LONG RANGE PLANNING LIAISONS

Judge Niemeyer reported that he and Judge Stotler had participated in the meeting of long-range planning liaisons from 13 Judicial Conference committees on May 15, 1997. He

pointed out, among other things, that the liaisons had been asked to consider whether an ad hoc committee of the Conference should be appointed to consider mass tort litigation. Judge Stotler stated that Judge Niemeyer had made an impressive presentation on the extensive work of the Advisory Committee on Civil Rules over the past six years in studying mass torts in the context of class actions. Judges Stotler and Niemeyer added that the liaisons concluded that no new committee was needed, and that if any committee of the Conference were to consider mass torts, it should be the Advisory Committee on Civil Rules.

REPORT ON UNIFORM NUMBERING OF LOCAL RULES OF COURT

Professor Squiers reported that the Judicial Conference had approved the requirement that courts renumber their local rules of court by April 15, 1997, to conform with the numbering of the national rules. She stated that half the district courts had completed their renumbering, and the remaining courts were in the process of fulfilling the requirement.

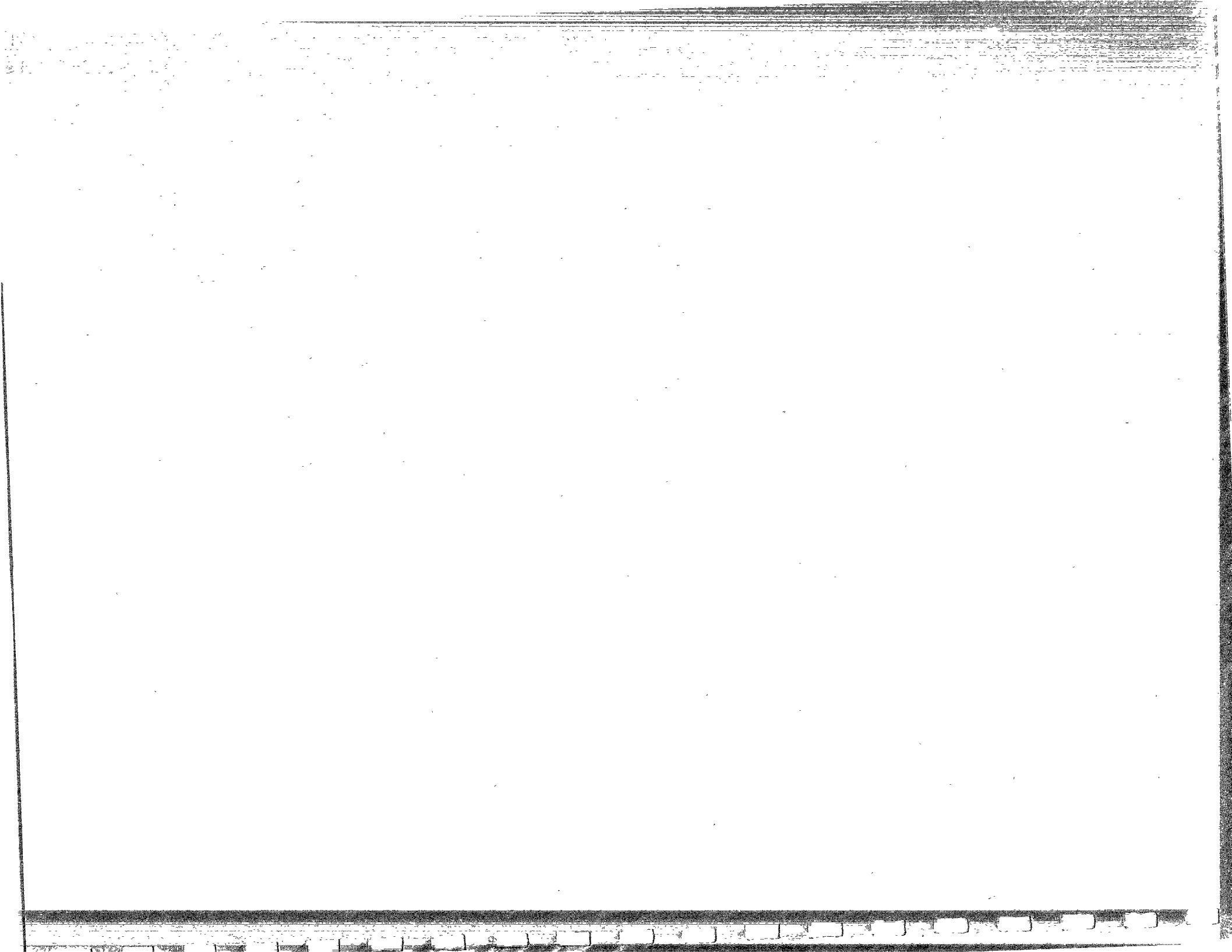
FUTURE COMMITTEE MEETINGS

Judge Stotler reported that the winter meeting of the committee would be held on January 8-9, 1998. She invited the members to select the location for the meeting, and they expressed a preference for Marina del Rey, California, if hotel space were available at a reasonable rate.

Judge Stotler reported further that the mid-year 1998 meeting would be held on either June 11-12, 1998, or June 18-19, 1998.

Respectfully submitted,

Peter G. McCabe,
Secretary



SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendments to Appellate Rules 1-48 and to Form 4 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 2-9

2. Approve the proposed revisions to Official Bankruptcy Forms 1, 3, 6F, 8, 9A-9I, 10, 14, 17, 18, and new Forms 20A and 20B ..... pp. 9-12

3. Promulgate the proposed revisions to the Official Bankruptcy Forms to take effect immediately, but permit the superseded forms to also be used until March 1, 1998 ..... pp. 12

4. Approve the proposed new Civil Rule 23(f) and transmit it to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 16-20

5. Approve the proposed amendments to Criminal Rules 5.1, 26.2, 31, 33, 35, and 43 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 21-23

6. Approve the proposed amendment to Evidence Rule 615 and transmit it to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 26-27

The remainder of the report is submitted for the record, and includes the following items for the information of the Conference:

Agenda F-18
Rules
September 1997

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure met on June 19-20, 1997. All the members attended the meeting, except Alan C. Sundberg. Acting Deputy Attorney General Seth P. Waxman attended on June 19. The Department of Justice was represented on June 20 by Ian H. Gershengorn and Roger A. Pauley.

Representing the advisory committees were: Judge James K. Logan, chair, and Professor Carol Ann Mooney, reporter, of the Advisory Committee on Appellate Rules; Judge Adrian G. Duplantier, chair, and Professor Alan N. Resnick, reporter, of the Advisory Committee on Bankruptcy Rules; Judge Paul V. Niemeyer, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge D. Lowell Jensen, chair, and Professor David A. Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules. Judge Fern M. Smith, chair of the Evidence Rules Committee, was unable to be present.

Participating in the meeting were Peter G. McCabe, the Committee's Secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief, and Mark D. Shapiro,

attorney, of the Administrative Office's Rules Committee Support Office; Patricia S. Channon of the Bankruptcy Judges Division; James B. Eaglin of the Federal Judicial Center; Professor Mary P. Squiers, Director of the Local Rules Project; and Bryan A. Garner and Joseph F. Spaniol, consultants to the Committee.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules completed its style revision project to clarify and simplify the language of the appellate rules. It submitted revisions of all forty-eight Rules of Appellate Procedure and a revision of Form 4 (no changes were made in Forms 1, 2, 3, and 5), together with Committee Notes explaining their purpose and intent. The comprehensive style revision was published for public comment in April 1996 with an extended comment period expiring December 31, 1996. Public hearings were scheduled but canceled, because no witness requested to testify.

The style revision has taken up most of the advisory committee's work during the past four years. The style changes were designed to be nonsubstantive, except with respect to those rules outlined below, which were under study when the style project commenced. A few additional substantive changes have been made necessary by legislative enactments or other recent developments. Almost all comments received from the bench, bar, and law professors teaching procedure and legal writing were quite favorable to the restyled rules. Only one negative comment was received—that to the effect "why change a system that has worked?"

The advisory committee recommended, and the Standing Rules Committee agreed, that the submission to the Judicial Conference and its recommendation for submission to the Supreme Court, if the changes are approved, should be in a different format from the usual

submission. Instead of striking through language being eliminated and underlining proposed new language, the changes made by the restylization project can best be perceived by a side-by-side comparison of the existing rule (in the left-hand column) with the proposed rule (in the right-hand column). Commentary on changes that could be considered more than stylistic—generally resolving inherent ambiguities—are discussed in the Committee Notes. A major component of the restylization has been to reformat the rules with appropriate indentations. Your Committee concurs with the recommendation of the advisory committee that the physical layout of the rules should be an integral part of any official version—and of any published version that is intended to reflect the official version.

In connection with the restylization project, the advisory committee and the Standing Rules Committee bring to the attention of the Judicial Conference two changes in the restyled rules—the use of "en banc" instead of "in banc" and the use of "must" in place of "shall." Although 28 U.S.C. § 46 has used "in banc" since 1948, a later law, Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1633, used "en banc" when authorizing a court of appeals having more than fifteen active judges to perform its "en banc" functions with some subset of the court's members. Also the Supreme Court uses "en banc" in its own rules. *See* S. Ct. R. 13.3. The "en banc" spelling is overwhelmingly favored by courts, as demonstrated by a computer search conducted in 1996 that found that more than 40,000 circuit cases have used the term "en banc" and just under 5,000 cases (11%) have used the term "in banc." When the search was confined to cases decided after 1990, the pattern remained the same—12,600 cases using "en banc" compared to 1,600 (11%) using "in banc." The advisory committee decided to follow the most commonly used "en banc" spelling. This is a matter of choice, of course, but both committees recommend the more prevalent use to the Judicial Conference.

The advisory committee adopted the use of "must" to mean "is required to" instead of using the traditional "shall." This is in accord with Bryan A. Garner, *Guidelines for Drafting and Editing Court Rules* § 4.2 at 29 (1996). The advisory committee is aware that the Supreme Court changed the word "must" to "shall" in some of the amendments of individual rules previously submitted to the Court. In doing so, the Supreme Court indicated a desire not to have inconsistent usages in the rules, and concluded "that terminology changes in the Federal Rules be implemented in a thoroughgoing, rather than piecemeal, way." The instant submission is a comprehensive revision of all the appellate rules. Because of the potentially different constructions of "shall," *see* Garner, *A Dictionary of Modern Legal Usage* 939-42 (2d ed. 1995), the advisory committee eliminated all uses of "shall" in favor of "must" when "is required to" is meant. Both the advisory committee and the Standing Rules Committee recognized room for differences of opinion and do not want the restylization work rejected due to the use of this word.

Included in this submission are some rules that have substantive amendments, all of which have been published for public comment at least once except the proposed abrogation of Rule 3.1 and the proposed amendments to Rule 22. Both of the latter changes are responsive to recent legislation. The changes to Rules 26.1, 29, 35, and 41 were approved for circulation to the bench and bar for comment in September 1995. They were resubmitted for public comment in April 1996 as a part of the comprehensive style revision. After considering suggestions received during these two comment periods, they were approved with minor changes along with the restylized version of the rules. Revised Rules 27, 28, and 32 were approved for circulation for public comment in April 1996 along with the restylized rules—with special notations to the bench and bar that these three rules underwent substantive changes. Rules 5, 5.1 (the latter of which is proposed to be abrogated), and Form 4 were sent out for comment separately, after the

restylization package. Rules 5 and 5.1 were revised because of recent legislative changes and a proposed new Fed. R. Civ. P. 23(f); Form 4 was revised because of recent legislative changes and a request by the Supreme Court Clerk for a more comprehensive form. The substantive changes are summarized below, rule-by-rule in numerical order.

Rule 3.1 (Appeal from a Judgment of a Magistrate Judge in a Civil Case) would be abrogated under the proposed revision because it is no longer needed. The primary purpose for the existence of Rule 3.1 was to govern an appeal to the court of appeals following an appeal to the district court from a magistrate judge's decision. The Federal Courts Improvement Act of 1996, Pub. L. 104-317, repealed paragraphs (4) and (5) of 28 U.S.C. § 636(c) and eliminated the option to appeal to the district court. An appeal from a judgment by a magistrate judge now lies directly to the court of appeals.

The proposed consolidation of Rule 5 (Appeal by Permission Under 28 U.S.C. § 1292(b)) and Rule 5.1 (Appeal by Permission Under 28 U.S.C. § 636(c)(5)) would govern all discretionary appeals from a district or magistrate judge order, judgment, or decree. In 1992, Congress added subsection (e) to 28 U.S.C. § 1292 giving the Supreme Court power to prescribe rules that "provide for an appeal of an interlocutory decision to the Court of Appeals that is not otherwise provided for" in § 1292. The advisory committee believed the amendment of Rule 5 was desirable because of the possibility of new statutes or rules authorizing discretionary interlocutory appeals, and the desirability of having one rule that governs all such appeals. One possible new application appears contemporaneously in the proposed new Fed. R. Civ. P. 23(f) to allow the interlocutory appeal of a class certification order. Present Rule 5.1 applies only to appeals by leave from a district court's judgment entered after an appeal to the district court from

a magistrate judge's decision. The Federal Courts Improvement Act of 1996 abolished all appeals by permission that were covered by this rule, making Rule 5.1 obsolete.

The proposed amendments to Rule 22 (Habeas Corpus and Section 2255 Proceedings) conform to recent legislation. First, the rule is made applicable to 28 U.S.C. § 2255 proceedings. This brings the rule into conformity with 28 U.S.C. § 2253 as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132. Second, the amended rule states that a certificate of appealability may be issued by a "circuit justice or a circuit or district judge." Amended § 2253 requires a certificate of appealability issued by a "circuit justice or judge" in order to bring an appeal from denial of an application for the writ. The proposed amendment removes the ambiguity created by the statute and is consistent with the decisions in all circuits that have addressed the issue.

The proposed amendment of Rule 26.1 (Corporate Disclosure Statement) would eliminate the requirement that corporate subsidiaries and affiliates be listed in a corporate disclosure statement. Instead, the rule requires that a corporate party disclose all of its parent corporations and any publicly held company owning ten percent or more of its stock. The changes eliminate the ambiguity inherent in the word "affiliates" and identify all of those entities which might possibly result in a judge's recusal. The revised rule was submitted to the Committee on Codes of Conduct, which found it to be satisfactory in its revised form.

The proposed amendment of Rule 27 (Motions) would treat comprehensively, for the first time, motion practice in the courts of appeals. The rule is entirely rewritten to provide that any legal argument necessary to support a motion must be contained in the motion itself, not in a separate brief. It expands the time for responding to a motion from seven to ten days and permits a reply to a response—without prohibiting the court from shortening the time requirements or

deciding a motion before receiving a reply. It establishes length limitations for motions and responses, and states that a motion will be decided without oral argument unless the court orders otherwise.

The proposed amendment of Rule 28 (Briefs) is necessary to conform it to the proposed amendments to Rule 32. Page limitations for a brief are deleted from Rule 28(g), because they are treated in Rule 32.

Rule 29 (Brief of an Amicus Curiae) would be amended to establish limitations on the length of an amicus curiae brief. It adds the District of Columbia to those governments that may file without consent of the parties or leave of court. The amended rule generally makes the form and timing requirements more specific, and states that the amicus curiae may participate in oral argument only with the court's permission.

Rule 32 (Form of Briefs, Appendices, and Other Papers) would be rewritten comprehensively with a principal aim of curbing cheating on the traditional fifty-page limitation on the length of a principal brief. New computer software programs make it possible to use type styles and sizes, proportional spacing, and sometimes footnotes, to create briefs that comply with a limitation stated in a number of pages, but that contain up to 40% more material than a normal brief and are difficult for judges to read. The rule was amended in several significant ways. A brief may be on "light" paper, not just "white," making it acceptable to file a brief on recycled paper. Provisions for pamphlet-sized briefs and carbon copies have been deleted because of their very infrequent use. The amended rule permits use of either monospaced or proportional typeface. It establishes length limitations of 14,000 words or 1,300 lines of monospaced typeface (which equates roughly to the traditional fifty pages) and requires a certificate of compliance unless the brief utilizes the "safe harbor" limits of thirty pages for a principal brief and fifteen

pages for a reply brief. Requirements are included for double spacing and margins; type faces are to be fourteen-point or larger type if proportionally spaced and limited to 10½ characters per inch if monospaced. Treatment of the appendix is in its own subdivision. A brief that complies with the national rule must be accepted by every court; local rules may not impose form requirements that are not in the national rule. Local rules may, however, move in the other direction; they can authorize noncompliance with certain of the national norms. Thus, for example, a particular court may choose to accept pamphlet briefs or briefs with smaller typeface than those set forth in the national rules.

Rule 35 (En Banc Determination) would be amended to treat a request for rehearing en banc like a petition for panel rehearing, so that a request for rehearing en banc will suspend the finality of the district court's judgment and extend the period for filing a petition for a writ of certiorari. Therefore, a "request" for rehearing en banc is changed to a "petition" for rehearing en banc. The amendments also require each petition for en banc consideration to begin with a statement demonstrating that the cause meets the criteria for en banc consideration. An intercircuit conflict is cited as an example of a proceeding that might involve a question of "exceptional importance"—one of the traditional criteria for granting an en banc hearing.

Rule 41 (Mandate; Contents; Issuance and Effective Date; Stay) would be amended to provide that filing of a petition for rehearing en banc or a motion for stay of mandate pending petition to the Supreme Court for a writ of certiorari both delay the issuance of the mandate until disposition of the petition or motion. The amended rule also makes it clear that a mandate is effective when issued. The presumptive period of a stay of mandate pending petition for a writ of certiorari is extended to ninety days, to accord with the Supreme Court's time period.

Official Form 1 (Voluntary Petition) would be amended to simplify the form and make it easier to complete. In particular, the amendments reduce the amount of information requested, add new statistical ranges for reporting assets and liabilities, and delete the request for information regarding the filing of a plan.

Official Form 3 (Application and Order to Pay Filing Fee in Installments) would be amended to include an acknowledgment by the debtor that the case may be dismissed if the debtor fails to pay a filing fee installment. It would also clarify that a debtor is not disqualified under Rule 1006 from paying the fee in installments solely because the debtor paid a bankruptcy petition preparer.

Official Form 6 (Schedule F) would be amended by adding to the schedule (which lists creditors holding an unsecured nonpriority claim) a reference to community liability for claims.

Official Form 8 (Chapter 7 Individual Debtor's Statement of Intention) would be amended to make it more consistent with the language of the Bankruptcy Code. Language would also be deleted from the present form that may imply that a debtor is limited to options contained on the form.

Official Form 9 (Notice of Commencement of Case Under the Bankruptcy Code, Meeting of Creditors and Fixing of Dates) includes eleven alternatives. Each form is designed for a particular type of debtor (individual, partnership, or corporation), the particular chapter of the Bankruptcy Code in which the case is pending, and the nature of the estate (asset or no asset). The forms are used in virtually all bankruptcy cases.

Form 9 and its Alternatives would be expanded to two pages to make them easier to read, and the explanatory material is rewritten in plain English. Several clerks of court expressed concern that the existing forms' instructions were difficult to understand, which resulted in many

questions from the public that consumed considerable staff resources. The advisory committee agreed that the existing instructions were inadequate. At the same time, it recognized that there would be added printing expense incurred in expanding the instructions. The advisory committee believed that better instructions were essential, and the savings realized from the expected reduction in calls to the clerks' offices asking for assistance probably would offset some of the added printing expenses. In addition, the advisory committee noted that the $30 administrative fee assessed against a debtor filing a chapter 7 or chapter 13 bankruptcy case was intended to pay for the cost of noticing. The fee would easily cover the added expense in expanding the form to two pages. On balance, the advisory committee concluded that the benefits to the public substantially outweighed the added expense.

Official Form 10 (Proof of Claim) would be amended to provide instructions and definitions for completing the form. The form also is reformatted to eliminate redundancies in the information request. Creditors are advised not to submit original documents in support of the claim.

Official Form 14 (Ballot for Accepting or Rejecting the Plan) would be amended to simplify its format and make it easier to complete.

Official Form 17 (Notice of Appeal from a Judgment, Order, or Decree of a Bankruptcy Court) would be amended to direct the appellant to provide the addresses and telephone numbers of the attorneys for all parties to the judgment, order, or decree appealed from, as required by Bankruptcy Rule 8001(a). It also informs other parties—in addition to the appellant—that they may elect to have the appeal heard by the district court, rather than by a bankruptcy appellate panel.

Official Form 18 (Discharge of Debtor) would be amended to simplify the form and clarify the effects of a discharge. A comprehensive explanation, in plain English, is added to the back of the form to assist both debtors and creditors to understand bankruptcy discharge.

Official Form 20A (Notice of Motion or Objection) and Form 20B (Notice of Objection to Claim) would be added to provide uniform, simplified explanations on how to respond to motions and/or objections that are frequently filed in a bankruptcy case.

The proposed revisions and additions to the Official Bankruptcy Forms, as recommended by your Committee, are in Appendix B together with an excerpt from the advisory committee's report.

> **Recommendation:** That the Judicial Conference approve the proposed revisions to Official Bankruptcy Forms 1, 3, 6F, 8, 9A-9I, 10, 14, 17, 18, and new Forms 20A and 20B.

Most debtors and creditors participating in bankruptcy rely on the private sector for copies of the Official Forms. There is usually a significant lag time between the promulgation of a form revision and the date when the private sector publishes the revised new forms. In addition, some of the amended forms are notices and orders generated by the courts' automated systems and the Bankruptcy Noticing Center. Court staff and the Noticing Center will need adequate time to implement the revisions to the forms. The advisory committee recommended that a reasonable transition of about five months be authorized during which continued use of superseded forms would be permitted.

> **Recommendation:** That the Judicial Conference promulgate the proposed revisions to the Official Bankruptcy Forms to take effect immediately, but permit the superseded forms to also be used until March 1, 1998.

Rules Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted to your Committee proposed amendments to Bankruptcy Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006, and 9014 and recommended that they be published for public comment.

The proposed amendments to Rule 1017 (Dismissal or Conversion of Case; Suspension) would specify the parties who are entitled to a notice of a United States trustee's motion to dismiss a voluntary chapter 7 or chapter 13 case based on the debtor's failure to file a list of creditors, schedules, or statement of financial affairs. Instead of sending a notice of a hearing in a chapter 7 case to all creditors, as presently required, the notice would only be sent to the debtor, the trustee, and any other person or entity specified by the court.

The proposed amendments to Rule 1019 (Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to Chapter 7 Liquidation Case) would: (1) clarify that a motion for an extension of time to file a statement of intention regarding collateral must be filed or made orally before the time specified in the rule expires; (2) provide that the holder of a postpetition, preconversion administrative expense claim is required to file within a specified time period a request for payment under § 503(a) of the Code, rather than a proof of claim under § 501 of the Code or Rules 3001(a)-(d) and 3002; and (3) conform the rule to the 1994 amendments to § 502(b)(9) of the Code and to the 1996 amendments to Rule 3002(c)(1) regarding the 180-day period for filing a claim by a governmental unit.

Rule 2002(a)(4) (Notices to Creditors, Equity Security Holders, United States, and United States Trustee) would be amended to delete the requirement that notice of a hearing on dismissal

of a chapter 7 case based on the debtor's failure to file required lists, schedules, or statements must be sent to all creditors. The amendment conforms with the proposed amendment to Rule 1017, which requires that the notice be sent only to certain parties.

The proposed amendments to Rule 2003 (Meeting of Creditors or Equity Security Holders) would require the United States to mail a copy of the report of a disputed election for a chapter 7 trustee to any party in interest that has requested a copy of it. The amendment gives a party in interest ten days from the filing of the report—rather than from the date of the meeting of creditors—to file a motion to resolve the dispute.

The proposed amendments to Rule 3020(e) (Deposit; Confirmation of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case) would automatically stay for ten days an order confirming a chapter 9 or chapter 11 plan so that parties will have sufficient time to request a stay pending appeal.

Rule 3021 (Distribution under Plan) would be amended to conform to the amendments to Rule 3020 regarding the 10-day stay of an order confirming a plan in a chapter 9 or chapter 11 case.

A new subdivision (a)(3) would be added to Rule 4001 (Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements) that would automatically stay for ten days an order granting relief from an automatic stay so that parties will have sufficient time to request a stay pending appeal.

The proposed amendments to Rule 4004(a) (Grant or Denial of Discharge) would clarify that the deadline for filing a complaint objecting to discharge under § 727(a) of the Code is 60 days after the first date set for the meeting of creditors, whether or not the meeting is actually held on that date. Rule 4004(b) is amended to clarify that a motion for an extension of time for

filing a complaint objecting to a discharge must be filed before the time specified in the rule has expired.

Rule 4007 (Determination of Dischargeability of a Debt) would be amended to clarify that the deadline for filing a complaint to determine dischargeability of a debt under § 523(c) of the Code is 60 days after the first date set for the meeting of creditors, whether or not the meeting is actually held on that date. The rule is also amended to clarify that a motion for an extension of time for filing a complaint must be filed before the time specified in the rule has expired.

Rule 6004(g) (Use, Sale, or Lease of Property) is added to automatically stay for ten days an order authorizing the use, sale, or lease of property, other than cash collateral, so that parties will have sufficient time to request a stay pending appeal.

A new subdivision (d) would be added to Rule 6006 (Assumption, Rejection and Assignment of Executory Contracts and Unexpired Leases) that would automatically stay for ten days an order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) of the Code so that a party will have sufficient time to request a stay pending appeal.

The proposed amendments to Rule 7001 (Scope of Rules of Part VII) would recognize that an adversary proceeding is not necessary to obtain injunctive relief when the relief is provided for in a chapter 9, chapter 11, chapter 12, or chapter 13 plan.

The proposed amendments to Rule 7004(e) (Process; Service of Summons, Complaint) would provide that the 10-day time limit for service of a summons does not apply if the summons is served in a foreign country.

The proposed amendments to Rule 7062 (Stay of Proceedings to Enforce a Judgment) would delete the references to the additional exceptions to Rule 62(a) of the Federal Rules of Civil Procedure. The deletion of these exceptions, which are orders in a contested matter rather

than in an adversary proceeding, is consistent with amendments to Rule 9014 that render Rule 7062 inapplicable to a contested matter.

Rule 9006(c)(2) (Time) would be amended to prohibit the reduction of time fixed under Rule 1019(6) for filing a request for payment of an administrative expense incurred after the commencement of a case and before conversion of the case under chapter 7.

Rule 9014 (Contested Matters) would be amended to delete the reference to Rule 7062 from the list of Part VII rules that automatically apply in a contested matter.

The Committee voted to circulate the proposed amendments to the bench and bar for comment.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rule 23(c)(1) and Rule 23(f) on class actions, together with Committee Notes explaining their purpose and intent. The proposed amendments were part of a larger package of proposed revisions to Rule 23 circulated to the bench and bar for comment in August 1996. Public hearings on the proposed amendments were held in Philadelphia, Dallas, and San Francisco. The Standing Rules Committee approved new subdivision (f), but recommitted the proposed amendments to (c)(1) to the advisory committee.

The advisory committee's work on these proposed amendments began in 1991, when it was asked by the Judicial Conference to act on the recommendation of the Ad Hoc Committee on Asbestos Litigation to study whether Rule 23 should be amended to facilitate mass tort litigation. To understand the full scope and depth of the problems, the advisory committee sponsored or participated in a series of major conferences at the University of Pennsylvania, New York

University, Southern Methodist University, and the University of Alabama, as well as studied the issues at regularly scheduled meetings elsewhere. During these conferences, the advisory committee heard from experienced practitioners, judges, academics, and others. To shore up the minimal empirical data on current class action practices, the Federal Judicial Center, at the request of the advisory committee, completed a study of the use of class actions terminated within a two-year period in four large districts.

In the course of its six-year study, the advisory committee considered a wide array of procedural changes, including proposals to consolidate (b)(1), (b)(2), and (b)(3) class actions, to add opt-in and opt-out flexibility, to enhance notice, to define the fiduciary responsibility of class representativeness and counsel, and to regulate attorney fees. In the end, with the intent of stepping cautiously, the committee opted for what it believed were five modest changes which were published for comment in August 1996.

During the six-month commentary period, the advisory committee received hundreds of pages of written comments and testimony from some 90 witnesses at the public hearings. Comments and testimony were received from the entire spectrum of experienced users of Rule 23, including plaintiffs' class action lawyers, plaintiffs' lawyers who prefer not to use the class action device, defendants' lawyers, corporate counsel, judges, academics, journalists, and litigants who had been class members. The work of the advisory committee and the information considered by it, including all the written statements and comments and transcripts of witnesses' testimony, filled a four-volume, 3,000 page compendium of the committee's working papers published in May 1997.

Although five general changes were published for comment, the advisory committee decided to proceed with only the proposed amendments to Rule 23(c)(1) and (f) at this time. The

change to Rule 23(c)(1) would clarify the timing of the court's certification decision to reflect present practice. New subdivision (f) would authorize a permissive interlocutory appeal, in the sole discretion of the court of appeals, from an order granting or denying class certification. The remaining proposed changes either were abandoned or deferred by the advisory committee after further reflection, or set aside in anticipation of the Supreme Court's decision in *Amchem Products, Inc. v. Windsor*, No. 96-270 (decided June 25, 1997) — a Third Circuit case holding invalid a settlement of a class action that potentially consisted of tens of thousands of asbestos claimants. The advisory committee carefully considered whether to delay proceeding on the proposed amendments to Rule 23 (c)(1) and (f) and wait until action on the remaining proposed amendments to Rule 23 was completed. But it concluded unanimously that the changes to (c)(1) and (f) were important and distinct from the remaining proposed changes and needed to be acted on expeditiously. In particular, the proposed change to Rule 23(f) could have immediate and substantial beneficial impact on class action practice.

New subdivision (f) would create an opportunity for interlocutory appeal from an order granting or denying class action certification. The decision whether to permit appeal is in the sole discretion of the court of appeals. Application for appeal must be made within ten days after entry of the order. District court proceedings would be stayed only if the district judge or the court of appeals ordered a stay. Authority to adopt an interlocutory appeal provision was conferred by 28 U.S.C. § 1292(e).

The advisory committee concluded that the class action certification decision warranted special interlocutory appeal treatment. A certification decision is often decisive as a practical matter. Denial of certification can toll the death knell in actions that seek to vindicate large numbers of individual claims. Alternatively, certification can exert enormous pressure to settle.

Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis) would be substantially revised. The Clerk of the Supreme Court asked the advisory committee to devise a new, more comprehensive form of affidavit in support of an application to proceed in forma pauperis. A single form is used by both the Supreme Court and the courts of appeals. In addition, the Prison Litigation Reform Act of 1996 prescribed new requirements governing in forma pauperis proceedings by prisoners, including requiring submission of an affidavit that includes a statement of all assets the prisoner possesses. Form 4 was amended to require a great deal more information than specified in the current form, including all the information required by the recent enactment.

The Standing Rules Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Appellate Procedure, as recommended by your Committee, are in Appendix A with an excerpt from the advisory committee report.

Recommendation: That the Judicial Conference approve the proposed amendments to Appellate Rules 1-48 and to Form 4 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Official Bankruptcy Forms Submitted for Approval

The Advisory Committee on Bankruptcy Rules submitted proposed revisions to Official Bankruptcy Forms 1, 3, 6F, 8, 9A-9I, 10, 14, 17, 18, and new Forms 20A and 20B. The proposed revisions mainly clarify or simplify existing forms. Several of the most heavily used forms were redesigned by a graphics expert, and instructions contained in forms often used by petitioners in bankruptcy or creditors were rewritten using plain English.

The advisory committee's proposed amendment was limited to witnesses specifically defined by the two victim rights' statutes. The Standing Rules Committee concluded that a more expansive amendment was preferable to account for any other existing or future statutory exception. It revised the proposed amendment to extend to any "person authorized by statute to be present." The Committee also agreed with the request to forward the proposed amendments directly to the Judicial Conference without publishing them for public comment. Under the governing, *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure* the "Standing Committee may eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it determines that notice and comment are not appropriate or necessary." The Standing Rules Committee determined that the proposed amendment, as revised, was a conforming amendment.

The proposed amendment to the Federal Rules of Evidence, as recommended by your Committee, appears in Appendix E together with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Evidence Rule 615 and transmit it to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Informational Items

The Standing Rules Committee recommitted to the advisory committee for further study proposed amendments to Evidence Rule 103 (Rulings on Evidence) that would add a new subdivision governing *in limine* practice. The present rules do not address *in limine* practice, and this has resulted in some conflict in the courts and confusion in the practicing bar. Proposed amendments to Evidence Rule 103 were published for comment in 1995, but were eventually withdrawn. Although generally inclined to publish for comment another proposed *in limine* rule,

several members of the Standing Rules Committee expressed concern regarding certain technical issues that they believed needed first to be addressed by the advisory committee. The Committee agreed that further study by the advisory committee would be helpful before publishing another proposed change to Rule 103.

The advisory committee has refrained from considering amending Evidence Rule 702 to account for the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and later decisions generated by it, until a time when the district courts and courts of appeals have had an opportunity to explore some of the decision's far-reaching implications. Several years have now passed. *Daubert* case law has rapidly developed and involves many areas not considered nor in issue in the 1993 case. The advisory committee has concluded that the time is now right for a review of Evidence Rules 702 and 703 and has placed the matter on its agenda for its October meeting. In addition, both the Senate and the House of Representatives are considering bills to codify the Court's decision.

RULES GOVERNING ATTORNEY CONDUCT

A study by the Committee's reporter of appellate and bankruptcy cases involving rules of attorney conduct and a Federal Judicial Center empirical study on rules governing attorney conduct have now been completed. The Committee was also advised of the current status of meetings between the Department of Justice and the Conference of Chief Justices on contacting represented parties. The Committee's reporter was asked to prepare some specific proposals for the Committee's consideration at its next meeting in January.

UNIFORM NUMBERING SYSTEM FOR LOCAL RULES OF COURT

Amendments to the Federal Rules of Practice and Procedure took effect on December 1, 1995, which required that all local rules of court "must conform to any uniform numbering

Because of the difficulties and uncertainties that attend some certification decisions—those that do not fall within the boundaries of well-established practice—the need for immediate appellate review may be greater than the need for appellate review of many routine civil judgments. Under present appeal statutes, however, it is difficult to win interlocutory review of orders granting or denying certification that present important and difficult issues. Many such orders fail to win district court certification for interlocutory appeal under 28 U.S.C. § 1292(b), in part because some courts take strict views of the requirements for certification. Resort has been had to mandamus, with some success, but review may strain ordinary mandamus principles.

The lack of ready appellate review has made it difficult to develop a body of uniform national class-action principles. Many commentators and witnesses advised the advisory committee that district courts often give different answers to important class-action questions, and that these differences encourage forum shopping. The commentators and witnesses who testified on proposed Rule 23(f) provided strong, although not universal, support for its adoption.

The main ground for opposing the proposed amendment was that applications for permission to appeal would become a routine strategy of defendants to increase cost and delay. The advisory committee recognized that there might be strong temptations to seek permission to appeal, particularly during the early days of Rule 23(f). It hoped that lawyers would soon recognize that appeal would be granted only in cases that present truly important and difficult issues, and that the potential for many ill-founded appeal petitions would quickly dissipate. In any event, it relied on the advice of many circuit judges that applications for permission to appeal under 28 U.S.C. § 1292(b) are quickly processed, adding little to the costs and delay experienced by the parties and trial courts, and imposing little burden on the courts of appeals. The committee was confident that, as with § 1292(b) appeals, Rule 23(f) petitions would be quickly

resolved on motion. The advisory committee concluded that the benefits of the proposal greatly outweighed the small additional workload burden.

The Standing Rules Committee concurred with the advisory committee's recommendation to add a new Rule 23(f). The proposed amendments to the Federal Rules of Civil Procedure, as recommended by your Committee, are in Appendix C with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed new Civil Rule 23(f) and transmit it to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

In many class action cases, the decision to certify is the single most important judicial event, which often sets into motion a series of actions inexorably leading to settlement. The advisory committee heard much testimony about the intense pressure placed on the defendant to settle once a class action had been certified, rather than risk any chance of losing. The proposed amendment of Rule 23(c)(1) would amend the requirement that the class action certification determination be made "as soon as practicable." The advisory committee's proposed change to "when practicable" was designed to confirm present practice, which permits a ruling on a motion to dismiss or for summary judgment before addressing certification questions.

The Standing Rules Committee recognized that in most class action cases a judge needs sufficient information, which often requires adequate time for discovery, before making the critical class action certification decision. But concern was expressed that a delay in the certification decision might as a practical matter eliminate any real relief to some injured parties under certain circumstances, particularly when their claims may become moot if not acted on expeditiously. In addition, the advisory committee continues to study proposed revisions to other parts of the rule and could further consider the change to (c)(1) at the same time. Accordingly,

your Committee voted to recommit the proposed amendments to Rule 23(c)(1) to the advisory committee for further consideration.

Scope and Nature of Discovery

With the goal of reducing cost and delay in litigation, the advisory committee has embarked on a major review of the general scope and nature of discovery. As part of this overall discovery project, the advisory committee will address the discovery-related recommendations contained in the Judicial Conference's report to Congress on RAND's Civil Justice Reform Act study, including the need to revisit the "opt-in" "opt-out" mandatory disclosure provisions.

A subcommittee was appointed to explore discovery issues. It convened a conference of about 30 prominent attorneys and academics to discuss discovery problems. Building on that meeting, the advisory committee, along with the Boston College School of Law, is sponsoring a symposium on discovery in September 1997. Academics will present papers that will later be published by the school's law review. Several panels of experienced practitioners and judges will also address distinct discovery issues at the conference. The advisory committee plans to meet in October to decide which specific discovery issues discussed at the symposium it will pursue.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Federal Rules of Criminal Procedure 5.1, 26.2, 31, 33, 35, and 43 together with Committee Notes explaining their purpose and intent. The proposed amendments had been circulated to the bench and bar for comment in August 1996. A public hearing was scheduled for Oakland, California, but no witnesses requested to testify.

The proposed amendments to Rule 5.1 (Preliminary Examination) would require production of a witness statement after the witness has testified at a preliminary examination hearing. The proposal is similar to current provisions in other rules that require production of a witness statement at other pretrial proceedings.

Rule 26.2 (Production of Witness Statements) would be amended to include a cross-reference to the proposed amendment to Rule 5.1, extending the requirement to produce a witness statement to a preliminary examination.

The proposed amendment to Rule 31 (Verdict) would require individual polling of jurors when polling occurs after the verdict, either at a party's request or on the court's own motion. The amendment confirms the existing practice of most courts.

Rule 33 (New Trial) would be amended to require that a motion for a new trial based on newly discovered evidence be filed within three years after the date of the "verdict or finding of guilty." The current rule uses "final judgment" as the triggering event, but courts have reached different conclusions on when a final judgment is entered. As a result of the disparate practices, the time to file the motion has varied among the districts. The published version of the proposed amendment fixed a clear starting point to begin the time period and set two years as the outside limit. The advisory committee was persuaded by the public comment, however, that an additional year was necessary. Defense attorneys often concentrate their available time and resources prosecuting an appeal immediately after the verdict or finding of guilty and only begin considering filing a motion for a new trial when they have completed the appeal.

Rule 35 (Correction or Reduction of Sentence) would be amended to permit a court to aggregate a defendant's assistance in the prosecution or investigation of another offense rendered

before and after sentencing in determining whether a defendant's assistance is "substantial" as required under Rule 35(b). The proposed amendment is intended to recognize a defendant's significant assistance rendered before and after sentencing, either of which viewed alone would be insufficient to meet the "substantial" level.

The proposed amendment to Rule 43 (Presence of the Defendant) would clarify that a defendant need not be present: (1) at a Rule 35(b) reduction of sentence proceeding for substantial assistance rendered by the defendant; (2) at a Rule 35(c) correction of sentence proceeding for a technical, arithmetical, or other clear error; or (3) at a 18 U.S.C. § 3582(c) resentencing modifying an imposed term of imprisonment. In virtually all these proceedings, the modification of a sentence can only inure to the benefit of the defendant, and the defendant's attendance is not necessary. The court does, however, retain the power to require or permit a defendant to attend any of these proceedings in its discretion. A defendant's presence would still be required at a resentencing to correct an invalid sentence following a remand under Rule 35(a).

The Standing Rules Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Criminal Procedure, as recommended by your Committee, are in Appendix D with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rules 5.1, 26.2, 31, 33, 35, and 43 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee on Criminal Rules submitted proposed amendments to Criminal Rules 6, 11, 24, 30, and 54, abrogation of Rules 7(c)(2), 31(e), 32(d)(2), and 38(e), and a new Rule 32.2 with a recommendation that they be published for public comment.

Rule 6 (The Grand Jury) would be amended to permit the grand jury foreperson or deputy foreperson to return an indictment in open court without requiring the presence of the entire grand jury as mandated under present procedures. The amendment would be particularly helpful when the grand jury meets in places other than in the courthouse and needs to be transported to discharge a ministerial function. The second proposed amendment would allow the presence of an interpreter who is necessary to assist a juror in taking part in the grand jury deliberations. The advisory committee recommended that the exception be limited solely to interpreters assisting the hearing impaired. But the Standing Rules Committee concluded that it would be more helpful to obtain public comment on an expanded exception to the rule that would allow any interpreter found to be necessary to assist a grand juror.

The proposed amendment of Rule 11 (Pleas) would require the court to determine whether the defendant understands any provision in a plea agreement that waives the right to appeal or to collaterally attack the sentence. The advisory committee first considered the proposed amendment at the request of the Committee on Criminal Law. The amendment also conforms Rule 11 to current practices under sentencing guidelines and makes it clear that a plea agreement may include an agreement as to a sentencing range, sentencing guideline, sentencing factor, or policy statement. It also distinguishes plea agreements made under Rule 11(e)(1)(B), which are not binding on the court, and agreements under Rule 11(e)(1)(C), which are binding.

Rule 24 (Alternate Jurors) would permit the court to retain alternate jurors during the deliberations if any other regular juror becomes incapacitated. The alternate jurors would remain insulated from the other jurors until required to replace a regular juror. The option would be particularly helpful in an extended trial when two or more original jurors could not participate in the deliberations because otherwise a new trial would be required.

The proposed amendments to Rule 30 (Instructions) would permit a court to require or permit the parties to file any requests for instructions before trial. Under the present rule, a court may direct the parties to file the requests only during trial or at the close of the evidence.

New Rule 32.2 (Forfeiture Procedures) consolidates several procedural rules governing the forfeiture of assets in a criminal case, including existing Rules 7(c)(2), 31(e), 32(d)(2), and 38(e). In *Libretti v. United States*, 116 S. Ct. 356 (1995), the Supreme Court held that criminal forfeiture constitutes an aspect of the sentence imposed in a criminal case, and that the defendant has no constitutional right to have the jury determine any part of the forfeiture. The proposed amendment was originally suggested by the Department of Justice and sets up a bifurcated post-guilt adjudication forfeiture procedure. At the first proceeding, the court determines what property is subject to forfeiture. At the second, the court rules on any petition filed by a third party claiming an interest in the forfeitable property and otherwise conducts ancillary proceedings. Parties are permitted to conduct discovery in accordance with the Federal Rules of Civil Procedure to the extent determined necessary by the court.

A technical amendment is proposed to Rule 54 removing the reference to the court in the Canal Zone, which no longer exists.

The Committee voted to circulate the proposed amendments to the bench and bar for comment.

Informational Items

The Standing Committee voted to reject the recommendation of the advisory committee to seek legislation amending 18 U.S.C. § 3060 to permit a magistrate judge to conduct a preliminary examination over the defendant's objection. Criminal Rule 5(c) tracks the statutory provision, and it would also need to be amended to conform to a statutory change. At the request

of the Committee, the Committee on the Administration of the Magistrate Judges System was asked to review the advisory committee's recommendation. It agreed with the substance of the proposal and endorsed the necessary legislative and rule changes. Your Committee concluded that the proposed change should be recommitted to the advisory committee to consider action under the rulemaking process. A parallel statutory change could be pursued at the appropriate time.

A bill was introduced in the House of Representatives (H.R. 1536) that would amend 18 U.S.C. § 3321 and reduce the number of grand jurors from a range of 16-23 to 9-13, with 7 jurors instead of 12 jurors necessary to concur in an indictment. Criminal Rule 6 tracks the language of the current statutory provision. The Advisory Committee on Criminal Rules has placed the matter on the agenda of its next meeting in October 1997, which is consistent with the recommendations of the Committee on Court Administration and Case Management and the Committee on Criminal Law.

AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules submitted proposed amendments to Federal Rules of Evidence 615 (Exclusion of Witnesses). The amendment would expand the list of witnesses who may not be excluded from attending a trial to include any victim as defined in the Victim's Rights and Restitution Act of 1990 and the Victim Rights Clarification Act of 1997. The amendment is intended to conform to the two Acts. These laws provide that: (1) a victim-witness is entitled to attend the trial unless the witness' testimony would be materially affected by the testimony at trial; and (2) a victim-witness who may testify at a later sentencing proceeding cannot be excluded from the trial for that reason.

system prescribed by the Judicial Conference." In March 1996, the Conference prescribed a numbering system for local rules of court to implement the 1995 rules amendments. The Conference set April 15, 1997, as the effective date of compliance with the uniform numbering system so that courts would have sufficient time to make necessary changes to their local rules.

Slightly less than half of the courts were able to renumber their local rules by April 15, 1997. Several additional courts completed their renumbering before the Standing Rules Committee met in June. Other courts have advised the Committee that they are nearing completion of their local rules renumbering. The Committee continues to encourage those courts that have not yet adopted a uniform numbering system to renumber their local rules. The Committee finds promising the recent increase in the number of courts adopting a uniform numbering system, and it will continue to offer to help the courts that are in the process of renumbering their local rules.

LONG RANGE PLANNING

The chairs of the Standing Rules Committee and the Advisory Committee on Civil Rules participated in the May 15, 1997, meeting of the Judicial Conference committee liaisons on the judiciary's *Long Range Plan.* During the discussion on mass torts, the advisory committee chair described the extensive work of the Advisory Committee on Civil Rules on the study of mass torts in the context of class actions during the past six years. As previously noted, the advisory committee garnered substantial information and data on class action and mass torts practice, which were compiled into a four-volume compendium of working papers. The rules committee chairs favored the consensus of the liaisons that the individual Conference committees should continue to coordinate their respective work with the other committees involved in the study of mass tort litigation.

LOCAL RULES AND OFFICIAL BANKRUPTCY FORMS ON INTERNET

The Committee was advised of ongoing efforts in the Administrative Office to place local rules of court and Official Bankruptcy Forms on the Internet. Rather than furnishing paper copies of local rules of court and any amendments to the Administrative Office—as presently required by 28 U.S.C.§ 2071(d)—courts could fulfill this statutory responsibility by placing and updating their local rules directly on the Internet. It is expected that Internet access to the rules would benefit lawyers researching local practices and relieve the clerks' offices of some of their burden in providing copies of local rules and otherwise responding to inquiries regarding them. Access to Official Bankruptcy Forms would benefit practitioners and pro se claimants in bankruptcy. Paper copies of most of these forms are not available from the courts, but must be obtained from private sector sources. The advantages of having public access to the forms on the Internet are clear.

REPORT TO THE CHIEF JUSTICE

In accordance with the standing request of the Chief Justice, a summary of issues concerning select new amendments and proposed amendments generating controversy is set forth in Appendix F.

STATUS OF PROPOSED AMENDMENTS

A chart prepared by the Administrative Office (reduced print) is attached as Appendix G, which shows the status of the proposed amendments to the rules.

Respectfully submitted,

Alicemarie H. Stotler
Chair

Frank W. Bullock, Jr.	Alan W. Perry
Frank H. Easterbrook	Sol Schreiber
Seth P. Waxman	Morey L. Sear
Geoffrey C. Hazard, Jr.	James A. Parker
Phyllis A. Kravitch	E. Norman Veasey
Gene W. Lafitte	William R. Wilson, Jr.

APPENDICES

Appendix A —	Proposed Amendments to the Federal Rules of Appellate Procedure
Appendix B —	Proposed Amendments to the Federal Rules of Bankruptcy Procedure
Appendix C —	Proposed Amendments to the Federal Rules of Civil Procedure
Appendix D —	Proposed Amendments to the Federal Rules of Criminal Procedure
Appendix E —	Proposed Amendments to the Federal Rules of Evidence
Appendix F —	Report to the Chief Justice on Proposed Select New Rules or Rules Amendments Generating Controversy
Appendix G —	Chart Summarizing Status of Rules Amendments

PROPOSED SELECT NEW RULES OR RULES AMENDMENTS GENERATING SUBSTANTIAL CONTROVERSY

The following summary outlines considerations underlying the recommendations of the advisory rules committees and the Standing Rules Committee on certain new rules or controversial rules amendments. A fuller explanation of the committees' considerations was submitted to the Judicial Conference and is sent together with this report.

Federal Rules of Appellate Procedure

The proposed style revision of the Appellate Rules is intended to improve the rules' clarity, consistency, and readability. The advisory rules committee identified and eliminated ambiguities and inconsistencies that inevitably had crept into the rules since their enactment in 1976. The style changes are designed to be nonsubstantive, unless otherwise specified and except with respect to several rules that were under study when the style project commenced. Virtually all comments from the bench, bar, and law professors on the stylized rules were favorable.

The style revision has taken up most of the advisory committee's work during the past four years. The revision of the appellate rules completes the first step of a long-term plan to re-examine all the procedural rules. The rules committees do not, however, plan to revise the Evidence Rules for style purposes because of the disruptive effect it would have on trial practice. Judges and lawyers are familiar with, and rely heavily on, the current text and numbers of the Evidence Rules during trial proceedings. The style project was launched originally by Judge Robert E. Keeton, former chairman of the Standing Rules Committee, and Professor Charles Alan Wright, the first chairman of the Style Subcommittee. The consultant enlisted by them created *Guidelines for Drafting and Editing Court Rules*, which provides a uniform set of conventions for all future writing.

Two style changes are brought to the attention of the Court — the use of "en banc" instead of "in banc" and the use of "must" in place of "shall." Like several other style changes made in the rules, these two changes represent the consensus of the rules committees on a style issue that required a decision that would be adhered to uniformly throughout the rules for purposes of consistency. The committee recognizes room for differences of opinion and does not want the restylization work to be rejected due to the adoption of either usage.

Two other rules, published and commented on for revision other than style, drew notable comment. Rule 32 is of interest because it incorporates generally the acceptability of computerized word-processing programs that assist the bench and bar in determining the proper length of briefs and size of typeface for text. The proposed amendments addressed concerns expressed by many commentators that were aimed at earlier drafts of the rule. As revised in light of these comments, the amended rule was well received by the bench and bar. Rule 35 was rewritten after careful deliberations with representatives of the Department of Justice as well as careful attention to other

proposed word choices, to the extent of setting aside preferred style conventions, in order to improve the rule.

I. Use of "en banc" instead of "in banc"

A. Brief Description

The proposed amendment to Rule 35 substitutes the word "en banc" for "in banc."

B. Arguments in Favor

- "En banc" is the common usage and is overwhelmingly favored by the courts. More than 40,000 published opinions in circuit cases referred to "en banc" and just under 5,000 opinions used the term "in banc." A similar pattern was evidenced in Supreme Court opinions, with 950 opinions using "en banc" while only 46 opinions used "in banc." The Supreme Court rules refer to "en banc."

- "En banc" was used by Congress in a statute when authorizing a court of appeals having more than fifteen judges to perform its "en banc" functions. Act of Oct. 20, 1978, Pub. L. No. 95-486.

C. Objections

- 28 U.S.C. § 46(c) sets out the requirements for an "en banc" proceeding and uses the term "in banc."

D. Rules Committees' Consideration

Both the advisory rules committee and the Standing Rules Committee decided that the most commonly used spelling should be followed in the stylized rules. No objection from any committee member was expressed to the proposed use of "en banc."

II. Use of "must" instead of "shall"

A. Brief Description

The word "must" is used throughout the stylized rules whenever "is required to" is intended, instead of using the more traditional "shall."

B. Arguments in Favor

- The meaning of "must" is clear in all contexts.

- The meaning of the word "shall" is ambiguous and changes depending on the context of the sentence in which it is used. In fact, the word "shall" can shift its meaning even in midsentence. It has as many as eight senses in drafted documents. It is also commonly used as a future tense modal verb, which is inconsistent with present-tense drafting.

C. Objections

- The sound of "must" is jarring in many sentences. Statutes and current rules commonly use "shall."

D. Rules Committees' Consideration

Both the advisory rules committee and the Standing Rules Committee initially expressed skepticism about the use of "must" instead of "shall." But on careful consideration, both committees agreed that the use of "shall" has generated much unwarranted satellite litigation over its meaning. Case law is replete with examples of courts and litigants attempting to discern its precise meaning in various contexts. "Must" has the virtue of universal and uniform meaning. Both committees are sensitive to concerns over piecemeal stylistic changes and adopted the convention of using "must" in every instance that "is required to" is intended in the rules.

Federal Rules of Civil Procedure

I. Rule 23(f) (Interlocutory Appeal of Class Action Certification)

A. Brief Description

A new subdivision (f) would permit an interlocutory appeal from an order granting or denying class action certification in the sole discretion of the court of appeals. District court proceedings would be stayed only if the district judge or the court of appeals ordered a stay.

B. Arguments in Favor

- The proposed amendment would facilitate the establishment of a body of uniform class-action certification principles.

- Denial of certification can toll the death knell in actions that seek to vindicate large numbers of individual claims. A grant of certification can exert a reverse death knell, creating enormous pressure to settle that is often decisive as a practical matter. The need for immediate appellate review may be greater than the need for appellate review of many routine final civil judgments.

- Final judgment appeal, review on preliminary injunction appeal, certification for permissive appeal under § 1292(b), and mandamus together often fail to provide effective review. One response has been to strain ordinary mandamus principles.

- The committee was confident that, as with § 1292(b) appeals, the courts of appeal would act quickly and at a low cost in determining whether to grant permission to appeal. Significant costs would be incurred only in cases presenting such pressing issues as to warrant permission to appeal. In addition, the committee believed that although requests for interlocutory appeal may initially be frequent, that number would fall as the bar acquired experience with the rule and the appellate courts' responses to such requests.

- The committee also noted that a similar proposal had been introduced in Congress.

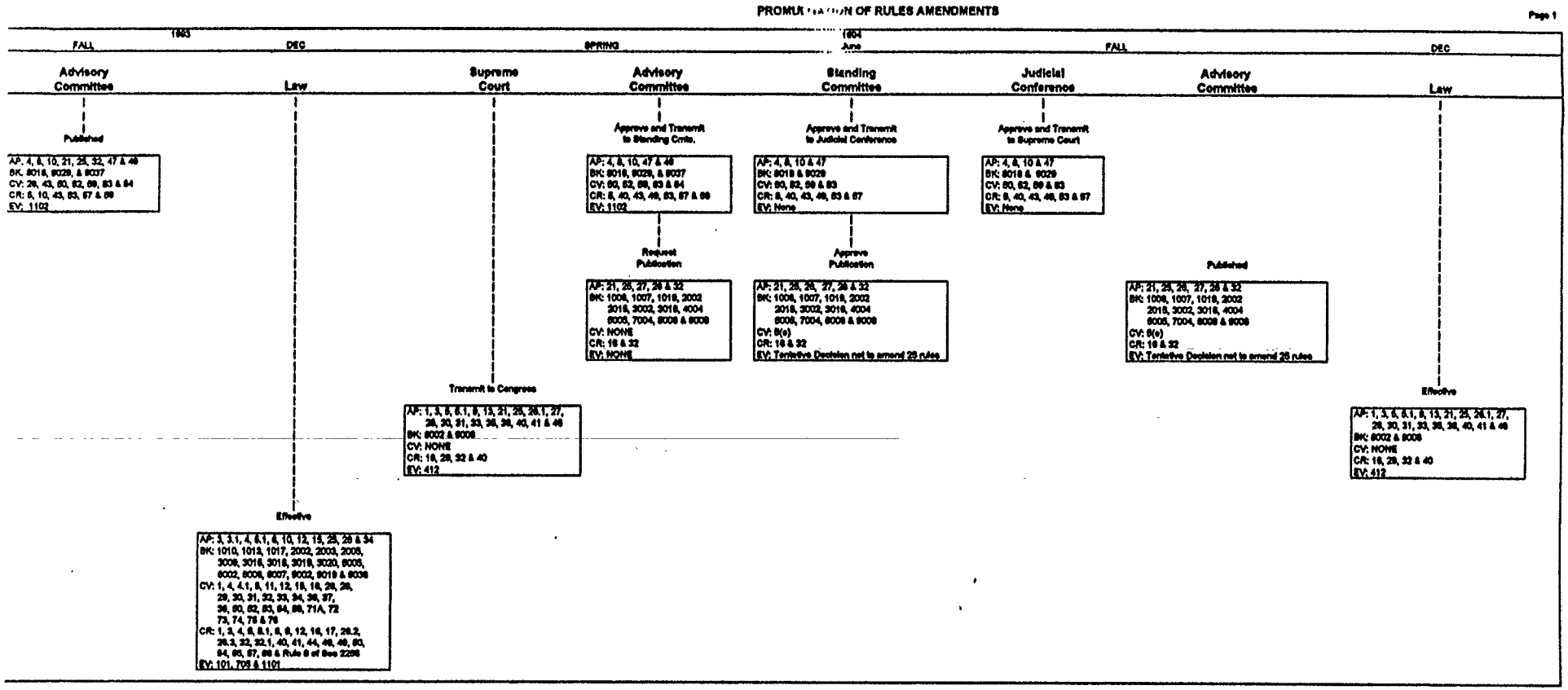
C. Objections

- Applications for permission to appeal would become a routine strategy to increase costs and delay.

- The proposed amendment would add hundreds, maybe thousands, of motions to the already overburdened workloads of the courts of appeals.

D. Rules Committees Consideration

Both committees agreed that the benefits of the proposed amendment greatly outweigh the predictably lesser disadvantages.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DEC
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Standing Committee
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BK: 9018, 9029, & 9037
CV: 26, 43, 50, 52, 59, 63 & 64
CR: 5, 10, 43, 53, 57 & 59
EV: 1102
Effective
AP: 3, 3.1, 4, 6.1, 8, 10, 12, 15, 25, 28 & 34
BK: 1010, 1013, 1017, 2002, 2003, 2005, 3008, 3016, 3018, 3019, 3020, 9005, 9002, 9008, 9007, 9002, 9019 & 9036
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EV: 412
Approve and Transmit to Standing Cmte.
AP: 4, 8, 10, 47 & 48
BK: 9018, 9029, & 9037
CV: 50, 52, 59, 63 & 64
CR: 5, 40, 43, 49, 53, 57 & 59
EV: 1102
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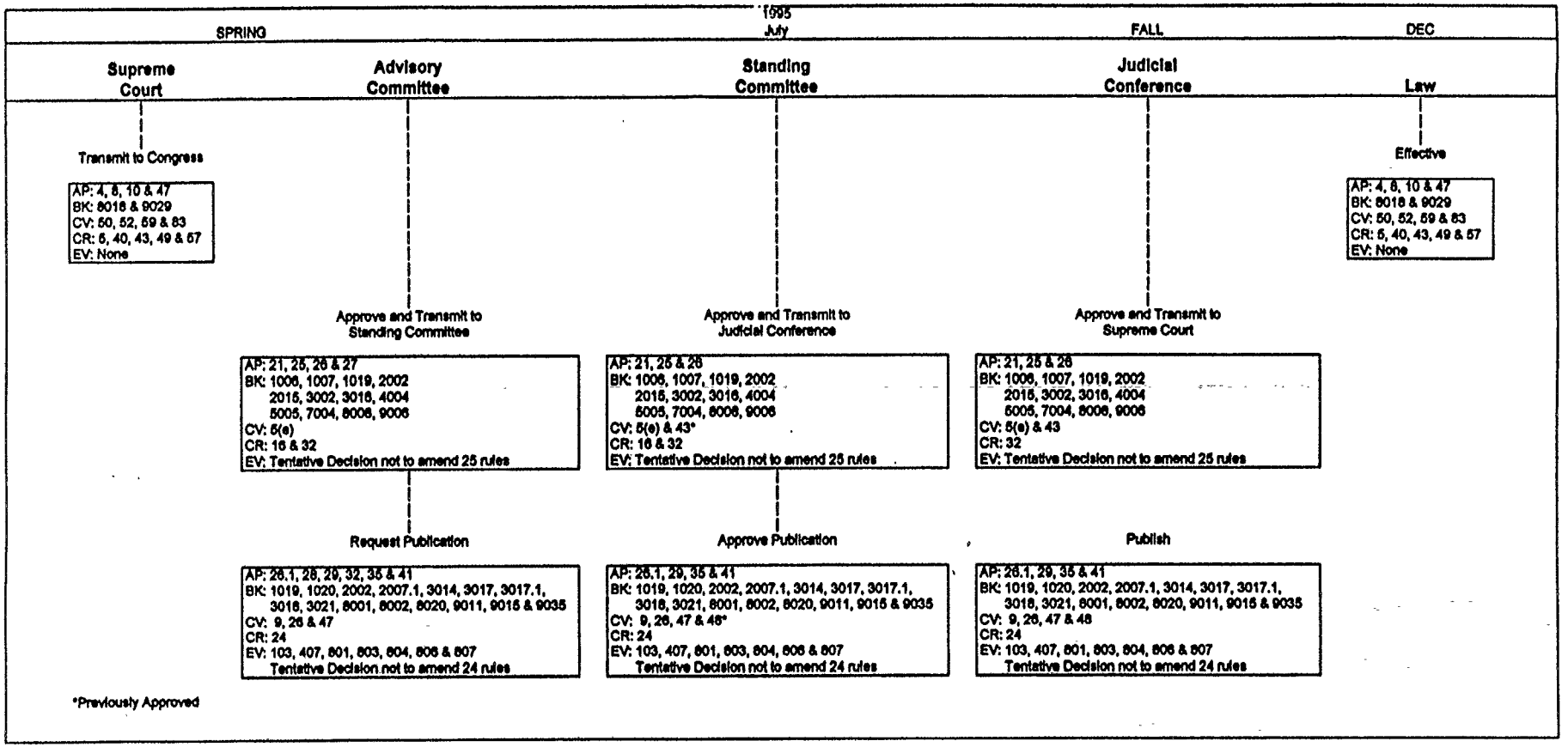
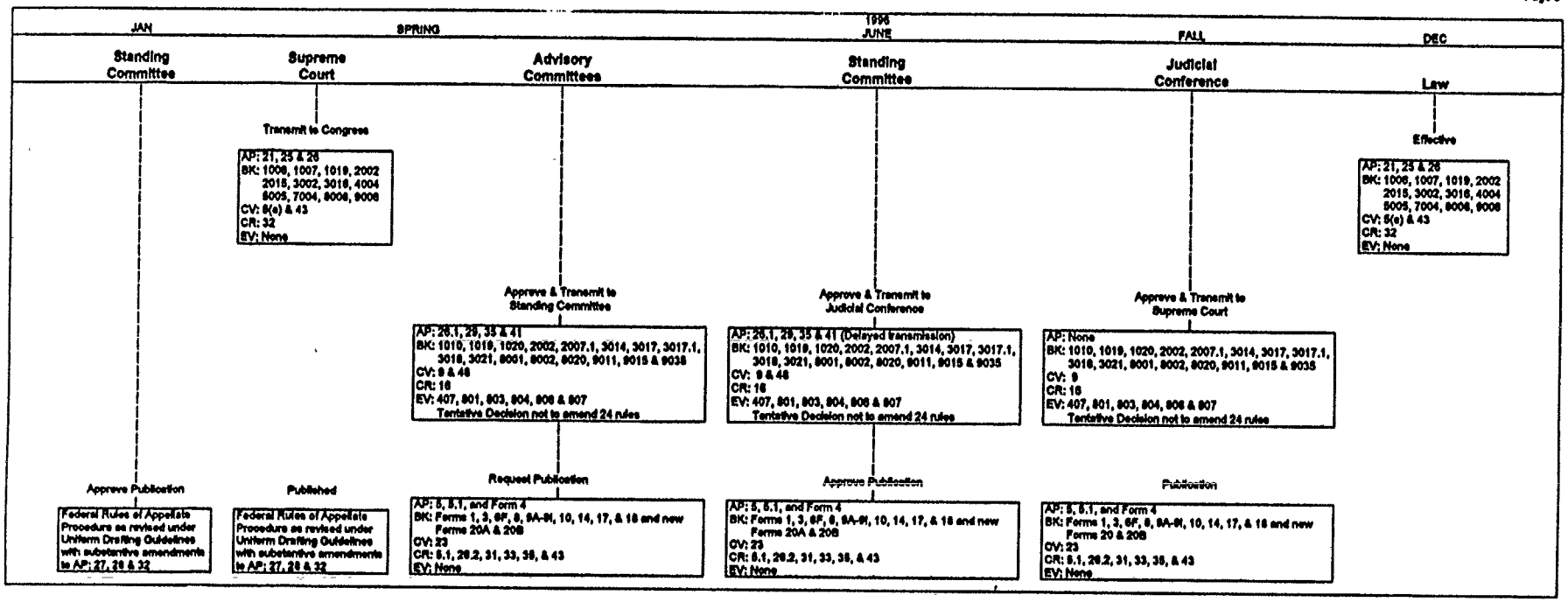
AP: 21, 25, 27, 28 & 32
BK: 1008, 1007, 1018, 2002 2018, 3002, 3018, 4004 9005, 7004, 9008 & 9009
CV: NONE
CR: 16 & 32
EV: NONE
Approve and Transmit to Judicial Conference
AP: 4, 8, 10 & 47
BK: 9018 & 9029
CV: 50, 52, 59 & 63
CR: 5, 40, 43, 49, 53 & 57
EV: None
Approve Publication
AP: 21, 25, 25, 27, 28 & 32
BK: 1008, 1007, 1018, 2002 2018, 3002, 3018, 4004 9005, 7004, 9008 & 9009
CV: 5(e)
CR: 16 & 32
EV: Tentative Decision not to amend 25 rules
Approve and Transmit to Supreme Court
AP: 4, 8, 10 & 47
BK: 9018 & 9029
CV: 50, 52, 59 & 63
CR: 5, 40, 43, 49, 53 & 57
EV: None
Published
AP: 21, 25, 25, 27, 28 & 32
BK: 1008, 1007, 1018, 2002 2018, 3002, 3018, 4004 9005, 7004, 9008 & 9009
CV: 5(e)
CR: 16 & 32
EV: Tentative Decision not to amend 25 rules
Effective
AP: 1, 3, 5, 6.1, 8, 13, 21, 25, 26.1, 27, 28, 30, 31, 33, 36, 38, 40, 41 & 46
BK: 9002 & 9008
CV: NONE
CR: 16, 29, 32 & 40
EV: 412

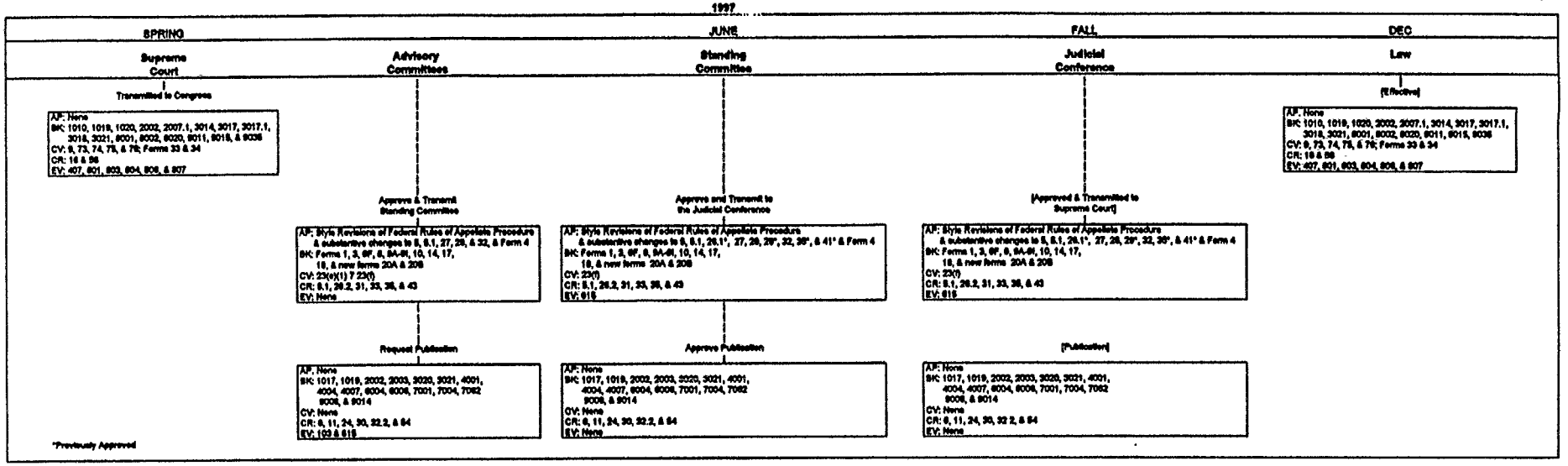
PROMULGATION OF RULES AMENDMENTS



PROMULGATION OF RULES AMENDMENTS



PROMULGATION OF RULES AMENDMENTS
1997



Item IIA

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Memorandum To: Members of the Advisory Committee on the Federal Rules of Evidence
From: Dan Capra, Reporter
Re: Possible Amendment to Evidence Rule 103
Date: September 11, 1997

As you know, the Evidence Rules Committee has been considering a possible amendment to Evidence Rule 103 for some time. At the April, 1997 meeting, a proposed Rule 103 was approved by the Evidence Rules Committee. However, the Standing Committee rejected the proposal (though not on policy grounds), and sent it back to the Evidence Rules Committee for reconsideration.

This memorandum is divided into four parts. Part One discusses the amendment approved by the Evidence Rules Committee in April, and the objections voiced by Judge Easterbrook, who was then a member of the Standing Committee. Part Two sets forth drafting changes in both the proposed Rule and the proposed Advisory Committee Comment, to accomodate Judge Easterbrook's stated concerns. Part Two also includes an alternative proposal from Steve Saltzburg. Part Three sets forth the cases (updated from April) that have discussed the renewal question, i.e., whether an unsuccessful objection or proffer made *in limine* must be renewed at trial. Part Four sets forth the cases (updated from April), discussing the *Luce* question (i.e., whether a ruling that takes effect only on the occurrence of a trial event can be appealed if the event never occurs).

Proposed Amendment to Rule 103, Approved by Evidence Rules Committee in April, 1997.

The Evidence Rules Committee proposal, approved at the April meeting, stated as follows:

> **(e) Motions in limine.** -- If a party moves for an advance ruling to admit or exclude evidence, the court may rule before the evidence is offered at trial or may defer a decision until the evidence is offered. A motion for an advance ruling, when definitively resolved on the record, is sufficient to preserve error for appellate review. But in a criminal case, if the court's ruling is conditioned on the testimony of a witness or the pursuit of a defense, error is not preserved unless that testimony is given or that defense is pursued. Nothing in this subdivision precludes the court from reconsidering an advance ruling.

Judge Easterbrook had four major complaints about the wording of the Rule:

1. The use of the term "preserve error" is not appropriate because nobody is trying to preserve an error. Rather, they are trying to preserve the *right to appeal* or a *claim* of error.

2. A *motion* for an advance ruling does not itself protect the right to appeal. Rather, the court's definitive *ruling* on the motion preserves the adversely affected party's right to appeal.

3. As to the third sentence of the Rule, as written it implies that the court's ruling is *conditional*, when in fact it is not. The ruling is unconditional, but its effect is dependent on the occurrence of a specified trial event (e.g., a defendant's decision to testify or to put on certain evidence).

4. Most importantly, the language purporting to codify *Luce* is too confining. The *Luce* rule should be extended to its broadest logical holding--that if the effect of a ruling depends on admitting evidence, a party must actually have that evidence admitted before he has a right to complain on appeal about the ruling. The Standing Committee in general (i.e., the feeling seemed broader than just Judge Easterbrook) appeared to be of the view that any distinction between civil and criminal cases was untenable.

Revised Draft of a Possible Amendment to Rule 103

The draft set forth below does its best to combine the extremely helpful suggestions of the Chair and several Committee members.

(e) Motions in limine. --If a party moves for an advance ruling to admit or exclude evidence, the court may rule before the evidence is offered at trial or may defer a decision. A party satisfying the requirements of subdivision (a) preserves the right to appeal an advance ruling if the ruling is on the record and definitively admits or excludes evidence. But if the introduction of certain testimony or other evidence, or the pursuit of a certain claim or defense, is a condition precedent to admissibility under the court's advance ruling, a party may not appeal the advance ruling unless the condition precedent is satisfied. Nothing in this subdivision precludes the court from reconsidering an advance ruling.

Reporter's Comment and Alternative Proposal

The above proposal seems to cover all the objections from the Standing Committee. It is also consistent with the proposals of the Style subcommittee of the Standing Committee, e.g., starting the third sentence with "But."

Steve Saltzburg has proposed the following version, as a simple way to deal with preserving issues for appeal that does not require dealing with the *Luce* issue.

(e) Once the court makes a definitive ruling admitting or excluding evidence, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

Approval of this proposal would require reconsideration of whether we want to discuss *Luce* in the rule, and whether we want to include the first and fourth sentences of the current proposal. Also, thought must be given to whether we need to refer to subdivision (a), as the other proposal does. Finally, the other proposal refers to definitive rulings *on the record,* and adoption of the Saltzburg proposal would require reconsideration of whether that language is important.

Proposed Advisory Committee Comment to Rule 103(e).
(Modified from the Comment approved in April)

Note: Major changes from the previous version are redlined.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 103

COMMITTEE NOTE

Since the Federal Rules of Evidence became effective, litigants have increasingly relied on motions *in limine* to raise issues about the admissibility of evidence. As originally enacted, the Federal Rules did not refer to motions *in limine*. This Rule is intended to provide some guidance on the use of *in limine* motions.

One of the most difficult questions arising from *in limine* motions is whether a losing party must renew an objection or offer of proof when the evidence would be offered at trial in order to preserve ~~an issue for~~ a claim of error on appeal. Courts have taken differing approaches to this question. Some courts have held that a renewal at the time the evidence would be offered at trial is always required. *See, e.g., Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980). Some courts have taken a more flexible approach, holding that renewal is not required if the issue decided *in limine* is one that (1) was fairly presented to the trial court for an *in limine* ruling, (2) may be decided as a final matter in the *in limine* context, and (3) was ruled on definitively by the trial judge. *See, e.g., Rosenfeld v. Basquiat,* 78 F.3d 84 (2d Cir. 1996) (admissibility of former testimony under the Dead Man's Statute). Other courts have distinguished between objections to evidence, which must be renewed when evidence is offered at trial, and offers of proof, which need not be renewed at trial. *See, e.g., Fusco v. General Motors Corp.*, 11 F.3d 259 (1st Cir. 1993). Other courts have held that an objection or proffer made *in limine* is sufficient to preserve error because the *in limine* ruling constitutes "law of the case." *See, e.g., Cook v. Hoppin,* 783 F.2d 684 (7th Cir. 1986). These differing approaches create uncertainty for litigants and unnecessary work for the appellate courts.

Subdivision (e) provides that ~~a motion *in limine* definitively resolved by order of record is sufficient to preserve appellate review~~ a definitive advance ruling may be appealed, when the party has otherwise satisfied the objection or offer of proof requirements of Rule 103(a). Where the advance ruling is definitive, a renewed objection or offer of proof is more a formalism than a necessity. See Fed.R.Civ.P. 46 (formal exceptions unnecessary); Fed.R.Cr.P. 51 (same); *Favala v. Cumberland Engineering Co.*, 17 F.3d 987, 991 (7th Cir. 1994) ("once a motion *in limine* has been granted, there is no reason for the party losing the motion to try to present the evidence in order to preserve the issue for appeal"). On the other hand, where the trial court reserves its ruling or declares the ruling provisional, it makes sense to require the party to bring the issue to the court's attention ~~at trial~~ subsequently. *See, e.g.,*

Stockwell v. Sweeney, 76 F.3d 370 (1st Cir. 1996) (the party's failure to object at trial waived the right to appeal an *in limine* ruling, where the trial court "very plainly indicated that plaintiffs should renew their objections as the evidence came in"); *United States v. Valenti*, 60 F.3d 941 (2d Cir. 1995) (failure to proffer evidence at trial waives any claim of error where trial judge had stated that he would reserve judgment on the *in limine* motion until he had heard the trial evidence).

Even where the court's ruling is definitive, nothing in this Rule prohibits the court from revisiting its decision ~~at trial~~ when the evidence is offered. If the court changes its ~~ruling at trial~~ *in limine* ruling, or if the opposing party violates the ~~pretrial~~ *in limine* ruling, objection must be made when the evidence is offered to preserve ~~error~~ the right to appeal. The error if any in such a situation occurs only ~~at trial~~ when the evidence is offered and admitted. *United States Aviation Underwriters, Inc. v. Olympia Wings, Inc.*, 896 F.2d 949, 956 (5th Cir. 1990) ("objection is required to preserve error when an opponent, or the court itself, violates a motion *in limine* that was granted"); *United States v. Roenigk*, 810 F.2d 809 (8th Cir. 1987) (claim of error not preserved where defendant failed to object at trial to secure the benefit of a favorable advance ruling).

The third sentence in Subdivision (e) is intended to codify the principles of *Luce v. United States*, 469 U.S. 38 (1984), and its progeny. ~~In *Luce*, the Supreme Court held that a criminal defendant must testify at trial to preserve for appeal any Rule 609 objection to a trial court's ruling on the admissibility of the defendant's prior convictions for impeachment. The *Luce* principle has been extended by the lower courts to other comparable situations.~~ In *Luce*, the Supreme Court held that a criminal defendant must testify at trial in order to preserve a claim of error predicated upon a trial court's decision to admit the defendant's prior convictions for impeachment. The *Luce* principle has been extended by many lower courts to other comparable situations, and logically applies whenever a trial event is a condition precedent to an advance ruling that evidence is admissible. *See United States v. DiMatteo*, 759 F.2d 831 (11th Cir. 1985) (applying *Luce* where defendant's witness would be impeached with evidence offered under Rule 608). *See also United States v. Goldman*, 41 F.3d 785, 788 (1st Cir. 1994), *cert.denied*, 115 S.Ct. 1321 (1995) ("Although *Luce* involved

impeachment by conviction under Rule 609, the reasons given by the Supreme Court for requiring the defendant to testify apply with full force to the kind of Rule 403 and 404 objections that are advanced by Goldman in this case."); *Palmieri v. DeFaria,* 88 F.3d 136 (2d Cir. 1996) (where the plaintiff decided to take an adverse judgment rather than challenge an advance ruling by bringing evidence at trial, the *in limine* ruling would not be reviewed on appeal); *United States v. Ortiz,* 857 F.2d 900 (2d Cir.), *cert. denied,* 489 U.S. 1070 (1989) (where uncharged misconduct is ruled admissible if the defendant pursues a certain defense, the defendant must actually pursue that defense at trial to preserve a claim of error for appeal); *United States v. Bond,* 87 F.3d 695 (5th Cir. 1996) (where the trial court rules *in limine* that the defendant would waive his fifth amendment privilege were he to testify, the defendant must take the stand and testify in order to challenge that ruling on appeal).

The Rule does not purport to answer whether a party ~~objecting to impeachment evidence *in limine* waives the objection by offering the evidence on direct to "remove the sting" of anticipated impeachment~~ who objects to evidence that the court finds admissible in a definitive *in limine* ruling, and who then offers the evidence to "remove the sting" of its anticipated prejudicial effect, thereby waives the right to appeal the *in limine* determination. The Rule states that the occurrence of a condition precedent is necessary, but does not state that it is sufficient, to preserve the issue for appeal. See *Gill v. Thomas,* 83 F.3d 537, 540 (1st Cir. 1996) ("by offering the misdemeanor evidence himself, Gill waived his opportunity to object and thus did not preserve the issue for appeal"); *United States v. Fisher,* 106 F.3d 622 (5th Cir. 1997), as corrected 1997 U.S. App. LEXIS 12671 (1997) (where the trial judge ruled *in limine* that the government could use a prior conviction to impeach the defendant if he testified, the defendant did not waive his right to appeal by introducing the conviction on direct examination); United States v. Williams, 939 F.2d 721 (9th Cir. 1991)(objection to impeachment evidence was waived where the defendant was impeached on direct examination); *Judd v. Rodman,* 105 F.3d 1339 (11th Cir. 1997) (an objection made *in limine* is sufficient to preserve a claim of error when the movant, as a matter of trial strategy, presents the objectionable evidence herself on direct examination to minimize its prejudicial effect).

Proposed Advisory Committee Comment to Saltzburg Proposal

Note: What follows is simply the second, third and fourth paragraphs of the Proposed Advisory Committee Note set forth immediately above. Those are the only paragraphs that provide pertinent commentary to the Saltzburg proposal. They are set forth again immediately below, for the convenience of the Committee

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 103

COMMITTEE NOTE

One of the most difficult questions arising from *in limine* motions is whether a losing party must renew an objection or offer of proof when the evidence would be offered at trial in order to preserve ~~an issue for~~ a claim of error on appeal. Courts have taken differing approaches to this question. Some courts have held that a renewal at the time the evidence would be offered at trial is always required. *See, e.g., Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980). Some courts have taken a more flexible approach, holding that renewal is not required if the issue decided *in limine* is one that (1) was fairly presented to the trial court for an *in limine* ruling, (2) may be decided as a final matter in the *in limine* context, and (3) was ruled on definitively by the trial judge. *See, e.g., Rosenfeld v. Basquiat,* 78 F.3d 84 (2d Cir. 1996) (admissibility of former testimony under the Dead Man's Statute). Other courts have distinguished between objections to evidence, which must be renewed when evidence is offered at trial, and offers of proof, which need not be renewed at trial. *See, e.g., Fusco v. General Motors Corp.*, 11 F.3d 259 (1st Cir. 1993). Other courts have held that an objection or proffer made *in limine* is sufficient to preserve error because the *in limine* ruling constitutes "law of the case." *See, e.g., Cook v. Hoppin,* 783 F.2d 684 (7th Cir. 1986). These differing approaches create uncertainty for litigants and unnecessary work for the appellate courts.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 103

Subdivision (e) provides that ~~a motion *in limine* definitively resolved by order of record is sufficient to preserve appellate review~~ a definitive advance ruling may be appealed, when the party has otherwise satisfied the objection or offer of proof requirements of Rule 103(a). Where the advance ruling is definitive, a renewed objection or offer of proof is more a formalism than a necessity. See Fed.R.Civ.P. 46 (formal exceptions unnecessary); Fed.R.Cr.P. 51 (same); *Favala v. Cumberland Engineering Co.*, 17 F.3d 987, 991 (7th Cir. 1994) ("once a motion *in limine* has been granted, there is no reason for the party losing the motion to try to present the evidence in order to preserve the issue for appeal"). On the other hand, where the trial court reserves its ruling or declares the ruling provisional, it makes sense to require the party to bring the issue to the court's attention ~~at trial~~ subsequently. *See, e.g., Stockwell v. Sweeney*, 76 F.3d 370 (1st Cir. 1996) (the party's failure to object at trial waived the right to appeal an *in limine* ruling, where the trial court "very plainly indicated that plaintiffs should renew their objections as the evidence came in"); *United States v. Valenti*, 60 F.3d 941 (2d Cir. 1995) (failure to proffer evidence at trial waives any claim of error where trial judge had stated that he would reserve judgment on the *in limine* motion until he had heard the trial evidence).

Even where the court's ruling is definitive, nothing in this Rule prohibits the court from revisiting its decision ~~at trial~~ when the evidence is offered. If the court changes its ~~ruling at trial~~ *in limine* ruling, or if the opposing party violates the ~~pretrial~~ *in limine* ruling, objection must be made when the evidence is offered to preserve ~~error~~ the right to appeal. The error if any in such a situation occurs only ~~at trial~~ when the evidence is offered and admitted. *United States Aviation Underwriters, Inc. v. Olympia Wings, Inc.*, 896 F.2d 949, 956 (5th Cir. 1990) ("objection is required to preserve error when an opponent, or the court itself, violates a motion *in limine* that was granted"); *United States v. Roenigk*, 810 F.2d 809 (8th Cir. 1987) (claim of error not preserved where defendant failed to object at trial to secure the benefit of a favorable advance ruling).

Summary of Cases on the Renewal Question:

Stockwell v. Sweeney, 76 F.3d 370 (1st Cir. 1996): Failure to object at trial waives error where the trial court "very plainly indicated that plaintiffs should renew their objections as the evidence came in."

United States v. Holmquist, 36 F.3d 154 (1st Cir. 1995): "[W]hen a judge issues a provisional in limine pretrial order and clearly invites the adversely affected party to offer evidence at sidebar for the purpose of reassessing the scope or effect of the order in the setting of the actual trial, the exclusion of evidence pursuant to that order may be challenged on appeal only if the party unsuccessfully attempts to offer such evidence in accordance with the terms specified in the order."

Fusco v. General Motors Corp., 11 F.3d 259 (1st Cir. 1993): Where a party is told definitively in limine that its evidence will not be admitted at trial, there is no requirement that the evidence be offered again at trial to preserve error. Otherwise, "the proponent would have to engage in the wasteful and inconvenient task of summoning witnesses or organizing demonstrative evidence that the proponent has already been told not to proffer."

Doty v. Sewall, 908 F.2d 1053 (1st Cir. 1990): A pre-trial motion in limine is not sufficient to preserve an issue for appeal where the district court declines to rule on the admissibility of the evidence until the evidence is actually offered.

Rosenfeld v. Basquiat, 78 F.3d 84 (2d Cir. 1996): Trial Judge ruled in limine that former testimony would be inadmissible at trial. There was no need to renew the issue at trial, since the issue was fairly presented in limine, and the trial court made a definitive ruling on what was tantamount to a question of law.

United States v. Birbal, 62 F.3d 456 (2d Cir. 1995): Rule 403 objections must be renewed at trial to preserve error, since they are based on a balancing approach that is trial-sensitive.

United States v. Valenti, 60 F.3d 941 (2d Cir. 1995): Failure to proffer evidence at trial waives objection where trial judge had stated that he would reserve judgment on the in limine motion until he had heard the trial evidence.

Government of the Virgin Islands v. Joseph, 964 F.2d 1380 (3rd Cir. 1992): Contemporaneous objection not needed where the trial court had "thoroughly considered the issue just the day before the evidence was offered."

American Home Assurance Co. v. Sunshine Supermarket, Inc., 753 F.2d 321 (3rd Cir. 1985): Objection at trial was not required to preserve a claim of error where the defendant filed a written pretrial motion, and the trial court held a hearing and made a definitive oral ruling, with no indication that it would reconsider the matter at trial. "Under these circumstances, requiring an objection when the evidence was introduced at trial would have been in the nature of a formal exception and, thus, unnecessary under Rule 46."

Keene v. Aircap Industries Corp., 60 F.3d 823 (4th Cir. 1995): Renewal of objection required "where, as here, the district court does not make a definitive ruling on the motion *in limine*."

United States v. Williams, 81 F.3d 1321 (4th Cir. 1996): The court agrees with the general principle that a motion *in limine* preserves error where the pretrial ruling is definitive and the issue can be determined in advance of trial. However, here the claim of error was not preserved because the *in limine* ruling was not even based on the precise issue that the defendant sought to argue on appeal.

Marcel v. Placid Oil Co., 11 F.3d 563 (5th Cir. 1994): "The general rule in this Circuit is that an overruled motion *in limine* does not preserve error on appeal."

United States v. Estes, 994 F.2d 147 (5th Cir. 1993): Where evidence is ruled inadmissible at an *in limine* hearing, the party must proffer the testimony at trial in order to preserve a claim of error for appeal. The court recognized that a party would have to make the proffer "through a sidebar conference (on the record) or otherwise handle it outside the hearing of the jury; failure to do so would defeat the purpose of the *in limine* ruling. The flip side is, of course, that a trial judge should not be surprised, perturbed or annoyed when counsel makes an objection or offer of proof on an issue that the judge believes was disposed of at the in limine ruling."

United States v. Fortenberry, 919 F.2d 923 (5th Cir. 1990): Objection at trial not required where the trial court allowed the defendant to register a continuing objection at the *in limine* hearing, that would apply when the challenged evidence was admitted at trial. The court of appeals frowns on this practice, however, because it deprives the trial court of the opportunity to revisit the admissibility issue.

United States Aviation Underwriters, Inc. v. Olympia Wings, Inc., 896 F.2d 949 (5th Cir. 1990): "objection is required to preserve error when an opponent, or the court itself, violates a motion *in limine* that was granted."

Garner v. Santoro, 865 F.2d 629 (5th Cir. 1989): No offer of proof is required at trial where the trial court, *in limine*, definitively excluded an entire class of evidence on a categorical basis.

Saglimbene v. Venture Industries Corp., 895 F.2d 1414 (6th Cir. 1990): A motion to exclude an expert's testimony, made just prior to his testifying, is "analagous" to a motion *in limine*, and since this motion was denied, the party had to object to the questions when asked of the expert in order to preserve a claim of error for appellate review.

Favala v. Cumberland Engineering Co., 17 F.3d 987 (7th Cir. 1994): "once a motion *in limine* has been granted, there is no reason for the party losing the motion to try to present the evidence in order to preserve the issue for appeal."

United States v. Haddad, 10 F.3d 1252 (7th Cir. 1993): Where the trial judge expressly left the admissibility of a guilty plea open for reconsideration, objection must be renewed at trial to preserve a claim of error for appeal.

United States v. Hoyos, 3 F.3d 232 (7th Cir. 1993): "Failure to accept the district court's invitation to renew his challenge to the motion *in limine* bars Hoyos' challenge to the merits of the ruling on appeal."

Cook v. Hoppin, 783 F.2d 684 (7th Cir. 1986): Ruling on a motion in limine constitutes "law of the case" and therefore the objection need not be renewed at trial to preserve a claim of error for appeal.

United States v. Pena, 67 F.3d 153 (8th Cir. 1995): Where the district court deferred ruling on the motion *in limine*, the failure to raise the objection at trial means that the claim of error is not preserved for appeal.

Aerotronics, Inc. v. Pneumo Abex Corp., 62 F.3d 1053 (8th Cir. 1995): *In limine* ruling on which statute of limitations to apply; objection need not be renewed at trial, since the ruling was definitive and on a legal question.

United States v. Roenigk, 810 F.2d 809 (8th Cir. 1987): Waiver found where defendant failed to object at trial to secure the benefit of a favorable ruling he had received before trial.

Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322 (8th Cir. 1985): Objection at *in limine* hearing does not preserve a claim of error where the party objects at trial on grounds different from those asserted at the in limine hearing.

United States v. Lui, 941 F.2d 844 (9th Cir. 1991): Objection need not be renewed at trial where the trial court referred to the *in limine* motion as "frivolous" and deserving of a sanction.

Palmerin v. City of Riverside, 794 F.2d 1409 (9th Cir. 1986): Objection need not be renewed "where the substance of the objection has been thoroughly explored during the hearing on the motion *in limine*, and the trial court's ruling permitting introduction of evidence was explicit and definitive."

Unit Drilling Co. v. Enron Oil & Gas Co., 108 F.3d 1186 (10th Cir. 1997): The plaintiff could appeal, without having made an offer of proof at trial, the grant of an *in limine* motion based on Rule 403 to exclude evidence. The plaintiff had made clear the evidence it wished to admit and the grounds of admissibility, the issue was a discrete one that could be presented adequately and ruled upon before trial, and the issue was definitively decided by the order granting the motion.

Pandit v. American Honda Motor Co., 82 F.3d 376 (10th Cir. 1996): Any error in admission of evidence of lack of similar accidents was properly preserved for appeal by objection *in limine*. There was no need to renew the objection at trial, since the *in limine* ruling was definitive, and the issue was of a type that could finally be decided before trial.

United States v. Mejia-Alarcon, 995 F.2d 982 (10th Cir. 1993): Objection at trial not required where trial court rules *in limine* that prior convictions were automatically admissible under Rule 609(a)(2). The trial court made a definitive ruling on what is essentially a question of law. The court notes that an objection would have to be made at trial if the pre-trial ruling is "fact-bound" (e.g., a ruling under 403), or if the trial court declines to issue a definitive pretrial ruling.

United States v. Khoury, 901 F.2d 948 (11th Cir. 1990) "A defendant must object at trial to preserve an objection on appeal; the overruling of a motion *in limine* does not suffice."

Summary of Cases on the *Luce* Question:

Gill v. Thomas, 83 F.3d 537, 540 (1st Cir. 1996): Plaintiff objected *in limine* to the use of misdemeanor evidence for impeachment. The trial court ruled that it would be admissible. When the plaintiff took the stand, counsel brought the conviction out on direct. This was held a waiver of any claim of error.

United States v. Goldman, 41 F.3d 785 (1st Cir. 1994), *cert.denied*, 115 S.Ct. 1321 (1995) ("Although *Luce* involved impeachment by conviction under Rule 609, the reasons given by the Supreme Court for requiring the defendant to testify apply with full force to the kind of Rule 403 and 404 objections that are advanced by Goldman in this case.").

United States v. Holmquist, 36 F.3d 154 (1st Cir. 1994), *cert. denied*, 115 S.Ct. 1797 (1995): "[W]hen a judge issues a provisional *in limine* order and clearly invites the adversely affected party to offer evidence at sidebar for the purpose of reassessing the scope or effect of the order in the setting of the actual trial, the exclusion of evidence pursuant to that order may be challenged on appeal only if the party unsuccessfully attempts to offer such evidence in accordance with the terms specified in the order."

United States v. Griffin, 818 F.2d 97 (1st Cir. 1987): The prosecutor proposed to explain a government witness' delay in coming forward by offering evidence of a third-party threat against him. The trial court sustained the *in limine* objection to this evidence, but warned that, if defense counsel cross-examined the witness as to the delay, the threat evidence could come in as rebuttal. Under these circumstances, the failure to cross-examine the witness as to delay operated to waive any objection to the court's ruling. Since the threat evidence was never introduced, the defendant's challenge "never ripened into an appealable issue."

United States v. Nivica, 887 F.2d 1110 (1st Cir. 1989): At an in limine hearing the court ruled that if the defendant chose to testify, the scope of cross-examination would be broader than that proposed by the defendant. Where the defendant never testified, any error was not preserved for review.

United States v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991): The trial court ruled pre-trial that if the defendant testified in a certain way (i.e., that he had a good faith belief he was not violating securities laws), this would constitute an advice of counsel defense and would result in a waiver of the attorney-client privilege. The defendant took the stand but avoided reference to his good faith belief. Any objection to the trial court's pre-trial ruling was not preserved, because the defendant never fulfilled the condition of testifying to his good faith belief.

United States v. Ortiz, 857 F.2d 900 (2d Cir. 1989): At a pretrial hearing in a drug case, the trial court ruled that if the defendant put on a personal use defense, the prosecution would be permitted to introduce uncharged misconduct under Rule 404(b). The defendant did not put on a personal use defense at trial. This operated to waive any objection to the *in limine* ruling. "The proper method to preserve a claim of error in similar circumstances is to take the position that leads to the admission of the adverse evidence, in order to bring a fully developed record into this Court."

United States v. DiPaolo, 804 F.2d 225 (2d Cir. 1986): To preserve error based on an *in limine* ruling holding impeachment evidence admissible against a defense witness, the witness must testify at trial.

United States v. Weichert, 783 F.2d 23 (2d Cir. 1986): *Luce* rule applies where the government would impeach the defendant with evidence offered under Rule 608.

Palmieri v. DeFaria, 88 F.3d 136 (2d Cir. 1996): Where the plaintiff decided to take an adverse judgment rather than challenge an evidentiary ruling by bringing evidence at trial, the in limine ruling would not be reviewed on appeal. This was simply an attempt to evade the final judgment rule that would not be tolerated. The court emphasizes that the district judge "continually showed his willingness to revisit all of his rulings depending upon how the evidence developed."

United States v. Fisher, 106 F.3d 622 (5th Cir. 1997), as corrected 1997 U.S. App. LEXIS 12671 (1997): The Trial Judge ruled *in limine* that the government could use a prior conviction to impeach the defendant if he testified, so the defendant introduced the conviction on direct; the Court held that the defendant had not waived his right to appeal by introducing the conviction. Any finding of waiver would result in unfairness.

United States v. Bond, 87 F.3d 695 (5th Cir. 1996): Where trial court rules *in limine* that the defendant would waive his fifth amendment privilege were he to testify, the defendant must take the stand and testify in order to challenge that ruling on appeal.

United States v. Smiley, 997 F.2d 475 (8th Cir. 1993): Defendant waived objection on appeal by introducing evidence of his conviction on direct examination. See also *United States v. Martinez*, 76 F.3d 1145 (10th Cir. 1996) (same).

United States v. Williams, 939 F.2d 721 (9th Cir. 1991): Objection to impeachment evidence was not preserved, where the defendant took the stand and impeachment was introduced on direct examination.

United States v. Johnson, 903 F.2d 1219 (9th Cir. 1990): The trial court ruled that the defendant would have to try on certain clothing if he took the stand to testify. Any objection to this ruling was not preserved because the defendant never took the stand.

United States v. DiMatteo, 759 F.2d 831 (11th Cir. 1985): Objection to impeachment of the defendant's witness under Rule 608 is not preserved unless the witness takes the stand.

Judd v. Rodman, 105 F.3d 1339 (11th Cir. 1997): After the trial judge definitively denied a motion *in limine* to exclude evidence of the plaintiff's sexual history, the plaintiff introduced this evidence on direct examination. The error was not waived because a motion *in limine* is sufficient to preserve the objection when the movant, as a matter of trial strategy, presents the objectionable evidence herself on direct examination to minimize its prejudicial effect.

Item IIB

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Memorandum To: Members of the Advisory Committee on the Federal Rules of Evidence
From: Dan Capra, Reporter
Re: Developments Concerning Evidence Rule 615.
Date: September 11, 1997

As you know, the Standing Committee, at its June meeting, accepted in principle the Evidence Rules Committee's proposal to amend Rule 615 so that it would be consistent with recent victim's rights legislation. However, the Standing Committee rejected the language of the Advisory Committee's proposed amendment, and substituted its own. The Standing Committee's version of the Rule has been sent to the Judicial Conference with the recommendation that the public comment period be waived.

Since the Standing Committee meeting, new victim's rights legislation has been introduced in Congress that would directly amend Rule 615. The new legislation sets forth a provision delaying the effective date if enacted, in order to allow input from the Judicial Conference.

This memo provides background on the Standing Committee action, describes the new legislation, and possible responses to the legislation should it be passed. It also discusses other proposals currently in Congress that would affect the Rule 615 sequestration power.

I have been informed by people active in the Victim's Rights movement that the Congressional proposal to amend Rule 615 will probably not be enacted. Nonetheless, it would be very useful to be prepared with comments and suggestions, should the legislation be enacted and the time line started.

Evidence Rules Committee's Proposed Amendment to Rule 615

The Evidence Rules Committee, at its April, 1997 meeting, recommended that the Standing Committee issue the following proposed amendment to Rule 615 for public comment:

Rule 615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. <u>But in a criminal case, the court shall not exclude a victim, as defined in Section 503(e)(2) of the Victims' Rights and Restitution Act of 1990, unless the court determines that the victim's trial testimony would be materially affected if the victim heard other testimony at the trial.</u> This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

This amendment sought to track two pieces of victim's rights legislation that are in conflict with the current Rule: the Victim's Rights and Restitution Act of 1990, and the Victim's Rights Clarification Act of 1997. Judge Easterbrook, however, was of the view that a Rule should not attempt to track or refer to another statute, because the statute might be changed or superseded.

Amendment to Evidence Rule 615 Approved by the Standing Committee

The amendment to Rule 615 approved by the Standing Committee and referred to the Judicial Conference reads as follows:

Rule 615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person whose presence is authorized by statute.

The Advisory Committee's Note to the Rule now reads as follows:

COMMITTEE NOTE

The amendment is in response to (1) the Victim's Rights and Restitution Act of 1990, 42 U.S.C. § 10606, which guarantees, within certain limits, the right of a crime victim to attend the trial, and (2) the Victim Rights Clarification Act of 1997 (18 U.S.C. § 3510).

The Standing Committee viewed this as a conforming amendment, and therefore recommended that the amendment be adopted without a period of public comment.

The Recent Congressional Proposal That Would Amend Rule 615

Senators Kennedy and Leahy introduced the Crime Victims Assistance Act (S.1081) on July 29, 1997. The intent of the Act is to provide for victims' rights by statute rather than constitutional amendment. The bill would directly amend Rule 615, but delays the effective date for six months until the Judicial Conference has submitted its own recommendations for a change in the Rule.

Section 131 of the Act, entitled "Enhanced Right To Be Present At Trial", would amend Rule 615 as follows (redlined version):

Rule 615. Exclusion of Witnesses

~~At the request~~ (a) IN GENERAL. Except as provided in subsection (b), at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. ~~This rule~~

(b) EXCEPTIONS. Subsection (a) does not authorize ~~exclusion of (1) a party~~ exclusion of--

(1) a party who is a natural ~~person, or (2) an officer~~ person;

(2) an officer or employee of a party which is not a natural person designated as its representative by its ~~attorney, or (3) a person~~ attorney;

(3) a person whose presence is shown by a party to be essential to the presentation of the party's cause~~.~~; or

(4) a person who is a victim (or a member of the immediate family of a victim who is deceased or incapacitated) of an offense involving death or bodily injury to any person, a threat of death or bodily injury to any person, a sexual assault, or an attempted sexual assault, for which a defendant is being tried in a criminal trial, unless the court concludes that--

(A) the testimony of the person will be materially affected by hearing the testimony of other witnesses, and the material effect of hearing the testimony of other witnesses on the testimony of that person will result in unfair prejudice to any party; or

(B) due to the large number of victims or family members of victims who may be called as witnesses, permitting attendance in the courtroom itself when testimony is being heard is not feasible.

(c) DISCRETION OF COURT; EFFECT ON OTHER LAW. -- Nothing in subdivision (b)(4) shall be construed --

(1) to limit the ability of a court to exclude a witness, if the court determines that such action is necessary to maintain order during a court proceeding; or

(2) to limit or otherwise affect the ability of a witness to be present during court proceedings pursuant to section 3510 of title 18, United States Code.

Reporter's Note: The statutory reference in proposed subdivision (c)(2) is to the Victim Rights Clarification Act, also known as the McVeigh legislation, prohibiting exclusion from trial of victims who would only testify at sentencing.

Effective Date Provisions of Proposed Legislation

S. 1081 sets forth the following rules to govern the effective date of the legislation if enacted:

1. Within 180 days of enactment, the Judicial Conference must submit to Congress a report "containing recommendations for amending the Federal Rules of Evidence to provide enhanced opportunities for victims of offenses involving death or bodily injury to any person, to attend judicial proceedings, even if they may testify as a witness at the proceeding."

2. If the Judicial Conference report agrees with the amendments to Rule 615, then the amendments become effective 30 days after the report is submitted.

3. If the Judicial Conference recommendations are different in any respect from the legislation, then the Judicial Conference recommendations become effective 180 days after they are submitted to Congress, "unless an act of Congress is passed overturning the recommendations."

4. If the Judicial Conference fails to file a report, the legislation becomes effective 360 days after its enactment.

Comment By Reporter on Evidence Rules Committee Planning

Apparently it is not probable that S. 1081 will be enacted. The bill is put forth as an alternative to a constitutional amendment, and those in Congress who favor a victim's rights amendment are said to be against the legislation. Victim's rights groups are said to be opposed to the legislation in general, and are particularly opposed to the provision giving the Judicial Conference an opportunity to "overrule" the legislation.

If the legislation does pass, however, the timetable is such that the Evidence Rules Committee should be ready to either approve the legislation or suggest changes by the time our October meeting is concluded.

One possibility is to simply report to Congress that the Judicial Conference is already considering an amendment to Rule 615 that would incorporate all statutory changes by reference. Therefore, it is unnecessary and unwise to directly amend Rule 615. But we should be prepared with suggested changes, if any, to the amendment, should this argument be rejected.

Comment By Reporter on the Legislation

In substance, the legislation proposes an amendment to Rule 615 that is not far different from the amendment approved by the Evidence Rules Committee at its April meeting. Immediately below is a "clean copy" of what Rule 615 would look like if S.1081 were passed without change

Rule 615. Exclusion of Witnesses

(a) In General. Except as provided in subsection (b), at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion.

(b) Exceptions. Subsection (a) does not authorize exclusion of--

(1) a party who is a natural person;

(2) an officer or employee of a party which is not a natural person designated as its representative by its attorney;

(3) a person whose presence is shown by a party to be essential to the presentation of the party's cause; or

(4) a person who is a victim (or a member of the immediate family of a victim who is deceased or incapacitated) of an offense involving death or bodily injury to any person, a threat of death or bodily injury to any person, a sexual assault, or an attempted sexual assault, for which a defendant is being tried in a criminal trial, unless the court concludes that--

(A) the testimony of the person will be materially affected by hearing the testimony of other witnesses, and the material effect of hearing the testimony of other witnesses on the testimony of that person will result in unfair prejudice to any party; or

(B) due to the large number of victims or family

members of victims who may be called as witnesses, permitting attendance in the courtroom itself when testimony is being heard is not feasible.

(c) Discretion of Court; Effect on Other Law. -- Nothing in subdivision (b)(4) shall be construed --

(1) to limit the ability of a court to exclude a witness, if the court determines that such action is necessary to maintain order during a court proceeding; or

(2) to limit or otherwise affect the ability of a witness to be present during court proceedings pursuant to section 3510 of title 18, United States Code.

Differences Between Proposed Legislation and Advisory Committee Draft:

1. The legislation breaks out the exceptions to the sequestration power into subparts, whereas the Evidence Rule Committee proposal sets forth a separate sentence applying to criminal cases. The subdivision breakout is consistent with the Standing Committee's restylization efforts, and if the Rule is going to be amended, there would appear to be no strong objection to stylizing it in this way.

2. The term "victim" is not defined in the legislative amendment to Rule 615, but it is defined elsewhere in the legislation. The Evidence Rules Committee proposal defined "victim" by reference to the definition in the Victim's Bill of Rights, and then set forth that definition in the Advisory Committee Note. It would seem preferable to have some definition in the body of the Rule, since the term "victim" admits of several possibilities. The fact that "victim" is defined in the omnibus legislation is of little assistance, since the amendment to Rule 615 would be freestanding in the Federal Rules of Evidence--practitioners should not have to go back to the initial legislation to find the definition.

3. The legislation protects only the victims of crimes involving death or bodily injury, threatened death or bodily injury, and sexual assault or attempted sexual assault. The

Advisory Committee proposal is broader, because it incorporates the definition of "victim" from the Victim's Bill of Rights, (i.e., "a person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime"), and applies it to any criminal case. Thus, the Advisory Committee's version of Rule 615 protects many more victims, including victims of fraud, property crimes, etc. Put another way, S. 1081 is more limited in its protection of victim-witnesses than is the Victim's Bill of Rights. The scope of coverage is, to some extent, a political question, though in terms of drafting a good and consistent rule, there should probably be a presumption against unequal protection of victims.

4. Besides the "material effect" standard for exclusion set forth in the Evidence Rules Committee proposal, the legislation adds that sequestration of victims cannot occur unless the material effect on the witness' testimony "will result in unfair prejudice". This is not really an extra requirement, since it is hard to think of a case in which a victim's testimony would be materially affected by other testimony, and yet the effect would not be prejudicial to the complaining party. Yet if there are such situations, the added language has value in assuring that the sequestration power will only be used against victim-witnesses when it is meaningful to protect a party.

5. The legislation adds a proviso that trial attendance can be limited if the number of victims is so large that attendance by all of them would not be feasible. There is no such provision in the Advisory Committee proposal. The "numerosity" problem does indeed seem to be one that could and should be addressed by an amendment to Rule 615.

6. The legislation adds a proviso that attendance can be limited where necessary to maintain order during a court proceeding. The Evidence Rules Committee proposal contains no such language. Again, the "order in the court" problem appears a worthy one to address if Rule 615 is to be amended.

7. The legislation covers the McVeigh problem (i.e., victims who will only testify at sentencing) by reference to the Victim Rights Clarification Act of 1997 (18 U.S.C. 3510). This would seem contrary to the considered position of the Standing Committee, that statutes should not be incorporated by reference into the Federal Rules of Evidence.

Possible Suggestions for Changes in the Legislation

Given the analysis of the legislation set forth above, the Evidence Rules Committee might begin with the following suggested changes to the Congressional amendment to Rule 615, should it be adopted in its current form.

1. Set forth a definition of "victim" within the text of the Rule, that would cover all victims as defined in the Victim's Bill of Rights.

2. Provide for the attendance of victims who would only testify at sentencing in some way other than through a reference to another statute.

If these two suggestions are implemented, and the legislative proposal is otherwise considered sound, Rule 615 would look like this (redlined from the current Congressional proposal:

Rule 615. Exclusion of Witnesses

(a) IN GENERAL. Except as provided in subsection (b), at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion.

(b) EXCEPTIONS. Subsection (a) does not authorize exclusion of--

(1) a party who is a natural person;

(2) an officer or employee of a party which is not a natural person designated as its representative by its attorney;

(3) a person whose presence is shown by a party to be essential to the presentation of the party's cause; or

(4) a person who is a victim ~~(or a member of the immediate family of a victim who is deceased or incapacitated)~~ of an offense

~~involving death or bodily injury to any person, a threat of death or bodily injury to any person, a sexual assault, or an attempted sexual assault,~~ for which a defendant is being tried in a criminal trial, unless the court concludes that--

(A) the trial testimony of the person will be materially affected by hearing the testimony of other witnesses, and the material effect of hearing the testimony of other witnesses on the testimony of that person will result in unfair prejudice to any party; or

(B) due to the large number of victims or family members of victims who may be called as witnesses, permitting attendance in the courtroom itself when testimony is being heard is not feasible.

(c) DISCRETION OF COURT~~; EFFECT OF OTHER LAW~~. -- Nothing in subdivision (b)(4) shall be construed

~~(1)~~ to limit the ability of a court to exclude a witness, if the court determines that such action is necessary to maintain order during a court proceeding.~~; or~~

(2) ~~to limit or otherwise affect the ability of a witness to be present during court proceedings pursuant to section 3510 of title 18, United States Code.~~

(d) DEFINITION OF VICTIM. In this Rule, the term "victim" means a person that has suffered direct physical emotional, or pecuniary harm as a result of the commission of a crime, including--

(1) in the case of a victim that is an institutional entity, an authorized representative of the entity; and

(2) in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, one of the following (in order of preference):

(A) a spouse;

(B) a legal guardian;
(C) a parent;
(D) a child;
(E) a sibling;
(F) another family member; or
(G) another person designated by the court.

Reporter's Comment:

1. The definition of "victim" is taken directly from the Victim's Bill of Rights. No assertion is made that the definition is appropriate or comprehensive as a matter of policy. This is simply a discussion draft which might help the Committee to think about recommendations within the time period provided by the legislation.

2. The scope of the right of attendance for victim-witnesses is also a policy question that I do not purport to answer. The Kennedy-Leahy proposal imposes limitations on the right of attendance that are similar to those set forth in the Victim's Bill of Rights. Other proposals, discussed immediately below, provide for an unlimited or virtually unlimited right of attendance. It is up to the Committee to decide whether to address these policy questions.

3. The proposal takes care of the sentencing testimony problem by simply referring to trial testimony. In this respect it is much cleaner and more direct than the Kennedy-Leahy proposal; and it does not require reference to a statute in the text of the rule.

Other Pending Legislative Proposals

There are two further victim's rights proposals currently before Congress that deal with attendance at trial by victim-witnesses. Neither of these proposals directly amends Rule 615, and neither calls for a Judicial Conference recommendation within a time limit after enactment. Both proposals guarantee a broader right of attendance than is currently provided by Rule 615.

If the Standing Committee's proposal to amend Rule 615 is enacted, there will no longer be a conflict between the Rule and any legislative expansion of the right of attendance. Consequently, we need not deal with these proposals, if enacted, in the same way that we would have to deal with the Kennedy-Leahy proposal. They are set forth below simply for informational purposes. A short discussion of these two proposals follows:

Hyde Proposal

One of the proposals affecting Rule 615 is H.R. 1322, introduced by Congressman Hyde. The proposal provides simply that crime victims shall have the right "to notice of, and not to be excluded from, all public proceedings relating to the offense." This seems to be an absolute, unqualified right--the victim-witness cannot be excluded even if his testimony would be materially affected by other testimony, and even if that material effect would prejudice the defendant. So it is broader in its protection of victims than the Victim's Bill of Rights. The definition of "victim" in the Hyde proposal (like that of the Evidence Committee's proposed amendment to Rule 615) is taken directly from the Victim's Bill of Rights.

One possible problem posed by the Hyde proposal is that it contains a provision repealing the Victim's Bill of Rights. This makes sense, because if the Hyde legislation is passed, the Victim's Bill of Rights would be at best superfluous and at worst in conflict with some of the Hyde provisions, because the Hyde proposal is more protective of victims. But the Advisory Committee Note to Rule 615, which is currently before the Judicial Conference, states that the amendment "is in response to (1) the Victim's Rights and Restitution Act of 1990, 42 U.S.C. § 10606, which guarantees, within certain limits, the right of a crime victim to attend the trial * * *." Thus, if the Hyde proposal is adopted, the Advisory Committee Note would be referring to a repealed statute. Assuming that this is a problem, it does not appear to be a problem that we can solve at this point.

Administration Proposal

The Administration has proposed victim's rights legislation that would affect Rule 615 in its current state--though as with the Hyde proposal, the Standing Committee's amendment to Rule 615 would prevent any conflict between the Rule and any statute. The Administration proposal would amend the Victim's Bill of Rights to strengthen the right to attend the trial. The proposal guarantees "the right to be present throughout all public court hearings related to the offense, including but not limited to all public proceedings concerning release of the accused or convicted offender, acceptance of a plea, the determination of guilt or innocence, or sentencing, unless the victim's presence would violate a constitutional right of the defendant." Thus, the only limitation on the victim-witness' right of attendance is where attendance would violate the defendant's constitutional right to a fair trial. Presumably that requires more egregious circumstances than the fact that the witness' testimony might be materially affected by other testimony at the trial.

The Administration proposal works by amending (i.e., strengthening) the Victim's Bill of Rights, rather than totally repealing it as does the Hyde proposal. The definition of "victim" from the Victim's Bill of Rights is retained.

Item IIC

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Memorandum To: Advisory Committee on the Federal Rules of Evidence
From: Dan Capra, Reporter
Re: The Effect of *Daubert* on Evidence Rule 702
Date: September 11, 1997

At its April, 1997 meeting, the Evidence Rules Committee resolved to take up the question of whether Evidence Rule 702 should be amended to account for *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and its progeny. This memorandum is intended to get the *Daubert* discussion started. It is not intended to set forth the definitive amendment to Rule 702, that would fully take account of *Daubert*; nor is it intended to make the case that an amendment is necessary. Rather, the memorandum provides background information, and some alternative models for amending Rule 702 should the Committee decide that an amendment is necessary.

This memorandum first sets forth some of the policy questions that must be addressed by the Committee in determining whether and how Rule 702 should be amended. The memo then canvasses the states, commentators and courts, and sets forth different versions of Rule 702 that are designed to handle the problem of unreliable expert testimony. It is anticipated that at least some of these proposals can be used as drafting models should the Committee decide that an amendment to Rule 702 is advisable. Finally, two documents are attached to this memorandum. The first is the text of the portion of the Federal Rules of Evidence Manual (7th ed. 1998) that deals with *Daubert*. The second document is an outline of all the major cases applying *Daubert*.

Questions That Must Be Addressed In Deciding How To Deal With *Daubert*

As the documents attached to this memorandum indicate, there is some dispute among the courts on the meaning and application of the *Daubert* "gatekeeper" test, though there is room for argument on how serious the dispute is. In deciding whether and how to amend Rule 702 to account for *Daubert*, the Advisory Committee must address at least the following questions:

1. Does the Rule need to be amended to alleviate confusion and conflict, or are courts by now sufficiently familiar with the *Daubert* standards that an amendment is not necessary?

2. Should the Rule be amended to "codify" *Daubert*, or should the rule be amended to reject the flexible reliability test of *Daubert* in favor of some other test (e.g., general acceptance creates a rebuttable presumption of reliability).

3. If the goal is to codify *Daubert*, how should that be done? This question gives rise to several subsidiary questions:

a. Is it enough to simply require generally that expert testimony be "reliable" or "scientifically valid", or is it better to try to provide more specific guidance to courts and litigants?

b. Should the *Daubert* test apply only to the *principles* upon which the expert bases her testimony, or should Rule 702 also require that the *application* of the principles must be reliable as well? For example, with DNA tests, is it only necessary to show that the technique of DNA identification is reliable, or must it also be shown that the test was reliably conducted in the specific case?

c. Should the *Daubert* standards apply to "technical and other" expert testimony as well as to scientific testimony?

d. If *Daubert* is to apply to "technical and other" expert testimony, how should that be stated in a rule? Should there just be a general statement, or should specific, non-exclusive factors be set forth?

Other Versions of Rule 702 That Deal With the *Daubert* Problem

There are several state versions of Rule 702 that deal more explicitly with guaranteeing the reliability of expert testimony than does the general "helpful knowledge" standard of Federal Rule 702. Also, several commentators have proposed changes to Rule 702 to address the issues encountered by the Court in *Daubert*. Moreover, the Standing Committee itself approved an amendment to Rule 702 before *Daubert* was decided. Finally, there are two proposals in Congress to codify *Daubert*. All of these alternative versions of Rule 702 are set forth below. At the end of this memorandum, I set forth another model, intended to codify the Seventh Circuit's capsulization of *Daubert*, which I believe could be a useful starting point should the Committee decide that Rule 702 needs amending.

Hawaii

The first sentence of Hawaii Rule 702 is the same as the Federal Rule, but Hawaii adds a second sentence providing general language to deal with the problem of unreliable expert testimony. The Hawaii Rule reads as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert.

The second sentence was added in 1991, in order to address the then-raging debate over whether Rule 702 could be read to

incorporate the *Frye* general acceptance test. The amendment was thought necessary to clarify that "[g]eneral acceptance in the scientific community is highly probative of the reliability of a new technique but should not be used as an exclusive threshold for admissibility determinations."

Reporter's Comment to Hawaii Rule

While the Commentary to the Rule says the intent is to go beyond *Frye* with respect to novel scientific techniques, the Hawaii rule does more than that. The second sentence of the Rule applies to *all* experts, scientific or not. The trial judge is encouraged to consider the validity of the "mode of analysis" of *any* proffered expert. This is the way many courts have been reading *Daubert*--i.e., that the reliability test applies to all experts--as the attached documents indicate.

On the other hand, the Hawaii amendment could have little effect as a practical matter, because it does not *mandate* an enquiry into the reliability of a technique or mode of analysis. It says only that the court *may* consider trustworthiness and validity should it choose to do so. Presumably, *Daubert* goes farther by *requiring* the gatekeeper-judge to conduct a reliability enquiry. But for the Committee's purposes, this problem could be rectified by changing the "may" to "must".

Query whether adding "trustworthiness" and "validity" adds much to the Rule. Few would argue that untrustworthy or invalid expert testimony is admissible under the current Rule 702. The Hawaii Rule gives little guidance as to how trustworthiness and validity are to be determined. It was more useful before *Daubert*, when the question was whether a reliability standard even applied, than it is after *Daubert*.

Indiana

The Indiana version of Rule 702 is somewhat like that of Hawaii, in that it adds a second sentence (in the form of a new subdivision), to deal with the reliability question. But it is different in several respects. The Indiana Rule provides as follows:

> (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
>
> (b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

Reporter's Comment on Indiana Rule

The additional language in the Indiana Rule applies only to scientific testimony. It leaves it unclear as to whether "technical or other" testimony must be reviewed for reliability. It can be argued, of course, that a technical or other expert's testimony must be scrutinized as to reliability under the all-encompassing helpfulness standard of Rule 702--it won't assist the jury unless it's reliable, so special language concerning reliability is unnecessary. But if you follow this argument through, it would mean that you don't need extra reliability-based language for scientific testimony either; scientific testimony, like technical or other testimony, must be found reliable to be of any assistance to the jury. It would seem, then, that a viable proposal to Rule 702 must consider all expert testimony, not just scientific testimony.

One advantage of the Indiana rule is that the reliability requirement is mandatory--the judge must be satisfied that the

scientific principles are reliable.

One arguable disadvantage of the Indiana rule is that the reliability enquiry specifically applies only to the "principles" upon which the expert testimony rests." As Judge Becker points out in *Paoli*, an expert may base his opinion on reliable principles, and yet may reach an unreliable conclusion because he misapplies the principles. If *Daubert* applies to both principles and execution, as Judge Becker cogently asserts it does, then the Indiana provision is missing a critical component for the reliability enquiry.

New York

New York courts still adhere to the *Frye* test. The most recent Proposed Code of Evidence (unenacted at this point) sought to codify New York evidence law on this and other questions. I include New York Proposed Rule 702 in case the Committee is interested in rejecting the reliability approach in favor of *Frye* or some version thereof.

Proposed New York Rule 702(a) is similar to Federal Rule 702. Proposed Rule 702(b) specifically deals with scientific testimony, and reads as follows:

> Testimony concerning scientific matters, or testimony concerning the result of a scientific procedure, test or experiment is admissible provided:
>
> 1. There is general acceptance within the scientific community of the validity of the theory or principle underlying the matter, procedure, test, or experiment;
>
> 2. There is general acceptance within the relevant scientific community that the procedure, test or experiment is reliable and produces accurate results; and
>
> 3. The particular test, procedure, or experiment was conducted in such a way as to yield an accurate result.
>
> Upon request of a party, a determination pursuant to this subdivision shall be made before the commencement of trial.

Reporter's Comment on the New York Proposal:

This proposal clarifies that *Frye* is applicable not only to the scientific principle itself, but also to the implementation of that principle in the specific case. It covers only scientific testimony, leaving technical or other testimony to the general test of assisting the factfinder. That is the way it was under *Frye*. It the Committee decides to go to a *Frye* model, the New York proposal is, at least, a good starting point, and could potentially be expanded to any procedure used by an expert, scientific or not.

Note that the Rule applies to all scientific testimony, not just novel science. There are at least two good reasons for applying *Frye* to all scientific testimony, assuming arguendo that the general acceptance test is a good solution. First, the term "novel" is not self-defining--many *Frye* courts have had trouble determining whether a scientific procedure was "novel" enough to be subject to *Frye*. Second, *Frye's* limitation to novel scientific procedures meant that traditional science could be admitted even if it had subsequently been repudiated.

Ohio

In 1994, Ohio Rule 702 was amended because the previous rule, which was identical to Federal Rule 702, had "proved to be uninformative and, at times, misleading." The amended Ohio Rule 702, insofar as it applies to reliability, reads as follows:

A witness may testify as an expert if all of the following apply:

* * *

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

(2) The design of the procedure, test, or experiment reliably implements the theory;

(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

The Rule was intended to codify Ohio law, which had rejected *Frye* as the exclusive test for determining the admissibility of expert testimony.

Reporter's Comment on Ohio Rule:

The Ohio Rule is preferable to some of the previous models, because it requires not only that the expert's principles be reliable, but also that the principles be correctly applied. The three specific reliability requirements apply to *any* testimony reporting the result of a procedure, test, or experiment. It need not necessarily be scientific. So for example, Ohio Rule 702 would apply to expert testimony of a design engineer who wants to testify that a product was unsafe. As the attached outline shows, there is dispute among the federal courts about whether *Daubert* applies to such testimony. But as a policy matter, it is anomalous to apply stringent standards to scientific testimony, yet no standards to non-scientific testimony. That would create the perverse result of an expert having the incentive to argue that his methodology was *not* scientific--indeed, this is occurring in some courts today, where document examiners are arguing that their field is not a science, and therefore is not covered by *Daubert*.

Previous Standing Committee Proposal

In 1991, the Standing Committee proposed that Rule 702 be amended to read as follows:

> Testimony providing scientific, technical, or other specialized information, in the form of an opinion or otherwise, may be permitted only if (1) the information is reasonably reliable and will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, and (2) the witness is qualified as an expert by knowledge, skill, experience, training, or education to provide such testimony. [Ends with a notice requirement invoking the pre-amendment Civil Rule 26]

The Advisory Committee Note to the proposed Rule stated that "while testimony from experts may be desirable if not crucial in many cases, excesses cannot be doubted and should be curtailed." It called on courts to "reject testimony that is based upon premises lacking any significant support and acceptance within the scientific community." The Note also provided the following helpful paragraph:

> In deciding whether the opinion evidence is reasonably reliable and will substantially assist the trier of fact, as well as in deciding whether the proposed witness has sufficient expertise to express such opinions, the court, as under present Rule 702, is governed by Rule 104(a).

Reporter's Comment on Previous Standing Committee Proposal:

The effect of the proposal is to add the term "reasonably reliable" and to require that the expert's testimony provide "substantial" assistance rather than merely assistance. The intent is to tighten up the requirements for admissibility, but an arguable problem is that no guidance is given as to how to apply the tightened standards. See Tamarelli, *Daubert v. Merrell Dow Pharmaceuticals: Pushing the Limits of Scientific Reliability*, 47 Vand. L.Rev. 1175 (1994) (criticizing the Standing Committee proposal for offering "no concrete criteria by which to judge reliability.").

General language such as that proposed by the Standing Committee might well have had some utility before *Daubert*, when the question was whether *Frye* was codified in Rule 702. But after *Daubert*, the value of adding the word "reliable" to Rule 702 is doubtful. Everyone knows that testimony must be reliable or it won't assist the jury. The question is how to determine whether proffered expert testimony is reliable, and whether different tests should be applied to different kinds of expert testimony.

Proposal By Professor Graham

Professor Michael Graham, in the supplement to his treatise on Evidence, proposes the following amendment to Rule 702 to account for *Daubert*:

Testimony providing scientific, technical or other specialized information, in the form of an opinion, or otherwise, may be permitted only if (1) the information is based upon adequate underlying facts, data or opinions, (2) the information is based upon an explanative theory either (a) established to have gained widespread acceptance in the particular field to which the explanative theory belongs, or (b) shown to possess particularized earmarks of trustworthiness, (3) the witness is qualified as an expert by knowledge, skill, experience, training or education to provide such information, and (4) the information will substantially assist the trier of fact to understand the evidence or to determine a fact in issue.

Reporter's Comment on Graham Proposal:

This proposal is arguably more helpful than a general requirement that expert testimony be reliable. It specifically applies its reliability standard to all expert testimony, but it is flexible enough to be applied in accordance with a particular area of expertise. We do not expect real estate appraisers to follow the same methodology as toxicologists, but we do expect both kinds of experts to give reliable testimony, and this proposal is flexible enough to cover both kinds of experts. The proposal also notes helpfully that one of the most important components of a reliable opinion is an adequate basis of information.

One arguable problem with the proposal is the vagueness of the language "particularized earmarks of trustworthiness." Another arguable problem is that the requirement of "substantial" assistance is vague and may present a conflict with the Rule 403 balancing approach.

Finally, the Graham proposal deals only with the expert's general approach or methodology. It does not require that the expert's principles be reliably applied. Arguably, a clause should be included requiring that "the explanative theory has been applied in a reliable manner."

Vanderbilt Proposal

A comment in the Vanderbilt Law Review contains an interesting proposal to amend Rule 702 so as to establish "general acceptance" as a rebuttable presumption of reliability. See Tamarelli, *Daubert v. Merrell Dow Pharmaceuticals: Pushing the Limits of Scientific Reliability,* 47 Vand. L.Rev. 1175 (1994). The proposal reads as follows:

A witness may testify, in the form of an opinion or otherwise, concerning scientific, technical, or other specialized information that will assist the trier of fact to understand the evidence or to determine a fact in issue, but only if (1) the information is reasonably reliable, and (2) the witness is qualified as an expert by knowledge, skill, experience, training, or education to provide that testimony.

Information normally will be considered reasonably reliable if it is based on premises, or derived from techniques, having significant support and acceptance within the relevant specialized community. A party seeking to object to a witness testifying thereto must show by a preponderance of the evidence that the information is not reasonably reliable.

Information based on premises or derived from techniques not having significant support and acceptance within the relevant specialized community normally will not be considered reasonably reliable. A party seeking to have an expert base testimony on this type of information must show by a preponderance of the evidence that this testimony is reasonably reliable.

The Vanderbilt comment states that this proposal has the advantage of addressing *Daubert* directly "by establishing in the text of Rule 702 that peer review and general acceptance should be the primary indicators of reliable expert testimony." Unlike *Frye*, however, the proposal "would not work as an absolute bar against admitting theories that are not generally accepted. Rather, it merely would establish a presumption that these theories are not reliable enough to be admitted."

Reporter's Comment on Vanderbilt Proposal

The *Vanderbilt* burden-shifting proposal seems like an innovative solution to the perceived problem of "junk science", without creating the danger that reliable expert testimony will be unfairly excluded. How one feels about the proposal depends on one's acceptance of the premise--that general acceptance is in virtually every case an indicator that the expert's testimony is reliable. After all the brouhaha of *Daubert*, it indeed appears that most expert testimony excluded after *Daubert* does not meet the test of general acceptance, while most of the testimony admitted after *Daubert* (especially the non-scientific stuff) meets the general acceptance test. So the Vanderbilt proposal is probably a fair codification of the post-*Daubert* results. Also, the proposal applies to all expert testimony, thus providing better guidance and consistency than those proposal which apply only to scientific experts.

One problem with the proposal is the same as was discussed previously in some other proposals. It applies to the principles and premises used by the expert, but says nothing about the application of those principles. One could add language to the *Frye* presumption (e.g., "and is applied in a manner that is generally accepted in the specialized community") to account for this omission.

Buffalo Proposal

A comment in the Buffalo Law Review, entitled *Abandoning New York's "General Acceptance" Requirement: Redesigning Proposed Rule of Evidence 702(b) After Daubert v. Merrell Dow Pharmaceuticals*, 43 Buff.L.Rev. 229 (1995), proposes the following codification of *Daubert*, applicable to scientific testimony only:

Rule 702. Testimony by Experts

(a) In general. - If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(b) Reliable Scientific Testimony. - Testimony concerning scientific matters, or testimony concerning the result of a scientific procedure, test or experiment is admissible provided: (1) the theory or principle underlying the matter, procedure, test or experiment is scientifically valid; (2) the procedure, test, or experiment is reliable and produces accurate results; and (3) the particular test, procedure or experiment was conducted in such a way as to yield an accurate result. Upon request of a party, a determination pursuant to this subdivision shall be made before the commencement of trial.

Reporter's Comment on the Buffalo Proposal:

This is a pretty good codification of the *Daubert* opinion itself, assuming arguendo that codifying the opinion is a worthwhile project. The problem is that cases after *Daubert* have added gloss to the opinion (e.g., was the research conducted in anticipation of litigation), and have applied the reliability test of *Daubert* to all kinds of non-scientific expert testimony. So if a proposal like this were adopted, it would engender some confusion and would certainly change the law in some jurisdictions. Moreover, as discussed above, the limitation to scientific evidence would create the perverse incentive for a field of expertise to call itself unscientific.

One salutary aspect of the proposal is that it specifically applies the reliability requirements not only to the general principles used by the expert, but also to the particular application of those principles.

Professor Starrs' Proposal

Professor Starrs participated in a project sponsored by the Science and Technology Section of the ABA, the goal of which was to fashion evidentiary rules for scientific evidence. His proposal, which can be found at 115 F.R.D. 79, was published in 1987, six years before *Daubert*. Nonethless, it anticipates the decision in that case. Professor Starrs' proposal reads as follows:

Rule 702. Testimony by Experts

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. But expert testimony based upon a scientific theory or technique is not admissible unless the court find that the theory or technique in question is scientifically valid for the purposes for which it is tendered.

Professor Starrs notes that the Rule is designedly general and open-ended: "Just as helpfulness to the jury and the qualifiying of an expert are left undefined by the rule, so too is scientific validity. The sound discretion of the trial court, an oft-touted strength, is once again summoned to the task."

Reporter's Comment on Starrs Proposal:

1. We once again have the problem of applying the reliability standard to scientific testimony only.

2. As stated above, the Rule is designedly general. Before *Daubert*, such a Rule may have been useful, since there was dispute as to whether *Frye* was codified in Rule 702; the Starrs proposal would make clear that *Frye* was not codified. But after *Daubert*, the general reference to scientific validity is arguably of little value. There is no longer a dispute over whether a standard of scientific validity controls scientific testimony. The dispute over *Daubert* is in the details. Does it apply to non-scientific testimony? Can a court rely on other factors than those elicited in the *Daubert* opinion? What weight should a court assign to the explicated *Daubert* factors? A strong argument can be made that an amendment to Rule 702 is not worth the effort unless it tries to answer some of these questions. Though maybe the better approach is to provide general language in the amendment, and more explicit and extensive guidance in the Advisory Committee Note.

Professor Faigman's Proposal

In *Making the Law Safe for Science: A Proposed Rule for the Admission of Expert Testimony,* 35 Washburn L.J. 401 (1996), Professor Faigman proposes the following amendment to Rule 702:

Rule 702 Testimony by Experts

(a) *Scientific Expert Testimony*. If valid scientific knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by scientific training and education may testify thereto in the form of an opinion or otherwise. This inquiry shall consider both the scientific foundation for the testimony and its application to the specific case.

(1) *The Scientific Foundation for the Testimony*. In assessing the validity of the scientific foundation for expert testimony, the court must find that the basis for the expert's testimony has been tested. In order to determine the validity of those scientific tests, the court should consider, among other things, (A) the adequacy of the research methods used to conduct these tests; (B) whether the research supporting the expert's testimony was peer reviewed and published; and (C) the degree of acceptance in the scientific community of the science supporting the expert's opinion.

(2) *Expert Testimony Regarding Case Specific Facts.* In assessing the validity of expert testimony when that testimony is applied to facts specific to the case, the court must find that the methodology or technique used to ascertain the pertinent fact or facts has been adequately tested. The court should consider, among other things, (A) the adequacy of the research methods used to conduct these tests; (B) whether the research validating these methods was peer reviewed and published; and (C) the error rate associated with the methodology used to ascertain the pertinent fact or facts.

(b) *Non-Scientific Testimony.* When the basis for expert testimony is not testable or when scientific knowledge is unnecessary, and technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(c) *Rule 403.* Evidence otherwise admissible under this Rule may be excluded pursuant to Rule 403.

Professor Faigman justifies this proposal as follows:

The proposed rule divides the previously combined concepts of "scientific knowledge" and "non-scientific knowledge". These concepts were separated here for practical purposes rather than in any profound belief that scientific knowledge can be sharply delineated from non-scientific knowledge. It should be emphasized at the outset that in separating scientific and nonscientific knowledge, the rule does not treat non-scientific knowledge more leniently than scientific knowledge. The judge's gatekeeping responsibilities remain the same throughout the proposed rule. However, the rule recognizes that the evaluation of evidence seeking to enter the gate changes depending on the discipline with which it is identified. Therefore, whereas scientific expert testimony must be based on a "valid" scientific basis, non-scientific expert testimony must be based on an "accurate" technical or specialized basis. In fact, the proposed rule states a preference for scientific knowledge when it is available as well as when the matter is not so routine that simple experience would be sufficient. Only when the subject of the expert testimony is not testable, as provided by subsection (b), should the court consider specialized sources of knowledge that might support expert opinion.

Daubert's "validity standard" is incorporated directly into the proposed rule. As many commentators have observed, the validity standard and the relevance requirement of Rule 702 are somewhat redundant, since only valid science can have probative value. Nonetheless, the explicit requirement of validity serves to make clear that the proposed rule follows the *Daubert* principle that judges serve the gatekeeping function of assessing the validity of the science. It should be emphasized that neither this proposed rule nor *Daubert* contemplates a change in the traditional role of jurors to determine what weight to attribute to the expert testimony.

Implicit in the second paragraph of subdivision (a) is the *Daubert* holding that the standard of proof for determining the admissibility of scientific evidence is provided by Rule 104(a). Rule 104(a) establishes a preponderance of the evidence standard for preliminary facts. In addition, this paragraph introduces the division of scientific expert testimony into two categories, general and specific, as set forth in subdivisions (a)(1) and (a)(2).

* * *

The proposed rule is consistent with *Daubert's* rejection of a wooden general acceptance test in two respects. First, it is one factor among several non-exclusive factors that judges might consider in making the pertinent determination. Moreover, the proposed rule merely queries the "acceptance" of the science, rather than whether it is "generally accepted." This minor wording change is meant to emphasize that acceptance need not be complete and that this factor is only one of several factors judges should consider. Thus, expert testimony based on science that has a strong research record in peer-reviewed journals might be admitted despite the lack of general acceptance.

Reporter's Comment on Faigman Proposal

The proposal has some value in that it tries to give some detailed guidance to courts in determining the question of reliability. It does not stop at simply saying that expert testimony must be "reliable" or "valid". However, it is way too long. Also, the proposal seems to say that non-scientific experts can only testify if scientific experts are unnecessary--a kind of best evidence rule for experts. This would certainly change current practice in which each expert is assessed on whether she will assist the jury. To the extent that a non-scientific expert would in some way be cumulative, that expert could be excluded without this proposal, under Rule 403.

Other than the best evidence preference, the proposal puts few barriers in the way of non-scientific experts. Despite Professor Faigman's protests, it seems to say that qualified non-scientific expert can testify, without the necessity of inquiring into their methodology. Some might think this standard to be too generous. And again, the imposition of strict requirements on scientific testimony, without corresponding requirements on non-scientific testimony, creates the perverse incentive for the expert to argue that he is unscientific.

Evidence Project Proposal

The American University Law School Evidence Project has proposed an amendment to the Federal Rules to deal with *Daubert* issues. The proposal has been placed in Rule 703, with Rule 702 dealing only with qualifications. The proposal reads as follows:

Principles, methodologies, and applications employed. A proponent of expert testimony must demonstrate, by a preponderance of the evidence, that the scientific, technical, or other bases of the testimony, including all principles, methodologies, and applications employed by the witness in forming opinions and inferences, produce credible results.

Reporter's Comment on Evidence Project Proposal

The proposal has some virtues. First, it applies to all expert testimony, not just scientific testimony; and yet it does not impose unrealistic expectations or inapposite requirements on non-scientific testimony, as some courts have done after *Daubert*. Second, it applies to principles as well as applications.

The major problem with the proposal is that the term "credible results" is left undefined. It sounds like a fairly low standard, which presents a policy question of how rigorous the gatekeeper scrutiny should be. Even if there is agreement on policy, the undefined term gives little guidance to courts or practitioners as to how to determine whether results are "credible." Thus, the proposal is not much of an improvement on those proposals which simply say that expert testimony must be "reliable."

House Proposal

H.R. 903, introduced by Congressman Coble in March, 1997, would amend Rule 702 as follows:

Rule 702. Testimony by Experts

(a) In general. - If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(b) Adequate basis for opinion. - Testimony in the form of an opinion by a witness that is based on scientific knowledge shall be inadmissible in evidence unless the court determines that such opinion -

(1) is scientifically valid and reliable;

(2) has a valid scientific connection to the fact it is offered to prove; and

(3) is sufficiently reliable so that the probative value of such evidence outweighs the dangers specified in rule 403.

(c) Disqualification. - Testimony by a witness who is qualified as described in subdivision (a) is inadmissible in evidence if the witness is entitled to receive any compensation contingent on the legal disposition of any claim with respect to which the testimony is offered.

(d) Scope. - Subdivision (b) does not apply to criminal proceedings.

Reporter's Comment on House Proposal

In a letter to Congressman Hyde dated April 10, 1997, Judge Stotler noted the following problems with H.R. 903:

1. The Rule seems to distinguish between validity and reliability. This is an uncertain distinction, which is inconsistent with *Daubert*. In *Daubert*, the Court essentially equated validity with reliability.

2. The Rule distinguishes between "scientific" knowledge and "technical or other" knowledge. While the validity of various expert opinions from various fields of knowledge must be addressed flexibly, *Daubert* should not be read as limited to the field of science. Moreover, the line between scientific knowledge and technical knowledge is a vague one.

3. The special balancing test overrides Rule 403 and can only create confusion. Moreover, it applies to scientific knowledge only, creating further confusion and complexity.

Another problem is that the Rule applies stringent standards to expert evidence in civil cases only. It would be anomalous to permit experts to testify in criminal cases when their opinions would not be considered reliable enough to testify in civil cases. A final problem is that the Rule could be read to apply only to the basis of the expert's opinion; this leaves the expert's application of the basis unregulated.

Senate Proposal

S.79, also known as the Honesty in Evidence Act, was introduced in the Senate in the Spring of 1997. The Act would amend Rule 702 to read as follows:

Rule 702. Testimony by Experts

(a) In general. - If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(b) Adequate Basis for Opinion. -

(1) Testimony in the form of an opinion by a witness that is based on scientific, technical, or medical knowledge shall be inadmissible in evidence unless the court determines that such opinion--

(A) is based on scientifically valid reasoning;

(B) is sufficiently reliable so that the probative value of evidence outweighs the dangers specified in Rule 403; and

(C) the techniques, methods, and theories used to formulate that opinion are generally accepted within the relevant scientific, medical, or technical field.

(2) In determining whether an opinion satisfies conditions in paragaph (1), the court shall consider--

(A) whether the opinon and any theory on which it is based have been experimentally tested;

(B) whether the opinion has been published in peer-review literature; and

(C) whether the theory or techniques supporting the opinion are sufficiently reliable and valid to warrant their use as support for the proffered opinion.

(c) Expertise in the field. - Testimony in the form of an opinion by a witness that is based on scientific, technical, or medical knowledge, skill, experience, training, education, or other expertise shall be inadmissible unless the witness's knowledge, skill, experience, training, education, or other expertise lies in the particular field about which such witness is testifying.

(d) Disqualification. - Testimony by a witness who is qualified as described in subsection (a) is inadmissible in evidence if the witness is entitled to receive any compensation contingent on the legal disposition of any claim with respect to which the testimony is offered.

Reporter's Comment on Senate Proposal:

In a letter dated April 29, 1997, Judge Stotler recommended that the Senate proposal to amend Rule 702 be rejected. These substantive criticisms were expressed:

1. The Rule changes the Rule 403 balancing test with respect to scientific and technical testimony. This will cause confusion, especially in sorting out the expert testimony covered by the new balancing test and the expert testimony that is not.

2. The Rule covers both scientific and technical testimony, and yet the evidence is not admissible unless it is based on *scientifically* valid reasoning. Under the plain meaning of the rule, technical testimony (e.g., that of an engineer) should be excluded because it is not based on scientifically valid reasoning.

3. The Rule imposes no extra requirement for "other" expert testimony. This gives the witness the incentive to claim that the testimony is not based in science, as has happened with handwriting comparison testimony. It seems anomalous that handwriting comparison testimony gets treated more liberally because it is *not* a science.

4. The Rule does not really codify *Daubert* as much as it adds *Daubert* on top of *Frye*. That is, scientific testimony must satisfy *both* the general acceptance test and the *Daubert* validity test. This could create real problems for cutting edge, reliable science that has not yet been generally accepted.

On the other hand, the proposal might be considered useful in providing more guidance than some of the general proposals set forth earlier in this memo. Also, by requiring a finding of general acceptance of "techniques, methods, and theories used to *formulate*" the expert's opinion, the proposal properly regulates not only the principles used by the expert, but also the particular application of those principles.

Proposal Attempting To Codify Seventh Circuit Jurisprudence

As indicated in the attached outline, the Seventh Circuit has squarely held that the *Daubert* "framework" must be applied to all proffered expert testimony. The court recognizes that the gatekeeper function operates differently with respect to different types of experts. It essentially has characterized *Daubert* as setting forth a rule of thumb. In the words of Judge Posner, the *Daubert* standards protect against experts testifying "for a fee to propositions that they have not arrived at through the methods that they use when they are doing their regular professional work rather than being paid to give an opinion helpful to one side in a lawsuit." In another opinion, Judge Posner put it slightly differently, stating that *Daubert* requires that when experts testify "they adhere to the same standards of intellectual rigor that are demanded in their professional work." This language capsulizes the concern expressed in many circuit court opinions, that the expert has prepared his research in anticipation of litigation.

Assuming, arguendo, that Rule 702 should be amended to account for *Daubert*, there is something to be said for the Seventh Circuit's capsulizaion. It puts all experts to the same test of reliability, but it recognizes that experts have to be evaluated differently depending on their area of expertise. Not all can be expected to have peer reviewed articles and statistics concerning rates of error. The test applies not only to the principles used by the expert, but also to whether the expert has applied those principles in the same manner as he would in his professional work. That is, it applies to the whole of the expert's opinion.

When I lecture on *Daubert* to Federal Judges, I start with the Seventh Circuit's characterization of *Daubert* and follow that through the cases and questions. An admittedly unscientific survey of feedback from the Judges indicates that this standard helps them in figuring out how to apply *Daubert*. Consequently, it might be useful to consider a codification of the Seventh Circuit's approach as a possible model for discussion purposes.

If the Seventh Circuit's approach is considered by the Committee to be sound, an amendment to Rule 702 might read something like this:

Rule 702. Testimony by Experts

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. Testimony is not admissible under this Rule unless the expert, in formulating an opinion, has adhered to the same standards of intellectual rigor that are demanded in the expert's professional work.

Note on an Advisory Committee Note

I decided not to try to craft an Advisory Committee Note until the Committee has decided which of the many possible approaches to take, if any. I decided against adding an Advisory Committee Note to each of the proposals, since it would have been so time-consuming, and I do have a life (of sorts).

One general comment can be made about an Advisory Committee Note to an amendment to Rule 702, however: the Note will be crucial if the Committee decides to adopt some kind of general language requiring reliability or credibility of expert testimony. The Note can be used to provide guidance on some of the difficult details, e.g., how much to weigh the fact that the expert's research was prepared in anticipation of litigation.



















Appendix to Rule 702 Report--Federal Rules of Evidence Manual, 7th Edition, 1998 Commentary on *Daubert*

***The Gatekeeper Function*--Daubert**

In the well-known case of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), the Court indicated that before scientific evidence could be admitted it had to gain general acceptance in the particular field to which it belonged. Up until 1993, there was considerable controversy as to whether Rule 702 incorporated or rejected the *Frye* ''general acceptance'' test. Then, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court unanimously rejected the *Frye* test as a basis for assessing the admissibility of scientific expert testimony under Rule 702.

Beyond rejecting *Frye* as a controlling principle, seven members of the Court, in an opinion written by Justice Blackmun, went further and established general, flexible guidelines, for determining the admissibility of scientific expert testimony. According to Justice Blackmun, Rule 702 of the Federal Rules requires the Trial Judge to act as a gatekeeper for such testimony, to assure that it truly proceeds from ''scientific ... knowledge'' as required by the Rule. Essentially, this means that a Trial Judge must evaluate the proffered testimony to assure that it is at least minimally reliable; concerns about expert testimony cannot be simply referred to the jury as a question of weight.

The majority in *Daubert* set forth a five-factor, nondispositive, nonexclusive, ''flexible'' test to be employed by the Trial Court under Rule 702 in determining the ''validity'' of scientific evidence. These factors are:

(1) whether the technique or theory can be or has been tested;

(2) whether the theory or technique has been subject to peer review and publication;

(3) the known or potential rate of error;

(4) the existence and maintenance of standards and controls; and

(5) the degree to which the theory or technique has been generally accepted in the scientific community.

The *Daubert* Court remanded the case because the Lower Courts had excluded the testimony of the plaintiffs' scientific experts solely on the basis that their methodology was not generally accepted in the scientific community and was not peer-reviewed. Under the new, flexible standards set by the Court, the general acceptance test relied upon by the Lower Courts in *Daubert* is relevant to but not dispositive of admissibility.

The *Daubert* Court's rejection of the *Frye* test certainly makes sense as a matter of statutory construction. Rule 702 does not mention *Frye*, and the plain meaning of the Rule, which refers

to merely *assisting* the jury through scientific and other knowledge, does not readily lend itself to a relatively exclusive ''general acceptance'' test. As the Court in *Daubert* pointed out, the *Frye* test is conservative, because it excludes otherwise reliable scientific testimony merely because it has not undergone the time-consuming process of general acceptance in the scientific community.[1] In contrast, Federal Rules 702 and 403 are written in terms of a presumption of admissibility.

As a matter of policy, however, the Court's rejection of *Frye* is far less compelling. It is true that the majority of commentators have criticized *Frye* as being unduly restrictive and unduly vague at the same time.[2] There is much to be said, though, for a conservative approach when faced with new ''scientific'' technology and theories that have not been generally accepted by the relevant scientific community — especially where the so-called expert is testifying against the defendant in a criminal case.

Daubert rejects ''general acceptance'' as an exclusive test for assessing scientific expert evidence, and clearly states that Trial Courts have a front-line role in screening out questionable or unreliable expert testimony.[3] But the impact of *Daubert* is open to question, since the Court specifically relied upon general acceptance and peer review (which is just a variant of general acceptance) as important factors in determining admissibility. As Judge Becker stated in *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985), a case relied upon heavily by the *Daubert* Court:

> In many cases ... the acceptance factor may well be decisive, or nearly so. Thus, we expect that a technique that satisfies the *Frye* test usually will be found to be reliable as well. On the other hand, a known technique which has been able to attract only

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[1]See Lacey, *Scientific Evidence*, 24 JURIMETRICS J. 254 (1984) (*Frye* jurisdictions will always lag behind advances in science).

[2]See generally United States v. Downing, 753 F.2d 1224 (3d Cir. 1985) (rejecting *Frye* on policy grounds and collecting authorities).

[3]See, e.g., Frymire-Brinati v. KPMG Peat Marwick, 2 F.3d 183 (1993) (expert testified to value of properties by using a ''discounted cash flow analysis''; he relied solely on historical cash flows, rather than potential cash flows; after *Daubert*, this testimony was improperly admitted, since the expert ''conceded that he did not employ the methodology that experts in valuation find essential''; the Trial Judge erred in failing to conduct a ''preliminary assessment'' of methodology before allowing the expert to testify).

minimal support within the community is likely to be found unreliable.

What *Frye* recognized and what Courts using the *Daubert* reliability analysis should recognize is that a trier of fact must be in a position to evaluate the weight of evidence. A novel scientific test, especially one devised by one or two people, poses problems because there may be few experts available to examine the test from the opposite viewpoint of the party relying upon it. Results that would not stand rigorous analysis might be accepted because such analysis is not possible at the time of trial. The ultimate question for the Trial Judge under any test is whether both sides will have a fair opportunity to test the validity of scientific results; if not, those results should not be admissible. In deciding the ultimate questions, Trial Judges must consider the degree to which the accuracy of scientific information has been established. The less certain the scientific community is about information, the less willing Courts should be to receive it. Whether a Trial Judge excludes evidence as likely to confuse the jury or as being more prejudicial (meaning more likely to be misused than used correctly) than probative, on the one hand, or as lacking sufficient acceptance in the scientific community, on the other hand, is not likely to be crucial in the long run.[4] Under any approach, Trial Judges and Appellate Courts have reason to be concerned about scientific evidence manufactured for litigation.

Major post-Daubert *Cases*

The *Daubert* opinion was open-ended and vague. The Court clearly switched the focus from the scientific community--which determined reliability under *Frye*--to the Trial Judge, who now must determine reliability by taking into account not only the views of the scientific community, but also other factors, to determine whether proffered expert testimony is in fact reliable. While the *Daubert* Court set forth a few factors for judicial gatekeepers to take into account, it did not purport to provide a comprehensive analysis. Thus, it has been left to the Lower Courts to figure out how to become gatekeepers of expert testimony.

There are several Lower Court opinions which try to put some meat on the *Daubert* bones. Two of the most important are Judge Kozinski's opinion in *Daubert* on remand, and Judge Becker's opinion in the *Paoli* case.

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[4]The Court in *Daubert* specifically stated that expert testimony should be more strictly scrutinized under Rule 403 than other forms of testimony. See the discussion on this point in the Editorial Explanatory Comment to Rule 403.

On remand of the *Daubert* case from the Supreme Court, the Court of Appeals held that summary judgment was properly granted against the plaintiffs because the testimony of their experts, which was offered to prove that Bendectin caused the plaintiffs' limb reduction, was inadmissible under Rule 702. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir.), *cert. denied*, 116 S. Ct. 189 (1995). The Ninth Circuit thoroughly analyzed and applied the Supreme Court's opinion, making the following important points:

1. *Daubert* requires a two-part analysis. First, the Court must determine whether the expert testimony is based upon the scientific method. Second, the Court must determine whether there is a "fit" between the expert's testimony and a disputed issue in the case.

2. The first prong of *Daubert* is not satisfied by "an expert's self-serving assertion that his conclusions were derived by the scientific method." Rather, "the party presenting the expert must show that the expert's findings are based on sound science, and this will require some objective, independent validation of the expert's methodology."

3. An important determinant of reliability "is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." This is because — with the important exception of scientific forensic testimony in a criminal case — "a scientist's normal workplace is the lab or the field, not the courtroom or the lawyer's office." Thus, if an expert testifies on the basis of research he has conducted independent of the litigation, this "provides important, objective proof that the research comports with the dictates of good science." The Court reasoned that "independent research carries its own indicia of reliability, as it is conducted, so to speak, in the usual course of business and must normally satisfy a variety of standards to attract funding and institutional support."

4. If the expert's testimony is not based on independent research, "the party proffering it must come forward with other objective, verifiable evidence that the testimony is based on scientifically valid principles."

5. One means of showing scientific validity, even if the research was prepared in anticipation of litigation, is that "the research and analysis supporting the proffered conclusions have been subjected to normal scientific scrutiny through peer review and publication." The Court reasoned that publication and peer review provide "a significant indication that [the research] is taken seriously by other scientists, i.e., that it meets at least the minimal criteria of good science."

6. Where the expert's testimony does not grow out of pre-litigation research and has not been subject to peer review, "the experts must explain precisely how they went about reaching their conclusions and point to some objective source — a learned treatise, the policy statement of a professional association, a published article in a reputable scientific journal or the like — to show that they have followed the scientific method, as it is practiced by (at least) a recognized minority of scientists in their field."

Applying these principles to the testimony of the plaintiffs' experts, the *Daubert on remand* Court found that the *Daubert* standards had not been met. The experts' research was prepared solely for purposes of Bendectin litigation. It had not been peer reviewed, nor had it even been deemed worthy of comment by the scientific community. Finally, the experts had not explained their methodology or verified it by reference to objective sources. The Court concluded that it had been presented "with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough."

The Court also found that the testimony of most of the plaintiffs' experts failed the "fit" requirement of *Daubert*. This was because the substantive law required proof that Bendectin more likely than not caused the plaintiffs' limb reduction. Yet most of the plaintiffs' experts testified only that Bendectin increased the risk of limb reduction. This testimony actually tended to disprove the plaintiffs' contention that Bendectin was more likely than not the cause of their limb reduction.

In *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994), Judge Becker reviewed, in light of *Daubert*, a grant of summary judgment in a case alleging damages from exposure to PCB's. The Court engaged in an extensive and incisive analysis of *Daubert's* effect on scientific expert testimony. The Court made the following important points about the gatekeeping function after *Daubert*:

1. Because a judge at an *in limine* hearing must make findings of fact on complex scientific issues, and because the *in limine* ruling will often decide the case, "it is important that each side have an opportunity to depose the other side's experts in order to develop strong critiques and defenses of their expert's methodologies."

2. Because the question of reliability is an admissibility requirement governed by Rule 104(a), a proponent must do more than simply make a *prima facie* case on reliability. While the proponent does not have to prove to the judge that the proffered expert testimony is *correct*, she must prove to the judge by a

preponderance of the evidence that the testimony is *reliable*. The *Paoli* Court stated that the "evidentiary requirement of reliability is lower than the merits standard of correctness."

3. After *Daubert* any distinction between methodology and its application is no longer viable. It is no longer the case that if the methodology is sound, the possible misapplication in a specific case becomes a question for the jury. *Daubert* provides that "*any* step that renders the analysis unreliable * * * *renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.*"

4. The *Daubert* Court stated that the Trial Judge must review the reliability of an expert's methodology, as distinct from the expert's conclusion. Presumably, therefore, the Court left open the possibility that an expert's controversial *conclusion* could be admissible so long as the expert's *methodology* was sound. But Judge Becker pointed out that this passage in *Daubert* does not generally hold water. When a judge disagrees with the expert's conclusion, "it will generally be because he or she thinks that there is a mistake at some step in the investigative or reasoning process of that expert." The only situation in which the methodology/conclusion distinction might make a difference is where expert testimony is challenged on the *sole* ground that the conclusion is different from that of other experts. In that case, the Trial Judge must inquire beyond the conclusion before excluding the testimony. But in the ordinary case, if the conclusion is controversial, it is ordinarily excluded under *Daubert*, because there is probably something wrong with the methodology that was used to reach such an odd conclusion.[5]

5. The qualifications of the expert are relevant not only to the qualifications prong of Rule 702, but also to the reliability prong. Thus, the court should be especially reluctant to exclude a disputed methodology where the expert

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[5] See also Lust v. Merrell Dow Pharmaceuticals, Inc., 89 F.3d 594 (9th Cir. 1996)("When a scientist claims to rely on a method practiced by most scientists, yet presents conclusions that are shared by no other scientist, the district court should be wary that the method has not been faithfully applied.").

is eminently qualified. Despite *Daubert* putting the spotlight on Trial Judges, it stands to reason that there should be some judicial deference to an outstanding expert. As one post-*Daubert* Court put it, an expert's outstanding qualifications provide "circumstancial evidence" that the expert has employed a sound methodology.[6]

6. Because the *Daubert* Court held that Rule 702 was the "primary locus of a court's gatekeeping role," the use of Rule 403 to exclude expert testimony should be left for the rare case. Thus, "there must be something *particularly* confusing about the scientific evidence at issue--something other than the general complexity of scientific evidence."

Applying the foregoing principles to the expert testimony proffered by plaintiffs, the *Paoli* Court held the following:

1. The testimony of one doctor was properly excluded because he relied on answers to a questionnaire to assume that the plaintiffs had certain symptoms. As a result, the doctor had no reliable foundation to assume that the plaintiffs even had any illness, much less that the illness was caused by exposure to PCB's. The testimony was also unreliable because the doctor failed to exclude other possible causes through a proper differential diagnosis.

2. The District Court erred in excluding the testimony of one doctor insofar as that testimony was based on the doctor's personal examination and review of the medical history of certain plaintiffs, knowledge of PCB exposure in the area at issue, and some consideration of possible alternative causes.

3. The testimony of an expert who concluded that the plaintiffs had been exposed to PCB's was properly excluded insofar as it relied on the expert's recalculation of data prepared by a medical laboratory. The Court found that recalculation based on the differences between three samples "is not a technique identified in the scientific literature; nor is it generally accepted." A recalculation based on such a small sample is "too rough to be reliable."

4. The District Court abused its discretion when it excluded expert testimony that PCBs are harmful to

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[6]Ambrosini v. Labarraque, 101 F.3d 129 (D.C.Cir. 1996) (expert testimony that drug caused birth defects held admissible, in part on the basis of the expert's outstanding qualifications).

humans. The testimony was based on animal studies, and such studies are sufficiently reliable when they are not contradicted by epidemiological studies.

5. Contrary to the District Court's ruling, it was not necessary for a doctor to examine patients before he could reliably testify that they faced a future risk of illness from prior exposure to PCB's. The doctor's opinion was reliable because he based it on a residential history of each plaintiff, and on fat and blood tests performed on the plaintiffs.

"Red flags" under Daubert

After *Daubert*, the Courts have focussed on several factors other than those listed in the *Daubert* opinion which might indicate that an expert's testimony is unreliable. None of these factors is dispositive, but each has been considered as cutting against admissibility. A short discussion of these "red flag" factors follows.

Improper extrapolation. Many experts have fallen into the trap of leaping from an accepted scientific premise to an unsupported conclusion. These experts have sometimes relied on logical analysis to go from premise to conclusion. Some have simply made a leap of faith. If the process from premise to conclusion is not itself consistent with the scientific method, then Courts have generally, after *Daubert*, excluded the testimony as based on unreliable and improper extrapolation.

One example of improper extrapolation is an expert's use of structure analysis. This problem arose in *Daubert* on remand, as well as in other toxic tort cases. Structure analysis is sometimes proffered by an expert where there is no demonstrated connection between a certain chemical substance and a certain injury, but there is a demonstrated connection between a similar chemical substance and that injury. For example, there is no scientifically demonstrable connection between Bendectin and birth defects; but there is scientific evidence that substances with a chemical structure similar to that of Bendectin cause birth defects. Thus, the expert employing structure analysis reasons that substances with similar chemical structures cause similar injuries. But this reasoning is not consistent with the scientific method; it is improper extrapolation. As scholars have noted, "Even minor changes in molecular structure can alter a substance's effect. The metabolic process stands as an unknown intervening variable between the original chemical structure and

the adverse effect."[7] Thus, it is improper, after *Daubert*, to leap to a conclusion about one chemical substance on the basis of the effects caused by another, in the absence of other scientific support.[8]

Similarly, it is improper extrapolation to conclude, without any supporting research, that a substance which causes one harm also causes a different harm. For example, in *Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594 (9th Cir. 1996), the question was whether the plaintiff's birth defect, hemifacial microsomia, was caused by his mother's use of Clomid. The expert based his conclusion to that effect on epidemiological studies which showed a link between Clomid and other types of birth defects. He concluded that since Clomid is capable of causing other birth defects, it also caused hemifacial microsomia. The Court held that this reasoning was not scientific. The Doctor's testimony "was influenced by litigation-driven financial incentive", and the Doctor's premise--that a positive association between a drug and some birth defects indicates an association with other birth defects--was not recognized by even a minority of scientists.

It is also improper to testify on the basis of a methodology that is transposed from one area to a completely different area of inquiry--at least if there is no independent research supporting the transposition. Thus, in *Braun v. Lorillard Inc.*, 84 F.3d 230 (7th Cir. 1996), the plaintiff sought to prove that the decedent's mesothelioma was caused by smoking cigarettes with a filter made with crocidolite asbestos. The decedent's lung tissue was tested for asbestos fibers, using the standard methodologies of "bleach digestion" and "low temperature plasma ashing." No crocidolite fibers were found. The plaintiffs then retained an expert who tested for asbestos in *building materials* to conduct tests on the decedent's lung tissue. This expert was unaware of the methodologies ordinarily employed in testing human tissue. He used the same test that he used on building materials, known as high temperature ashing, and found crocidolite fibers in the tissue. The expert stated that high temperature ashing was as usable on tissue as on bricks, though he had never conducted such a test on tissue before this litigation. He also admitted that the high temperature could alter the chemistry of the sample, in which case it would be impossible to tell whether asbestos fibers

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7. Joseph Sanders, *Scientific Validity, Admissibility, and Mass Torts After Daubert*, 78 MINN. L. REV. 1387, 1409 (1994).

8. *See also* Cavallo v. Star Enter., 892 F. Supp. 756 (E.D. Va. 1995) ("Although Dr. Monroe found support in the literature for a conclusion that exposure to similar levels of a different mixture of volatile organic compounds produces somewhat similar, short-term effects, he is unable to provide any scientifically valid basis to support the leap from those studies to his opinion in this case."), *aff'd in pertinent part*, 100 F.3d 1150 (4th Cir. 1996).

were crocidolite or some other kind. But he asserted that his method was far more likely to produce a false negative than a false positive.

The Court held that the expert's testimony was properly excluded as unscientific under *Daubert*. It made the following points:

> Nowhere in *Daubert* did the Court suggest that failure to adhere to the customary methods for conducting a particular kind of scientific inquiry is irrelevant to the admissibility of a scientist's testimony. On the contrary, the Court made clear that it is relevant. A judge or jury is not equipped to evaluate scientific innovations. If, therefore, an expert proposes to depart from the generally accepted methodology of his field and embark upon a sea of scientific uncertainty, the court may appropriately insist that he ground his departure in demonstrable and scrupulous adherence to the scientist's creed of meticulous and objective inquiry. To forsake the accepted methods without even inquiring why they are the accepted methods--in this case, why specialists in testing human tissues for asbestos fibers have never used the familiar high temperature ashing method--and without even knowing what the accepted methods are, strikes us * * * as irresponsible.
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> Modern science is highly specialized. An expert in the detection of asbestos in building materials cannot be assumed to be an expert in the detection of asbestos in human tissues even though, as the plaintiff reminds us, many building materials, most obviously wood, are, like human and animal tissues, organic rather than inorganic substances. The fact that the plaintiffs' lawyer turned to this nonexpert, having already consulted experts without obtaining any useful evidence, is suggestive of the abuse, or one of the abuses, at which *Daubert* and its sequelae are aimed. That abuse is the hiring of reputable scientists, impressively credentialed, to testify for a fee to propositions that they have not arrived at through the methods that they use when they are doing their regular professional work rather than being paid to give an opinion helpful to one side in a lawsuit.

All this is not to say that learning from one subject matter can never be used to form a conclusion as to a different subject matter. The question is how big a leap the expert is taking. In *Braun*, the Court reasoned, correctly we think, that the leap from

testing bricks to testing human tissue was too great in the absence of some objective support. In contrast, *Newport Limited v. Sears, Roebuck and Co.*, 1995 WL 328158 (E.D.La. 1995), an economist was permitted to testify to the amount of lost profits suffered by the plaintiff as a result of a breach of a real estate contract concerning industrial park property. The economist used a methodology known as multiple regression analysis. The defendant complained that this methodology had never been used to determine the value industrial park real estate, but admitted that the methodology was widely accepted as a reliable way to determine the value of commercial real estate. The Court found that the difference between commercial real estate to industrial park property was not so profound as to render the economist's testimony unreliable. It was not like the leap from bricks to lung tissue in *Braun*.

Reliance on anecdotal evidence. If an expert is basing an opinion only on her own experience with patients, or on a few case studies, this has been generally held inconsistent with the scientific method, and therefore insufficiently reliable after *Daubert*. There are two problems with relying on such anecdotal data, at least exclusively. First, anecdotal evidence is usually derived from insufficient sampling. Second, there is a strong possibility that anecdotal cases are not comparable to the facts of the case at bar – for example, if a number of people contract lung cancer through an alleged exposure to a toxic substance, a proper statistical study will exclude the possibility of other sources for the injury (referred to as confounding factors), such as cigarette smoking. But a single case study, or other anecdotal evidence, is unlikely to be screened for confounding factors.

So for example, in *Cavallo v. Star Enter.*, 892 F. Supp. 756 (E.D. Va. 1995), *aff'd in pertinent part*, 100 F.3d 1150 (4th Cir. 1996), the plaintiff alleged that she suffered respiratory illness as a result of exposure to aviation jet fuel vapors that were released from an overflow at the defendant's storage terminal. The plaintiff's expert toxicologist was prohibited from testifying at trial after a *Daubert* hearing, and the Court consequently granted summary judgment for the defendant. The toxicologist relied on case studies in which people who were exposed to the organic compounds in jet fuel suffered respiratory illnesses (though most illnesses were temporary). The Court held that reliance on these studies to form a conclusion was inconsistent with the scientific method. The Court reasoned that "case reports are not reliable scientific evidence of causation, because they simply describe reported phenomena without comparison to the rate at which the phenomena occur in the general population or in a defined control group; do not isolate and exclude potentially alternative causes; and do not inves-

tigate or explain the mechanism of causation."[9] Importantly, the Court noted that the toxicologist did not purport to follow the methodology ordinarily followed by toxicologists. Rather, he formed his opinion "and then tried to conform it to the methodology."

This is not to say that case studies are completely irrelevant to an analysis consistent with the scientific method. The problem in *Cavallo* was that the case studies were, essentially, the *only* source upon which the expert based his opinion. In contrast, scientists often use case studies to spur further research, or to confirm conclusions already arrived at in more methodical studies. Thus, in *Cantrell v. GAF Corp.*, 999 F.2d 1007 (6th Cir. 1993), the plaintiffs claimed that their exposure to asbestos in the workplace created a legitimate fear that they would develop laryngeal cancer in the future. The plaintiffs' expert testified that asbestos created a risk of laryngeal cancer, basing his conclusion on epidemiological evidence reported in the medical literature, and on the inordinately high incidence of persons at the plaintiffs' workplace whom the expert had personally diagnosed as having laryngeal cancer. The defendants objected to the expert's testimony under *Daubert* insofar as it was based on anecdotal evidence, because the expert had personally evaluated only 150 patients, and found four to have laryngeal cancer. They argued that this was not a sufficient number of cases from which to draw a proper statistical conclusion of cause and effect. Moreover, the expert made no analysis of possible confounding factors. The Court, nonetheless, held that the expert testimony was properly admitted, stating: "Nothing in Rules 702 and 703 or in *Daubert* prohibits an expert from testifying to confirmatory data, gained through his own clinical experience, on the origin of a disease or the consequences of exposure to certain conditions." The Court noted that the expert was cross-examined and freely acknowledged that his anecdotal evidence was not dispositive but rather simply confirmatory of the medical literature. Undoubtedly the result in *Cantrell* would have been different if the expert had relied *solely* on personal anecdotal evidence for his conclusion.

Reliance on temporal proximity. There are a good number of cases after *Daubert* where a healthy plaintiff is exposed to a product and becomes ill shortly thereafter. For example, in

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9. *See also* Casey v. Ohio Medical Prods., 877 F. Supp. 1380 (N.D. Cal. 1995) (granting summary judgment for the defendant in a case in which the plaintiff alleged that he contracted hepatitis shortly after his exposure to halothane; the expert relied solely on anecdotal evidence, and this was not sufficient scientific support for the expert's conclusion on causation).

Porter v. Whitehall Labs., Inc., 9 F.3d 607 (7th Cir. 1993), Porter came to the hospital to be treated for a fractured toe. He had no other health problems. He was given ibuprofen, took about 30 tablets over a month-long period, and at the end of that month he was diagnosed with renal failure from which he would not recover. Porter's experts testified that ibuprofen caused his renal failure, even though no published data or study supported this conclusion. The experts essentially based their opinions on Porter's prior good health and the temporal proximity between the ingestion of ibuprofen and renal failure. The Court concluded, however, that forming a conclusion on the basis of temporal proximity, in the absence of some established scientific connection between substance and illness, is inconsistent with the scientific method. By relying solely on temporal proximity, the expert fails to consider other possible explanations — not to mention the unexplainable — that a scientist would want to look into before drawing a conclusion.[10]

Again, this is not to say that the temporal proximity between exposure and injury is completely irrelevant to the scientific method. The result in *Porter* might well have been different if published controlled studies and/or epidemiological evidence established some connection between ibuprofen and renal failure. Then the temporal proximity between exposure and injury can be used as confirmatory data.

Moreover, in certain unusual circumstances, the short time between exposure and injury may itself be enough for a scientist to draw a conclusion about causation. As the Court put it in *Cavallo, supra*: "There may be instances where the temporal connection between exposure to a given chemical and subsequent injury is so compelling as to dispense with the need for reliance on standard methods of toxicology." In *Cavallo*, the plaintiff was exposed to a fairly small amount of jet fuel vapors, and developed a respiratory disease immediately thereafter. While the Court excluded expert testimony based on temporal proximity, it recognized that the case would be different if a previously healthy plaintiff were exposed to jet fuel in an extremely large dose (e.g., a barrel of it was poured on the plaintiff's head), and developed a respiratory disease shortly thereafter. Also, the Court recognized that a scientifically-based conclusion of causation can be drawn where a large number of people are all exposed to a substance, and all develop similar symptoms right away. For example, if everyone in Cavallo's neighborhood

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10. *See also* Schmaltz v. Norfolk & W. Ry., 878 F. Supp. 1119 (N.D. Ill. 1995) ("It is well-settled that a causation opinion based solely on a temporal relationship is not derived from the scientific method.").

developed the same respiratory disease right after a jet fuel spill, a scientist might properly conclude that the jet fuel caused the injuries.[11]

Insufficient information about the case. Many experts after *Daubert* have fallen into the trap of relying on a proper methodology, but failing to connect it with the facts of the case. Thus, in *Chikovsky v. Ortho Pharmaceutical Corp.*, 832 F. Supp. 341 (S.D. Fla. 1993), the Court granted summary judgment after holding inadmissible the plaintiff's expert's testimony that Retin-A caused the plaintiff's birth defects. The plaintiff's mother had used Retin-A topically for skin blemishes during her pregnancy. Some studies tended to show a connection between a product similar to Retin-A and birth defects, but only when the product was taken orally and in large doses. But the plaintiff's expert did not know how much Retin-A the plaintiff's mother had applied to her skin during pregnancy, and it was clear that the amount could not have approached the dosages in the studies relied upon by the expert.

Another example of a failure to connect reliable expert testimony with the facts arose in *Bogosian v. Mercedes-Benz of North America, Inc.*, 104 F.3d 472 (1st Cir. 1997). The plaintiff was run over by her car after putting it in park and exiting the vehicle. She sought to have an engineer testify about the phenomenon of "false park detent"--where the driver feels as if he has put the car in park, without looking at the gear shift, but the car is not actually in park. The Court held that this testimony was properly excluded under *Daubert*, because it rested on a factual premise--that the plaintiff did not look at the console shift before turning off the car--that was at odds with the plaintiff's own testimony: "The district court appropriately found it very odd that Bogosian would present an expert witness who would testify that her own unwavering testimony was incorrect."

An expert's lack of knowledge about the case has also been regulated through the *Daubert* "fit" requirement. The Court in *Daubert* stated that a scientific principle may be valid for one purpose but not for another. The principle, though valid, might not "fit" the facts of the case at bar. A valid study finding a connection between a substance and an injury will fail the "fit"

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11. *See also* Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311 (9th Cir. 1995) ("If 50 people who eat at a restaurant one evening come down with food poisoning during the night, we can infer that the restaurant's food probably contained something unwholesome, even if none of the dishes is available for analysis.").

requirement if the plaintiff's exposure to the substance is materially different from the exposures considered in the study. Thus, in *Sorenson v. Shaklee Corp.*, 31 F.3d 638 (8th Cir. 1994), the plaintiffs alleged that their mental retardation was caused by their parents' use, before childbirth, of alfalfa tablets which had been coated with ethylene dioxide (EtO). The Court held that the Trial Judge properly rejected the plaintiffs' experts' testimony which concluded that EtO could cause mental retardation in children if taken by parents before childbirth. The testimony failed the *Daubert* "fit" requirement, because the experts did not know whether, and the plaintiffs produced no evidence that, the alfalfa tablets taken by their parents contained any EtO residue.

Failure to consider other possible causes. Before a conclusion on causation can be reliably drawn, the expert must make some reasonable attempt to eliminate some of the most obvious causes. In medical terms, this is called conducting a differential diagnosis – e.g., excluding other causes, such as genetics or other toxins, for a certain disease. In epidemiological terms, this is called controlling for confounding factors.

Unfortunately, many experts have sought to testify that a toxic substance has caused an injury without having attempted to screen out other causes. Thus, in *Claar v. Burlington N. R.R.*, 29 F.3d 499 (9th Cir. 1994), the plaintiffs brought an action under FELA alleging that they were injured by exposure to toxic chemicals. Affirming an order of summary judgment for the defendant, the Court held that the proffered testimony of the plaintiffs' experts was inadmissible. The experts concluded that the plaintiffs' injuries were caused by exposure to toxic chemicals, but they neglected to investigate any other possible causes of the plaintiffs' injuries. For example, an expert concluded that the chemicals caused one plaintiff to suffer from "dyscalculia" (bad at arithmetic) and "spelling dispraxia" (bad at spelling). But the expert never reviewed the plaintiff's school records, which indicated that he had these problems when he was a child. Basically, the experts appeared to have first concluded that the plaintiffs were injured due to exposure to chemicals, and then consulted the relevant literature in the field to support their opinions. The *Claar* Court concluded:

> Coming to a firm conclusion first and then doing research to support it is the antithesis of [the scientific] method. Certainly, scientists may form initial tentative hypotheses. However, scientists whose conviction about the ultimate conclusion of their research is so firm that they are willing to aver under oath that it is correct prior to performing the necessary validating tests could properly be viewed by the district court as lacking the objectivity that is

the hallmark of the scientific method.[12]

This is not to say that an expert, in order to testify on causation, must be able to categorically exclude each and every possible alternative cause. For example, in *Ambrosini v. Labarraque,* 101 F.3d 129 (D.C.Cir. 1996), the plaintiff proffered experts who testified that the drug Depo-Provera caused the plaintiff's burth defects. The experts could not categorically rule out all possible sources of the plaintiff's birth defect. For example, they they had not done state of the art chromosomal studies, though they did look at the relevant medical records of mother, grandmother, etc. But to require the experts to categorically rule out all other possible causes for an injury would mean that few experts would ever be able to testify--or that the cost of litigation for plaintiffs would be prohibitively expensive. The Court held that the possibility of some uneliminated causes presented a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert.

Lack of testing. If the expert has not even tested the hypothesis he is testifying to, this is considered an extremely negative factor. The problem arises most often in product liability cases, where the plaintiff calls an expert who would testify that the defendant should have designed the product differently. If the alternative design has never been made and tested, either by the expert himself or anyone else, courts are likely to prohibit the expert from testifying after *Daubert.* As the Seventh Circuit noted in *Cummins v. Lyle Industries,* 93 F.3d 362 (7th Cir. 1996), a number of factors must go into a reliable conclusion that an alternative design should have been employed, e.g., the compatibility of the design with existing systems, relative efficiency, maintenance costs, ease of servicing, and the effects of price. As the *Cummins* Court put it: "Many of these considerations are product-and-manufacturer-specific, and most cannot be determined reliably without testing."

However, again, testing should not be an absolute requirement to the admissibility of expert testimony on design safety. The expense of litigation must be taken into account. If

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12. *See also* In re Paoli R.R. Yard PCB Litig., 35 F.3d 717 (3d Cir. 1994) (District Court erred in excluding the testimony of one doctor insofar as that testimony was based on the doctor's personal examination and review of the medical history of certain plaintiffs, knowledge of PCB exposure in the area at issue, and some consideration of possible alternative causes; however, where the doctor was unable to explain away alternative causes, the District Court properly excluded the doctor's testimony).

a design engineer testifies that a car could have been designed more safely, the Court should not exclude the testimony simply because the expert has not himself built a car employing the alternative design.

A fine example of the proper approach to testing after *Daubert* is found in Judge Vance's opinion in *Tassin v. Sears Roebuck,* 946 F.Supp. 1241 (M.D.La. 1996). Tassin was injured while operating a power saw, and proffered an engineer who concluded that alternative designs were safer, and that the defendant failed to provide adequate warnings. Judge Vance analyzed the admissibility of this testimony in light of *Daubert* as follows:

> It may well be that an engineer is able to demonstrate the reliability of an alternative design without conducting scientific tests, for example, if he can point to another type of investigation or analysis that substantiates his conclusions. For example, an expert might rely upon a review of experimental, statistical, or other technical industry data, or on relevant safety studies, products, surveys, or applicable industry standards. He could also combine any one or more of these methods with his own evaluation and inspection of the product based on experience and training in working with the type of product at issue. The expert's opinion must, however, rest on more than speculation, he must use the types of information, analyses and methods relied on by experts in his field, and the information that he gathers and the methodology that he uses must reasonably support his conclusions. If the expert's opinions are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches, then [testing of an alternative design is not absolutely required].

Applying these standards to the facts, the *Tassin* Court excluded the expert's testimony on certain alternative designs based on parts that he had never tested or even seen, and the safety of which was not supported by the tests of others nor by any relevant literature. However, the Court held testimony as to another alternative design admissible, where the expert had actually conducted some testing, and where the safety of the product received support from the relevant literature. The expert could have tested more systematically or extensively, but this presented a question of weight. Finally, the Court held the expert's conclusion as to inadequate warnings to be admissible. The alternative warnings suggested by the expert had not been scientifically tested. But the Court found that testing as to warnings (as opposed to testing alternative designs) was not critical where the expert had substantial experience in both product design and in preparing product manuals and warnings.

Subjectivity. The Court in *Daubert* emphasized that the scientific method is an objective one. It instructed a Trial Court to assure itself that the expert's hypothesis could be tested by objective standards. This is the essence of what the Court referred to as scientific validity, also known as "falsifiability." It follows that if an expert's methodology cannot be explained in objective terms, and is not subject to be proven incorrect by objective standards, then the methodology is presumptively unreliable.

An example of this proposition arose in *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir.), *cert. denied*, 114 S. Ct. 2711 (1994). The plaintiff claimed that her cataracts were caused by exposure to nuclear radiation. She called an ophthalmologist who testified to that effect. He based his conclusion on a visual inspection of the plaintiff's eyes. The expert testified that he could identify radiation-induced cataracts by simple visual observation; however, there was no scientific support for this premise. The Court noted that the defendant's experts had shown that a proper methodology for detecting radiation-induced cataracts included a medical work-up, a work-up of the patient's history, and an examination of occupation dosimetry charts. The testimony failed under *Daubert* because the expert employed a completely subjective approach that was rejected by other scientists, and which could not be proven false.

Good testimony after Daubert.

Many of the reported cases on scientific experts after *Daubert* have resulted in exclusion of the proffered expert testimony.[13] There are a growing number of cases, however, in

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13. See, e.g., Allen v. Pennsylvania Engineering Corp., 102 F.3d 194 (5th Cir. 1996) (no error in the exclusion of expert testimony concluding that the decedent's brain cancer was caused by exposure to ethylene dioxide: "Where, as here, no epidemiological study has found a statistically significant link between EtO exposure and human brain cancer; the results of animal studies are inconclusive at best; and there was no evidence of the level of Allen's occupational exposure to EtO, the expert testimony does not exhibit the level of reliability necessary to comport with Federal Rules of Evidence 702 and 703, the Supreme Court's *Daubert* decision, and this court's authorities."); Wright v. Willamette Industries, Inc., 91 F.3d 1105 (8th Cir. 1996) (expert testimony that the plaintiff's injuries were more probably than not related to exposure to formaldehyde,

which a scientific expert has been found to pass the "good science" threshold established by *Daubert*.[14] A good example of

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"was not based on any knowledge about what amounts of wood fibers impregnated with formaldehyde involve an appreciable risk of harm to human beings who breathe them"; therefore, the expert's testimony was speculative and unscientific under *Daubert*).

In Smelser v. Norfolk Southern Ry. Co., 105 F.3d 299 (6th Cir. 1997), expert testimony that a shoulder belt, not a lap belt, failed in an accident in which the plaintiff was rear-ended, was held inadmissible under *Daubert*. The Court stated:

> *Daubert* teaches that expert opinion testimony qualifies as scientific knowledge under Rule 702 only if it is derived by the scientific method and is capable of validation. Huston's opinion that the shoulder belt, but not the lap belt, failed in the August 29, 1989 accident cannot be based on "good science" when he (1) failed to perform any tests on the lap belt yet concluded it was in proper working condition; (2) conducted no testing to verify his conclusion the shoulder belt was damaged in the June 1989 accident; (3) failed to adequately document testing conditions and the rate of error so the test could be repeated and its results verified and critiqued; and (4) failed to discover, use or at least consider the degree the restraint system was actually mounted at in the subject vehicle and explain whether that information would affect his pendulum test for compliance with the federal safety standard. Smelser failed to establish that any of Huston's seat belt tests were based on scientifically valid principles, were repeatable, had been the subject of peer review or publication or were generally accepted methods for testing seat belts in the field of biomechanics. Accordingly, Huston's opinion testimony that the pick-up truck's shoulder belt, but not the lap belt, was defective should have been excluded.

14. See, e.g., Holbrook v. Lykes Bros. S.S. Co., Inc., 80 F.3d 777 (3d Cir. 1996) (testimony from defense experts that radiation caused the plaintiff's mesothelioma was properly admitted; one expert was a pathologist and the other was a specialist in occupational lung disease; both relied on medical literature, their knowledge of mesothelioma and its causes, animal studies, and the plaintiff's medical history: "As required by *Daubert*, their procedures for examining the facts presented to them and their own research methodologies were based on the methods of science and did not reveal opinion based merely on their own subjective beliefs."); Hose v. Chicago Northwestern Trans. Co., 70 F.3d 968 (8th Cir. 1995) (claim that plaintiff contracted manganese encephalopathy while at the defendant's worksite; the

testimony satisfying *Daubert* is found in *Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378 (4th Cir. 1995). The plaintiff claimed that he suffered severe liver damage as a result of combining Extra-Strength Tylenol and alcohol. Eventually the plaintiff had to have a liver transplant. To prove general causation (i.e., that there is a link between substance and injury), the plaintiff called two liver disease specialists, who both testified that a warning of the possible danger of combining alcohol and acetaminophen should have been placed on the Tylenol label. These experts described how the alcohol-acetaminophen mixture can become a toxin in the liver. They cited numerous treatises and articles published in medical journals that described the increased risk of liver injury when acetaminophen is combined with alcohol. To prove specific causation (i.e., that the substance caused the plaintiff's injury), the plaintiff called two treating physicians, who had examined his liver and found evidence of acetaminophen toxicity. The treating physicians investigated the possibility of other causes, such as viral failure, by comparing the plaintiff's liver to liver samples damaged by viruses. They concluded that the plaintiff's liver showed negative for viral damage.

What makes for sound methodology? The *Benedi* Court stressed the following:

> Benedi's treating physicians based their conclusions on the microscopic appearance of his liver, the Tylenol found in his blood upon his admission to the hospital, the history of several days of Tylenol use after regular alcohol consumption, and the lack of evidence of a viral or any other cause of the liver failure. Benedi's [liver disease experts] relied upon a similar methodology: history, examination, lab and pathology data, and study of the peer-reviewed

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plaintiff's doctor conducted a "PET" scan of the plaintiff's brain, and used this to exclude alternative sources of the plaintiff's condition, such as Alzheimer's disease; he concluded that the PET scan result was consistent with menganese encephalopathy; this testimony was properly admitted under *Daubert:* "In determining the cause of a person's injuries, it is relevant that other possible sources of his injuries, argued for by the defense counsel, have been ruled out by his treating physicians. Indeed, ruling out alternative explanations for injuries is a valid medical method."). Importantly, the Court in *Hose* noted that "the fact that Hose's treating physician ordered the PET scan prior to the initiation of litigation is another important indication that this technique is scientifically valid."

literature.

The Court concluded that it would "not declare such methodologies invalid and unreliable in light of the medical community's daily use of the same methodologies in diagnosing patients."

Evaluating the result in *Benedi*, and comparing it to the "red flag" cases after *Daubert*, leads to the following conclusion: a scientific expert's testimony will be admissible if she employs the same methodology in reaching her conclusion as she would employ if working as a scientist in the real world. If the methodology is good enough for the real world, it is good enough for a trial. On the other hand, if the methodology is altered for the purposes of litigation, there is every reason to exclude it after *Daubert*. As Judge Posner has put it, the object of *Daubert* is to assure that "experts adhere to the same standards of intellectual rigor that are demanded in their professional work."[15]

It must be stressed that while *Daubert* assigns Trial Judges the role of gatekeepers, it does not authorize Trial Judges to act as "super-experts", or to scrutinize experts in such a way as to exclude all but the perfect expert testimony. This lesson was learned by the Trial Judge who was reversed in *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi,* 80 F.3d 1074 (5th Cir. 1996). This was an eminent domain action, in which the landowner proffered an engineering expert and a real estate appraisal expert. The engineering expert stated that a new levee left the subject property unprotected from flooding, and in a worse position than before the levee was built. The real estate appraisal expert stated that any prospective buyer would determine that the property was subject to flooding, and that the fair market value of the property had been reduced. The Trial Court excluded the experts' testimony as speculative and without foundation, relying specifically on the experts' apparent uncertainty about the extent of flooding on the property in the event of heavy rainfall. But the Court of Appeals found an abuse of discretion, because the Trial Court "applied too stringent a reliability test." The Court stated that *Daubert* had not worked a "seachange over federal evidence law" and that "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." The engineer's opinion was properly based on his review of maps, photographs and other relevant data, as well as his experience as an engineer. The appraisal expert's

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15. Rosen v. Ciba-Geigy Corp., 78 F.3d 316 (7th Cir.1996) (holding expert testimony properly excluded where the expert offered "neither a theoretical reason to believe that wearing a nicotine patch for three days * * * could precipitate a heart attack, or any experimental, statistical or other scientific data from which such a causal relation might be inferred or which might be used to test a hypothesis founded on such a theory.").

opinion was based on his experience, his personal inspection of the property, comparable sales, and discussions with local brokers. Under these circumstances, any vagueness or tentativeness in the testimony were "matters properly to be tested in the crucible of adversary proceedings; they are not the basis for truncating that process."

Thus, it is not up to Trial Judges to pick apart an expert's testimony and exclude it if there is any flaw, no matter how minute. The task of the gatekeeper after *Daubert* is to assure that the expert reached her opinion by the same avenues that the expert uses in her day-to-day work. Perhaps Judge McLaughlin put it best in *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038 (2d Cir. 1995). The plaintiff in *McCullock* alleged that she contracted a respiratory ailment, including throat polyps, from exposure to an unventilated glue pot at the place of her employment. Fuller aggressively challenged two experts under *Daubert*--a consulting engineer, who testified that the plaintiff was in the "breathing zone" of the glue fumes, and an ear, nose and throat doctor, who testified that the glue fumes caused the plaintiff's ailments. The engineer based his opinion on his extensive practical experience, examination of safety literature and the warnings provided by the defendant, interviews with the plaintiff concerning her exposure, and background industrial experience with ventilation. The doctor based his testimony on his treatment of the plaintiff, her medical history, pathological studies, use of a scientific analysis known as differential etiology (which requires listing all possible causes, then eliminating all causes but one), and scientific and medical treatises. Under these circumstances, the Court found that any dispute as to the experts' lack of specialization, flaws in methodology, or lack of textual authority went to weight and not admissibility. The Court concluded that the defendant's point-by-point, scrict scrutiny attack on the experts' qualifications and methodology constituted an unwarranted extention of *Daubert*:

> Trial judges must exercise sound discretion as gatekeepers of expert testimony under *Daubert*. Fuller, however, would elevate them to the role of St. Peter at the gates of heaven, performing a searching inquiry into the depth of an expert witness's soul -- separating the saved from the damned. Such an inquiry would inexorably lead to evaluating witness credibility and weight of the evidence, the ageless role of the jury.[16]

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16. See also Ambrosini v. Labarraque, 101 F.3d 129 (D.C.Cir. 1996). In an action alleging that birth defects were caused by the drug Depo-Provera, the Court held that the Trial Court im-

Applying Daubert to "non-scientific" opinions

One of the questions left open by *Daubert* is whether its standards apply to expert testimony that does not purport to be scientifically-based. The starting point in analyzing this question is that Rule 702 does not limit expert testimony to that which is scientifically grounded. It refers as well to technical or other specialized knowledge. Because the Rule permits admission of expert testimony whenever it will assist the factfinder, any information that is not common knowledge may be an appropriate subject of expert testimony, whether scientifically grounded or not. Given the breadth of permissible topics for expert testimony, then, can the *Daubert* Court's focus on the Trial Judge's gatekeeper role be applicable to experts other than the epidemiologist- and toxicologist-types considered in *Daubert*?

At first glance it would appear that if *Daubert* is more broadly applicable, the factors set forth by the Court require some modification, to say the least. An expert who testifies to safety practices in the shipping industry, or to generally accepted accounting principles, does not purport to be using the scientific method. An expert who testifies for the prosecution to explain the practices of a narcotics distribution conspiracy has rarely resorted to publication or peer review, at least in the ordinary sense. An expert in a "soft" science such as psychology

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properly granted summary judgment for the defendants. The Trial Court rejected the testimony of two experts, an epidemiologist and a teratologist. The Court held that the Trial Court had misconceived "the limited gatekeeper role envisioned in *Daubert*." Both of the plaintiff's experts had relied on standard methodologies and published studies. Both were highly qualified, a fact which the Court treated "as circumstantial evidence as to whether the expert employed a scientifically valid methodology or mode of reasoning." The fact that one expert had not published his conclusions was of no moment, because the drug Depo-Provera is no longer prescribed during pregnancy, and thus there would be "no reason in the world" to publish those findings. The Court also found it relevant that the teratologist had testified to his conclusions about Depo-Provera at an FDA hearing, before the instant litigation arose. Both experts sufficiently ruled out some other possible causes for the plaintiff's birth defect, including viruses and genetic defect. The fact that several possible causes might have remained "uneliminated" went only to weight and not to admissibility. Finally, the fact that the epidemiologist could not state categorically that Depo-Provera causes birth defects did not render his testimony inadmissible under the "fitness" prong of *Daubert*. The Court reasoned that the "fitness" prong is satisfied if the testimony is relevant--it need not be sufficient to prove the point.

operates differently from an expert in a "hard" science such as physics.

The inadaptability of many of the *Daubert* factors outside the hard sciences has led many courts to find that *Daubert* is simply inapplicable to anything other than expert testimony that can be evaluated in light of the scientific method. One example is *United States v. Starzecpyzel*, 880 F. Supp. 1027 (S.D.N.Y. 1995), in which the Court concluded that forensic document examination (FDE) could not satisfy the *Daubert* reliability standard, because the process relied on subjective factors and the expert's practical experience, rather than upon any scientific method. The Court nevertheless held the testimony admissible, on the ground that *Daubert* is not applicable to FDE testimony.

Despite its finding that *Daubert* was inapplicable, the *Starzecpyzel* Court rejected the notion that non-scientific testimony from a qualified expert is automatically admissible. It noted that a Trial Judge must still scrutinize the reliability of the expert's opinion under Rule 702. As applied to FDE testimony, which was largely based on practical experience in comparing handwriting samples to detect forgery, the Court found a sufficient indication that the prosecution's expert document examiner relied on enough standard points of comparison, as well as his own experience, to reach his conclusion.

A similar analysis is found in *United States v. Jones*, 107 F.3d 1147 (6th Cir. 1997), in which convictions for credit card fraud were based in large part on expert testimony identifying the handwriting on certain documents as the defendant's. The Court refused to evaluate handwriting analysis as scientific evidence, noting that handwriting examiners "do not concentrate on proposing and refining theoretical explanations about the world" and do not rely on experimentation and falsification, the way scientists do. Rather, handwriting analysts are governed by the "technical or other specialized knowledge" prong of Rule 702. The Court declared that "*Daubert* does not create a new framework" for analyzing technical or other specialized expert testimony. If the *Daubert* framework were extended without modification outside the realm of scientific testimony, "many types of relevant and reliable expert testimony--that derived substantially from practical experience--would be excluded." Without relying on *Daubert*, the *Jones* Court concluded that handwriting analysis is a field of non-scientific expertise within the meaning of Rule 702. The Court found no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail to the jury.

The Ninth Circuit has also indicated its belief that *Daubert* is inapplicable outside its bailiwick of hard scientific evidence. In *Thomas v. Newton Int'l Enter.*, 42 F.3d 1266 (9th Cir. 1994), a longshoreman sued for injuries suffered on a boat.

The Court held that the Trial Court erred when it excluded the testimony from the plaintiff's proffered expert to the effect that the defendant had left a boat in an unsafe condition. The defendant's reliance on *Daubert* was misplaced, because "*Daubert* was clearly confined to the evaluation of *scientific* expert testimony." The Court stated: "While a scientific conclusion must be linked in some fashion to the scientific method, ... non-scientific testimony need only be linked to some body of specialized knowledge or skills." In *Thomas*, the expert's twenty-nine years of experience provided the necessary link.[17]

In most areas of non-scientific expert testimony, such as accountancy or evaluation of customary industry practices, there are well-accepted practices and methodologies that are used. If the expert follows these accepted practices, the testimony will be found admissible without regard to *Daubert*; if the expert does not follow these accepted practices, the expert testimony should be held inadmissible, again without regard to the *Daubert* factors. Thus, in *Iacobelli Constr., Inc. v. County of Monroe*, 32 F.3d 19 (2d Cir. 1994), a case arising out of a construction contract dispute, the Trial Court rejected affidavits of the plaintiff's experts, a geographical consultant and an underground- construction consultant, by relying on the *Daubert* "gatekeeping" function. The Court of Appeals found that this reliance on *Daubert* was "misplaced," reasoning that the experts' affidavits "do not present the kind of 'junk science' problem that *Daubert* meant to address." Rather, the experts had relied "upon the type of methodology and data typically used and accepted in construction-litigation cases." While the *Daubert* factors were held inapplicable to an expert's assessment of a construction site, that testimony must still be reliable. In *Iacobelli*, reliability was found by the expert's use of well-accepted methodology and data.

Other Courts have made more of an attempt to incorporate the *Daubert* standards to soft science and non-scientific expert testimony. These Courts contend that the Supreme Court supported a broader application of *Daubert* when it remanded a case involving expert testimony concerning the unreliability of identification evidence (a soft science if ever there was one) for reconsideration in light of *Daubert*.[18] These Courts use

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17. *See also* Compton v. Subaru of Am., Inc., 82 F.3d 1513 (10th Cir.) (*Daubert* inapplicable to expert testimony of automotive engineer), *cert. denied*, 117 S. Ct. 611 (1996); Tamarin v. Adam Caterers, Inc., 13 F.3d 51 (2d Cir. 1993) (*Daubert* inapplicable to testimony based on a payroll review prepared by a union accountant; *Daubert* was concerned with scientific evidence, while in this case the expert evaluated payroll records, which are "straightforward lists of names and hours worked").

18. See United States v. Rincon, 510 U.S. 801 (1993).

Daubert jargon more freely: "gatekeeper," "peer review," "validity," "good grounds," etc.

An example of a broader application of the *Daubert* structure can be seen in *Berry v. City of Detroit*, 25 F.3d 1342 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 902 (1995). *Berry* was a § 1983 action brought against the City, arising from the use of excessive force by one of its police officers. To prove that his injury was caused by the City or one of its departments, the plaintiff called an expert to testify that the injury suffered by the plaintiff was caused by the police department's failure to previously discipline other officers who had committed similar acts. Holding that admission of this testimony was reversible error, the Court stated that the *Daubert* principles applied to all expert testimony, not just scientific testimony, and that in this case the expert's conclusion was unreliable within the meaning of *Daubert*. The expert's theory — that police excessiveness can be caused by failure to discipline other officers — had not been tested, published, or peer reviewed. Also, there was no indication that other experts ascribed to this discipline theory.[19]

Yet even the courts which opt for a broader application of *Daubert* generally recognize that the factors must be modified when reviewing soft science or non-scientific expert testimony. An example of this necessary flexibility is found in *Tyus v. Urban Search Management*, 102 F.3d 256 (7th Cir. 1996). The plaintiffs in *Tyus* appealed a judgment rendered for the defendants in a suit alleging that advertising for a rental building targeted only whites, in violation of the Fair Housing Act. The plaintiffs proffered a social science expert who would have testified to how an all-white advertising campaign affects African-Americans. The Trial Court, without conducting a *Daubert* analysis, excluded the expert on the ground that his testimony

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19. For other cases applying the *Daubert* structure outside hard sciences, see, e.g., F.D.I.C. v. Suni Associates, Inc., 80 F.3d 681 (2d Cir. 1996)(expert valuation of real estate was properly admitted under *Daubert*, which establishes a flexible and permissive approach to expert testimony; the expert's "hybrid of two widely-recognized methods" of valuation was sufficiently reliable; the internal contradictions in the expert's testimony presented a question of weight); Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134 (9th Cir. 1997) ("[A]s long as they are conducted according to accepted principles, survey evidence should ordinarily be found sufficiently reliable under *Daubert*. Unlike novel scientific theories, a jury should be able to determine whether asserted technical deficiencies undermine a survey's probative value.").

was too general to be helpful. The Court found that the Trial Court erred in failing to scrutinize the expert's testimony under the *Daubert* "framework", and reversed the judgment. The Court declared that the central teaching of *Daubert*--that expert testimony "must be tested to be sure that the person possesses genuine expertise in a field and that her court testimony adheres to the same standards of intellectual rigor that are demanded in her professional work"--was fully applicable to the testimony of experts in the social sciences. However, recognizing the need for a flexible application of *Daubert*, the Court noted the following caveat:

> It is true, of course, that the measure of intellectual rigor will vary by the field of expertise and the way of demonstrating expertise will also vary. Furthermore, we agree * * * that genuine expertise may be based on experience or training. In all cases, however, the district court must ensure that it is dealing with an expert, not just a hired gun.

The *Tyus* Court found that the Trial Court erred in excluding the expert, because his testimony "would have given the jury a view of the evidence well beyond their everyday experience." Moreover, the expert's research was based on peer-reviewed articles, and his "focus group" method was a well-accepted methodology in the field of social science. In other words, the expert brought basically the same intellectual rigor to his courtroom testimony as he employed in his life as a social scientist.

It is apparent from the above cases that the "controversy" over whether *Daubert* applies beyond hard science is essentially a false one. The Courts agree that all expert testimony is governed by *Daubert*, at least in the general sense that the Trial Court must scrutinize the reliability of expert testimony. There is also agreement that an assessment of reliability must vary according to the type of testimony proffered. Some expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication. Other types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise.

Where expert testimony is not adaptable to being put through the ringer of falsifiability, publication, and peer review, the Trial Judge still has the obligation to determine whether the testimony is properly grounded, well-reasoned, and not speculative. If there is a well-accepted body of learning and experience in the field, then the expert's testimony must be grounded in that learning and experience to be reliable. The more subjective and controversial the expert's inquiry, the more likely the testimony is to be excluded as unreliable. So, for

example, in *Gier v. Educational Serv. Unit No. 16*, 845 F. Supp. 1342 (D. Neb. 1994), *aff'd*, 66 F.3d 940 (8th Cir. 1995), an action brought against a school on behalf of mentally retarded students for alleged sexual, physical, and emotional abuse, the Magistrate Judge held a *Daubert* hearing with respect to experts who had interviewed the children who were allegedly abused. The Magistrate Judge ruled *in limine* that the experts would not be permitted to testify that any of the plaintiffs were abused in any manner, nor to any opinion based on such a conclusion. The Court expressed concern about the subjective nature of the investigation of specific instances of child abuse, and about the vagueness of the standard protocol, which "leaves a gaping hole in the direction it provides the master's level clinician to conduct the interview." In other words, the experts had not relied on any well-accepted, objective methodology in reaching their conclusions.

Thus, whether or not *Daubert* technically applies, the Trial Court must independently review expert testimony to assure that it is well-reasoned, in accordance with generally accepted principles of an expert's work out of court, and not unduly speculative. In this regard, the opinion in *Frymire-Brinati v. KPMG Peat Marwick*, 2 F.3d 183 (7th Cir. 1993), is instructive. In this action for securities fraud, the plaintiff's expert, an accountant, was allowed to testify that a Peat Marwick audit had improperly certified that property interests had a certain value when in fact they were worth much less. To reach this conclusion, the accountant used a discounted cash flow analysis, by which he assessed value solely on the basis of net, rather than potential, cash flow. Reversing a judgment for the plaintiff, the Court held that the Trial Court abused its discretion in admitting the expert's valuation, because the expert's methodology was faulty: by failing to consider potential cash flow, the expert's methodology would lead to the conclusion that "raw land is worthless and that a large office building in the final stages of construction also has no value even though it is fully leased out and could be sold for a hundred million dollars." The Seventh Circuit held that the expert's testimony lacked validity under *Daubert*; but even if *Daubert* is confined to hard science, it is clear that the accountant's testimony was inadmissible under Rule 702; it was patently inconsistent with well-accepted accounting principles, and it was illogical to boot. The accountant would not have lasted long in his profession if he employed such a goofy methodology for clients outside the courtroom.

Daubert and sufficiency review

A second question left open after *Daubert* is whether the decision changes the Trial Judge's role in assessing the sufficiency, as well as the admissibility, of expert testimony. The Second Circuit gave a negative answer to that question in *In*

re Joint E. & S. Dist. Asbestos Litig., 52 F.3d 1124 (2d Cir. 1995).

In the *Asbestos* case, the Trial Judge had originally ruled that the plaintiff's expert testimony — which concluded, partly on the basis of epidemiological studies, that asbestos caused colon cancer — was inadmissible under Rule 702, and had granted summary judgment for the defendants. On remand from the Second Circuit's reversal of that admissibility decision,[20] the Trial Judge again reviewed the expert testimony. After a jury verdict in favor of the plaintiff, the Trial Judge found the testimony insufficient to establish that asbestos caused colon cancer, and granted the defendant's motion for judgment as a matter of law. The Judge relied on *Daubert* for the proposition that a Trial Judge has an obligation to strictly scrutinize expert testimony for its sufficiency as well as its admissibility.

The Court of Appeals again reversed, and reinstated the verdict, holding that *Daubert* did not change the standard for assessing the sufficiency of evidence or for granting judgment as a matter of law. That standard is, as it has always been, whether a reasonable trier of fact could find in favor of the non-moving party. While the Trial Judge after *Daubert* has an expanded role in assessing the admissibility of expert testimony, the Second Circuit refused to read *Daubert* as authorizing the Trial Judge to usurp the jury's function by acting as a gatekeeper as to sufficiency. The Court explained:

> The "admissibility" and "sufficiency" of scientific evidence necessitate different inquiries and involve different stakes. Admissibility entails a threshold inquiry over whether a certain piece of evidence ought to be admitted at trial. The *Daubert* opinion was primarily about admissibility. It focused on district courts' role in evaluating the methodology and the applicability of contested scientific evidence in admissibility decisions.
>
> This case is about sufficiency, not admissibility. A sufficiency inquiry, which asks whether the collective weight of a litigant's evidence is adequate to present a jury question, lies further down the litigational road.

As to the review of epidemiological evidence for sufficiency in toxic tort cases, the *Asbestos* Court provided the following guidance:

> Applied to epidemiological studies, the question is not whether there is some dispute about the validity or force of a given study, but rather, whether it would be unreasonable for a rational jury to rely on that study to find causation by a preponderance of the evi-

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20. 964 F.2d 92 (2d Cir. 1992).

> dence. In addition, multiple epidemiological studies cannot be evaluated in isolation from each other. Unlike admissibility assessments, which involve decisions about individual pieces of evidence, sufficiency assessments entail a review of the sum total of a plaintiff's evidence.

After finding multiple errors in the District Court's treatment of the plaintiff's expert evidence, the Second Circuit concluded:

> [W]e hold that the district court erred in ruling that plaintiff presented insufficient epidemiological and clinical evidence to support the jury's verdict finding causation. In our view, the district court impermissibly made a number of independent scientific conclusions — without granting plaintiff the requisite favorable inferences — in a manner not authorized by *Daubert*.

In apparent contrast to the Second Circuit's approach to sufficiency review after *Daubert* is the Sixth Circuit's decision in *Conde v. Velsicol Chem. Corp.*, 24 F.3d 809 (6th Cir. 1994). The Trial Court granted summary judgment for the defendant on the plaintiffs' claim for damages allegedly caused by their exposure to chlordane. The plaintiffs complained that the Trial Court misconstrued *Daubert* by requiring their experts' testimony to be generally accepted. But the Court of Appeals held that the issue was whether the experts' testimony, even if admissible, was sufficient to prove that chlordane caused the plaintiffs' injuries. The experts could only state that chlordane exposure was "consistent with" the symptoms suffered by the plaintiffs; the experts could not exclude alternative causes, and their conclusions were inconsistent with the fact that tests of the body tissues of the plaintiffs revealed no chlordane, and were also inconsistent with the relevant, peer-reviewed scientific literature. The Court concluded that "the Condes' expert testimony is insufficient to permit a jury to conclude, by a preponderance of the evidence, that chlordane exposure caused the Condes' health problems."[21]

Like the question of whether *Daubert* applies to non-scientific evidence, the question of whether that case applies to sufficiency review is to some extent a false issue.

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21. *See also* Elkins v. Richardson-Merrell, Inc., 8 F.3d 1068 (6th Cir. 1993) ("the Court in *Daubert* indicated that even if expert opinion or evidence on one side were relevant and admissible, if insufficient to allow a reasonable juror to conclude that the position more likely than not is true, it may be the basis for a directed verdict or a grant of summary judgment"), *cert. denied*, 510 U.S. 1193 (1994).

This is because admissibility and sufficiency often go hand in hand, especially in toxic tort cases, where exclusion of an expert on admissibility grounds is tantamount to a dismissal on insufficiency grounds.

A Judge who doesn't want to (or is not permitted to) intrude on sufficiency questions has enough discretion under *Daubert* to exclude suspect expert testimony on admissibility grounds. If, for example, the Judge believes that the expert's methodology is flawed, the issue of sufficiency never arises, because flawed methodology is grounds for exclusion under *Daubert*. If, on the other hand, the Judge could accept the methodology, but has a concern that the expert is being vague or ambiguous (as in *Conde*), such vagueness can be treated as an admissibility question as well. This is because of the "fit" requirement of *Daubert*. For example, in the *Daubert* case itself on remand,[22] the experts could only testify to the "possibility" that Bendectin increased the risk of limb reduction. One could look at that as a sufficiency problem. But the Ninth Circuit treated it as an admissibility problem, because the expert's testimony did not "fit" with the substantive law requirement of having to prove that Bendectin was more likely than not the cause of the plaintiffs' limb reduction.

In sum, even if *Daubert* does not permit an aggressive review of the sufficiency of expert testimony, the Trial Court can ordinarily forestall any problem by simply holding the testimony inadmissible in the first place. The Second Circuit *Asbestos* case can be explained as an anomaly, where the Trial Court and the Appellate Court simply disagreed about the *admissibility* of the expert testimony. The first time around, the Trial Court thought it wasn't admissible and the Appellate Court thought it was. On remand, the Trial Court apparently still thought that it was right and the Second Circuit was wrong on the admissibility question; but given the law of the case prohibiting an inquiry into admissibility, the Trial Court tried an end-run by finding the expert testimony insufficient. From the Second Circuit's perspective, this obviously would not do.

What should a Trial Court do, however, if it initially admits expert testimony and, upon reflection as the trial unfolds, it becomes convinced that the testimony was not as reliable as first appeared? One possibility is to conduct a rigorous review for *sufficiency*, applying the *Daubert* factors to the critical expert testimony, and to issue a judgment as a matter of law. Cases like *Conde* find that process to be perfectly permissible under *Daubert*. In a Court following the Second Circuit view, however, the prudent course is to explicitly reconsider the *admissibility* of the expert evidence, and to provide appropriate relief based upon the need to retroactively exclude the evidence. It is apparent that there is little

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22. 43 F.3d 1311 (9th Cir.), *cert. denied,* 116 S. Ct. 189 (1995).

difference between these two procedures, but the latter route is made necessary by the Second Circuit's decision in the *Asbestos* case.

Daubert *analysis and summary judgment*

Should the gatekeeper standards of *Daubert* apply in the same measure on summary judgment as they apply at trial? The best discussion of this question is found in *Cortes-Irizarry v. Corporacion Insular*, 111 F.3d 184 (1st Cir. 1997), in which the Court addressed the plaintiff's argument that a *Daubert* analysis is improper in the context of summary judgment:

> The plaintiff posits that *Daubert* is strictly a time-of-trial phenomenon. She is wrong. The *Daubert* regime can play a role during the summary judgment phase of civil litigation. If proffered expert testimony fails to cross *Daubert's* threshold for admissibility, a district court may exclude that evidence from consideration when passing upon a motion for summary judgment. See *Cavallo v. Star Enter.*, 100 F.3d 1150, 1159 (4th Cir. 1996); *Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293, 297-99 (8th Cir. 1996); *Claar v. Burlington N.R.R.*, 29 F.3d 499, 502-05 (9th Cir. 1994); *Porter v. Whitehall Lab.*, Inc., 9 F.3d 607, 612, 616-17 (7th Cir. 1993).

However, the Court cautioned against applying the gatekeeper function too rigorously when deciding a summary judgment motion. The Court explained as follows:

> The fact that *Daubert* can be used in connection with summary judgment motions does not mean that it should be used profligately. A trial setting normally will provide the best operating environment for the triage which *Daubert* demands. Voir dire is an extremely helpful device in evaluating proffered expert testimony, and this device is not readily available in the course of summary judgment proceedings. Moreover, given the complex factual inquiry required by *Daubert*, courts will be hard-pressed in all but the most clearcut cases to gauge the reliability of expert proof on a truncated record. Because the summary judgment process does not conform well to the discipline that *Daubert* imposes, the *Daubert* regime should be employed only with great care and circumspection at the summary judgment stage.
>
> We conclude, therefore, that at the junction where *Daubert* intersects with summary judgment practice, *Daubert* is accessible, but courts must be cautious -- except when defects are obvious on the face of a proffer -- not to

exclude debatable scientific evidence without affording the proponent of the evidence adequate opportunity to defend its admissibility.

As the *Cortes-Irizarry* Court notes, the record on summary judgment is ordinarily insufficient for a conscientious *Daubert* determination. It is only where the expert's affidavit is purely conclusory and speculative that the Trial Court would have enough confidence to reject the expert testimony as insufficiently reliable at such an early stage of the proceedings.

Of course it is possible for the Trial Court to speed up the *Daubert* determination by essentially requiring a full presentation of the expert testimony, and rebuttal, at the summary judgment stage. Courts have displayed considerable ingenuity in devising ways in which an adequate record can be developed so as to permit *Daubert* rulings to be made in conjunction with motions for summary judgment. See, e.g., *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 736, 739 (3d Cir. 1994) (discussing the use of in limine hearings), *cert. denied,* 115 S. Ct. 1253 (1995); *Claar v. Burlington N.R.R.*, 29 F.3d 499, 502-05 (9th Cir. 1994) 29 F.3d at 502 (discussing the District Court's technique of ordering experts to submit serial affidavits explaining the reasoning and methodology underlying their conclusions). The problem with these methods is that it may result in a trial before the trial. As the *Cortes-Irizarry* Court put it: "We do not in any way disparage such practices; we merely warn that the game sometimes will not be worth the candle."

Pre-Daubert cases

Before the Supreme Court in *Daubert* established its flexible test for determining the reliability of scientific expert testimony, several Federal Circuits had already rejected *Frye* in favor of a more permissive and flexible approach to admissibility. The *Daubert* Court relied on many of these cases, especially from the Third Circuit. Thus, the cases that had rejected the *Frye* test before *Daubert* are still good authority after *Daubert;* indeed, they represent helpful, concrete applications of the flexible reliability-based approach to scientific expert testimony.[23]

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23. See, e.g., United States v. Jakobetz, 955 F.2d 786 (2d Cir. 1992) (applying a reliability test and concluding that DNA identification testing is sufficiently reliable to be admissible under Rule 702; some of the specific factors to determine the reliability of a scientific technique are: potential rate of error; existence and maintenance of standards; whether the method is employed carefully or whether it is subject to abuse; the existence of analogies to other types of scientific inquiries; and the risk of false positives as opposed to false negatives);

The annotations to this Rule continue to include pre-*Daubert* cases that applied a flexible, reliability-based approach to scientific expert testimony. However, we have deleted the cases that relied solely on ''general acceptance,'' as they have now been repudiated by *Daubert*.

Peer review

It is interesting to note that several of the amici in *Daubert* argued that peer review was not a very effective means of determining the reliability of scientific expert testimony. The amici reasoned that peer review is only as good as the reviewer, and that professional experts are now creating their own peer-reviewed journals to benefit from the deference given by Courts to peer review and publication.[24] The *Daubert* Court, however, rejected these concerns. It stated that ''submission to the scrutiny of the scientific community is a component of 'good science''' and is highly relevant, though not dispositive to reliability. Of course, even the amici who criticized peer review did not reject it entirely as a legal standard — to do so would remove an incentive for an expert to publish his or her opinions before trial.

However, it must be remembered that peer review is not an absolute requirement for admissibility after *Daubert*. For one thing, the expert's research may be too particularized to be publishable. If an expert researches the water flow in a particular aquifer in Kansas, it is unlikely that there is much of a market for publication. Also, the expert's research may concern a historical even that is no longer of much interest to the publication world. *Thus, in Ambrosini v. Labarraque,* 101 F.3d 129 (D.C.Cir. 1996), an expert testified, on the basis of his

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United States v. Bynum, 3 F.3d 769 (4th Cir. 1993): Chromatographic analysis used to prove that three samples of cocaine came from the same batch was properly admitted:

> Though it invoked *Frye*, the government's proffer of evidence could hardly have better anticipated *Daubert*. The government explained the hypotheses underlying the technique, listed the numerous publications through which the technique had been submitted to peer review, and concluded with a citation to authority that gas chromatography enjoys general acceptance in the field of forensic chemistry.

24. See Brief of Amici Curiae Daryl E. Chubin, Ph.D., et al.; Brief of Carnegie Commission on Science, Technology and Government as Amicus Curiae in Support of Neither Party.

research, that the drug Depo-Provera caused birth defects. The research had not been peer reviewed, but the Court found that this was of no moment, because Depo-Provera had been taken off the market several years earlier, and thus there would be "no reason in the world" to publish those findings.

One thing is clear--peer review means review by fellow experts. In *Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293 (8th Cir. 1996), the expert made the novel argument that his research had been peer reviewed because he had already testified about it in several court actions. The Court understandably rejected the argument that review of an expert's methodology by other courts could constitute "peer review" within the meaning of *Daubert*.

Judge and jury functions

In the past, cries have been heard that experts usurp the function of the jury. Under Rule 702 the expert may be used as an advisor to the jury, much like a consultant might advise a business so that the jury can benefit far more from the special knowledge or training of the expert than it has in the past where the expert was simply asked to give one conclusory opinion to one extended hypothetical question. Of course, if the expert does intrude on areas left for the jury--such as the credibility of a witness--the Trial Judge should exclude the testimony as unhelpful.[25] Conversely, if the expert is called simply to give

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25. See, e.g., *Westcott v. Crinklaw*, 68 F.3d 1073 (8th Cir. 1995) (in an excessive force case, the police officer called an expert witness who testified that the officer was suffering from post-traumatic stress syndrome when he made the statements, and that this syndrome may cause a person to make inaccurate and unreliable statements; admission of the expert's testimony was an abuse of discretion, because it directly addressed the credibility of the officer as a witness, and usurped the function of the jury; since the case turned on the accuracy of the officer's testimony, this improper bolstering was reversible error); United States v. Beasley, 72 F.3d 1518 (11th Cir. 1996) (no error in excluding a defense psychiatric expert who would have testified that a former cult member--and prosecution witness--was a psychopath with no conception of the truth: "[e]xpert medical testimony concerning the truthfulness or credibility of a witness is generally inadmissible because it invades the jury's province to make credibility assessments."). Compare *United States v. Tsinnijinnie*, 91 F.3d 1285 (9th Cir. 1996) (in a child sex prosecution, there was no error when an expert on child sex abuse was permitted to testify about the timing of reports of sexual abuse by children: "The expert did not bolster the credibility of the victim. The expert testimony was offered only to explain why children may be intimidated by physical abuse and

an opinion on the applicable law, he should be excluded as intruding on the *Judge's* role.[26]

After *Daubert,* there is a greater emphasis on the Trial Judge's role as a gatekeeper for expert testimony. A careful offer of proof can make the Trial Judge's job much easier. In most instances in which a party desires to call an expert, there has been careful preparation of the expert by trial counsel. It should be helpful for the Court, if the Court has reservations about the expert testimony, to see a summary of the expert's opinions, conclusions, and related material before making a final determination on admissibility. Preparation of such a summary before trial places counsel in the strongest possible position to argue for admission.

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deterred from complaining against the abuser, sometimes for long periods of time. The testimony was not offered to prove that the defendant had physically abused the child, but to explain how, if such conduct occurs, it may affect children.").

26. See, e.g., CMI-Trading, Inc., v. Quantum Air, Inc., 98 F.3d 887 (6th Cir. 1996): In a commercial dispute on a promissory note, the question was whether the transaction between the parties was a loan transaction or a joint venture. The defendants proffered expert testimony from a financial consultant, who would have concluded both that the parties intended to enter a joint venture, and that they had actually created a joint venture. Affirming a judgment for the plaintiff, the Court held neither of these conclusions were proper subject matter for an expert opinion. First, "the intent of the parties is an issue within the competence of the jury and expert opinion testimony will not assist the jury." Second, "the legal concepts of 'loan' and 'joint venture' are issues of law and are within the sole competence of the court; experts may not testify as to the legal effect of a contract."

CASES APPLYING *DAUBERT*

By Daniel J. Capra, Reed Professor of Law, Fordham University School of Law

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This Outline is current as of September 5, 1997

I. THE GATEKEEPING ROLE

Factors for the Gatekeeper to Consider

Research In Anticipation of Litigation: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir. 1995): On remand from the Supreme Court, the Court of Appeals held that summary judgment was properly granted against the plaintiffs. The Court noted that "Federal judges ruling on the admissibility of expert scientific testimony face a far more complex and daunting task in a post-*Daubert* world than before." It stated that the first prong of the two-prong *Daubert* analysis--whether the expert's testimony is derived from the scientific method--"puts federal judges in an uncomfortable position" because they must second-guess qualified experts. Nonetheless, a Court after *Daubert* cannot be content with an expert's self-serving conclusion that his testimony is derived from the scientific method. "Rather, the party presenting the expert must show that the expert's findings are based on sound science, and this will require some objective, independent validation of the expert's methodology."

The *Daubert* Court stated that a "very significant fact" in determining reliability is whether the experts are testifying on the basis of research "conducted independent of the litigation, or whether they have developed their opinions expressly for the purposes of testifying." Since the scientist's "normal workplace is the lab or the field, not the courtroom" it follows that expert testimony based on research prepared in anticipation of litigation is unlikely to be consistent with the scientific method, whereas research prepared independent of the litigation gives some objective proof of good science. However, one exception to the general exclusion of research prepared in anticipation of litigation is that scientific research "closely tied to law enforcement may indeed have the courtroom as a principal theatre of operations."

Applying these principles to the plaintiffs' experts, the *Daubert* Court found that none had conducted research that pre-

existed or was independent from the litigation. Nor had the research and analysis been "subjected to normal scientific scrutiny through peer review and publication." The Court concluded that apparently no one in the scientific community "has deemed these studies worthy of verification, refutation or even comment."

In the absence of both independent research and peer review, the *Daubert* Court held that the experts "must explain precisely how they went about reaching their conclusions and point to some objective source--a learned treatise, the policy statement of a professional association, a published article in a reputable scientific journal or the like--to show that they have followed the scientific method, as it is practiced by (at least) a recognized minority of scientists in their field." In this case, the experts had failed to explain with particularity the methodology they followed, and they could not point to any objective external source to validate their methodology. The Court concluded that it had been presented "with only the expert's qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough."

The second prong of *Daubert* requires a showing of the "fit" between the expert's testimony and an issue in the case. The Court found that most of the plaintiffs' expert testimony failed the "fit" requirement. This was because state tort law required the plaintiffs to prove that Bendectin was more likely than not the cause of their injuries, and these experts did not did not make that conclusion. Rather, they simply testified that Bendectin increased the risk of limb reduction; this testimony in fact tended to disprove the plaintiffs' argument as to legal causation, because "it shows that Bendectin does not double the likelihood of birth defects."

Thorough Overview of the *Daubert* Mandate: *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994): Affirming in part and reversing in part a grant of summary judgment in a case alleging damages from exposure to PCB's, the Court engaged in an extensive and incisive analysis of *Daubert's* effect on scientific expert testimony. The Court made the following important points about Rules 702 and 403 after *Daubert*:

> 1. Because a judge at an *in limine* hearing must make findings of fact on complex scientific issues, and because the *in limine* ruling will often decide the case, "it is important that each side have an opportunity to depose the other side's experts in order to develop strong critiques and defenses of their expert's methodologies."

2. The factors to be deemed important for scientific validity are: a. whether the expert's hypothesis can be tested; b. peer review; c. known or potential rate of error; d. existence of protocols; e. general acceptance; f. the relationship of the method to other techniques which have been found reliable; g. the qualifications of the expert; and h. the non-judicial uses to which the method has been put.

3. Because the question of reliability is an admissibility requirement governed by Rule 104(a), a proponent must do more than simply make a *prima facie* case on reliability. While the proponent does not have to prove to the judge that the proffered expert testimony is *correct*, she must prove to the judge by a preponderance of the evidence that the testimony is *reliable*. The *Paoli* Court stated that the "evidentiary requirement of reliability is lower than the merits standard of correctness."

4. After *Daubert* any distinction between methodology and its application is no longer viable. *Daubert* provides that "*any* step that renders the analysis unreliable * * * *renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.*"

5. *Daubert's* focus on methodology rather than conclusion has only a limited practical effect, because when a judge disagrees with the expert's conclusion, "it will generally be because he or she thinks that there is a mistake at some step in the investigative or reasoning process of that expert." The only situation in which the methodology/conclusion distinction might make a difference is the rare case in which expert testimony is challenged on the sole ground that the conclusion is different from that of other experts. In that case, the Trial Judge must inquire beyond the conclusion before excluding the testimony.

6. Because the *Daubert* Court held that Rule 702 was the "primary locus of a court's gatekeeping role," the use of Rule 403 to exclude expert testimony should be left for the rare case, especially at the pretrial stage. Thus, "there must be something *particularly* confusing about the scientific evidence at issue--something other than the general complexity of scientific evidence."

7. When the district court excludes scientific expert opinion testimony and the exclusion results in a

summary judgment or directed verdict, the Court of Appeals must give the district court's decision a "hard look" that is less deferential than the traditional abuse of discretion standard for evidentiary rulings. This is because "the reliability standard of Rules 702 and 703 is somewhat amorphous" and there is "a significant risk that district judges will set the threshold too high and will in fact force plaintiffs to prove their case twice." **Note:** The propriety of the "hard look" standard of review is now being considered by the Supreme Court in the *Joiner* case, discussed in this outline under the heading, "Appellate Review."

Applying the foregoing principles to the expert testimony proffered by plaintiffs, the *Paoli* Court held the following:

1. The testimony of one doctor was properly excluded because he relied on answers to a questionnaire to assume that the plaintiffs had certain symptoms. As a result, the doctor had no reliable foundation to assume that the plaintiffs even had any illness, much less that the illness was caused by exposure to PCB's. The testimony was also unreliable because the doctor failed to exclude other possible causes through a proper differential diagnosis.

2. The district court erred in excluding the testimony of one doctor insofar as that testimony was based on the doctor's personal examination and review of the medical history of certain plaintiffs, knowledge of PCB exposure in the area at issue, and some consideration of possible alternative causes.

3. The testimony of an expert who concluded that plaintiffs had been exposed to PCB's was properly excluded insofar as it relied on the expert's recalculation of data prepared by American Medical Laboratories, Inc. The Court found that recalculation based on the differences between three samples "is not a technique identified in the scientific literature; nor is it generally accepted." A recalculation based on such a small sample is "too rough to be reliable."

4. The district court abused its discretion when it excluded expert testimony that PCB's are harmful to humans. The testimony was based on animal studies, and such studies are sufficiently reliable when they are not contradicted by epidemiological studies.

5. Contrary to the district court's ruling, it was not necessary for a doctor to examine patients before

he could reliably testify that they faced a future risk of illness from prior exposure to PCB's. The doctor's opinion was reliable because he based it on a residential history of each plaintiff, and on fat and blood tests performed on the plaintiffs.

Expert Must Employ the Same Methodology for an In-Court Conclusion as She Would Employ In Her Out-of-Court Work: *Braun v. Lorillard Inc.,* 84 F.3d 230 (7th Cir. 1996): The plaintiff sought to prove that the decedent's mesothelioma was caused by smoking cigarettes with a filter made with crocidolite asbestos. The decedent's lung tissue was tested for asbestos fibers, using the standard methodologies of "bleach digestion" and "low temperature plasma ashing." No crocidolite fibers were found. The plaintiffs then retained an expert who tested for asbestos in building materials to conduct tests on the decedent's lung tissue. This expert was unaware of the methodologies ordinarily employed in testing tissue. He used the same test that he used on building materials, known as high temperature ashing, and found crocidolite fibers in the tissue. The expert stated that high temperature ashing was as usable on tissue as on bricks, though he had never conducted such a test on tissue before this litigation. He also admitted that the high temperature could alter the chemistry of the sample, in which case it would be impossible to tell whether asbestos fibers were crocidolite or some other kind. But he asserted that his method was far more likely to produce a false negative than a false positive.

The Court held that the expert's testimony was properly excluded as unscientific under *Daubert*. It made the following points:

> Nowhere in *Daubert* did the Court suggest that failure to adhere to the customary methods for conducting a particular kind of scientific inquiry is irrelevant to the admissibility of a scientist's testimony. On the contrary, the Court made clear that it is relevant. A judge or jury is not equipped to evaluate scientific innovations. If, therefore, an expert proposes to depart from the generally accepted methodology of his field and embark upon a sea of scientific uncertainty, the court may appropriately insist that he ground his departure in demonstrable and scrupulous adherence to the scientist's creed of meticulous and objective inquiry. To forsake the accepted methods without even inquiring why they are the accepted methods--in this case, why specialists in testing human tissues for asbestos fibers have never used the familiar high temperature ashing method--and without even knowing what the accepted methods are, strikes us * * * as irresponsible.

> Modern science is highly specialized. An expert in the detection of asbestos in building materials cannot be assumed to be an expert in the detection of asbestos in human tissues even though, as the plaintiff reminds us, many building materials, most obviously wood, are, like human and animal tissues, organic rather than inorganic substances. The fact that the plaintiffs' lawyer turned to this nonexpert, having already consulted experts without obtaining any useful evidence, is suggestive of the abuse, or one of the abuses, at which *Daubert* and its sequelae are aimed. That abuse is the hiring of reputable scientists, impressively credentialed, to testify for a fee to propositions that they have not arrived at through the methods that they use when they are doing their regular professional work rather than being paid to give an opinion helpful to one side in a lawsuit.

Level of Scrutiny

Limited View of Gatekeeper Role: *McCullock v. H.B. Fuller Co.,* 61 F.3d 1038 (2d Cir. 1995): The plaintiff alleged that she contracted a respiratory ailment, including throat polyps, from exposure to an unventilated glue pot at the place of her employment. The defendant challenged two experts under *Daubert*--a consulting engineer, who testified that the plaintiff was in the "breathing zone" of the glue fumes, and an ear, nose and throat doctor, who testified that the glue fumes caused the plaintiff's ailments. The Court held that the testimony of both experts was sufficiently reliable under *Daubert*. The engineer based his opinion on his extensive practical experience, examination of safety literature and the warnings provided by the defendant, interviews with the plaintiff concerning her exposure, and background industrial experience with ventilation. The doctor based his testimony on his treatment of the plaintiff, her medical history, pathological studies, use of a scientific analysis known as differential etiology (which requires listing all possible causes, then eliminating all causes but one), and scientific and medical treatises. Under these circumstances, any dispute as to the experts' lack of specialization, flaws in methodology, or lack of textual authority, went to weight and not admissibility. The Court concluded that the defendant's point-by-point, scrict scrutiny attack on the experts' qualifications and methodology constituted an unwarranted extention of *Daubert:*

> Trial judges must exercise sound discretion as gatekeepers of expert testimony under *Daubert*. Fuller,

however, would elevate them to the role of St. Peter at the gates of heaven, performing a searching inquiry into the depth of an expert witness's soul -- separating the saved from the damned. Such an inquiry would inexorably lead to evaluating witness credibility and weight of the evidence, the ageless role of the jury.

Trial Court's Gatekeeping Standards Too Strict: *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi,* 80 F.3d 1074 (5th Cir. 1996): In an eminent domain action, the landowner proffered an engineering expert and a real estate appraisal expert. The engineering expert stated that a new levee left the subject property unprotected from flooding, and in a worse position than before the levee was built. The real estate appraisal expert stated that any prospective buyer would determine that the property was subject to flooding, and that the fair market value of the property had been reduced. The trial court excluded the experts' testimony as speculative and without foundation, relying specifically on the experts' uncertainty about the extent of flooding on the property in the event of heavy rainfall. But the Court of Appeals found an abuse of discretion, because the trial court "applied too stringent a reliability test." The Court stated that *Daubert* had not worked a "seachange over federal evidence law" and that "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." The engineer's opinion was properly based on his review of maps, photographs and other relevant data, as well as his experience as an engineer. The appraisal expert's opinion was based on his experience, his personal inspection of the property, comparable sales, and discussions with local brokers. Under these circumstances, any vagueness or tentativeness in the testimony were "matters properly to be tested in the crucible of adversary proceedings; they are not the basis for truncating that process."

Trial Court Imposed Too Strict a Scrutiny: *Joiner v. General Electric Co.*, 78 F.3d 524 (11th Cir. 1996): In an action in which the plaintiff alleged that his cancer was caused by exposure to PCB's, the Court reversed a grant of summary judgment for the defendants. The Court reasoned that the lower court had employed an excessively strict scrutiny to the proposed medical testimony of the plaintiff's experts. The *Daubert* gatekeeping function "is not to weigh or choose between conflicting scientific opinions" and "is not intended to turn judges into jurors or surrogate scientists." Rather, the judge's gatekeeping role "is simply to guard the jury from considering as proof pure speculation presented in the guise of legitimate scientifically-based expert opinion." The Court found that the medical testimony of the

plaintiff's experts was supported "by the respective expert's specialized education, years of experience, physical examination of Joiner, and familiarity with the general scientific literature in the field, as well as by reliance upon specific scientific studies related to the carcinogenic effect of PCB's." The Court also found that the trial court erred in rejecting the expert testimony on the grounds that the expert relied in part on two animal studies. It stated that "it is improper to find research unreliable solely because it uses animal subjects" and elaborated as follows:

> Opinions of any kind are derived from individual pieces of evidence, each of which by itself might not be conclusive, but when viewed in their entirety are the building blocks of a perfectly reasonable conclusion, one reliable enough to be submitted to a jury along with the tests and criticisms cross-examination and contrary evidence would supply.

Note: The Supreme Court granted certiorari in *Joiner*, to consider whether the 11th Circuit erred in applying a stringent standard of review to the trial court's exclusion of evidence under *Daubert*. The grant of certiorari does not extend to the proper application of the *Daubert* test--at least not on its face.

Sufficiency of Expert Testimony

Reliability and Sufficiency Are Intertwined: *Conde v. Velsicol Chemical Corp.*, 24 F.3d 809 (6th Cir. 1994): The trial court granted summary judgment for the defendant on the plaintiffs' claim for damages allegedly caused by their exposure to chlordane. The plaintiffs complained that the trial court misconstrued *Daubert* by requiring their experts' testimony to be generally accepted. But the Court held that the issue was whether the experts' testimony, even if admissible, was sufficient to prove that chlordane caused the plaintiffs' injuries. The experts could only state that chlordane exposure was "consistent with" the symptoms suffered by the plaintiffs; the experts could not exclude alternative causes, and their conclusions were inconsistent with the fact that tests of the body tissues of the plaintiffs revealed no chlordane, and were also inconsistent with the relevant, peer-reviewed scientific literature. Thus, "the Condes' expert testimony is insufficient to permit a jury to conclude, by a preponderance of the evidence, that chlordane exposure caused the Condes' health problems." See also ***Elkins v. Richardson-Merrell, Inc.***, 8 F.3d 1068 (6th Cir. 1993) ("the Court

in *Daubert* indicated that even if expert opinion or evidence on one side were relevant and admissible, if insufficient to allow a reasonable juror to conclude that the position more likely than not is true, it may be the basis for a directed verdict or a grant of summary judgment.").

Gatekeeper Role Does Not Extend to Sufficiency Review: *In re Joint E. and S. Dists. Asbestos Litigation (Maiorana)*, 52 F.3d 1124 (2d Cir. 1995): The trial court held that the plaintiff had presented insufficient evidence to establish that asbestos caused colon cancer, and granted the defendant's motion for judgment as a matter of law after a jury verdict in favor of the plaintiff. While the plaintiff's expert testimony was found on a previous appeal to be admissible, the trial court on remand relied on *Daubert* for the proposition that the trial judge has an obligation to strictly scrutinize expert testimony for its sufficiency as well as its admissibility. But the Court of Appeals reversed the trial court and reinstated the verdict. The Court held that *Daubert* did not change the standard for assessing the sufficiency of evidence or for granting judgment as a matter of law. While the trial judge has an expanded role in assessing the admissibility of scientific expert testimony, this does not allow the judge to usurp the jury's function by acting as a gatekeeper as to sufficiency. The Court explained as follows:

> The "admissibility" and "sufficiency" of scientific evidence necessitate different inquiries and involve different stakes. Admissibility entails a threshold inquiry over whether a certain piece of evidence ought to be admitted at trial. The *Daubert* opinion was primarily about admissibility. It focused on district courts' role in evaluating the methodology and the applicability of contested scientific evidence in admissibility decisions.
>
> This case is about sufficiency, not admissibility. A sufficiency inquiry, which asks whether the collective weight of a litigant's evidence is adequate to present a jury question, lies further down the litigational road.

Applying its analysis of sufficiency review after *Daubert* to the District Court's ruling, the *Asbestos* Court held that the District Court erred in at least the following respects:

> 1. The district court unfairly discredited an expert's testimony that a number of studies listing standard mortality ratios for asbestos/colon cancer ranging from 1.14 to 1.47 are statistically significant when taken together.

The district court had simply asserted, without support, that an SMR of less than 1.50 is "statistically insignificant" and that "no matter how many studies yield a positive but statistically insignificant SMR for colorectal cancer, the results remain statistically insignificant." The Court of Appeals responded: "Although perhaps a floor can be set as a matter of law, we are reluctant to adopt such an approach. We believe that it would be far preferable for the district court to instruct the jury on statistical significance and then let the jury decide whether many studies over the 1.0 mark have any significance in combination."

2. The district court erred in disregarding the studies proffered by the plaintiff's experts revealing SMRs of 1.62 and 1.85 for asbestos exposure and colon cancer, and in disregarding another study which yielded an SMR of 2.27 for colon cancer in plant workers exposed to asbestos. These SMRs exceeded the district court's own threshold for statistical significance, yet that court unaccountably rejected them in its sufficiency inquiry.

3. The district court gave too much weight to contrary epidemiological studies offered by the defendant, and improperly ignored public reports which had found a link between asbestos exposure and colon cancer. The Court of Appeals stated: "For the district judge to supersede the opinions of the expert witnesses with his own lay judgment raises some concerns; for the court to omit any consideration of agency reports backing up the claims of plaintiff's experts and supporting the jury verdict is, in our view, especially troubling."

Summary Judgment

Caution Required in Applying *Daubert* on Summary Judgment: *Cortes-Irizarry v. Corporacion Insular,* 111 F.3d 184 (1st Cir. 1997). The Court addressed the plaintiff's argument that a *Daubert* analysis is improper in the context of summary judgment:

> The plaintiff posits that *Daubert* is strictly a time-of-trial phenomenon. She is wrong. The *Daubert* regime can play a role during the summary judgment phase of civil litigation. If proffered expert testimony fails to cross *Daubert's* threshold for admissibility, a district court may exclude that evidence from consideration when passing upon a motion for summary judgment. See *Cavallo v. Star Enter.*, 100 F.3d 1150, 1159 (4th Cir. 1996); *Peitzmeier v. Hennessy*

Indus., Inc., 97 F.3d 293, 297-99 (8th Cir. 1996); *Claar v. Burlington N.R.R.*, 29 F.3d 499, 502-05 (9th Cir. 1994); *Porter v. Whitehall Lab.*, Inc., 9 F.3d 607, 612, 616-17 (7th Cir. 1993).

However, the Court cautioned against employing the gatekeeper function too rigorously when deciding a summary judgment motion. The Court explained as follows:

> The fact that *Daubert* can be used in connection with summary judgment motions does not mean that it should be used profligately. A trial setting normally will provide the best operating environment for the triage which *Daubert* demands. Voir dire is an extremely helpful device in evaluating proffered expert testimony, and this device is not readily available in the course of summary judgment proceedings. Moreover, given the complex factual inquiry required by *Daubert*, courts will be hard-pressed in all but the most clearcut cases to gauge the reliability of expert proof on a truncated record. Because the summary judgment process does not conform well to the discipline that *Daubert* imposes, the *Daubert* regime should be employed only with great care and circumspection at the summary judgment stage.
>
> We conclude, therefore, that at the junction where *Daubert* intersects with summary judgment practice, *Daubert* is accessible, but courts must be cautious -- except when defects are obvious on the face of a proffer -- not to exclude debatable scientific evidence without affording the proponent of the evidence adequate opportunity to defend its admissibility.

As the *Cortes-Irizarry* Court notes, the record on summary judgment is ordinarily insufficient for a conscientious *Daubert* determination. It is only where the expert's affidavit is purely conclusory and speculative that the Trial Court would have enough confidence to reject the expert testimony as insufficiently reliable at such an early stage of the proceedings.

Of course it is possible for the Trial Court to speed up the *Daubert* determination by essentially requiring a full presentation of the expert testimony, and rebuttal, at the summary judgment stage. Courts have displayed considerable ingenuity in devising ways in which an adequate record can be developed so as to permit *Daubert* rulings to be made in conjunction with motions for summary judgment. See, e.g., *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 736, 739 (3d Cir. 1994) (discussing the use of in limine hearings), *cert. denied*, 115 S. Ct. 1253 (1995); *Claar v. Burlington N.R.R.*, 29 F.3d 499, 502-05 (9th Cir. 1994) 29 F.3d at 502 (discussing the District Court's technique of ordering experts to submit serial affidavits explaining the reasoning and methodology underlying their conclusions). The problem with these methods is that it may result in

a trial before the trial. As the *Cortes-Irizarry* Court put it: "We do not in any way disparage such practices; we merely warn that the game sometimes will not be worth the candle."

Use of Rule 403

Requirement of a Record On Which To Base Exclusion: *Petruzzi's IGA v. Darling-Delaware*, 998 F.2d 1224 (3d Cir. 1993): To prove an antitrust conspiracy, the plaintiffs proffered the testimony of two economists, who applied multiple regression analysis to sales information provided by the defendants in discovery. On the basis of this methodology, the experts concluded that the defendants must have set prices in concert. The Trial Court rejected this testimony by invoking Rule 403, and granted summary judgment for the defendants, but the Court held that this was an abuse of discretion. The Court made the following points:

> 1. The testimony comported with the scientific method under *Daubert*; multiple regression analysis is reliable and well-accepted, and there was no indication that it was improperly applied by the plaintiffs' experts.
>
> 2. The Trial Court's use of Rule 403 to exclude the evidence, in the context of a pre-trial ruling, was inappropriate, because Rule 403 is only to be used as a last resort with respect to expert testimony. This is especially true at the pretrial level, where there is a danger that the perceived risk of confusion and prejudice cannot be accurately assessed. Thus, in order to exclude expert testimony under Rule 403, a court must have a record complete enough to be considered a "virtual surrogate for a trial record." That standard of completeness was not met in this case.
>
> 3. The Trial Court employed the wrong test under Rule 403 when it excluded the evidence on the ground that it was not more probative than prejudicial. Rule 403 provides that evidence is admissible unless the probative value is substantially outweighed by the risk of prejudice, confusion and delay.

Special Scrutiny for DNA Probability Evidence: *United States v. Chischilly,* 30 F.3d 1144 (9th Cir. 1994): The Court held that evidence of DNA identification was admissible under *Daubert*. It noted, however, that Rule 403 would have special bearing on the statistical probability aspect of DNA evidence. The Court recognized that the jury might assign undue weight to DNA profiling statistics. It specified two "general tendencies that should be guarded against by the use of Rule 403." First, the jury might accept the DNA evidence as a definitive statement of source probability. Second, the jury might equate source with guilt, "ignoring the possibility of non-criminal reasons for the evidentiary link between the defendant and the victim."

As to the second concern, that of equating source with guilt, there was no danger of prejudice in *Chischilly*, since the source of evidence was semen extracted from the murder victim. Under the circumstances presented in the case, this was not susceptible of an innocent explanation.

As to the first concern, the danger is that the jury may equate random match probability with source probability, when in fact "the real source probability will reflect the relative strength of circumstantial evidence connecting the defendant and other persons with matching DNA to the scene of the crime." The *Chischilly* Court noted that the pitfalls of source probability become "more perilous where the defendant is a member of a substructured population" because the danger is created that the odds will be inflated due to underrepresentation of the substructure in the database. In these situations, "the jury may be ill-suited to discount properly the probative value of DNA profiling statistics." The problem of overstated odds is exacerbated further by geographic differences between the database and the possible set of suspects; it is quite possible that the product rule "will understate the random probability that some other nearby resident with a similar genetic profile could have been the source of the sample found on the victim."

Despite all these risks, the *Chischilly* Court held that evidence of statistical probability that is attendant to DNA profiling can survive a Rule 403 objection, so long as "the district court provides careful oversight." The Court found that such oversight was provided by the district court in this case. It noted that the prosecution "was careful to frame the evidence properly" by characterizing the DNA profiling statistics as the probability of a random match, "not the probability of the defendant's innocence that is the crux of the prosecutor's fallacy." Also, the prosecution expert "arguably calculated on the basis of somewhat conservative statistical assumptions"; and the defendant, a Native American, was compared with a Native American database--though admittedly there was a possibility of substructuring because the defendant is a Navajo and the database was of Native Americans throughout the country.

Use of Rule 703

Reliance on Hearsay: *United States v. Locascio*, 6 F.3d 924 (2d Cir. 1993): The government called a law enforcement official to testify as an expert concerning the structure and practices of organized crime families. The expert admittedly relied on inadmissible hearsay for some of his conclusions. The defendant argued that after *Daubert*, the trial court must find that the sources of information relied upon by an expert are trustworthy. The Court agreed that under *Daubert*, the trial court had a gatekeeper function as to the sources of information relied upon by an expert. While *Daubert* dealt with Rule 702 and the "source" question is covered by Rule 703, the Court found that "the flexibility of the federal rules also applied to Rule 703 and the determination of the trustworthiness of the sources of expert testimony." However, the court declined "to shackle the district court with a mandatory and explicit trustworthiness analysis." That is, no explicit determination of trustworthiness must be made on the record. The Court found no abuse of discretion in admitting the expert's testimony in this case.

***Daubert* Applies to the Rule 703 Enquiry: *In re Paoli R.R. Yard PCB Litigation*,** 35 F.3d 717 (3rd Cir. 1994): The Court held that after *Daubert*, the Circuit's previous view of Rule 703--that the trial judge had no independent role in assessing the reliability of the basis of an expert's opinion--was no longer viable. The Court explained as follows:

> *Daubert* makes clear for the first time at the Supreme Court level that courts have to play a gatekeeping role with regard to experts. In stating that Rule 702 is the primary locus of the gatekeeping role, the Court implies that there are at least some secondary loci in other Rules. By requiring the judge to look to the views of other experts rather than allowing the judge to exercise independent judgment, current Third Circuit case law eviscerates the judge's gatekeeping role with respect to an expert's data and instead gives that role to other experts. * * *
>
> We now make clear that it is the judge who makes the determination of reasonable reliance, and that for the judge to make the factual determination under Rule 104(a) that an expert is basing his or her opinion on a type of data *reasonably* relied upon by experts, the judge must conduct an independent evaluation into reasonableness.

The *Paoli* Court noted that in a trial court's evaluation of reasonable reliance under Rule 703, the views of experts would be relevant, but not dispositive.

II. HARD SCIENCES--EVIDENCE INADMISSIBLE

Causation in Tort Cases

Unreliable Methodology In Light of Contrary Epidemiological Evidence: *Raynor v. Merrell Dow Pharmaceuticals, Inc.*, 103 F.3d 1371 (D.C.Cir. 1997): In a Bendectin case, the trial judge, before *Daubert,* granted a JNOV in favor of the defendant. This decision was remanded for consideration in light of *Daubert*. The trial court held that *Daubert* did not change the result, and the Court of Appeals affirmed this decision. The plaintiffs' experts testified to causation on the basis of chemical studies, in vitro studies, and animal studies. The Court concluded that this methodology was unscientific because it came to a conclusion contrary to every existing epidemiological study. The Court distinguished its opinion in *Ambrosini v. Labarraque* (see infra), where the same type of testimony was held admissible, on the ground that the drug at issue in *Ambrosini* had not been the subject of significant epidemiological study. As to the specific factors noted in *Daubert,* the Court stated: 1) The experts' methodology and conclusion had not been peer reviewed; 2) The testimony suffered from "testing" problems since there was no way to verify that animal and chemical studies are accurate as applied to humans--indeed, the only reliable testing in such an area is through epidemiological study, and the experts' conclusions were contrary to these studies; when *Daubert* referred to the importance of testing, it clearly did not mean that expert testimony was admissible when contradicted by the testing; 3) "[W]here sound epidemiological studies produce opposite results from nonepidemiological ones, the rate of error of the latter is likely to be quite high." The Court noted that "epidemiological evidence does not always trump the nonepidemiological." However, in this case the plaintiffs made "no serious argument that the epidemiological sample sizes have been too small to detect the relationship between Bendectin and birth defects, a relationship that has been studied for hundreds of thousands of subjects."; and 4) Reliance on chemical and animal studies in the face of contradicting epidemiological evidence is not a generally accepted methodology.

Unreasonable Extrapolation: *Cavallo v. Star Enterprise*, 892 F.Supp. 756 (E.D.Va. 1995), *aff'd*, 100 F.3d 1150 (4th Cir. 1996): The plaintiff alleged that she suffered respiratory illness as a result of exposure to aviation jet fuel vapors that were released from an overflow at the defendant's storage terminal. The plaintiff's experts, one a toxicologist and the other an immunologist, were prohibited from testifying at trial after a

Daubert hearing, and the Court consequently granted summary judgment for the defendant. The toxicologist did not purport to follow the methodology ordinarily followed by toxicologists. Rather, he formed his opinion "and then tried to conform it to the methodology." His reliance on anecdotal case studies was improper, because these studies were not pre-designed in a controlled setting, and moreover they dealt with different exposures, symptoms, and chemicals from those present in this case. The Court noted that the expert extrapolated from the findings in the literature and case studies, without any scientifically valid basis for doing so:

> Although Dr. Monroe found support in the literature for a conclusion that exposure to similar levels of a different mixture of volatile organic compounds produce somewhat similar, short-term effects, he is unable to provide any scientifically valid basis to support the leap from those studies to his opinion in this case. * * * Thus, while the agreed-upon methodology appears to be scientifically valid, it does not appear to have been faithfully applied.

The immunologist was unaware of the plaintiff's level of exposure and could cite no studies or published literature to support a finding of adverse effects from the plaintiff's level of exposure. The immunologist's reliance on the temporal proximity between exposure and injury was "not the method of science." The Court did, however, state that "there may be instances where the temporal connection between exposure to a given chemical and subsequent injury is so compelling as to dispense with the need for reliance on standard methods of toxicology." Here, however, the plaintiff was merely exposed to some level of jet fuel; she was not doused with chemicals and did not thereupon suffer an immediate injury. Nor was there a mass exposure of many people who all thereafter suffered the same symptoms.

The Court closed by noting that "nothing in the Court's review of this issue required any scientific training. Rather, the Court did nothing more than use the customary legal tools of logical reasoning to carry out its gatekeeping function."

On appeal, the Court of Appeals stated that the District Court's ruling was "restrictive" but "not inconsistent with *Daubert*." The Court of Appeals concluded as follows: "Although *Daubert* eliminated the requirement of general acceptance, the five factors it established still require that the methodology and reasoning used by a witness have a significant place in the discourse of experts in the field."

Insufficient Basis: *Allen v. Pennsylvania Engineering Corp.,* 102 F.3d 194 (5th Cir. 1996): The Court affirmed the grant of summary judgment in a wrongful death action, finding no error in the exclusion of expert testimony concluding that the decedent's brain cancer was caused by exposure to ethylene dioxide. The Court stated: "Where, as here, no epidemiological study has found a statistically significant link between EtO exposure and human brain cancer; the results of animal studies are inconclusive at best; and there was no evidence of the level of Allen's occupational exposure to EtO, the expert testimony does not exhibit the level of reliability necessary to comport with Federal Rules of Evidence 702 and 703, the Supreme Court's *Daubert* decision, and this court's authorities." The Court rejected the experts' "weight of the evidence" methodology, which the experts employed to reach the conclusion that EtO caused brain cancer. This methodology is used by government agencies to establish prophylactic rules governing human exposure to possible carcinogens. But this preventive perspective is based on a threshold of proof that is "reasonably lower than that appropriate in tort law."

Untested Theory: *Wheat v. Pfizer, Inc.*, 31 F.3d 340 (5th Cir. 1994): In a wrongful death action, the principal dispute was whether the decedent's hepatitis was viral or whether it was caused by her ingestion of Feldene or Parafon Forte DSC. The trial judge granted summary judgment for one defendant and judgment as a matter of law for the other, holding that the testimony as to causation by the plaintiff's expert was inadmissible. The Court of Appeals affirmed. The expert's theory, that a combination of the two medications could cause hepatitis, was untested; no study of the combined effects of the two drugs had ever been done; and his theory was not published or subject to peer review.

Scientific Rigor Lacking: *Rosen v. Ciba-Geigy Corp.,* 78 F.3d 316 (7th Cir.1996): The plaintiff brought a negligence action against the manufacturer of a nicotine patch. The plaintiff claimed that the use of the nicotine patch, together with his continued smoking, caused him to have a heart attack. The Court held that the testimony from the plaintiff's expert cardiologist, concerning the role of the nicotine patch in the plaintiff's heart attack, was properly excluded. The Court noted that the object of *Daubert* was "to make sure that when scientists testify in court they adhere to the same standards of intellectual rigor that are demanded in their professional work. If they do, their evidence (provided of course that it is relevant to some issue in the case) is admissible even if the particular methods they have used in arriving at their opinion are not yet accepted as

canonical in their branch of the scientific community." The Court held that the plaintiff's expert's methodology lacked "scientific rigor." The expert offered "neither a theoretical reason to believe that wearing a nicotine patch for three days * * * could precipitate a heart attack, or any experimental, statistical or other scientific data from which such a causal relation might be inferred or which might be used to test a hypothesis founded on such a theory."

Reliance on Temporal Proximity: *Porter v. Whitehall Laboratories, Inc.*, 9 F.3d 607 (7th Cir. 1993): The plaintiff sued for damages from kidney failure allegedly caused by ingestion of ibuprofen. The trial court, before *Daubert* was decided, held that expert testimony concluding that the plaintiff's kidney failure was caused by ibuprofen was inadmissible, and granted summary judgment. The Court of Appeals held that the trial court's exclusion of the expert testimony was consistent with *Daubert*. The experts reached their conclusions solely on the basis of the temporal proximity between the plaintiff's use of ibuprofen and his kidney failure. But reliance on this temporal factor alone did not comport with the scientific method. None of the experts could point to studies, records or data which would support the conclusion that ibuprofen was linked to the particular type of kidney failure (known as anti-GBM RPGN) suffered by the plaintiff. Finally, certain of the experts' conclusions were based on factual premises inconsistent with the evidence, and therefore they were properly excluded under the *Daubert* "fit" requirement.

Subjective Methodology: *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994): The Court held that testimony of the plaintiff's expert opthamologist, concluding that the plaintiff's cataracts were cause by exposure to nuclear radiation, was properly excluded under *Daubert*. The expert testified that he could identify radiation-induced cataracts by simple visual observation; however, there was no scientific support for this premise. Furthermore, the studies upon which the expert purported to rely for this premise actually contradicted his conclusion. The Court noted that the defendant's experts had shown that a proper methodology for detecting radiation-induced cataracts included a medical work-up, a work-up of the patient's history, and an examination of occupation dosimetry charts.

Hypothetical and Unsupported Conclusions: *Bradley v. Brown*, 42 F.3d 434 (7th Cir. 1994): The trial court excluded testimony of two clinical ecologists, who would have testified that the plaintiffs were suffering from Multiple Chemical Sensitivity Disorder caused by exposure to the defendant's pesticides. The Court held that the trial court had properly followed the *Daubert* framework and had not abused its discretion. The trial court had found that the etiology of MTS was not known or tested, and that the scientific literature raised doubts about the experts' methodology. Since the experts' conclusions were "hypothetical" at this point, they could not assist the factfinder and were properly excluded under Rule 702.

Speculation, and Insufficient Information about the Specific Case: *Wintz by and through Wintz v. Northrop Corp.*, 110 F.3d 508 (7th Cir. 1997): To defeat a motion for summary judgment, the plaintiffs proffered the testimony of a toxicologist who concluded that the plaintiff-infant's birth defects were caused by exposure to bromide in utero. Affirming the order granting summary judgment, the Court held that the Trial Court did not err in finding this testimony insufficiently reliable under *Daubert*. At the time the expert formed his opinion, he knew only that the infant's mother had worked with a chemical containing bromide, and that the infant's symptoms were consistent with bromide exposure. He did not know the amount or extent of exposure or the specifics of the work environment, nor did he attempt to correlate any specific dose the mother received with the infant's symptoms. The Court concluded as follows:

> Ellenbogen's methodology in attempting to relate the general principles of toxicology and bromide exposure to the facts of this case appears to have been based less on a scientific understanding of the specifics of Jill Wintz's workplace exposure and the potential effects on Jessica, and more on merely a general understanding of bromide, with only unsupported speculation having been used to relate the general knowledge to the facts surrounding Jill Wintz's exposure.

Insufficient Knowledge to Support the Opinion: *Wright v. Willamette Industries, Inc.*, 91 F.3d 1105 (8th Cir. 1996): In an action alleging personal injuries due to exposure to formaldehyde emanating from a nearby fibreboard plant, the Court reversed a judgment for the plaintiffs due to insufficient evidence. The Court held that the testimony of the plaintiff's expert on causation should not have been admitted. The expert testified that the injuries were more probably than not related to exposure to formaldehyde, "but that opinion was not based on any knowledge about what amounts of wood fibers impregnated with formaldehyde

involve an appreciable risk of harm to human beings who breathe them." Therefore, the expert's testimony was speculative and unscientific under *Daubert*.

Result-Oriented Methodology: *Sorenson By and Through Dunbar v. Shaklee Corp.*, 31 F.3d 638 (8th Cir. 1994): Affirming summary judgment for the defendant, the Court held that the trial court properly rejected the plaintiffs' experts' testimony which sought to establish a link between the plaintiffs' mental retardation and the ingestion by the plaintiff's parents of alfalfa tablets which had been coated with ethylene dioxide (EtO). The Court first held that the testimony, which concluded that EtO could cause mental retardation in children if taken by parents before childbirth, failed the *Daubert* "fit" requirement, because the plaintiffs produced no evidence that the alfalfa tablets taken by their parents contained any EtO residue. The Court also concluded that the scientific validity prong of *Daubert* had not been met, because the experts' conclusions as to causation were not based on any studies, their theories had not been published or peer reviewed, were not based on any well-accepted methodology, and did not purport to exclude or analyze other possible causes. The Court concluded: "Instead of reasoning from known facts to reach a conclusion, the experts here reasoned from an end result in order to hypothesize what needed to be known but what was not."

Improper Extrapolation: *Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594 (9th Cir. 1996): In a case alleging that a drug caused a birth defect, the Court held that the testimony of an expert employed by the plaintiff in *Daubert* was properly excluded. Doctor Done testified that the plaintiff's birth defect, hemifacial microsomia, was caused by the mother's use of Clomid. Doctor Done based his conclusion on epidemiological studies which showed a link between Clomid and other types of birth defects. He concluded that since Clomid is capable of causing other birth defects, it also caused hemifacial microsomia. The Court held that this reasoning was not scientific. The Doctor's testimony "was influenced by litigation-driven financial incentive", and the Doctor's premise--that a positive association between a drug and some birth defects indicates an association with other birth defects--was not recognized by even a minority of scientists. The Court concluded as follows:

> When a scientist claims to rely on a method practiced by most scientists, yet presents conclusions that are shared by no other scientist, the district court should be wary that the method has not been faithfully applied.

Thus, the exclusion of the testimony in *Lust* was not based solely on the unsupported conclusion of the expert--in violation of *Daubert's* directive to focus on methodology rather than conclusion--but rather on the likelihood that the expert misapplied standard scientific methodology.

Failure to Consider Alternative Causes: *Claar v. Burlington Northern R. Co.*, 29 F.3d 499 (9th Cir. 1994): Plaintiffs brought an action under FELA alleging that they were injured by exposure to chemicals. Affirming an order of summary judgment for the defendant, the Court held that the proffered testimony of the plaintiffs' experts was inadmissible. The experts concluded that the plaintiffs' injuries were caused by exposure to chemicals, but they failed to articulate any basis for these conclusions, and could not describe the methodology by which they reached those conclusions, despite the fact that the trial judge ordered the experts to provide affidavits explaining their methodology. Also, the experts neglected to investigate any other possible causes of the plaintiffs' injuries. Finally, the experts appeared to have first concluded that the plaintiffs were injured due to exposure to chemicals, and then consulted the relevant literature in the field to support their conclusions. The *Claar* Court stated:

> Coming to a firm conclusion first and then doing research to support it is the antithesis of [the scientific] method. Certainly, scientists may form initial tentative hypotheses. However, scientists whose conviction about the ultimate conclusion of their research is so firm that they are willing to aver under oath that it is correct prior to performing the necessary validating tests could properly be viewed by the district court as lacking the objectivity that is the hallmark of the scientific method.

In a footnote, the *Claar* Court stated that the *Daubert* standards are applicable to all expert testimony, not just scientific expert testimony.

Result-Oriented Methodology: *Diaz v. Johnson Matthey, Inc.*, 1995 U.S. Dist. Lexis 10970 (D.N.J. 1995): The plaintiff claimed that his asthma was caused by his workplace exposure to platinum salts. The Court granted summary judgment after holding a *Daubert* hearing and concluding that the plaintiff's expert testimony as to causation was unreliable. The Court found the following flaws in the expert's testimony: 1) The expert failed to conduct a differential diagnosis, even though the plaintiff smoked a pack

of cigarettes a day for fifteen years, had a family history of asthma, and was exposed to other potential causes of asthma; and 2) The expert's only diagnosis of this specific condition was for purposes of this particular litigation.

"Working Hypothesis" Based on Speculation: *Ballinger v. Atkins,* 947 F.Supp. 925 (E.D.Va. 1996): The plaintiff claimed neurological damages caused by using Nutrasweet in conjunction with a ketogenic diet. After a *Daubert* hearing, the Court held that the plaintiff's biochemist expert would not be permitted to testify at trial. The expert described his opinion as a "working hypothesis"; he testified only that Nutrasweet together with a ketogenic diet "can be unsafe", and he could not state or estimate at what level of consumption the unsafe effects could arise. His methodology was not tested or peer-reviewed, no studies supported his theory, and his opinion was generated solely for litigation purposes.

No Supporting Studies: *Schmaltz v. Norfolk & Western Ry. Co.*, 878 F.Supp. 1119 (N.D.Ill. 1995): A railroad employee claimed that he developed "reactive airway disfunction syndrome," a respiratory disease, by exposure to the herbicides atrazine and tebuthiuron. The Court granted the defendant's motion *in limine* to exclude two experts proffered by the plaintiff to prove causation, determining that neither expert's methodology could be validated. Neither expert could point to any documented cases of the herbicides causing a respiratory disease. One expert's reliance on high dose studies on rabbits, resulting in eye irritation, was plainly inconsistent with the scientific method. Neither expert was aware of the concentration of the herbicides to which the plaintiff was exposed. One expert's reliance on temporal proximity between exposure and injury was similarly insufficient because "[i]t is well-settled that a causation opinion based solely on a temporal relationship is not derived from the scientific method." Finally, the experts could not find any peer-reviewed studies to support their conclusions (even though the herbicides had been used for many years), and indeed all of the published studies indicated that there was no harm involved in using these herbicides.

Anecdotal Evidence: *Casey v. Ohio Medical Products*, 877 F. Supp. 1380 (N.D.Cal. 1995): The Court granted summary judgment for the defendant in a case in which the plaintiff alleged that he contracted hepatitis shortly after his exposure to halothane. The plaintiff's expert, an occupational health physician, relied solely on anecdotal evidence, and this was not sufficient scientific support for the expert's conclusion on causation.

Unsupported Speculation: *Trail v. Civil Engineer Corps.,* 849 F. Supp. 766 (W.D.Wash. 1994): The District Court granted summary judgment for the defendant United States in an action for alleged health risks caused by leakage and runoff from a waste disposal site at a federal facility. The Court held that the defendant's experts provided reliable scientific expert testimony which proved that any health risk from the leakage and runoff was negligible. The plaintiff's expert testimony to the contrary did not satisfy the *Daubert* standards. The plaintiff's witness was qualified as an expert on sampling and testing for hazardous substances; but he had no expertise regarding the health effects of these substances. Any extrapolations from the level of contaminant to its health risk were simply "subjective belief or unsupported speculation not validated by any known facts or inferences presented to the court and are thus unreliable and inadmissible under the *Daubert* standard."

Speculation: *Chikovsky v. Ortho Pharmaceutical Corp.,* 832 F. Supp. 341 (S.D. Fla. 1993): Relying on *Daubert,* the Court granted summary judgment after holding inadmissible the plaintiff's expert's testimony that Retin-A caused the plaintiff's birth defects. The Court noted the following points: 1. No published studies have made a connection between Retin-A and birth defects; 2. The expert did not know how much Retin-A the plaintiff's mother had applied to her skin during pregnancy; 3. The expert's admitted extrapolation from Vitamin A and Accutane studies was "wanting" because the studies concerned far different circumstances, products and exposures than those existing in this case; 4. The expert was an obstetrician, not a geneticist, and so he was not able to rule out a genetic explanation for the plaintiff's birth defects; and 5. The expert's self-defined "common sense" assumption that there is evidence of the teratogenetic effects of Retin-A, but that the evidence has not been released to the public, was nothing more than speculation. **See also *Everett v. Georgia-Pacific Corp.,*** 949 F.Supp. 856 (S.D.Ga. 1996) (expert opinion as to causation held unreliable under *Daubert* where it was based solely on the fact of exposure to the substance; expert did not review medical history, and did not eliminate other causes; this testimony was nothing more than pure speculation).

Failure to Eliminate Alternatives, Failure to Consider Epidemiological Evidence, etc.: *Haggerty v. Upjohn Co.,* 950 F.Supp. 1160 (S.D.Fla. 1996): Plaintiff claimed that he was injured as a result of taking a single Halcion tablet--the injuries coming from his erratic and violent behavior after taking the Halcion. Granting summary judgment for the defendant, the court held that the testimony of the plaintiff's expert pharmacologist did not satisfy *Daubert*. The expert would have testified that the plaintiff's behavior was caused by the single

Halcion tablet, but this opinion was not scientifically valid for several reasons: 1) the expert ignored the results of thousands of clinical trials and the corresponding epidemiological evidence; 2) she relied only on summaries of a few case studies; 3) she did not consider alternative causes, such as the plaintiff's diagnosed mental disorder which had led to previous violent episodes; 4) her hypothesis was untested and not peer-reviewed; 5) the general view in the scientific community is that the methodology employed by the expert "can be used to generate hypotheses about causation, but not causation conclusions."

Environmental Experts

Speculative Assumptions as to Specific Causation: *Thomas v. FAG Bearings Corp.*, 846 F.Supp. 1382 (W.D.Mo. 1994): The defendant in a suit to recover response costs brought third-party actions against other property owners seeking recovery under CERCLA. The question was whether contaminants from these other properties caused the contamination in the drinking wells at Silver Creek and Saginaw Village. The defendant's expert, a hydrogeologist, was deposed and stated that based on his investigation, there was an underground waterway running somewhere among the various properties and Silver Spring and Saginaw Village, but that more testing was required to determine the probable cause of the contamination of the drinking wells at issue. He concluded that there was a "potential" that the contaminants came from one or more of the third party properties.

The District Court granted summary judgment for the third parties on the issue of causation, holding that the hydrogeologist's testimony was inadmissible under *Daubert*. The Court explained that "a scientific opinion that cannot establish a probability cannot be the basis on which a reasonable juror can find in favor of a proposition" and that courts "are particularly wary of unfounded expert opinion when causation is the issue." Applying these principles to the expert's testimony, the Court declared as follows:

> Overton's opinions are concocted of impermissible bootstrapping of speculation upon conjecture. He first speculates that any contamination in the soil at third-party defendant sites entered the groundwater. The first conjecture is made without the benefit of any factual data about the nature or depth of the alleged contamination, the composition of the earth below the site, its proximity to the "conceptual" underwater pathway of the amount of contaminants actually

released. Overton's second speculative assumption is that the contaminants * * * may have travelled this generalized, uncharted subterranean river and contaminated Silver Creek and Saginaw Village. He admits that, although he is confident of the existence of the pathway and its general flow, there is no information available to say to any degree of certainty that contaminants went from point "A" to point "B".

While Overton may be permitted to testify that such groundwater pathways are generally accepted in his scientific community, opinions about causation on a particular site must be supported by some factual basis to remove them from the realm of impermissible speculation. * * * He cannot say, with any reasonable degree of scientific certainty that any cause is more than just a possibility. His opinions have nothing to do with probabilities and, therefore, are not properly the subject of expert testimony.

Medical Testimony

Inadmissible PET Scan: *Penney v. Praxair, Inc.,* 116 F.3d 330 (8th Cir. 1997): To prove the existence of brain injury after a car accident, the plaintiff offered testimony from a doctor who conducted a Position Emission Tomography (PET) scan of the plaintiff's brain. The Court held that the testimony concerning the results of the PET scan was properly excluded under *Daubert*. A PET scan measures brain functions, and the results of the scan are compared to a control group to detect abnormalities. In this case, the plaintiff, who was 62 years old, was compared with a control group of 31 persons, with ages from 18 to 70. The parties agreed that PET scan results can be affected by a person's age, and yet the plaintiff made no showing that comparison of his results with those of a control group of such widely disparate ages would be reliable. Moreover, PET scan results can be affected by the patient's medication; the plaintiff's test was conducted while he was on medication for his heart condition and other maladies, whereas none of the control-group subjects was on medication at the time of their PET scans. While it was not clear whether these problems actually led to an unreliable expert opinion, "it was the plaintiff's burden to establish a reliable foundation for the PET scan readings." Here, the plaintiffs failed to establish such a foundation, and there was no error in excluding the PET scan evidence.

The Court recognized that in *Hose v. Chicago Northwestern Transp.Co.*, 70 F.3d 968 (8th Cir. 1995), it had held that PET scan testimony was admissible under *Daubert*. "However, because the admission of scientific evidence in one case does not automatically render that evidence admissible in another case, we

assume that *Hose* did not present the same evidentiary problems as does this case."

Statistics

Failure to Account for Confounding Factors: *Sheehan v. Daily Racing Form, Inc.,* 104 F.3d 940 (7th Cir. 1997): The plaintiff brought an age discrimination action when he was terminated from employment after his job was computerized and the offices of the employer were consolidated. The district court's grant of summary judgment in favor of the employer was upheld. In opposition to the motion for summary judgment, the plaintiff relied on an affidavit of a statistician, who compared the age of those who were dismissed and those who were retained. The statistician concluded that the probability that retention of office personnel was uncorrelated with age was less than five percent. The Court held that the expert's affidavit failed to meet the *Daubert* standard, "which requires the district judge to satisfy himself that the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting." The statistician's methodology was defective because: 1) He arbitrarily excluded certain personnel from the sample tested; and 2) He failed to correct for any potential explanatory variations other than age (e.g., that those who were retained might have had better computer skills than those who were let go, and that the employees in the office held a variety of jobs). The court concluded as follows:

> The expert's failure to make any adjustment for variables bearing on the decision whether to discharge or retain a person on the list other than age--his equating a simple statistical correlation to a causal relation ("of course, if age had not role in termination, we should expect that equal proportions of older and younger employees would be terminated"--true only if no other factor relevant to termination is correlated with age)--indicates a failure to exercise the degree of care that a statistician would use in his scientific work, outside the context of litigation. In litigation an expert may consider (he may have a financial incentive to consider) looser standards to apply. Since the expert's statistical study would have been inadmissible at trial, it was entitled to zero weight in considering whether to grant or deny summary judgment.

See also *People Who Care v. Rockford Board of Education,* 111 F.3d 528, 537 (7th Cir. 1997) (holding that expert testimony attributing discrimination as the cause of underperforming of minority students was unreliable under *Daubert;* the expert made

no attempt to exclude causes other than poverty, and used an unreliable indicator of poverty levels: "A statistical study is not inadmissible merely because it is unable to exclude all possible causal factors other than the one of interest. But a statistical study that fails to correct for salient explanatory variables, or even to make the most elementary comparisons, has no value as causal explanation and is therefore inadmissible in a federal court.").

III. HARD SCIENCES--EVIDENCE ADMISSIBLE

Causation in Tort Cases

Limited Gatekeeper Role: *Ambrosini v. Labarraque,* 101 F.3d 129 (D.C.Cir. 1996): In an action alleging that birth defects were caused by the drug Depo-Provera, the Court held that the Trial Court improperly granted summary judgment for the defendants. The Trial Court rejected the testimony of two experts, an epidemiologist and a teratologist. The Court held that the Trial Court had misconceived "the limited gatekeeper role envisioned in *Daubert.*" Both of the plaintiff's experts had relied on standard methodologies and published studies. Both were highly qualified, a fact which the Court treated "as circumstantial evidence as to whether the expert employed a scientifically valid methodology or mode of reasoning." The fact that one expert had not published his conclusions was of no moment, because the drug Depo-Provera is no longer prescribed during pregnancy, and thus there would be "no reason in the world" to publish those findings. The Court also found it relevant that the teratologist had testified to his conclusions about Depo-Provera at an FDA hearing, before the instant litigation arose. Both experts sufficiently ruled out some other possible causes for the plaintiff's birth defect, including viruses and genetic defect. The fact that several possible causes might have remained "uneliminated" went only to weight and not to admissibility. Finally, the fact that the epidemiologist could not state categorically that Depo-Provera causes birth defects did not render his testimony inadmissible under the "fitness" prong of *Daubert*. The Court reasoned that the "fitness" prong is satisfied if the testimony is relevant--it need not be sufficient to prove the point. The dissenting judge argued that the experts' testimony was conclusory and unscientific.

Standard Procedures Followed: *Holbrook v. Lykes Bros. S.S. Co., Inc.,* 80 F.3d 777 (3d Cir. 1996): The plaintiff alleged that he contracted mesothelioma from exposure to asbestos. He objected to testimony from defense experts that the cause of his condition was radiation. The Court held that the experts' testimony was properly admitted. One expert was a pathologist and the other was a specialist in occupational lung disease. Both relied on medical literature, their knowledge of mesothelioma and its causes, animal studies, and the plaintiff's medical history. The Court concluded: "As required by *Daubert*, their procedures for examining the facts presented to them and their own research methodologies were based on the methods of science and did not

reveal opinion based merely on their own subjective beliefs."

Standard Procedures Followed: *Benedi v. McNeil-P.P.C., Inc.,* 66 F.3d 1378 (4th Cir.1995): Plaintiff alleged that his liver failure was caused by his having taken Tylenol together with alcohol. Plaintiff's experts testified to causation on the basis of the following: the microscopic appearance of the plaintiff's liver, the Tylenol found in his blood when he was admitted to the hospital, the plaintiff's history of Tylenol use after alcohol consumption, the liver enzyme blood level, the lack of any evidence of a viral or any other cause of liver failure, and numerous articles and treatises that described the increased risk of liver injury when acetominophen is combined with alcohol. The Court found no error in the Trial Court's admission of the experts' testimony. The experts' methodology was reliable under *Daubert*; it was the same methodology employed daily by the medical community in diagnosing patients. The Court rejected the defendant's argument that the testimony should have been excluded because the experts did not rely upon epidemiological data. It concluded: "Under the *Daubert* standard, epidemiological studies are not necessarily required to prove causation, as long as the methodology employed by the expert in reaching his or her conclusion is sound."

Note that there is no indication in the case that any epidemiological studies had been conducted; presumably the result would have been different if the plaintiffs' experts had simply ignored reliable epidemiological studies.

Peer-reviewed Studies Indicate a Reliable Methodology: *Glaser v. Thompson Medical Co., Inc.,* 32 F.3d 969 (6th Cir. 1994): Reversing a grant of summary judgment for the defendant in an action brought by the plaintiff for alleged damages caused by ingestion of the diet pill Dexatrim, the Court held that the testimony of the plaintiff's expert created a triable issue of fact as to whether the plaintiff's acute hypertension and related injuries were caused by using Dexatrim. The expert's conclusion that there was an 80% likelihood that the plaintiff's injuries were caused by taking a single dose of Dexatrim was scientifically valid. The conclusion was based on eight clinical studies, several conducted by the expert himself, which detected a significant connection between ingestion of small doses of the active ingredient in Dexatrim and acute hypertension. None of these studies were prepared in anticipation of litigation. The *Glaser* Court concluded:

> These studies, together with Dr. Zaloga's extensive

> experience and work in this area, provide sufficient, reliable scientific data upon which Dr. Zaloga may base his conclusion. All of these papers have clearly explained, solid scientific methodologies upon which they have tested their theories, and all have been peer-reviewed and published in reputable medical journals * * *. The error rates are published and their impact on the studies explained.

The fact that other studies disagreed with the expert's conclusion was not critical, because the expert distinguished many of them and pointed out flaws in the techniques of others. The Court stated that "[s]uch differences in opinions among medical experts do not invalidate Dr. Zaloga's opinion, but rather create material issues of fact which must be resolved by the jury."

Anecdotal Evidence as Confirmatory Data: *Cantrell v. GAF Corp.*, 999 F.2d 1007 (6th Cir. 1993): Plaintiffs claimed that their exposure to asbestos in the workplace created a legitimate fear that they would develop laryngeal cancer in the future. The plaintiff's expert testified that asbestos created a risk of laryngeal cancer, basing his conclusion on epidemiological evidence reported in the medical literature, and on the relatively high incidence of persons at the plaintiffs' workplace whom the expert had personally diagnosed as having laryngeal cancer. The defendants objected to the expert's testimony under *Daubert* insofar as it was based on anecdotal evidence, because the expert had not evaluated a sufficient number of cases from which to draw a proper statistical conclusion of cause and effect. But the Court held that the expert testimony was properly admitted. It stated: "Nothing in Rules 702 and 703 or in *Daubert* prohibits an expert from testifying to confirmatory data, gained through his own clinical experience, on the origin of a disease or the consequences of exposure to certain conditions." The Court noted that the expert was cross-examined and freely acknowledged that his anecdotal evidence was not dispositive but rather simply confirmatory of the medical literature. Presumably the result would have been different had the expert relied only on personal anecdotal evidence for his conclusion.

Reliable Basis in the Absence of Epidemiological Findings: *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116 (9th Cir. 1994): Affirming a judgment for the plaintiff in an action for damages suffered from defective silicon breast implants, the Court held that testimony from the plaintiff's experts was properly admitted as proof of causation. Relying on *Daubert*, the Court concluded that the experts "based their opinions on the types of scientific

data and utilized the types of scientific techniques relied upon by medical experts in making determinations regarding toxic causation where there is no solid body of epidemiological data to review." The Court also noted that the Trial Court is not required under *Daubert* to hold a formal hearing, so long as a determination is made that the expert is qualified and that the testimony is reliable.

Generally Accepted Methodology: *Zuchowitz v. United States,* 870 F. Supp. 15 (D.Conn. 1994): In a suit for personal injury resulting from an excessive dose of Danocrine, the Court held that the testimony of the plaintiffs' experts on causation was admissible. The testimony was based on epidemiological, clinical and animal studies which had been subjected to peer review and publication, and the experts used methodologies which had gained general acceptance within the relevant scientific community. These findings were sufficient to qualify the testimony as admissible after *Daubert*. The Court found that there was no requirement under *Daubert* that the expert assert his conclusions to a level of certainty.

Computers

Standard Components: *Roback v. V.I.P. Transport Inc.*, 90 F.3d 1207 (7th Cir. 1996): The defendant, a truck driver who rammed another car, brought a third-party action claiming that he was distracted by the erratic operation of a faulty cruise control system. The defendant retained an engineer who used a computerized data acquisition system he refers to as the DATAQ, to gather data on the performance of various systems within an automobile or truck. The expert took the truck on a 90 mile drive and used the DATAQ to document how the vehicle performed. He paid particular attention to the engine throttle, the position of the accelerator pedal, and the operation of the cruise control. He concluded that the cruise control, when engaged, caused the engine to rev and the speedometer to fluctuate dramatically, even though the truck would not exceed the set speed limit. The third-party defendants argued that this testimony was inadmissible under *Daubert* because the DATAQ system had not been subject to peer review. But the Court held that the testimony was sufficiently scientific to satisfy *Daubert*:

> Documenting the malfunction of a vehicle by gathering and compiling data during a test run is hardly a novel methodology. In a basic sense, Rosenbluth was no different

than an eyewitness who may have observed Martin's truck malfunction on another occasion. Arguably, however, his testimony would have been more reliable because his observations were quantified. The only thing apparently unique to Rosenbluth's approach was the DATAQ, in the sense that he put together the hardware and designed the software and * * * only he had ever used them. But Rosenbluth used standard components to assemble the DATAQ, and he certainly could have been interrogated about the way in which his software worked. His data were subject to examination and independent verification. We see no way in which Rosenbluth's testimony did not qualify for admission under Rule 702.

DNA Testing

RFLP Identification Satisfies *Daubert*: *United States v. Bonds*, 12 F.3d 540 (6th Cir. 1993): The Court found no error in admitting expert testimony on DNA identification, through the Restriction Length Fragment Polymorphism process, by an FBI crime laboratory. While the lower court's rulings admitting the DNA evidence were couched in *Frye* terminology, the findings were still relevant because "general acceptance is still one factor the Supreme Court has said can impact on a court's scientific validity determination * * *." The Court found that DNA identification was scientifically valid, and made the following points:

1. The methodology employed by the FBI was tested by internal proficiency testing, validation studies and environmental insult studies.
2. The methodology had been published and was exposed to some peer review, and the fact that some flaws in the methodology were exposed by peer review went to weight and not admissibility. As *Daubert* says, the very reason for requiring peer review is so that the methodology can be evaluated and criticized.
3. There was an absence of proof as to rate of error, because the FBI had failed to conduct any external blind proficiency tests to account for the possibility of laboratory error. While this was a negative factor, "the error rate is only one in a list of nonexclusive factors that the *Daubert* Court observed would bear on the admissibility question."
4. The methodology employed by the FBI for determining a DNA match was generally accepted as a reliable testing technique; acceptance need not be universal to be deemed general acceptance, and

> therefore the fact that the reliability of the methodology is in some dispute goes to weight and not admissibility.

The Court held that "criticisms touching on whether the lab made mistakes in arriving at its results is for the jury." Thus, in the Sixth Circuit, an admissibility hearing is not required to determine whether protocols were followed in the particular case. As the Court put it: "the criticisms about the specific application of the procedure used or questions about the accuracy of the test results do not render the scientific theory and methodology invalid or destroy their general acceptance. These questions go to the weight of the evidence, not the admissibility."

The Court in *Bonds* further held that the probability estimates employed by the FBI were admissible even though they did not take account of possible ethnic subgrouping in the sample data base. The Court stated: "This substructure argument involves a dispute over the accuracy of the probability results, and thus this criticism goes to the weight of the evidence and not its admissibility."

Errors Claimed in a Particular Test Are Part of the *Daubert* Enquiry: *United States v. Martinez*, 3 F.3d 1191 (8th Cir. 1993): Applying *Daubert*, the Court held that a trial court may take judicial notice of the reliability and scientific validity of the general theory and techniques of DNA profiling. However, the Court held that *Daubert* requires the trial court to "inquire into whether the expert properly performed the techniques involved in creating the DNA profiles." In this respect, the Court differed with the pre-*Daubert* case of *United States v. Jakobetz*, 955 F.2d 786 (2d Cir. 1992) (issue of whether protocols were properly performed generally goes to weight and not admissibility), and with the Sixth Circuit's view in *Bonds*, *supra*. The *Martinez* Court stated that trial courts "should require the testifying expert to provide affidavits attesting that he properly performed the protocols involved in DNA profiling" and that if the opponent challenges the application of the protocols in a specific case, "the district court must determine whether the expert erred in applying the protocols, and if so, whether such error so infected the procedure as to make the results unreliable." The Court cautioned, however, that not every error in protocol would result in exclusion of DNA profiling testimony. To warrant exclusion, the error must be such as "to skew the methodology itself."

PCR Testing Reliable under *Daubert*: *United States v. Beasley,* 102 F.3d 1440 (8th Cir. 1996): The Court held that DNA testing by the polymerase chain reaction method (PCR) was

reliable under *Daubert*, and that courts could take judicial notice of its reliability in the future. PCR testing depends on replicating DNA samples through a heating process. It has forensic advantages over the traditional RFLP testing because an infinitesimal sample can be replicated. The Court found that any potential for contamination of samples was a question of weight rather than admissibility. The Court noted, however, that in any particular case, "the reliability of the proffered test results may be challenged by showing that a scientifically sound methodology has been undercut by sloppy handling of the samples, failure to properly train those performing the testing, failure to follow the proper protocols, and the like."

Questions of Weight: *United States v. Chischilly*, 30 F.3d 1144 (9th Cir. 1994): The Court held that evidence of DNA identification prepared by an FBI laboratory was admissible under *Daubert*. The defendant's objections as to potential faults in the RFLP identification process (e.g., contaminants could have affected the samples, inconsistencies in the gel could have affected allele mobility, and the use of ethidium bromide in the test could have retarded the migration of DNA fragments) went to weight and not admissibility after *Daubert*. Moreover, the defendant's contention that protocols were not followed in the particular case went to weight and not admissibility, because the *Daubert* admissibility rules are designed to regulate the reliability of methodology, not execution. As to peer review, the Court stated that the National Research Council (NRC) report on DNA identification was "the functional equivalent of a publication subject to peer review under *Daubert's* liberally framed second factor." The fact that the NRC report criticized much of the FBI's DNA analysis was not critical, since criticism is the very purpose of peer review.

The Court also rejected the defendant's attacks on the FBI's statistical techniques for determining the probability of a match, even though the Court acknowledged that the defendant had "significant scientific backing" on the questions concerning ethnic subgrouping. The Court stated that the defendant's citations of scientific detractors might have been dispositive under *Frye*, but not under *Daubert*:

> While perhaps some support for exclusion of Chischilly's DNA test results under the superseded *Frye* test, with its requirement of general acceptance of a theory in the scientific community, these same [critical] statements take on the hue of adverse admissions under *Daubert's* more liberal admissibility test: evidence of opposing academic camps arrayed in virtual scholarly equipoise amidst the scientific journals is scarcely an indication of the "minimal

support within a community" that would give a trial court cause to view a known technique with skepticism under *Daubert's* fourth factor.

PCR Testing Satisfies *Daubert*: *United States v. Hicks,* 103 F.3d 837 (9th Cir. 1996): The Court held that the trial court did not abuse its discretion in admitting, after a *Daubert* hearing, evidence based on the DNA testing procedure known as PCR. The Court declared that though "PCR testing is relatively new to the federal appeals courts, its novelty should not prevent the district court from exercising its sound discretion in admitting such evidence once a proper *Daubert* showing has been made." The Court held that the risk of contamination during PCR testing presented a question of weight and not admissibility, noting that similar risks apply to all forensic testing. Nor should the evidence have been excluded under Rule 403; unlike RFLP testing, which assesses the probability of a DNA match and which can lead to very high improbability numbers, PCR testing simply results in a conclusion that a person cannot be excluded from a match. Therefore, the risk of prejudicial effect is not as great.

Statistical Probability of a Match: *United States v. Davis,* 40 F.3d 1069 (10th Cir. 1994): Affirming bank robbery convictions, the Court held that evidence of DNA testing, as well as expert testimony as to the improbability of another person matching the DNA found at the scene, were properly admitted. The Court found it unnecessary to decide a question in dispute among the circuits: whether *Daubert* requires a pre-trial hearing to determine if a particular DNA test followed protocol. It held that the trial court in this case had conducted "the functional equivalent of a preliminary hearing" because the government expert testified and was heavily cross-examined at a hearing conducted before the jury, without objection from the defendant. As to the contested evidence of probability, the Court stated that "statistical probabilities are basic to DNA analysis and their use has been widely researched and discussed."

RFLP Testing Satisfies *Daubert*: *Government of Virgin Islands v. Penn,* 838 F.Supp. 1054 (D.V.I. 1993): Ruling on a motion *in limine* in a rape case, the Court held that the FBI's DNA profiling process, including its assessment of improbability of a random match, satisfied *Daubert*. The opinion contains an extensive and well-informed discussion of the RFLP process, the use of probability theory, and of all the things that can go wrong in the DNA identification process. The Court made the following conclusions in its *Daubert* analysis:

1. The DNA profiling process can be verified because the protocol has been published and widely replicated.

2. The FBI's profiling process was subject to peer review from its inception, because independent scientists were called in to review the process and make suggestions as it was being implemented.

3. Any risk of error that could occur during the test--such as degraded DNA, improper movement of the band fragments, degraded HAE III (the cutting enzyme), and human error--would be readily determined by the protocol and would result in the FBI either rejecting the test or resolving any uncertainty in the defendant's favor.

4. It was not improper to assign bin frequencies derived from a United States Black database to the DNA bands of a Black suspect from St. John's, because the FBI provided expert testimony which indicated that the frequency estimates from the same racial group do not vary significantly by geographic location.

5. The FBI uses standard methodologies that are generally employed in the scientific community.

Fingerprint Identification

General Acceptance and Peer-Review: *United States v. Sherwood*, 98 F.3d 402 (9th Cir. 1996): Affirming convictions arising out of a kidnapping, the Court found that testimony from the prosecution's fingerprint identification expert was properly admitted. The defendant argued that the Trial Court failed to conduct a *Daubert* analysis. The Court noted that not every one of the *Daubert* factors would be applicable in every case. Here, the defendant admitted that the expert's identification technique was generally accepted and that fingerprint comparison has been subjected to peer review and publication. This was sufficient to satisfy the *Daubert* reliability requirements. And since the testimony would assist the jury in determining the identity of the kidnappers, it also satisfied the "fit" requirement of *Daubert*.

Gas Chromatography

Peer Review and General Acceptance: *United States v. Bynum,* 3 F.3d 769 (4th Cir. 1993): In a narcotics prosecution, the government sought to link co-conspirators by expert testimony that the cocaine samples possessed by various persons came from the same batch. The experts' methodology consisted of gas chromatographic analysis. The defendant argued on appeal that gas chromatography was novel and not generally accepted under *Frye*. But while the appeal was pending, *Daubert* was decided. The *Bynum* Court held that the experts' testimony was scientifically valid under *Daubert*:

> Though it invoked *Frye*, the government's proffer of evidence could hardly have better anticipated *Daubert*. The government explained the hypotheses underlying the technique, listed the numerous publications through which the technique had been subjected to peer review, and concluded with a citation to authority that gas chromatography enjoys general acceptance in the field of forensic chemistry.

Ink Analysis

Rate of Error Only One Factor: *Janopoulos v. Harvey L. Walner & Assocs.,* 866 F. Supp. 1086 (N.D. Ill. 1994): In an employment discrimination case, the plaintiff objected to expert testimony concluding that certain documents offered by the plaintiff had been backdated. The expert investigated the ink on the documents using a process known as thin layer chromatography ("tlc"). The plaintiff argued that under *Daubert* the testimony was inadmissible, because the expert had no information about the known or potential rate of error of tlc testing. But the Court held that the expert's methodology was a "generally accepted" test for determining the validity of documents. Citing *Daubert*, the Court stated: "Rates of error, or confidence rates, are only one factor to consider in determining the admissibility of an expert's testimony."

Medical Testimony

Standard of Care: *Carroll v. Morgan*, 17 F.3d 787 (5th Cir. 1994): Affirming a judgment for the defendant in a wrongful death medical malpractice action, the Court found no error under *Daubert* when the Trial Court permitted the defendant's expert cardiologist to testify as to the standard of medical care owed to the decedent. The plaintiff did not allege that the expert relied on "a particularly objectionable or unconventional scientific theory or methodology." Moreover, the expert based his testimony on thirty years of experience as a cardiologist, a review of the decedent's medical records, the coroner's report, and a "broad spectrum of published materials." The Court found that the expert's testimony was grounded in the procedures and methods of science, and was not mere "unsupported speculation."

Excluding Alternative Causes: *Hose v. Chicago Northwestern Trans. Co.*, 70 F.3d 968 (8th Cir. 1995): The plaintiff claimed that he contracted manganese encephalopathy while at the defendant's worksite. The plaintiff's doctor conducted a "PET" scan of the plaintiff's brain, and used this to exclude alternative sources of the plaintiff's condition, such as Alzheimer's disease. He concluded that the PET scan result was consistent with menganese encephalopathy. The Court held that this testimony was properly admitted under *Daubert:*

> Dr. Gupta's testimony clearly showed the limited use of the PET scan, but that use was nonetheless relevant. In determining the cause of a person's injuries, it is relevant that other possible sources of his injuries, argued for by the defense counsel, have been ruled out by his treating physicians. Indeed, ruling out alternative explanations for injuries is a valid medical method.

The Court also noted that "the fact that Hose's treating physician ordered the PET scan prior to the initiation of litigation is another important indication that this technique is scientifically valid."

Photogrammetry

United States v. Quinn, 18 F.3d 1461 (9th Cir. 1994): In a bank robbery trial, the prosecution called an expert who used the process of photogrammetry to determine the height of the bank robber in the bank surveillance photographs. The process of photogrammetry derives a formula by measuring the change in dimensions of objects as they move away from the camera, and tests that formula against objects of known dimensions in the photograph. The Trial Court admitted the photogrammetry-based evidence on the ground that the process was nothing more than a series of computer-assisted calculations "that did not involve any novel or questionable scientific technique." The Court of Appeals found no abuse of discretion, and held that the defendant was not entitled to a full evidentiary hearing on the reliability of the evidence, given the fact that he could provide no evidence to question the reliability of the process used by the government's expert.

IV. "SOFT" SCIENCE, SOCIAL SCIENCE--EVIDENCE INADMISSIBLE

Accident Reconstructions

Failure to Meet the "Fit" Requirement: ***Habecker v. Clark Equipment Co.,*** 36 F.3d 278 (3rd Cir. 1994): A product liability action for wrongful death was brought after the decedent was crushed by a forklift which fell from a ramp. In the course of remanding the case for a new trial, the Court held that the Trial Court had properly excluded testimony from the plaintiff's expert, who had conducted an investigation and attempted to simulate the accident. The Court stated that the expert's testimony did not "fit" with the facts of the case, as is required by *Daubert*, because the conditions of the simulation were far different from those existing at the time of the accident. Specifically, there was no attempt to replicate the velocity or the rearward movement of the forklift, the height of the fork was disregarded, and there was no operator in the forklift nor cargo on the fork during the purported simulation.

Insufficiently Similar Circumstances: ***Guillory v. Domtar Industries Inc.,*** 95 F.3d 1320 (5th Cir. 1996): The plaintiff was severely injured while working in a salt mine, when a fork fell off a forklift and hit him on the head. The defendant's expert, a mechanical engineer and specialist in accident reconstruction, was excluded by the Trial Court under *Daubert*. The Court found no error, because the expert would have testified on the basis of forklift models and exhibits that were not sufficiently similar to the forklift which caused the accident. The Court stated that the Trial Court's gatekeeping role is "designed to extract evidence tainted by farce or fiction. Expert evidence based on a fictitious set of facts is just as unreliable as evidence based upon no research at all. Both analyses result in pure speculation." The Court rejected the defendant's argument that any discrepancy in the expert's testimony went to weight rather than admissibility:

> Normally, the truth regarding differences in models and demonstrations surfaces with vigorous cross-examination; however, where technical information is involved, it is easier for the jury to get lost in the labyrinth of concepts. We are convinced that cross-examination of Dr. Reed could not salvage the truth. Equipment and procedures in a salt mine are foreign to the average juror. The jury, frantically grasping at complex forklift and mining concepts, could easily miss subtle distinctions revealed on

cross-examination and then drown in the untrue and the unproven. This is especially true because the unreliable evidence here would have been presented in a format resembling a recreation of the event that caused the accident.

Child Sexual Abuse

No Generally Accepted Standards: *United States v. Powers*, 59 F.3d 1460 (4th Cir. 1995): Affirming a defendant's conviction for sexual abuse of his minor daughter, the Court held that the Trial Judge properly excluded the results of a "penile plethysmograph" test offered to prove that the defendant did not exhibit the characteristics of a "fixated pedophile." The Court found that the test is not a valid diagnostic tool and that it lacked accepted standards, although it might be useful in the treatment of offenders. The Court also noted that the expert testimony violated the "fit" requirement of *Daubert*: Powers was charged with statutory rape of his daughter, not with being a "fixated pedophile." Powers had offered no supporting evidence "showing that those who are not fixated pedophiles are less likely to commit incest abuse."

Subjective Enquiry: *Gier v. Educational Service Unit No. 16,* 845 F.Supp. 1342 (D.Neb. 1994), *aff'd* 66 F.3d 940 (8th Cir. 1995): In an action brought against a school on behalf of mentally retarded students for alleged sexual, physical and emotional abuse, the Magistrate Judge held a *Daubert* hearing and ruled *in limine* that three experts would not be permitted to testify that the plaintiffs were abused, nor to any opinion based on such a conclusion. The Magistrate Judge reasoned that the expert had used child abuse methodology ordinarily applied to non-retarded children; as such, the witnesses "made an incorrect extrapolation by comparing the behavior of mentally retarded children to the model of abused non-retarded children." The Court also expressed concern about the subjective nature of the investigation of specific instances of child abuse, and about the vagueness of the standard protocol, which "leaves a gaping hole in the direction it provides the master's level clinician to conduct the interview." Finally, the Court held that the *Daubert* "fit" requirement was not met, because the methodologies employed were for therapeutic rather than investigative purposes:

> The witnesses all testified that their purposes in evaluating plaintiffs were for the provision of

> therapy, not investigation. The methods used here may well have been sufficiently reliable for purposes of choosing a course of psychotherapy for these disturbed children, a course which must, to some extent, rely upon perception as well as reality, and upon the subjective reports of parents and others. However, the methodologies have not been shown to be reliable enough to provide a sound basis for investigative conclusions and confident legal decision-making.

On appeal, the Court of Appeals declared that the Magistrate Judge's analysis "is precisely the type of analysis the decision in *Daubert* would appear to contemplate." The Court concluded that while the evaluation methodology employed by the experts might be useful for treatment purposes, it was "not reliable enough to make factual or investigative conclusions in legal proceedings."

Failure to Meet the "Fit" Requirement: *United States v. Reynolds,* 77 F.3d 250 (8th Cir. 1996): The defendant, who was charged with sexual abuse of a child, proffered an expert to testify as to the unreliability of the standard techniques for interviewing children about sex abuse. The trial court excluded the testimony because no evidence was presented that the victim had ever been interviewed. The Court of Appeals found the exclusion proper, because the testimony failed, under *Daubert*, to fit the facts of the case.

Economists

Speculative Assumptions: *Joy v. Bell Helicopter Textron, Inc.,* 999 F.2d 549 (D.C.Cir. 1993): In a wrongful death action, the Court held that an economist's testimony as to the decedent's earning capacity was improperly admitted because it was wholly speculative. For example, the expert hypothesized, without any basis, that the decedent would have entered a different and more lucrative line of work had he lived, and that he would have built a house on an empty lot he owned and sold it at a profit. The Court relied on *In re Air Crash Disaster at New Orleans,* 795 F.2d 1230 (5th Cir. 1986), in which an economist's testimony as to a decedent's future earnings was held improperly admitted because it was based on speculative assumptions. The Court noted that the teaching from the *Air Crash* case--that the courts must take greater control over speculative expert testimony--was supported by *Daubert*. Quoting *Daubert*, the Court concluded that an expert must testify on the basis of "knowledge" and that "knowledge

connotes more than subjective belief or unsupported conclusion."

Insufficient Factual Foundation: ***Boucher v. U.S. Suzuki Motor Corp.,*** 73 F.3d 18 (2d Cir. 1996): The Court vacated a damages award for a plaintiff in a personal injury action, holding it was error to permit the plaintiff's expert to testify as to the plaintiff's lost earnings. The expert assumed that the plaintiff would work 40 hours per week, 52 weeks per year, with fringe benefits and regular pay increases for the rest of his career. These assumptions represented a "complete break" with the plaintiff's work history of seasonal and intermittent employment. The Court also found error in the expert's reliance on unsupported assumptions concerning fringe benefits, absent any evidence that the plaintiff received benefits of any kind from his employment. The Court concluded that "[s]ince Boucher's expert testimony was not accompanied by a sufficient factual foundation before it was submitted to the jury, it was inadmissible under Federal Rule of Evidence 702."

Improper Methodology: ***In re Aluminum Phosphide Antitrust Litigation,*** 1995 U.S. Dist. Lexis 11026 (D.Kan. 1995): The Court held that while not all of the *Daubert* factors are applicable to expert testimony in the social sciences, "the Court has no doubt that *Daubert* requires it to act as gatekeeper" to assure that an economist's expert testimony is reliable. In this case, an expert's conclusion about the damages suffered by victims of price-fixing was unreliable. The expert purported to employ the standard "before and after" methodology used by economists, but he did not employ it properly. He did no assessment of the period before the price-fixing; his choice of a time period to evaluate after the price-fixing was arbitrary; and he failed to conduct a multiple regression analysis to determine whether other market forces may have affected pricing.

Ergonomics

Insufficient Basis: ***Bennett v. PRC Public Sector, Inc.,*** 931 F.Supp. 484 (S.D.Tex. 1996): The plaintiffs, who worked at computer keyboards, alleged that they suffered repetitive motion disorders as a result of a defectively designed work station. The Court held that the plaintiff's expert on ergonomics would not be permitted to testify at trial. The expert would have testified that the plaintiffs suffered from repetitive motion disorders because the workstation was defectively designed, in that it

could not be easily adjusted to fit the requirements of individual workers. However, the expert never met or interviewed any of the plaintiffs; he made no attempt to exclude other potential causes of the plaintiff's injuries; and he made no attempt to do any statistical analysis of the frequency of injuries at the workplace, or to compare that frequency with injuries at adjustable workstations. Thus, the expert's methodology was inadequate under *Daubert*. The methodology consisted of only a superficial review of medical records, some measuring of the offending equipment (with uncertainty as to which stations were used by the plaintiffs), and a brief visual observation of certain workers performing the jobs in issue. The Court concluded that this methodology "is not consistent with the methodologies described by the authors and experts whom Dr. Schulze identifies as key authorities in the field."

Hedonic Damages

Insufficiently Scientific: *Hein v. Merck & Co.,* 868 F. Supp. 230 (M.D. Tenn. 1994): Ruling on a motion *in limine* to exclude expert testimony, the Court held that testimony as to the "hedonic damages" suffered by the plaintiff in a tort action would not be admissible. The Court reasoned as follows: 1. The theory could not be tested by any independent verification; 2. The thesis that life can be valued by what an individual would pay for the reduced probability of dying was subject to dispute in the literature; 3. The potential rate of error was great given the wide disparity of hedonic damages valuations among experts in the field; 4. The methodology is based on a faulty assumption that "people have complete freedom of choice in the decisions they make and that they perceive the risks accurately"; and 5. To the extent the conclusion is based on surveys of people to determine how much they would pay to decrease their chance of dying, it is based on unreliable hearsay.

Failure to Meet the Fit Requirement: *Ayers v. Robinson,* 887 F.Supp. 1049 (N.D. Ill. 1995): The Court held that expert testimony on hedonic damages--an economic attempt to place a value on human life--was inadmissible under *Daubert*. The hedonic damages theory is based on a willingness to pay model--how much would a person pay to decrease his chance of dying. But that model estimates the value of a statistical life, not necessarily the life of the decedent with all its individual circumstances. Consequently, the expert testimony failed the *Daubert* fit requirement. Also, the willingness to pay model is scientifically flawed, because it rests on assumptions that people have freedom of choice in deciding to confront risk, that people perceive

risks accurately, that people never make decisions based on other considerations than a willingness to live, and that government regulation has no effect on the model. But these assumptions are not grounded in scientific knowledge or method. Therefore the testimony fails the scientific knowledge prong of *Daubert* as well.

Failure to Meet the Fit Requirement: *Sullivan v. United Gypsum Co.*, 862 F. Supp. 317 (D. Kan. 1994): The Court granted a motion to preclude expert testimony on hedonic damages. It reasoned that the "willingness-to-pay" studies on which the expert's testimony was based had "no apparent relevance to the particular loss of enjoyment of life suffered by a plaintiff due to an injury or death." Accordingly, the testimony failed the *Daubert* "fit" requirement. The Court concluded that hedonic damages are, "by their very nature, not subject to such analytical precision."

Hypnotically Refreshed Testimony

Competency Question Does Not Implicate *Daubert*: *Borawick v. Shay*, 68 F.3d 597 (2d Cir. 1995): In a case alleging sexual abuse and based heavily on the plaintiff's repressed memories, the Trial Judge granted the defendant's motion *in limine* to exclude the plaintiff's testimony. The Judge reasoned that the testimony was "hypnotically refreshed" and consequently would not be admissible under *Daubert* unless the hypnotist was qualified and certain procedural safeguards were met. Here, the plaintiff's hypnotist had no college or graduate degree, had worked with faith healers and as a hypnotist on the theatrical stage, and had failed to preserve a record of the plaintiff's hypnosis session. The Court of Appeals affirmed the Trial Court's exclusion of the testimony and grant of summary judgment, but used a somewhat different analysis. The Court of Appeals found that *Daubert* was not directly applicable since there was no testimony from any expert witness that was being challenged. Rather, the question was whether the plaintiff was a competent witness after having had her memory refreshed by hypnosis. Applying a totality of the circumstances test under Rule 403, the Court agreed with the Trial Court that exclusion was appropriate due to the unqualified expert and the failure to preserve the hypnosis session.

Identification Evidence

Failure to Explicate Methodology: *United States v. Brien*, 59 F.3d 274 (1st Cir. 1995): The Court declined to adopt a per se rule either admitting or excluding expert testimony concerning the unreliability of identification evidence. It found no abuse of discretion, however, in the trial court's exclusion of the defense expert in this case. The expert's proffered testimony was very general, and did not fit with many of the circumstances underlying the identifications in this case. Nor did the expert explicate the methodology by which he concluded that the identifications were unreliable. The Court concluded:

> If presented with a fair sample of the underlying data, the district court might have decided (as the trial judge here offered to consider) that some of the warnings were best reflected in instructions; that other portions of the proposed testimony were reliable and helpful; and that still other portions failed one or both of these criteria or met them but were outweighed by confusion or misleading character. *Daubert*, as well as common prudence, entitled the judge to require such underlying information, and the failure to provide it supplies an adequate basis of the trial court's decision to reject that proffer.

Daubert* Factors Not Met: *United States v. Dorsey, 45 F.3d 809 (4th Cir. 1995): Affirming a conviction for bank robbery, the Court found no abuse of discretion in the exclusion of the testimony of two forensic anthropologists who would have testified that the person depicted on surveillance photographs was not the defendant. The Court held that the testimony was not scientifically valid because the methodology had not been tested, there was no peer review, the potential rate of error was high due to differing camera angles, and there was no general acceptance of the methodology used by the experts. Moreover, the testimony was not helpful because the "the comparison of photographs is something that can sufficiently be done by the jury without help from an expert," and it was impermissible to introduce expert testimony simply to cast doubt on the credibility of identification witnesses.

Subjective Methodology: *United States v. Jones*, 24 F.3d 1177 (9th Cir. 1994): Affirming a narcotics conviction, the Court found no abuse of discretion when the Trial Court refused to allow a defense witness to testify as an expert in voice

identification. While the Trial Court prohibited the testimony under the then-applicable *Frye* test, the same result was appropriate under *Daubert*. The witness' methodology for voice comparison "involved an aural, subjective" comparison between the defendant's recorded voice and the voice on tape recordings derived from government surveillance. The witness did not employ a voice spectrograph, had done no research to verify his theory, and had not subjected it to peer review or publication. No other expert used this subjective technique. The *Jones* Court concluded: "[E]ven under *Daubert*, Jones failed to establish the scientific validity of his proffered expert's voice identification technique."

Individualized Enquiry Mandated: *United States v. Rincon*, 28 F.3d 921 (9th Cir. 1994): In a bank robbery trial, the Trial Court excluded, under *Frye*, expert testimony proffered by the defendant on the unreliability of identification evidence. Ultimately, the Supreme Court remanded for reconsideration in light of *Daubert*. Applying *Daubert* on remand, the District Court again excluded the testimony, and the Court of Appeals affirmed. The Court held that the defendant had failed to prove that the testimony was on a scientific subject, because the defendant had not proffered any research or studies which supported the expert's conclusions. The Court also found that the District Court had not erred in excluding the testimony under Rule 403 as unduly confusing. The Court noted that the jury was instructed about the perils of identification evidence in much the same terms as the proffered expert testimony. The Court then added a cautionary note:

> Notwithstanding our conclusion, we emphasize that the result we reach in this case is based upon an individualized inquiry, rather than strict application of the past rule concerning expert testimony on the reliability of eyewitness identification. Our conclusion does not preclude the admission of such testimony when the proffering party satisfies the standard established in *Daubert* by showing the expert opinion is based upon "scientific knowledge" which is both reliable and helpful to the jury in any given case. District courts must strike the appropriate balance between admitting reliable, helpful expert testimony and excluding misleading or confusing testimony to achieve the flexible approach outlined in *Daubert*.

Police Practices

Berry v. City of Detroit, 25 F.3d 1342 (6th Cir. 1994): In a case brought against the city for the use of excessive force by one of its police officers, the plaintiff called an expert to testify that the particular act of excessive force was caused by the police department's failure to previously discipline other officers who had committed similar acts. The Court held that the admission of this testimony was reversible error. It stated that the *Daubert* principles applied to all expert testimony, not just scientific testimony, and that in this case the expert's conclusion was unreliable within the meaning of *Daubert*. The expert's theory--that police excessiveness can be caused by failure to discipline other officers--had not been tested, published or peer reviewed. There was no indication that other experts ascribed to this discipline theory. Finally, the expert misinterpreted data which he claimed showed a rise of unjustified shooting incidents on the Detroit police force.

Polygraphs

Ambiguous Questions: *United States v. Kwong,* 69 F.3d 663 (2d Cir. 1995): Without deciding whether polygraph evidence was sufficiently reliable to be admissible under *Daubert*, the Court held that the polygraph testimony offered by the defendant in an attempted murder case was properly excluded under Rule 403. The defendant was charged with an attempt to murder a United States Attorney by sending her a booby-trapped briefcase. The Court found that the questions posed to the defendant were inherently ambiguous no matter how they were answered. Question one asked whether Kwong conspired with anyone--but Kwong was not charged with conspiracy. Question two asked whether Kwong was the one who sent the package--but "even if Kwong honestly answered that he did not personally mail the package, this does not mean that he did not construct the booby-trap and arrange to have it mailed." Question three asked whether Kwong "knew for sure" who bought the gun in question. This phrasing rendered the negative answer "chimerical at best."

No *per se* Rule of Exclusion, But Test Results Excluded on Remand: *United States v. Posado*, 57 F.3d 428 (5th Cir. 1995): Concluding that the Circuit's per se rule against admission of polygraph testimony could not survive *Daubert*, the Court reversed drug convictions due to the Trial Court's exclusion of defense polygraph evidence, and remanded the case for further proceedings. The Court reasoned as follows:

> There can be no doubt that tremendous advances have been made in polygraph instrumentation and technique in the years since *Frye*. * * * Current research indicates that, when given under controlled conditions, the polygraph technique accurately predicts truth or deception between seventy and ninety percent of the time. Remaining controversy about test accuracy is almost unanimously attributed to variations in the integrity of the testing environment and the qualifications of the examiner. Such variation also exists in many of the disciplines and for much of the scientific evidence we find admissible under Rule 702. Further, there is good indication that polygraph technique and the requirements for professional polygraphists are becoming progressively more standardized. In addition, polygraph technique has been and continues to be subjected to extensive study and publication. Finally, polygraphy is now widely used by employers and government agencies alike.

The Court emphasized that it was not holding that polygraph examinations are scientifically valid or that they always will assist the trier of fact. In removing the per se exclusion of polygraph evidence, the Court recognized that Rule 403 might appropriately be invoked to exclude polygraph evidence in some cases.

On remand in *Posado,* the District Court held a *Daubert* hearing and found the polygraph results to be inadmissible. ***United States v. Ramirez,*** 1995 WL 918083 (S.D.Tex. 1995). The Court found that the low rate of error asserted was unreliable, because the error rate was determined in laboratory tests, in which the participants had no real stake in the outcome. It also noted that people can use countermeasures (such as self-infliction of pain) to fool the examiner, and that while these can be detected with an activity monitor, no activity monitor was used in the present case. Moreover, the results can be skewed if, as in the instant case, an interpreter is required, and the interpreter is familiar with the case. Finally, the Court noted that "polygraph theory is based on the underlying presumption, which may or may not be accurate for a given subject, that telling lies is stressful. A polygraph examination of subjects who provide false information without fear or stress will not measure truthfulness."

Rule 403 Analysis: *United States v. Pettigrew,* 77 F.3d 1501 (5th Cir. 1996): The Court concluded that the Trial Judge did not err in excluding polygraph evidence offered by a defendant. Two of the questions asked by the polygraph examiner were not relevant to any disputed issue and the third question was not

conclusive. The Court emphasized the enhanced role that Rule 403 may play when polygraph evidence is offered, and the safeguards that might increase the potential for admissibility of polygraph evidence--e.g., affording the other side the opportunity to participate in the examination, and offering the evidence in a bench rather than jury proceeding.

Unilateral Testing: *Conti v. Commissioner of Internal Revenue*, 39 F.3d 658 (6th Cir. 1994): Affirming a Tax Court finding that the taxpayers had substantially understated their income, the Court found no error in the exclusion of polygraph evidence offered by the taxpayers. The Court noted that the taxpayers had unilaterally arranged for polygraph tests after the Commissioner refused to agree to such tests. Under circuit precedent, unilaterally obtained polygraph tests are excluded under Rule 403 because the results of the tests would not be disclosed if they were unfavorable, and therefore the party offering them does not have a sufficiently "adverse interest at stake while taking the test." Given its rationale for exclusion, the *Conti* Court found it unnecessary to decide whether polygraph evidence is sufficiently reliable under *Daubert*. ***See also United States v. Sherlin***, 67 F.3d 1208 (6th Cir. 1995)(relying on Rule 403 and finding that the results of a polygraph examination were properly excluded where the defendant took the test without an agreement in advance that the results would be admissible no matter what); ***Barker v. Jackson National Life Insurance Co.,*** 896 F.Supp. 1159 (N.D.Fla. 1995) (results of unilateral polygraph tests are inadmissible).

Questions Peripheral to the Crime: *United States v. Williams,* 95 F.3d 723 (8th Cir. 1996): The Court held that the results of a polygraph test conducted on a prosecution witness were properly excluded under Rule 403. The questions asked the witness concerned only peripheral details of the crime; the defendants rejected the government's proposal to conduct a new test that would go to the "heart of the matter." The Court concluded as follows:

> Introducing evidence that Campbell failed a polygraph examination on questions relating to the murder without permitting the jury to know whether he could have passed a test asking far more relevant questions would be unfair and misleading. It is, of course, relevant that Campbell was found to be dishonest, no matter what the questions were. Still, in light of the potential for misleading the jury, the court did not abused its discretion in ruling that evidence of the first test alone would be more prejudicial than probative.

Testimony of Psychophysiologist Required: *Jesionowski v. Beck,* 995 F.Supp. 149 (D.Mass. 1997): The Magistrate Judge ruled that polygraph evidence would be excluded in the absence of specific testimony by a psychophysiologist "as to the reasons why the measurable physiological reactions are reliable indicators of whether the examinee is being truthful." Reliance on court opinions finding polygraph evidence to be reliable was an insufficient predicate to admissibility. Likewise, testimony by a certified polygrapher would not establish admissibility.

Excluded Under Rule 403: *United States v. Lech,* 895 F.Supp. 582 (S.D.N.Y. 1995): In a bribery and conspiracy case, the defendant sought to introduce his responses to certain questions on a polygraph examination. The defendant was asked whether he tried to bribe or take part in bribing anyone, and he answered no. The Court, while questioning the reliability of polygraph results, found it unnecessary to decide the *Daubert* issue, because the answers to the general questions were substantially more prejudicial than probative. It reasoned as follows:

> Each of the questions Lech seeks to introduce call for his belief about the legal implications of his actions, without setting forth the factual circumstances underlying such a conclusion. In other words, the jury would receive evidence showing Lech's personal belief that he did not violate any federal criminal statute, but would not receive any information that would assist its inquiry to find the facts.

The Court noted that the case might be different where a defendant completely denies any connection or involvement with the charged conduct. Under those circumstances, "the factual predicates for the polygraph examiner's conclusions are relatively simple, and thus may be less likely to confuse the jury."

Nothing Changed by *Daubert*: *United States v. Black,* 831 F.Supp. 120 (E.D.N.Y. 1993): The Court held that nothing in *Daubert* required a change in the Circuit's long-standing rule that polygraph evidence is inadmissible. Polygraphs are excluded because they are unreliable, and *Daubert* supports the view that unreliable evidence is inadmissible.

Subjective Enquiry: *Meyers v. Arcudi,* 947 F.Supp. 581 (D.Conn. 1996): The Court excluded the results of a unilateral polygraph. The Court engaged in an extensive analysis of many of the reasons why polygraphs are unreliable under *Daubert*. Among others: there is still dispute in the relevant field as to whether polygraph results are reliable; the risk of error is significant; and the control questions, which are needed to

compare to the relevant questions, vary from subject to subject and examiner to examiner.

Subjective Analysis and Unacceptable Rate of Error: *United States v. Dominguez,* 902 F.Supp. 737 (S.D.Tex. 1995): The Court refused to admit an exculpatory polygraph offered by the defendant. The Court, after holding a *Daubert* hearing, found as follows: polygraph tests enjoy only a 70 to 90 percent rate of accuracy; that people of different cultures have different value systems, and thus respond to the questions differently; test results are measured against the subjective values of the test examiner; the test is begun by telling the suspect an untruth, and the procedure involved varies from examiner to examiner.

The Court concluded that the following requirements were relevant to determining whether a polygraph test was admissible: 1. All parties should be present to observe the proceedings; 2. The parties should agree in advance to allow the admission of the results by either side; 3. The subject should agree to be examined by any polygraphic expert designated by the other side; 4. When more than one exam is contemplated, the choice of the first examiner should take place by chance; 5. All parties should be present at the pre-test interview; 6. All parties should be present at the post-test interview; 7. Immediately prior to the test, the subject should be tested for drug use; 8. The parties should waive the rules limiting the admissibility of character evidence; 9. No questions should be permitted as to the mental state of a defendant at the time of the alleged commission of the event; and 10. The subject should make himself available for cross-examination at trial. Since none of these factors were met in the instant case, the Court refused to admit the results of the polygraph test.

Insufficient Specific Showing of Reliability: *Miller v. Heaven,* 922 F.Supp. 495 (D.Kan.1996): In an excessive force case, the Court excluded evidence that the plaintiff passed her polygraph test and the defendant failed his. The Court concluded that the polygraph examiner, "although able to discuss the reliability of polygraph examinations in general terms, was unable to articulate with sufficient precision the reasons for its reliability and the manner with which the polygraph examinations such as those he performed on Miller and Officer Heaven have been proven reliable."

Psychiatric Testimony

Speculation as to Past Mental State: ***Goomar v. Centennial Life Ins. Co.,*** 855 F. Supp. 319 (S.D. Cal. 1994): In an action to recover from disability insurers for psychiatric disability, the plaintiff proffered two psychiatrists who testified that he suffered from a psychotic condition from 1980-84 (the relevant time period). These experts did not see the plaintiff until 1992 and 1993 respectively, but claimed that they could opine as to the plaintiff's previous condition based upon his self-report to them. The Court held that this testimony was speculative and unscientific and excluded it under *Daubert*. It stated: "Retrospective expert testimony regarding the existence or onset of a mental illness is inadmissible speculation." Since there was no competent medical evidence that the plaintiff suffered from a psychiatric disability during the relevant time period, the District Court granted the defendants' motion for summary judgment.

Surveys

Unreliable Methodology: ***Arche, Inc. v. Azaleia, U.S.A., Inc.***, 882 F. Supp. 334 (S.D.N.Y. 1995): In a trade dress infringement action involving shoe styles, the results of a survey intended to show the likelihood of consumer confusion were excluded as unreliable. The survey was unscientific because it was conducted by a single interviewer, wearing the defendant's shoes, who stood in a park within blocks of one of the plaintiff's stores and asked well-dressed passers-by whether they had an opinion as to the brand of the shoes. The interviewer often departed from her prepared script, and interviewed only 46 people. The survey was unreliable because, among other things, it drew from an unrepresentative universe of likely consumers; since the plaintiff's shoes sold for more than the defendant's, the plaintiff's choice of wealthy respondents was self-selected to reach a predetermined result. This was especially so since the survey was conducted near one of the plaintiff's stores. The plaintiff was allowed to introduce the testimony of some of the individual survey respondents, however.

V. "SOFT" SCIENCE, SOCIAL SCIENCES--EVIDENCE ADMISSIBLE

Accident Reconstructions

Cautionary Approach: Robinson v. Missouri Pacific R.Co., 16 F.3d 1083 (10th Cir. 1994): Affirming an award for fatal injuries arising from a collision at a railroad crossing, the Court held that a videotaped simulation of the accident, prepared by the plaintiff's expert, was properly admitted to illustrate the expert's opinion. However, the Court expressed caution about such evidence in light of *Daubert*:

> Here, the physical phenomena of crash movements may be explained on scientific principles but an argument can be made that it is outside scientific knowledge to opine in a crash such as this one that a car struck at an angle will necessarily leave the railroad tracks on impact.
>
> Concerning future similar issues under Rule 702, we suggest that as "gatekeeper" the district court carefully and meticulously make an early pretrial evaluation of issues of admissibility, particularly of scientific expert opinions and films or animations illustrative of such opinions. Recent amendments to the federal discovery rules will permit an early and full evaluation of these evidentiary problems.

Economists

Standard Economics Methodology: *Khan v. State Oil Co.,* 93 F.3d 1358 (7th Cir. 1996): The plaintiff leased a gas station and alleged that the defendant engaged in maximum price-fixing, thereby damaging the plaintiff's ability to make a profit. In order to prove damages resulting from the maximum price-fixing, the plaintiff presented expert testimony from an economist, who concluded that the plaintiff could have made a profit if the retail price of the gas and the plaintiff's profit margin had not been capped by the defendant. The economist based this conclusion on the operation of the gas station by a receiver after the plaintiff failed. The receiver's records showed a profit margin greater than that permitted the plaintiff by the defendant, from which the economist concluded that the receiver charged more for

gas than was permitted under the plaintiff's contract. The Court held that this testimony was improperly excluded. It was possible that the plaintiff may not have been able, due to differing market conditions, to charge more for gas than the retail price set forth in the contract, in which case there would have been an antitrust violation but no injury. "But this is just to say that the evidence presented by the expert was not conclusive on the subject of injury." The Court elaborated as follows:

> The only ground on which it could be argued to be inadmissible would be that the expert, although a Ph.D in economics from a reputable university and an experienced consultant in antitrust economics, * * * had failed to conduct a study that satisfied professional norms. As we have emphasized in cases involving scientific testimony--and the principle applies to the social sciences with the same force that it does to the natural sciences--a scientist, however reputable, is not permitted to offer evidence that he has not generated by the methods he would use in his normal academic or professional work, which is to say in work undertaken without reference to or expectation of possible use in litigation. The district judge identified no basis, and State Oil can point to none, for supposing that the expert's report flunked this test. The inference regarding the receiver's profit margin, drawn from the station's cost and revenue data, was straightforward, and, so far as appears, was made in just the way that an economist interested in a firm's profit margins for reasons unrelated to litigation would make it; and likewise the inference that if Khan had enjoyed the freedom that the receiver evidently thought *he* had he would have charged a higher price, and made more money, than he did. If anything, the economist was overqualified to give evidence that could as easily have been given by an accountant; but over-qualification is not yet a recognized basis for disqualification.

Permissible Extrapolation: *Newport Limited v. Sears, Roebuck and Co.*, 1995 WL 328158 (E.D.La. 1995): An economist was permitted to testify to the amount of lost profits suffered by the plaintiff as a result of a breach of a real estate contract. The economist used a multiple regression analysis, which is "an appropriate methodology to determine the absorption rate of land because it is a viable method to attain simultaneous control of variables and give each characteristic the weight it deserves." While this methodology may never have been used in the context of industrial park real estate, such as at issue in this case, there is no indication that the methodology should be differently applied in this instance. The expert's use of national statistics of industrial park absorption did not render his opinion

unreliable--the validity of his choice of comparables was a question of weight. While some of the expert's underlying assumptions were not sufficiently established at the *Daubert* hearing, the Court did not find this problematic: "the Court believes that Newport could not be expected to demonstrate the true viability of these assumptions in the context of a *Daubert* hearing; indeed, the matter of damages would have then been tried twice. Instead, the Court will require that Newport satisfy the Court of a significant number of these factors prior to Dr. Conte taking the stand."

Testimony Not Based on Rampant Speculation: *Boyar v. Korean Air Lines,* 954 F.Supp. 4 (D.D.C. 1996): Testimony from an economist on the decedent's future earnings was held admissible. The expert's factual assumptions were not speculative as a matter of law. While all predictions of future earnings are to some extent speculative, the expert's testimony in this case was not impermissibly so. He reasonably assumed that the decedent's business would have expanded, given the expansion the two years before the decedent's death, and given the decedent's own statements of intent. Unlike other cases in which an economist's testimony has been excluded as speculative, the expert in this case did not assume a complete break from the decedent's previous work history, and did not assume facts that were completely contradicted by the record.

Ergonomics

"Fit" Close Enough: *Vice v. Northern Telecom, Inc.*, 1996 WL 200281 (E.D.La. 1996): The plaintiff alleged that she suffered repetitive strain injury (RSI) as a result of operating a defectively designed computer keyboard. The defendant challenged the testimony of two experts under *Daubert*, but the Court found that the testimony of both experts was sufficiently reliable. The first expert, a professor of clinical medicine, testified to the connection between RSI and the use of computer keyboards. While the expert did not rely on epidemiological studies, the Court rejected the proposition that "expert testimony is rendered unreliable merely because it does not rely on such data, particularly where, as here, the party seeking to exclude the testimony has offered no epidemiological data repudiating the existence of an exposure-response relationship." The Court noted that the expert's conclusion was properly based on a substantial body of scientific literature demonstrating a positive temporal relationship between the number of hours spent typing at a keyboard and the incidence of RSI symptoms. Although these

studies contained weaknesses--including the existence of confounding factors such as the failure to adjust for different height and weight of persons, and different working conditions--the differences were not "so grievous as to render the testimony inadmissible."

The second expert, an ergonomist, reached a cause/effect conclusion by considering the studies of factory workers that have demonstrated a correlation between the forcefulness and repetitiveness of manual work and RSI, and applying this learning to other tasks such as keyboard operation. "While the fit might be less than perfect, this does not render the methodology wholly unreliable, particularly in light of the growing number of peer reviewed studies and papers on the subject."

Human Factors Experts

Flexible Approach Required: *Surace v. Caterpillar, Inc.,* 1995 U.S. Dist. Lexis 6683 (E.D.Pa. 1995), *affirmed in pertinent part,* 111 F.3d 1039 (3d Cir. 1997): The plaintiff was struck by a pavement profiler that was being operated in reverse with its back-up alarms sounding. The plaintiff, a worker, was wearing earplugs as protection against the noise of the machinery, and did not move out of the machinery's path. The plaintiff's witness, an expert in human factors, testified at the *Daubert* hearing as to the inadequacy of the alarm on the profiler in light of human behavioral patterns, including a phenomenon known as "habituation" i.e., that workers would become accustomed to the alarm sound and would not respond to it. The Court found that the expert's opinion was based on "good grounds" and was sufficiently reliable under *Daubert*. The expert began his analysis with a review of pertinent literature on human factors and auditory warning devices, then proceeded to review material specific to the pavement profiler. He also reviewed measurements of decibel levels of the machine and the effect of the earplugs worn by the plaintiff. Combining this background with his knowledge and experience, the expert evaluated whether the alarm, under usual operating conditions, would be subject to habituation, and determined that it was. He then considered various devices that would address the deficiencies he found with the current alarm system. The Court concluded as follows:

> Dr. Lambert thus approached this issue in a methodical, reasoned manner, and his result is therefore reliable. * * * Given his experience and knowledge, he is qualified to analyze the alarm sound and to determine, under ordinary operating conditions,

whether that sound would be subject to habituation. No peer review or testing is necessary in order to form an opinion based on the relevant facts and his knowledge.

With respect to Dr. Lambert's opining as to the type of alarms that would counteract the deficiencies he found, his opinion is also on solid footing. He analyzed the deficiencies of the current alarm system based on his experience; having done so, he is also qualified to determine what alarms possess the characteristics that would not present similar defects. Given the nature of his opinion, he need not develop prototypes or submit his opinion as to this particular piece of machinery to peer review in order to validate his conclusions.

The *Surace* Court noted that with experts in soft sciences such as human factors, the *Daubert* analysis requires some modification:

> Dr. Lambert's opinion does not employ the objectively quantifiable data that lend itself to the methodical and quantifiable [*Daubert*] factors. Similarly, Dr. Lambert's view as to causation is limited to "probabilities" of preventing the accident. Further, his opinion goes to only one aspect of the plaintiffs' case. His opinion can be adequately probed on cross-examination, after which the jury can determine the weight to be afforded his testimony.

Polygraphs

No per se* Rule of Exclusion: *United States v. Cordoba, 104 F.3d 225 (9th Cir. 1997): The Court revisited the Circuit's rule that unstipulated polygraph evidence is *per se* inadmissible. The Court held that under the "flexible inquiry" mandated by the Supreme Court's decision in *Daubert,* such a *per se* rule of exclusion is no longer tenable. The Court reasoned further that while *Daubert* did not deal directly with Rule 403, a *per se* rule of inadmissibility under Rule 403 would be as inconsistent with *Daubert* as it would under Rule 702. The Court remanded for a determination of whether the defendant's exculpatory polygraph examination was sufficiently reliable under *Daubert*. It emphasized that its opinion was not to be taken as an indication of enthusiasm for unstipulated polygraph evidence, but rather was simply a recognition that a *per se* rule of exclusion is inconsistent with *Daubert*.

Test Results Sufficiently Reliable: *Ulmer v. State Farm Fire and Casualty Co.,* 897 F.Supp. 299 (W.D.La. 1995): In a civil case to collect on fire insurance, an exculpatory polygraph test of plaintiff-insureds satisfied *Daubert*. The Court declaraed that polygraph theory has been tested and peer reviewed, and a 10-30% error rate is not an unreasonable potential rate of error. Most importantly, the instant test was administered by a licensed polygraphist at the request of a law enforcement official, presumably with interests adverse to the insureds.

Exculpatory Polygraph Results Reliable: *United States v. Crumby,* 895 F.Supp. 1354 (D.Ariz. 1995): The Court held that exculpatory polygraph results are sufficiently reliable to be admissible under *Daubert*. It concluded that polygraph research had been peer reviewed, and was conducted outside the realm of litigation. It stated that "the science of polygraphy has been subjected to vigorous scientific testimony and the assumptions underpinning the science have been deeply analyzed by those in the field of polygraphy and psychophysiology." The Court ruled that polygraph evidence could only be admissible for the limited purpose of rebutting an attack on the subject's credibility; the parties would not be allowed to bring in the specific questions used or the specific answers.

Test Results Sufficiently Reliable: *United States v. Galbreth,* 908 F.Supp. 877 (D.N.Mex. 1995): The Court held that the defendant could present testimony that he passed a lie detector test, where the relevant questions were whether the defendant knowingly failed to report certain items of income on his tax return. The Court held that under *Daubert,* the proponent of the expert testimony must show not only that the scientific technique is reliable, but also that the specific application of the technique was reliably conducted. As to the general question of reliability of polygraph tests, the Court relied on laboratory studies (known as "mock crime" studies) which indicate an error rate of false positives at 5%, and an error rate of false negatives at 10%. It also relied on field studies in which "ground truth" was assessed on the basis of the defendant having confessed after failing a polygraph test. The Court noted that the "numerical" method of evaluating polygraph results "helps to ensure a rigorous, semi-objective evaluation of the physiological information contained in the charts, thereby guarding against examiner bias."

The Court stated that for the results of polygraph tests to be admissible, it is critical that the test be conducted by a competent examiner, since it is the examiner "who determines the suitability of the subject for testing, formulates proper test questions, establishes the necessary rapport with the subject,

stimulates the subject to react, and interprets the charts." It also noted that it was critical for the session to be taped, in order to allay the otherwise legitimate concern that the polygraph examiner might "manipulate the subject and the examination in such a way as to produce a desired result." On the question of properly conducting the test, the Court concluded as follows:

> It is clear from the studies and even proponents of the polygraph technique readily concede that the polygraph technique produces reliable results only where certain conditions exist, such as administration of the test by a well trained, experienced and competent examiner, the utilization of the control question technique and the utilization of a quantitative scoring system.

The Court noted the legitimate concern of "habituation" if more than one test is conducted, but noted that this concern was not applicable in this case. The Court rejected the argument that drug use can act as a countermeasure against a polygraph examination. It reasoned that "the control question technique requires differential reactivity between the control and the relevant questions and there is simply no drug that can selectively reduce the reaction to relevant questions while leaving the control questions unaffected." The Court also rejected the argument that polygraph tests are unreliable where the subject knows that negative test results would remain undisclosed. This argument was found flawed on a theoretical basis because "in order for it to work, the subject would still have to react to the control questions. If the subject is not worried or concerned about the outcome of the test, then the subject would not react anymore to the control questions that to the relevant questions."

The Court recognized that countermeasures (such as biting the tongue unobtrusively while answering control questions) can be used to defeat polygraph tests. However, "because an individual must receive highly specialized, hands-on training in order to successfully engage in countermeasures, the possibility that a subject will succeed is very slight." The Court considered this problem to go to weight rather than admissibility.

Test Results Admissible If Credibility Attacked: *United States v. Padilla,* 908 F.Supp. 923 (S.D.Fla. 1995): The Court held that the defendant's polygraph results would be admissible to bolster her credibility if she were to take the stand and testify that her confession was coerced, and if the government then attacked her credibility. The Court found that a sufficient showing of reliability was made, and held that the use of a translator from the Public Defenders Office presented a question of weight rather than admissibility.

Psychologists and Psychiatrists

Daubert* Applicable, Testimony Helpful: *United States v. Hall, 93 F.3d 1337 (7th Cir. 1996): The Court vacated a kidnapping conviction because the defendant had not been permitted to introduce testimony from a psychologist and a psychiatrist that would have shown his susceptibility to giving a false confession. The Trial Judge erred in failing to apply the *Daubert* framework. The first question that a Trial Judge should address in ruling on the admissibility of expert testimony is whether the proffer demonstrates that a sufficiently reliable body of specialized knowledge exists. the Court recognized that "because the fields of psychology and psychiatry deal with human behavior and mental disorders, it may be more difficult at times to distinguish between testimony that reflects genuine expertise--a reliable body of specialized knowledge--and something that is nothing more than fancy phrases for common sense." In the instant case, the prosecution did not challenge the scientific basis for the proffered testimony, so the Court assumed it was valid. The Court concluded that "it was precisely because juries are unlikely to know that social scientists and psychologists have identified a personality disorder that will case individuals to make false confessions that the testimony would have assisted the jury in making its decision."

Repressed Memory

Permissive View: *Isely v. Capuchin Province,* 877 F.Supp. 1055 (E.D.Mich. 1995): In a pretrial ruling, the Court held that the plaintiff's expert would be permitted to testify about the plaintiff's repressed memory of acts of sexual abuse in his childhood. The Court noted that repressed memory was the subject of a good deal of psychological literature and that a fair number of clinicians in the field have accepted repressed memories as being reliable accounts of the past. The Court concluded as follows:

> In this case, Dr. Hartman knowledgeably testified about several studies which have validated the theory of repressed memory. Whether other experts agree with the theory or not, because there is no absolute empirical way to prove that (1) an event happened and/or (2) that the memory of it was repressed, it will be up to the jury to determine the probative value of Dr. Hartman's opinion. In the Court's view, there is a sufficient scientific basis of support for the theory in Dr. Hartman's field of expertise, through the studies and writings, to permit the issue to go to the

jury.

The Court emphasized, however, that the expert would not be permitted to give her opinion that the plaintiff was telling the truth about the alleged instances of child sexual abuse, since that would "invade the province of the jury by vouching for the credibility of Isely and would, in any event, be unhelpful to the jury since everything she knows about the alleged events is hearsay from Mr. Isely."

Note: It is notable that the *Isely* Court assumed that the expert testimony should go to the jury so long as it satisfied the standards of Rule 104(b)--in this instance, that the proponent established that a reasonable juror could find the expert testimony to be reliable. This is why the Court was rather permissive in assessing the reliability of the proffered testimony on repressed memories. In fact, however, after *Daubert*, the admissibility of expert testimony is governed by Rule 104(a). The proponent must prove to the judge that the expert testimony is reliable by a preponderance of the evidence. Applying the more permissive standard of Rule 104(b) is inconsistent with the "gatekeeper" role that the Court established for trial judges in *Daubert*.

Sociology

Daubert* Framework Applies: *Tyus v. Urban Search Management, 102 F.3d 256 (7th Cir. 1996): The plaintiffs appealed a judgment rendered for the defendants in a suit alleging that advertising for a rental building targeted only whites, in violation of the Fair Housing Act. The plaintiffs proffered two social science experts at trial. One would have testified to how an all-white advertising campaign affects African-Americans. The other would have described the history of racial discrimination in the local market. The Trial Court, without conducting a *Daubert* analysis, excluded both experts on the ground that their testimony was too general to be helpful. The Court found that the Trial Court erred in failing to scrutinize the expert's testimony under the *Daubert* "framework", and reversed the judgment. The Court declared that the central teaching of *Daubert*--that expert testimony "must be tested to be sure that the person possesses genuine expertise in a field and that her court testimony adheres to the same standards of intellectual rigor that are demanded in her professional work"--was fully applicable to the testimony of experts in the social sciences. The Court noted the following caveat:

It is true, of course, that the measure of intellectual

> rigor will vary by the field of expertise and the way of demonstrating expertise will also vary. Furthermore, we agree * * * that genuine expertise may be based on experience or training. In all cases, however, the district court must ensure that it is dealing with an expert, not just a hired gun.

The Court found that the Trial Court erred in excluding the expert who would testify about the effect of the advertisements. Such testimony "would have given the jury a view of the evidence well beyond their everyday experience"; moreover, the expert's research was based on peer-reviewed articles, and his "focus group" method was a well-accepted methodology in the field of social science. As to the expert who would testify to the history of local discrimination, the Court recognized that the Trial Court had the discretion to exclude the testimony under Rule 403. However, the Trial Court's failure to use the *Daubert* framework put the Court at a "significant disadvantage" in determining whether error occurred. Therefore, the proper course was to leave the matter open for another proffer by the expert at the retrial.

Surveys

Accepted Principles Establish Reliability: *Southland Sod Farms v. Stover Seed Co.,* 108 F.3d 1134 (9th Cir. 1997): Reversing a grant of summary judgment for the defendant in a suit brought under the Lanham Act, the Court found that survey evidence proffered by the plaintiff's expert was improperly excluded. The defendant contended that the survey was unreliable because it was improperly confined to a certain geographical area, and the people conducting the survey used leading questions. The Court, however, concluded that the survey was conducted pursuant to well-accepted principles, including the use of closed-ended rotating questions. The Court declared: "[A]s long as they are conducted according to accepted principles, survey evidence should ordinarily be found sufficiently reliable under *Daubert*. Unlike novel scientific theories, a jury should be able to determine whether asserted technical deficiencies undermine a survey's probative value."

VI. NON-SCIENTIFIC TESTIMONY (INCLUDING TESTIMONY ON TECHNICAL SUBJECTS)--INADMISSIBLE

Accountants

Failure to Consider Obvious Factors: ***Frymire-Brinati v. KPMG Peat Marwick,*** 2 F.3d 183 (7th Cir. 1993): In an action for securities fraud, plaintiff's expert, an accountant, was allowed to testify that a Peat Marwick audit had overvalued certain property interests. To reach this conclusion, the accountant used a discounted cash flow analysis, by which he assessed property value solely on the basis of net, rather than potential, cash flow. Reversing a judgment for the plaintiff, the Court held that the Trial Court abused its discretion in admitting the expert's valuation, because the expert's methodology was faulty: the expert failed to consider potential cash flow, and his methodology would lead to the conclusion that "raw land is worthless and that a large office building in the final stages of construction also has no value even though it is fully leased out and could be sold for a hundred million dollars." As such, the expert's testimony lacked validity within the meaning of *Daubert.*

Banking Practices

Legal Analysis in the Guise of Banking Expertise: ***Minasian v. Standard Chartered Bank,*** 109 F.3d 1212 (7th Cir. 1997): Plaintiffs claimed that they were defrauded by a bank. They bought a business which had a line of credit with the bank, and claimed that the bank fraudulently asserted that it would continue the line of credit unabated. The bank eventually financed a loan with the plaintiffs, but on different terms and in a lesser amount than that allegedly agreed to previously. The plaintiffs defaulted on the loan. To defeat summary judgment, the plaintiffs proffered an affidavit of an expert on banking practices. The Court found that the affidavit was properly rejected, as it "did little beyond demonstrating how vital it is that judges not be deceived by the assertions of experts who offer credentials rather than analysis." The Court provided a further critique of the expert's affidavit:

> Schroeder's affidavit exemplifies everything that is bad about expert witnesses in litigation. It is full of vigorous

assertion (much of it legal analysis in the guise of banking expertise), carefully tailored to support plaintiffs' position but devoid of analysis. Schroeder must have allowed the lawyers to write an affidavit in his name. He does not identify and test any hypothesis; he does not identify hypotheses considered and rejected; indeed, he does not suggest any way in which his views may be falsified. For example, Schroeder declared that it was not "commercially reasonable" for the Bank to declare Par-Inco in default, just because it gave away collateral, failed to deposit proceeds into a cash collateral account, neglected to inform the Bank of the status of the collateral, and refused to allow inspections of its books. This assertion (a) is unreasoned; (b) is economically ludicrous (a secured creditor is vitally interested in the status and disposition of the collateral); [and] (c) ignores the contract between Par-Inco and the Bank, which made violation of the commitments concerning collateral good reasons to accelerate payment and did not require that the defaults be material * * *. Schroeder asserts that banks just don't accelerate the principal indebtedness because of shortcomings of the kind Par-Inco displayed. Apparently we are supposed to take this on faith, because Schroeder did not gather any data on the subject, survey the published literature, or do any of the other things that a genuine expert does before forming an opinion. An expert is entitled to offer a view on the ultimate issue, see Fed. R. Evid. 704(a), but an expert's report that does nothing to substantiate this opinion is worthless, and therefore inadmissible.

Design Engineering

Engineering Testimony Concerning Faulty Automobile Design Held Inadmissible: *Bogosian v. Mercedes-Benz of North America, Inc.,* 104 F.3d 472 (1st Cir. 1997): The plaintiff was run over by her car after putting it in park and exiting the vehicle. She sought to have an engineer testify about the phenomenon of "false park detent"--where the car feels as if it is in park but is not. The Court held that this testimony was properly excluded under *Daubert*. The Court found it unnecessary to determine whether the evidence was "scientific" or "technical"--"even if *Daubert's* specific discussion of the admissibility of scientific principles did not strictly apply to Davidson's testimony, the admissibility of the testimony was still controlled by the requirement of factual relevance and foundational reliability." The expert's testimony was unreliable in this case because he rested on a

factual premise--that the plaintiff did not look at the console shift before turning off the car--that was at odds with the plaintiff's own testimony: "The district court appropriately found it very odd that Bogosian would present an expert witness who would testify that her own unwavering testimony was incorrect."

Lack of Testing: *Smelser v. Norfolk Southern Ry. Co.,* 105 F.3d 299 (6th Cir. 1997): The Court reversed a judgment for an employee in an FELA case, finding that testimony from a biomechanical engineer did not satisfy *Daubert*. The expert testified that a shoulder belt, not a lap belt, failed in an accident in which the plaintiff was rear-ended. He further testified that the defective shoulder belt was the cause of the plaintiff's neck injury. The Court concluded that neither of these opinions were sufficiently reliable to withstand a *Daubert* enquiry. The main problem with the conclusion as to the shoulder belt was lack of sufficient testing. The Court stated:

> *Daubert* teaches that expert opinion testimony qualifies as scientific knowledge under Rule 702 only if it is derived by the scientific method and is capable of validation. Huston's opinion that the shoulder belt, but not the lap belt, failed in the August 29, 1989 accident cannot be based on "good science" when he (1) failed to perform any tests on the lap belt yet concluded it was in proper working condition; (2) conducted no testing to verify his conclusion the shoulder belt was damaged in the June 1989 accident; (3) failed to adequately document testing conditions and the rate of error so the test could be repeated and its results verified and critiqued; and (4) failed to discover, use or at least consider the degree the restraint system was actually mounted at in the subject vehicle and explain whether that information would affect his pendulum test for compliance with the federal safety standard. Smelser failed to establish that any of Huston's seat belt tests were based on scientifically valid principles, were repeatable, had been the subject of peer review or publication or were generally accepted methods for testing seat belts in the field of biomechanics. Accordingly, Huston's opinion testimony that the pick-up truck's shoulder belt, but not the lap belt, was defective should have been excluded.

As to the opinion on causation, the Court held that the testimony was improperly admitted because it was beyond the biomechanical engineer's field of expertise to determine that an injury was caused by a defective shoulder belt. Moreover, the testimony was unreliable because the expert failed to take account of the plaintiff's pertinent medical history.

Lack of Testing: *Cummins v. Lyle Industries,* 93 F.3d 362 (7th Cir. 1996): Affirming a judgment for the defendant in a product liability case, the Court held that the testimony of the plaintiff's design engineer, to the effect that the defendant should have used a different design to make its product safer, was properly excluded under *Daubert*. The Court held that the *Daubert* analysis was fully applicable to testimony which "involves the application of science to a concrete and practical problem." It concluded that the expert's testimony was unscientific, because the expert had never tested his proposed alternative design. The Court noted that a number of factors must go into the conclusion that an alternative design should have been employed:

> These include, but are not limited to, the degree to which the alternative design is compatible with existing systems and circuits; the relative efficiency of the two designs; the short- and long-term maintenance costs associated with the alternative design; the ability of the purchaser to service and to maintain the alternative design; the relative cost of installing the two designs; and the effect, if any, that the alternative design would have on the price of the machine. Many of these considerations are product-and-manufacturer-specific, and most cannot be determined reliably without testing.

Subjective Observation: *Deimer v. Cincinnati Sub-Zero Products, Inc.*, 58 F.3d 341 (7th Cir. 1995): The plaintiff was injured when some mobile medical equipment fell on her. The Trial Court excluded the plaintiff's expert, who would have testified about the equipment's faulty design. The Court held that this testimony was properly excluded under *Daubert*. The expert gave an opinion without foundation; he had no basis upon which to conclude that the accident happened in any particular way; rather, the conclusion was simply a subjective observation. Moreover, the testimony failed the "fit" requirement because the witness did not have the requisite experience to assess the equipment's suitability for use where the accident occurred.

Unsupported Conclusion: *Navarro v. Fuji Heavy Industries, Ltd.*, 117 F.3d 1027 (7th Cir. 1997): Affirming the grant of summary judgment in favor of the defendant in a personal injury case, the Court held that the Trial Court properly excluded an expert's affidavit under *Daubert*. The expert asserted that the defendant, a car manufacturer should have known about the risk of internal rusting, but the expert had not conducted a study of the matter and was thus his assertions were "nakedly conclusional". The Court rejected the plaintiff's argument that the gaps in the

expert's testimony would have been filled in if the defendant, before moving for summary judgment, had deposed the expert. The Court declared that "there is no duty to cross-examine or depose your opponent's witnesses so that they can supplement the testimony they failed to give on direct examination or in their affidavit. An expert's affidavit must be sufficiently complete to satisfy the *Daubert* decision, and one of those criteria * * * is that the expert show how his conclusion * * * is grounded in--follows from--an expert study of the problem."

Insufficient Testing: *Pestel v. Vermeer Manufacturing Co.*, 64 F.3d 382 (8th Cir. 1995): The plaintiff was injured when he slipped on the ground while operating a stump cutter and his foot went into the cutter wheel. The plaintiff's expert designed a guard for the stump cutter. While he was working on the design, the expert did not look at any other manufacturer's stump cutters. The expert had never used a stump cutter, and he did not consult with anyone to determine how his design would work in the field. The defendant then manufactured a guard according to the expert's design; videotaped demonstration indicated that the guard rendered the stump cutter difficult to operate in several recurring situations. The expert admitted that the design needed some modification. The Court held that the expert's testimony, that the stump cutter should have been designed with a guard, was properly excluded under *Daubert*. The expert's design had not been sufficiently tested, and there was no general acceptance of the premise that guards were necessary for stump cutters.

Insufficient Testing: *Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293 (8th Cir. 1996): The Court affirmed a summary judgment for the manufacturer of a tire changer sued by a mechanic who was injured while using the changer when a tire exploded. It held that an engineering expert's testimony was properly excluded where the expert had not designed or tested any of the proposed safety devices he claimed were missing from the tire changer, and the expert had never designed or tested a platform for a tire changer. The Court also rejected the argument that review of an expert's methodology by other courts could constitute "peer review" within the meaning of *Daubert*.

Testimony Subjective and Not Helpful: *Diviero v. Uniroyal Goodrich Tire Co.*, 114 F.3d 851 (9th Cir. 1997): The district court granted summary judgment in a personal injury case alleging that an accident was caused by a defectively designed tire. The Court affirmed and held that the testimony of the plaintiff's expert was properly excluded. The expert concluded that an adhesion defect caused the steel belts of the tire to separate.

But the Court found the testimony "unsubstantiated and subjective" and therefore inadmissible. The expert could not dismiss other possible causes, he knew nothing about adhesion failures generally, and he could not explain the reasoning behind his opinion. The Court concluded that it did not have to decide whether *Daubert* applied to the expert's testimony, "because we find that his testimony does not meet Rule 702's reliability standard."

Relevance of Testing in Design Cases: *Tassin v. Sears Roebuck,* 946 F.Supp. 1241 (M.D.La. 1996): The plaintiff was injured while operating a power saw, and proffered an engineer who concluded that alternative designs were safer, and that the defendant failed to provide adequate warnings. The Court provides an excellent survey of the post-*Daubert* cases dealing with design engineers. On the relevance of the *Daubert* analysis, the Court declared as follows:

> [T]his Court does not believe that the *Daubert* factors are irrelevant to a case involving alternative product designs. If an engineering expert can demonstrate that his proposed design has been tested, peer reviewed, or is generally accepted, so much the better. On the other hand, this does not mean that engineering testimony on alternative designs should be excluded automatically if it cannot withstand a strict analysis under *Daubert*. * * * It may well be that an engineer is able to demonstrate the reliability of an alternative design without conducting scientific tests, for example, if he can point to another type of investigation or analysis that substantiates his conclusions. For example, an expert might rely upon a review of experimental, statistical, or other technical industry data, or on relevant safety studies, products, surveys, or applicable industry standards. He could also combine any one or more of these methods with his own evaluation and inspection of the product based on experience and training in working with the type of product at issue. The expert's opinion must, however, rest on more than speculation, he must use the types of information, analyses and methods relied on by experts in his field, and the information that he gathers and the methodology that he uses must reasonably support his conclusions. If the expert's opinions are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches, then rigid compliance with *Daubert* is not necessary.

Applying these standards to the facts, the Court excluded the expert's testimony on certain alternative designs based on parts that he had never tested or even seen, and the safety of which

was not supported by the tests of others nor by any relevant literature. However, the Court held testimony as to another alternative design admissible, where the expert had actually conducted some testing, and where the safety of the product received support from the relevant literature. The expert could have tested more systematically or extensively, but this presented a question of weight. Finally, the Court held the expert's conclusion as to inadequate warnings to be admissible. The alternative warnings suggested by the expert had not been scientifically tested. But the Court found that testing as to warnings (as opposed to testing alternative designs) was not critical where the expert had substantial experience in both product design and in preparing product manuals and warnings.

Untested, Subjective Hypothesis: *Brown v. Miska*, 1995 WL 723156 (S.D.Tex. 1995): The plaintiff's seatback collapsed when she was rear-ended by another car, and she claimed that the design of the seat was defective. The Court granted summary judgment for the car manufacturer, because the plaintiff's expert testimony as to defective design did not satisfy *Daubert*, which the Court found fully applicable to expert testimony of engineers:

> As presented to the court, Plaintiff's expert's opinions and methodology are untested and inherently untestable. Indeed, Cox's deposition does not reflect the application of any particular methodology. Rather, Cox only testifies about (1) his understanding of the events surrounding Plaintiff's collision, which he has developed third-hand through Plaintiff's counsel, (2) the nature of his "expert" credentials, and (3) his subjective opinion that an ultimate fact for trial -- "product defect" -- is supported by his examination of a model Mitsubishi seat and Plaintiff's counsel's version of the events. At no time has Cox ever explained the chain of reasoning that, in his mind at least, links the underlying facts to his ultimate conclusion.
>
> Without any account of Cox's intermediate reasoning of methodology, the validity of that reasoning cannot be tested. If a methodology cannot be falsified, refuted, or tested by any objective means, then it is incapable of meeting the "validity" criterion of *Daubert* because it can never be subjected to the scrutiny that any "valid" methodology must survive. Were his opinion admitted, Plaintiff's expert would bring to the jury no more than her lawyer can offer in argument.

Electrical Engineers

Failure to Follow Standard Protocol: *American and Foreign Insurance Co. v. General Electric Co.*, 45 F.3d 135 (6th Cir. 1995): In an action arising from a fire in a school building, the Trial Judge excluded testimony from the plaintiff's expert, an electrical engineer, that the fire was caused by a defectively designed and manufactured circuit breaker. While the Trial Judge's ruling was rendered before *Daubert*, the Court held that the Judge's reasoning was equally sound after *Daubert*. The expert's testimony had been properly excluded because: 1. His theories about circuit breakers were not accepted by experts in the field; 2. He did not follow standard protocol when conducting his tests on the circuit breaker in question; 3. The raw data of the expert's test was not preserved; and 4. His instruments were not calibrated.

Lay Witnesses

Daubert* Applies to Lay Witnesses Who Testify on Technical Subjects: *Asplundh Manufacturing Division v. Benton Harbor Engineering, 57 F.3d 1190 (3rd Cir. 1995). In a trial for contribution among defendants arising out of an injury to a worker when an aerial lift collapsed, the insurance company seeking contribution called the maintenance supervisor. The witness had maintenance responsibility for the aerial lift, and had investigated it after the accident. He opined that the collapse of the lift was caused by metal fatigue and that the rod manufactured by the defendant was designed improperly. The Trial Court permitted this testimony under Rule 701. The Court of Appeals found this to be reversible error. While Rule 701 has been read to permit technical testimony from lay witnesses, the Court declared that the "spirit" of *Daubert* "counsels trial judges to carefully exercise a screening function with respect to Rule 701 opinion testimony when the lay opinion offered closely resembles expert testimony." The Court set forth the following test for assessing technical testimony from a lay witness:

> In determining whether a lay witness has sufficient special knowledge or experience to ensure that the lay opinion is rationally derived from the witness's observation and helpful to the jury, the trial court should focus on the substance of the witness's background and its germaneness to the issue at hand. Though particular educational training is of course not

> necessary, the court should require the proponent of the testimony to show some connection between the special knowledge or experience of the witness, however acquired, and the witness's opinion regarding the disputed factual issues in the case.

The Court held that the insurance company had failed to establish that the maintenance supervisor had a sufficient background of specialized knowledge to rationally conclude that the collapse of the aerial lift had been caused by metal fatigue.

Legal Questions

Safety Standards: *Bammerlin v. Navistar Intern. Transp. Corp.*, 30 F.3d 898 (7th Cir. 1994): The plaintiff was injured in a truck accident and claimed that his injuries were caused by a defective seatbelt which did not comply with Federal Motor Vehicle Safety Standards. The Court found that the Trial Court committed reversible error in permitting two of the plaintiff's experts to testify that the seat belt did not comply with two specific safety standards, because the experts were unfamiliar with the legal interpretation of the safety standards and their test protocols did not conform to those used by the National Highway Transportation Safety Administration. The Court concluded that under *Daubert*, the Trial Judge erred when he "conceived of this as a problem of credibility." The Court elaborated further:

> All questions of testing method to one side, however, the initial step here was one of legal interpretation. What do the safety standards mean? The district judge should have resolved that question and provided the jury with the proper answer, so that experts for each side could address their testimony to the governing standards. By treating the meaning of the rules as if it were an issue of fact, and the reliability of the tests as if it were an issue of credibility, the district judge left the jury adrift * * *.

Legal Conclusions: *Pries v. Honda Motor Co., Ltd.*, 31 F.3d 543 (7th Cir. 1994): Citing *Daubert*, the Court held that the testimony of the plaintiff's expert in a product liability case was properly rejected and summary judgment for the defendant was properly granted, because the testimony was "not scientific." The expert testified that the plaintiff's seatbelt latch was defective because it was possible for objects to strike and open

it during an accident. But the Court found that this testimony was based on a misunderstanding of the word "defect." The question is not whether it is possible for something bad to happen during an accident, but whether the device is unreasonably dangerous. See also ***Berry v. City of Detroit***, 25 F.3d 1342 (6th Cir. 1994) (expert should not have been permitted to testify that the city was recklessly indifferent to the rights of citizens, as that is a legal conclusion).

Personal Conduct

Failure to Meet the "Fit" Requirement: *United States v. Lilly*, 37 F.3d 1222 (7th Cir. 1994): In a prosecution of a Reverend and his wife for income tax evasion, the defendant-wife sought to call an expert witness to testify about the general duties of Baptist ministers' wives. The Court held that the testimony was properly excluded for lack of "fit", because the witness' expertise "on the general duties of ministers' wives, without specific reference to whether those duties would render a minister's wife incapable of willingly evading tax, could not have aided a jury in determining the issue of Mrs. Lilly's intent."

VII. NON-SCIENTIFIC TESTIMONY (INCLUDING TESTIMONY ON TECHNICAL SUBJECTS)--ADMISSIBLE

Accountants

Standard Accounting Methodology: *Tamarin v. Adam Caterers, Inc.*, 13 F.3d 51 (2d Cir. 1993): In a dispute concerning delinquent contributions to employees pursuant to a collective bargaining agreement, the Court held that summary judgment was properly granted against the employer. The employer argued that the payroll review prepared by the union accountant was inadmissible under *Daubert*, but the Court found that *Daubert* was inapposite because that case dealt only with scientific evidence. In this case, the expert evaluated payroll records, which are "straightforward lists of names and hours worked."

Automotive Engineers

***Daubert* Found Inapplicable: *Compton v. Subaru of America, Inc.*,** 82 F.3d 1513 (10th Cir. 1996): The Court affirmed a judgment finding an automobile manufacturer and its distributor liable for more than 50% of a passenger's injuries in a roll-over accident. The Court, reviewing the applicability of *Daubert* under a de novo standard, rejected the defendants' argument that the Trial Judge failed to exercise the gatekeeper role imposed by *Daubert*, and held that *Daubert* was inapplicable to the testimony of the plaintiff's engineering expert. The Court reasoned that "[t]he language in *Daubert* makes clear the factors outlined by the [Supreme] Court are applicable only when a proffered expert relies upon some principle or methodology," and that "application of the *Daubert* factors is unwarranted in cases where expert testimony is based solely upon experience or training." In the latter cases, the Court asserted that "Rule 702 merely requires the trial court to make a preliminary finding that proferred expert testimony is both relevant and reliable." The Court also observed that it did "not believe *Daubert* completely changes our traditional analysis under Rule 702." In the instant case, the plaintiff's expert relied upon general engineering principles and his 22 years of experience as an automotive engineer. The Court found that the Trial Judge erred in applying *Daubert* to the witness's testimony, but that the Trial Judge had properly admitted the testimony nonetheless.

Construction Litigation

Daubert* Inapplicable: *Iacobelli Const., Inc. v. County of Monroe, 32 F.3d 19 (2d Cir. 1994): In a case arising out of a construction contract dispute, the Court held that the Trial Court erroneously granted summary judgment for the defendant. The Trial Court had rejected affidavits of the plaintiff's experts, a geographical consultant and an underground-construction consultant, by relying on the Court's "gatekeeping" function established by the Supreme Court in *Daubert*. The Court found that this reliance on *Daubert* was "misplaced," reasoning that the experts' affidavits "do not present the kind of 'junk science' problem that *Daubert* meant to address." Rather, the experts had relied "upon the type of methodology and data typically used and accepted in construction-litigation cases."

Contractual Damages

Use of Comparables: *Ventura v. Titan Sports, Inc.*, 65 F.3d 725 (8th Cir.1995): The Court affirmed a judgment on a quantum meruit claim brought by a professional wrestler who contended that he was entitled to some of the profits from sales of videotapes on which he served as a commentator. The defendant argued that the plaintiff's expert on damages should have been excluded under *Daubert*, because he relied upon royalty percentages owed to the plaintiff that had no basis in fact. But the Court held that the expert's methodology in arriving at the royalty percentages was reliable. The expert based his opinion upon a survey of thousands of licensing agreements in the field of entertainment and sports, and it is "common practice to prove the value of an article (e.g., a videotape license) by introducing transactions involving substantially similar articles (i.e., other licenses)." The Court stated that, "[a]lthough no individual arrangement examined by [the expert] was 'on all fours' with the predicted Ventura-Titan license, in the aggregate, the licenses provided sufficient information to allow [the expert] to predict a royalty range for a wrestling license."

Design Engineering

Emphasis on General Acceptance: *Officer v. Teledyne Republic/Sprague*, 870 F. Supp. 408 (D.Mass. 1994): The Court denied summary judgment in a product liability case, and held that the opinion of the plaintiff's expert, a design engineer, created a triable issue of fact. The defendant relied on *Daubert* and argued that the expert's opinion was unbolstered by field tests or other empirical data. But the Court stated: "While *Daubert*'s principles have valuable application in determining the admissibility of controversial and novel scientific hypotheses, they have less use in fields like design engineering where 'general acceptance' is the norm, not the exception."

Emphasis on Traditional Expertise: *Lappe v. American Honda Motor Co., Inc.*, 857 F. Supp. 222 (N.D.N.Y. 1994): In a suit arising from a car accident in which the plaintiff alleged that the vehicle was defectively designed, the Court denied the defendant's motion for summary judgment and held that the testimony of the plaintiff's engineering expert (to the effect that the vehicle's roof and foot pedals were defectively designed) was admissible. The Court rejected the defendant's contention that the expert's testimony was not scientifically valid under *Daubert*:

> The application of *Daubert* to the testimony in the present action, however, would require an expansion of the Supreme Court's language beyond its obvious scope and meaning. *Daubert's* narrow focus is on the admissibility of "novel scientific evidence" under Fed.R.Evid. 702. * * * *Daubert* only prescribes judicial intervention for expert testimony approaching the outer boundaries of traditional scientific and technological knowledge.
>
> The participation of plaintiff's expert is not based on novel scientific evidence or testimony. In this action, he will participate as an engineer and convey opinions relating to the happening of an automotive accident. * * * [H]is opinions are based on facts, an investigation, and traditional/mechanical expertise. More important, the expert's opinions are supported by rational explanations which reasonable men might accept, and none of his methods strike the court as novel or extreme.

More Flexible Approach Required: *Surace v. Caterpillar, Inc.,* 1995 U.S. Dist. Lexis 6683 (E.D.Pa. 1995), *affirmed in pertinent part,* 111 F.3d 1039 (3d Cir. 1997): The Court rejected the defendant's motion *in limine* to exclude testimony from the plaintiff's expert, in a case where the plaintiff was struck by a pavement profiler that was being operated in reverse with its back-up alarms sounding. The plaintiff, a worker, was wearing earplugs as protection against the noise of the machinery, and did not move out of the machinery's path. The plaintiff's witness, an expert in mechanical and safety design, testified at the *Daubert* hearing that the single auditory alarm was insufficient in light of the noise involved in operating the machinery. The expert based his opinion on his own experience, review of literature and industry safety standards, information about the accident, and tests conducted on the pavement profiler. The Court found the expert's opinion to be sufficiently probative and reliable under *Daubert*. The Court stated that the *Daubert* factors needed a more flexible application in engineering and similar areas of expertise. It reasoned as follows:

> In *Daubert* * * *, objective, quantifiable tests and reproducible results which could be analyzed and which were achieved through standard methods were involved. In the situation at bar that is not the case. There is no real "scientific methodology" at issue. A flaw in the applied methodology of producing a scientific opinion such as that in *Daubert* * * * would adulterate the analysis and render the opinion substantially or totally flawed. Given that the opinion would inexorably and scientifically link the injury to the defendant's action or inaction, the resultant prejudice would be overwhelming. In contrast, Mr. Stephens has opined on the existence and benefits of alternate devices and that CMI's failure to include alternate devices was a cause, not the definitive cause, of the accident.

Electrical Engineers

Theory as to Causation: *Kieffer v. Weston Land, Inc.,* 90 F.3d 1496 (10th Cir. 1996): The plaintiff alleged that he received an electrical shock from a Pepsi machine, that resulted in a burn and a broken shoulder. The Pepsi machine was removed from the site, and the plug removed, so it could not be tested by the plaintiff. The plaintiff's expert electrical engineer testified that if the wrong type of plug had been attached to the machine, it could have produced a shock sufficient to cause the

plaintiff's injuries. The defendant objected that the expert's testimony was based on speculation, but the Court found the testimony properly admitted under *Daubert*. The expert did not testify that the soda machine actually caused the injuries, but merely theorized circumstances under which the machine could have created an electical shock sufficient to cause the injuries. The Court also noted that any lack of factual basis in the expert's opinion was attributable to the defendant's own failure to preserve the evidence.

Handwriting Identification

Emphasis on Experience Rather than Experimentation: *United States v. Jones*, 107 F.3d 1147 (6th Cir. 1997): The Court affirmed convictions for credit card fraud that were based in large part on expert testimony identifying the handwriting on certain documents as the defendant's. The Court refused to evaluate handwriting analysis as scientific evidence, noting that handwriting examiners "do not concentrate on proposing and refining theoretical explanations about the world" and do not rely on experimentation and falsification, the way scientists do. Rather, handwriting analysts are governed by the "technical or other specialized knowledge" prong of Rule 702. The Court declared that "*Daubert* does not create a new framework" for analyzing technical or other specialized expert testimony. If the *Daubert* framework were extended without modification outside the realm of scientific testimony, "many types of relevant and reliable expert testimony--that derived substantially from practical experience--would be excluded." Without relying on *Daubert*, the Court concluded that handwriting analysis is a field of non-scientific expertise within the meaning of Rule 702. The Court found no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail to the jury.

Daubert* Inapplicable, But Reliability Still Required: *United States v. Starzecpyzel, 880 F.Supp. 1027 (S.D.N.Y. 1995): The defendants were charged with conspiring to steal artwork and jewelry, by delivering stolen items to auction houses and authorizing their sale by way of forged documentation. They moved *in limine* to exclude expert testimony that certain signatures were forged. The prosecution expert was a forensic document examiner. The Court concluded that forensic document examination (FDE) could not satisfy the *Daubert* reliability standard, because

the process relied on subjective factors and the expert's practical experience, rather than upon any scientific method. Yet the Court held the testimony admissible anyway, reasoning that *Daubert* is not applicable to FDE testimony. The Court stated that *Daubert* merely established reliability standards "for expert testimony in fields whose scientific character is undisputed." It reasoned that many of the *Daubert* factors, "such as peer review and publication, are irrelevant for many categories of expert testimony." The Court declared that *Daubert* does not impose any new standard for the admissibility of the testimony of non-scientific witnesses.

The Court, however, rejected the notion that non-scientific testimony from a qualified expert is automatically admissible. It noted that a trial court must still scrutinize the reliability of the expert's opinion. As applied to FDE testimony, which was largely based on practical experience in comparing handwriting samples to detect forgery, the Court found a sufficient indication that the expert relied on enough points of comparison to reach his conclusion.

While permitting the FDE expert to testify, the Court held that under Rule 403, the jury must be instructed that the FDE witness was offering practical rather than scientific expertise. Moreover, the FDE expert could not be permitted to testify as to his certainty on the basis of a nine-level scale of probability that is employed by FDE experts. Such probabilistic assertions would give the expert's testimony a scientific aura that was unjustified in light of the practical, subjective methodology employed by the expert. Finally, the Court permitted testimony only as to forgery detection, not as to forger identification (the more difficult task of identifying who committed a known forgery), since there was no showing made that the technique of forger identification was sufficiently reliable under Rule 702.

Law Enforcement Agents

Scrutiny Under *Daubert*: *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993): The Court cited *Daubert* as signalling the Supreme Court's willingness to permit more active supervision by the trial court over expert testimony. It opined that active supervision was especially necessary as to law enforcement agents testifying as experts in civil forfeiture cases, given the "heavy burden placed on claimants" in such cases. See also ***United States v. Johnson***, 28 F.3d 1487 (8th Cir. 1994) (citing *Daubert* and finding no error in permitting an unindicted co-conspirator to testify as an expert on drug trafficking).

Daubert* Analysis Inapplicable: *United States v. Cordoba, 104 F.3d 225 (9th Cir. 1997): In the course of remanding a drug conviction on other grounds, the Court found no error in the admission of a law enforcement agent's expert testimony that sophisticated narcotics traffickers do not entrust 300 kilograms of cocaine to someone who does not know what he is transporting. The Court found the testimony helpful to explain the modus operandi of drug dealers, in a complex criminal case. The Court rejected the defendant's argument that the expert testimony was inadmissible under *Daubert*. It concluded that "*Daubert* applies only to the admisson of scientific testimony" and that the law enforcement expert "testified on the basis of specialized knowledge, not scientific knowledge."

Gatekeeper Function Applicable: *United States v. Webb,* 115 F.3d 711 (9th Cir. 1997): In a felon-gun-possession case, the Trial Court admitted testimony from a law enforcement expert on why "people" conceal who possess a gun would conceal it in the passenger compartment of a car. The defendant challenged this testimony as unreliable under *Daubert*. The three-judge panel was divided on whether *Daubert* is applicable to testimony of a law enforcement expert. Judge Trott, writing the opinion for the Court, stated that because "the expert testimony in this case constitutes specialized knowledge of law enforcement, not *scientific* knowledge, the *Daubert* standards for admission simply do not apply. Judge Jenkins, concurring in the result, stated that while the four *Daubert* factors (i.e., publication, falsifiability, etc.) might not be applicable to law enforcement experts, the *gatekeeper* function set forth in *Daubert* was fully applicable. He reasoned that Rule 702 requires that *all* experts must speak from "knowledge", and must give testimony which is helpful to the jury. Judge Jenkins explained as follows:

> In saying that "the *Daubert* standards for admission simply do not apply" to "specialized knowledge of law enforcement," we cannot be suggesting that the district court examine less rigorously the specialized knowledge underlying proffered *nonscientific* testimony, or that the district court may abdicate its role as gatekeeper where the subject matter does not depend on the scientific method. The trial court's role as gatekeeper concerning nonscientific "specialized knowledge" proves equally crucial to the integrity of the trial process, particularly where, as here, the proffered testimony's potential for prejudice to the defendant runs so high.

Judge Jenkins criticized Judge Trott as implying that modus operandi testimony would always be admissible if the law enforcement expert was qualified. He concluded that "Rule 702 as amplified in *Daubert* requires trial courts as gatekeepers to engage in a more thoughtful, more deliberate process testing

specialized knowledge and helpfulness anew in each situation." He concurred in the result on the ground that the trial judge made an implicit finding that the modus operandi testimony was helpful and reliable, and that this finding was not clearly erroneous.

Judge Fletcher concurred in Judge Jenkins's opinion insofar as it highlighted "the need for district courts to perform adequately the gate-keeper function in determining whether expert testimony is truly 'expert' and likely to be of help to the jury."

Machines

Technical Devices Covered by *Daubert*: *United States v. Lee*, 25 F.3d 997 (11th Cir. 1994): In a pre-*Daubert* prosecution for narcotics possession, the defendant unsuccessfully objected, under *Frye*, to evidence from two machines which detected trace amounts of cocaine on his personal effects. These machines--the Sentor and the Ionscan-- incorporate the scientific techniques of gas chromatographic luminescence and ion mobility spectography, respectively. The Court remanded for a hearing in light of *Daubert*, and in the course of doing so, rejected the contention that *Daubert* is inapplicable to the results obtained by specialized technical equipment. The Court stated:

> The results of such specialized, technical, diagnostic machinery are only admissible through the testimony of an expert witness; courts do not distinguish between the standards controlling admission of evidence from experts and evidence from machines. * * * Rule 702 specifically applies to the admission of "scientific, technical, or other specialized *knowledge*," a category of evidence that includes the results of technical devices. * * * *Daubert* applies not only to testimony about scientific concepts but also to testimony about the actual applications of those concepts.

Safety Conditions

Testifying on the Basis of Experience: *Thomas v. Newton Intern. Enterprises*, 42 F.3d 1266 (9th Cir. 1994): In a suit by a longshoreman for injuries suffered on a boat, the Court held that the Trial Court erred when it excluded the testimony from the plaintiff's proffered expert to the effect that the defendant had left a boat in an unsafe condition. The expert was sufficiently qualified due to his 29 years of experience as a longshoreman.

The defendant's reliance on *Daubert* was misplaced, because "*Daubert* was clearly confined to the evaluation of *scientific* expert testimony." The Court stated: "While a scientific conclusion must be linked in some fashion to the scientific method, * * * non-scientific testimony need only be linked to some body of specialized knowledge or skills." In this case, the expert's 29 years of experience provided the necessary link.

Valuation of Property

Hybrid of Two Recognized Methodologies: *F.D.I.C. v. Suni Associates, Inc.,* 80 F.3d 681 (2d Cir. 1996): In a proceeding for a deficiency judgment, the F.D.I.C. offered the testimony of an expert, who valued the real estate on the basis of a sale of all of the property to a single purchaser and testified that he used a valuation methodology that was a blend of two approaches to valuation: direct sales comparison and income capitalization. The defendant objected that the testimony was based on "a developmental analysis unknown to appraisal literature, unique to [the expert] and on factual assumptions which were without any reasonable foundation." But the Court found the testimony sufficiently reliable, citing *Daubert* as establishing a flexible and permissive approach. It found the expert's "hybrid of two widely-recognized methods" of valuation to be sufficiently reliable, and dismissed the internal contradictions in the expert's testimony as a question of weight.

VIII. GATEKEEPING PROCEDURES

Court-appointed Experts

Assistance in the *Daubert* Enquiry: *DeAngelis v. A. Tarricone, Inc.*, 151 F.R.D. 245 (S.D.N.Y. 1993): In this personal injury case, the Court granted the defendant's motion for a court-appointed expert, after the plaintiff had successfully objected to neurotoxological and psychiatric examinations by defense experts. The Court held that after *Daubert*, the trial court's role in assessing the reliability of expert testimony is critical, and that court-appointed experts might often be helpful. Recognizing that a court-appointed expert may carry undue weight before the jury, the Court stated that "the source of appointment of an expert can be placed in proper perspective by awareness of the factfinder that even an impartial expert can be wrong, and the impartial expert must be subjected to the same evaluation of credibility as any other witness."

Limitations on Deposition: *In re Joint E. and S. Dists. Asbestos Litigation*, 151 F.R.D. 540 (S.D.N.Y. 1993): The Court denied a motion to depose court-appointed experts. The motion was made by counsel for a handful of plaintiffs in a mass tort litigation, and was not joined by counsel for the plaintiff class. The Court reasoned that, in light of *Daubert* and the gatekeeping function that it imposes, it is more efficient for a court to hold a pre-trial "*Daubert* hearing" at which the court-appointed expert could be questioned by all parties in the presence of the trial judge.

Hearing Requirement

Party Unprepared: *Holbrook v. Lykes Bros. S.S. Co., Inc.*, 80 F.3d 777 (3d Cir. 1996): The Court found no error in the Trial Court's admitting the defendant's expert testimony without having held a *Daubert* hearing. The Court found that the Trial Court had scheduled a *Daubert* hearing, but that plaintiff's counsel was unprepared. At that point, it was sufficient for the Trial Court to entertain a motion to strike at trial. The Court concluded: "Counsel failed to prepare appropriately and the court exercised sound discretion in controlling the efficient and orderly disposition of this case to avoid unnecessary inconvenience to the jury."

Hearing Must Be Held: *Gruca v. Alpha Therapeutic Corp.,* 51 F.3d 638 (7th Cir. 1995): In an action arising from a hemophiliac's death from AIDS, the plaintiffs claimed, among other things, that the decedent's death was hastened by additional exposure to HIV contained in the defendants' blood coagulant products. The plaintiffs provided expert scientific testimony based on the theory of antigenic stimulation. Under this theory, an infected person's exposure to additional HIV, other viruses, or foreign proteins shortens the asymptomatic period of the initial infection and leads to quicker death from HIV. The defendants objected to the experts' testimony on *Daubert* grounds, but the district court declined to rule on the objection and instead directed a verdict on the merits of the plaintiffs' claim as to additional exposure--the court found no jury question on the issue of subsequent infection. The Court of Appeals held that the Trial Court's approach was improper. *Daubert* requires that when faced with the proffer of expert scientific testimony, the district court must determine "at the outset" whether it comports with the scientific method. The Court declared that the district court "abdicated its responsibility under Rule 104(a) by failing to conduct a preliminary assessment of the admissibility of the plaintiffs' expert testimony concerning antigenic stimulation before permitting the plaintiffs' experts to testify." The Court reversed the directed verdict and remanded the antigenic stimulation claim with instructions to evaluate the expert testimony under the *Daubert* framework. It emphasized that it took no view on the admissibility of antigenic stimulation testimony under *Daubert*.

Party Waives a Pre-trial Hearing: *Hose v. Chicago Northwestern Trans. Co.*, 70 F.3d 968 (8th Cir. 1995): Affirming a judgment for an employee who brought an FELA action alleging that his employer was liable for his suffering from manganese encephalopathy, the Court upheld the Trial Judge's admission of medical testimony which the employer challenged under *Daubert*. It observed in a footnote that "[c]hallenges to the scientific reliability of expert testimony should ordinarily be addressed prior to trial," because "an early evidentiary challenge allows the trial judge to exercise properly the gatekeeping role regarding expert testimony envisioned under *Daubert*." The Court noted, however, that the employer apparently chose not to seek a pre-trial hearing in this case.

IX. APPELLATE REVIEW

Preserving Objections

Failure to Object Results in Heavy Presumption That Trial Court Conducted a Proper *Daubert* Review: *Hoult v. Hoult*, 57 F.3d 1 (1st Cir. 1995): The plaintiff recovered damages against her father for sexual assaults that occurred during her childhood. At trial she called an expert in repressed memories, who supported her testimony. The defendant did not object. On appeal from denial of relief under Rule 60(b), he argued that his failure to object was not dispositive, because under *Daubert* the trial court must make a *sua sponte* ruling on the admissibility of expert testimony. The Court stated that while *Daubert* does instruct district courts to conduct a preliminary assessment of the reliability of expert testimony, even in the absence of an objection, it does not require a court to *sua sponte* hold a hearing and make explicit on-the-record findings. In the absence of an explicit objection, "we assume that the district court performs such an analysis *sub silentio* throughout the trial with respect to all expert testimony." The Court found that the trial court's admission of the expert testimony was not a "mistake" within the meaning of Rule 60(b).

Objection Not Specific Enough: *McKnight v. Johnson Controls, Inc.*, 36 F.3d 1396 (8th Cir. 1994): Affirming a judgment for the plaintiff in an action alleging personal injury caused by an exploding battery, the Court held that the defendant failed to preserve its objection that the plaintiff's expert's testimony was not scientifically valid within the meaning of *Daubert*. The plaintiff's expert testified on the basis of tests he conducted on a battery similar to the battery which exploded. The defendant objected that the expert was using "a test on a battery, for which a foundation hasn't been laid sufficiently, to prove the ultimate issue in this case." The Court held that this objection failed "to raise any question about the scientific validity of the principles and methodology" underlying the expert's testimony. The Court rejected the argument that district judges have an obligation to exercise their *Daubert* gatekeeping function even in the absence of a specific objection.

Failure to Object Precludes Sufficiency Attack: *Marbled Murrelet v. Babbitt,* 83 F.2d 1060 (9th Cir. 1996): the Court affirmed the grant of injunctive relief against a logging company in an action by an environmental group to protect a nesting habitat. It held that, because the company failed to request a ruling at trial on its *Daubert* objections to expert testimony, it could not make a sufficiency of the evidence argument on appeal that seemed to be based on a *Daubert* analysis.

Standard of Review

Exclusion of Evidence Resulting In Summary Judgment: *Duffee v. Murray Ohio Manufacturing Co.,* 91 F.3d 1410 (10th Cir. 1996): Affirming the trial court's exclusion of testimony by the plaintiff's expert concerning the safety of brakes on a bicycle, the Court reached the question of which standard would be used to review decisions to exclude expert testimony under *Daubert* that result in summary judgment. The Court reviewed cases in other circuits and analyzed the question as follows:

> Ordinarily we review the grant or denial of summary judgment de novo. *Wolf v. Prudential Ins. Co. of Am.*, 50 F.3d 793, 796 (10th Cir. 1995). Evidentiary rulings, however, are generally reviewed for abuse of discretion. *Hinds v. General Motors Corp.*, 988 F.2d 1039, 1047 (10th Cir. 1993). The Third and Eleventh Circuits, while acknowledging that evidentiary rulings usually receive greater deference, have nonetheless held that "when the district court's exclusionary evidentiary rulings with respect to scientific opinion testimony will result in a summary or directed judgment, we will give them a "hard look" (more stringent review) to determine if a district court has abused its discretion in excluding evidence as unreliable." *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 749-750 (3d Cir. 1994) (citation omitted); see *Joiner v. General Elec. Co.*, 78 F.3d 524, 529 (11th Cir. 1996) (applying "a particularly stringent standard of review to the trial judge'sexclusion of expert testimony.") The Seventh Circuit, on the other hand, has held that the trial judge's decision to exclude evidence under Daubert should be reviewed for abuse of discretion, even when that decision results in summary judgment. *Buckner v. Sam's Club, Inc.*, 75 F.3d 290, 292-93 (7th Cir. 1996).
>
> *Daubert* requires district judges to act as gatekeepers to ensure that scientific evidence is both relevant and reliable. This entails two inquiries: whether the reasoning

and methodology underlying the testimony is scientifically valid, and whether the reasoning and methodology can properly be applied to the facts. Like the Supreme Court, we "are confident that federal judges possess the capacity to undertake this review." Their decisions, therefore, are properly reviewed under the traditional abuse of discretion standard. In this case, the district judge found that the testimony of the plaintiff's expert was not supported by appropriate validation, and therefore was inadmissible under *Daubert*. After reviewing the record, we conclude that the district judge did not abuse his discretion by excluding this testimony.

Note: The Supreme Court has granted certiorari in *Joiner*, the 11th Circuit case cited by the *Duffee* court, to consider whether the standard of review for *Daubert* rulings excluding evidence should be for abuse of discretion or something more stringent.

Item II D

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Memorandum To: Advisory Committee on the Federal Rules of Evidence
From: Dan Capra, Reporter
Re: Omnibus Crime Bill, Proposed Amendments to Rule 404(b)
Date: September 11, 1997

At the April meeting, the Evidence Rules Committee considered, on a preliminary basis, two proposed amendments to Evidence Rule 404 that are currently contained in the Omnibus Crime Control Act of 1997 (S.3).

1. Section 503 of the Act would amend Evidence Rule 404(a) to provide that "if an accused offers evidence of a pertinent trait of character of the victim of the crime, evidence of a pertinent character trait of the accused" may be offered by the prosecution.

2. Section 713 of the Act would amend Evidence Rule 404(b) to include "disposition toward a particular individual" among the valid purposes for admitting evidence of a person's (usually a criminal defendant's) uncharged misconduct.

At the April meeting, the Evidence Rules Committee agreed to consider the substance of these proposals in more detail to determine whether Rule 404 should be amended accordingly pursuant to the rulemaking process. This memorandum is intended to assist the Committee in its deliberations. The memorandum is in two parts. Part one sets forth some historical and other background that will be pertinent to the Committee's consideration of the proposed amendments. Part two discusses the case law that might be pertinent to the Committee's determinations.

Background

The Committee discussed the Congressional proposals to amend Rule 404 at the last meeting, and agreed upon language to be recommended as part of a letter from the Standing Committee to Congress commenting on the Omnibus Crime Control Act. In this language, the Committee stated that it has preliminarily reviewed the proposed changes to Rule 404, and that it would appreciate the opportunity to consider them further at the next Committee meeting; it asked that the Congressional proposal be delayed until the Committee has a chance to consider the matter more fully. The Committee agreed to place the substance of the proposed amendments on the agenda for its October, 1997 meeting, with a view to determining whether Rule 404 should be amended, through the rulemaking process, along the lines suggested by the Omnibus Crime Bill proposal. (A copy of the letter to Congress is attached to this memorandum).

If Rule 404 were amended in accordance with the Congressional proposal, it would read like this:

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. — Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. — Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or, if an accused offers evidence of a pertinent trait of character of the victim of the crime, evidence of a pertinent trait of character of the accused offered by the prosecution;

(2) Character of victim. — Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. — Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. — Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, ~~or~~ absence of mistake or accident, or a disposition toward a particular individual, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

The preliminary discussion at the April meeting indicated that most members of the Committee agreed with the substance of the proposal to amend Rule 404(a), though no vote was taken on whether an actual amendment to the Rule should be proposed. The rationale expressed was that by bringing in character evidence, the accused has admitted that character evidence is useful and is relevant to the case; therefore it makes sense that the accused's own pertinent character traits should be admissible. Moreover, by trying to prove that the victim has a bad character, the defendant is at least implying that he has a good one; and the prosecution should be allowed to respond to this implication.

Some members of the Committee were opposed to the substance of the amendment, however, expressing concern that the provision might be read to permit evidence attacking the defendant's credibility whenever the defendant attacked the victim's credibility.

At the April meeting, most members of the Committee expressed disapproval of the proposal to amend Rule 404(b) to add "disposition toward a particular individual" to the list of permissible purposes. The rationale expressed was that such an amendment was unnecessary on the one hand and confusing and possibly damaging to the prosecution on the other. The amendment was considered unnecessary because the list of permissible purposes in the Rule is not intended, nor has it been read, to be exclusive. Further, evidence of disposition toward another would virtually always be admissible to prove intent, identity, or some other not-for-character purpose--therefore no change to the Rule is necessary. The amendment was considered confusing, and possibly damaging to the government's interests, because the addition of another purpose to the Rule might create the misimpression that uncharged misconduct evidence could not be admitted unless offered for a purpose specified in the Rule.

Some concern was expressed, however, that the amendment might indeed be necessary if courts have excluded evidence that would have been admissible if the language proposed by Congress had been in the rule. I was directed to survey the case law on "disposition toward a particular individual" evidence, to determine whether there are any cases in which such evidence had been erroneously excluded. I have also researched the case law and state statutes on Rule 404(a) to determine if these sources might provide the Committee some guidance.

Rule 404(a)--Pertinent Cases and Statutes

There is no case law that I could find that might shed light on the consequences of amending Rule 404(a) in the manner proposed by the Omnibus Crime Bill. The current law is so clear on the point--i.e., that by proving a pertinent character trait of the victim, the defendant does not open the door to his own character traits--that the issue virtually never arises in the reported cases. See, e.g., *United States v. Fountain*, 768 F.2d 790 (7th Cir. 1985) (proving self-defense permits proof of the victim's character trait for peacefulness, but it does not permit proof of the defendant's character trait for violence).

Nor do any of the state provisions provide for anything comparable to the proposed amendment. Thus, there are no state cases which address the concern posed by some Committee members at the April meeting: that if the defendant attacks the victim's credibility as a witness, the amended rule might be held to open the door to an attack on the defendant's credibility.

Rule 404(b)--Pertinent Cases and Statutes

There are no state provisions which specifically contain "disposition toward a particular individual" in the list of permissible purposes under Rule 404(b). Some states, such as West Virginia, have added a special rule admitting uncharged misconduct when offered to show a "lustful disposition." But nobody contends that such a provision is necessary under the Federal Rules, given Rules 413-415.

The Federal and State case law gives little or no cause for concern that uncharged misconduct indicating disposition toward a particular individual is being wrongly excluded in the absence of statutory language. The cases show that evidence of prior misconduct toward the victim has been routinely admitted on any number of grounds. The most notable case, of course, is the O.J. Simpson case, where the domestic violence evidence was held admissible to prove identity. I could not find a case which refused to admit uncharged misconduct against the same individual on the ground that the purpose wasn't explicitly set forth in the Rule. Virtually all courts look at the list of purposes in Rule 404(b) as illustrative rather than exclusive.

What follows is a short description of the cases involving evidence of uncharged misconduct against the person who is also the victim of the crime charged. Many of these cases are child sexual abuse cases, that would no longer be covered by Rule 404(b) in a federal court, given the advent of Rules 413-415. However, they are instructive of the point that prior misconduct directed toward the same victim will virtually always be admissible despite the Rules' preclusion of character evidence.

Federal Cases--Evidence Admissible

United States v. Powers, 59 F.3d 1460 (4th Cir. 1995): Powers was charged with a series of sexual assaults against his daughter. He objected to evidence of domestic violence perpetrated by him on the daughter and other family members. The Court found this evidence properly admitted, and provided an extensive analysis of admissibility of evidence of bad acts perpetrated against the same victim under Rule 404(b):

> The list of purposes for which prior bad acts may be admitted under Rule 404(b) is illustrative rather than exclusionary. Consequently, we have construed the exceptions to the inadmissibility of prior bad acts evidence

broadly, and characterize Rule 404(b) "as an inclusive rule, admitting all evidence of other crimes or acts except that which tends to prove only criminal disposition."

* * *

We conclude that the evidence of Powers' violence against Brandi and her family members was admissible to explain Brandi's submission to the acts and her delay in reporting the sexual abuse. See State v. Wilson, 60 Wash.App. 887, 808 P.2d 754, 757 (physical abuse of victim admissible under state's version of Rule 404(b) in sex abuse case to explain, among other things, the delay in reporting the sexual abuse), rev. denied, 117 Wash.2d 1010, 816 P.2d 1224 (1991); State v. Bates, 784 P.2d 1126, 1127-28 (Utah 1989) (doctor's testimony as to delays in reporting of abuse admissible under state's version of Rule 404(b) where victim testified that her failure to report crime was because she was afraid of defendant). * * * The timing of the beatings shows that they constituted yet another expression of the brutality with which Powers dominated Brandi and her family, creating an environment conducive to the further violence of rape.

The *Powers* Court also held that the acts of violence were admissible to provide "context":

Powers' acts of violence against Brandi and her family and the violent sexual assaults he committed against his daughter were "so linked together in point of time and circumstances ... that one [could not] be fully shown without proving the other." Masters, 622 F.2d at 86. To place the rape in context, the Government elicited testimony from Brandi to show Powers' control over Brandi and the entire family and their inability to resist or report his violent acts. Brandi testified that she did not tell her mother of the sexual assaults for fear of arousing Powers' anger. Indeed, Brandi testified Powers had threatened that if she reported the assaults, "something bad [would] happen to [her]," and everyone, especially she, would "be in trouble." The evidence of Powers' complete control over his family explains Brandi's belief that, as long as Powers lived with the family, it would be futile for Brandi to report the assaults to her mother, who would not have been able to protect her. Thus, having seen the entire context of the crime, the jury could have found more credible Brandi's inability to reject Powers' advances and her explanation that she only told of the assaults when she could no longer face the fear and anxiety of being molested again.

United States v. Thompson, 999 F.2d 541 (6th Cir. 1993): In a kidnapping prosecution, evidence that the defendant sexually assaulted the victim was properly admitted to show motive.

United States v. Butler, 56 F.3d 941 (8th Cir. 1995): Uncharged sexual misconduct with the same child-victim was held admissible to prove intent and identity.

United State v. Yellow, 18 F.3d 1438 (8th Cir. 1993): The trial court admitted evidence of prior sex abuse of the same two victims--the defendant's brother and sister--though that court had excluded some of the more remote acts under Rule 403. The Court of Appeals found no error in admitting the evidence. The Court provided the following analysis:

> We have previously held that "prior sexual acts with the prosecutrix are generally admissible in a statutory rape prosecution." United States v. St. Pierre, 812 F.2d 417, 420 (8th Cir. 1987). *St. Pierre* reflects the general rule that evidence of prior sex offenses committed upon the victim of the charged offense is relevant and admissible at trial. See 1 McCormick on Evidence sec. 190(4), at pp. 803-04 (4th ed. 1992). * * * [F]ederal courts have consistently held that such evidence is relevant under one or more of the permissible purposes enumerated in the Rule. See, e.g., United States v. Bradshaw, 690 F.2d 704, 708-09 (9th Cir. 1982) (evidence of prior sex acts admissible in kidnapping case to prove defendant's dominion and control over the minor victim).
>
> * * *
>
> Rule 404(b) expressly provides that prior acts evidence may be admitted if relevant to prove intent. Yellow generally denied abusing his brother and sister, thus requiring the government to prove that Yellow specifically intended to rape his disabled brother in violation of 18 U.S.C. § 2242(2)(B), and that he specifically intended to rape his minor sister in violation of § 2243(a).
>
> Evidence of prior sexual abuse of the victim has been admitted to prove the defendant's specific intent to take advantage of one who was "physically incapable of declining participation," an element of the offense under 18 U.S.C. § 2242(2)(B). See United States v. Peden, 961 F.2d 517, 520-21 (5th Cir.), cert. denied, 506 U.S. 945, 113 S.Ct. 392, 121 L.Ed.2d 300 (1992). It has also been admitted to prove a specific intent to gratify the defendant's sexual desires for purposes of 18 U.S.C. § 2245(3). See United States v. Hadley, 918 F.2d 848, 851 (9th Cir.1990), cert. dismissed, 506 U.S. 19, 113 S.Ct. 486, 121 L.Ed.2d 324

(1992). We conclude that such evidence was relevant to the intent issues in this case.

In addition, at trial, Yellow attempted to portray David Lyons, who was previously convicted of attempting to rape Yellow's sister, as the person who committed the charged offense against his sister. Rule 404(b) evidence may be admitted to prove identity, and evidence that a defendant committed prior sexual assaults against the victim is relevant in identifying defendant as the person who committed the assault charged in the indictment. See United States v. Dia, 826 F.Supp. 1237, 1241 (D.Ariz.1993).

"This circuit views [R]ule 404(b) as one of inclusion, permitting admission of other crimes, wrongs, or bad acts material to an issue at trial, unless the evidence tends to prove only the defendant's criminal disposition." United States v. Estabrook, 774 F.2d 284, 287 (8th Cir.1985). The district court has broad discretion to admit evidence of other wrongs. See United States v. Johnson, 934 F.2d 936, 939 (8th Cir.1991). In light of the many cases approving the admission of such evidence, the district court did not abuse its discretion in concluding that evidence of Yellow's past sexual abuse of his siblings was relevant to material issues at trial.

The *Yellow* Court noted that evidence of uncharged misconduct perpetrated by the defendant upon the same victim is virtually always admissible under Rule 404(b), while uncharged misconduct between the defendant and others is more strictly scrutinized. The court stated that "[c]ases from other jurisdictions also note this distinction. See United States v. Gano, 560 F.2d 990, 992-93 n.1 (10th Cir. 1977) (evidence of uncharged misconduct between the defendant and the same victim held admissible to prove common plan or scheme)."

United States v. St. Pierre, 812 F.2d 417 (8th Cir. 1987): The twelve-year-old victim of the defendant's sexual abuse was permitted to testify about sexual acts between herself and the defendant other than those for which the defendant was indicted. The district court properly allowed the jury to consider this testimony only as it related to the defendant's opportunity, intent, preparation, or plan to commit the acts charged.

State Cases--Evidence Admissible

Bowden v. State, 538 So.2d 1226, 1235 (Ala.1988): The Court rejects a lustful disposition exception to the rule against character evidence, but holds that same-victim evidence is admissible under Rule 404(b). "Thus, where as in [this case,] a defendant is charged with the first degree rape of his minor daughter, evidence establishing that he had raped and/or committed acts of sexual abuse toward her prior to or subsequent to the offense for which he is charged, is admissible to prove his motive in committing the charged offense. Such evidence tends to establish the inducement (i.e., unnatural sexual passion for his child) that led him to rape or molest her."

Mosley v. State, 325 Ark. 469, 929 S.W.2d 693 (1996): The victim was allowed to testify that the defendant had sexually attacked her over a number of years and had threatened to kill her if she reported the attacks. This evidence was held properly admitted as proof of a "proclivity toward a specific act with a person or class of persons with whom the accused has an intimate relationship."

People v. Stewart, 181 Cal.App.3d 300, 226 Cal.Rptr. 252 (1986): Prior acts of sexual misconduct with the same victim were held admissible. The Court provides the following analysis:

> In People v Moon, 165 Cal.App.3d 1074, 212 Cal.Rptr. 101 (1985) the admission of prior uncharged acts of molestation against the prosecuting witnesses was upheld based on the line of cases holding that "evidence of other, not too remote sex offenses with the prosecuting witness is admissible because it is relevant to show a 'lewd disposition or the intent of the defendant' toward that witness." (People v. Moon, supra, 165 Cal.App.3d at p. 1079, 212 Cal.Rptr. 101, emphasis added; see, e.g., People v. Sylvia (1960) 54 Cal.2d 115, 119-120, 4 Cal.Rptr. 509, 351 P.2d 781; People v. Brown (1971) 14 Cal.App.3d 334, 347, 92 Cal.Rptr. 370; People v. Hefner (1981) 127 Cal.App.3d 88, 98, 179 Cal.Rptr. 336; People v. Barney (1983) 143 Cal.App.3d 490, 494, 192 Cal.Rptr. 172; People v. Dunnahoo (1984) 152 Cal.App.3d 561, 574, 199 Cal.Rptr. 796; People v. Brunson (1986) 177 Cal.App.3d 1062, 1068, 223 Cal.Rptr. 439.)
>
> The *Moon* court quotes *Barney* with approval as stating that " '[w]hen the uncharged offense evidences the emotion of sexual passion toward a particular individual the

statutory exclusion [of Evid.Code, § 1101, subd. (a)] is inapplicable. [Citations.] Such evidence tends to prove defendant would act to realize his desire on the occasion of the charged offense [citation] and is not dependent upon defendant's bad character or his disposition to do wrongful acts.' " (People v. Moon, supra, 165 Cal.App.3d at p. 1079, 212 Cal.Rptr. 101, quoting People v. Barney, supra, 143 Cal.App.3d at p. 494, 192 Cal.Rptr. 172.)

State v. Maylett, 108 Idaho 671, 701 P.2d 291 (1985): The victim was allowed to testify about uncharged sexual attacks on her by the defendant. This evidence was held properly admitted "as probative of Maylett's intent to use the victim to gratify his sexual desires." A concurring judge found the evidence admissible to prove common scheme or plan.

State v. Maestas, 224 N.W.2d 248 (Iowa 1974): "The trial court may properly admit testimony as to similar acts of misconduct by defendant with the prosecutrix for the purpose of showing his lascivious and lewd disposition."

State v. Crossman, 229 Kan. 384, 624 P.2d 461 (1981): Prior acts of illicit sexual relations between an adult and a child were admissible to establish the relationship of the parties' continuing course of conduct and to corroborate the testimony of the complainant.

Thacker v. Commonwealth, 816 S.W.2d 660 (Ky. App. 1990): "Evidence of prior sexual acts between the victim and the defendant, even if criminal, may be admitted. See Keeton v. Commonwealth, Ky., 459 S.W.2d 612 (1970). Such evidence is deemed corroborative of the evidence of the offense being tried as it tends to indicate an affinity or lustful desire or incestuous disposition toward the particular victim."

State v. Crawford, 672 So.2d 197 (La. App. 1996): "Generally, evidence of other sex crimes committed by the accused against the same victim or a similarly situated victim falls into one of the LSA-C.E. Art. 404(B) exceptions."

Commonwealth v. King, 387 Mass. 464, 441 N.E.2d 248 (1982): "One of the recognized exceptions invariably followed in this Commonwealth is that, when a defendant is charged with any form of illicit sexual intercourse, evidence of the commission of similar crimes by the same parties though committed in another place, if not too remote in time, is competent to prove an inclination to commit the [acts] charged in the indictment ... and is relevant to show the probable existence of the same passion or emotion at the time in issue." Commonwealth v. Bemis, 242 Mass. 582, 585, 136 N.E. 597 (1922).

Lovejoy v. State, 555 So.2d 57 (Miss. 1989): In a sex abuse case, nude photos of the victim taken by the defendant were "properly admitted into evidence in order to establish the defendant's licentious disposition and lust for the victim." The Court elaborated as follows:

> Here, the photographs are more probative than prejudicial for several reasons. They show the depravity of the defendant and his lustful disposition for the victim, corroborate the victim's testimony about Lovejoy taking the photographs, and connect reasonably to the charge of capital rape. Additionally, for those jurors who disbelieve that a father can have lust for his natural daughter, the photographs show that such lust exists other than in the imagination of the victim.

State v. Barnard, 820 S.W.2d 674 (Mo.App. 1991): "Evidence of a defendant's prior sexual abuse of the same victim is admissible under the motive exception [to the rule against admitting character evidence]. In State v. Graham, 641 S.W.2d 102 (Mo. banc 1982), the Missouri Supreme Court articulated the reason for allowing such evidence under the motive exception. It stated, '[p]rior sexual intercourse or intimacy between defendant and victim indicates sexual desire for the victim by defendant and tends to establish a motive....'"

State v. Morosin, 200 Neb. 62, 262 N.W.2d 194 (1978): In a case involving physical abuse of a child, evidence that the defendant had beaten the child on other occasions was held admissible where the child's injuries were claimed to be accidental or unintentional.

State v. Craig, 219 Neb. 70, 361 N.W.2d 206 (1985): Where the defendant claimed that sexual contact with his daughter was accidental, previous acts of sexual contact were admissible to prove absence of mistake or accident.

Landon v. State, 83 Okl.Cr. 141, 174 P.2d 266 (1946): In a trial upon a charge of rape, proof of other acts of intercourse is admissible for the purpose of corroboration and as showing the relationship between the parties.

State v. Tobin, 602 A.2d 528 (R.I.1992): The Court held that evidence of uncharged sexual misconduct with the victim was properly admitted. The Court noted the existence of an "almost universally recognized" exception to Rule 404(b) for the admission of evidence of uncharged sexual misconduct to show "lustful disposition or sexual propensity" in cases concerning the proof of prior incestuous relations between the defendant and the complainant. See also State v. Woodson, 551 A.2d at 1193-94 (upholding the admission of testimony regarding uncharged sexual assaults on the same victim when reasonably necessary to establish defendant's lewd disposition or intent).

State v. Winter, 162 Vt. 388, 648 A.2d 624 (1994): The Court rejected a "lustful disposition" exception to the rule against character evidence, yet held that uncharged misconduct directed toward the same victim would generally be admissible for "to supply a context for the charged acts". The Court explained as follows:

> The point of establishing the existence of an incestuous relationship was not to make an issue of defendant's general character for sexually abusing females of minor age. Rather, the point was to establish specifically defendant's propensity to engage in sexual contact with his daughter as an object of his desire.

People v. Toennis, 52 Wash. App. 176; 758 P.2d 539 (Wash. App. 1988): The defendant was charged with second degree murder of his girlfriend's child. His defense was that while he hit the child, he did not think he had hit him hard enough to kill him. Evidence of the defendant's prior beatings of the child was properly admitted to show that the child "was in an obviously battered condition, which should have put Toennis on notice that additional blows could result in grievous bodily harm to Jason."

State v. Ray, 116 Wash.2d 531, 806 P.2d 1220 (1991): The Court held that evidence of uncharged sexual misconduct perpetrated by the defendant on the victim was properly admitted. The court stated that it had "consistently recognized that evidence of collateral sexual misconduct may be admitted under ER 404(b) when it shows the defendant's lustful disposition directed toward the offended female." The evidence "makes it more probable that the defendant committed the offense charged."

State v. Charles, 183 W.Va. 641, 398 S.E.2d 123 (1990): In a child sex abuse prosecution, the Trial Court admitted evidence that the defendant forced the children to look at pornography and to listen to phone sex. The Court held this evidence properly admitted, and provided the following analysis:

> We therefore find that the acts which occurred in the presence of either one or both children or as part of the transactions with the children which constituted the basis for the indictment were admissible under W.Va.R.Evid. 404(b). These acts not only showed lascivious intent or sexual gratification on the part of this appellant towards his children to commit the crimes charged, but also that the acts did not occur accidentally as the appellant attempted to establish as part of his defense through his own testimony. Furthermore, the acts were so intrinsically related to the alleged offenses that they may be considered as part of the transactions with the children and so interwoven with his pattern of conduct toward the children that they are part of the res gestae of the crimes charged. Lastly, they were highly probative on the issue of whether this defendant committed sexual abuse against these children.

State Cases--Evidence Inadmissible

Getz v. State, 538 A.2d 726 (Del. 1988): The defendant was charged with rape of his daughter. The Court held that evidence of other sexual attacks by the defendant upon his daughter were not admissible to prove plan, common scheme, or intent; and the court rejected a "lustful disposition" exception to the rule against character evidence. The Court held that intent could be proven by the act itself, and therefore uncharged misconduct was not necessary to prove intent. The acts were not admissible to prove identity, because identity of the perpetrator, if there was one, was not in dispute. As to common scheme or plan, the Court declared that the uncharged misconduct consisted of "two other

isolated events within the previous two years depicting no common plan other than multiple instances of sexual gratification. Repetition is not, in itself, evidence of a plan and other 'crimes of the sort with which he is charged' cannot be admitted against the defendant under that guise." The Court rejected the "lustful disposition" exception in the following analysis:

> The State's argument in favor of a sexual gratification exception must be rejected because it seeks to impart a blanket exception to a classification of criminal offenses without regard to the materiality requirement. The sexual gratification exception proceeds upon the assumption that a defendant's propensity for satisfying sexual needs is so unique that it is relevant to his guilt. The exception thus equates character disposition with evidence of guilt contrary to the clear prohibition of D.R.E. Rule 404(b). We are no more inclined to endorse that equation than we are to consider previous crimes of theft as demonstrating a larcenous disposition and thus admissible to show proof of intent to commit theft on a given occasion.

Lanman v. State, 600 N.E.2d 1334 (Ind. 1992): In a sex abuse case, uncharged prior misconduct with the victim was admitted at trial. The Supreme Court overruled a previous line of cases permitting uncharged misconduct to prove a depraved sexual instinct. It held that this type of evidence was best administered under Rule 404(b). The Court emphasized that under Rule 404(b), the evidence would probably be admitted anyway, but in a more honest fashion. The Court elaborated as follows:

> We hasten to add that abandoning the depraved sexual instinct exception does not mean evidence of prior sexual misconduct will never be admitted in sex crimes prosecutions. It means only that such evidence will no longer be admitted to show action in conformity with a particular character trait. It will continue to be admitted, however, for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. * * *
>
> For example, this Court has on occasion approved the admission of evidence of prior sexual crimes under the "common scheme or plan" exception to the general rule. Our cases have recognized two branches of this exception, the first permitting proof of identity by showing the defendant committed other crimes with identical modus operandi, and the second permitting proof of an uncharged crime as evidence of a preconceived plan which included the charged

> crime. * * * This is also known as the theory of res gestae, under which the state is allowed to present evidence that completes the story of the crime in ways that might incidentally reveal uncharged misconduct. * * * Evidence of prior sex offenses--charged or uncharged--may also be admissible under Rule 404(b) to prove absence of mistake.

The Court held, however, that testimony from the victim, to the effect that the defendant had sex with her at least three times after the crime charged, was not admissible under Rule 404(b). The Court could find no proper not-for-character purpose for the evidence.

State v. Zybach, 93 Or.App. 218, 761 P.2d 1334 (1988): The trial court admitted evidence of three contacts or attempted contacts between the child-victim and the defendant which occurred after the alleged rape. The trial court had relied on some old Oregon cases under which other sexual contacts with the victim were admissible to prove a lustful disposition. The Court of Appeals found this to be error. It held that the passage of Oregon Rule 404 superseded the prior case law which had established a lustful disposition exception to the rule against character evidence. The state argued on appeal that the uncharged misconduct could have been admitted to explain why the complainant delayed in reporting the rape; but the Court of Appeals held that the uncharged misconduct occurred so long after the charged crime that it would not have been probative to explain any delay in reporting.

State v. Rickman, 876 S.W.2d 824 (Tenn. 1994): The Court concluded "that Tennessee should not recognize a 'sex crimes' exception to the general rule, but that it has recognized a narrow special rule which admits prior sex crimes into evidence if they are included in the indictment." Neither the prosecution nor the court made an effort to fit the uncharged misconduct into any not-for-character purpose.

Reporter's Comment

It is apparent that most cases have admitted uncharged misconduct perpetrated by the defendant upon the same victim. The few state cases that have held such evidence to be inadmissible are sex abuse cases. The result in these cases would be different under current federal law, given Federal Rules 413-415. Thus, I have found no case in which the inclusion of language in Rule 404(b) to permit proof of "disposition toward a particular individual" would have made a difference. Certainly there is no case which refuses to admit this evidence simply because it is not listed as a permissible purpose under Rule 404(b).

It could be argued, however, that the rationale for rejecting the "lustful disposition" rule in the four cases set forth above would be equally applicable to non-sexual evidence of "disposition toward a particular individual." Ignoring the argument that the rationale for rejection is probably sound (i.e., essentially "disposition" is really propensity, which is what the Rule is supposed to prohibit), the fact remains that no reported case that I could find has excluded evidence of disposition toward an individual when offered to prove a crime other than a sexual offense. Indeed, several of the state cases discussed above reject a lustful disposition exception, and then hold that such an exception is not necessary to admit evidence of misconduct toward the same victim--that is, same victim evidence is basically automatically admissible for a not-for-character purpose.

Therefore, it does not appear as if Rule 404(b) cries out for amendment. Whatever problem might exist for the prosecution has not been realized in the cases.

I did not draft an Advisory Committee Note for any proposed amendment to Rule 404. I decided to await discussion and deliberation by the Committee on whether Rule 404 should be amended and, if so, how. If the Committee approves an amendment, I will draft an Advisory Committee Note that could be reviewed by the Committee at the January, 1998 meeting.

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

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June 17, 1997

Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Hatch:

Six sections of the *Omnibus Crime Control Act of 1997* (S. 3) affect the rulemaking process, including five provisions that directly amend the Federal Rules of Practice and Procedure. On behalf of the Judicial Conference's Rules Committees, I had previously written to the House and Senate Judiciary Committees opposing two of the sections, which were included in earlier pending legislation. Additionally, the provisions of §§ 501, 502, 503, and 713 of the Act will be considered by either the Criminal or Evidence Rules Advisory Committee, as appropriate, at their fall meetings. Finally, a proposal to amend Rule 35(b) of the Criminal Rules (related to § 821 of the Act) has already been approved by the Advisory Committee on Criminal Rules and will be considered by the Standing Rules Committee at its June 19-20, 1997 meeting. For these reasons, I urge you and your colleagues on the Senate Judiciary Committee to decline approving these six sections of S. 3.

Composition of the Rules Committees (§ 505 of the Act)

Section 505 of S. 3 would require that the composition of the Appellate, Civil, Criminal, Evidence, and Standing Rules committees of the Judicial Conference include no fewer prosecutors than defenders. Our letter of August 21, 1995, commented on an identical provision contained in § 504 of the *Violent Crime Control and Law Enforcement Improvement Act of 1995* (S. 3) and § 604 of the *Local Law Enforcement Act of 1995* (S. 816). The following discussion tracks my earlier correspondence.

At its March 1995 session, the Judicial Conference approved the recommendation of the Standing Rules Committee to oppose legislation regulating the composition of committees constituted to advise the Conference and the Chief Justice on the rules governing practice and procedure in the federal courts. Chief Justice Rehnquist had noted in his 1994 year-end report, that "this system (rulemaking) has worked well, and ... Congress should not seek to regulate the composition of rules committees any more than it already has."

Section 505 of S. 3 raises important concerns relating to the Chief Justice's prerogative to appoint members to committees expressly established to provide advice to the Judicial Conference. The rules committees serve in an advisory capacity under the *Rules Enabling Act*, 28 U.S.C. §§ 2071-77. Members of the rules committees are appointed by the Chief Justice and include federal judges, practicing lawyers, law professors, state chief justices, and representatives from the Department of Justice. The tradition of rulemaking has been based on a disinterested expertise, as opposed to decisionmaking controlled by interest-groups. The recommendations of the rules committees have been given great respect and weight among the bench, bar, and academia. No small part of this deference is due to the neutral character of the committees, which is enhanced by a membership that represents a wide cross-section of the bench and bar and reflects the leadership of the federal judges.

Although rendering fair decisions is certainly not the exclusive province of federal judges, they do have the knowledge to act in the best interest of the public those courts serve. Judges are of course lawyers too, with substantial experience on both sides of the bench and many have substantial prosecutorial backgrounds. Placing a premium on the notion of representativeness, i.e., that there ought to be a "seat" on the rules committees for each identifiable faction of the bar, would undermine the integrity of the rulemaking process. Committees would be perceived as promoting self-interested goals rather than the interests of justice.

For these reasons, I urge you and your colleagues to reject a provision mandating a particular composition of the rules committees.

Equalize Number of Peremptory Challenges (§ 501 of the Act)

Under Criminal Rule 24(b), the prosecution is allowed 6 peremptory challenges of prospective petit jurors, while the defense is allowed 10 peremptory challenges in a felony case. Section 501 of S. 3 would amend Rule 24(b) to equalize the number of peremptory challenges available to the prosecution and the defense. On November 10, 1993, we had written to Congressman Schumer and his colleagues on the House Judiciary Subcommittee on Crime and Criminal Justice on a similar provision contained in the *Sexual Assault Prevention Act of 1993* (H.R. 688).

The rules committees' study of proposed amendments to Rule 24(b) goes back to 1973, when the Advisory Committee on Criminal Rules recommended that the number of peremptory challenges be fixed at five for each side in a felony case. The proposal was submitted to Congress later in 1976 after the Judicial Conference and the Supreme Court had approved the amendments. But Congress rejected the amendments. (Pub. L. No. 95-78 (1977).) The Senate Judiciary Committee noted in its report that: "Of all the proposed amendments, it (equalization of peremptory challenges) probably drew the most vigorous criticism in the House hearing and in correspondence received by this Committee." Senate Report No. 95-354, p. 9 (July 25, 1977).

The Senate Judiciary Committee was particularly concerned with the voir dire procedures and the claimed inability of counsel to ferret out biased prospective jurors.

In March 1990, the Advisory Committee on Criminal Rules again published for public comment proposed amendments to Rule 24(b) equalizing the number of peremptory challenges. Although the comments received were essentially adverse, the advisory committee nonetheless recommended that the proposed amendments be approved for submission to the Judicial Conference. The Standing Rules Committee, however, rejected unanimously the recommendation. The following arguments in favor of retaining the present rule were considered persuasive by the Standing Rules Committee:

- The defense's additional peremptory challenges are needed to offset the availability of the government's overwhelming resources to examine prospective jurors.
- The defendant has little control over the voir dire process that is exercised often by the judge in many trials.
- The defense's greater number of peremptory challenges represents a historical right.
- The committee was mindful of the Congressional rejection of a similar proposal in 1977.
- No convincing data was provided to demonstrate that the amendment was necessary.

This background discloses that over time the rules committees' position on equalizing peremptory challenges has changed. In part, the committees' views were based on deference to the perceived will of Congress on this subject. The Advisory Committee on Criminal Rules considered but declined to act on this subject most recently in 1993; nonetheless, it has now placed the matter on the agenda for its October 1997 meeting. I respectfully request that § 501 be withdrawn pending renewed consideration by the advisory committee.

Amendments of Evidence Rule 404(a) (§ 503 of the Act)

Section 503 would amend Evidence Rule 404(a) of the Federal Rules of Evidence to provide that "if an accused offers evidence of a pertinent character trait of the victim of the crime, evidence of a pertinent character trait of the accused" may be offered by the prosecution.

Under current law, the defendant does not necessarily open the door to his own character by proffering evidence about the character of the victim. The Advisory Committee on Evidence Rules discussed the proposal at its April 1997 meeting. A majority of the committee was favorably disposed to the general concept, although several expressed concern with the details on how the provision would work. For example, would the introduction by the accused of evidence, which only slightly involved a victim's character trait, permit the wholesale introduction of the defendant's character traits? The advisory committee has placed the proposal at the top of the

agenda for its meeting in October 1997. Under these circumstances, I respectfully request that section 503 be withdrawn pending consideration by the advisory committee.

Amendments of Evidence Rule 404(b) (§ 713 of the Act)

Section 713 would amend Evidence Rule 404(b) of the Federal Rules of Evidence to include "disposition toward a particular individual" among the valid purposes for admitting evidence of a person's uncharged misconduct. The Advisory Committee on Evidence Rules considered this proposal on a preliminary basis at its April 1997 meeting. Reservations were expressed by some committee members on the advisability of amending Rule 404(b) to add another permissible purpose to a list that is universally recognized as non-exclusive. The concern was that by adding another permissible purpose to the rule, courts might get the wrong impression and exclude evidence of uncharged misconduct if offered for a purpose that does not happen to be on the list.

The advisory committee will study the matter further, and has placed the proposal on the agenda for its October 1997 meeting. In preparation for that meeting, the reporter to the advisory committee will survey the case law to determine whether evidence of "disposition toward another" has been wrongly excluded in any reported cases. I respectfully request that § 713 be withdrawn pending consideration of that proposal by the advisory committee.

Six-Person Juries in Criminal Cases (§ 502 of the Act)

Section 502 would amend Rule 23(b) of the Federal Rules of Criminal Procedure to permit a six-person jury in a criminal case on the request of the defendant and with the approval of the government and the court. The Advisory Committee on Criminal Rules was advised of the proposal in the pending legislation. Neither the advisory committee nor the Judicial Conference has taken a position on it. Several members of the advisory committee expressed concern that such a change should first be considered under the rulemaking process. The advisory committee decided to consider the proposal at its October 1997 meeting, and I request that § 713 be withdrawn pending its review.

Reduction of Sentence for Substantial Assistance (§ 821)

Section 821 would amend Rule 35(b) of the Federal Rules of Criminal Procedure to permit consideration of a defendant's "substantial assistance in an investigation *of any offense or* the prosecution of another person who has committed an offense" when reviewing a motion to reduce sentence under this rule. The Advisory Committee on Criminal Rules published in August 1996 proposed amendments clarifying Rule 35(b) that would permit a court to consider both pre-sentence and post-sentence assistance provided by the defendant in determining whether to reduce the sentence. The proposed amendments will be considered by the Standing Rules Committee at its June 19-20, 1997, meeting for submission to the Judicial Conference and later to the Supreme Court for their consideration. The committee was advised of the pending

legislation, but decided not to take any action on it. Under these circumstances, I request that legislation be stayed until the judiciary's consideration of changes to Rule 35(b) has been completed and the provision is brought before the Congress in the regular course of the rulemaking process.

Conclusion

The Judicial Conference of the United States strongly supports and promotes the integrity of the rulemaking process as prescribed by the *Rules Enabling Act*. (28 U.S.C. §§ 2071-77.) The Act establishes a partnership between the courts and Congress designed to handle the daily business of the courts, which are matters of concern to all branches of the Government. This partnership has worked well.

The general rules of practice and procedure affect the daily business of the courts. The rules have evolved over time and now form an intricate, interlocking whole. Changes in one rule can have unforeseen and unintended consequences affecting other rules. Widespread opportunity to comment by those who work daily with the rules and meticulous care in drafting by experts in the area — as envisioned under the *Rules Enabling Act* — are the hallmarks of the rulemaking process.

Both the courts and Congress have a clear duty in rulemaking. The genius of the *Rules Enabling Act* rulemaking process is that it accords to each branch of Government its proper role in this shared endeavor. I hope that the cooperation on rulemaking between the Congress and the Judiciary will continue to remain strong.

Sincerely yours,

Alicemarie H. Stotler

Alicemarie H. Stotler
United States District Judge

cc: Committee on the Judiciary,
United States Senate

Item II E

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Memorandum To: Advisory Committee on the Federal Rules of Evidence
From: Dan Capra, Reporter
Re: Rule 703 and the Use of Inadmissible Information by an Expert
Date: September 11, 1997

At the April, 1997 meeting, the Evidence Rules Committee discussed a draft of a proposed amendment to Rule 703 that would regulate the use of that Rule as a "back door" hearsay exception. Suggestions were made to improve the draft, but no closure was reached on whether an amendment to Rule 703 should be recommended to the Standing Committee. It was agreed that discussion on the matter would continue at the November meeting.

This memorandum sets forth the draft amendment as it was left after Committee discussion. Also included is material from the Rule 703 memorandum issued for the April, 1997 meeting. This material includes a short overview of the case law and commentary on the hearsay exception potential of Rule 703. It also includes the extant rules and proposals for amending the Rule to control the use of inadmissible evidence relied upon by the expert.

I draw no conclusions and give no suggestions on whether the Rule should actually be amended.

Draft of Proposed Amendment to Evidence Rule 703 (as Revised by Committee Discussion)

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admissible. The court may apply the principles of Rule 403 to exclude or limit the presentation to the jury of otherwise inadmissible underlying facts or data. If the facts or data are admitted solely to explain or support the expert's opinion or inference, the court must, on request, so instruct the jury. Nothing in this rule restricts the presentation of underlying expert facts or data when offered by an adverse party.

Proposed Advisory Committee Comment

The amendment provides a structure for the court to employ when information not otherwise admissible is relied upon by an expert in forming an opinion. Courts have reached different results on how to treat this information. Compare *United States v. Rollins,* 862 F.2d 1282 (7th Cir. 1988) (admitting, as part of the basis of an FBI agent's expert opinion on the meaning of code language, the statements of an informant), with *United States v. 0.59 Acres of Land,* 109 F.3d 1493 (9th Cir. 1997) (error to admit hearsay offered as the basis of an expert opinion without a limiting instruction). Commentators have also taken different views. *See, e.g.,* Carlson, *Policing the Bases of Modern Expert Testimony,* 39 Vand.L.Rev. 577 (1986) (advocating limits on the jury's consideration of otherwise inadmissible evidence used as the basis for an expert opinion); Rice, *Inadmissible Evidence as a Basis for Expert Testimony: A Response to Professor Carlson,* 40 Vand.L.Rev. 583 (1987) (advocating unrestricted use of information reasonably relied upon by an expert).

When information is reasonably relied upon by an expert and yet is not independently admissible, a trial judge applying this Rule may treat the underlying bases of expert testimony in several different ways, depending on the balance of probative value on the one hand, and the risk of prejudice and

confusion on the other, in a particular case. First, the judge may permit the expert to disclose the details of the inadmissible information to the jury. If this option is chosen, a limiting instruction must be given upon request, to inform the jury that the underlying data may not be used for substantive purposes. Second, the judge may limit disclosure to a general reference to the source or nature of the inadmissible information. This option presents a compromise between the proponent's interest in educating the jury about the expert's opinion, and the opponent's concern that the evidence will be used improperly as substantive evidence. Finally, the trial court may preclude any mention at all of the inadmissible information, allowing only the expert opinion testimony that is predicated upon it. In determining the appropriate course, the court must consider the effectiveness of a limiting instruction under the particular circumstances.

The amendment governs the use before the jury of inadmissible information reasonably relied on by an expert. It is not intended to affect the admissibility of an expert's opinion, or to deprive an expert of the use of unadmitted hearsay to form and propound an expert opinion.

Use of Rule 703 as a "Back Door" Hearsay Exception

It is very difficult to assess, from a reading of the reported cases, whether Rule 703 is being routinely used as a de facto hearsay exception. Certainly, no court to my knowledge has explicitly stated that Rule 703 establishes an exception to the hearsay rule for information reasonably relied upon by an expert. See Epps, *Clarifying the Meaning of Federal Rule of Evidence 703*, 36 B.C.L.Rev. 53 (1994) (noting that while one commentator argues that Rule 703 should be read to establish a hearsay exception, "no located case makes this ruling explicitly").

Still, there seems to be a good deal of concern that courts are allowing juries to consider the basis of an expert's opinion as substantive evidence, even when that basis is not independently admissible. Much of this is from the commentators. See Epps, *supra;* Carlson, *Policing the Bases of Modern Expert Testimony*, 39 Vand.L.Rev. 577 (1986). The commentary points out that Rule 703 is not explicit as to how the basis of an expert's testimony can be used when that basis is not independently admissible. Many commentators are concerned that Rule 703 can be read to constitute an end-run around the entire remainder of the Federal Rules of Evidence, by the simple expedient of having an expert rely on information that would not otherwise be admissible. These commentators (most notably Professor Carlson) contend that experts should not be permitted to control the exclusionary rules of evidence in this manner.

Other commentators, most notably Professor Rice, contend that Rule 703 *should* be used as a hearsay exception. See Rice, *The Allure of Illogic: A Coherent Solution for Rule 703 Requires More than Redefining "Facts or Data"*, 47 Mercer L.Rev. 495 (1996). Professor Rice argues that if information is good enough to meet the reasonable reliance requirement of Rule 703, it is good enough to qualify for a hearsay exception. He also argues, citing the Advisory Committee Comment to Rule 803(4), that there is no meaningful distinction between evidence used for its truth and evidence used as the basis of a truthful expert's opinion.

There are some cases which, while not explicit on the point, appear to bear out the premise that Rule 703 can be (ab)used as a hearsay exception. That is, cases can be found which appear to admit an expert's underlying information as full substantive evidence. See, e.g., *United States v. Rollins*, 862 F.2d 1282 (7th Cir. 1988) (admitting, as part of the basis of an FBI agent's expert opinion on the meaning of code language, the statements of an informant); *Stevens v. Cessna Aircraft*, 634 F.Supp. 137 (E.D.

Pa. 1986) (holding, as properly admitted under Rule 703, an expert's testimony describing hearsay statements of friends and associates of a deceased pilot, in support of an opinion that the pilot was under a great deal of stress); *Durflinger v. Artiles*, 563 F.Supp. 322 (D.Kan. 1981) (admitting, as "validated by Rule 703 of the Federal Rules of Evidence," the deposition testimony of a psychiatrist containing an expert opinion and the basis of that opinion). The requirement of a limiting instruction does not appear to be applied in these cases.

Other cases can be found which admit only the expert's opinion itself as substantive evidence, while admitting the underlying facts for the limited purpose of explaining or supporting the expert's opinion. *See, e.g., Marsee v. United States Tobacco*, 866 F.2d 319 (10th Cir. 1989) (noting that inadmissible basis could be considered by the jury, but only for the purpose of evaluating the expert's testimony); *Bryan v. John Bean Div. of FMC Corp.*, 566 F.2d 541 (5th Cir. 1978) (citing Rules 703 and 705 as permitting disclosure of otherwise inadmissible hearsay evidence but only for the purpose of illustrating the basis of expert witness opinion).

Finally, there are reported appellate cases indicating that trial courts have sometimes permitted experts to bring inadmissible information before the jury without limitation. *See, e.g., U.S. v. 0.59 Acres of Land*, 109 F.3d 1493 (9th Cir. 1997) (error to allow hearsay to be admitted as the basis of an expert opinion, where no limiting instruction was given); *Hutchinson v. Groskin*, 927 F.2d 722 (2d Cir. 1991) (medical expert allowed to refer to letters from three prominent physicians, and to testify that his conclusion was consistent with those doctors; this was reversible error, since the tactic revealed hearsay to the jury and impermissibly bolstered the expert's testimony); *Boone v. Moore*, 980 F.2d 539 (8th Cir. 1992) (harmless error where trial court allowed a report relied on by a medical expert to be admitted into evidence).

Whether or not there is a prevalent use of Rule 703 as a backdoor hearsay exception, it is clear that there is substantial thought being given to the risk of abuse left by the Rule as written. This is indicated by the extensive commentary on the Rule, the several proposals that have been made to amend the Rule, and the fact that three states have rules which specifically deal with the use of inadmissible information relied upon by the expert. The next section of this memorandum describes these proposals and rules.

State Provisions--Minnesota

Minnesota Rule 703 is in two parts. Subdivision (a) is basically the same as Federal Rule 703. Subdivision (b) deals specifically with the treatment of inadmissible evidence reasonably relied upon by the expert. Subdivision (b) reads as follows:

> (b) Underlying expert data must be independently admissible in order to be received upon direct examination; provided that when good cause is shown in civil cases and the underlying data is particularly trustworthy, the court may admit the data under this rule for the limited purpose of showing the basis for the expert's opinion. Nothing in this rule restricts admissibility of underlying expert data when inquired into on cross-examination.

The Minnesota Rules Committee commentary to this subdivision is as follows:

> Although an expert may rely on inadmissible facts or data in forming an opinion, the inadmissible foundation should not be admitted into evidence simply because it forms the basis for an expert opinion. In civil cases, upon a showing of good cause, the inadmissible foundation, if trustworthy, can be admitted on direct examination for the limited purpose of establishing the basis for the opinion. See generally Carlson, Policing the Bases of Modern Expert Testimony, 39 Vand.L.Rev. 577 (1986); Federal Rules of Evidence: A Fresh Review and Evaluation, ABA Criminal Justice Section, Rule 703 and accompanying comment, 120 F.R.D. 299, at 369 (1987). In criminal cases, the inadmissible foundation should not be admitted. Admitting such evidence might violate the accused's right to confrontation. See State v. Towne, 142 Vt. 241, 453 A.2d 1133 (1982).

Reporter's Comment on the Minnesota Rule

This Rule says that inadmissible underlying information cannot be admitted on direct examination, even with a limiting instruction, unless, in a civil case, the data is particularly trustworthy, at which point it could then be admitted for the limited purpose of evaluating the expert opinion. There are several possible objections to the Rule. First, it would mean that in many cases an expert's conclusion could not receive full consideration by the jury; the jury would not know all of the information that the expert relied upon. See Allen and Miller, *The Common Law Theory of Experts: Deference or Education*, 87 Nw.U.L.Rev. 1131 (1993) (arguing that the Minnesota provision requires jurors to defer to an expert's conclusion more than is appropriate). Second, the trustworthiness exception is odd because if the information is trustworthy, it should be admissible anyway under the residual hearsay exception--there would then be no need to admit it for only the limited purpose of illustrating the expert's testimony. If the Rule is attempting to categorize information that is trustworthy enough to be mentioned to the jury as the basis of an expert's opinion, but not trustworthy enough to be admissible as residual hearsay, it is misguided. Any attempt to draft or maintain such a delineation is obviously fraught with practical difficulty.

Perhaps the reference to trustworthiness in the Minnesota rule refers to evidence that would be excluded not because it is hearsay, but because of some other exclusionary principle, such as Rule 407. If that is the case, there seems no reason to treat evidence excluded on one ground from evidence excluded on another, assuming that all such evidence can be reasonably relied upon by the expert.

State Provisions--Kentucky

Kentucky Rule 703 provides as follows:

Rule 703 Bases of opinion testimony by experts.

(a) The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

(b) If determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data relied upon by an expert pursuant to subdivision (a) may at the discretion of the court be disclosed to the jury even though such facts or data are not admissible in evidence. Upon request the court shall admonish the jury to use such facts or data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference.

(c) Nothing in this rule is intended to limit the right of an opposing party to cross-examine an expert witness or to test the basis of an expert's opinion or inference.

Reporter's Comment on Kentucky Provision

The Kentucky provision is like the Minnesota provision in establishing a category of evidence relied on by an expert which is trustworthy enough to be put before the jury for the limited purpose of evaluating the expert's opinion, yet not trustworthy enough to be admissible as residual hearsay. It thus creates the same practical problems discussed above in the comment on the Minnesota provision--a two-tiered standard that seems too difficult to apply.

The Kentucky provision has some possible advantages, however. First, it mentions that privilege rules remain applicable. Second, it usefully emphasizes that a limiting instruction must be given upon request. Third, it is helpful in that it tells trial judges that the underlying information need not be disclosed in all its details.

State Provisions--Texas

Texas Rule of Criminal Evidence 705 specifically addresses the use at trial of inadmissible information reasonably relied upon by an expert. The Texas Rule provides as follows:

Texas Rule of Criminal Evidence 705(d)

(d) Balancing Test; Limiting Instructions. When the underlying facts or data would be inadmissible in evidence for any other purpose than to explain or support the expert's opinion or inference, the court shall exclude the underlying facts or data if the danger that they will be used for an improper purpose outweighs their value as explanation or support for the expert's opinion. If the facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

Reporter's Comment on the Texas provision:

This Rule takes a different approach from that of Kentucky and Minnesota. Instead of trying to classify information based on various levels of trustworthiness, courts are instructed generally to consider the risk of use for an improper purpose against the importance of explaining the basis of an expert's opinion. Thus, a Rule 403-type balancing process is established--though it is not exactly a Rule 403 balance, because under this provision the danger of an improper purpose need only outweigh, not *substantially* outweigh, the probative value for the information to be excluded.

A flexible balancing process is a far better solution, it would seem, than the complicated trustworthiness-based provisions found in Minnesota and Kentucky--again assuming that an amendment is a worthwhile effort in the first place. However, providing a balancing test that is different from the usual 403 test should only be done in compelling circumstances--it is obviously confusing to have a number of different balancing tests floating around.

It is unclear why the Texas provision applies only to criminal cases. There is no parallel provision in the Texas Civil Rules. Certainly the concerns of misuse of inadmissible information relied upon by an expert arise in civil as well as criminal cases.

Proposed Revision of Rule 703--Wisconsin

The Judicial Council of Wisconsin proposed an amendment to Wisconsin Rule 703 to prescribe how and whether inadmissible information relied upon by an expert can be used before the jury. The proposal was in response to a conflict in the Wisconsin cases. Some cases allowed unrestricted use of the inadmissible information, some allowed limited use with a limiting instruction, and some allowed no use at all. The proposal was withdrawn because the Wisconsin Supreme Court decided a case and in that case set forth standards which were essentially drawn from the proposed rule. See Buratti, *What is the Status of "Inadmissible" Bases of Expert Testimony?*, 77 Marquette L.Rev. 531 (1994).

The proposed Wisconsin Rule would have added a subdivision (2) to Rule 703, providing as follows:

> Where the facts or data underlying the expert opinion of inference are otherwise inadmissible in evidence but are of a type reasonably relied upon by such experts as provided in subdivision (1), the judge, after an analysis of the considerations set forth in Rule 403, may permit some or all of this information to be disclosed to the jury under this subsection or under Rule 705, for the limited purpose of establishing the basis for the expert's opinion or inference.

The Judicial Council Note to the Proposal was quite helpful. It stated as follows:

A trial judge may address the underlying bases of expert testimony in several different ways. First, the judge may permit the expert to disclose the details of the inadmissible bases to the jury. If this option is chosen, a limiting instruction must be given to inform the jury that the underlying data may not be used for substantive purposes. Second, the judge may limit disclosure to a general reference to the source or nature of the basis. This option presents a compromise between the proponent's interest in educating the jury about the expert's opinion and the opponent's concern that the evidence will be misused. Finally, the trial court may preclude any mention at all of the inadmissible bases, allowing only the expert opinion testimony that is predicated upon it.

Reporter's Comment on Wisconsin Proposal:

Assuming without deciding that Rule 703 should be amended, the Wisconsin proposal has much to commend it. It gives the trial judge the necessary flexibility to treat the inadmissible information in a variety of ways, depending on the balance of probative value and prejudicial effect in the specific circumstances. The Council Note is especially helpful in instructing judges as to the appropriate options. The reference in the Rule to the factors discussed in Rule 403 is, at least arguably, an effective shorthand device.

Proposed Revision of Rule 703--ABA Committee

In 1987, the ABA Committee on Rules of Criminal Procedure and Evidence proposed the following amendment to Federal Rule 703:

(a) Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence, in order for the opinion or inference to be admissible.

(b) Admissibility of underlying facts or data.

Except as provided hereinafter in this Rule, the facts and data underlying an expert's opinion or inference must be independently admissible in order to be received in evidence on behalf of the party offering the expert, and the expert's reliance on facts or data that are not independently admissible does not render those facts or data admissible in that party's behalf.

(1) Exception. Facts or data underlying an expert's opinion or inference that are not independently admissible may be admitted in the discretion of the court on behalf of the party offering the expert, if they are trustworthy, necessary to illuminate the testimony, and not privileged. In such instances, upon request, their use ordinarily shall be confined to showing the expert's basis.

(2) Discretion whether or not independently admissible. Whether underlying facts and data are independently admissible or not, the mere fact that the expert witness has relied upon them does not alone require the court to receive them in evidence on request of the party offering the expert.

(3) Opposing party unrestricted. Nothing in this Rule restricts admissibility of an expert's basis when offered by a party opposing the expert.

The ABA Commentary to the proposed amendment states, in pertinent part:

> While some of [the] underlying records will have been offered and received by the time the expert testifies, others will not. In selected cases, counsel may have formally introduced none of the supporting data, especially where it comes from offices in distant parts of the country.

In these circumstances, is the lawyer who calls an expert entitled to read the underlying records into evidence?

Applying strict principles of expert, hearsay and confrontation law, the answer would appear in many cases to be "no." While the underlying records might frequently qualify as business records, and business records are admissible under an exception to the hearsay rule, virtually every formulation ordinarily requires an authenticating witness from the office which generated the record. Such a person knows the regularity of the entries contained in the offered record, their timeliness, and the sort of knowledge possessed by individuals participating in the recordkeeping process. For this reason, business record acts and evidence codes in the usual case require the custodian of the records to testify, or another qualified witness from the office which prepared the record.

Nothing said here is intended to deprive an expert of the use of unadmitted hearsay to form and propound an expert opinion. Rather, the analysis speaks to the impropriety of receiving in wholesale fashion the unauthenticated background data as a substantive exhibit or substantive evidence, received for the truth of the matter, on behalf of the party that offered the expert's courtroom opinion. Once the expert, during direct examination, identifies the sources for his conclusions, the reference to outside material ordinarily should be complete. Especially in criminal cases, to permit the expert to go further and recite extensively from another person's report may do significant damage to the confrontation clause values of the Constitution. The back door introduction of the contents of a nontestifying expert's report, without producing the author of the material, can in many cases, impinge on the defendant's Sixth Amendment rights.

To help protect against litigation unjustifiably based upon unsworn allegations contained in the report or materials of a person not subject to cross-examination, it is timely to consider careful revision of Federal Evidence Rule 703. Such revision would lend a degree of relative consensus to expert witness practice, and help settle the question on whether Rule 703 creates a giant automatic exception to the hearsay rule for otherwise inadmissible hearsay reports and opinions.

Reporter's Comment on ABA Proposal:

The clause added to the end of the current Federal Rule is helpful in distinguishing the opinion--which can be admissible even though the expert relies on inadmissible evidence--from the underlying information itself. The first clause of the new subdivision is odd, however, since it says the same thing twice; one clause or the other would appear to do. The exception to the general rule of exclusion has the same flaw as is found in the Minnesota and Kentucky provisions--it establishes a category of evidence trustworthy enough to be admitted to illustrate the opinion, but not trustworthy enough to be admitted for its truth.

Subdivision (b)(2) is anomalous because it provides that a judge can exclude the underlying information even if it is independently admissible. This is to say the least confusing, and to the extent it is intended to give the judge discretion to exclude evidence which might be admissible but cumulative, the judge has that power independent of this proposal.

Proposed Revision of Rule 703--Professor Carlson

In a series of articles, Professor Carlson has suggested amending Rule 703 to provide that the current rule would be set forth as subdivision (a), and a new subdivision (b) added, to read as follows:

(b) Nothing in this rule shall require the court to permit the introduction of facts or data into evidence on grounds that the expert relied on them. However, they may be received into evidence when they meet the requirements necessary for admissibility prescribed in other parts of these rules.

See Carlson, *Experts as Hearsay Conduits: Confrontation Abuses in Opinion Testimony,* 76 Minn.L.Rev. 859 (1992).

Reporter's Comment on Carlson Proposal:

This proposal does not really say what Professor Carlson wants it to say. He wants it to say that inadmissible information relied on by an expert cannot be admitted into evidence. But the proposal says that nothing requires its admission; the Rule provides no ground for exclusion. On the other hand, if the proposal were to say that inadmissible information could never be introduced into evidence, it would have the drawback of depriving the jury of information that it needs to properly assess the weight of the expert's opinion.

Proposed Revision of Rule 703--Evidence Project

The American University School of Law Evidence Project would amend the Federal Rules to provide a new hearsay exception for information reasonably relied upon by an expert in forming her opinion. This would actually be accomplished by two separate amendments. Rule 703 would be amended to add the following provision at the end of the current Rule:

> The facts or data need not have been proven beforehand, however, in the absence of admissible proof, a specific demonstration of reliability must be made of otherwise inadmissible hearsay statements pursuant to Rule [new hearsay exception]. Evidence that is inadmissible on grounds other than reliability, may not be relied upon by an expert witness if disclosure of that evidence would be inconsistent with the purposes of the rule excluding it.

The new hearsay exception would be added to Rule 803 and would provide that the following type of hearsay would not be excluded by the hearsay rule:

> Statement Employed in Expert Testimony. A statement employed by an expert in arriving at a conclusion offered by that expert at trial, to the extent that (a) the statement is of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject,

and (b) the expert has demonstrated to the presiding judge a basis for concluding that the statement possesses substantial guarantees of trustworthiness.

Reporter's Comment on Evidence Project Proposal:

Obviously this is the most radical of all the proposals. It is up to the Committee to determine whether providing a hearsay exception for information reasonably relied on by an expert is good policy or not. The proposal has some virtues, however. First, it eliminates the insubstantial distinction, already recognized in the Advisory Committee Comment to Evidence Rule 803(4), between evidence admissible for its truth and evidence admissible only to illustrate the basis of an expert's opinion. Second, it avoids the complications of a two-tiered trustworthiness standard, such as is found in the Kentucky and Minnesota versions of Rule 703.

Reporter's First Draft of Proposed Amendment to Rule 703

Note: This initial draft was subject to several comments at the April meeting. The "working draft" that resulted from Committee discussions is set forth on page 2 of this memo. The initial draft, set forth below, is included for informational purposes.

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence, in order for the opinion or inference to be admissible. When the underlying facts or data would be inadmissible in evidence for any other purpose than to explain or support the expert's opinion or inference, the court may exclude, or limit, the use of the underlying facts or data if the danger that they will be used for an improper purpose substantially outweighs their value as explanation or support for the expert's opinion. If the facts or data are disclosed before the jury solely to explain or support the expert's opinion or inference, a limiting instruction by the court must be given upon request. Nothing in this rule restricts admissibility of underlying expert data when offered by an adverse party.

Item II F

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Memorandum To: Advisory Committee on the Federal Rules of Evidence
From: Dan Capra, Reporter
Re: The Witness Requirement of Rule 803(6)
Date: September 11, 1997

At the April, 1997 meeting, the Committee considered the possibility of amendments to Rule 803(6) and 902, which would permit introduction of business records without the necessity of producing a qualified witness at trial. Most members of the Committee were in favor of the concept of self-authentication of business records, while a few were opposed. Those in favor of the proposal contended that self-authentication would avoid the wasteful process of presenting a qualified witness to give essentially conclusory and perfunctory testimony. Members also noted that the trend in the states is toward permitting certification. Others noted the anomaly under current law--that foreign business records can be proved through certification in criminal cases, whereas domestic business records cannot be proved through certification in any case.

The Committee members opposed to the proposal were concerned that permitting proof of business records through certification would shift the burden of proof on admissibility from the proponent to the opponent. The response to these concerns was that the protections included in the draft would provide the proponent with more of a real opportunity to attack the trustworthiness of a proffered record than exists under the current law.

A subcommittee was appointed to consider whether language could be added to the draft to require foundation through a qualified witness where a legitimate question is raised as to the trustworthiness or authenticity of the record.

This memorandum sets forth an alternative that amends the proposal of April, 1997, to include the "genuine question" protection suggested at the April meeting. The result is a revised version of Rules 902(11) and 902(12).

It is to be noted, however, that most members of the subcommittee were opposed to the revision, for reasons discussed below. Therefore, the April versions of the proposal, approved by most members of the subcommittee, are also included in this memorandum. It was decided that in light of the discussion at the last meeting, the Committee as a whole should consider both alternatives.

The memorandum also reproduces the background information set forth in the memorandum supplied for the April meeting, including a short review of the case law, and state provisions permitting certification of business records.

Proposed Amendment to Rule 803(6) for the Committee to Consider

Note: This proposal has been amended slightly from the April version to include a reference to statutory authority, in light of the fact that self-authentication of business records in criminal cases is provided by statute.

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

Proposed Advisory Committee Note Concerning an Amendment to Rule 803(6)

The amendment provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses. Under current law, courts have required foundation witnesses to testify. See, e.g., *Tongil Co., Ltd. v. Hyundai Merchant Marine Corp.*, 968 F.2d 999 (9th Cir. 1992) (reversing a judgment based on business records where qualified person filed an affidavit but did not testify). Protections are provided by the authentication requirements of Rule 902(11) for domestic records, Rule 902(12) for foreign records in civil cases, and 18 U.S.C. § 3505 for foreign records in criminal cases.

Proposed Amendment to Rule 902 (Revised Version)

(11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity, which would be admissible under Rule 803(6), and which the custodian thereof or another qualified person certifies under oath--

(A) was made at or near the time of the occurrence of the matters set forth, by or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record in evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record available for inspection sufficiently in advance of its offer in evidence to provide an adverse party with a fair opportunity to challenge it. A record is not self-authenticating under this paragraph if a genuine question is raised as to the trustworthiness or authenticity of the record.

Proposed Advisory Committee Comment to Rule 902(11) (Revised Version)

The Rule provides a means for parties to authenticate domestic records of regularly conducted activity other than through the testimony of a foundation witness. See the proposed amendment to Rule 803(6). The notice requirement is intended to provide the opponent of the evidence with a full opportunity to test the adequacy of the foundation set forth in the certification. Testimony from a foundation witness is required if a genuine question is raised as to either the trustworthiness or the authenticity of the record. Cf. Rule 1003.

Proposed Rule 902(12) (Revised Version)

(12) Certified foreign records of regularly conducted activity. In a civil case, the original or a duplicate of a foreign record of regularly conducted activity which would be admissible under Rule 803(6), and which is accompanied by a written declaration by the custodian thereof or another qualified person that the record--

(A) was made at or near the time of the occurrence of the matters set forth, by or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The record must be signed in a manner which, if falsely made, would subject the maker to criminal penalty under the laws of the country where the record is signed. A party intending to offer a record in evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record available for inspection sufficiently in advance of its offer in evidence to provide an adverse party with a fair opportunity to challenge it. A record is not self-authenticating under this paragraph if a genuine question is raised as to the trustworthiness or authenticity of the record.

Proposed Advisory Committee Comment to Rule 902(12 (Revised Version)

The Rule provides a means in civil cases for parties to authenticate foreign records of regularly conducted activity other than through the testimony of a foundation witness. See the proposed amendment to Rule 803(6). The notice requirement is intended to provide the opponent of the evidence with a full opportunity to test the adequacy of the foundation set forth in the certification. Testimony from a foundation witness is required if a genuine question is raised as to either the trustworthiness or the authenticity of the record. Cf. Rule 1003.

The Rule applies only to civil cases. Certification of foreign records of regularly conducted activity in criminal cases is currently provided for by statute. See 18 U.S.C. § 3505.

Reporter's Comment on Revision From Initial Proposed Amendment

The revision borrows language from the best evidence rule and provides that self-authentication is not permissible if a genuine question is raised as to the trustworthiness or authenticity of the record. Most members of the subcommittee are of the view that the revision should be rejected. They see two basic problems with the added language.

First, there is no such language in 18 U.S.C. § 3505, which provides for self-authentication of foreign records in criminal cases. One of the driving forces behind the amendment of these Rules is the anomaly that foreign business records are admissible without a witness in criminal cases, while a foundation witness is required for all other business records in all other cases. If the goal of the amendment is the salutary one of consistency in the treatment of business records, this goal is undermined by adding a requirement in the Federal Rule that is not found in the statute. Of course, the response could be to apply this extra requirement to foreign business records in criminal cases as well. But this raises the sensitive problem of amending a statute by way of a Federal Rule of Evidence. The Committee should probably be reticent about proposing a rule that would have the effect of amending a statute.

Second, the amendment does not appear to be necessary. The proposed amendment already incorporates the protections of Rule 803(6), specifically the trustworthiness requirement of that Rule. There seems to be little gain, and perhaps a good deal of confusion, in adding another trustworthiness requirement on top of that.

Amendments As Proposed for the April, 1997 Meeting

Note: The Proposal for Rule 803(6) is set forth on page 3 of this memorandum. What follows is the proposed amendments and commentary respecting Rule 902 that were considered at the April Advisory Committee Meeting.

(11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity, which would be admissible under Rule 803(6), and which the custodian thereof or another qualified person certifies under oath--

(A) was made at or near the time of the occurrence of the matters set forth, by or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record in evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record available for inspection sufficiently in advance of its offer in evidence to provide an adverse party with a fair opportunity to challenge it.

Proposed Advisory Committee Comment to Rule 902(11)

(April, 1997)

The Rule provides a means for parties to authenticate domestic records of regularly conducted activity other than through the testimony of a foundation witness. See the proposed amendment to Rule 803(6). The notice requirement is intended to provide the opponent of the evidence with a full opportunity to test the adequacy of the foundation set forth in the certification.

Proposed Rule 902(12) (April, 1997 version).

(12) Certified foreign records of regularly conducted activity. In a civil case, the original or a duplicate of a foreign record of regularly conducted activity which would be admissible under Rule 803(6), and which is accompanied by a written declaration by the custodian thereof or another qualified person that the record--

(A) was made at or near the time of the occurrence of the matters set forth, by or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice. The record must be signed in a manner which, if falsely made, would subject the maker to criminal penalty under the laws of the country where the record is signed.A party intending to offer a record in evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record available for inspection sufficiently in advance of its offer in evidence to provide an adverse party with a fair opportunity to challenge it.

Proposed Advisory Committee Comment to Rule 902(12) (April, 1997)

The Rule provides a means for parties to authenticate foreign records of regularly conducted activity other than through the testimony of a foundation witness. See the proposed amendment to Rule 803(6). The notice requirement is intended to provide the opponent of the evidence with a full opportunity to test the adequacy of the foundation set forth in the certification. The Rule applies only to civil cases. Certification of foreign records of regularly conducted activity in criminal cases is currently provided for by statute. See 18 U.S.C. § 3505.

Case Law Under Current Rule 803(6)

Currently, Rule 803(6) provides that the foundation requirements of the Rule must be "shown by the *testimony* of the custodian or other qualified witness". Most courts have construed this language to mean that business records cannot be admitted without the in-court testimony of a custodian or other qualified witness. See, e.g., *Tongil Co., Ltd. v. Hyundai Merchant Marine Corp.*, 968 F.2d 999 (9th Cir. 1992) (reversing a judgment based on business records proven by way of affidavit of a qualified person). The Court in *Tongil* reasoned that the foundation requirements of Rule 803(6) could not be proven through hearsay declarations at trial, since such a practice would itself violate the hearsay rule. See also *Kehm v. Proctor & Gamble Mfg. Co.*, 724 F.2d 613 (8th Cir. 1983) (Rule 803(6) calls for a foundation to be made through the testimony of a live witness).

Some courts have, in limited and unusual circumstances, permitted admission of business records without the testimony of a foundation witness. The leading case for a more permissive view of Rule 803(6) is *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3d Cir. 1983), where the court stated:

> It would make little sense to require live witness testimony every time a business record is offered when, from the other materials open for the court's consideration, it can make the required finding to its own satisfaction.

The Ninth Circuit in *Tongil* distinguished *Japanese Products* as a summary judgment case. But there are a few cases that have employed the liberal *Japanese Products* interpretation of Rule 803(6) at trial as well. See e.g., *United States v. Pelullo*, 964 F.2d 193 (3d Cir. 1992) (noting that live foundation testimony is not required, even in a criminal case, but reversing a conviction nonetheless because the government made no attempt, through the testimony of a witness or otherwise, to prove that the foundation requirements of the business records exception were met); *United States v. Mendel*, 746 F.2d 155 (2d Cir. 1984) (stating that foundation testimony is not required "when circumstances otherwise demonstrate trustworthiness"); *FDIC v. Staudinger*, 797 F.2d 908 (10th Cir. 1986) (foundation for admissibility of a business record was properly based on judicial notice that bank records are regularly kept); *United States v. Seelig*, 622 F.2d 207 (6th Cir. 1980) (party-admission made during discovery established foundation for business records).

The problem with admitting business records in the absence of foundation testimony is that it conflicts with the plain language of the Rule. The Rule sets forth the foundation requirements, and then specifically states that these

requirements must be shown by "testimony." The provision concerning "testimony" represents an additional requirement that was not included in predecessor statutes--therefore it must have been intended to mean something. Thus, if the Committee decides, as a policy matter, that a foundation witness should not be a sine qua non for admissibility of a business record, the Rule must be amended to reach that result. No reliance can fairly be placed on a few scattered cases, which are contrary to the Rule on its face.

18 U.S.C. § 3505--Foreign Business Records in Criminal Cases

It must be kept in mind that foreign business records are already proveable in criminal cases through a certification process. See 18 U.S.C. § 3505. This statute has been routinely upheld against confrontation clause challenges. See, e.g., *United States v. Chan*, 680 F.Supp. 521 (E.D.N.Y. 1988). Section 3505 provides as follows:

3505. Foreign records of regularly conducted activity

(a)(1) In a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that--

(A) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;

(B) such record was kept in the course of a regularly conducted business activity;

(C) the business activity made such a record as a regular practice; and

(D) if such record is not the original, such record is a duplicate of the original;

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

(2) A foreign certification under this section shall authenticate such record or duplicate.

(b) At the arraignment or as soon after the arraignment as practicable, a party intending to offer in evidence under this section a foreign record of regularly conducted activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.

(c) As used in this section, the term--

(1) "foreign record of regularly conducted activity" means a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country;

(2) "foreign certification" means a written declaration made and signed in a foreign country by the custodian of a foreign record of regularly conducted activity or another qualified person that, if falsely made, would subject the maker to criminal penalty under the laws of that country; and

(3) "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Any amendment of Rule 803(6) and corresponding authentication rules must take account of the existence of section 3505. The proposal in this memorandum chooses to cover authentication of all records *not* covered by section 3505, leaving section 3505 to a mention in the Committee Note. This is in accordance with the view of the Standing Committee that it is generally unwise to refer to specific statutes in the text of a Federal Rule.

State Provisions

States treating the witness requirement of the business records exception differently from the federal model fall into three categories. Some states provide for proof by affidavit for specific types of records, most commonly hospital records. See, e.g., Alabama Code § 12-21.5; KRS 422.310 (Ky.); 16 Maine Rev. Stat. § 357; Wis.Stat.Ann. § 908.06(m). These particularized rules provide little guidance for an amendment of Rule 803(6). They deal with specific kinds of records that routinely arise in state litigation; it seems unlikely that this Committee could isolate the types of records most worthy of proof through affidavit in a federal court.

A few states simply drop the language "all as shown by the testimony of the custodian or other qualified witness" from their version of the Rule. See, e.g., Conn.Stat. Ann. § 52-180; Ga.Stat.Ann. 24-3-14. Assuming arguendo that Rule 803(6) should be amended to permit foundation through certification, that goal could probably not be accomplished successfully at this point by simply deleting the language concerning testimony from the Rule. There would be no explicit language authorizing the proof of foundation requirements by way of certification. This could leave courts so inclined to hold, as many have already, that a business record cannot be proven through hearsay evidence. It makes little sense to go to all the trouble of an amendment only to leave the amended rule purposely vague.

At least three states explicitly provide for the potential admissibility of any business record through certification. These provisions are set forth below.

Indiana

The Indiana version of the Rule uses the simple expedient of adding the language "or affidavit" after the word "testimony" in the rule. That is, after setting forth the foundation requirements, the rule reads: "all as shown by the testimony or affidavit of the custodian or other qualified witness." The Committee Note to the Indiana Rule indicates that the intent was to "eliminate the need for time-consuming foundation witnesses."

The Indiana Rule also adds two provisions to Rule 902, to provide for self-authentication of business records proven by way of affidavit. Indiana Rule 902(9) specifies that the following domestic records are self-authenticating:

> **(9) Certified domestic records of regularly conducted activity.** Unless the source of information or the circumstances of preparation indicate a lack of trustworthiness, the original or a duplicate of a domestic record of regularly conducted activity within the scope of Rule 803(6), which the custodian thereof or another qualified person certifies under oath (i) was made at or near the time of the occurrence of the matters set forth, by or from information transmitted by, a person with knowledge of those matters; (ii) is kept in the course of the regularly conducted activity; and (iii) was made by the regularly conducted activity as a regular practice. A record so certified is not self-authenticating under this subsection unless the proponent makes an intention to offer it known to the adverse party and makes it available for inspection sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to challenge it.

Indiana Rule 902(10) provides for self-authentication of foreign business records:

> **(10) Certified foreign records of regularly conducted activity.** Unless the source of information or the circumstances of preparation indicate lack of trustworthiness, the original or a duplicate of a foreign record of regularly conducted activity within the scope of Rule 803(6), which is accompanied by a written declaration by the custodian thereof or another qualified person that the record (i) was made at or near the time of the occurrence of the matters set forth, by or from information transmitted by, a person with knowledge of those matters; (ii) is kept in the course of the regularly conducted activity; and (iii) was made by the regularly conducted activity as a regular practice. The record must be signed in a foreign country in a manner which, if falsely made, would subject the maker to criminal penalty under the laws of that country, and the signature certified by a government official * * *. The record is not self-authenticating under this subsection unless the proponent makes his or her intention to offer it known to the adverse party and makes it available for inspection sufficiently in advance of its offer in evidence to prove the adverse party with a fair opportunity to challenge it.

Reporter's Comment on Indiana Rule:

The Indiana Rule was used as a model for the April draft that was reviewed by the Committee. The following changes were made:

1. The beginning "unless" clause was dropped because the trustworthiness clause is already included in Rule 803(6). There is no need to duplicate it in the authentication rule.

2. The notice requirement was slightly modified to track the notice provision in 18 U.S.C. 3505.

3. The particular requirements of the certification were broken out in letter form (A,B,C), rather than small roman numeral form (i, ii, iii), since the former is consistent with other Federal Rules of Evidence. See, e.g., Rule 803(8).

Maryland

Maryland Rule 803(6) drops the testimony requirement from the Rule. Maryland Rule 902(11) provides for self-authentication of the following:

> **(11) Certified Records of Regularly Conducted Business Activity**. The original or a duplicate of a record of regularly conducted business activity, within the scope of [the business records exception], which the custodian or another qualified individual certifies (A) was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters, (B) is made and kept in the course of the regularly conducted business activity, and (C) was made and kept by the regularly conducted business activity as a regular practice, unless the sources of information or the method or circumstances of preparation indicate lack of trustworthiness; but a record so certified is not self-authenticating under this subsection unless the proponent makes an intention to offer it known to the adverse party and makes it available for inspection sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to challenge it.

Reporter's Comment on Maryland Rule

The problem with the Rule is that it lumps all business records together, and sets forth no special procedure for the certification of foreign business records. This would not work very well in the Federal system, where 18 U.S.C. 3505 is already in operation in criminal cases.

Texas

Texas Civil and Criminal Rules 803(6) both explicitly permit proof of business record foundation requirements through affidavit. The witness clause of the Texas provision states: "all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902(10)."

Texas Criminal and Civil Rules 902(10) provide for self-authentication of the following:

(10) Business Records Accompanied by Affidavit.

(a) Records or Photocopies; Admissibility; Affidavit; Filing. Any record or set of records or photographically reproduced copies of such records, which would be admissible under Rule 803(6) or (7) shall be admissible in evidence in any court of this state upon the affidavit of the person who would otherwise provide the prerequisites of Rule 803(6) or (7), that such records attached to such affidavit were in fact so kept as required by Rule 803(6) or (7), provided further, that such record or records along with such affidavit are filed with the clerk of the court for inclusion with the papers in the cause in which the record or records are sought to be used as evidence at least fourteen days prior to the day upon which trial of said cause commences, and provided the other parties to said cause are given prompt notice by the party filing same of the filing of such record or records and affidavit, which notice shall identify the name and

employer, if any, of the person making the affidavit and such records shall be made available to the counsel for other parties to the action or litigation for inspection and copying. The expense for copying shall be borne by the party, parties or persons who desire copies and not by the party or parties who file the records and serve notice of said filing, in compliance with this rule. Notice shall be deemed to have been promptly given if it is served in the manner contemplated by [procedural rule providing for manner of notice], fourteen days prior to commencement of trial in said cause.

(b) Form of Notice. [Sample affidavit]

Comment by Reporter on Texas Rule:

The Rule is not specific enough in setting forth what an affidavit must include. It simply refers to the admissibility requirements of the hearsay exception. It would seem better to specifically state in the Rule what is required in the certification to establish authenticity. Also, the Rule does not treat foreign records separately.

One matter that the Texas Rule does treat is admissibility of the absence of business records under Rule 803(7). If that is a problem that is worth treating, the proposals currently under consideration by the Committee would have to be substantially amended, perhaps along the lines of the general language of the Texas provision. This is because the certification requirements in the proposals are set forth envision the existence of business records, not their absence.

It should be noted that 18 U.S.C. 3505 does not cover proof of the absence of foreign business records. In order to maintain consistency, it would appear that any proposal to add new provisions to Rule 902 should track the statutory provision as closely as possible. This would mean that absence of business records should not be covered in these provisions. Since proof of the absence of business records is so rarely offered, it would seem that little is lost by failing to provide for self-authentication of such evidence.

Item IV

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Memorandum To: Advisory Committee on the Federal Rules of Evidence
From: Dan Capra, Reporter
Re: Incorrect and/or misleading Advisory Committee Notes
Date: September 5, 1997

The Committee requested that I prepare a document indicating all of the Advisory Committee Notes that either contained inaccuracies when written, or that became misleading when Congress changed the Advisory Committee proposal. The attached document is in response to that request.

The document sets forth all of the Advisory Committee Notes that are problematic. It describes the problem and then suggests Editorial Comments to be placed within each of the offending Notes. The document is written as if it were to be submitted to publishers of the Federal Rules, to indicate where editorial comments should be placed.

Advisory Committee Notes That May Require Editorial Comment

By Daniel J. Capra, Reporter, Judicial Conference Advisory Committee on Evidence Rules

1. Advisory Committee Note to Rule 104(b)

Problem--Incorrect word that might change the meaning.

Advisory Committee's Note

* * *

If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that given fact questions generally. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not **[sic]** established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration

2. Advisory Committee Note to Rule 201(g)

Problem--The Rule as enacted distinguishes between civil and criminal cases.

Advisory Committee's Note

* * *

Authority upon the propriety of taking judicial notice against an accused in a criminal case with respect to matters other than venue is relatively meager. Proceeding upon the theory that the right of jury trial does not extend

to matters which are beyond reasonable dispute, the rule does not distinguish between criminal and civil cases. People v. Mayes, 113 Cal. 618, 45 P. 860 (1896); Ross v. United States, 374 F.2d 97 (8th Cir. 1967). Cf. State v. Main, 94 R.I. 338, 180 A.2d 814 (1962); State v. Lawrence, 120 Utah 323, 234 P.2d 600 (1951). **[Editor's Note: This treatment was rejected by the Congress, which provided that judicial notice is not conclusive in criminal cases.]**

3. Advisory Committee Note to Rule 301

Problem--Internal reference to Rule 303, which was never adopted.

Advisory Committee's Note

* * *

This rule governs presumptions generally. See Rule 302 for presumptions controlled by state law and Rule 303 for those against an accused in a criminal case. **[Editor's Note: The latter rule was deleted by Congress.]**

Problem: The Rule as enacted adopts the "bursting bubble" view of presumptions rather than the burden-shifting approach,

Presumptions governed by this rule are given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it. The same considerations of fairness, policy, and probability which dictate the allocation of the burden of the various elements of a case as between the prima facie case of a plaintiff and affirmative defenses also underlie the creation of presumptions. These considerations are not satisfied by giving a lesser effect to presumptions. Morgan and Maguire, Looking Backward and Forward at Evidence, 50 Harv. L. Rev. 909, 913 (1937); Morgan, Instructing the Jury upon Presumptions and Burden of Proof, 47 Harv. L. Rev. 59, 82 (1933); Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan. L. Rev. 5 (1959). **[Editor's Note: This approach was rejected by the Congress.]**

The so-called ''bursting bubble'' theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too ''slight and evanescent'' an effect. Morgan and Maguire, *supra,* at p. 913. **[Editor's Note: This approach was adopted by the Congress.]**

4. Advisory Committee Note to Rule 402

Problem--Internal reference to privilege rules that were not enacted.

Advisory Committee's Note

* * *

Succeeding rules in the present article, in response to the demands of particular policies, require the exclusion of evidence despite its relevancy. In addition, Article V recognizes a number of privileges **[Editor's Note: The Advisory Committee proposals on Article V were subsequently rejected by Congress]**; Article VI imposes limitations upon witnesses and the manner of dealing with them; Article VII specifies requirements with respect to opinions and expert testimony; Article VIII excludes hearsay not falling within an exception; Article IX spells out the handling of authentication and identification; and Article X restricts the manner of proving the contents of writings and recordings.

5. Advisory Committee note to Rule 403

Problem--Internal reference to a Rule that was renumbered.

Advisory Committee's Note

* * *

In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. See Rule 106 **[Editor's Note: This is now Rule 105]** and Advisory Committee's Note thereunder. The availability of other means of proof may also be an appropriate factor. * * *

6. Advisory Committee Note to Rule 404(a)

Problem--Incorrect reference to another rule.

Advisory Committee's Note

* * *

Subdivision (a). This subdivision deals with the basic question whether character evidence should be admitted. Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 405, which follows, in order to determine the appropriate method of proof. If the character is that of a witness, see Rules 608 and 610 **[Editor's Note: The correct reference is to Rules 608 and 609]** for methods of proof. * * *

7. Advisory Committee Note to Rule 406

Problem--Proposed Rule 406(b), dealing with the permissible forms of proof of habit, was deleted by Congress.

Advisory Committee's Note

* * *

Subdivision (a). [Editor's Note: As proposed by the Advisory Committee, Rule 406 contained two subdivisions; subdivision (b) was deleted by Congress.] An oft-quoted paragraph, McCormick § 162, p. 340, describes habit in terms effectively contrasting it with character. * * *

Subdivision (b). [Editor's Note: This subdivision was deleted by Congress.] Permissible methods of proving habit or routine conduct include opinion and specific instances sufficient in number to warrant a finding that the habit or routine practice in fact existed. * * *

8. Advisory Committee Note to Rule 410

Problem--The initial Advisory Committee proposal was rejected, because Congress was concerned with its broad exceptions. Then there was an amendment in 1980. Therefore, the Advisory Committee Note to the 1980 amendment is the most appropriate.

Advisory Committee's Note

[Editor's Note: The following material is the Note accompanying the Advisory Committee's draft of the latest versions of the Rule, promulgated in 1980, which sets forth the relevant legislative history. The Rule was changed slightly after the Note was written.]

The major objective of the amendment to rule **[Fed. R. Crim. P.]** 11(e)(6) **[virtually identical to Rule 410]** is to describe more precisely, consistent with the original purpose of the provision, what evidence relating to pleas or plea discussions is inadmissible. The present language is susceptible to interpretation which would make it applicable to a wide variety of statements made under various

circumstances other than within the context of those plea discussions authorized by rule 11(e) and intended to be protected by subdivision (e)(6) of the rule. See United States v. Herman, 544 F.2d 791 (5th Cir. 1977), discussed herein.

Fed. R. Ev. 410, as originally adopted by Pub. L. 93-595, provided in part that 'evidence of a plea of guilty, later withdrawn, or a plea of *nolo contendere* or an offer to plead guilty or *nolo contendere* to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer.' (This rule was adopted with the proviso that it 'shall be superseded by any amendment to the Federal Rules of Criminal Procedure which is inconsistent with this rule.') As the Advisory Committee Note explained: 'Exclusion of offers to plead guilty or *nolo* has as its purpose the promotion of disposition of criminal cases by compromise.' The amendment of Fed. R. Crim. P. 11, transmitted to Congress by the Supreme Court in April 1974, contained a subdivision (e)(6) essentially identical to the rule 410 language quoted above, as a part of a substantial revision of rule 11. The most significant feature of this revision was the express recognition given to the fact that the 'attorney for the government and the attorney for the defendant or the defendant when acting *pro se* may engage in discussions with a view toward reaching' a plea agreement. Subdivision (e)(6) was intended to encourage such discussions. As noted in H.R. Rep. No. 94-247, 94th Cong., 1st Sess. 7 (1975), the purpose of subdivision (e)(6) is to not 'discourage defendants from being completely candid and open during plea negotiations.' Similarly, H.R. Rep. No. 94-414, 94th Cong., 1st Sess. 10 (1975), states that 'Rule 11(e)(6) deals with the use of statements made in connection with plea agreements.' (Rule 11(e)(6) was thereafter enacted, with the addition of the proviso allowing use of statements for purposes of impeachment and in a prosecution for perjury, and with the qualification that the inadmissible statements must also be 'relevant to' the inadmissible pleas or offers. Pub. L. 94-64; Fed. R. Ev. 410 was then amended to conform. Pub. L. 94-149.)

* * *

[Editor's Note: What follows next is the Advisory Committee's Note on the original version of Rule 410, which was rejected by Congress.]

Withdrawn pleas of guilty were held inadmissible in federal prosecutions in Kercheval v. United States, 274 U.S. 220, 47 S. Ct. 582, 71 L. Ed. 1009 (1927). The Court pointed out that to admit the withdrawn plea would effectively set at naught the allowance of withdrawal and place the accused in a dilemma utterly inconsistent with the decision to award him a trial. The New York Court of Appeals, in People v. Spitaleri, 9 N.Y.2d 168, 212 N.Y.S.2d 53, 173 N.E.2d 35 (1961), reexamined and overturned its earlier decisions which had allowed admission. In addition to the reasons set forth in *Kercheval,* which was quoted at length, the court pointed out that the effect of admitting the plea was to compel defendant to take the stand by way of explanation and to open the way for the prosecution to call the lawyer who had represented him at the time of entering the plea. State court decisions for and against admissibility are collected in Annot., 86 A.L.R.2d 326.

Pleas of *nolo contendere* are recognized by Rule 11 of the Rules of Criminal Procedure, although the law of numerous States is to the contrary. The present rule gives effect to the principal traditional characteristic of the *nolo* plea, i.e., avoiding the admission of guilt which is inherent in pleas of guilty. This position is consistent with the construction of Section 5 of the Clayton Act, 15 U.S.C. § 16(a), recognizing the inconclusive and compromise nature of judgments based on *nolo* pleas. General Electric Co. v. City of San Antonio, 334 F.2d 480 (5th Cir. 1964); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 323 F.2d 412 (7th Cir. 1963), *cert. denied,* 376 U.S. 939, 84 S. Ct. 794, 11 L. Ed. 2d 659; Armco Steel Corp. v. North Dakota, 376 F.2d 206 (8th Cir. 1967); City of Burbank v. General Electric Co., 329 F.2d 825 (9th Cir. 1964). See also state court decisions in Annot., 18 A.L.R.2d 1287, 1314.

Exclusion of offers to plead guilty or *nolo* has as its purpose the promotion of disposition of criminal cases by compromise. As pointed out in McCormick § 251, p. 543, ''Effective criminal law administration in many localities would hardly be possible if a large proportion of the charges were not disposed of by such compromises.'' See also People v. Hamilton, 60 Cal. 2d 105, 32 Cal. Rptr. 4, 383 P.2d 412 (1963), discussing legislation designed to achieve this result. As with compromise offers generally, Rule 408, free communication is needed, and security against having an offer of compromise or related statement admitted in evidence effectively encourages it.

Limiting the exclusionary rule to use against the accused is consistent with the purpose of the rule, since the possibility of use for or against other persons will not

impair the effectiveness of withdrawing pleas or the freedom of discussion which the rule is designed to foster. See A.B.A. Standards Relating to Pleas of Guilty § 2.2 (1968). See also the narrower provisions of New Jersey Evidence Rule 52(2) and the unlimited exclusion provided in California Evidence Code § 1153.

9. Advisory Committee Note to Rule 412

Problem--Congress adopted the Advisory Committee's version rather than the Supreme Court's version; the Supreme Court had rejected the Advisory Committee's version.

[Editor's Note: There is no legislative history to the original Rule 412. Nor is there legislative history to the amended Rule 412, which was passed as part of the Violent Crime Control and Law Enforcement Act of 1994. Congress did in that Act, however, adopt verbatim the version of Rule 412 recommended by the Advisory Committee. The Advisory Committee proposal had been rejected by the Supreme Court in favor of a slightly different version, but Congress chose the Advisory Committee's version over that adopted by the Supreme Court. Accordingly, we include the Advisory Committee's Note on amended Rule 412, as at least some indication of the legislative intent behind amended Rule 412.]

Advisory Committee's Note

Rule 412 has been revised to diminish some of the confusion engendered by the original rule and to expand the protection afforded alleged victims of sexual misconduct. Rule 412 applies to both civil and criminal proceedings. The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.

* * *

10. Advisory Committee Note to Rule 501

Problem--All of the proposed rules on privilege were rejected by Congress, in favor of the common law approach.

Advisory Committee's Note

Deleted. **Editor's Note: Congress rejected the Advisory Committee's proposals on privileges. The reasons given in support of the Congressional action are stated in the report of the House Committee on the Judiciary, the Report of the Senate Committee on the Judiciary, and the Report of the House/Senate Conference Committee, set forth below. [Insert those Reports]**

11. Advisory Committee Note to Rule 601

Problems--Congress added language concerning deference to state law, and the Note makes reference to a Rule that was not adopted by Congress.

Advisory Committee's Note

This general ground-clearing eliminates all grounds of incompetency not specifically recognized in the succeeding rules of this Article. Included among the grounds thus abolished are religious belief, conviction of crime, and connection with the litigation as a party or interested person or spouse of a party or interested person. With the exception of the so-called Dead Man's Acts, American jurisdictions generally have ceased to recognize these grounds.

The Dead Man's Acts are surviving traces of the common law disqualification of parties and interested persons. They exist in variety too great to convey conviction of their wisdom and effectiveness. These rules contain no provision of this kind. For the reasoning underlying the decision not to give effect to state statutes in diversity cases, see the Advisory Committee's Note to Rule 501. **[Editor's Note: This proposal by the Advisory Committee, providing that federal**

rules of competency applied even where state law provided the rule of decision, was rejected by Congress.]

* * *

Admissibility of religious belief as a ground of impeachment is treated in Rule 610. Conviction of crime as a ground of impeachment is the subject of Rule 609. Marital relationship is the basis for privilege under Rule 505 **[Editor's Note: Rule 505 was deleted by Congress.].** Interest in the outcome of litigation and mental capacity are, of course, highly relevant to credibility and require no special treatment to render them admissible along with other matters bearing upon the perception, memory, and narration of witnesses.

12. Advisory Committee Note to Rule 607

Problem--The Note refers to the Advisory Committee's proposed Rule 801(d)(1), while the version of that Rule enacted is narrower.

Advisory Committee's Note

The traditional rule against impeaching one's own witness is abandoned as based on false premises. A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right leaves the party at the mercy of the witness and the adversary. If the impeachment is by a prior statement, it is free from hearsay dangers and is excluded from the category of hearsay under Rule 801(d)(1). **[Editor's Note: This categorical statement is not correct. Congress changed the Advisory Committee's version of Rule 801(d)(1). As enacted, Rule 801(d)(1)(A) exempts prior inconsistent statements from the hearsay rule only if the statements are made under oath at a formal proceeding.]**

* * *

13. Advisory Committee Note to Rule 608

Problem--Congress deleted the Advisory Committee's "remote in time" limitation on admissibility.

Advisory Committee's Note

* * *

(2) Particular instances of conduct, though not the subject of criminal conviction, may be inquired into on cross-examination of the principal witness himself or of a witness who testifies concerning his character for truthfulness. Effective cross-examination demands that some allowance be made for going into matters of this kind, but the possibilities of abuse are substantial. Consequently safeguards are erected in the form of specific requirements that the instances inquired into be probative of truthfulness or its opposite and not remote in time. **[Editor's note: The Advisory Committee's proposal precluded reference to bad acts that were remote in time. This provision was deleted by Congress in favor of a case-by-case balancing of probative value and prejudicial effect.].** Also, the overriding protection of Rule 403 requires that probative value not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, and that of Rule 611 bars harassment and undue embarrassment.

* * *

14. Advisory Committee Note to Rule 609--

Problem--Congress amended Rule 609(a)(1) to provide for balancing of probative value and prejudicial effect.

Advisory Committee's Note

As a means of impeachment, evidence of conviction of crime is significant only because it stands as proof of the commission of the underlying criminal act. There is little dissent from the general proposition that at least some crimes are relevant to credibility but much disagreement among the cases and commentators about which crimes are usable for this purpose. See McCormick § 43; 2 Wright,

Federal Practice and Procedure: Criminal § 416 (1969). The weight of traditional authority has been to allow use of felonies generally, without regard to the nature of the particular offense, and of crimen falsi, without regard to the grade of the offense. This is the view accepted by Congress in the 1970 amendment of § 14-305 of the District of Columbia Code, P.L. 91-358, 84 Stat. 473. Uniform Rule 21 and Model Code Rule 106 permit only crimes involving ''dishonesty or false statement.'' Others have thought that the trial judge should have discretion to exclude convictions if the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965); McGowan, Impeachment of Criminal Defendants by Prior Convictions, 1970 Law & Soc. Order 1. Whatever may be the merits of those views, this rule is drafted to accord with the congressional policy manifested in the 1970 legislation. **[Editor's Note: The Rule ultimately adopted by Congress, and as amended in 1990, provides for Trial Court balancing of probative value and prejudicial effect as to convictions not involving dishonesty or false statement.]**

* * *

Problem--Rule 609(b) was amended to provide for admissibility in exceptional cases, rather than total preclusion of old crimes.

Subdivision (b). Few statutes recognize a time limit on impeachment by evidence of conviction. However, practical considerations of fairness and relevancy demand that some boundary be recognized. See Ladd, Credibility Tests — Current Trends, 89 U. Pa. L. Rev. 166, 176-177 (1940). This portion of the rule is derived from the proposal advanced in Recommendation Proposing an Evidence Code, § 788(5), p. 142, Cal. Law Rev. Comm'n (1965), though not adopted. See California Evidence Code § 788. **[Editor's Note: The Rule ultimately adopted by Congress provides for admissibility of convictions more than ten years old when the probative value substantially outweighs the prejudicial effect.]**

15. Advisory Committee Note to Rule 611:

Problem--Incorrect internal reference.

Advisory Committee's Note

Subdivision (a). Spelling out detailed rules to govern the mode and order of interrogating witnesses and presenting evidence is neither desirable nor feasible. The ultimate responsibility for the effective working of the adversary system rests with the judge. The rule sets forth the objectives which he should seek to attain.

* * *

Item (2) is addressed to avoidance of needless consumption of time, a matter of daily concern in the disposition of cases. A companion piece is found in the discretion vested in the judge to exclude evidence as a waste of time in Rule 403(b). **[Editor's Note: The correct reference is to Rule 403; there is no subdivision (b).]**

* * *

Problem--The Advisory Committee recommended the English view as to the permissible scope of cross-examination. Congress opted for the American view.

Subdivision (b). [Editor's Note: The Advisory Committee version of Rule 611(b) called for wide open cross-examination on any relevant issue. Congress rejected this proposal and adopted a rule limiting the scope of cross-examination to the subject matter of the direct, with the Trial Court having discretion to broaden the scope. The Advisory Committee Note makes the case for the Committee's proposal and criticizes the view that was ultimately adopted by Congress.] The tradition in the federal courts and in numerous state courts has been to limit the scope of cross-examination to matters testified to on direct, plus matters bearing upon the credibility of the witness. Various reasons have been advanced to justify the rule of limited cross-examination. (1) A party vouches for his own witness but only to the extent of matters elicited on direct. Resurrection Gold Mining Co. v. Fortune Gold Mining Co., 129 F. 668, 675 (8th Cir. 1904), quoted in Maguire, Weinstein, et al., Cases on Evidence 277, n. 38 (5th ed. 1965). But the concept of vouching is discredited, and Rule 607 rejects it. (2) A party cannot ask his own witness leading questions.

This is a problem properly solved in terms of what is necessary for a proper development of the testimony rather than by a mechanistic formula similar to the vouching concept. See discussion under subdivision (c). (3) A practice of limited cross-examination promotes orderly presentation of the case. Finch v. Weiner, 109 Conn. 616, 145 A. 31 (1929). While this latter reason has merit, the matter is essentially one of the order of presentation and not one in which involvement at the appellate level is likely to prove fruitful. See, for example, Moyer v. Aetna Life Ins. Co., 126 F.2d 141 (3d Cir. 1942); Butler v. New York Cent. R. R., 253 F.2d 281 (7th Cir. 1958); United States v. Johnson, 285 F.2d 35 (9th Cir. 1960); Union Automobile Indem. Ass'n v. Capitol Indem. Ins. Co., 310 F.2d 318 (7th Cir. 1962). In evaluating these considerations, McCormick says:

> The foregoing considerations favoring the wide-open or restrictive rules may well be thought to be fairly evenly balanced. There is another factor, however, which seems to swing the balance overwhelmingly in favor of the wide-open rule. This is the consideration of economy of time and energy. Obviously, the wide-open rule presents little or no opportunity for dispute in its application. The restrictive practice in all its forms, on the other hand, is productive in many courtrooms, of continual bickering over the choice of the numerous variations of the ''scope of the direct'' criterion, and of their application to particular cross-questions. These controversies are often reventilated on appeal, and reversals for error in their determination are frequent. Observance of these vague and ambiguous restrictions is a matter of constant and hampering concern to the cross-examiner. If these efforts, delays and misprisons were the necessary incidents to the guarding of substantive rights or the fundamentals of fair trial, they might be worth the cost. As the price of the choice of an obviously debatable regulation of the order of evidence, the sacrifice seems misguided. The American Bar Association's Committee for the Improvement of the Law of Evidence for the year 1937-38 said this:
>
> ''The rule limiting cross-examination to the precise subject of the direct examination is probably the most frequent rule (except the Opinion rule) leading in the trial practice today to refined and technical quibbles which obstruct the progress of the trial, confuse the jury, and give rise to appeal on technical grounds only. Some of the instances in which Supreme Courts have ordered new trials for the mere transgression of this rule about the order of evidence have been astounding.

''We recommend that the rule allowing questions upon any part of the issue known to the witness ... be adopted....''

McCormick, § 27, p. 51. See also 5 Moore's Federal Practice ¶43.10 (2nd ed. 1964).

The provision of the second sentence, that the judge may in the interests of justice limit inquiry into new matters on cross-examination, is designed for those situations in which the result otherwise would be confusion, complication, or protraction of the case, not as a matter of rule but as demonstrable in the actual development of the particular case.

Problem--Congress changed the Advisory Committee's proposed Rule 611(c), expanding the definition of hostile witnesses, and applying the Rule to criminal as well as civil cases.

Subdivision (c).

* * *

The final sentence deals with categories of witnesses automatically regarded and treated as hostile. Rule 43(b) of the Federal Rules of Civil Procedure has included only ''an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party.'' This limitation virtually to persons whose statements would stand as admissions is believed to be an unduly narrow concept of those who may safely be regarded as hostile without further demonstration. See, for example, Maryland Cas. Co. v. Kador, 225 F.2d 120 (5th Cir. 1955), and Degelos v. Fidelity & Cas. Co., 313 F.2d 809 (5th Cir. 1963), holding despite the language of Rule 43(b) that an insured fell within it, though not a party in an action under the Louisiana direct action statute. The phrase of the rule, ''witness identified with'' an adverse party, is designed to enlarge the category of persons thus callable. **[Editor's Note: Congress revised the last sentence of Rule 611(c) by expanding it to apply to criminal cases (allowing the defendant, for example, to use leading questions on the direct examination of a witness associated with the government), and by permitting the use of leading questions in the direct examination of any hostile witness.]**

16. Advisory Committee Note to Rule 612

Problem--Congress provided for less extensive disclosure of documents relied on by witnesses before trial.

Advisory Committee's Note

The treatment of writings used to refresh recollection while on the stand is in accord with settled doctrine. McCormick § 9, p. 15. The bulk of the case law has, however, denied the existence of any right to access by the opponent when the writing is used prior to taking the stand, though the judge may have discretion in the matter. Goldman v. United States, 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322 (1942); Needelman v. United States, 261 F.2d 802 (5th Cir. 1958), cert. dismissed, 362 U.S. 600, 80 S. Ct. 960, 4 L. Ed. 2d 980, reh. denied, 363 U.S. 858, 80 S. Ct. 1606, 4 L. Ed. 2d 1739, Annot., 82 A.L.R.2d 473, 562 and 7 A.L.R.3d 181, 247. An increasing group of cases has repudiated the distinction, People v. Scott, 29 Ill. 2d 97, 193 N.E.2d 814 (1963); State v. Mucci, 25 N.J. 423, 136 A.2d 761 (1957); State v. Hunt, 25 N.J. 514, 138 A.2d 1 (1958); State v. Deslovers, 40 R.I. 89, 100 A. 64 (1917), and this position is believed to be correct. As Wigmore put it, ''the risk of imposition and the need of safeguard is just as great'' in both situations. 3 Wigmore § 762, p. 111. To the same effect is McCormick § 9, p. 17. **[Editor's Note: The Advisory Committee proposal to require disclosure of documents relied on by witnesses before trial was rejected, in favor of a provision allowing disclosure only if the court, in its discretion, finds that it is necessary in the interests of justice.]**

* * *

17. Advisory Committee Note to Rule 704

Problem--The application of Rule 704 was limited by Congress' later addition of Rule 704(b).

Advisory Committee's Note

The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called 'ultimate

issue' rule is specifically abolished by the instant rule.

The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. 7 Wigmore §§ 1920, 1921; McCormick § 12. The basis usually assigned for the rule, to prevent the witness from ''usurping the province of the jury,'' is aptly characterized as ''empty rhetoric.'' 7 Wigmore § 1920, p. 17. Efforts to meet the felt needs of particular situations led to odd verbal circumlocutions which were said not to violate the rule. Thus a witness could express his estimate of the criminal responsibility of an accused in terms of sanity or insanity, but not in terms of ability to tell right from wrong or other more modern standard. And in cases of medical causation, witnesses were sometimes required to couch their opinions in cautious phrases of ''might or could,'' rather than ''did,'' though the result was to deprive many opinions of the positiveness to which they were entitled, accompanied by the hazard of a ruling of insufficiency to support a verdict. In other instances the rule was simply disregarded, and, as concessions to need, opinions were allowed upon such matters as intoxication, speed, handwriting, and value, although more precise coincidence with an ultimate issue would scarcely be possible.

Many modern decisions illustrate the trend to abandon the rule completely. People v. Wilson, 25 Cal. 2d 341, 153 P.2d 720 (1944), whether abortion necessary to save life of patient; Clifford-Jacobs Forging Co. v. Industrial Comm'n, 19 Ill. 2d 236, 166 N.E.2d 582 (1960), medical causation; Dowling v. L. H. Shattuck, Inc., 91 N.H. 234, 17 A.2d 529 (1941), proper method of shoring ditch; Schweiger v. Solbeck, 191 Or. 454, 230 P.2d 195 (1951), cause of landslide. In each instance the opinion was allowed.

[Editor's Note: The inference in this Note, that Rule 704 imposes no limitations on ultimate issue testimony, must be qualified in light of the later addition of Rule 704(b) by Congress. Rule 704(b) prevents an expert from drawing a conclusion that a criminal defendant had or did not have the requisite mental state to commit the crime charged.]

18. Advisory Committee Note to Rule 801

Problem--The reference to the residual exceptions is no longer accurate, because these exceptions have been combined into a new Rule 807.

Advisory Committee's Note

* * *

(3) The approach to hearsay in these rules is that of the common law, i.e., a general rule excluding hearsay, with exceptions under which evidence is not required to be excluded even though hearsay. The traditional hearsay exceptions are drawn upon for the exceptions, collected under two rules, one dealing with situations where availability of the declarant is regarded as immaterial and the other with those where unavailability is made a condition to the admission of the hearsay statement. Each of the two rules concludes with a provision for hearsay statements not within one of the specified exceptions ''but having comparable circumstantial guarantees of trustworthiness.'' Rules 803(24) and 804(b)(6) **[Editor's Note: The latter exception was enacted as (b)(5), and both exceptions have been transferred to a single Rule 807 by a 1997 amendment.].** This plan is submitted as calculated to encourage growth and development in this area of the law, while conserving the values and experience of the past as a guide to the future.

Problem--Congress modified Rule 801(d)(1)(A) to include an under oath requirement.

(A) Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence. **[Editor's Note: The Advisory Committee proposal was modified by the Congress to provide for substantive admissibility only if the prior statement was made under oath at a formal proceeding.]** As has been said by the California Law Revision Commission with respect to a similar provision:

> Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in

time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the ''turncoat'' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case.

Comment, California Evidence Code § 1235. See also McCormick § 39. The Advisory Committee finds these views more convincing than those expressed in People v. Johnson, 68 Cal. 2d 646, 68 Cal. Rptr. 599, 441 P.2d 111 (1968). The constitutionality of the Advisory Committee's view was upheld in California v. Green, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970). Moreover, the requirement that the statement be inconsistent with the testimony given assures a thorough exploration of both versions while the witness is on the stand and bars any general and indiscriminate use of previously prepared statements.

19. Advisory Committee Note to Rule 803

Problem--The Note on Rule 803(6) refers to a broader standard of covered activity than the "business" activity ultimately set forth by Congress.

Advisory Committee's Note

* * *

Exception (6) * * * The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation. McCormick §§ 281, 286, 287; Laughlin, Business Entries and the Like, 46 Iowa L. Rev. 276 (1961). The model statutes and rules have sought to capture these factors and to extend their impact by employing the phrase ''regular course of business,'' in conjunction with a definition of ''business'' far broader than its ordinarily accepted meaning. The result

is a tendency unduly to emphasize a requirement of routineness and repetitiveness and an insistence that other types of records be squeezed into the fact patterns which give rise to traditional business records. The rule therefore adopts the phrase ''the course of a regularly conducted activity'' as capturing the essential basis of the hearsay exception as it has evolved and the essential element which can be abstracted from the various specifications of what is a ''business.'' **[Editor's Note: This terminology was rejected by the Congress.]**

Problem--Congress changed Rule 803(6) in a way that could arguably affect the business duty requirement that was traditionally part of the Rule.

Sources of information presented no substantial problem with ordinary business records. All participants, including the observer or participant furnishing the information to be recorded, were acting routinely, under a duty of accuracy, with employer reliance on the result, or in short ''in the regular course of business.'' If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. An illustration is the police report incorporating information obtained from a bystander; the officer qualifies as acting in the regular course but the informant does not. The leading case, Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930), held that a report thus prepared was inadmissible. Most of the authorities have agreed with the decision. Gencarella v. Fyfe, 171 F.2d 419 (1st Cir. 1948); Gordon v. Robinson, 210 F.2d 192 (3d Cir. 1954); Standard Oil Co. of California v. Moore, 251 F.2d 188, 214 (9th Cir. 1957), cert. denied, 356 U.S. 975, 78 S. Ct. 1139, 2 L. Ed. 2d 1148; Yates v. Bair Transport, Inc., 249 F. Supp. 681 (S.D.N.Y. 1965); Annot., 69 A.L.R.2d 1148. Cf. Hawkins v. Gorea Motor Express, Inc., 360 F.2d 933 (2d Cir. 1966). Contra, 5 Wigmore § 1530a, n. 1, pp. 391-92. The point is not dealt with specifically in the Commonwealth Fund Act, the Uniform Act, or Uniform Rule 63(13). However, Model Code Rule 514 contains the requirement ''that it was the regular course of that business for one with personal knowledge ... to make such a memorandum or record or to transmit information thereof to be included in such a memorandum or record....'' The rule follows this lead in requiring an informant with knowledge acting in the course of the regularly conducted activity. **[Editor's Note: Congress' amendment to the Rule makes it unclear whether the informant**

must be acting in the course of business activity; but Congress does not appear to have intended to reject the business duty requirement].

Problem--Rule 803 (24) has been transferred to Rule 807

Exception (24). Editor's Note: Rule 803(24) has been transferred to Rule 807. The Advisory Committee Note on Rule 803(24) has accordingly been transferred to that Rule as well.

20. Advisory Committee Note to Rule 804

Problem--Congress added a deposition preference to Rule 804(a)(5).

Advisory Committee's Note

* * *

Subdivision (a). * * * If the conditions otherwise constituting unavailability result from the procurement or wrongdoing of the proponent of the statement, the requirement is not satisfied. The rule contains no requirement that an attempt be made to take the deposition of a declarant. **[Editor's Note: A deposition preference was included by Congress when unavailability is asserted on grounds of absence. See the text of Rule 804(a)(5).].** * * *

Problem--Congress added a predecessor in interest requirement to Rule 804(b)(1).

Exception (1). * * * As a further assurance of fairness in thrusting upon a party the prior handling of the witness, the common law also insisted upon identity of parties, deviating only to the extent of allowing substitution of successors in a narrowly construed privity. Mutuality as an aspect of identity is now generally discredited, and the requirement of identity of the offering party disappears except as it might affect motive to develop the testimony. Falknor, *supra*, at 652; McCormick § 232, pp. 487-88. The question remains whether strict identity, or privity, should continue as a requirement with respect to the party against

whom offered. The rule departs to the extent of allowing substitution of one with the right and opportunity to develop the testimony with similar motive and interest. The position is supported by modern decisions. McCormick § 232, pp. 489-90; 5 Wigmore § 1388. **[Editor's Note: This approach was rejected by the Congress, which provided that prior testimony cannot be used against a party unless that party or a predecessor in interest had a similar motive and opportunity to develop the testimony.]**

Problem--The dying declaration exception was renumbered (because the exception for statements of recent perception was deleted), and the Rule was limited to civil cases and homicide cases.

[Editor's Note: The exception for dying declarations, described in the Note as Exception (3), became Rule 804(b)(2) as enacted. The change in numbering was due to the deletion by Congress of the Advisory Committee's proposal for an exception for statements of recent perception. Also, the dying declaration exception was amended by Congress so as to be available only in civil cases and prosecutions for homicide].

Exception (3). The exception is the familiar dying declaration of the common law, expanded somewhat beyond its traditionally narrow limits. While the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present. See 5 Wigmore § 1443 and the classic statement of Chief Baron Eyre in Rex v. Woodcock, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (K.B. 1789).

The common law required that the statement be that of the victim, offered in a prosecution for criminal homicide. Thus declarations by victims in prosecutions for other crimes, e.g., a declaration by a rape victim who dies in childbirth, and all declarations in civil cases were outside the scope of the exception. An occasional statute has removed these restrictions, as in Colo.R.S. § 52-1-20, or has expanded the area of offenses to include abortions, 5 Wigmore § 1432, p. 223, n. 4. Kansas by decision extended the exception to civil cases. Thurston v. Fritz, 91 Kan. 468, 138 P. 625 (1914). While the common law exception no doubt originated as a result of the exceptional need for the evidence in homicide cases, the theory of admissibility applies equally in civil cases and in prosecutions for crimes other than homicide. The same considerations suggest abandonment of the limitation to circumstances attending the event in question, yet when the statement deals with matters

other than the supposed death, its influence is believed to be sufficiently attenuated to justify the limitation. Unavailability is not limited to death. See subdivision (a) of this rule. Any problem as to declarations phrased in terms of opinion is laid at rest by Rule 701, and continuation of a requirement of firsthand knowledge is assured by Rule 602.

* * *

Problem--The exception for declarations against penal interest was renumbered, and statements against social interest were rejected as a basis for admissibility. Also, there is an incorrect internal reference.

[Editor's Note: The exception for statements against interest, described below as Exception (4), became Rule 804(b)(3) as enacted. The change in numbering was due to the deletion by Congress of the Advisory Committee's proposal for an exception for statements of recent perception. Also, the statement against interest exception was amended by Congress so as not to cover statements against the declarant's "social" interest.]

Exception (4). The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true. Hileman v. Northwest Engineering Co., 346 F.2d 668 (6th Cir. 1965). If the statement is that of a party, offered by his opponent, it comes in as an admission, Rule 803(d)(2) **[Editor's Note: Now Rule 801(d)(2)]**, and there is no occasion to inquire whether it is against interest, this not being a condition precedent to admissibility of admissions by opponents.The common law required that the interest declared against be pecuniary or proprietary but within this limitation demonstrated striking ingenuity in discovering an against-interest aspect. Highman v. Ridgway, 10 East 109, 103 Eng. Rep. 717 (K.B. 1808); Reg. v. Overseers of Birmingham, 1 B. & S. 763, 121 Eng. Rep. 897 (Q.B. 1861); McCormick § 256, p. 551, nn.2 and 3.

The exception discards the common law limitation and expands to the full logical limit. One result is to remove doubt as to the admissibility of declarations tending to establish a tort liability against the declarant or to extinguish one which might be asserted by him, in accordance with the trend of the decisions in this country. McCormick § 254, pp. 548-49. Another is to allow statements tending to expose declarant to hatred, ridicule, or disgrace, the

motivation here being considered to be as strong as when financial interests are at stake. McCormick § 255, p. 551. * * *

Problem--the exception for statements of pedigree was renumbered.

[Editor's Note: The exception for statements against interest, described below as Exception (4), became Rule 804(b)(3) as enacted. The change in numbering was due to the deletion by Congress of the Advisory Committee's proposal for an exception for statements of recent perception].

Exception (5). The general common law requirement that a declaration in this area must have been made *ante litem motam* has been dropped, as bearing more appropriately on weight than admissibility. See 5 Wigmore § 1483. Item (i) specifically disclaims any need of firsthand knowledge respecting declarant's own personal history. In some instances it is self-evident (marriage) and in others impossible and traditionally not required (date of birth). Item (ii) deals with declarations concerning the history of another person.

Problem--Rule 804(b)(5) has been transferred to Rule 807.

Exception (5). [Editor's Note: Rule 804(b)(5) has been transferred to Rule 807. The Advisory Committee Note on Rule 804(b)(5) simply referred to the commentary under the identical Rule 803(24), which in 1997 was combined with Rule 804(b)(5) into a single Rule 807.]

21. Advisory Committee Note to Rule 807

Problems--This Rule is a combination of two old Rules, so the Advisory Committee Notes to the old Rules should be transferred. Also, the Advisory Committee's proposal on residual exceptions was changed by Congress: Congress added a notice requirement, and also the requirement that the hearsay be probative of a material fact and more probative than any other evidence reasonably available. Also, there are incorrect internal references.

Editor's Note: Below is the Advisory Committee's original Note to what was then Rule 803(24). In 1997, Rule 803(24) was combined with Rule 804(b)(5) and transferred to a new Rule 807.

Advisory Committee Note to Rule 803(24)

The preceding 23 exceptions of Rule 803 and the first five **[Editor's Note: Only four were actually enacted.]** exceptions of Rule 804(b) *infra*, are designed to take full advantage of the accumulated wisdom and experience of the past in dealing with hearsay. It would, however, be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system. Exception (24) and its companion provision in Rule 804(b)(6) **[Editor's Note: The Rule 804 residual exception was originally enacted as 804(b)(5).]** are accordingly included. They do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 102. See Dallas County v. Commercial Union Assur. Co., Ltd., 286 F.2d 388 (5th Cir. 1961). **[Editor's Note: Congress added several limitations to the residual exception proposed by the Advisory Committee: 1) the hearsay must be more probative than other evidence reasonably available; 2) the statement must be offered as evidence of a "material fact"; and 3) the proponent must give pretrial notice.].**

[The original Advisory Committee Note to Rule 804(b)(5) stated as follows: "In language and in purpose, this exception is identical with Rule 803(24). See the Advisory Committee's Note to that provision."]

Item IV - VI

September 1997

Electronic Filing: A Status Report for the Rules Committees

I. Introduction

Recent amendments to the federal rules authorize courts to accept papers in electronic form.[1] The rules now provide that "[a] court may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules."[2]

Several courts now are working to identify and acquire appropriate technology to accept and maintain court records in digitized form. At the national level, work is proceeding on a "core" electronic filing system that interested courts could adapt to fit local needs. And the Judicial Conference's Committee on Automation and Technology has made Electronic Case Files ("ECF") one of its priority initiatives.

Moving towards an electronic case file ("ECF") system will require the federal judiciary to resolve numerous legal and policy questions—including several that may implicate the federal rules. A recent report by the Administrative Office, *Electronic Case Files in the Federal Courts: A Preliminary Examination of Goals, Issues, and the Road Ahead*, outlines a vision for how the courts might implement ECF systems. The report identifies some of these questions that should be resolved and suggests possible approaches for resolving them.

As outlined in the report, a fully developed ECF system would capture documents electronically at the earliest possible point, ideally from the person who creates the document. The system would not only contain everything presently included in a paper case file, but could also accommodate the court's internal case-related documents. Working on the assumption that the transition towards ECF should promote savings for the courts, an electronic case file system is expected eventually to provide at least the following:

- electronic submission of documents to, from, and within the court
- electronic service and noticing
- appropriate management of electronic documents, including storage and security

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[1] Fed. R. Civ. P. 5(e); Fed. R. Bank. P. 5005; Fed. R. App. P. 25(a)(2)(D) (all effective Dec. 1, 1996). Fed. R. Crim. P. 49(d) provides that papers in criminal actions be filed in the manner provided in civil actions.

[2] Fed. R. Civ. P. 5(e). The language of the companion bankruptcy and appellate rules is essentially the same.

- docket entries automatically through information provided in electronic form by the filing party
- case management reports based upon the electronic documents and docket entries
- quick retrieval of documents and case files, including public and remote access.

Nationally developed ECF systems delivered through the initiative will be made available to all courts, will incorporate new capabilities (such as creation of docket entries by the filing attorneys), and will replace the current case management systems used in the courts. The decision to use the systems, however, will be left to individual courts, and the assessment and utilization of the new capabilities will be left to those courts. The Administrative Office, with assistance from the courts, is about to begin the process of defining the functional requirements that ECF systems will be expected to satisfy. That process should be completed by mid-1998, after which the alternatives for meeting those requirements will be considered.

Two federal courts are already operating "prototype" ECF systems developed by staff in the Administrative Office. The Northern District of Ohio, which was the first prototype court, began receiving electronic filings in maritime asbestos cases through the Internet in January 1996. This system, developed by the Administrative Office, has managed over 9,000 such cases and handled over 125,000 docket entries (involving some 20,000 documents). Nearly 50 attorneys from around the country have not only submitted those documents in electronic form, but also simultaneously and automatically created the court's official docket entries. The bankruptcy court in the Southern District of New York has more recently begun testing in Chapter 11 cases a prototype ECF system based on the same model. At this time, filings in approximately 70 cases are being handled electronically in that court.

Beginning in the fall of 1997, the list of courts testing the AO-developed prototype systems will be expanded to include the district courts of the Western District of Missouri, the Eastern District of New York, and the District of Oregon, and the bankruptcy courts of the Southern District of California, the Northern District of Georgia, the District of Arizona, and the Eastern District of Virginia (Alexandria Division). Each of the prototype courts is being asked to test ECF functionality in handling certain types of civil actions (e.g., non-prisoner civil rights and Title VII actions, intellectual property disputes, cases involving federal, state and local governments or large national firms) and the various kinds of bankruptcy cases (Chapter 7, Chapter 11, Chapter 13). A similar Internet-based system has recently been established in the District of New Mexico, and several courts have begun constructing their own electronic case files by having court staff scan paper documents into their systems.

The 1996 rules amendments enable individual courts to authorize electronic filing by local rule, subject to any technical standards that may be adopted by the Judicial Conference. The Committee on Automation and Technology ("CAT Committee") recently approved a set of

"Interim Technical Guidelines for Filing by Electronic Means." The committee has chosen not to seek Judicial Conference approval of the standards at this time, but it will urge courts choosing to implement electronic filing to use them as guidance for their efforts. The proposed guidelines do not establish mandatory standards, but rather provide recommended approaches for experimental use subject to further evaluation by the CAT Committee and the Conference. They focus primarily on ensuring the "integrity of the record," providing an electronic filing capability that is at least as reliable as existing paper-based systems, and promoting nationwide uniformity in electronic filing procedures. The guidelines are based on proposed technical standards and guidelines that were circulated for comment among the judiciary and the interested public in late December 1996.

II. Potential Rules Issues Relating to ECF

Potential rules issues have already surfaced in the ongoing court experiments with electronic case filing. The following is a preliminary list of such issues:

- authorizing electronic filing (or certain requirements for electronic filing) by a court's standing order or case-by-case order, rather than by local rule
- allowing electronic means of service, as only mail and various methods of personal service are now authorized nationally
- adequacy of electronic filing and service of the initial case pleadings, raising filing fee and jurisdictional issues
- responsibility for, and proof of, service of pleadings
- providing notice of court orders and opinions electronically to the parties
- timeliness of filings and the possibility of computing action dates differently when filing and service are accomplished electronically by some or all parties
- verification of signatures and Rule 11 requirements
- verification of signatures on documents not signed by the attorney (e.g., bankruptcy schedule of assets)
- document format questions, including:
  — problems with documents received in an incompatible format, including potential problems affecting timeliness and service of papers
  — incompatible software among electronic filers.

III. Conclusion

An ongoing part of the "ECF" initiative will be the identification and collection of additional rules-related issues, particularly as encountered in the various prototyping efforts. The Office of Judges Programs staff assigned to the project will continue to monitor developments in prototype courts and forward relevant information to the Rules Committee Support Office for circulation to the rules committees' technology subcommittees.