ADVISORY COMMITTEE ON EVIDENCE RULES

Seattle, WA
October 18, 2002

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING
Seattle, Washington
October 18, 2002

I. Opening Remarks of the Chair

Including approval of the minutes of the April 2002 meeting, a report on the June 2002 meeting of the Standing Committee, and the status of proposed amendments. The Draft minutes of the April 2002 meeting, this Committee's report to the Standing Committee, and the minutes of the Standing Committee meeting, are all included in the agenda book.

II. Proposed Amendments Currently Outstanding

The proposed amendments to Rule 608(b) and Rule 804(b)(3), as approved by the Advisory Committee, are set forth in the agenda book.

III. Consideration of Evidence Rules

A. Rule 106

The Reporter's memorandum concerning the problems arising under the Rule, including whether the Rule can be used as a hearsay exception and whether the Rule can apply to oral statements, is included in the agenda book.

B. Rule 404(a)

The Reporter's memorandum concerning the Rule's coverage of the use of character evidence in a civil case is included in the agenda book.

C. Rule 408

The Reporter's memorandum concerning the problems arising under the Rule, including admissibility of compromise evidence in a criminal case, and the use of statements made in settlement negotiation for impeachment, is included in the agenda book.

D. Rule 412

The Reporter's memorandum concerning the admissibility of false claims, as well as the need for technical changes to the Rule, is included in the agenda book.

E. Rule 803(4)

Professor Ken Broun's memorandum, on whether the Rule should be amended to preclude admissibility under the Rule for statements made to doctors with no motive of obtaining treatment, is included in the agenda book.

IV. Privileges

The agenda book includes the Privileges Subcommittee's discussion drafts and supporting memoranda on four possible Rules: 1) a privilege for confidential communications between spouses; 2) an amended draft of a new Rule 501; 3) an amended draft of an attorney-client privilege; 4) an amended draft of a physician and mental health provider-patient privilege.

The agenda book also includes a draft of a waiver rule tentatively approved by the Committee, and a short memorandum discussing a comment received concerning the draft rule. Finally, the agenda book includes drafts of a spousal privilege against adverse testimony (tentatively rejected by the Committee) and a privilege for communications to clerics (tabled by the Committee).

V. Long-Range Planning

The agenda book includes a memorandum from the Reporter concerning possible amendments to the Evidence Rules that the Committee might consider in the future, including the possibility that Rules might be amended to accommodate technological changes in filing, service, and the presentation of evidence.

VI. New Business

VII. Next Meeting

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Effective October 1, 2002

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October 1, 2002
Projects

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October 1, 2002
Projects

I-A

Advisory Committee on Evidence Rules

Draft Minutes of the Meeting of April 19, 2002

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence met on April 19, 2002 at the Thurgood Marshall Federal Judiciary Building in Washington, D.C.

The following members of the Committee were present:

Hon. Milton I. Shadur, Chair
Hon. Ronald L. Buckwalter
Hon. David C. Norton
Thomas W. Hillier, Esq.
David S. Maring, Esq.
Christopher A. Wray, Esq.

Also present were:

Hon. Frank W. Bullock, Jr., Liaison to the Standing Committee on Rules of Practice and Procedure
Hon. David G. Trager, Liaison to the Criminal Rules Committee
Professor Daniel R. Coquillette, Reporter to the Standing Committee on Rules of Practice and Procedure
Peter G. McCabe, Esq., Secretary, Standing Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Jennifer Marsh, Esq., Federal Judicial Center
Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Roger Pauley, Esq., Former Committee Member
Christopher F. Jennings, Esq., Law Clerk to Hon. Anthony J. Scirica
Professor Leo Whinery, Reporter, Uniform Rules of Evidence Drafting Committee

Opening Business

Judge Shadur opened the meeting by welcoming Christopher Wray, the new Department of Justice representative on the Committee. Judge Shadur then asked for approval of the minutes of the April 2001 Evidence Rules Committee meeting. The minutes were unanimously approved.

Judge Shadur reported on the January 2002 meeting of the Standing Committee. The Evidence Rules Committee's report to the Standing Committee was brief, consisting of a report on the two pending amendments to the Evidence Rules and an update on the long-term project on privileges. Judge Shadur noted that the most important matters currently before the Standing Committee include potential amendments to Civil Rule 23, consideration of possible Federal Rules on attorney conduct, issues raised by electronic case filing and the problems created by the proliferation of local rules.

Committee Consideration of Proposed Amendments Released For Public Comment

1. Rule 608

The proposed amendment to Evidence Rule 608(b) would clarify the scope of the Rule's prohibition on extrinsic evidence. That prohibition would apply only when the extrinsic evidence is offered to prove the character for truthfulness of a witness. Extrinsic evidence offered for other impeachment purposes–such as for bias, capacity, contradiction or prior inconsistent statement–would be governed by Rules 402 and 403. The original Advisory Committee Note makes clear that Rule 608(b)'s exclusion of extrinsic evidence is applicable only if the opponent's goal is to attack the witness' character for veracity. Other forms of impeachment are not intended to be covered by the absolute exclusion on extrinsic proof in Rule 608(b).

The problem giving rise to the need for amendment is that the text of the Rule by its terms prohibits extrinsic evidence whenever offered to address the witness' "credibility." This could be read to bar extrinsic evidence for bias, competency, contradiction and prior inconsistent statement impeachment since they too bear upon "credibility."

Most courts do read Rule 608(b) the way it was intended – to apply only where the extrinsic evidence is offered to prove the witness' character for truthfulness. But there are many decisions applying the Rule more broadly to mean what it appears to say – that extrinsic evidence is completely prohibited whenever offered on any aspect of the witness' credibility.

Judge Shadur noted that the comments on the proposed amendment uniformly praised the Advisory Committee's deletion of the overbroad term "credibility" and agreed that the Rule should be restored to its original intent–prohibiting extrinsic evidence only when it is offered to prove a witness' character for truthfulness, and leaving all other uses of extrinsic evidence to be regulated by Rules 402 and 403.

One comment suggested, however, that the Committee also use the occasion of the proposed amendment to address other provisions in the Evidence Rules in which the term "credibility" is used when the proper reference is to "character for truthfulness." The comment refers to four additional places in the Evidence Rules in which "credibility" is arguably an overbroad reference to "character for truthfulness." They are:

1. In the final sentence of Rule 608(b), which currently provides:

> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to *credibility*.

2. In Rule 608(a), which currently provides:

> The *credibility* of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:(1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

3. In Rule 609(a) , which provides:

> (a) General rule.—For the purpose of attacking the *credibility* of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

4. In Rule 610, which provides:

> Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' *credibility* is impaired or enhanced.

The Committee first considered whether to propose a change to the last sentence of Rule 608(b) in accordance with the public comment. The sense of the Committee was that such a change was a matter of form and not substance, because the provision is rarely applied, and when it is, the courts have had no problem in limiting its protections to matters that are probative of the witness' character for truthfulness. The Committee noted, however, that while an amendment to the second sentence of Rule 608(b) would not be warranted on its own, it made sense to make a change together with the parallel change to the first sentence of Rule 608(b). The change to both sentences would provide for consistent use of terminology throughout Rule 608(b). A motion was made and seconded to propose that the term "credibility" be replaced with the term "character for truthfulness" in the last sentence of Rule 608(b). That motion was unanimously approved.

The Committee next considered the proposal in the public comment to amend Rule 608(a) to replace "credibility" with "character for truthfulness." The Committee found this question more complex than the previous proposal to change the last sentence of Rule 608(b). Rule 608(a)(1) already states that evidence offered under the subdivision must be limited to that probative of "character for truthfulness or untruthfulness." Thus, the broader reference to "credibility" in subdivision (a) is already limited by language in the Rule. Accordingly, the reference to "credibility" is doing no harm. Nor has it been subject to any misinterpretation by the bench or bar. Moreover, because the limitation to character impeachment already exists in Rule 608(a), an amendment to the term "credibility" would require a more extensive reworking than simply replacing one term with another. For all these reasons, Committee members expressed the sense that the costs of amending the provision far outweighed the benefits. A motion to retain Rule 608(a) as it currently reads was made, seconded and unanimously approved.

The Committee then took up the suggestion that Rules 609 and 610 should be amended to substitute "character for truthfulness" for the existing term "credibility." The question for the Committee, at the moment, was not whether amendments to those two Rules would make sense, but whether they were so important that the existing proposal to amend Rule 608(b) should be delayed until corresponding amendments to Rules 609 and 610 could be sent out for public comment.

One member of the Committee was in favor of holding off the amendment to Rule 608(b) until corresponding amendments to Rules 609 and 610 were processed. He suggested that amendments should not be made on a piecemeal basis. But the other members of the Committee disagreed. One member pointed out that the Committee had just decided not to propose an amendment to replace the term "credibility" in Rule 608(a), so the notion of a uniform "credibility" package had already been rejected. Other members noted that the need to amend Rule 609 was not established. Unlike Rule 608(b), Rule 609 has not been misinterpreted by the courts. As to Rule 610, the question of amendment raised public policy questions that do not exist under Rule 608(b). It

might be appropriate public policy to prohibit impeachment of witnesses due to their religious conviction even though the impeachment attack was not limited to the witness' character. In other words, simply replacing "credibility" with "character for truthfulness" in Rule 610 may result in bad public policy.

The majority of the Committee ultimately determined that any amendment to Rules 609 or 610 should be considered independently, and on its own merits, rather than as a package with Rule 608(b). Because each Rule presented different questions and different advantages and disadvantages, the majority believed that it made no sense to defer the well-received amendment to Rule 608(b) for a number of years. A motion that the proposed amendment to Rule 608(b) not be deferred was approved, with one dissent.

The Committee next turned to the proposed Committee Note to the amendment to Rule 608(b). The Reporter noted that the Note would have to be changed slightly from that issued for public comment, because the proposed text had been revised to add a change to the last sentence of Rule 608(b). A paragraph was added to the Committee Note that referred to the change to the last sentence of Rule 608(b) as one made for purposes of consistent terminology. A further short paragraph was added to clarify that the change to Rule 608(b) should not raise a negative inference about the retention of the term "credibility" in other Rules.

Finally, the Committee considered a possible objection to certain paragraphs of the Committee Note that were intended to educate the bench and bar about issues that have arisen under Rule 608(b). The Committee unanimously believed that Committee Notes are an important source of education about how an amended Rule is to be applied, and accordingly voted unanimously to retain those parts of the proposed Committee Note.

Recommendation:

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Rule 608(b) and the accompanying Committee Note, each as modified following publication, be approved and forwarded to the Judicial Conference. The motion was passed by a unanimous vote.

A copy of the proposed amendment to Rule 608(b), together with the proposed Committee Note, is attached to these minutes.

2. Rule 804(b)(3)

In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest; but by its terms the Rule imposes no similar requirement on the prosecution. Nor does the Rule require a showing of corroborating circumstances in civil cases.

At its last meeting the Evidence Rules Committee proposed an amendment to Rule 804(b)(3) that would require every proponent of a declaration against penal interest to establish corroborating circumstances clearly indicating the trustworthiness of the statement. This proposal was approved by the Standing Committee to be released for public comment. The most important goal of the proposed amendment was to provide equal treatment to the accused and the prosecution in a criminal case.

Judge Shadur noted that most of the public comment on the proposed amendment was positive. The Department of Justice, however, expressed substantial objections to the proposal, as did some academics. A major criticism of the proposal was that extending the corroborating circumstances requirement to government-proffered statements would create a problematic interface with the government's independent obligation to satisfy the Confrontation Clause in criminal cases. The existing Rule's requirement of "corroborating circumstances" has never been clearly defined. The term "corroborating circumstances" is not used in any other Evidence Rule, and the Advisory Committee Note makes no attempt to define the term.

Most courts have held that "corroborating circumstances" can be shown by reference to independent corroborating evidence indicating that the declarant's statement is true. But this definition of corroborating circumstances–including a component of corroborating evidence–is problematic if applied to government-proffered hearsay statements because of the Supreme Court's decision in *Lilly v. Virginia,* 527 U.S. 116 (1999). In *Lilly* the Court declared that the hearsay exception for declarations against penal interest is not "firmly rooted" and therefore the Confrontation Clause is not satisfied simply because a hearsay statement fits within that exception. Therefore, to admit a declaration against penal interest consistently with the Confrontation Clause after *Lilly*, the government is required to show that the statement carries "particularized guarantees of trustworthiness" that indicate it is reliable. And the Court in *Lilly* held that this showing of "particularized guarantees of trustworthiness" cannot be met by a showing of independent corroborating evidence. Rather, the statement must be shown reliable due to the circumstances under which it is made.

The Committee engaged in a lengthy discussion of the merits of the proposed amendment in light of the objections posed by the Department of Justice and other public commentators. Some Committee members noted that the public comment by and large was in favor of establishing symmetry in Rule 804(b)(3). But after substantial consideration, the Committee resolved that the "symmetry" model was not as simple as it appeared. If "corroborating circumstances" requires or permits a showing of corroborating evidence, then the amendment would impose an evidentiary

requirement that is different from, and probably more stringent than, the significant evidentiary requirement of reliability currently imposed by the Confrontation Clause after *Lilly*. Moreover, the true impact of the amendment could not even be assessed as applied to prosecution-generated evidence, given the lack of unanimity about the meaning of "corroborating circumstances." Members stated that it was problematic to propose an amendment without being sure of how it would apply or how it would relate to existing evidentiary and constitutional requirements. This was especially so given the reservations about the amendment expressed by several members of the Standing Committee when the amendment was released for public comment.

Another Committee member expressed the view that symmetry in the Rule was unwarranted because inculpatory statements against penal interest are often made under different circumstances than exculpatory statements. As Congress recognized, exculpatory statements are potentially unreliable because a declarant may simply be trying to get the defendant off from charges by confessing to the crime himself, perhaps secure in the knowledge that he will not himself be convicted because the evidence does not point to him. This member stated that in contrast, statements that inculpate the defendant do not raise the same questions of unreliability, especially after the Supreme Court's decision in *Williamson v. United States* – which provides that statements made in custody are inadmissible to the extent they directly implicate the defendant – and especially in light of the government's obligation to satisfy the reliability requirements of the Confrontation Clause.

On the other hand, several Committee members noted the problem of the current state of Rule 804(b)(3) after *Lilly*. As Rule 804(b)(3) currently reads, a hearsay statement offered by the government could satisfy the Rule and yet would not satisfy the Constitution. This is because after *Lilly*, Rule 804(b)(3) is not a firmly-rooted hearsay exception, so the mere fact that a statement falls within the exception does not satisfy the Confrontation Clause. *Lilly* holds that a statement offered under a hearsay exception that is not firmly-rooted will satisfy the Confrontation Clause only when it bears "particularized guarantees of trustworthiness." And the *Lilly* Court held that this standard of "particularized guarantees" would not be satisfied simply because the statement was disserving to the declarant's penal interest. The government must show circumstantial guarantees of trustworthiness beyond the fact that the statement is disserving. Yet Rule 804(b)(3) as written requires only that the prosecution show that the statement is disserving to the declarant's penal interest. It does not impose any additional evidentiary requirement. Thus, after *Lilly*, Rule 804(b)(3) as written is not consistent with constitutional standards. This has led at least one court to hold that a disserving statement offered against an accused was properly admitted under Rule 804(b)(3) and yet violated the accused's right to confrontation. *United States v. Westmoreland*, 240 F.3d 618 (7th Cir. 2001).

Committee members noted the anomaly of an Evidence Rule that is unconstitutional as applied. Other Evidence Rules are written to avoid a conflict with constitutional principles. Examples include Rule 412, which contains a provision that prohibits its application when to do so would violate the constitutional rights of the accused; Rule 803(8)(B) and (C), which prohibit the admission of police reports when to do so would violate the accused's right to confrontation; and

Rule 201(g), which prohibits conclusive presumptions in criminal cases out of concern for the accused's constitutional right to jury trial. To the Committee's knowledge, no other hearsay exception has the potential of being applied in such a way that a statement could fit within the exception and yet would violate the accused's right to confrontation. Other hearsay exceptions, such as those for dying declarations, excited utterances and business records, have been found firmly-rooted.

The fact that Rule 804(b)(3) can be unconstitutional if applied literally has led a number of courts to extend the Rule's "corroborating circumstances" requirement to statements offered by the government–even though the Rule does not so provide. The problem with this extension, however, is that the "corroborating circumstances" requirement does not necessarily match the Constitution's requirement of "particularized guarantees of trustworthiness." Under the Confrontation Clause, "particularized guarantees of trustworthiness" must be found in the circumstances under which the statement is made–the existence of independent corroborating evidence is irrelevant. In contrast, most courts have construed "corroborating circumstances" to include the possibility of independent corroborating evidence.

Some Committee members noted another disadvantage of an Evidence Rule that does not comport with the Constitution–it poses a trap for the unwary. A defense counsel might be under the impression that the hearsay exceptions as written comport with the Constitution. Indeed. this is a justifiable assumption for all the categorical hearsay exceptions in the Federal Rules of Evidence, which generally have been found "firmly rooted"–except for Rule 804(b)(3). A minimally competent defense lawyer might object to a hearsay statement as inadmissible under Rule 804(b)(3), thinking that an additional, more specific objection on constitutional grounds would be unnecessary. In doing so, counsel will have inadvertently waived the additional reliability requirements of the Confrontation Clause. If the hearsay exception and the Confrontation Clause are congruent, then the risk of inadvertent waiver of the constitutional reliability requirements would be eliminated.

In light of this discussion, a Committee member suggested that the proposed amendment be reformulated to accomplish the following objectives.

1. Retain the corroborating circumstances requirement as applied to statements against penal interest offered by the accused.

2. Extend the corroborating circumstances requirement to declarations against penal interest offered in civil cases.

3. Require that statements against penal interest offered against the accused must be "supported by particularized guarantees of trustworthiness."

Judge Shadur noted that if this proposal were accepted by the Committee, it would have to be submitted for a new round of public comment. The proposed amendment released for public

comment was intended to provide symmetry and unitary treatment of declarations against penal interest–"corroborating circumstances" would be required for all such statements. The proposed reformulation would impose different admissibility requirements depending on the party proffering the declaration against penal interest. The prosecution would be required to show "particularized guarantees of trustworthiness" (i.e., the Confrontation Clause reliability standard), while all other parties would be required to show "corroborating circumstances," however that term is interpreted by the courts.

The Reporter drafted a reformulated proposed amendment to Rule 804(b)(3) in accordance with the Committee member's suggestion. That draft was reviewed by Professor Kimble, a member of the Standing Committee's Subcommittee on Style. Professor Kimble made several suggestions for stylistic changes to the proposed revised amendment to Rule 804(b)(3). Those stylistic changes were incorporated into the draft. The Reporter then drafted a revised Committee Note to respond to the changes that would be made to the proposed amendment as it was released for public comment. The Committee reviewed the draft Note and made suggestions that were incorporated into the draft.

At the end of the discussion, a motion was made and seconded to recommend that the amendment as originally released for public comment, together with a small stylistic change, be approved. This motion was defeated; two members voted in favor and three against.

Recommendation:

A motion was then made and seconded to propose a revised amendment to be released for public comment, in accordance with the revised draft prepared by the Committee with the assistance of the Reporter and Professor Kimble, and consistently with the discussion set forth above. This new proposal would read as follows:

> (b) Hearsay exceptions. – The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *
>
> > (3) Statement against interest. – A statement ~~which~~ that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. But a ~~A~~ statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is ~~not~~ admissible ~~unless~~ under this subdivision in the following circumstances only: (A) if offered in a civil case or to exculpate an accused in a criminal case, it is supported by corroborating circumstances that clearly indicate ~~the~~ its trustworthiness, or ~~of the statement~~ (B) if offered to inculpate an accused, it is supported by particularized guarantees of trustworthiness.

The motion to propose the revised amendment to Rule 804(b)(3) for release for public comment was approved by all members of the Committee, including the Justice Department representative. The proposed Committee Note was also approved unanimously.

In the course of its discussion on the amendment to Rule 804(b)(3) proposed for public comment, and its reformulation of the proposal, the Evidence Rules Committee considered and rejected a number of other proposals for change suggested in the public comment. Those proposals included:

1. *Deleting the corroborating circumstances requirement.* Some public commentary suggested that the corroborating circumstances requirement should be deleted from the Rule entirely. The Committee unanimously rejected this proposal. Members reasoned that this solution would result in a substantial change to the case law and would be contrary to the legislative history of Rule 804(b)(3), in which Congress expressed strong concern about the reliability of against penal interest statements. The Committee found nothing to indicate that the reliability of against penal interest statements has increased over time in such a way as to justify dispensing with the corroborating circumstances requirement.

2. *Expanding the corroborating circumstances requirement to statements against pecuniary interest.* Two public comments suggested that Rule 804(b)(3)'s corroborating circumstances requirement should be extended to declarations against *pecuniary* interest. The Committee unanimously rejected this suggestion on two grounds. First, the Committee believed that declarations against pecuniary interest are as a class more reliable than declarations against penal interest. This is because declarations against pecuniary interest are often made by declarants who are reliable and credible, whereas declarations against penal interest are by definition made by those who have either violated a criminal law or have lied about doing so. Second, the Committee noted that the common law provided for admission of declarations against pecuniary interest without a showing of corroborating circumstances, and that the common-law rule had been considered and retained by the original Advisory Committee and Congress. The Committee saw nothing to indicate that the reliability of declarations against pecuniary interest had changed from the time that Rule 804(b)(3) was initially adopted.

3. *Defining the corroborating circumstances requirement:* As previously noted, there is a good deal of dispute about the meaning of the corroborating circumstances requirement in Rule 804(b)(3). One public comment suggested that the Committee amend the Rule to provide a textual definition of corroborating circumstances. The Committee considered and unanimously rejected this suggestion. Committee members noted that the factors supporting the reliability of a declaration against penal interest will vary with each case. In some cases corroborating evidence might be useful; in others the fact that the statement was spontaneous will be important; and in some cases a combination of independent evidence and reliable circumstances will be sufficient and appropriate.

Any textual change also might lead to an unwarranted change in the case law that had developed over the meaning of corroborating circumstances. The Committee noted that it had provided guidance to the bench and bar in the Committee Note to the proposed amendment, which sets out some of the factors that the courts have found relevant to a determination of corroborating circumstances.

A copy of the proposed revised amendment to Rule 804(b)(3), together with the proposed Committee Note, is attached to these minutes.

Privileges

Judge Shadur noted that the Subcommittee on Privileges is engaged in a long-term project to provide a draft of privilege rules that would codify the federal common law as developed under Evidence Rule 501. The Subcommittee has prepared a preliminary draft of seven privilege rules: 1) a catchall provision, providing that the state law of privilege applies in diversity cases and containing a provision to govern application of privileges not specifically established in the Rules; 2) a rule covering the attorney-client privilege; 3) a rule providing a privilege to a witness to refuse to give adverse testimony against a spouse in a criminal case; 4) a rule providing a privilege for interspousal confidential communications; 5) a rule providing a privilege for communications to physicians and mental health providers; 6) a rule covering the privilege for communications to clerics; and 7) a rule governing waiver.

At previous meetings the full Committee had reviewed five of the draft privilege rules. It had provided comments and suggestions that had been incorporated into the current working drafts. As of the April 2002 Committee meeting the full Committee had tentatively approved the draft rule on waiver and had agreed preliminarily to reject the privilege protecting a witness from giving adverse testimony against a spouse. The Committee had provided suggestions on the catch-all provision, the attorney-client privilege and the privilege for confidential spousal communications that were incorporated into the current working drafts of those privilege rules.

Judge Shadur noted that even if the Committee ultimately agrees with the Subcommittee drafts, it is not bound or required to propose a codification of the privileges. He also noted that even if no amendments are proposed, the Committee would perform a valuable service in preparing a "best principles" version of the federal law of privilege.

At the Committee meeting the Subcommittee sought commentary from the full Committee on two of the draft rules–the privilege for communications to physicians and mental health providers and the privilege for communications to clerics. Because the privilege project is at a very preliminary

stage, no final decisions were made on any of the drafts. What follows is a summary of the discussion on the two drafts that were reviewed by the Committee:

1. *The Physician-Mental Health Provider Privilege*

Professor Broun, the consultant to the Privileges Subcommittee, led the discussion on the draft of the privilege for communications to physicians and mental health providers. He noted that the Supreme Court in *Jaffee v. Redmond* established a privilege under federal common law for confidential communications to psychotherapists and other mental health providers. The Court in *Jaffee* left open whether a similar privilege would extend to communications to "general" physicians. Lower federal courts have rejected a more general doctor-patient privilege. The Subcommittee's draft of the privilege would protect confidential communications to physicians.

The Committee considered the merits of extending the *Jaffee* privilege to protect statements to general physicians. The DOJ representative argued that extending the privilege in this way would impair the government's ability to prosecute health fraud cases. Judge Shadur responded that the draft included a crime-fraud exception, and so in a health fraud case the government would be able to obtain communications to physicians that are in furtherance of health fraud. The DOJ representative countered that initial proof of crime or fraud sufficient to invoke the crime-fraud exception may be difficult to obtain, so in fact a physician-patient privilege would impair the government's objectives in health fraud cases.

The Reporter questioned whether a general physician-patient privilege was worth the cost of changing, rather than codifying, federal common law. The privilege would probably not apply in many cases, because in most situations a waiver would be found, for example where a party refers to his or her medical condition as part of a claim or defense. Nor would the privilege protect information about the patient's condition–it would protect only communications that could be separated from that condition. Professor Broun responded that even if the physician-patient privilege would rarely apply, the privilege is worth the effort because it would make a statement that the physician-patient relationship is an important relationship worthy of legal protection.

A tentative vote was taken on whether the draft should continue to include a privilege for communications to physicians. The Committee voted four to one in favor of retaining the physician-patient privilege in the draft.

The Committee then turned to whether the privilege should be limited to communications to "licensed" mental health providers. The Uniform Rules privilege protects communications to "authorized" providers, but the Privileges Subcommittee believed that the term "authorized" might be too broad, resulting in the shielding of communications to persons who might not be performing responsible therapeutic services. The Committee took a tentative vote and unanimously agreed that the term "licensed" should be included in the draft. It also instructed the Subcommittee to include language in the draft that would allow the privilege to apply when the communication is made to a person under the supervision of a licensed physician or mental health provider, e.g., an intern.

After further discussion, the Committee tentatively accepted the draft's language on the definition of "physician," on who may claim the privilege, and on the application of the privilege to hospitalization proceedings.

The Committee then considered the draft's definition of a crime-fraud exception and made two suggested changes. First, the Committee decided that the exception should be expanded to allow disclosure when the patient confers with the physician in an attempt to assist a third party in committing a fraud. This expansion would cover medical frauds where the payment is sought by someone other than the patient (e.g., a parent who filed the claim). Second, the Committee decided that the exception should be expanded to allow disclosure when the patient confers with the physician in an attempt to "escape detection" from a completed crime.

The Committee next considered the proper scope of the "dangerous patient" exception to the privilege for communication to physicians and other health providers. The dangerous patient exception can be attributed to a footnote in the *Jaffee* case, where the Court stated that "there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist." But despite this language, two lower court cases have distinguished between a duty to disclose in order to protect the patient or others (where the exception to the privilege would apply) and the disclosure of the threat in a court proceeding after the danger had past. The Committee, however, agreed with the thrust of the *Jaffee* opinion: that statements indicating an imminent threat to individuals did not warrant the protection of the privilege under any circumstances. The Committee therefore agreed that the privilege should not protect a communication "in which the patient has expressed an intent to engage in conduct likely to result in imminent death or serious bodily injury to the patient or another individual."

The Committee next considered whether an exception to the privilege should apply when disclosure is required by law. There was general agreement that the privilege would have to bow to disclosure required by federal law, but there was dispute about whether state law reporting obligations should trump the privilege. Some Committee members expressed concern that deference to state law reporting obligations would render the federal privilege subservient to state law. Members also noted that the existence of the federal privilege would not prevent the physician or mental health provider from complying with state reporting obligations. It would simply mean that the disclosed communications might still be privileged in a federal proceeding. The Committee ultimately determined that the working draft should not carve out an exception for communications that are required to be reported under state law.

Finally, the Committee instructed the Subcommittee to include a provision for an exception to the privilege where there is a dispute between the patient and the physician or mental health provider. This provision would parallel the exception for disputes between an attorney and client. The Committee agreed that language should be added to specify that if the dispute is over fees, the exception would permit disclosure of confidential communications only to the extent necessary to prove a fact at issue in the fee dispute.

2. Privilege For Communications To Clerics

Federal courts have recognized a common-law privilege for confidential communications to clerics, where the communications are made for the purpose of obtaining spiritual advice or consolation. The Privileges Subcommittee drafted a privilege that would codify this federal case law.

The Committee engaged in an extensive discussion on whether to proceed with this privilege. Committee members expressed significant concern that it would be difficult to define terms like "cleric," "religious" and "spiritual." The DOJ representative noted that many communications made by suspected terrorists could be protected by a privilege covering "religious" communications. Other members noted that, given the fluid nature of religious and spiritual activity in today's society, it would probably be better to leave the development of the cleric privilege to the case law. The Committee ultimately resolved to table the draft privilege for communications to clerics. The Committee also noted that if the privilege is to be considered at a later date, it would have to include at a minimum an exception for communications made in furtherance of crime or fraud. The Subcommittee was also directed to conduct further research to determine whether the term "cleric" could be defined in accordance with some standard found in other law, such as a federal statute.

Long-Term Projects

At the April 2001 Committee meeting the Reporter was directed to prepare a report setting forth the Evidence Rules that might be usefully considered on a long-term basis for possible amendment. The Committee was strongly of the view that amendments should not be proffered simply for the sake of change. On the other hand, the Committee recognized that valid arguments for necessary amendments must be seriously considered.

The Reporter submitted a report that set forth Rules that might be considered as part of a long-term project for proposed amendment. As directed by the Committee, the Reporter used three sources of information: 1. Legal scholarship suggesting change to one or more Evidence Rules; 2. The Uniform Rules project; and 3. Federal case law indicating either a conflict in the meaning of an Evidence Rule, or a divergence between the case law and the text of a Rule.

The Reporter led the Committee through the report, emphasizing that the issue for the Committee at this point was not whether an Evidence Rule should actually be amended. Rather, the question is whether there is a colorable case for an amendment that justifies directing the Reporter to provide a full report an a proposed amendment to the Committee at a subsequent meeting. Using that standard, the Committee considered the following Rules:

1. *Rule 104(b).* Some scholars have suggested that Rule 104(b)'s standard of proof for conditional relevance is misguided. They argue that the relevance of any piece of evidence is relative to all other evidence in the case, and therefore no distinction can be drawn between relevancy and conditional relevancy.

The Committee considered an amendment to Rule 104(b) proposed by an academic, but decided not to proceed. The Committee reasoned that any amendment to Rule 104(b) would upset settled expectations set by the Supreme Court's decision in *Huddleston v. United States.*

2. *Rule 104 new subdivision on privileges:* The Uniform Rules contain a new provision allocating the burden of proof in establishing privileges and exceptions to privileges, and setting forth the standards for holding an *in camera* hearing.

The Committee decided not to proceed with an amendment to Rule 104 that would set forth procedures for establishing privileges and their exceptions. Members noted that these procedural standards are already well-established in federal case law. If any such amendment were to be proposed, the Committee resolved that it should be made part of the long-term project on privileges.

3. *Rule 106:* Rule 106 sets forth a rule of completeness, providing that when a party introduces a writing or recorded statement, the adversary may "require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Rule 106 by its terms permits the adversary to introduce completing statements only where the proponent introduces a *written or recorded* statement. The language of the Rule does not on its face permit completing evidence when the proponent introduces an oral statement, such as a criminal defendant's oral confession. Some courts have found, however, that Rule 106, or at least the principle of completeness embodied therein, applies to require admission of omitted portions of an oral statement when necessary to correct a misimpression. Moreover, some courts have held that Rule 106 can operate as a de facto hearsay exception when the opponent opens the door by creating a misimpression by offering only part of a statement. In other words, completing evidence is found admissible under Rule 106 even if it would otherwise be hearsay.

The Committee directed the Reporter to prepare a full report on whether a possible amendment to Rule 106 is warranted by the conflict in the case law. Committee members noted that the Rule as written covers a "writing or recorded statement," and this terminology may be outdated given the use of email and other electronic transmissions.

4. *Rules 401, 402 and 403:* The Reporter noted that some commentators have suggested that the standards of admitting relevant evidence should be tightened. These commentators claim that a good deal of marginally relevant and time-consuming evidence is admitted under the liberal standards of Rules 401-403.

The Committee refused to proceed on any amendment to Rules 401-403. These are the most important rules of evidence; they are invoked thousands of times a year and are the subject of thousands of opinions. The Committee noted the risk that any change to Rules 401-403 will upset substantial, ingrained expectations and could result in the inadvertent overruling of a large number of opinions.

5. *Rule 404(a):* Rule 404(a) states that no party is permitted in the first instance to introduce character evidence to prove action in accordance with character, except for the "accused"--i.e., only the "accused" can open the door to circumstantial use of character evidence. Thus, the Rule seems explicit in prohibiting the circumstantial use of character evidence in civil cases. And the Advisory Committee Note confirms this exclusionary principle. Yet some courts have permitted civil defendants to use character evidence circumstantially "when the central issue in a civil case is by its nature criminal." This divergent case law could be addressed by an amendment to Rule 404(a) that would permit only an accused "in a criminal case" to offer character evidence in the first instance.

The Committee directed the Reporter to prepare a full report on whether a possible amendment to Rule 404(a) is justified by the divergent case law. Committee members noted that any change would be consistent with the original intent of the Rule.

6. *Rule 404(b):* The Uniform Rules now include substantial procedural protections limiting the admission of evidence of uncharged misconduct under Rule 404(b). Protections include a hearing requirement, a requirement of clear and convincing evidence that the uncharged misconduct actually occurred and a provision that the probative value of the uncharged misconduct must outweigh its prejudicial effect.

The Committee decided not to proceed with an amendment to Rule 404(b). The Uniform Rules proposal would substantially change the case law in all the Circuits. Committee members also noted that the proposal would meet substantial opposition from the Justice Department.

7. *Rule 405:* One scholar would amend Rule 405 to permit a homicide defendant to introduce evidence of specific bad acts of the victim when the accused claims self-defense. Currently, an accused can introduce character evidence in the form of reputation or opinion evidence only to prove that a decedent was the initial aggressor; an accused cannot use specific bad act evidence to prove a decedent's character (though the acts can be admitted to prove the defendant's state of mind if he heard about them beforehand).

The Committee decided not to proceed with an amendment to Rule 405. It found that the current Rule provided a proper balance between the defendant's interest in admitting probative evidence and the government's interest in excluding extraneous, possibly confusing and prejudicial evidence of the victim's conduct.

8. *Rule 408:* Rule 408 holds that evidence of a settlement or settlement negotiations is not admissible to prove the validity or amount of a claim. The Rule is not explicit on whether it covers evidence from a civil settlement that is offered in a subsequent criminal case. A number of cases have held that settlement evidence can be admitted in related criminal litigation. Some commentators have argued against such a result on the ground that it is bad policy–it will deter civil settlements if there is a risk of later criminal prosecution.

The Committee directed the Reporter to prepare a full report on a possible amendment to Rule 408 that would clarify whether civil compromise evidence is admissible in subsequent criminal litigation. The Committee found that the public policy questions are debatable enough to warrant further consideration.

9. *Rule 412:* Rule 412, the rape shield law, contains two possible anomalies. First, the Rule provides three exceptions, permitting evidence of the victim's sexual behavior to be admitted under certain limited conditions. One such exception is where its exclusion "would violate the constitutional rights of the defendant." Yet this language is qualified by preceding language stating that the exceptions apply if the evidence of sexual behavior is "otherwise admissible under these rules." As applied to the constitutional rights exception, the language could be read to mean that evidence, if *not* admissible under other rules, must be excluded *even if* its exclusion would violate the constitutional rights of the defendant. This anomaly could be corrected by a technical amendment to the Rule.

Another possible anomaly is that the Rule is inexplicit about whether it excludes evidence that the victim has made prior false claims of rape or has made claims of rape that are later withdrawn. Some courts hold that false claims of rape are "sexual behavior," while other courts disagree. Language could be added to the Rule to clarify whether evidence of false and withdrawn claims should be admitted or excluded.

The Committee directed the Reporter to prepare a full report on possible changes to Rule 412. The Committee found that one of the anomalies could be cured by a technical amendment. It also determined that the question of admissibility of false and withdrawn claims raises important public policy issues that warrant further consideration.

10. *Rules 413-415:* Rules 413-415 provide that evidence of prior sexual misconduct "is admissible" to prove a defendant's propensity to commit sex crimes. The major ambiguity in these Rules is whether evidence of a defendant's prior acts of sexual misconduct are subject to exclusion under Rule 403.

The Committee decided not to proceed with an amendment to Rules 413-415 that would specify that admissibility of a prior act of sexual misconduct is limited by Rule 403. The Committee noted that every case construing these Rules has held that Rule 403 is applicable, so there is no need to amend the Rules in light of this judicial unanimity.

11. *Rule 606(b):* Rule 606(b) generally excludes juror affidavits or testimony concerning jury deliberations. There has been some question in the courts about whether juror affidavit or testimony is admissible if it is offered to prove a clerical error, such as a mathematical miscalculation or checking the wrong box on the verdict form.

The Committee directed the Reporter to prepare a report on a possible amendment to Rule 606(b) that would clarify whether the Rule covers clerical errors. The Committee noted that it would be important, if the Rule were to be amended, to propose language that would clearly circumscribe the scope of any "clerical error" exception to the Rule.

12. *Rule 607:* Rule 607 states categorically that a party may impeach any witness it calls. On its face the Rule permits a party to call a witness solely for the purpose of "impeaching" the witness with evidence that would not otherwise be admissible, such as hearsay. Yet despite the affirmative and permissive language of the Rule, courts have held that a party cannot call a witness solely to impeach that witness, because to allow this practice would undermine the hearsay rule. Thus there is a divergence between the case law and the text of the Rule.

The Committee directed the Reporter to prepare a full report on whether a possible amendment to Rule 607 is justified by the divergent case law. The Committee noted that the divergence between the text and the case law created a possible trap for the unwary.

13. *Rule 609*: Rule 609(a)(2) provides that convictions involving "dishonesty or false statement" are automatically admissible to impeach a witness' character for truthfulness. The Rule does not define which crimes involve dishonesty or false statement, and there is dispute in the courts about two matters: whether theft and drug crimes involve dishonesty or false statement, and whether crimes must be admitted under Rule 609(a)(2) when they are committed by deceitful means. The Uniform Rules propose that only those crimes that contain an *element* of untruthfulness should be automatically admitted. This means that drug crimes and theft crimes would not be automatically admitted, because those crimes can be committed without having to lie. This also means that the proponent could not go behind the crime to the underlying facts, because the test would focus on the elements of the crime.

The Committee directed the Reporter to prepare a full report on the merits of the Uniform Rules version of Rule 609(a)(2). The Committee noted that the case law conflict on the meaning of Rule 609(a)(2) at least warranted further study.

14. *Rule 610:* A public commentator on the proposed amendment to Rule 608(b) suggests that the term "credibility" in Rule 610 should be replaced by "character for truthfulness." Such an amendment would provide that the Rule's limitation on using a witness' religious beliefs for impeachment would apply only if the goal of the impeachment is to attack the witness' character for

truthfulness.

The Committee decided not to proceed with any amendment to Rule 610 at this time. Members reasoned that the term "character for truthfulness" might be too narrow as applied to impeachment on the basis of religious beliefs. A policy argument could be made that a person's religious beliefs should be used, where probative, to impeach the witness' mental capacity as well as the witness' character for truthfulness. Moreover, as with the cleric's privilege, difficult questions arise as to what beliefs are "religious" and what are not. The Committee determined that any problems that might arise under the Rule are better left to case law development.

15. *Rule 611:* Several suggestions have been made in the academic literature for possible amendments to Rule 611. One suggestion is to impose a duty on judges to limit the length of cross-examinations where necessary to prevent the admission of marginally relevant evidence. Another is to clarify whether a party can ask leading questions when cross-examining a witness that the judge has identified as hostile to the adversary.

The Committee decided not to proceed with an amendment to Rule 611. The Committee found that the courts have had no problem in administering the Rule. The Rule already gives an appropriate measure of discretion to trial judges to limit both unduly lengthy cross-examination and unnecessary leading questions.

16. *Rule 613(b):* The Rule provides that a prior inconsistent statement can be admitted without giving the witness an opportunity to examine it in advance of admission. The witness simply must be given an opportunity at some point in the trial to explain or deny the statement. The Rule thus rejects the common-law rule under which the proponent was required to lay a foundation for the prior inconsistent statement at the time the witness testified. Despite the language of the Rule and Committee Note, however, some courts have reverted to the common-law rule.

The Committee directed the Reporter to prepare a report on the conflict in the case law in interpreting Rule 613(b), so that the Committee could determine whether an amendment to the Rule would be necessary.

17. *Rule 704(b):* Rule 704(b) would seem to prohibit all expert witnesses from testifying that a criminal defendant either did or did not have the requisite mental state to commit the crime charged. It states that "[n]o expert witness . . . may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." But some courts have held (and others have implied) that the Rule is applicable only to mental health experts, and therefore does not prohibit intent-based testimony from such witnesses as law enforcement agents testifying about the narcotics trade.

The Committee directed the Reporter to prepare a report on Rule 704(b), so that the Committee might consider whether the Rule should be amended to restore its original focus, which was to limit the conclusory testimony of mental health experts in criminal cases.

18. *Rule 706:* Judge Gettleman sent a letter to the Committee suggesting that Rule 706, governing court appointment of expert witnesses, might be amended to make stylistic improvements and to eliminate the "show cause" language that is rarely observed in practice. The Reporter also noted that the ABA Litigation Section has adopted detailed civil trial practice standards providing guidance to trial courts considering appointment of expert witnesses.

The Committee directed the Reporter to prepare a report on Rule 706, covering the suggestions proposed by Judge Gettleman and analyzing the ABA civil trial practice standards to determine whether it might be useful to incorporate them in the text of the Rule.

19. *Rule 801(c):* Academic commentators have suggested that the definition of hearsay in Rule 801(c) should be clarified to provide that the "matter asserted" should include both implied and express assertions.

The Committee decided not to proceed with any amendment to Rule 801(c). The Committee found that the courts have not had a problem in applying the hearsay definition to implied assertions, and that a Rule as fundamental as the hearsay rule should not be amended except in extreme circumstances.

20. *Rule 801(d):* Rule 801(d) provides that certain prior statements of testifying witnesses, and admissions by party-opponents, are "not hearsay" even though these statements clearly fit the definition of hearsay in Rule 801(c). Academic commentators have argued that it is confusing to define a statement as "hearsay" in one subdivision and then declare that it is "not hearsay" in the next subdivision. These commentators suggest that statements covered by Rule 801(d) might better be termed "exemptions" from the hearsay rule, rather than "not hearsay."

The Committee decided not to proceed with an amendment to Rule 801(d) that would style these statements as "exemptions." While the current situation is perhaps not analytically ideal, it has worked well enough in practice. The Committee concluded that the benefits of an amendment in analytical clarity would be outweighed by the costs of upsetting settled practices and expectations under the current Rule.

21. *Rule 801(d)(1)(B):* Rule 801(d)(1)(B) provides that certain prior consistent statements of testifying witnesses may be admitted for their truth. Courts have held that prior consistent statements not falling within Rule 801(d)(1)(B) might still be admissible–not for their truth but to rehabilitate the witness. Judge Bullock has proposed that Rule 801(d)(1)(B) be amended to provide

that prior consistent statements are admissible for their truth whenever they would be admissible to rehabilitate the witness' credibility. The justification for the proposal is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements, and any limiting instruction to use a prior consistent statement for rehabilitation and not for its truth is nonsensical to a jury.

The Committee directed the Reporter to prepare a report on Rule 801(d)(1)(B), to determine whether an amendment is necessary to eliminate any confusion that might be arising under the current Rule.

22. *Rule 803(3):* Rule 803(3) incorporates the famous *Hillmon* doctrine, providing that a statement reflecting the declarant's state of mind can be offered as probative of the declarant's subsequent conduct in accordance with that state of mind. The Rule is silent, however, on whether a declarant's statement of intent can be used to prove the subsequent conduct of someone other than the declarant. The original Advisory Committee Note refers to the Rule as allowing only "evidence of intention as tending to prove the act intended"– implying that the statement can be offered to prove how the declarant acted, but cannot be offered to prove the conduct of a third party. The legislative history is ambiguous. The case law is conflicted. Some courts have refused to admit a statement that the declarant intended to meet with a third party as proof that they actually did meet. Other courts hold such statements admissible if the proponent provides corroborating evidence that the meeting took place.

The Committee directed the Reporter to prepare a report on Rule 803(3), analyzing whether the conflict in the case law warrants a possible amendment to the Rule to clarify whether statements can be admitted to prove the conduct of someone other than the declarant.

23. *Rule 803(4):* Rule 803(4) exempts certain statements made to medical personnel from the hearsay rule. Statements made to doctors for purposes of litigation fall within the exception, because the Rule specifically states that it covers statements made "for purposes of medical *diagnosis* or treatment." The original Advisory Committee recognized that such statements might not be reliable due to a litigation motive, but relied on practical reasons for including statements to litigation doctors within the exception. One reason was that under Rule 703, the doctor would be able to rely on the patient's statements in forming an expert opinion, even though they were hearsay; because the hearsay statements would get before the jury anyway to illustrate the basis for the expert's opinion, the Advisory Committee figured it would not make much difference if they were also admitted substantively.

Professor Broun, a consultant to the Evidence Rules Committee, has suggested that the original Advisory Committee's reliance on Rule 703 is no longer justified now that Rule 703 was amended in 2000. Under the amendment, hearsay relied upon by an expert cannot be disclosed to the jury unless its probative value in illustrating the expert's basis substantially outweighs the risk

that the jury will use the hearsay for its truth. Therefore, it is far less likely than it once was that a litigation doctor would be able to disclose the plaintiff's hearsay statement to the jury in the guise of illustrating the basis for the expert's opinion. Professor Broun suggests that an amendment might be proposed to provide that Rule 803(4) does not cover statements made to medical personnel for purposes of litigation.

The Committee directed Professor Broun to prepare a report on Rule 803(4), so that the Committee could determine whether the Rule should be amended to eliminate its coverage of statements for purposes of litigation. Committee members observed that if such statements were to be eliminated from the hearsay exception, the best solution might be to add a sentence to the Rule specifically eliminating such statements, rather than to delete the term "diagnosis" from the Rule. A statement may be made for purposes of "diagnosis" as opposed to "treatment" and yet not be made for purposes of litigation.

24. *Rule 803(5):* Rule 803(5) provides a hearsay exception for past recollection recorded: a record "containing a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately" where the record is "shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly." The Rule does not explicitly provide for a situation in which a person makes a statement to another person who records the statement, and the recorded statement is not adopted by the person making the statement. Thus the Rule does not envision that a person with personal knowledge might make a statement recorded by another, with the record being made admissible by calling both the reporter and the recorder. Despite the language of the Rule, however, cases can be found that permit two-party vouching under Rule 803(5).

The Committee directed the Reporter to prepare a report on Rule 803(5), to determine whether the Rule should be amended to specifically permit a record to be admitted where both the person making the statement and the person recording it can vouch for the accuracy of their respective reports.

25. *Rule 803(6):* Rule 803(6) defines a business record as one "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." This language could be read as abrogating the common-law requirement that the person transmitting the information to the recorder must have a business duty to do so. It states only that the transmitting person must have "knowledge", not that the person must be reporting within the business structure. Yet despite the text, the courts have held that all those who report information included in a business record must be under a business duty to do so--or else the reliability problem created from the report by an outsider must be satisfied by some other circumstances. The Reporter informed the Committee that several States, e.g., Louisiana and Tennessee, have versions of Rule 803(6) that specifically provide criteria for admitting statements in business records where the recorder is relying on information submitted by another person and

does have personal knowledge of the accuracy of the information.

The Committee directed the Reporter to prepare a report on Rule 803(6), to determine whether the Rule should be amended to provide criteria to assure the reliability of statements transmitted to the person who prepared the business record.

26. *Rule 803(8):* Rule 803(8) provides a hearsay exception for public reports. Courts and commentators alike have noted that the Rule has several drafting problems. It is divided into three subdivisions, each defining admissible public reports, but the subdivisions are overlapping. Subdivisions (B) and (C) exclude law enforcement reports in criminal cases from the exception, but courts have held that these exclusions are not to be applied as broadly as they are written. The exceptions are intended to protect against the admission of unreliable public reports, but this concern might be better stated if the exception were written simply to admit a public report unless the court finds it to be untrustworthy under the circumstances. The Reporter informed the Committee that the Uniform Rules have departed from the Federal model, as have many States.

The Committee directed the Reporter to prepare a report on Rule 803(8), to determine whether the Rule should be amended to clarify that a public report is admissible unless the court finds it to be untrustworthy under the circumstances.

27. *Rule 803(18):* Rule 803(18) provides a hearsay exception for "statements contained in published treatises, periodicals, or pamphlets" if they are "established as a reliable authority" by the testimony or admission of an expert witness or by judicial notice. This "Learned Treatise" exception does not on its face permit evidence in electronic form, such as a film or video. But some courts have rejected a literal reading the Rule and have upheld the admission of electronic evidence under the learned treatise exception.

The Committee directed the Reporter to prepare a report on Rule 803(18), so that the Committee could determine whether an amendment should be proposed to cover the presentation of "learned treatise" evidence in electronic form.

28. *Other Rules:* Time did not permit the Committee to give preliminary consideration to other Rules identified by the Reporter as Rules that might be the subject of long-term consideration, on the basis of scholarly commentary, case law conflict or case law divergence from the text. The Committee therefore decided to defer preliminary consideration of the following Rules until the next meeting: Rules 804(a)(5), 804(b)(1), 806, 807, a possible "tender years" exception to the hearsay rule, and Rules 901(b), 902 and 1006.

Conclusion

Judge Shadur noted that his term as Chair of the Evidence Rules Committee expires in September 2002, and that Judge Norton's term on the Committee expires in September as well. Committee members and the Reporter expressed their deep gratitude to Judge Shadur for his stellar work as Committee Chair, and to Judge Norton for his important contributions to the Committee.

The meeting was adjourned at 5:00 p.m., Friday, April 19th.

The next meeting of the Evidence Rules Committee is scheduled for October 18, 2002 in Seattle.

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law

Attachments:

1. Proposed amendment to Evidence Rules 608(b), with the recommendation that the proposal be approved by the Standing Committee and forwarded to the Judicial Conference

2. Proposed amendment to 804(b)(3), with the recommendation that the proposal be released for public comment.

Attachment 1

Proposed Amendment to Rule 608(b)

Committee Recommendation: That the Standing Committee Approve the Proposed Amendment and Forward the Proposed Amendment to the Judicial Conference.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 608

Rule 608. Evidence of Character and Conduct of Witness*

(a) Opinion and reputation evidence of character. — The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. — Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' ~~credibility~~ character for truthfulness, other than conviction of crime as provided in

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* New matter is underlined and matter to be omitted is lined through.

rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters ~~which~~ that relate only to ~~credibility~~ character for truthfulness.

* * *

COMMITTEE NOTE

The Rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness. *See United States v. Abel,* 469 U.S. 45 (1984); *United States v. Fusco,* 748 F.2d 996 (5th Cir. 1984) (Rule 608(b) limits the use of evidence "designed to show that the witness has done things, unrelated to the suit being tried, that make him more or less believable per se"); Ohio R.Evid. 608(b). On occasion the Rule's use of the overbroad term "credibility" has been read "to bar extrinsic evidence for bias, competency and contradiction

41 impeachment since they too deal with credibility." American Bar
42 Association Section of Litigation, *Emerging Problems Under the*
43 *Federal Rules of Evidence* at 161 (3d ed. 1998). The amendment
44 conforms the language of the Rule to its original intent, which was
45 to impose an absolute bar on extrinsic evidence only if the sole
46 purpose for offering the evidence was to prove the witness' character
47 for veracity. *See* Advisory Committee Note to Rule 608(b) (stating
48 that the Rule is "[i]n conformity with Rule 405, which forecloses use
49 of evidence of specific incidents as proof in chief of character unless
50 character is in issue in the case . . .").
51
52 By limiting the application of the Rule to proof of a witness'
53 character for truthfulness, the amendment leaves the admissibility of
54 extrinsic evidence offered for other grounds of impeachment (such as
55 contradiction, prior inconsistent statement, bias and mental capacity)
56 to Rules 402 and 403. *See, e.g., United States v. Winchenbach,* 197
57 F.3d 548 (1st Cir. 1999) (admissibility of a prior inconsistent
58 statement offered for impeachment is governed by Rules 402 and
59 403, not Rule 608(b)); *United States v. Tarantino*, 846 F.2d 1384
60 (D.C.Cir. 1988) (admissibility of extrinsic evidence offered to
61 contradict a witness is governed by Rules 402 and 403); *United States*
62 *v. Lindemann,* 85 F.3d 1232 (7th Cir. 1996) (admissibility of extrinsic
63 evidence of bias is governed by Rules 402 and 403). Rules 402 and
64 403 displace the common-law rules prohibiting impeachment on
65 "collateral" matters. *See* 4 Weinstein's Evidence § 607.06[3][b][ii]
66 (2d ed. 2000) (advocating that courts substitute "the discretion
67 approach of Rule 403 for the collateral test advocated by case law").
68
69 It should be noted that the extrinsic evidence prohibition of
70 Rule 608(b) bars any reference to the consequences that a witness
71 might have suffered as a result of an alleged bad act. For example,
72 Rule 608(b) prohibits counsel from mentioning that a witness was
73 suspended or disciplined for the conduct that is the subject of
74 impeachment, when that conduct is offered only to prove the
75 character of the witness. *See United States v. Davis,* 183 F.3d 231,
76 257 n.12 (3d Cir. 1999) (emphasizing that in attacking the
77 defendant's character for truthfulness "the government cannot make
78 reference to Davis's forty-four day suspension or that Internal Affairs
79 found that he lied about" an incident because "[s]uch evidence would
80 not only be hearsay to the extent it contains assertion of fact, it would
81 be inadmissible extrinsic evidence under Rule 608(b)"). *See also*
82 Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and*

83 *Extrinsic Evidence*, 7 Crim. Just. 28, 31 (Winter 1993) ("counsel
84 should not be permitted to circumvent the no-extrinsic-evidence
85 provision by tucking a third person's opinion about prior acts into a
86 question asked of the witness who has denied the act.").
87
88 For purposes of consistency the term "credibility" has been
89 replaced by the term "character for truthfulness" in the last sentence
90 of subdivision (b). The term "credibility" is also used in subdivision
91 (a). But the Committee found it unnecessary to substitute "character
92 for truthfulness" for "credibility" in Rule 608(a), because subdivision
93 (a)(1) already serves to limit impeachment to proof of such character.
94
95 Rules 609(a) and 610 also use the term "credibility" when the
96 intent of those Rules is to regulate impeachment of a witness'
97 character for truthfulness. No inference should be derived from the
98 fact that the Committee proposed an amendment to Rule 608(b) but
not to Rules 609 and 610.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

The last sentence of Rule 608(b) was changed to substitute the term "character for truthfulness" for the existing term "credibility." This change was made in accordance with public comment suggesting that it would be helpful to provide uniform terminology throughout Rule 608(b). A stylistic change was also made to the last sentence of Rule 608(b).

SUMMARY OF PUBLIC COMMENTS

Thomas J. Nolan, Esq. (01-EV-001) states that the proposed amendment to Rule 608(b) is "extremely important, should be adopted, and can and will significantly increase the administration of justice in the United States Courts."

Mikel L. Stout, Esq. (01-EV-002) approves of the proposed amendment.

The Committee on Civil Litigation of the United States District Court for the Eastern District of New York (01-EV-003) endorses the proposed change to Rule 608(b).

The Federal Magistrate Judges Association (01-EV-004) supports the proposed amendment and notes that it "is consistent with the drafters' original intent and Supreme Court authority."

Professor Lynn McLain (01-EV-005) supports the proposed amendment on the ground that if "clarifies the rule and removes an arguable, though unintended, conflict with cases permitting extrinsic proof of bias and of contradiction . . ."

Professor John C. O'Brien (01-EV-006) supports the proposed change to Rule 608(b). He states that some Evidence Rules use the term "credibility" to refer to "character for truthfulness" and that this usage "has created considerable confusion, particularly with respect to whether extrinsic evidence is precluded by Rule 608(b)." He contends that the problem of misuse of the term "credibility" is not limited to Rule 608(b) and that the Advisory Committee consider proposing similar amendments to replace the term "credibility" with the term "character for truthfulness in Rules 608(a), 609 and 610.

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (01-EV-009) recommends the adoption of the proposed amendment to Rule 608(b), noting that it is "a modest and benign narrowing clarification of the existing rule." The Committee states that "the Advisory Committee is correct in suggesting that the proposed amendment brings the rule's language in line with its original intent and corrects a less precise locution that has led to unfortunate results in some cases."

The Federal Bar Association, Western Michigan Chapter (01-EV-012) supports the proposed amendment to Rule 608(b).

The State Bar of California's Committee on Federal Courts (01-EV-013) supports the proposed modification of Rule 608(b).

Professor James J. Duane (01-EV-014) recommends that the proposed change to Rule 608(b) should be made, "but only if the word 'credibility' is also replaced with 'character for truthfulness' throughout all of Rules 608, 609 and 610." He argues that the change proposed by the

Advisory Committee "would result in a situation whether the word 'credibility' would mean one thing in Rule 608(b), and something quite different in two other parts of the same Rule, as well as the two rules that follow it."

The Committee on the United States Courts of the State Bar of Michigan (01-EV-016) supports the proposed amendment to Rule 608(b).

The National Association of Criminal Defense Lawyers (01-EV-017) "fully supports the proposed amendment to Evidence Rule 608(b)." The Association notes that the proposed amendment "only makes more clear what the Rule already intends – that the prohibition against proving a specific instance of conduct by a witness with extrinsic evidence only applies where the specific instance of conduct is offered to attack or support the witness's character for truthfulness."

Attachment 2

Proposed Amendment to Rule 804(b)(3)

Committee Recommendation: That the Standing Committee Approve the Proposed Amendment for Release for Public Comment.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 804

1 **Rule 804. Hearsay Exceptions; Declarant Unavailable****

2 * * *

3 (b) Hearsay exceptions. – The following are not excluded by
4 the hearsay rule if the declarant is unavailable as a witness:

5 * * *

6 (3) Statement against interest. – A statement ~~which~~
7 that was at the time of its making so far contrary to the
8 declarant's pecuniary or proprietary interest, or so far tended
9 to subject the declarant to civil or criminal liability, or to
10 render invalid a claim by the declarant against another, that a
11 reasonable person in the declarant's position would not have
12 made the statement unless believing it to be true. But a ~~A~~
13 statement tending to expose the declarant to criminal liability
14 ~~and offered to exculpate the accused~~ is ~~not~~ admissible ~~unless~~
15 under this subdivision in the following circumstances only:

** Matter to be added is underlined. Matter to be omitted is lined through.

(A) if offered in a civil case or to exculpate an accused in a criminal case, it is supported by corroborating circumstances that clearly indicate ~~the~~ its trustworthiness, or ~~of the statement~~ (B) if offered to inculpate an accused, it is supported by particularized guarantees of trustworthiness.

* * *

COMMITTEE NOTE

The Rule has been amended in two respects:

1) To require a showing of corroborating circumstances when a declaration against penal interest is offered in a civil case. *See, e.g., American Automotive Accessories, Inc. v. Fishman,* 175 F.3d 534, 541 (7th Cir. 1999) (requiring a showing of corroborating circumstances for a declaration against penal interest offered in a civil case).

2) To confirm the requirement that the prosecution provide a showing of "particularized guarantees of trustworthiness" when a declaration against penal interest is offered against an accused in a criminal case. This standard is intended to assure that the exception meets constitutional requirements, and to guard against the inadvertent waiver of constitutional protections. *See Lilly v. Virginia,* 527 U.S. 116, 134-138 (1999) (holding that the hearsay exception for declarations against penal interest is not "firmly-rooted"and requiring a finding that hearsay admitted under a non-firmly-rooted exception must bear "particularized guarantees of trustworthiness" to be admissible under the Confrontation Clause).

The "particularized guarantees" requirement assumes that the court has already found that the hearsay statement is genuinely disserving of the declarant's penal interest. *See Williamson v. United States*, 512 U.S. 594, 603 (1994) (statement must be "squarely self-inculpatory" to be admissible under Rule 804(b)(3)). "Particularized

49 guarantees" therefore must be independent from the fact that the
50 statement tends to subject the declarant to criminal liability. The
51 "against penal interest" factor should not be double-counted as a
52 particularized guarantee. *See Lilly v. Virginia,* 527 U.S. at 138 (fact
53 that statement may have been disserving to the declarant's interest
54 does not establish particularized guarantees of trustworthiness
55 because it "merely restates the fact that portions of his statements
56 were technically against penal interest").
57
58 The amendment does not affect the existing requirement that
59 the accused provide corroborating circumstances for exculpatory
60 statements. The case law identifies some factors that may be useful
61 to consider in determining whether corroborating circumstances
62 clearly indicate the trustworthiness of the statement. Those factors
63 include (*see, e.g., United States v. Hall,* 165 F.3d 1095 (7th Cir.
64 1999)):
65
66 (1) the timing and circumstances under which the statement
67 was made;
68
69 (2) the declarant's motive in making the statement and
70 whether there was a reason for the declarant to lie;
71
72 (3) whether the declarant repeated the statement and did so
73 consistently, even under different circumstances;
74
75 (4) the party or parties to whom the statement was made;
76
77 (5) the relationship between the declarant and the opponent
78 of the evidence; and
79
80 (6) the nature and strength of independent evidence relevant
81 to the conduct in question.
82
83 Other factors may be pertinent under the circumstances. The
84 credibility of the witness who relates the statement in court is not,
85 however, a proper factor for the court to consider in assessing
86 corroborating circumstances. To base admission or exclusion of a
87 hearsay statement on the credibility of the witness would usurp the
88 jury's role in assessing the credibility of testifying witnesses.

I-B

TO: **Honorable Anthony J. Scirica, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Honorable Milton I. Shadur, Chair**
Advisory Committee on Evidence Rules

DATE: **May 1, 2002**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules met on April 19, 2002 in Washington, D.C. At the meeting the Committee approved a proposed amendment to Evidence Rule 608(b), with the unanimous recommendation that the Standing Committee approve the proposed amendment and forward it to the Judicial Conference. Part II of this Report summarizes the discussion of this proposed amendment. An attachment to this Report includes the text, Committee Note, GAP report, and summary of public comment for the proposed amendment to Rule 608(b).

The Evidence Rules Committee also unanimously agreed to revise a proposed amendment to Evidence Rule 804(b)(3) that was released for public comment. Part II of this Report summarizes the discussion of the proposed amendment as released for public comment and its proposed revision. The Evidence Rules Committee unanimously recommends that the revised proposal to amend Rule 804(b)(3) be released for a new round of public comment.

The Evidence Rules Committee also reviewed some long-term projects that are summarized

in Part III of this Report. The draft minutes of the April meeting set forth a more detailed discussion of all the matters considered by the Committee. Those minutes are attached to this Report.

II. Action Items

A. Recommendation To Forward the Proposed Amendment to Evidence Rule 608(b) to the Judicial Conference

At its June 2001 meeting the Standing Committee approved the publication of a proposed amendment to Evidence Rule 608(b). The Committee resolved 12 written comments from the public on this proposed amendment. Public hearings were cancelled because nobody expressed an interest in testifying. A complete discussion of the Committee's consideration of the public comments respecting Rule 608(b) can be found in the draft minutes attached to this Report. The following discussion briefly summarizes the proposed amendment to Rule 608(b).

The proposed amendment to Evidence Rule 608(b) is intended to bring the text of the Rule into line with the original intent of the drafters. The Rule was intended to prohibit the admission of extrinsic evidence when offered to attack or support a witness' character for truthfulness. Unfortunately the text of the Rule is phrased as prohibiting extrinsic evidence when offered to attack or support a witness' "credibility"– a less precise locution. The term "credibility" can be read to prohibit extrinsic evidence when offered for non-character forms of impeachment, such as to prove bias, contradiction or prior inconsistent statement. *United States v. Abel,* 469 U.S. 45 (1984) held that the Rule 608(b) extrinsic evidence prohibition does not apply when it is offered for a purpose other than proving the witness' character for veracity. But even though most case law is faithful to the drafters' original intent, a number of cases continue to misapply the Rule to preclude extrinsic evidence offered to impeach a witness on grounds other than character. *See, e.g., Becker v. ARCO Chem. Co.,* 207 F.3d 176 (3d Cir. 2000) (stating that evidence offered for contradiction is barred by Rule 608(b)); *United States v. Bussey,* 942 F.2d 1241 (8th Cir. 1991) (stating that the "plain language" of the Rule bars the use of extrinsic evidence to impeach a witness by way of contradiction); *United States v. Graham,* 856 F.2d 756 (6th Cir. 1988) (Rule 608(b) bars extrinsic evidence when offered to prove that the witness is biased).

The proposed amendment substitutes the term "character for truthfulness" for the overbroad term "credibility," thereby limiting the extrinsic evidence ban to cases in which the proponent's sole purpose is to impeach the witness' character for veracity. This change is consistent with the Court's construction of the Rule in *Abel*. The Committee Note to the proposed Rule clarifies that the admissibility of extrinsic evidence offered to impeach a witness on grounds other than character is governed by Rules 402 and Rule 403, not by Rule 608(b).

The public comments on the proposed amendment uniformly praised the Advisory Committee's deletion of the overbroad term "credibility" and agreed that the Rule should be limited

to its original intent, which was to exclude extrinsic evidence only when it is offered to prove a witness' character for truthfulness, and to leave all other uses of extrinsic evidence to be regulated by Rules 402 and 403.

One public commentator noted that there are other places in the Evidence Rules where the term "credibility" is probably used to mean "character for truthfulness." He suggested that the Committee use the occasion of the proposed amendment to address other provisions in the Evidence Rules where the term "credibility" is arguably misused. The Committee considered this comment carefully. It unanimously determined that the proposed amendment should be revised slightly to replace the term "credibility" with the term "character for truthfulness" in the last sentence of Rule 608(b). The Committee also revised the proposed Committee Note to refer to this slight change in the text and to explain that the change was made to provide uniform terminology throughout Rule 608(b).

The Evidence Rules Committee further considered whether the term "credibility" should be changed in other Evidence Rules. The Committee determined that the term need not be changed in Rule 608(a), because that Rule already limits impeachment to evidence pertinent to a witness' character for truthfulness. The Committee also determined that the use of the term "credibility" in Rules 609 and 610 has not created the same problems for courts and litigants as has the use of that term in Rule 608(b). The Committee found no reason to delay or withdraw the amendment to Rule 608(b) simply because the term "credibility" is used in other Evidence Rules.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 608(b), as modified following publication, be approved and forwarded to the Judicial Conference.

B. Recommendation To Approve the Revised Proposed Amendment to Evidence Rule 804(b)(3) For Release For Public Comment

At its June 2001 meeting the Standing Committee approved the publication of a proposed amendment to Evidence Rule 804(b)(3). This amendment would require every proponent of a declaration against penal interest to establish corroborating circumstances clearly indicating the trustworthiness of the hearsay statement. In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest; but by its terms the Rule imposes no similar requirement on the prosecution. Nor does

the Rule require a showing of corroborating circumstances in civil cases. The most important goal of the proposed amendment as released for public comment was to provide equal treatment to the accused and the prosecution in a criminal case.

After reviewing the public comment – particularly the comment filed by the Department of Justice – a majority of the Evidence Rules Committee determined that the proposal released for public comment would create substantial problems of application in criminal cases where declarations against penal interest are offered by the prosecution. This is because most courts have held that "corroborating circumstances" can or must be shown by reference to independent corroborating evidence indicating that the declarant's statement is true. But this definition of corroborating circumstances–including a component of corroborating evidence–is problematic if applied to government-proffered hearsay statements because of the decision in *Lilly v. Virginia,* 527 U.S. 116 (1999). In *Lilly* the Court declared that the hearsay exception for declarations against penal interest is not "firmly rooted" and therefore the Confrontation Clause is not satisfied simply because a hearsay statement fits within that exception. Therefore, to admit a declaration against penal interest consistently with the Confrontation Clause after *Lilly*, the government is required to show that the statement carries "particularized guarantees of trustworthiness" that indicate it is reliable. And the Court in *Lilly* held that this showing of "particularized guarantees of trustworthiness" cannot be met by a showing of independent corroborating evidence. Rather, the statement must be shown reliable due to the circumstances under which it is made.

Consequently, the proposed amendment's requirement of "symmetry" in applying the corroborating circumstances requirement to statements offered by the prosecution could end up in requiring the government to satisfy an evidentiary standard that is either more stringent than that required by the Constitution or different from that required by the Constitution. The government might have to provide independent corroborating evidence that the declaration against penal interest is true, even though the Confrontation Clause imposes no such requirement. The risk of confusion and undue burden in applying different evidentiary and constitutional standards to the same piece of evidence is profound. For this reason, a majority of the Evidence Rules Committee voted to withdraw the proposed amendment to Rule 804(b)(3) as it was released for public comment.

Despite voting to withdraw the proposed amendment, the Committee determined that the existing Rule presents a number of problems, the most important being that it does not comport with the Constitution in a criminal case. This is because after *Lilly*, Rule 804(b)(3) is not a firmly-rooted hearsay exception, so the mere fact that a statement falls within the exception does not satisfy the Confrontation Clause. *Lilly* holds that a statement offered under a hearsay exception that is not firmly-rooted will satisfy the Confrontation Clause only when it bears "particularized guarantees of trustworthiness." And the *Lilly* Court held that this standard of "particularized guarantees" would not be satisfied simply because the statement was disserving to the declarant's penal interest. To satisfy the Confrontation Clause, the government must show circumstantial guarantees of trustworthiness beyond the fact that the statement is disserving. Yet Rule 804(b)(3) as written requires only that the prosecution show that the statement is disserving to the declarant's penal interest. It does not impose any additional evidentiary requirement. Thus, after *Lilly*, Rule 804(b)(3) as written is not consistent with constitutional standards. To the Committee's knowledge, no other

categorical hearsay exception has the potential of being applied in such a way that a statement could fit within the exception and yet would violate the accused's right to confrontation. Other categorical hearsay exceptions, such as those for dying declarations, excited utterances and business records, have been found firmly-rooted.

The Committee found it notable that courts have struggled mightily to read Evidence Rules as if their text were consistent with the Constitution. Courts are understandably uncomfortable with having Evidence Rules that could be unconstitutional as applied. One example is the cases construing Rules 413-415. Courts have gone a long way to read those Rules as incorporating a Rule 403 balancing test, even though that is not evident from the text of those Rules. The rationale for that construction is that otherwise the Rules would violate the due process rights of a defendant charged with a sex crime. Another example of a non-textual construction found necessary due to the constitutional infirmity of the text of the Rule is Rule 804(b)(3) itself. The leading case on the subject, *United States v. Alvarez,* 584 F.2d 694 (5thCir. 1978), construed Rule 804(b)(3) as requiring corroborating circumstances for inculpatory statements against penal interest even though the text does not abide that construction. The Court reasoned that unless such a requirement were read into the Rule, the Rule would violate the defendant's right to confrontation. The Committee therefore believes that if courts are going to read language into a Rule to protect its constitutionality, it makes sense to write the Rule in compliance with the Constitution in the first place.

The Committee also determined that codifying constitutional doctrine provides a protection for defendants against an inadvertent waiver of the reliability requirements imposed by the Confrontation Clause. A defense counsel might be under the impression that the hearsay exceptions as written comport with the Constitution. Indeed, this is a justifiable assumption for all the categorical hearsay exceptions in the Federal Rules of Evidence, which have been found "firmly rooted"–except for Rule 804(b)(3). A minimally competent defense lawyer might object to a hearsay statement as inadmissible under Rule 804(b)(3), thinking that an additional, more specific objection on constitutional grounds would be unnecessary. If the hearsay exception and the Confrontation Clause are congruent, then the risk of inadvertent waiver of the constitutional reliability requirements would be eliminated. See, e.g., *United States v. Shukri,* 207 F.3d 412 (7th Cir. 2000) (court considers only admissibility under Rule 804(b)(3) because defense counsel never objected to the hearsay on constitutional grounds; yet there is no harm to the defendant because the Circuit requires corroborating circumstances for inculpatory statements against penal interest).

The Evidence Rules Committee also found it notable that a number of the Federal Rules of Evidence are written with constitutional standards in mind. For example, Rule 412, the rape shield law, provides that evidence of the victim's sexual conduct is admissible if its exclusion "would violate the constitutional rights of the defendant." Rule 803(8)(B) and (C), covering law enforcement reports in criminal cases, contain exclusionary language that is designed to protect the accused's right to confrontation. See *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977) (noting the constitutional basis for that exclusionary language). And Rule 201(g) contains a limitation on judicial notice in criminal cases, in specific deference to the defendant's constitutional right to jury trial. So it is hardly unusual, and indeed it is appropriate, for Evidence Rules to be written in light of constitutional standards.

Because of the concerns over the unconstitutionality of the Rule as presently written, the Committee has proposed a revised amendment to Rule 804(b)(3). That proposed amendment would accomplish at least three important objectives:

1. It would retain the corroborating circumstances requirement as applied to statements against penal interest offered by the accused. The Evidence Rules Committee remains convinced that the corroborating circumstances requirement is necessary to guard against the risk that criminal defendants and their cohorts will manufacture unreliable hearsay statements.

2. It would extend the corroborating circumstances requirement to declarations against penal interest offered in civil cases. This part of the proposal is unchanged from the proposal as originally released for public comment. The Committee notes that at least two federal circuits currently require corroborating circumstances for declarations against penal interest offered in civil cases, even though the text of the Rule does not impose such a requirement. *See American Automotive Accessories, Inc. v. Fishman,* 175 F.3d 534, 541 (7th Cir. 1999); *McClung v. Wal-Mart Stores, Inc.*, 270 F.3d 1007, 1013-15 (6th Cir. 2001). This part of the proposal would bring the Rule into line with this sensible case law.

3. It would require that statements against penal interest offered against the accused must be "supported by particularized guarantees of trustworthiness." This language is carefully chosen to track the language used by the Supreme Court in its Confrontation Clause jurisprudence. It would guarantee that the Rule would comport with the Constitution in criminal cases, without imposing on the government any evidentiary requirement that it is not already required to bear.

The proposed revised amendment to Rule 804(b)(3) was approved by all members of the Committee, including the Justice Department representative. The proposed revised amendment and accompanying Committee Note are attached to this Report.

The Committee believes that the proposed revision is a substantial change from the proposed amendment that was released for public comment. The proposal released for public comment was intended to provide symmetry and unitary treatment of declarations against penal interest; "corroborating circumstances" would be required for all such statements. Most of the public comment considered the merits of a symmetrical application of the corroborating circumstances requirement in criminal cases. In contrast, the proposed revision would impose different admissibility requirements depending on the party proffering the declaration against penal interest. The prosecution would be required to show "particularized guarantees of trustworthiness" (i.e., the Confrontation Clause reliability standard), while all other parties would be required to show "corroborating circumstances" – however that term is interpreted by the courts. Because the revision

is a significant change, the Evidence Rules Committee recommends that the revised proposal be released for a new period of public comment.

Recommendation: The Evidence Rules Committee recommends that the revised proposal to amend Evidence Rule 804(b)(3) be approved for release for public comment.

III. Information Items

A. Privileges

The Evidence Rules Committee continues to work on a long-term project to prepare provisions that would state, in rule form, the federal common law of privileges. This project will not necessarily result in proposed amendments, however. It is possible that the end result might be an FJC publication, not an official Committee document, much like two previous publications on Advisory Committee Notes and case law divergence.

The Subcommittee on Privileges prepared two draft rules for consideration by the Committee at the April meeting. Those drafts set forth: 1) a privilege for confidential communications to physicians and mental health providers; and 2) a privilege for confidential communications to clerics. At the April meeting the Committee provided extensive guidance and commentary on the draft of the physician-mental health provider privilege. The Committee also tentatively determined that any privilege for communications to clerics should be left to common law development. .

The Subcommittee on Privilege continues to conduct research on the privileges and will continue to revise and develop draft rules for further consideration and discussion at the October, 2002 meeting and future meetings of the Evidence Rules Committee.

B. Long-Range Planning

At its April meeting the Committee resolved to continue its practice of monitoring the cases and the legal scholarship for suggestions as to necessary amendments to the Evidence Rules. The Committee remains strongly of the view that amendments should not be proffered simply for the

sake of change. On the other hand, the Committee recognizes that valid arguments for necessary amendments must be considered.

At the April meeting the Committee considered a number of suggestions for amendments derived from three sources: 1. Legal scholarship suggesting change to one or more Evidence Rules; 2. The Uniform Rules project; and 3. Federal case law indicating either a conflict in the meaning of an Evidence Rule or a divergence between the case law and the text of a Rule.

The Committee voted to **reject** any long-term project to consider amendments to the following Evidence Rules:

Rule 104 (Preliminary Questions of Admissibility)

Rule 401 (Definition of Relevance)

Rule 402 (Admissibility of Relevant Evidence)

Rule 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, etc.)

Rule 404(b) (Admissibility of Other Crimes, Wrongs or Acts)

Rule 405 (Methods of Proving Character)

Rules 413-15 (Admissibility of Uncharged Sexual Misconduct)

Rule 610 (Impeachment for Religious Beliefs)

Rule 611 (Mode and Order of Interrogating Witnesses)

Rule 801(c) (Definition of Hearsay).

The Committee voted to consider tentatively whether the following Rules should be amended:

Rule 106 (To consider whether the rule of completeness should apply to statements that are not in writing, e.g., oral or electronic statements.)

Rule 404(a) (To consider whether character evidence should be admissible in civil cases where the defendant is charged with an act that constitutes a criminal offense.)

Rule 408 (To consider whether compromise evidence should be admissible in related criminal litigation.)

Rule 412 (To consider whether evidence of false and withdrawn claims of rape should be admissible, and to consider a technical amendment to the existing text.)

Rule 606(b) (To consider whether statements by jurors should be admissible when the inquiry is to determine whether the jury made a clerical error in rendering the verdict.)

Rule 607 (To consider whether the Rule should be amended to prohibit a party from calling a witness solely to impeach that witness with otherwise inadmissible information.)

Rule 609 (To consider whether to adopt the Uniform Rules definition of a conviction involving dishonesty or false statement.)

Rule 613(b) (To consider whether to require a party to confront a witness with a prior inconsistent statement before it can be admitted for impeachment.)

Rule 704(b) (To consider whether the Rule should be amended to exclude only opinions of mental health experts).

Rule 706 (To consider certain stylistic suggestions and to determine whether to incorporate civil trial practice standards developed by the ABA.)

Rule 801(d)(1)(B) (To consider whether the Rule should be amended to provide that a prior consistent statement is admissible for its truth whenever it is admissible to rehabilitate the witness.)

Rule 803(3) (To consider whether the Rule should be amended to cover statements of the declarant's state of mind when offered to prove the conduct of someone other than the declarant.)

Rule 803(4) (To consider whether statements made to medical personnel for purposes of litigation should continue to be admissible under the exception.)

Rule 803(5) (To consider whether the hearsay exception should cover records prepared by someone other than the party with personal knowledge of the event.)

Rule 803(6) (To consider whether the business records exception should be amended to require that statements recorded by a person without knowledge of the event must be shown to be reliable, either due to business duty or some other guaranty of trustworthiness.)

Rule 803(8) (To consider whether the language excluding law enforcement reports in criminal cases should be replaced by general language requiring that public reports are to be

excluded if they are untrustworthy under the circumstances).

Rule 803(18) (To consider whether the "learned treatise" exception should be amended to provide for admissibility of "treatises" in electronic form.)

A more detailed discussion of the above proposals, and the tentative Committee determinations, can be found in the Minutes, attached to this Report.

IV. Minutes of the April, 2002 Meeting

The Reporter's draft of the minutes of the Evidence Rules Committee's April, 2002 meeting are attached to this Report. These minutes have not yet been approved by the Evidence Rules Committee.

Attachments:

Proposed Amendment to Evidence Rule 608(b) and Committee Note (recommended for approval and forwarding to the Judicial Conference).

Proposed Revised Amendment to Evidence Rule 804(b)(3) and Committee Note (recommended for approval for release for public comment).

Draft Minutes of the April 2002 meeting of the Evidence Rules Committee

Attachment 1

Proposed Amendment to Rule 608(b)

Committee Recommendation: That the Standing Committee Approve the Proposed Amendment and Forward the Proposed Amendment to the Judicial Conference.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 608

1 **Rule 608. Evidence of Character and Conduct of Witness***

2 (a) Opinion and reputation evidence of character. —
3 The credibility of a witness may be attacked or supported by
4 evidence in the form of opinion or reputation, but subject to
5 these limitations: (1) the evidence may refer only to character
6 for truthfulness or untruthfulness, and (2) evidence of truthful
7 character is admissible only after the character of the witness
8 for truthfulness has been attacked by opinion or reputation
9 evidence or otherwise.
10
11 (b) Specific instances of conduct. — Specific
12 instances of the conduct of a witness, for the purpose of
13 attacking or supporting the witness' ~~credibility~~ character for
14 truthfulness, other than conviction of crime as provided in

* New matter is underlined and matter to be omitted is lined through.

rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters ~~which~~ that relate only to ~~credibility~~ character for truthfulness.

* * *

COMMITTEE NOTE

The Rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness. *See United States v. Abel,* 469 U.S. 45 (1984); *United States v. Fusco,* 748 F.2d 996 (5th Cir. 1984) (Rule 608(b) limits the use of evidence "designed to show that the witness has done things, unrelated to the suit being tried, that make him more or less believable per se"); Ohio R.Evid. 608(b). On occasion the Rule's use of the overbroad term "credibility" has been read "to bar extrinsic evidence for bias, competency and contradiction

41 impeachment since they too deal with credibility." American Bar
42 Association Section of Litigation, *Emerging Problems Under the*
43 *Federal Rules of Evidence* at 161 (3d ed. 1998). The amendment
44 conforms the language of the Rule to its original intent, which was
45 to impose an absolute bar on extrinsic evidence only if the sole
46 purpose for offering the evidence was to prove the witness' character
47 for veracity. *See* Advisory Committee Note to Rule 608(b) (stating
48 that the Rule is "[i]n conformity with Rule 405, which forecloses use
49 of evidence of specific incidents as proof in chief of character unless
50 character is in issue in the case . . .").
51
52 By limiting the application of the Rule to proof of a witness'
53 character for truthfulness, the amendment leaves the admissibility of
54 extrinsic evidence offered for other grounds of impeachment (such as
55 contradiction, prior inconsistent statement, bias and mental capacity)
56 to Rules 402 and 403. *See, e.g., United States v. Winchenbach,* 197
57 F.3d 548 (1st Cir. 1999) (admissibility of a prior inconsistent
58 statement offered for impeachment is governed by Rules 402 and
59 403, not Rule 608(b)); *United States v. Tarantino*, 846 F.2d 1384
60 (D.C.Cir. 1988) (admissibility of extrinsic evidence offered to
61 contradict a witness is governed by Rules 402 and 403); *United States*
62 *v. Lindemann,* 85 F.3d 1232 (7th Cir. 1996) (admissibility of extrinsic
63 evidence of bias is governed by Rules 402 and 403). Rules 402 and
64 403 displace the common-law rules prohibiting impeachment on
65 "collateral" matters. *See* 4 Weinstein's Evidence § 607.06[3][b][ii]
66 (2d ed. 2000) (advocating that courts substitute "the discretion
67 approach of Rule 403 for the collateral test advocated by case law").
68
69 It should be noted that the extrinsic evidence prohibition of
70 Rule 608(b) bars any reference to the consequences that a witness
71 might have suffered as a result of an alleged bad act. For example,
72 Rule 608(b) prohibits counsel from mentioning that a witness was
73 suspended or disciplined for the conduct that is the subject of
74 impeachment, when that conduct is offered only to prove the
75 character of the witness. *See United States v. Davis,* 183 F.3d 231,
76 257 n.12 (3d Cir. 1999) (emphasizing that in attacking the
77 defendant's character for truthfulness "the government cannot make
78 reference to Davis's forty-four day suspension or that Internal Affairs
79 found that he lied about" an incident because "[s]uch evidence would
80 not only be hearsay to the extent it contains assertion of fact, it would
81 be inadmissible extrinsic evidence under Rule 608(b)"). *See also*
82 Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and*

83 *Extrinsic Evidence*, 7 Crim. Just. 28, 31 (Winter 1993) ("counsel
84 should not be permitted to circumvent the no-extrinsic-evidence
85 provision by tucking a third person's opinion about prior acts into a
86 question asked of the witness who has denied the act.").
87
88 For purposes of consistency the term "credibility" has been
89 replaced by the term "character for truthfulness" in the last sentence
90 of subdivision (b). The term "credibility" is also used in subdivision
91 (a). But the Committee found it unnecessary to substitute "character
92 for truthfulness" for "credibility" in Rule 608(a), because subdivision
93 (a)(1) already serves to limit impeachment to proof of such character.
94
95 Rules 609(a) and 610 also use the term "credibility" when the
96 intent of those Rules is to regulate impeachment of a witness'
97 character for truthfulness. No inference should be derived from the
98 fact that the Committee proposed an amendment to Rule 608(b) but
not to Rules 609 and 610.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

The last sentence of Rule 608(b) was changed to substitute the term "character for truthfulness" for the existing term "credibility." This change was made in accordance with public comment suggesting that it would be helpful to provide uniform terminology throughout Rule 608(b). A stylistic change was also made to the last sentence of Rule 608(b).

SUMMARY OF PUBLIC COMMENTS

Thomas J. Nolan, Esq. (01-EV-001) states that the proposed amendment to Rule 608(b) is "extremely important, should be adopted, and can and will significantly increase the administration of justice in the United States Courts."

Mikel L. Stout, Esq. (01-EV-002) approves of the proposed amendment.

The Committee on Civil Litigation of the United States District Court for the Eastern District of New York (01-EV-003) endorses the proposed change to Rule 608(b).

The Federal Magistrate Judges Association (01-EV-004) supports the proposed amendment and notes that it "is consistent with the drafters' original intent and Supreme Court authority."

Professor Lynn McLain (01-EV-005) supports the proposed amendment on the ground that if "clarifies the rule and removes an arguable, though unintended, conflict with cases permitting extrinsic proof of bias and of contradiction . . ."

Professor John C. O'Brien (01-EV-006) supports the proposed change to Rule 608(b). He states that some Evidence Rules use the term "credibility" to refer to "character for truthfulness" and that this usage "has created considerable confusion, particularly with respect to whether extrinsic evidence is precluded by Rule 608(b)." He contends that the problem of misuse of the term "credibility" is not limited to Rule 608(b) and that the Advisory Committee consider proposing similar amendments to replace the term "credibility" with the term "character for truthfulness in Rules 608(a), 609 and 610.

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (01-EV-009) recommends the adoption of the proposed amendment to Rule 608(b), noting that it is "a modest and benign narrowing clarification of the existing rule." The Committee states that "the Advisory Committee is correct in suggesting that the proposed amendment brings the rule's language in line with its original intent and corrects a less precise locution that has led to unfortunate results in some cases."

The Federal Bar Association, Western Michigan Chapter (01-EV-012) supports the proposed amendment to Rule 608(b).

The State Bar of California's Committee on Federal Courts (01-EV-013) supports the proposed modification of Rule 608(b).

Professor James J. Duane (01-EV-014) recommends that the proposed change to Rule 608(b) should be made, "but only if the word 'credibility' is also replaced with 'character for truthfulness' throughout all of Rules 608, 609 and 610." He argues that the change proposed by the

Advisory Committee "would result in a situation whether the word 'credibility' would mean one thing in Rule 608(b), and something quite different in two other parts of the same Rule, as well as the two rules that follow it."

The Committee on the United States Courts of the State Bar of Michigan (01-EV-016) supports the proposed amendment to Rule 608(b).

The National Association of Criminal Defense Lawyers (01-EV-017) "fully supports the proposed amendment to Evidence Rule 608(b)." The Association notes that the proposed amendment "only makes more clear what the Rule already intends – that the prohibition against proving a specific instance of conduct by a witness with extrinsic evidence only applies where the specific instance of conduct is offered to attack or support the witness's character for truthfulness."

Attachment 2

Proposed Amendment to Rule 804(b)(3)

Committee Recommendation: That the Standing Committee Approve the Proposed Amendment for Release for Public Comment.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 804

Rule 804. Hearsay Exceptions; Declarant Unavailable[**]

* * *

(b) Hearsay exceptions. – The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

(3) Statement against interest. – A statement ~~which~~ that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. But a ~~A~~ statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is ~~not~~ admissible ~~unless~~ under this subdivision in the following circumstances only:

[**] Matter to be added is underlined. Matter to be omitted is lined through.

(A) if offered in a civil case or to exculpate an accused in a criminal case, it is supported by corroborating circumstances that clearly indicate ~~the~~ its trustworthiness, or ~~of the statement~~ (B) if offered to inculpate an accused, it is supported by particularized guarantees of trustworthiness.

* * *

COMMITTEE NOTE

The Rule has been amended in two respects:

1) To require a showing of corroborating circumstances when a declaration against penal interest is offered in a civil case. *See, e.g., American Automotive Accessories, Inc. v. Fishman,* 175 F.3d 534, 541 (7th Cir. 1999) (requiring a showing of corroborating circumstances for a declaration against penal interest offered in a civil case).

2) To confirm the requirement that the prosecution provide a showing of "particularized guarantees of trustworthiness" when a declaration against penal interest is offered against an accused in a criminal case. This standard is intended to assure that the exception meets constitutional requirements, and to guard against the inadvertent waiver of constitutional protections. *See Lilly v. Virginia,* 527 U.S. 116, 134-138 (1999) (holding that the hearsay exception for declarations against penal interest is not "firmly-rooted"and requiring a finding that hearsay admitted under a non-firmly-rooted exception must bear "particularized guarantees of trustworthiness" to be admissible under the Confrontation Clause).

The "particularized guarantees" requirement assumes that the court has already found that the hearsay statement is genuinely disserving of the declarant's penal interest. *See Williamson v. United States*, 512 U.S. 594, 603 (1994) (statement must be "squarely self-inculpatory" to be admissible under Rule 804(b)(3)). "Particularized

49 guarantees" therefore must be independent from the fact that the
50 statement tends to subject the declarant to criminal liability. The
51 "against penal interest" factor should not be double-counted as a
52 particularized guarantee. *See Lilly v. Virginia,* 527 U.S. at 138 (fact
53 that statement may have been disserving to the declarant's interest
54 does not establish particularized guarantees of trustworthiness
55 because it "merely restates the fact that portions of his statements
56 were technically against penal interest").
57
58 The amendment does not affect the existing requirement that
59 the accused provide corroborating circumstances for exculpatory
60 statements. The case law identifies some factors that may be useful
61 to consider in determining whether corroborating circumstances
62 clearly indicate the trustworthiness of the statement. Those factors
63 include (*see, e.g., United States v. Hall,* 165 F.3d 1095 (7th Cir.
64 1999)):
65
66 (1) the timing and circumstances under which the statement
67 was made;
68
69 (2) the declarant's motive in making the statement and
70 whether there was a reason for the declarant to lie;
71
72 (3) whether the declarant repeated the statement and did so
73 consistently, even under different circumstances;
74
75 (4) the party or parties to whom the statement was made;
76
77 (5) the relationship between the declarant and the opponent
78 of the evidence; and
79
80 (6) the nature and strength of independent evidence relevant
81 to the conduct in question.
82
83 Other factors may be pertinent under the circumstances. The
84 credibility of the witness who relates the statement in court is not,
85 however, a proper factor for the court to consider in assessing
86 corroborating circumstances. To base admission or exclusion of a
87 hearsay statement on the credibility of the witness would usurp the
88 jury's role in assessing the credibility of testifying witnesses.

I-C

The minutes of the June 10-11, 2002, Standing Committee meeting are being prepared, and on completion will be posted on the Rulemaking web site.

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposed Amendment to Evidence Rule 608(b), approved by Standing Committee
Date: September 15, 2002

As you know, the Evidence Rules Committee approved a proposed amendment to Rule 608(b), and referred it to the Standing Committee with the recommendation that it sent on to the Judicial Conference and the Supreme Court. The Standing Committee unanimously approved the recommendation. Barring any unforeseen opposition, the proposed amendment will take effect December 1, 2003.

The proposal, together with the Committee Note, is set forth below.

Rule 608. Evidence of Character and Conduct of Witness*

(a) Opinion and reputation evidence of character. — The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. — Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' ~~credibility~~ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning

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* New matter is underlined and matter to be omitted is lined through.

the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters ~~which~~ that relate only to ~~credibility~~ character for truthfulness.

* * *

COMMITTEE NOTE

The Rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness. *See United States v. Abel,* 469 U.S. 45 (1984); *United States v. Fusco,* 748 F.2d 996 (5th Cir. 1984) (Rule 608(b) limits the use of evidence "designed to show that the witness has done things, unrelated to the suit being tried, that make him more or less believable per se"); Ohio R.Evid. 608(b). On occasion the Rule's use of the overbroad term "credibility" has been read "to bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility." American Bar Association Section of Litigation, *Emerging Problems Under the Federal Rules of Evidence* at 161 (3d ed. 1998). The amendment conforms the language of the Rule to its original intent, which was to impose an absolute bar on extrinsic evidence only if the sole purpose for offering the evidence was to prove the witness' character for veracity. *See* Advisory Committee Note to Rule 608(b) (stating that the Rule is "[i]n conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless character is in issue in the case . . .").

51 By limiting the application of the Rule to proof of a witness'
52 character for truthfulness, the amendment leaves the admissibility of
53 extrinsic evidence offered for other grounds of impeachment (such as
54 contradiction, prior inconsistent statement, bias and mental capacity)
55 to Rules 402 and 403. *See, e.g., United States v. Winchenbach,* 197
56 F.3d 548 (1st Cir. 1999) (admissibility of a prior inconsistent
57 statement offered for impeachment is governed by Rules 402 and
58 403, not Rule 608(b)); *United States v. Tarantino*, 846 F.2d 1384
59 (D.C.Cir. 1988) (admissibility of extrinsic evidence offered to
60 contradict a witness is governed by Rules 402 and 403); *United States*
61 *v. Lindemann,* 85 F.3d 1232 (7th Cir. 1996) (admissibility of extrinsic
62 evidence of bias is governed by Rules 402 and 403).
63
64 It should be noted that the extrinsic evidence prohibition of
65 Rule 608(b) bars any reference to the consequences that a witness
66 might have suffered as a result of an alleged bad act. For example,
67 Rule 608(b) prohibits counsel from mentioning that a witness was
68 suspended or disciplined for the conduct that is the subject of
69 impeachment, when that conduct is offered only to prove the
70 character of the witness. *See United States v. Davis,* 183 F.3d 231,
71 257 n.12 (3d Cir. 1999) (emphasizing that in attacking the
72 defendant's character for truthfulness "the government cannot make
73 reference to Davis's forty-four day suspension or that Internal Affairs
74 found that he lied about" an incident because "[s]uch evidence would
75 not only be hearsay to the extent it contains assertion of fact, it would
76 be inadmissible extrinsic evidence under Rule 608(b)"). *See also*
77 Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and*
78 *Extrinsic Evidence*, 7 Crim. Just. 28, 31 (Winter 1993) ("counsel
79 should not be permitted to circumvent the no-extrinsic-evidence
80 provision by tucking a third person's opinion about prior acts into a
81 question asked of the witness who has denied the act.").
82
83 For purposes of consistency the term "credibility" has been
84 replaced by the term "character for truthfulness" in the last sentence
85 of subdivision (b). The term "credibility" is also used in subdivision
86 (a). But the Committee found it unnecessary to substitute "character
87 for truthfulness" for "credibility" in Rule 608(a), because subdivision
88 (a)(1) already serves to limit impeachment to proof of such character.
89
90 Rules 609(a) and 610 also use the term "credibility" when the
91 intent of those Rules is to regulate impeachment of a witness'
92 character for truthfulness. No inference should be derived from the

93 fact that the Committee proposed an amendment to Rule 608(b) but not to Rules 609 and 610.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

The last sentence of Rule 608(b) was changed to substitute the term "character for truthfulness" for the existing term "credibility." This change was made in accordance with public comment suggesting that it would be helpful to provide uniform terminology throughout Rule 608(b). A stylistic change was also made to the last sentence of Rule 608(b).

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposed Amendment to Evidence Rule 804(b)(3), released for public comment
Date: September 15, 2002

As you know, the Evidence Rules Committee revised its proposed amendment to Rule 804(b)(3), and referred it to the Standing Committee with the recommendation that it be released for a new round of public comment. The Standing Committee unanimously approved the recommendation, so the proposed revised amendment was released for public comment. The public comment period ends March 1, 2003.

To date, the Committee has not received any public comments on the revised proposal, though this is not surprising because most comments come it at the end (or after the end) of the comment period.

The revised proposal, together with the Committee Note, is set forth below. At its Spring, 2002 meeting the Committee will consider any public comments and determine whether to recommend the proposal to the Standing Committee.

1 **Rule 804. Hearsay Exceptions; Declarant Unavailable**[*]

2 * * *

3 (b) Hearsay exceptions. – The following are not excluded

4 by the hearsay rule if the declarant is unavailable as a witness:

5 * * *

6 (3) Statement against interest. – A statement ~~which~~

7 that was at the time of its making so far contrary to the

8 declarant's pecuniary or proprietary interest, or so far

9 tended to subject the declarant to civil or criminal liability,

10 or to render invalid a claim by the declarant against another,

11 that a reasonable person in the declarant's position would

12 not have made the statement unless believing it to be true.

13 But a ~~A~~ statement tending to expose the declarant to

14 criminal liability ~~and offered to exculpate the accused~~ is ~~not~~

15 admissible ~~unless~~ under this subdivision in the following

16 circumstances only: (A) if offered in a civil case or to

17 exculpate an accused in a criminal case, it is supported by

18 corroborating circumstances that clearly indicate ~~the~~ its

19 trustworthiness, or ~~of the statement~~ (B) if offered to

[*] Matter to be added is underlined. Matter to be omitted is lined through.

20 inculpate an accused, it is supported by particularized

21 guarantees of trustworthiness.

22 * * *

23 **COMMITTEE NOTE**

24 The Rule has been amended in two respects:
25
26 1) To require a showing of corroborating circumstances
27 when a declaration against penal interest is offered in a civil case.
28 *See, e.g., American Automotive Accessories, Inc. v. Fishman,* 175
29 F.3d 534, 541 (7th Cir. 1999) (requiring a showing of corroborating
30 circumstances for a declaration against penal interest offered in a
31 civil case).
32
33 2) To confirm the requirement that the prosecution provide
34 a showing of "particularized guarantees of trustworthiness" when a
35 declaration against penal interest is offered against an accused in a
36 criminal case. This standard is intended to assure that the exception
37 meets constitutional requirements, and to guard against the
38 inadvertent waiver of constitutional protections. *See Lilly v.*
39 *Virginia,* 527 U.S. 116, 134-138 (1999) (holding that the hearsay
40 exception for declarations against penal interest is not "firmly-
41 rooted"and requiring a finding that hearsay admitted under a non-
42 firmly-rooted exception must bear "particularized guarantees of
43 trustworthiness" to be admissible under the Confrontation Clause).
44
45 The "particularized guarantees" requirement assumes that
46 the court has already found that the hearsay statement is genuinely
47 disserving of the declarant's penal interest. *See Williamson v.*
48 *United States*, 512 U.S. 594, 603 (1994) (statement must be
49 "squarely self-inculpatory" to be admissible under Rule 804(b)(3)).
50 "Particularized guarantees" therefore must be independent from the
51 fact that the statement tends to subject the declarant to criminal
52 liability. The "against penal interest" factor should not be double-
53 counted as a particularized guarantee. *See Lilly v. Virginia,* 527
54 U.S. at 138 (fact that statement may have been disserving to the
55 declarant's interest does not establish particularized guarantees of

56 trustworthiness because it "merely restates the fact that portions of
57 his statements were technically against penal interest").
58
59 The amendment does not affect the existing requirement
60 that the accused provide corroborating circumstances for
61 exculpatory statements. The case law identifies some factors that
62 may be useful to consider in determining whether corroborating
63 circumstances clearly indicate the trustworthiness of the statement.
64 Those factors include (*see, e.g., United States v. Hall,* 165 F.3d
65 1095 (7th Cir. 1999)):
66
67 (1) the timing and circumstances under which the statement
68 was made;
69
70 (2) the declarant's motive in making the statement and
71 whether there was a reason for the declarant to lie;
72
73 (3) whether the declarant repeated the statement and did so
74 consistently, even under different circumstances;
75
76 (4) the party or parties to whom the statement was made;
77
78 (5) the relationship between the declarant and the opponent
79 of the evidence; and
80
81 (6) the nature and strength of independent evidence relevant
82 to the conduct in question.
83
84 Other factors may be pertinent under the circumstances. The
85 credibility of the witness who relates the statement in court is not,
86 however, a proper factor for the court to consider in assessing
87 corroborating circumstances. To base admission or exclusion of a
88 hearsay statement on the credibility of the witness would usurp the
89 jury's role in assessing the credibility of testifying witnesses.

III-A

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Committee Consideration of Whether an Amendment to Rule 106 Is Necessary
Date: October 1, 2002

At its April 2002 meeting, the Evidence Rules Committee directed the Reporter to prepare a report on Rule 106–the Federal Rule on completeness–so that the Committee could determine whether it is necessary to propose an amendment to that Rule. This report provides the Committee with the background to the problems under the current Rule and discusses how and whether these problems might be solved by an amendment.

The report is divided into four parts. Part One sets forth the current Rule. Part Two sets forth the six problems that courts and commentators have raised in applying Rule 106, and provides suggestions as to whether these problems are serious and whether they can be resolved by amendment. Part Three sets forth State law variations of Rule 106. Part Four sets forth drafting alternatives that address some or all of the problems of applying the current Rule 106.

It is important to note that this report takes no position on whether the Committee should propose an amendment to Rule 106. The intent is only to set out the problems and questions raised by the current Rule, and to discuss how and whether they might be resolved by textual changes. It is for the Committee to determine whether the problems in applying Rule 106 are serious enough to justify the substantial costs of an amendment.

I. Rule 106

Rule 106 embodies at least part of the common-law doctrine of completeness. The existing Rule provides as follows:

Rule 106. Remainder of or Related Writings or Recorded Statements

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

The original Advisory Committee Note states that the Rule is based on two independent policies. The first is that completing evidence should be admissible to correct a misleading impression that might be created by the proponent "taking matters out of context." The second is "the inadequacy of repair work when delayed to a point later in the trial." In other words, in some cases a first (mis)impression could be so devastating that it could not be corrected if the completing proof were delayed until the opponent's presentation. Thus, the Advisory Committee Note refers to the rule of completeness as involving both a rebuttal function and a timing function.

II. Problems With the Text of the Rule Raised by Case Law and Commentators

Courts and commentators have raised at least six problems in the operation of the existing Rule. As will be seen, these problems vary in importance and intensity. It seems appropriate to list these problems in order of apparent frequency and seriousness. In addition, there is a potential problem not raised in the literature or cases that might be considered by the Committee should it decide to propose an amendment–the possibility that incomplete evidence might be presented in electronic form. That potential problem is discussed at the end of this section.

A. Does, or Should, the Rule Provide an Independent Ground of Admissibility for the Completing Evidence?

Assume that the proponent has proffered a portion of a writing that is misleading. Assume further that an excised portion of the writing is necessary to correct the misleading impression left by the proponent. But also assume that this completing evidence, if offered on its own, would be excluded under a Federal Rule–most likely the hearsay rule. Does Rule 106 "trump" another Federal Rule that would exclude this evidence?

The question of whether Rule 106 trumps other exclusionary rules arises most often in the following context: A criminal defendant confesses, and the confession contains both inculpatory and exculpatory statements. The prosecution offers only the inculpatory portions as admissions of a party-opponent. The defendant invokes Rule 106 and argues that the exculpatory portions are necessary to correct a misleading impression left by the prosecution's proffer. The government argues that even if that were so, the hearsay rule prevents the defendant from offering the exculpatory portions; they are not admissions by a party-opponent as to the defendant, because they are the defendant's own statements. The question then is: *assuming* the completing evidence is necessary to correct a misimpression, does Rule 106 operate to trump the hearsay rule? [Note that while this problem arises most often in admission of portions of a defendant's confession, it can arise when *any* party offers only a portion of a writing or recording. See *United States v. Gravely*, 840 F.2d 1156 (4th Cir. 1988) (portions of grand jury testimony not included in defendant's initial proffer are offered under Rule 106, even though hearsay when offered by the prosecution).]

Case Law in Conflict

The courts are in dispute over whether Rule 106 operates to admit evidence otherwise excluded as hearsay or under some other exclusionary rule. Cases rejecting the use of Rule 106 as an independent ground of admissibility reason that the Rule simply operates as a timing device: it

allows an adversary to interrupt the proponent's presentation with completing evidence, but this is only the case if the evidence would have been admissible eventually anyway.

Cases adopting the view that Rule 106 does not trump exclusionary rules include: *United States Football League v. National Football League,* 842 F.2d 1335 (2d Cir. 1988) (Rule 106 "does not compel admission of otherwise inadmissible hearsay evidence"); *United States v. Wilkerson,* 84 F.3d 692 (4th Cir. 1996) (defendant's exculpatory statement cannot be admitted under Rule 106, because that Rule "would not render admissible the evidence which is otherwise inadmissible under the hearsay rule"); *United States v. Costner,* 684 F.2d 370 (6th Cir. 1982) ("Rule 106 is intended to eliminate the misleading impression created by taking a statement out of context. The rule covers an order of proof problem; it is not designed to make something admissible that should be excluded."); *United States v. Edwards,* 159 F.3d 1117 (8th Cir. 1998) (exculpatory statements could not be admitted under Rule 106 if they were hearsay); *United States v. Ortega,* 203 F. 3d 675 (9th Cir. 1996) (omitted portions of defendant's confession could not be admitted because they were hearsay).

It should be noted, however, that most of the declarations in these cases are dicta. For example, in *Costner* and *Edwards*, the alleged completing hearsay evidence did not fit within Rule 106 in any case, because the evidence was not necessary to correct any misleading impression from the portion initially proffered.

Cases adopting the broader view that Rule 106 operates as an independent grant of admissibility, trumping exclusionary rules such as the hearsay rule, include *United States v. Sutton,* 801 F.2d 1346 (D.C. Cir. 1986) ("Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that that proffered evidence should be considered contemporaneously."); *United States v. Rubin,* 609 F.2d 51 (2d Cir. 1979) (Rule 106 used to admit prior consistent statement not otherwise admissible under Rule 801(d)(1)(B)); *United States v. Gravely,* 840 F.2d 1156 (4th Cir. 1988) (prosecution allowed to admit completing portions of grand jury transcript that would otherwise have been excluded as hearsay); *United States v. LeFevour,* 798 F.2d 977 (7th Cir. 1986) ("If otherwise inadmissible evidence is necessary to correct a misleading impression, then either it is admissible for this limited purpose by force of Rule 106 * * * or, if it is inadmissible (maybe because of privilege) the misleading evidence must be excluded too.") (dictum because allegedly completing evidence was not necessary to correct a misimpression).

Commentators and Policy

Commentators argue persuasively, and it appears unanimously, that the broader view of Rule 106–that the rule trumps at least the hearsay rule–is better policy. See 21 Wright and Graham 21 Federal Rules of Practice and Procedure, § 5078; Nance, *Verbal Completeness and Exclusionary Rules Under the Federal Rules of Evidence,* 75 Tex. L. Rev. 51 (1996); Gillespie, *Federal Rule of Evidence 106: A Proposal to Return to the Common Law Doctrine of Completeness,* 62 Notre Dame

L. Rev. 382, 391 (1987); Saltzburg, Martin and Capra, Federal Rules of Evidence Manual, ¶ 106.02.

The policy arguments for a trumping function in Rule 106 proceed as follows: If Rule 106 is simply a device to allow interruption of the adversary's proof with evidence that is admissible anyway, it is a very limited Rule indeed. It has almost no effect at all. More importantly, significant unfairness could result if the Rule is not construed to admit otherwise inadmissible evidence–a result in contrast with a rule that is specifically based on fairness. Without a trumping function in the Rule, a party could present evidence out of context so as to mislead the jury, and then assert an exclusionary rule to bar exposure of his deception.

For example, assume a murder case in which the major contested issue is intent. The defendant wrote out a statement stating "I shot the victim, but I thought the gun had blanks." Under the limited view of Rule 106, the prosecution could admit the portion "I shot the victim"; and when the defendant moved to complete the statement with the reference to blanks, the prosecution could successfully interpose a hearsay objection.

It seems odd to construe an Evidence Rule in a way that would lead to such a skewed presentation of the evidence. No doubt Federal Judges will find a way to avoid such an unjust result; but the most direct way would be to construe Rule 106 broadly, to trump exclusionary rules like the hearsay rule. Wright and Graham elaborate on this point as follows:

> No self-respecting judge would permit a party to manipulate the rules of evidence to put on a case that looked like an advertisement for a bad movie--bits and pieces taken out of critical context to create a misleading impression of what was really said. If this cannot be done in a forthright manner under Rule 106, the judge must find some other way to see that justice is done. He can accomplish this in a number of ways; a fictional waiver of the right to object can be based on the introduction of the part of a writing, hearsay objections can be surmounted by ruling that evidence is not offered for the truth of the matter but only to aid in interpretation, other rules can be strained or deliberately misinterpreted, and if all else fails, the part of the evidence introduced by the proponent can be stricken under Rule 403. In short, there will be few cases in which the judge cannot reach the result that sound policy compels; to say that he cannot do this under Rule 106 is to prefer the costly, roundabout, fictional method over the direct and honest approach.

Commentators have therefore concluded that Rule 106 should be construed, or if necessary amended, to provide an independent ground of admissibility for completing evidence. This view is considered consistent with the ultimate intent of the Rule, which is to provide for a fair and accurate presentation of evidence. See Gillespie, *Federal Rule of Evidence 106: A Proposal to Return to the Common Law Doctrine of Completeness,* 62 Notre Dame L. Rev. 382, 391 (1987) ("Allowing a court, in its discretion, to admit otherwise inadmissible portions of a statement to place other portions of the statement in context best serves the purpose of the rule--to prevent misleading impressions created by taking matters out of context.").

It should be noted that a broad view of Rule 106 does not mean that it would necessarily trump *every* rule of exclusion. For example, if the probative value of the completing evidence is substantially outweighed by its prejudicial effect, the trial judge would have discretion to exclude it under any view of Rule 106–either because Rule 403 could be read to trump Rule 106, or more likely because the judge can rely on the "fairness" language of Rule 106 to exclude the completing evidence (and probably to exclude the initial portion as well if required under the circumstances). See *In re Paoli R.R. Yard PCB Litig.*, 113 F.3d 444 (3d Cir. 1997) (evidence initially excluded under Rule 403 did not become admissible as completing evidence under Rule 106). It is also likely that privilege rules would trump Rule 106 – though in practice this is an unlikely conflict because if a proponent admits a misleading portion of a document, the privilege would most likely be waived as to the completing remainder. Thus, the major effect of a trumping power under Rule 106 would be to allow the admission of completing evidence that would otherwise be excluded as hearsay.

Does the Existing Rule Support a Broad Construction?

As discussed above, the better view appears to be that Rule 106 should be construed to admit completing evidence even if it would otherwise be excluded as hearsay. But does the text of the Rule support such a broad construction?

The text of Rule 106 does not explicitly say that the adversary can admit completing evidence even though it would be excluded under another Rule. Yet there are several arguments in favor of such a broad construction of the text. The following discussion sets forth the textual arguments, relying mainly on two sources: the Wright and Graham treatise, and the D. C. Circuit's extensive discussion in *United States v. Sutton*, 801 F.2d 1346 (D.C. Cir. 1986):

1. No Exclusionary Language: The text of the Rule does not defer to any other rule of exclusion. By way of comparison, Rule 402 provides that relevant evidence is admissible "except as otherwise provided" in other rules. Note also that Rule 802 carries an "except as otherwise provided", indicating that the hearsay rule is trumped by other rules of admissibility. Rule 106 contains no "except as otherwise provided" language, so it would appear on its face to trump Rule 802, which explicitly provides an opening for trumping rules of admissibility.

2. Consistent With the Common-Law Rule: The rule at common law was that the opponent was entitled to put in the whole on the same subject if it was relevant–even if the completing evidence was hearsay. The only limitation was that if the remainder was not only inadmissible but was also prejudicial to the proponent, the judge had discretion to exclude it. See *Sutton,* 801 F.2d at 1371. In preparing the Evidence Rules, the Advisory Committee was at pains to adhere to the common law when possible, and when it veered from the common law it took pains to justify the change (as is the case with Rule 801(d)(1), providing for substantive use of some prior statements of testifying witnesses). Under these circumstances, if the Advisory Committee wanted to alter the common law rule of completeness, one would expect some explicit indication in the Committee

Note. Yet there is nothing in the short Note that could be read to permit the proponent of a writing to invoke the hearsay rule to block evidence indicating that he was taking the writing out of context.

3. Reliance on California Law: The Advisory Committee Note to Rule 106 indicates that the rule was modeled on the California codification of the completeness doctrine, Evidence Code § 356. This California provision was and still is interpreted to permit the opponent to introduce matter for completeness that would otherwise be barred by the hearsay rule. The California Law Revision Commission study on which the adoption of this provision was based states that the provision is "a special exception to the hearsay rule." It is notable that a member of the California Law Revision Commission served on the original Advisory Committee. Thus, explicit reliance on the California rule in the Committee Note is a good indication that the Advisory Committee intended that Rule 106 would trump the hearsay rule.

The other model cited by the Advisory Committee was the provision in the Civil Rules governing partial use of depositions, Rule 32(a)(4). That provision would make no sense at all if it were not interpreted as an exception to the hearsay rule, since the deposition is by definition hearsay. So again, the Advisory Committee Note indicates an intent for a broad, "trumping power" construction of Rule 106.

4. Legislative History: The question of the applicability of other exclusionary rules to evidence offered under the completeness doctrine arose during the Senate Judiciary Committee's consideration of the Rules. The Justice Department, in a letter to the Chairman of the Committee, suggested that Congress should add a provision that would require material introduced under the completeness doctrine to be "otherwise admissible." The Department's position assumed that the Rule as written (and as ultimately enacted) permitted the use of otherwise inadmissible evidence such as hearsay.

No action was taken on the Justice Department proposal. The most plausible way to read this lack of action is that Congress agreed with the Justice Department's reading of the Rule, but disagreed that this policy should be changed. The alternative is that Congress did not intend that inadmissible evidence should come in under the completeness doctrine, but felt (contrary to the Justice Department) that the Rule could not be interpreted to achieve that result. This latter alternative seems unlikely. It seems more likely that if the Committee thought that all it would take to make the Department happy was to make the Rule say what the Congress intended it should mean, then the Department's proposed amendment would have been adopted or some statement of Congressional intent placed in the Committee Report. Yet none was forthcoming.

5. Location of the Rule: Recall that the narrow view of Rule 106 is that it affects only the order of proof, and not the admissibility of evidence. If that is the case, it is odd that the Rule is placed in Article One, because the Rule would be nothing more than a specialized application of the Trial Judge's control over the order of proof, found in Rule 611. It seems significant that the other Rules in Article I are of the sort that can be regarded as generally controlling the method of applying the exclusionary rules; and that one of those Rules, Rule 104(a), sets aside most of the exclusionary

rules in the determination of preliminary facts.

Conclusion on Textual Construction

The above arguments indicate that the better view is to construe Rule 106 to be a source of admitting completing evidence even if it is hearsay, and that this construction is eminently supported by the text and original intent of the Rule. If this is so, the question for the Committee is whether the Rule needs to be amended to reach this proper result. If the Rule as written supports its construction as a trumping rule, why is an amendment necessary?

The argument for an amendment is that the case law, as discussed above, indicates that the courts are split on whether Rule 106 provides an independent ground of admissibility. There are a number of cases on both sides of the split, and some of the conflicting cases are within the same circuit. It is for the Committee to determine whether this significant conflict in the cases justifies the cost of amending the Rule–or whether, together with other problems discussed below, an amendment to the Rule is justified. Part Four sets forth possible language that might be used if the Committee decides that the Rule should be amended to provide specifically that it covers otherwise inadmissible completing evidence.

It should be noted that an amendment specifying a rule of independent admissibility under Rule 106 is consistent with the original intent of the Rule. This undoubtedly makes for an easier passage through the rulemaking process, as was shown with the amendment to Rule 608(b). It should also be noted, however, that the Committee is not bound by original intent and could propose a Rule that specifically *does not* provide for admission of otherwise inadmissible completing evidence. As will be seen in Part Three, at least one state has specifically limited its version of Rule 106 to otherwise admissible completing evidence. Possible language for such an amendment is included in Part Four.

B. Does, or Should, the Rule Apply to Oral Statements?

Rule 106 refers to a "writing or recording"– it therefore would not seem to apply if the proponent offers a misleading portion of an oral statement. The Advisory Committee's rationale for excluding oral statements was that it would be too difficult to interrupt the proponent's presentation of an oral statement with completing evidence. For example, if the witness is testifying to part of a conversation, he may not even have heard another part that would place his testimony in context. This would mean that the proponent would be forced to interrupt the presentation in order to call

another witness to present the completing portion. This would constitute a significant interruption in the opponent's case. Moreover, there might be a dispute over what was said in the conversation, and this could require testimony from multiple witnesses on both sides–requiring another elaborate interruption. Such disruptions in the ordinary order of proof were considered, apparently, too costly to warrant a completeness showing at the time the initial portion of an oral statement is admitted. In contrast, completing evidence in the form of a writing or recording could be more easily, and indisputably, presented, so the disruption would not be so great.

This rationale for excluding oral statements from Rule 106 assumes that the only reason for the Rule is to permit interruption of the proponent's order of proof–that is, the distinction between oral and written statements focuses only on the *timing* aspect of the Rule. But the Advisory Committee noted another reason for the Rule–the need to correct, or rebut, a misleading impression created by the proponent's selective presentation. This need for rebuttal is not necessarily related to the timing rationale of the Rule. It could mean, with respect to oral statements, that the rule of completeness applies to allow rebuttal with completing evidence *at some point in time*. If coupled with the power to trump the hearsay rule (see the discussion above) this would provide the adversary with significant power to correct any misleading impression created by an initial presentation of a portion of an oral statement.

The posed distinction between oral and written statements must be discussed under the assumption that Rule 106 currently provides (or should be amended to provide) for admission of otherwise inadmissible completing evidence–what has been called in this report a "trumping" function. If Rule 106 does not provide authority to trump the hearsay rule, and only regulates the timing of evidence, then it makes sense for oral statements to be excluded from its coverage. The only consequence is that presentation of the otherwise admissible completing oral evidence will be delayed until the adversary's case. This delay is arguably justified due to the difficulties inherent in interrupting the proponent's presentation with evidence of an oral statement. The real, practical importance of excluding completing evidence of an oral statement from the existing Rule is that the completing evidence loses the benefits of the Rule's trumping function. Specifically, it would mean that hearsay completing a written statement would be admissible, whereas hearsay completing an oral statement would not.

Policy

Assuming that Rule 106 provides a trumping power that applies to written and recorded statements, it would seem to be good policy to extend that trumping power to completing evidence of an oral statement as well. The need for a fair presentation of the evidence – for the whole truth – is no less as to oral evidence than it is for writings or recordings. See Gillespie, *supra* ("Logically, the possibility of the distortion of a statement by taking it out of context will not differ depending on whether it is reduced to writing or not . . ."). Professor Nance, *supra*, notes the anomaly of a rule of completeness with a trumping function (as distinct from a rule permitting interruption of the proponent's order of proof) limited to written and recorded statements. He notes that if there is a

dichotomy between written and oral statements,

> an incoherent scheme of rules will result: The truth-defeating unfairness of partial presentation of writings will be subject to correction, but the same defect will be left uncorrected * * * in the context of incomplete testimony of verbal utterances. No coherent ground of principle supports such a distinction.

Professor Nance, as well as Professors Wright and Graham, also note that the failure to include oral statements within the trumping function could invite abuse. Often a writing simply memorializes an oral statement or conversation. A party who wanted to proffer a misleading portion of a written transcription could evade Rule 106 by calling a witness who heard the statement that was recorded.

In sum, if Rule 106 provides a trumping function for completing evidence found in a writing, it would seem appropriate to provide the same trumping function for oral completing evidence. According to the commentators, the distinction between oral and written statements should be limited to the timing aspects of the Rule–interruption of the proponent's case should be limited to written and recorded statements. Commentators conclude that the trumping power of the Rule should be equally applicable to written and oral statements.

Case Law

Most courts have held that Rule 106 does not apply to oral statements, including oral statements about a writing. See generally *United States v. Branch,* 91 F.3d 699, 709 (5th Cir. 1996) (discussing the case law and finding no need to decide the question because the allegedly completing statement was not necessary to correct any misimpression); *United States v. Haddad*, 10 F.3d 1252, 1258 (7th Cir.1993); *United States v. Castro*, 813 F.2d 571, 576 (2d Cir. 1987); *United States v. Ramirez-Perez,* 166 F.3d 1106 (11th Cir. 1999) (Rule 106 applies only when a document is introduced directly or indirectly; officer testified to parts of an oral statement that defendant made, and did not refer to an identical written statement that the defendant made shortly thereafter, so Rule 106 was inapplicable). These rulings make sense as a matter of textual construction, because as written the Rule plainly does not cover oral statements–leaving open the question of whether the text should be amended to cover them.

But at least one case has relied on Rule 106 to permit rebuttal with completing evidence – even though the evidence would otherwise have been excluded as hearsay. See *United States v. Maccini*, 721 F.2d 840 (1st Cir. 1983) (citing Rule 106 as support for upholding a ruling that allowed the prosecutor, during defense cross-examination of a government witness, to have portions of the witness' grand jury testimony read to the jury in addition to those that defense counsel read). Another case held that a part of an oral statement was properly admitted as completing evidence even though it was hearsay, by relying on the principle of completeness, without specifically citing Rule 106. See *United States v. Draiman*, 784 F.2d 248 (7th Cir. 1986) (allowing the government to complete with

omitted oral statements, where portion admitted by defendant gave a misleading impression).

While it is true that most courts have found Rule 106 inapplicable to oral statements, the fact is that most of those courts still allow completing evidence of oral statements to be admitted, usually without regard to whether it is hearsay. These courts rely on the trial court's power to control the mode and order of interrogating witnesses under Rule 611(a). See *United States v. Castro*, 813 F.2d 571 (2d Cir. 1987) (Rule 611(a) gives the court the same power to complete oral statements as Rule 106 gives for written statements). Thus, in *United States v. Haddad*, 10 F.3d 1252 (7th Cir. 1993), the defendant was charged with felon-firearm possession. He was arrested at a premises in which drugs and a gun were found. He made a statement to a police officer that the drugs were his, but not the gun. At trial, the police officer testified that the defendant admitted the drugs were his; when the defense tried to present the defendant's statement denying gun ownership as completing testimony, it was excluded as hearsay. The court declared that Rule 106 was inapplicable because it did not apply to oral statements. However, Rule 611(a) "gives the district courts the same authority with respect to oral statements and testimonial proof." In this case, the statement about the gun should have been admitted, even though it was hearsay, because it was "part and parcel" of the statement about the drugs, and it was necessary "to avoid misleading inferences, and to help insure a fair and impartial understanding of the evidence."

Need for Amendment

Assume that the commentators are correct that it is appropriate to permit an adversary to admit completing evidence of an oral statement, even if that statement is hearsay. The question is whether Rule 106 needs to be amended to provide for that result. The question is not whether the current Rule can be read to cover oral statements – it cannot, even though one or two courts have invoked it to require completion of oral statements. The question is whether the Rule needs to be amended given the fact that the case law indicates that Rule 611(a) operates with respect to oral statements the same way that Rule 106 operates on writings and recordings. Under this case law, if Rule 106 provides a trumping function for writings, then Rule 611(a) provides an analogous trumping function for oral statements. It could thus be argued that there is no problem worthy of an amendment, because the courts are using Rule 611(a) to plug the hole in Rule 106.

One possible problem with this argument, however, is that a practitioner unversed in the nuances of the Rules and the case law would not be aware that this hole has been plugged – he may think there is no right to admit completing evidence of an oral statement when it is hearsay, because Rule 106 does not apply to oral statements. Thus, the current state of affairs is arguably a trap for the unwary.

Another problem with using Rule 611(a) is that it is only arguable authority for admitting completing statements that would otherwise be admissible as hearsay. Rule 611(a) gives the trial court authority over "the mode and order of interrogating witnesses and presenting evidence." This language appears to focus on procedure – it does not readily appear to give the court authority to

admit hearsay evidence. The Rule goes on to say that the court's authority over "mode and order" is to be exercised so as to "make the interrogation and presentation effective for the ascertainment of truth". This language could be construed as a grant of authority to *admit* otherwise inadmissible evidence in order to reach the truth; however, it is set forth in the context of trial court control over the "mode and order" of presentation, so it is arguably a stretch to read the provision as a rule of admissibility.

In sum, while courts have used Rule 611(a) to trump the hearsay rule when necessary to admit completing evidence of an oral statement, there is an argument that Rule 611(a) is not really a rule of admissibility. If this argument is accepted, and it is assumed that there should be a trumping power for completing evidence for oral statements, then it would follow that Rule 106 should be amended to provide specifically for such a trumping function for oral statements. The contrary point of view is that the courts have worked the problem out sufficiently by using Rule 611(a), and therefore the costs of amending Rule 106 are unjustified.

Note that the above discussion as to the need to amend Rule 106 to cover oral statements has investigated the need for that amendment in isolation from other possible amendments to the Rule. It has concluded that there are fair arguments on either side as to the need to amend Rule 106 to cover oral statements. However, if the Committee decides that the Rule needs to be amended on other grounds–such as to provide for a trumping function–then the Committee may also wish to specify that this trumping function covers oral statements as well. Part Four sets forth language for the Committee to consider, should it decide to amend Rule 106 to cover oral statements.

C. What Does "Fairness" Mean?

Rule 106 requires the admission of completing evidence whenever "fairness" requires it. Obviously, "fairness" is a malleable term. It could mean that the evidence should be admitted whenever necessary to place the proffered evidence in context. It could mean that it should be admitted whenever necessary to correct a misleading impression, or whenever a negative inference would be drawn by the absence of the completing evidence. Other conceptions are possible. The only thing that is absolutely clear is that "fairness" does not mean "relevance". That is, an adversary has no right to admit an omitted portion simply because it is relevant to the case. The Advisory Committee in its deliberations explicitly rejected a relevance requirement. See *United States v. Branch,* 91 F.3d 699, 728 (5th Cir. 1996) (holding that the trial court did not err in refusing to admit an exculpatory portion of a defendant's statement as completing evidence: "While we think that the excluded portion was relevant, we are not persuaded that it was necessary to qualify, explain, or place into context Castillo's statement regarding his actions * * * .").

The question for the Committee is whether the "fairness" language has resulted in problematic or inconsistent applications of the completeness doctrine, serious enough to warrant an amendment that would substitute some more specific standard for "fairness."

Case Law

The courts have used different tests for determining whether fairness requires completing evidence. It is not clear, however, that these different tests lead to substantially different results.

For example, the Seventh Circuit uses a four-part test for determining whether the adversary has the right to completing evidence. According to *United States v. Haddad, supra*, at 1259, the question is whether the proffered portion of the statement is necessary to: "1) Explain the admitted evidence, 2) Place the admitted portions in context, 3) Avoid misleading the trial of fact, and 4) Insure fair and impartial understanding of the evidence." The Third Circuit uses the same test, but the four factors are *disjunctive*. See *United States v. Soures,* 736 F.2d 87, 91 (3d Cir. 1984) (omitted portion admissible under Rule 106 when necessary "to (1) explain the admitted portion, (2) place the admitted portion in context, (3) avoid misleading the trier of fact, *or* (4) insure a fair and impartial understanding") (emphasis added).

The test used by the Fifth Circuit is set forth differently. According to *United States v. Branch, supra,* at 728, the question is whether the proffered portion is "necessary to qualify, explain, or place into context the portion already introduced."

The Second Circuit states that evidence is admissible under Rule 106 when it "is necessary to explain the admitted portion, to place it in context, or to avoid misleading the trier of fact." *United States v. Marin,* 669 F.2d 73, 84 (2d Cir. 1982)

It is not clear, however, that the somewhat different language employed by the circuits makes any difference in reality. Judge Higginbotham, in *Branch, supra,* noted that despite the different conceptions, the Circuits appear to apply a common standard: completing evidence is admissible when it is necessary to qualify, explain, or place into context the portion already introduced.

To be sure, there have been disagreements over the *application* of the various standards. For example, Judge Schwarzer dissented in *Branch*, arguing that the defendant's exculpatory statements made to an officer should have been admitted under Rule 106 after the government introduced the inculpatory portions of the statement. But the disagreement was not over the *standard* to be employed. Judge Schwarzer simply believed that the exculpatory portions were necessary to qualify and place in context the inculpatory portions; the majority did not.

The potential for differing results would seem to exist with respect to the circuits employing the four factor test set forth above. As discussed above, the Seventh Circuit seems to hold that all four factors must be met, whereas the Third Circuit holds that completing evidence is admissible

when any of the four factors have been met. It is unclear, however, that the Seventh Circuit really means what it says. No case has been found that definitely requires a showing on all four factors - assuming that the factors are even different enough that satisfying one factor would not satisfy them all. In *Haddad*, the court set forth the four factors, then held that an exculpatory statement by the defendant should have been admitted because it met "each part" of the test. But the Court did not spend time differentiating the factors, and it ultimately stated that the evidence was necessary to "clarify or explain the portion already received." That sounds a lot like the basic test employed in other circuits.

Need for an Amendment

As discussed above, it appears that the courts, while using somewhat differing standards, end up in practical agreement on when a completing statement can be offered under Rule 106. Rule 106 comes into play when the evidence is necessary to correct a misimpression created by the portion initially admitted. Judges do seem to differ in applying this standard to the facts of a particular case, but that is true with virtually every Evidence Rule.

So a good argument can be made that an amendment of the "fairness" test is not required. Certainly there is no need to amend the Rule for the sole purpose of amending the fairness standard. However, if the Rule is to be amended on other grounds, the Committee might consider whether it might be appropriate to substitute a more precise standard for the current, vague standard of "fairness." In Part Four, a drafting option is set forth for Committee consideration that arguably would provide a more precise standard.

D. When is Evidence "Introduced by a Party?"

Rule 106 does not apply to a writing or recorded statement until it is "introduced." This word is undefined and its ordinary usage is quite imprecise. The "introduction" of a document can be a lengthy process that may begin during the discovery stage and may not end until all the documents and exhibits are formally tendered and admitted in evidence at the conclusion of a party's case. Even in its narrower "at trial" sense, the introduction extends from the marking of the writing "for identification" until the time that the judge directs the clerk to mark it "in evidence."

The vagueness of the term "introduced" can create problems in the application of Rule 106. For example, if the term "introduced" is taken to mean the point of formal tender in evidence, then the proponent of the writing can get a lot of mileage out of the document without bringing Rule 106

into play, by simply delaying its "introduction." More broadly, a party could evade the Rule entirely by never bothering to formally introduce a document, choosing instead to rely upon it or refer to it in the course of eliciting testimony.

Case Law

The courts do not appear to have given much attention to what it means to "introduce" a writing or recording under Rule 106. The only significant body of case law concerns the specific situation in which a party cross-examines a witness on the basis of a document. If this constitutes "introduction" of the document and if it is used selectively, Rule 106 would allow the adversary to require the admission of the completing remainder into evidence. Most courts deciding this question have held that extensive cross-examination with a document does constitute "introduction" of the document under Rule 106. See, e.g., *Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 729 (6th Cir. 1994) (lengthy impeachment by use of report); *United States. v. Pendas-Martinez*, 845 F.2d 938, 943 (11th Cir. 1988) (extensive cross-examination on the basis of a document held "tantamount" to introduction). Other courts have assumed, without discussion, that cross-examination with a document constitutes "introduction" of that document under Rule 106. See, e.g., *United States v. Maccini,* 721 F.2d 840, 844 (1st Cir. 1983) (assumes without discussion that cross-examination with a document constitutes "introduction"); *United States v. Rubin*, 609 F.2d 51, 63 (2d Cir. 1979) (implicit holding).

At least one court has declared that cross-examination with a document does not fall within the literal terms of Rule 106. See, e.g., *United States v. Juarez,* 549 F.2d 1113 (7th Cir. 1977) (holding that while Rule 106 did not apply, there was no error in admitting a document where it was relevant and admitted for a non-hearsay purpose).

Commentary

Wright and Graham, *supra*, maintain that the term "introduce" is subject to abuse; they contend that it is a triggering mechanism that can be too easily evaded. They suggest that the Rule be amended so that the rule of completeness applies when a document is "utilized in court." In their view, this language "not only resolves the question of use for impeachment," but also protects against a party who makes an incomplete presentation before formally introducing a document. They conclude that if a party "has a writing marked for identification and proceeds to use it in some fashion that brings the contents to the attention of the trier of fact, he has 'utilized' it and the opponent should be entitled to completeness, even though there has been no formal introduction in evidence."

Need For Amendment

Wright and Graham's contention that the vagueness of the term "introduce" might lead to abuse theoretically has merit. But that abuse has not been reported in the cases. This would certainly seem to indicate that any problem with the term "introduced" does not on its own justify an amendment to Rule 106. However, if the Committee determines that the Rule should be amended in other respects, it might consider whether to amend the term "introduced". As seen in Part Three, at least one state uses the more specific term "utilized in evidence." In Part Four, the "utilized in evidence" language is used in one of the drafting models, for the Committee's consideration.

E. How Does an Adverse Party "Require the Introduction" of Completing Evidence?

The Rule states that "an adverse party may require the introduction" of completing evidence if fairness so mandates. This language is odd because it implies that the adverse party has some kind of self-help remedy available when the proponent makes a selective and misleading presentation of a writing or recording. The Rule does not refer to court action.

Other Evidence Rules granting rights all refer to court action in effectuating those rights. For example, Rule 615, which gives a party the right to have witnesses sequestered, provides for a court order to that effect upon request of the party. And Rule 105, which gives a party a right to a limiting instruction, states that the court shall give the instruction upon the request of the party.

Professors Wright and Graham, in 21 Federal Practice and Procedure, Evidence, § 5076, have this to say about the awkward phrasing of Rule 106:

> This peculiar wording was apparently copied from Civil Rule 32(a)(4), which governs the completeness doctrine with respect to the use of depositions. Presumably what is meant is that the judge, upon request of an adverse party, will require the offeror to comply with the Rule, though it is possible to read the rule as providing for some sort of forensic self- help. It is difficult to discern why the Advisory Committee in Rule 106 did not follow the format of Rule 105, which makes the proper procedure for invoking the doctrine of limited admissibility quite clear, instead of adopting the awkward phrasing of the Civil Rule.

It appears that the awkward phrasing of Rule 106 has not resulted in a problem in any of the reported case law. In practice, the adverse party requests relief from the judge and if the request is meritorious the judge orders the completing evidence to be presented. Thus, the "may require"

language is not so problematic as to justify an amendment to Rule 106 on its own. If the Rule is to be amended on other grounds, however, the Committee might consider revising the "may require" language, so that the Rule would specify that the court, upon request, must order the presentation of the completing evidence. This would bring Rule 106 more into line with the language and structure of Rule 105 and other Evidence Rules. Proposed language to that effect is set forth in Part Four of this report.

F. Who Proffers the Completing Evidence?

Assuming that it is necessary to interrupt a proponent's presentation in order to correct a misleading presentation, the question is, who presents that evidence? The Rule states that the adverse party "may require" the presentation, but it does not say that the adverse party will actually introduce the evidence. Another possibility is that the Rule calls for a forced presentation of the completing evidence by the party who offered the misleading portion of the writing or recording.

Wright and Graham, *supra*, take the view that Rule 106 calls for a forced presentation of evidence: "When one party has invoked the completeness doctrine to put in additional material, the Rule apparently would treat this as being introduced by the original proponent." However, Professor Nance, in *Verbal Completeness and Exclusionary Rules Under the Federal Rules of Evidence,* 75 Tex. L. Rev. 51 (1996), argues that the Rule is vague as to who actually presents the completing evidence.

One might wonder whether anyone should care about who is responsible for the presentation of completing evidence. In some cases, however, evidentiary rulings do turn on who presents a certain piece of evidence. For example, the use of leading questions, and the permissible scope of cross-examination, depend on who initially presented the evidence. Moreover, under Rule 106 itself, the question of who presented the completing evidence can be important in at least one situation: assume that the initial proponent complains that the completing evidence is itself incomplete, and other portions are necessary to clarify the completing evidence. If the completing evidence is introduced by the initial proponent, that proponent would have no right to demand further completing evidence under the terms of Rule 106. This is because Rule 106 gives rights only to an "adverse party", and the initial proponent is not an adverse party to himself. Wright and Graham, supra, put it this way:

> When one party has invoked the completeness doctrine to put in additional material, the Rule apparently would treat this as being introduced by the original proponent. This would mean that * * * the original proponent of the evidence could not invoke the Rule to justify introducing additional material needed to eliminate impressions misleading to him that were the result of material he was required to introduce under the Rule; he is not an "adverse

party" to the person who introduced the evidence, since under the Rule he is the party who introduced it, albeit unwillingly.

Yet the problems resulting from forced introduction – if that is what the rule requires – are probably not serious enough to justify amendment. As to leading questions and scope of cross-examination, Rule 611 provides the trial judge with significant discretion to reach a fair result. So if the initial proponent finds it necessary to question a witness about completing material that has interrupted the testimony, the trial judge can certainly grant the proponent the necessary latitude under Rule 611. And as to the need to introduce more material to place the completing material itself in context, the trial judge has discretion to reach a fair result under the "fairness" language of Rule 106. Wright and Graham, *supra*, put it this way:

> This does not mean that the judge is powerless to prevent misleading inferences from being drawn as to parties who are thus disqualified from invoking the Rule. In deciding what evidence "ought in fairness to be considered" with the writing originally introduced, the judge should consider not only "fairness" to the party who invokes the Rule, but also "fairness" to * * * the original proponent of the evidence. A party is not entitled to invoke the Rule in order to inflict on others the injury the Rule attempts to eliminate. The judge can require the proponent to introduce evidence beyond that requested to put the material in context even though the requesting party did not ask for such evidence, and even over the objection of the requesting party, where this additional evidence is needed to provide fairness.

It does not appear that the question of "who introduces the completing evidence" has created problems for the courts, at least in any reported decisions. Thus, the problem arising from the ambiguity in the text does not itself warrant an amendment to the Rule. If the Rule is to be amended on other grounds, however, the Committee might consider whether to clarify the language to provide either for forced admission by the initial proponent, or admission by the adversary. Language for the Committee to consider is set forth in Part Four. As is pointed out there, the text of the models provides for a forced presentation. But the models can be easily adjusted, as described, to provide that it is the adversary who admits completing evidence.

G. Evidence in Electronic Form

Rule 106 by its terms applies only to a "writing or recorded statement". This language does not easily cover the presentation of evidence in electronic form, e.g., an e-mail or a video presentation. This could mean, for example, that a party could make a misleading presentation of a portion of an email or a chat room exchange, and then argue that Rule 106 does not grant the adversary a right to completion because the Rule is limited to writings and recorded statements.

The term "recorded statement" could be construed broadly to cover most forms of electronic evidence, however. And it does not appear that there has been a problem with electronic evidence under Rule 106 in any of the reported cases. So an amendment solely to accommodate electronic evidence is not justified. However, if the Rule is to be amended on other grounds, the Committee might consider adding to the rule a reference to evidence "in any form." Such a change would accord with the position of the Standing Committee, that changes to the Rules should be considered where necessary to accommodate technology. Language for the Committee to consider is set forth in Part Four.

III. State Law Variations

Ten states have adopted versions of Rule 106 that differ in some substantial way from the Federal model. (This is a higher than average percentage for a Federal Rule–usually only four or five states deviate substantially from the Federal model.) This section sets forth these State versions and comments upon whether any of them might present a model for amending the current Rule 106. Where possible, the state model is set forth as a blacklined version of the Federal model.

Alabama

Rule 106. Remainder of ~~or Related~~ Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part ~~or any other writing or recorded statement~~ of the writing or statement which ought in fairness to be considered contemporaneously with it.

Reporter's Comment:

Alabama limits the completeness rule to the very writing or recorded statement the portion of which was initially introduced. The Alabama comment takes the position that the Federal Rule expands the common-law rule by allowing a showing of completeness through different writings than the one initially introduced. Commentators have disputed the Alabama reading of common law. Wright and Graham, *supra*, maintain that the common law rule did permit completion with additional documents.

The problematic nature of the Alabama limitation can be shown by a simple set of facts. Assume a defendant has responded to a letter. The plaintiff introduces parts of the defendant's letter, or even the entire letter. The defendant claims that the letter cannot really be understood unless the jury knows the tenor of the letter to which the defendant was replying – that is, the initial letter is necessary to place the responsive letter in context. The Federal Rule would permit the introduction of the initial letter and the Alabama rule would not. It seems apparent that the Federal Rule is more in line with the basic goal of the completeness doctrine, which is to avoid selective and misleading presentations of the evidence. For these reasons, there would seem to be no reason to consider an amendment along the lines of the Alabama version of Rule 106.

California

Evidence Code § 356. Entire act, declaration, conversation, or writing to elucidate part offered

Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.

Reporter's Comment

The California version is much more expansive than the Federal Rule. It specifically covers oral statements as well as actions. It provides a broad right of rebuttal. It has been construed to override the hearsay rule where hearsay is necessary for rebuttal. And it provides a more specific standard for rebuttal than the Federal standard of "fairness." Evidence is permitted in rebuttal whenever it is necessary to make the initial proffer "understood."

The California version triggers rebuttal when information is "given in evidence" as opposed to the Federal Rule, which requires the matter to be "introduced." The term "given in evidence" is probably subject to the same risk of abuse as the term "introduced", as discussed in Part Two.

If the Committee wishes to consider a complete rewrite of Rule 106 to address the problems discussed in Part Two, then the California version of Rule 106 might provide a starting point.

Iowa

Iowa R. Evid. 5.106 Remainder of or related acts, declarations, conversations, writings, or recorded statements.

a. When ~~a~~ an act, declaration, conversation, writing, or recorded statement, or part thereof, is introduced by a party, ~~an adverse party may require the introduction at that time of~~ any other part or any other act, declaration, conversation, writing, or recorded statement is admissible when necessary in the interest of fairness, a clear understanding, or an adequate explanation ~~which ought in fairness to be considered contemporaneously with it~~.

b. Upon request by an adverse party, the court may, in its discretion, require the offering party to introduce contemporaneously with the act, declaration, conversation, writing, or recorded statement, or part thereof, any other part or any other act, declaration, conversation, writing, or recorded statement which is admissible under rule 5.106(a). This rule, however, does not limit the right of any party to develop further on cross-examination or in the party's case in chief matters admissible under rule 5.106(a).

Reporter's Comment

The Iowa version of Rule 106 is an ambitious attempt to return the rule of completeness to its expansive application under the common law. The rule explicitly applies to oral statements as well as actions, and it provides an independent ground of admissibility for otherwise inadmissible evidence. See *State v. Austin*, 585 N.W.2d 241 (Iowa,1998) ("Iowa Rule 106 establishes an independent standard for the admissibility of the additional evidence, thus obviating any debate concerning whether such evidence may be admitted only if otherwise admissible."). Also, the Rule provides a somewhat sharper definition of completeness than the rather vague "fairness" standard used as the sole criterion in Federal Rule 106.

The Iowa Rule treats rebuttal and interruption in two separate subdivisions. This makes sense because the rule is intended to fulfill two functions–regulating timing and admitting otherwise inadmissible evidence–and these functions are not necessarily related.

The Iowa Rule has been the subject of only a handful of reported decisions. It does not appear from any of these decisions that the Rule has resulted in abuse or unjustified admissibility of evidence. Here is a short synopsis of the two cases with a significant discussion of the Iowa Rule:

1. In *State v. Austin, supra*, the defendant cross-examined a prosecution witness on the basis of portion of a summary of a taped statement made by the witness. The court held that the prosecution was properly allowed to introduce the taped statement in order to place the portion used by defense counsel in context.

2. In *State v. Turecek*, 456 N.W.2d 219 (Iowa,1990), a sexual assault case, the court upheld a trial court ruling prohibiting the defendant from admitting a statement by the victim that would have allegedly placed prior statements in context. The trial court had granted the defendant significant latitude to inquire into the complainant's motivations and the general nature of the victim's statement; to allow inquiry into the details of the statement would have allowed the defendant to bring the complainant's sexual history before the jury. The court ruled that the trial court "struck a reasonable balance between the provisions of rule106(a) and rule 412."

In sum, the Iowa version of Rule 106 can provide guidance if the Committee wishes to amend the Federal Rule specifically to provide for trumping and to cover oral statements.

Maine

RULE 106. REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

When a writing or recorded statement or part thereof is ~~introduced~~ utilized in court by a party, an adverse party has the right upon request to inspect it. The court on motion of the adverse party may require the introduction at that time of the writing or recorded statement or any part thereof ~~any other part~~ or any other writing or recorded statement which ought in fairness to be then considered ~~contemporaneously with it~~.

Reporter's Comment:

The Maine version of Rule 106 takes on two of the problems raised in Part Two, *supra*:

1) It rejects the term "introduced" in favor of the more specific term "utilized in court." This requires two further stylistic changes later in the rule, because the term "utilized in court" contemplates a situation in which the writing or recording has not yet been formally introduced. Thus, the Rule provides that the adversary may have the entire writing introduced. Moreover, the term "contemporaneously"had to be deleted, because at the time of the motion, it may be that there is nothing even introduced that could be contemporaneously considered with the completing evidence.

2) The Maine rule specifically provides that it is the court that orders completing evidence to be admitted upon motion of the adversary, thus eliminating the curious "self-help" language of the Federal Rule.

The Maine rule also gives the adversary a right to inspect the material utilized in court, similar to the right provided for statements used to refresh memory under Rule 612. There would seem to be some merit to this provision. It is hard to argue that the proponent has taken portions of a writing or recording out of context if the adversary has no access to the writing or recording. The Committee may wish to consider whether Federal Rule 106 should include a similar provision.

Montana

RULE 106. REMAINDER OF OR RELATED <u>ACTS,</u> WRITINGS, OR ~~RECORDED~~ STATEMENTS

(a) When part of an act, declaration, conversation, writing or recorded statement or series thereof is introduced by a party:

(1) an adverse party may require the introduction at that time of any other part of such item or series thereof which ought in fairness to be considered at that time; or

(2) an adverse party may inquire into or introduce any other part of such item of evidence or series thereof.

(b) This rule does not limit the right of any party to cross-examine or further develop as part of the case matters covered by this rule.

Reporter's Comment:

Like the Iowa Rule, Montana Rule 106 covers acts and oral statements as well as writings or recordings.

The case law on Montana Rule 106 is relatively sparse, in part because the Montana Supreme Court has held that the rule grants no power to trump any exclusionary rule. *Simmons Oil Corp. v. Wells Fargo Bank, N.A.*, 960 P.2d 291 (Mont.,1998) ("M.R.Evid. 106 does not authorize admission of otherwise inadmissible hearsay."); *State v. Castle*, 948 P.2d 688 (Mont.1997) (error to admit statements proffered by the prosecution as completing statements, since the statements were hearsay). A rule of completeness that does not trump the hearsay rule is of little utility even if it covers oral statements.

Nebraska

Nebraska Stat. § 27-106. Remainder of or related writings or recorded statements; action of judge.

(1) When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. When a letter is read, all other letters on the same subject between the same parties may be given. When a detached act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence.

(2) The judge may in his discretion either require the party thus introducing part of a total communication to introduce at that time such other parts as ought in fairness to be considered contemporaneously with it, or may permit another party to do so at that time.

Reporter's Comment

The Nebraska Rule explicitly applies to oral statements and actions, and provides a broad rebuttal power. It specifies that it is the judge, and not the adversary, who admits the evidence. The rule also distinguishes the trumping function from the power to interrupt the proponent's presentation with completing evidence. The rule leaves the interruption function to the discretion of the judge, which seems particularly appropriate given that the rule covers both oral and written statements. The problem of interrupting the proponent's presentation with completing evidence of oral statements, discussed in Part Two, warrants special consideration and thus should be subject to judicial discretion on a case-by-case basis.

Unlike the Montana Rule, the Nebraska Rule has been construed to provide a trumping function. See *Nickell v. Russell*, 614 N.W.2d 349 (Neb.2000) (under § 27-106, when evidence proffered by defense counsel "leaves a false impression, the trial court may allow the use of otherwise inadmissible evidence to clarify or complete an issue opened up by defense counsel."). Yet based on the handful of reported cases, it does not appear that the rule has been overused, nor has it resulted in wholesale admission of hearsay whenever part of a written or oral statement is introduced. See, e.g, *In re Interest of Robert D.*, 1994 WL 285088 (Neb.App.,1994) (after one party cross-examined a witness with part of a letter, it was error to admit the entire letter, because the letter "contained statements unrelated to the purposes for which it was used" by the party); *State v. Schrein*, 504 N.W.2d 827 (Neb.1993) (in a case involving sex abuse, defense counsel asked the investigating officer whether he had distributed articles on pedophilia; because this created a false impression that the officer had distributed sinister literature, the government was properly allowed to admit the article, which was taken from a popular women's magazine); *Chirnside By and Through Waggoner v. Lincoln Tel. & Tel. Co.*, 401 N.W.2d 489 (Neb. 1987) (error to admit a conversation that did not qualify or place in context a previously admitted conversation).

Thus, the Nebraska Rule seems to be a useful model with which to begin to address the problems analyzed in Part Two, should the Committee decide that those problems should be addressed by an amendment.

Nevada

Nev. Stat. 47.120. Remainder of writings or recorded statements

1. When any part of a writing or recorded statement or part thereof is introduced by a party, he may be required at that time to introduce ~~an adverse party may require the introduction at that time of~~ any other part of it ~~or any other writing or recorded statement~~ which is relevant to the part introduced, and any party may introduce any other relevant parts ~~which ought in fairness to be considered contemporaneously with it~~.

2. This section does not limit cross-examination.

Reporter's Comment:

The Nevada Rule differs from the Federal Rule in three important respects. First, like Alabama's Rule, the Nevada Rule only allows completion from the writing or recording that is initially proffered. As discussed above with respect to the Alabama Rule, this seems to be an unjustified limitation on the rule of completeness. Second, the Rule specifies that it is the initial proponent who may be required to admit the completing evidence; that is, the rule specifically requires a forced presentation. Third, the rule goes well beyond the Federal Rule in allowing completing evidence whenever it is "relevant" to the part introduced. That broad relevance standard was specifically rejected by the Federal Advisory Committee.

The Nevada Rule also specifies that a party can proceed with cross-examination without regard to the rule. Under Federal Law, it goes without saying that the rule of completeness does not prevent an adversary from cross-examining a witness with evidence that could have been admitted under Rule 106. This language is made necessary in Nevada, however, because Nevada Rule 106 permits completion only from the writing that was initially introduced. Thus, there is a presumptive exclusion of other writings even though they could be used to place the initial writing in context. The Nevada Advisory Committee therefore thought it important to specify that such writings could be used on cross-examination even though they were presumptively excluded under Nevada Rule 106.

Ohio

Rule 106. REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce ~~the introduction of~~ any other part or any other writing or recorded statement which is otherwise admissible and which ought in fairness to be considered contemporaneously with it.

Reporter's Comment

The major innovation of the Ohio Rule is that it specifies that its Rule 106 is not an admissibility rule–there is no trumping function.

As discussed extensively in Part Two, the question of whether to provide a trumping function in Rule 106 is a policy question. The better policy is to providing that completing evidence is admissible even if it is hearsay. Otherwise, parties will be able to make a misleading presentation of the evidence and then hide behind the hearsay rule when the adversary seeks to correct the misimpression. However, if the Committee decides that Rule 106 should be amended to eliminate a trumping function, the Ohio Rule would provide an appropriate model.

Oregon

RULE 106. WHEN PART OF TRANSACTION PROVED, WHOLE ADMISSIBLE

When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject, where otherwise admissible, may at that time be inquired into by the other; when a letter is read, the answer may at that time be given; and when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversation or writing which is necessary to make it understood may at that time also be given in evidence.

Reporter's Comment

The Oregon Rule is expansive in one sense and yet very limited in another. It is expansive in that it applies to oral statements and actions as well as writings and recordings. The Commentary to the Rule states that the Federal Rule "would exclude the possibility of admitting the remainder of any contemporaneous act, declaration or conversation" and that this limitation "is inconsistent with the broad purpose of the rule, which is one of fairness."

On the other hand, the Oregon Rule is limited because it provides that it only applies to completing evidence that is otherwise admissible. There is no trumping rule. It can be argued that the fairness rationale emphasized in the Oregon commentary should also mandate that evidence necessary to correct a misimpression should be admissible despite another rule of exclusion.

Texas

Texas has two rules on completeness. Texas Rule 106 is identical to the Federal Rule, with the exception that a sentence has been added to specify that "writing or recorded statement" includes depositions. That sentence would be inappropriate under the Federal Rule because the rule of completeness as applied to depositions is already found in Civil Rule 32(a)(4).

In addition to Rule 106, Texas has a separate Rule 107, which is labelled a rule of "optional completeness." That rule reads as follows:

> When part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, and any other act, declaration, writing or recorded statement which is necessary to make it fully understood or to explain the same may also be given in evidence, as when a letter is read, all letters on the same subject between the same parties may be given. "Writing or recorded statement" includes depositions.

This rule is quite expansive and it seems to render Texas Rule 106 superfluous or perhaps just applicable as a timing rule. The Texas courts have held that the Rule trumps the hearsay rule. See, e.g., *Broussard v. State*, 68 S.W.3d 197 (Tex. App. 2002) (prosecution properly allowed to admit hearsay statement where the defendant asked about selected portions of the statement on cross-examination). Texas courts seem to use Rule 107 as a broad rule to permit a complete presentation

from the adversary whenever a party presents any evidence that creates a misleading impression. See, e.g. *Nunez v. State*, 27 S.W.3d 210 (Tex. App. 2000) (Under the rule of optional completeness, the defendant-attorney's testimony that he was acquitted on forgery charge justified state's cross-examination to establish in witness tampering trial the reason for the acquittal, that is, that the indictment did not properly charge the crime).

In sum, the Texas Rule 107 would be a model for a broad rule of completeness that would permit an adversary to correct any kind of misimpression with otherwise inadmissible evidence. Whether this is too broad a remedy is a question for the Committee.

IV. Drafting Alternatives

If the Committee decides that Rule 106 should be amended, there are two basic models that could be followed, with permutations on each of the models. The first model would specify that the rule provides a trumping function, admitting completing evidence otherwise excluded as hearsay. The second model would provide the opposite–that the rule of completeness applies only to otherwise admissible evidence.

The Committee could then build on either of these models to deal with the other problems that have been encountered under the Rule, specifically:

1) Should the Rule apply to oral statements?

2) Should the fairness standard be sharpened?

3) Should the term "introduced" be replaced by language triggering the rule whenever the party actually uses the initial portion in some way at trial?

4) Should the Rule clarify, along the lines of Rule 105, that it is the court that orders the admission of completing evidence?

5) Should the Rule clarify that when the completing evidence interrupts the initial proponent's presentation, it is the proponent who proffers the evidence (i.e., a "forced presentation")?

Each model can also be used to provide for the possibility that evidence may be presented in electronic form.

The two models that follow attempt to answer each of the above questions. If the Committee decides that any or all of the above points do not need to be addressed, the models can be modified by simply deleting the amendatory language that is addressed to the specific problem.

A. Model One – Inclusion of a Trumping Function

Rule 106. Remainder of or Related Acts, Declarations, Conversations, Writings or Recorded Statements.

a. When ~~a~~ an act, declaration, conversation, writing or recorded statement in any form, or part thereof, is ~~introduced~~ utilized in court by a party, ~~an adverse party may require the introduction at that time of~~ any other part or any other act, declaration, conversation, writing or recorded statement in any form is admissible, subject to Rule 403, when necessary in the interest of fairness, a clear understanding, or an adequate explanation of the evidence ~~which ought in fairness to be considered contemporaneously with it~~.

b. Upon request by an adverse party, the court may, in its discretion, require the offering party to introduce contemporaneously with the act, declaration, conversation, writing or recorded statement in any form, or part thereof, any evidence admissible under subdivision (a). This subdivision does not limit the right of any party to develop evidence admissible under subdivision (a) on cross-examination or in the party's case.

Model Committee Note

The rule has been amended to resolve six problems that arose in the application of the original rule:

1. The amendment clarifies that if evidence is necessary to complete a misleading presentation of evidence, that completing evidence is admissible even if it would otherwise be excluded as hearsay or under some other exclusionary rule. Some courts and commentators read the original rule to provide this "trumping" function. *See generally* Dale Nance, *Verbal Completeness and Exclusionary Rules Under the Federal Rules of Evidence*, 75 Tex. L. Rev. 51, 63 (1996) (contending that "the better interpretation" of Rule 106, "the one favored by the most explicit and well-considered judicial opinions," is that the completing portion is admissible even if it would otherwise be excluded under the hearsay or original document rules); James P. Gillespie, *Federal Rule of Evidence 106: A Proposal to Return to the Common Law Doctrine of Completeness*, 62 Notre Dame L. Rev. 382, 391 (1987) ("Traditional rules of statutory construction indicate that the drafters of the Federal Rules of Evidence intended Rule 106 to be a substantive rule of evidence."); *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986) ("Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that that proffered evidence should be considered contemporaneously.") This amendment rejects the case law declaring that the protections of Rule 106 are limited to otherwise admissible evidence. The trial court retains discretion, however, to exclude completing evidence if its probative value is substantially outweighed by the risks set forth in Rule 403. See 21 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5078 (advocating the use of Rule 403

when necessary to exclude unduly prejudicial or confusing matter offered as completing evidence).

2. The amendment expands the protection of the rule to provide a completeness remedy for misleading presentations of oral statements and actions. The need for a fair presentation of the evidence – for the whole truth – is no less as to oral evidence and actions than it is for writings or recordings. See James P. Gillespie, *Federal Rule of Evidence 106: A Proposal to Return to the Common Law Doctrine of Completeness*, 62 Notre Dame L. Rev. 382, 393 (1987) ("Logically, the possibility of the distortion of a statement by taking it out of context will not differ depending on whether it is reduced to writing or not . . ."). Many courts have held that the trial court has authority under Rule 611(a) allow completing evidence of oral statements to be admitted, usually without regard to whether it is hearsay. See *United States v. Castro*, 813 F.2d 571 (2d Cir. 1987) (Rule 611(a) gives the court the same power to complete oral statements as Rule 106 gives for written statements); *United States v. Haddad*, 10 F.3d 1252, 1258 (7th Cir. 1993) (while Rule 106 did not apply to oral statements, Rule 611(a) "gives the district courts the same authority with respect to oral statements and testimonial proof."). The amendment specifically locates the authority to admit all completing evidence in a single rule.

3. The amendment provides a more explicit standard for determining when evidence is necessary to complete an initially misleading presentation. Courts have set forth varying, and sometimes conflicting standards for when "fairness" mandates completing evidence. See *United States v. Branch,* 91 F.3d 699, 728 (5th Cir. 1996) (noting that "different circuits have elaborated Rule 106's 'fairness' standard in different ways"); *United States v. Haddad*, 10 F.3d 1252, 1259 (7th Cir. 1993) (completing evidence admissible when necessary to "1) Explain the admitted evidence, 2) Place the admitted portions in context, 3) Avoid misleading the trial of fact, and 4) Insure fair and impartial understanding of the evidence"); *United States v. Soures,* 736 F.2d 87, 91 (3d Cir. 1984) (using the same four-factor test as *Haddad*, but stating that the factors are disjunctive rather than conjunctive). The amendment specifies that besides general notions of fairness, completing evidence is admissible when necessary for a clear understanding or an adequate explanation of the previously admitted evidence. The standard is derived from Iowa R. Evid. 5.106(a).

4. The amendment recognizes that a party might make unfair use of evidence before it is formally "introduced" into evidence. The rule of completeness is now triggered whenever the misleading evidence is "utilized in court." The language is derived from Maine R. Evid. 106.

5. The amendment makes clear that it is the court that orders the completing evidence to be admitted. The amendment deletes the "adverse party may require" language that implied some kind of self-help remedy. See 21 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5076 (noting that it was "possible to read the rule as providing for some sort of forensic self- help").

6. The amendment clarifies that when a party's presentation must be interrupted to admit completing evidence, that evidence is to be introduced by the party making the initial presentation. See Dale Nance, *Verbal Completeness and Exclusionary Rules Under the Federal Rules of Evidence*, 75 Tex. L. Rev. 51, 92 (1996) (noting that Rule 106 calls for a forced presentation of completing

evidence by the party whose presentation is being interrupted).

The amendment specifies that the decision whether to interrupt a proponent's presentation with completing evidence is left to the trial court's discretion. The disruption involved in interrupting the usual order of proof may well not be justified, especially if the completing evidence involves proof of an oral statement or an action. This does not mean, however, that the completing evidence is never to be admitted. The adverse party is entitled, subject to Rule 403, to proffer completing evidence on cross-examination or during the party's case.

The addition of the phrase "in any form" is intended to cover evidence in electronic form.

Reporter's Comment on Model One:

This proposal covers ALL of the problems addressed in Part Two of this report. The proposal can be modified to delete treatment of any of the six matters, and the Committee Note can be modified accordingly. For example, if the Committee were to decide that it did not want to change the language "introduced", the proposal could be changed as follows:

Rule 106. Remainder of or Related Acts, Declarations, Conversations, Writings or Recorded Statements.

a. When ~~a~~ an act, declaration, conversation, writing or recorded statement in any form, or part thereof, is introduced by a party, ~~an adverse party may require the introduction at that time of~~ any other part or any other act, declaration, conversation, writing or recorded statement in any form is admissible, subject to Rule 403, when necessary in the interest of fairness, a clear understanding, or an adequate explanation of the evidence ~~which ought in fairness to be considered contemporaneously with it~~.

b. Upon request by an adverse party, the court may, in its discretion, require the offering party to introduce contemporaneously with the act, declaration, conversation, writing or recorded statement in any form, or part thereof, any evidence admissible under subdivision (a). This subdivision does not limit the right of any party to develop evidence admissible under subdivision (a) on cross-examination or in the party's case.

Similarly, if the Committee does not wish to expand the Rule's coverage to include oral statements and actions, the amendatory language in the first line of the rule, and in the heading of the rule, can simply be deleted.

If the Committee wishes to retain the fairness language of the existing Rule, the model would be changed as follows:

Rule 106. Remainder of or Related Acts, Declarations, Conversations, Writings or Recorded Statements.

a. When ~~a~~ an act, declaration, conversation, writing or recorded statement in any form, or part thereof, is introduced by a party, ~~an adverse party may require the introduction at that time of~~ any other part or any other act, declaration, conversation, writing or recorded statement in any form is admissible, subject to Rule 403, when necessary in the interest of fairness ~~which ought in fairness to be considered contemporaneously with it~~.

b. Upon request by an adverse party, the court may, in its discretion, require the offering party to introduce contemporaneously with the act, declaration, conversation, writing or recorded statement in any form, or part thereof, any evidence admissible under subdivision (a). This subdivision does not limit the right of any party to develop evidence admissible under subdivision (a) on cross-examination or in the party's case.

If the Committee decides against the "forced presentation" provision in the Rule, subdivision (b) could be changed as follows:

b. Upon request by an adverse party, the court may, in its discretion, ~~require the offering party to introduce~~ **admit** contemporaneously with the act, declaration, conversation, writing or recorded statement in any form, or part thereof, any evidence admissible under subdivision (a). This subdivision does not limit the right of any party to develop evidence admissible under subdivision (a) on cross-examination or in the party's case.

Obviously, there are many permutations. But the model appears flexible enough to cover any of the permutations dependent on a trumping function.

B. Model Two – Limiting Rule 106 to Otherwise Admissible Evidence

Rule 106. Remainder of or Related acts, declarations, conversations, writings, or recorded statements.

When ~~a~~ an act, declaration, conversation, writing or recorded statement in any form, or part thereof, is ~~introduced~~ utilized in court by a party, ~~an adverse party~~ the court may in its discretion require the ~~introduction~~ party to introduce at that time ~~of~~ any other part or any other act, declaration, conversation, writing or recorded statement in any form, that is otherwise admissible, when necessary in the interest of fairness, a clear understanding, or an adequate explanation of the evidence ~~which ought in fairness to be considered contemporaneously with it~~. Nothing in this rule prevents a party from introducing evidence on cross-examination or in the party's case.

Model Committee Note

The rule has been amended to resolve six problems that arose in the application of the original rule:

1. The amendment clarifies that evidence covered by the rule must be independently admissible. The rule does not create an exception to other rules of exclusion. For example, if the proffered completing evidence is hearsay, it cannot be admitted under the rule. The appropriate remedy for a misleading presentation is not admitting hearsay, but rather excluding the misleading evidence, where appropriate, under Rule 403. See *United States v. Costner,* 684 F.2d 370, 373 (6th Cir. 1982) ("Rule 106 is intended to eliminate the misleading impression created by taking a statement out of context. The rule covers an order of proof problem; it is not designed to make something admissible that should be excluded.")

2. The amendment expands the protection of the rule to provide a completeness remedy for misleading presentations of oral statements and actions. The need for a fair presentation of the evidence – for the whole truth – is no less as to oral evidence and actions than it is for writings or recordings. See James P. Gillespie, *Federal Rule of Evidence 106: A Proposal to Return to the Common Law Doctrine of Completeness*, 62 Notre Dame L. Rev. 382, 393 (1987) ("Logically, the possibility of the distortion of a statement by taking it out of context will not differ depending on whether it is reduced to writing or not . . ."). Many courts have held that the trial court has authority under Rule 611(a) allow completing evidence of oral statements to be admitted, usually without regard to whether it is hearsay. See *United States v. Castro*, 813 F.2d 571 (2d Cir. 1987) (Rule 611(a) gives the court the same power to complete oral statements as Rule 106 gives for written statements); *United States v. Haddad*, 10 F.3d 1252, 1258 (7th Cir. 1993) (while Rule 106 did not apply to oral statements, Rule 611(a) "gives the district courts the same authority with respect to oral statements and testimonial proof."). The amendment locates the authority to admit all completing evidence in Rule 106, so long as the evidence is not excluded by other Evidence Rules..

3. The amendment provides a more explicit standard for determining when evidence is necessary to complete an initially misleading presentation. Courts have set forth varying, and sometimes conflicting standards for when "fairness" mandates completing evidence. See *United States v. Branch,* 91 F.3d 699, 728 (5th Cir. 1996) (noting that "different circuits have elaborated Rule 106's 'fairness' standard in different ways"); *United States v. Haddad,* 10 F.3d 1252, 1259 (7th Cir. 1993) (completing evidence admissible when necessary to "1) Explain the admitted evidence, 2) Place the admitted portions in context, 3) Avoid misleading the trial of fact, and 4) Insure fair and impartial understanding of the evidence"); *United States v. Soures,* 736 F.2d 87, 91 (3d Cir. 1984) (using the same four-factor test as *Haddad,* but stating that the factors are disjunctive rather than conjunctive). The amendment specifies that besides general notions of fairness, completing evidence is admissible when necessary for a clear understanding or an adequate explanation of the previously admitted evidence. The standard is derived from Iowa R. Evid. 5.106(a).

4. The amendment recognizes that a party might make unfair use of evidence before it is formally "introduced" into evidence. The rule of completeness is now triggered whenever the misleading evidence is "utilized in court." The language is derived from Maine R. Evid. 106.

5. The amendment makes clear that it is the court that orders the completing evidence to be admitted. The amendment deletes the "adverse party may require" language that implied some kind of self-help remedy. See 21 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5076 (noting that it was "possible to read the rule as providing for some sort of forensic self- help.").

6. The amendment clarifies that when a party's presentation must be interrupted to admit completing evidence, that evidence is to be introduced by the party making the initial presentation. See Dale Nance, *Verbal Completeness and Exclusionary Rules Under the Federal Rules of Evidence,* 75 Tex. L. Rev. 51, 92 (1996) (noting that Rule 106 calls for a forced presentation of completing evidence by the party whose presentation is being interrupted).

The amendment specifies that the decision whether to interrupt a proponent's presentation with completing evidence is left to the trial court's discretion. The disruption involved in interrupting the usual order of proof may well not be justified, especially if the completing evidence involves proof of an oral statement or an action. This does not mean, however, that the completing evidence is never to be introduced. The adverse party is entitled, subject to Rule 403 and other exclusionary rules such as the hearsay rule, to proffer completing evidence on cross-examination or during the party's case.

The addition of the phrase "in any form" is intended to cover evidence in electronic form.

Reporter's Comment on Model Two

As with Model One, this model is flexible enough to cover, or not to cover, all of the problems addressed in this report. But if this model is adopted, and a trumping function is denied, any of the other possible amendments to the language take on much less importance -- for the simple reason that if the rule contains no trumping power, it is not of much use to the party confronted with a misleading presentation of the evidence.

III-B

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Committee Consideration of Whether an Amendment to Rule 404(a) Is Necessary
Date: October 1, 2002

At its April 2002 meeting the Evidence Rules Committee directed the Reporter to prepare a report on Rule 404(a)–the Rule prohibiting character evidence when offered to prove conduct and providing three exceptions to that prohibition–so that the Committee could determine whether it is necessary to propose an amendment to that Rule. The possible need for amendment arises from the fact that two of the exceptions to the rule against using character evidence to prove conduct appear to be limited to criminal cases, and yet a number of opinions have allowed such evidence in civil cases. This report provides the Committee with an analysis of the case law under and a discussion of the policy basis of the current Rule, so that the Committee can determine whether the costs of amendment are justified.

The report is divided into four parts. Part One sets forth the current Rule and the original Advisory Committee Note. Part Two sets forth the case law and commentary on whether character evidence can be used in civil cases, and discusses the policy behind allowing some character evidence to prove conduct in criminal cases, but not in civil cases. Part Three sets forth State law variations of Rule 404(a) that bear on the particular question of admissibility of character evidence in civil cases. Part Four sets forth drafting alternatives that address the question of the permissibility of character evidence to prove conduct in civil cases.

It is important to note that this report takes no position on whether the Committee should propose an amendment to Rule 404(a). The intent is only to set out the policy arguments and case law on the question whether character evidence to prove conduct should ever be admissible in a civil case–and to advise how the Rule might be amended to either prohibit or accomplish that result. It is for the Committee to determine whether the divergent case law is significant enough to justify the substantial costs of an amendment.

Subject Matter Not Treated In This Report

The Advisory Committee directed the Reporter to write a report on the divergent case law holding that character evidence is admissible in certain civil cases to prove conduct despite the apparent preclusion in Rule 404(a). That is the only topic addressed in this report. Thus, it is presumed that the evidence considered in this report does not involve the following:

1) character evidence when character is "in issue" in the case (e.g., defamation cases)–the report treats only the situation in which character evidence is offered circumstantially, to prove conduct;

2) character evidence offered for impeachment under the Article 6 rules–such evidence is specifically exempted from the character exclusion in both civil and criminal cases under Rule 404(a)(3);

3) bad acts offered for a purpose other than proving character under Rule 404(b)–the Advisory Committee at its April meeting determined that it would not consider any amendment to Rule 404(b).

So this report deals with the scope of the exceptions to the rule against using character evidence to prove the conduct of a person whose actions are in dispute in the case. These exceptions are found in subdivisions (a)(1) and (a)(2) of Rule 404.

I. Rule 404(a)

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 evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim. — Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness. — Evidence of the character of a witness, as provided in rules 607, 608, and 609.

* * *

Relevant Portion of Advisory Committee's Note

Subdivision (a). This subdivision deals with the basic question whether character evidence should be admitted. * * *

* * * Character evidence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character. This use of character is often described as "circumstantial." Illustrations are: evidence of a violent disposition to prove that the person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft. This circumstantial use of character evidence raises questions of relevancy as well as questions of allowable methods of proof.

In most jurisdictions today, the circumstantial use of character is rejected but with important exceptions: (1) an accused may introduce pertinent evidence of good character (often misleadingly described as "putting his character in issue"), in which event the

prosecution may rebut with evidence of bad character; (2) an accused may introduce pertinent evidence of the character of the victim, as in support of a claim of self-defense to a charge of homicide or consent in a case of rape, and the prosecution may introduce similar evidence in rebuttal of the character evidence, or, in a homicide case, to rebut a claim that deceased was the first aggressor, however proved; and (3) the character of a witness may be gone into as bearing on his credibility. McCormick §§ 155-161. This pattern is incorporated in the rule. While its basis lies more in history and experience than in logic, an underlying justification can fairly be found in terms of the relative presence and absence of prejudice in the various situations. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L. Rev. 574, 584 (1956); McCormick § 157. In any event, the criminal rule is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence.

* * *

The argument is made that circumstantial use of character ought to be allowed in civil cases to the same extent as in criminal cases, i.e., evidence of good (nonprejudicial) character would be admissible in the first instance, subject to rebuttal by evidence of bad character. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L. Rev. 574, 581-583 (1956); Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 657-658 (1964). Uniform Rule 47 goes farther, in that it assumes that character evidence in general satisfies the conditions of relevancy, except as provided in Uniform Rule 48. The difficulty with expanding the use of character evidence in civil cases is set forth by the California Law Revision Commission in its ultimate rejection of Uniform Rule 47, *id.*, 615:

> Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.

Much of the force of the position of those favoring greater use of character evidence in civil cases is dissipated by their support of Uniform Rule 48 which excludes the evidence in negligence cases, where it could be expected to achieve its maximum usefulness. Moreover, expanding concepts of "character," which seem of necessity to extend into such areas as psychiatric evaluation and psychological testing, coupled with expanded admissibility, would open up such vistas of mental examinations as caused the Court concern in Schlagenhauf v. Holder, 379 U.S. 104, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964). It is believed that those espousing change have not met the burden of persuasion.

II. Case Law, Commentary, and Policy Discussion

The two exceptions at issue–allowing the "accused" to admit character evidence and allowing the "prosecution" to "rebut the same", seem on their face to be limited to criminal cases. The Advisory Committee Note to the Rule, excerpted above, seems clearly to indicate that the Rule is intended to prohibit the circumstantial use of character evidence in civil cases, and that the limited exceptions in subdivisions (1) and (2) can only be invoked in criminal cases.

However, both the Fifth and the Tenth Circuits have held that character evidence can be offered circumstantially when the defendant in a civil case is accused of an action that is tantamount to a crime. Those cases can be summarized as follows:

Case Law Holding That Circumstantial Use of Character Evidence Is Permitted In a Civil Case Involving Quasi-Criminal Conduct.

1. Carson v. Polley, 689 F.2d 562, 576 (5th Cir. 1982): This was a police brutality case, in which the officers claimed self-defense, and the plaintiff sought to rebut the claim with evidence that the officers were bad-tempered. The Court declared that circumstantial use of character evidence was not absolutely precluded in civil cases. Relying on prior Fifth Circuit case law, the court declared as follows:

> We have held that when a central issue in a case is "close to one of a criminal nature," the exceptions to the Rule 404(a) ban on character evidence may be invoked. See *Crumpton v. Confederation Life Ins. Co.*, 672 F.2d 1248, 1253 (5th Cir. 1982).
>
> The circumstances under which quasi-criminal conduct warrants the introduction of character evidence in a civil suit under Rule 404(a) may not always be easy to draw. Cf. *Croce v. Bromley Corp.*, 623 F.2d 1084 (5th Cir. 1980) (allowing evidence of character traits in a civil negligence suit in order to present the case fairly to the jury). Here, however, we believe that the assault and battery with which the defendants in this suit are charged falls "close to one of a criminal nature." Therefore, we apply the character evidence exceptions of Rule 404(a).

The court ultimately found, however, that the evidence of the defendants' bad tempers could not be admitted under Rule 404(a)(1), because the defendants never opened the door to this character evidence. Thus, the court construed the plaintiff to be the "prosecution" within the meaning of Rule 404(a)(1). *See also Crumpton v. Confederation Life Ins. Co.*, 672 F.2d 1248, 1253 (5th Cir.1982) ("While Rule 404(a) generally applies to criminal cases, the unusual circumstances here place the case very close to one of a criminal nature. The focus of the civil suit on the insurance policy was the issue of rape, and the resulting trial was in most respects similar to a criminal case for rape. Had

there been a criminal case against Crumpton, evidence of his character that was pertinent would have been admissible. We do not view the notes of the Advisory Committee as contravening this interpretation.").

2. Bolton v. Tesoro Petroleum Corp., 871 F.2d 1266, 1278 (5th Cir. 1989). Investors in a petroleum company brought a class action alleging securities fraud and violations of RICO. The defendant called former President Ford, who testified to his high regard for the CEO of the corporation. No objection was made on character grounds at trial so the court reviewed for plain error. The court found no error in admitting this character testimony under Rule 404(a)(1). It declared as follows:

> Rule 404(a)(1) allows evidence of relevant character traits of an "accused" individual. Such evidence can be admissible in a civil trial raising quasi-criminal allegations against a defendant. In this case, appellants promised during opening argument to show the jury the "sinister dark side of [the CEO]." During trial, [the CEO] was accused of obstructing justice, defrauding the government, perjury, and criminal bribery. It was not "plain error" to admit character evidence on his behalf.

Tesoro indicates that the "quasi-criminal" extension by the Fifth Circuit is not limited to cases in which physical violence is at issue. Anytime the plaintiff accuses the defendant of activity that can be characterized as criminal, Fifth Circuit law appears to indicate that the defendant can bring in evidence of his good character and, by logical extension, evidence of the victim's (whoever that is) bad character. And the plaintiff can rebut with character evidence if the defendant opens the door.

3. Perrin v. Anderson, 784 F.2d 1040, 1044-5 (10th Cir. 1986). This was a civil rights action in which the plaintiff alleged that his father was shot to death by police officers. The officers claimed self-defense, and sought to introduce evidence that the decedent had a violent temper, especially around police officers. The court held that Rule 404(a)(2) would permit proof of the victim's character for violence, even though this was a civil case. The court reasoned as follows:

> In a case of this kind, the civil defendant, like the criminal defendant, stands in a position of great peril. A verdict against the defendants in this case would be tantamount to finding that they killed Perrin without cause. The resulting stigma warrants giving them the same opportunity to present a defense that a criminal defendant could present. Accordingly we hold that defendants were entitled to present evidence of Perrin's character from which the jury could infer that Perrin was the aggressor. The self-defense claim raised in this case is not functionally different from a self-defense claim raised in a criminal case.

Ultimately, however, the character evidence was found improperly admitted under Rule 405, because it was specific act evidence. Rule 405 provides that if character evidence is offered to prove conduct, the only permissible forms are opinion and reputation. (The court held, however, that the specific

act evidence was properly admitted as habit.)

Case Law Holding That Circumstantial Use of Character Evidence Is Never Permitted In a Civil Case

Case law from other circuits rejects the view of the Fifth and Tenth Circuits and holds that character evidence, when offered to prove conduct, is never admissible in a civil case. Those cases can be summarized as follows:

1. *Ginter v. Northwestern Mut. Life Ins. Co.*, 576 F.Supp. 627, 629-30 (D. Ky.1984): This was an insurance claim, where the insurer argued that the plaintiff defrauded the insurer in preparing the application. The plaintiff proffered character evidence of his honesty, but the court excluded the evidence, reasoning that the exceptions in Rule 404(a)(1) and (2) were not applicable in civil cases. The court reasoned that the text implicitly limited these exceptions to criminal cases, because the exceptions are left for the "accused" and for the "prosecution" in rebuttal. The court analyzed the reasoning of the Fifth Circuit in the *Crumpton* decision, *supra*, and found it wanting:

> With respect, this court must disagree with the *Crumpton* decision. It seems beyond peradventure of doubt that the drafters of F.R.Evi. 404(a) explicitly intended that all character evidence, except where "character is at issue" was to be excluded [in civil cases]. After an extensive review of the various points of view on this issue, the Advisory Committee expressly stated, "[i]t is believed that those espousing change (from the view of excluding character evidence in civil cases) have not met the burden of persuasion." This language leads to the inevitable conclusion that the use in Rule 404(a) of terms applicable only to criminal cases was not accidental. * * * This court believes that the language of the rule, as originally drafted by the Advisory Committee and ultimately approved by Congress, has the effect of a statute in excluding the proffered evidence here, even though the case may be considered as analogous to a criminal prosecution. * * * The court regards itself as not having any discretion in this matter by reason of the explicit language of the rule.

Continental Cas. Co. v. Howard, 775 F.2d 876, 879, n.1 (7th Cir. 1985) (in a suit for recovery on a fire insurance policy where the insurance company claimed that the plaintiff committed arson, it was proper for the court to exclude evidence of the plaintiff's good character).

Blake v. Cich, 79 F.R.D. 398 (D..Minn.1978), was a civil rights action in which the officers alleged that the plaintiffs attacked them. Plaintiffs offered evidence of peaceful character–but this could not be admitted in a civil case.

SEC v. Morelli, 1993 WL 603275 (S.D.N.Y.): The SEC contended that the defendants had engaged in illegal trading, and the defendants wanted to proffer evidence of their good character. The court granted a motion *in limine* to exclude such evidence. The Court rejected the Fifth and Tenth Circuit approach in the following passage:

> In declining to follow the approach of the Fifth and Tenth Circuits set out in *Carson v. Polley*, 689 F.2d 562 (5th Cir.1982) and *Perrin v. Anderson,* 784 F.2d 1040 (10th Cir.1986), the Court finds that despite the allegations in this case of what could constitute criminal conduct, character evidence under Fed.R.Evid. 404(a)(1) is not appropriate in this civil action. By its use of the term "accused" in subdivision (a), Rule 404 expressly rejects the use of character evidence in civil cases to prove a person acted "in conformity therewith on a particular occasion." *See Ginter v. Northwestern Mutual Life Ins. Co.,* 576 F.Supp. 627 (E.D.Ky.1984); Fed.R.Evid. 404 advisory committee's note; Jack B. Weinstein & Margaret A. Berger, 2 Weinstein's Evidence ¶ 404[03] (1993) ("Weinstein").

SEC v. Towers Financial Corp., 966 F.Supp. 203 (S.D.N.Y. 1997): The SEC alleged that the defendants engaged in securities fraud. One defendant wanted to call character witnesses on his behalf. Magistrate Judge Peck undertook an extensive analysis of Rule 404 and the case law, and concluded that character evidence is not admissible to prove conduct in a civil case. Judge Peck relied on the "plain meaning" of the Rule and on the Advisory Committee Note. Judge Peck's analysis proceeds as follows:

> The Commission argues that one cannot be an "accused" outside of a criminal action, the present proceeding is a civil action, and, therefore, the accused's character exception does not apply. Brater argues for a more flexible definition of "accused" that includes a defendant in a "quasi-criminal" civil proceeding, such as this SEC action.
>
> Black's Law Dictionary defines "accused" as "the generic name for the defendant in

a criminal case." Blacks Law Dictionary, at 23 (6th ed.). Webster's defines "the accused" as "the person or persons formally charged with the commission of a crime." Webster's New World Dictionary, at 9 (3d College Edition). Use of the word "prosecution" in Rule 404(a)(1) also strongly suggests that the exception is meant to be limited to criminal cases. Thus, the plain meaning of Rule 404(a)(1)'s language limits the exception to criminal cases, making it unavailable in this civil case.

The Advisory Committee Notes to Rule 404 support the conclusion that the drafters' intent was to limit the Rule 404(a)(1) exception to criminal cases * * *.

The existing case law in this Circuit supports the Court's position. See *SEC v. Morelli,* 91 Civ. 3874, 1993 WL 603275 (S.D.N.Y. Dec. 21, 1993) (Preska, J.) (refusing to admit evidence of defendant's character under Rule 404(a)(1) in SEC civil suit for insider trading). The leading commentators and decisions from other circuits also support the Court's view. See 2 Weinstein's Federal Evidence § 404.03[3] (Matthew Bender 2d ed. 1997) ("Given the use of the terms 'accused' and 'prosecution' in Rule 404(a)(1) and (2), it would seem that the rule does not permit evidence of character in a civil case, even if the conduct involved would be a crime) (emphasis added); 22 Wright & Graham, Federal Practice & Procedure: Evidence § 5236 ("the use of the word 'prosecution' and the intent of the drafters to codify the common law will probably lead most courts to conclude that the rule cannot be interpreted to incorporate the minority rule permitting the use of character evidence when criminal conduct is in issue in a civil case."); *Continental Cas. Co. v. Howard,* 775 F.2d 876, 878 n.1 (7th Cir. 1985) (although insurance company alleged that insured was an arsonist, court did not allow insured to present character evidence in civil suit); *Fryou v. Gaspard, 1991 U.S. Dist. LEXIS 5571, Civ. A. No. 89-3642, 1991 WL 68440* at *1 (E.D. La. April 25, 1991) ("The language of Rule 404(a) permits the introduction of character evidence only in criminal trials; it does not provide for the admission of this information in civil cases."); *Ginter v. Northwestern Mut. Life Ins. Co.,* 576 F. Supp. 627, 630 (E.D. Ky. 1984).

The Court acknowledges that there are a small number of cases from outside the Second Circuit that allow the Rule 404(a)(1) exception to apply in civil cases. The Court does not find those cases to be persuasive. In *Perrin v. Anderson,* 784 F.2d 1040 (10th Cir. 1986), the court admitted character evidence about the victim in support of a self-defense claim in an action against a police officer for the shooting of a civilian, although the court acknowledged that the language of the rule left no room for interpretation. * * * Whatever the validity of allowing evidence of the victim's character under Rule 404(a)(2) in a wrongful death claim, the Court is not convinced that *Perrin* should extend to admission of evidence concerning the defendant's character under Rule 404(a)(1) in a civil securities fraud suit.

In *Crumpton v. Confederation Life Ins. Co.,* 672 F.2d 1248 (5th Cir. 1982), the court explained, in dicta, that it is proper to admit character evidence in a civil suit concerning rape allegations because "the unusual circumstances here place the case very close to one of a criminal nature." *Id. at 1253.* The Court chooses not to follow the dicta in this Fifth Circuit

decision, nor the Fifth Circuit's decisions in *Carson v. Polley*, 689 F.2d 562, 575-76 (5th Cir. 1982), and *Bolton v. Tesoro Petroleum Corp.*, 871 F.2d 1266, 1278 (5th Cir. 1989). The courts in *Crumpton, Carson*, and *Bolton* do not provide a persuasive explanation for why the clear language of Rule 404(a)(1) and its "legislative history" (i.e., the Advisory Committee Notes) should be ignored.

Dupard v. Kringle, 1996 U.S. App. LEXIS 3365 (9th Cir.): In an excessive force case, the trial court permitted the defendants to prove that no complaint of using excessive force against a prisoner had ever been lodged against them. The Ninth Circuit held that this was improper use of character evidence in a civil case. It rejected the defendant's argument for an exception:

> The defense argues that the testimony falls within an exception provided by Rule 404(a)(1). Rule 404(a)(1), which permits character evidence offered by an "accused," does not apply to defendants in civil cases. While some circuits allow in such evidence when a civil rights defendant is accused of quasi-criminal conduct, we do not. See *Gates v. Rivera,* 993 F.2d 697, 700 (9th Cir. 1993) (in civil rights case, police officer defendant who shot a suspect should not have been allowed to testify that in his sixteen and one-half years as a police officer, he had not shot anyone). Thus, Rule 404(a)(1) does not provide an exception that makes testimony regarding the marshals' work records admissible.

Similarly, evidence of the plaintiff's character for violence was inadmissible. If the exception in Rule 404(a)(1) is not applicable in civil cases, it follows that the exception in Rule 404(a)(2) is not applicable either. As the court put it:

> The defense next argues that evidence of Dupard's aggressiveness was admissible as evidence of a pertinent trait of the victim under Rule 404(a)(2). However, if the marshals are not "the accused" under Rule 404(a)(1), then Dupard is not a "victim" of crime under Rule 404(a)(2).

Summary of Case Law

The majority of cases hold that the exceptions for character evidence provided in Rule 404(a)(1) and (2) are applicable in criminal cases only. Those cases rely basically on the text of the Rule, which uses the terms "accused" and "prosecution", and the Advisory Committee Note, which specifically considers and rejects the possibility of permitting character evidence in a civil case. The minority view, of the Fifth and Tenth Circuits, is based on the argument that a civil party charged with criminal activity is essentially in the same position as a criminal defendant, perhaps needing evidence of character to shield himself from the stigma of what amounts to a charge of criminal

activity.

Rationale for Civil-Criminal Distinction

The Fifth and Tenth Circuits see no distinction between a criminal defendant and a civil party charged with criminal activity. If there is no real distinction, then perhaps the text of a Rule which seems to make such a distinction should be amended.

Commentators have, however, argued that a distinction does exist between criminal defendants and civil parties accused of criminal activity, justifying the use of character evidence in criminal cases only. This distinction must be understood within the basic premise that character evidence to prove conduct is disfavored, because it creates the risk of undue prejudice and jury confusion. See *Michelson v. United States,* 335 U.S. 469 (1948) ("The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.")

But in criminal cases, an exception is reluctantly provided to permit the accused to use character evidence. The reason for permitting the accused to use character evidence is well-expressed by Mueller and Kirkpatrick, who state that "this exception (sometimes called the 'mercy rule') gives a criminal defendant some counterweight against the strong investigative and prosecutorial resources of the government." Mueller and Kirkpatrick, *Evidence: Practice under the Rules*, pp. 264-5. In other words, the accused, often outmatched by the prosecution's resources, may have little to defend with other than his good name. The defensive shield of character evidence, as a necessary counterweight to the government, obviously does not apply to civil cases. Moreover, the risk to the criminal defendant, of loss of liberty, is greater than that faced by a civil defendant, once again warranting the cost of character evidence in criminal cases but not in civil. See Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U.Pa.L.Rev. 845, 855 (1982). ("the rule was relaxed to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the factfinder just what sort of person he really is.")

McCormick, analyzing the common-law rule in the 1972 edition, similarly concludes that character evidence, with all of its problems, is admitted in criminal cases because of the need to protect the accused–a need that does not exist in civil cases:

> The common law relaxed its ban upon evidence of character to show conduct to the extent of permitting the accused to open the door by producing evidence of his good character. This was a special dispensation to criminal defendants whose life or liberty were at hazard. Should the same dispensation be accorded to the party in a civil action who has been charged by his adversary's pleading or proof with a criminal offence involving moral turpitude? The peril of judgment here is less, and most courts have declined to pay the price in consumption of

time and distraction from the issue which the concession entails.

McCormick on Evidence, § 192 at 459-60 (2d Ed.1972).

In the most recent edition of McCormick, the authors justify the civil-criminal distinction by noting that "the consequences of civil judgments are less severe than those flowing from a criminal conviction." Therefore "most courts have declined to pay the price" that the use of character evidence "would demand in terms of possible prejudice, consumption of time, and distraction from the issue."

There is another reason for the civil-criminal distinction that has not been emphasized by the commentators. This argument again assumes that character evidence is problematic and should be limited as much as reasonably possible. If character evidence is permitted in civil cases whenever one of the parties is accused of a criminal act, that will constitute a fairly broad and potentially unmanageable exception to the rule excluding character evidence. This is because there are many civil cases in which the parties throw about charges of misconduct. Given the breadth of the criminal law, it might even be the rare civil case in which a charge of some criminality could not be found. A case like *Ginter, supra,* is a good example. The plaintiff sued for recovery under an insurance policy; the company refused to pay on the ground that the plaintiff had made some false statements in his insurance application. The plaintiff claimed that this was a charge of quasi-criminal conduct, so he could admit evidence of his good character. The court was clearly concerned about the breadth of such a "quasi-criminal" exception, so it is understandable that it held that character evidence was simply inadmissible in a civil case.

The viability of a civil-criminal distinction is largely colored by one's view of character evidence. If character evidence is considered extremely problematic, due to its confusing and prejudicial nature, then naturally it should be limited as much as reasonably possible. One taking this view would reluctantly retain the "rule of mercy" for criminal defendants, but would not accept an open-ended extension that would permit the use of character evidence in a large number of civil cases. On the other hand, if character evidence is considered useful – as it is in determining the suitability of lawyers to enter the Bar and prospective employees to work – then one would not be upset to permit such evidence in civil cases and would be hard-pressed to find a legitimate distinction between criminal defendants and civil parties accused of criminal misconduct.

The Need for an Amendment

The nature of the argument for amending Rule 404(a) depends on the Committee's view of the civil-criminal distinction discussed above. If the Committee believes that the exceptions permitting the use of character evidence should be limited to criminal cases, then the argument for amending the Rule is that two circuits have veered from the original intent of the Rule, by expanding

the use of character evidence to civil cases–an exception that will be difficult to limit given the possibility of finding a charge of quasi-criminal conduct in many civil cases. It is for the Committee to decide whether the costs of amendment are justified by the benefit obtained through overruling the nonconforming case law in two circuits.

If the Committee decides that the civil-criminal distinction is unwarranted and that the Fifth and Tenth Circuit view is correct as a matter of policy, then the argument for amending the rule is that the text of the existing Rule cannot really support the result reached by the Fifth and Tenth circuits – the Rule should therefore be amended to permit the use of character evidence in civil cases where a party is accused of criminal conduct.

In either case, one argument for amendment is that the case law is sharply divided, and a split in the circuits is a traditional and justifiable reason for proposing an amendment to an Evidence Rule.

There is also a possible argument against any kind of amendment to Rule 404(a): the Rule was recently amended in 2000. It does not seem to be good policy as a general rule to propose an amendment to a rule that has just been amended. But two arguments are possible in response. First, the 2000 amendment to Rule 404(a)(1) was in response to Congressional attempts to amend the Rule directly. Congress thought it problematic that a criminal defendant could attack the character of a victim and yet remain free from an attack on his own character. Thus, the amendment was a pinpointed effort to respond to a particular concern of Congress. It did not purport to be a full-scale review of the Rule. Second, the 2000 amendment will not really be very "recent" by the time another amendment to the Rule could be proposed and enacted. If an amendment is proposed, it would be part of a package of amendments that probably would not even be released for public comment until August, 2004 – meaning that the projected date of enactment would be December 1, 2006. A six-year period between amendments is arguably sufficient to allay any concerns about "over-amendment" of a particular rule.

Relationship to Rule 412

If the Committee does decide to propose an amendment to Rule 404(a)(2), it might consider adding language referring to Rule 412, the rape shield law. It is clear that some evidence that might be admissible to attack the victim's character under Rule 404(a)(2) is excluded under Rule 412. That is, Rule 412 takes predominance over Rule 404(a)(2). If Rule 404(a)(2) is amended and Rule 412 is not, it might create the misimpression that the later-amended provision was somehow intended to "trump" Rule 412. Therefore, an "except as otherwise provided in Rule 412" might be justified. The drafting alternatives in Part Four contain such language.

III. State Variations

A few states have provisions bearing on the circumstantial use of character evidence in civil cases. What follows is a discussion of those provisions.

Alabama

Alabama R. Evid. 404(a)
(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 character offered by an accused, or by the prosecution to rebut the same;

(2) Character of Victim.
(A) In Criminal Cases. (i) 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 (ii) 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;

(B) In Civil Cases. Evidence of character for violence of the victim of assaultive conduct offered on the issue of self-defense by a party accused of assaultive conduct, or evidence of character for peacefulness to rebut the same;

* * *

Reporter's Comment

The Alabama Rule specifically provides for circumstantial use of character evidence in civil cases. It is limited, however, to character for violence or peacefulness in civil cases where assaultive conduct is alleged. This would permit a police officer in a case like *Perrin* to introduce evidence of the victim's violent character. But it would not permit the plaintiff in a case like *Ginter* to introduce evidence that he was too honest to have made false statements on an insurance application.

One odd thing about the Alabama Rule is that it permits the defendant to prove that the victim was violent, but it does not permit the defendant to prove his own peaceful character. That is, the Rule extends the exception in Rule 404(a)(2) to civil cases, but it does not extend the exception in Rule 404(a)(1) to civil cases. This makes little sense. The reason for extending the use of character evidence to civil cases is that a civil defendant charged with criminal conduct suffers

basically the same stigma and has the same interests at stake as an accused. If that is so, then the civil defendant should have the same right to introduce character evidence as the criminal accused. This would mean that a civil defendant should be able to introduce evidence of his own peaceful character.

Note that Iowa and Pennsylvania have the same exception for civil cases as Alabama.

Maryland

Md. R. Evid. 5-104

(a) Character Evidence Generally.

(1) In General. 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:

(A) Character of Accused. Evidence of a pertinent trait of character of an accused offered by the accused, or by the prosecution to rebut the same;

(B) 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;

* * *

(2) Definitions. For purposes of subsections (a)(1)(A) and (B) of this Rule, "accused" means a defendant in a criminal case and a child alleged to be delinquent in an action in juvenile court, and for purposes of subsection (a)(1)(B), "crime" includes a delinquent act as defined by Code, Courts Article, § 3-801.

Reporter's Comment

Maryland specifically prohibits the use of character evidence to prove conduct in civil cases. It does this by providing a special definition for "accused" that can't be construed away. But it would be just as easy to clarify the Federal Rule by specifying that the exceptions to preclusion of character evidence are applicable only in criminal cases. Providing a separate provision for definition of an

"accused" seems more awkward, especially since the Federal Rules appear to try to avoid definitional sections.

Oregon

RULE 404. CHARACTER EVIDENCE: ADMISSIBILITY

> (1) Admissibility Generally. Evidence of a person's character or trait of character is admissible when it is an essential element of a charge, claim or defense.
> (2) Admissibility for Certain Purpose Prohibited; Exceptions. Evidence of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:
>> (a) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;
>> (b) 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 to rebut evidence that the victim was the first aggressor;
>> (c) Character of Witness. Evidence of the character of a witness, as provided in ORS 40.345 to 40.355; or
>> (d) Character for Violent Behavior. Evidence of the character of a party for violent behavior offered in a civil assault and battery case when self-defense is pleaded and there is evidence to support such defense.

Reporter's Comment

Oregon provides a separate subdivision for character evidence in civil cases. Like Alabama and Iowa, it is limited to cases in which assault is alleged. The odd result in Oregon, however, is that the plaintiff is permitted to introduce evidence of the defendant's violent behavior, but the defendant is apparently not permitted to introduce evidence of a peaceful character. This is because the Rule refers to "the character of a party for violent behavior."

The Commentary to the Oregon Rule states that "Paragraph (2)(d) also does not appear in Federal Rule 404, but was added to codify present Oregon law regarding character evidence of the pugnaciousness of parties to a civil action."

Another variation of note in the Oregon Rule is subdivision (1), which states that character evidence is admissible if character is "an essential element of a charge, claim or defense." This is

the "character in issue" rule, which is well-established under Federal law. Federal Rule 404(a) does not specifically provide that evidence of character is admissible when character is "in issue." But arguably such an explicit provision is unnecessary. Federal Rule 404(a) states that character evidence is not admissible to prove "action in conformity therewith" unless it falls within one of the exceptions. But if character is in issue, character evidence is not being offered to prove conduct in conformity therewith–so proof of character in issue falls completely outside the proscriptions of Rule 404(a), and is admissible under standard principles of relevance found in Rules 401 and 402.

Texas

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character Evidence Generally. Evidence of a person's character or character trait 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 character trait offered:

(A) by an accused in a criminal case, or by the prosecution to rebut the same, or

(B) by a party accused in a civil case of conduct involving moral turpitude, or by the accusing party to rebut the same;

(2) Character of victim. In a criminal case and subject to Rule 412, evidence of a pertinent character trait of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of peaceable character of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; or in a civil case, evidence of character for violence of the alleged victim of assaultive conduct offered on the issue of self-defense by a party accused of the assaultive conduct, or evidence of peaceable character to rebut the same;

* * *

Reporter's Comment

Texas goes further that Alabama in permitting the use of character evidence in a civil case. First, it permits any party accused of conduct involving "moral turpitude" to offer evidence of good

character. This goes well beyond an assault case. It would, for example, allow Ginter to offer evidence that he is too honest to have made a false statement on an insurance application. It would permit defendants in SEC enforcement actions to prove character inconsistent with securities fraud or insider trading.

If the Committee decides that it wishes to broadly expand the use of character evidence to all "quasi-criminal" conduct alleged in civil cases, then the Texas rule is an appropriate model.

IV. Drafting Alternatives

There are two basic possibilities for amending Rule 404(a). One possibility is to clarify that the exceptions in subdivisions (a)(1) and (a)(2) are applicable only in criminal cases. The other possibility is to provide that such exceptions are applicable to civil cases. If the latter course is chosen, the Committee will have to decide how broad the exception for civil cases should be. For example, should it be limited to assault and battery cases? To cases involving a charge of misconduct that violates a criminal law? To cases involving a charge of moral turpitude?

Model One: Limiting the Exceptions to Criminal Cases

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~~ In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim.— ~~Evidence~~ In a criminal case, and except as provided in Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

* * *

Model Committee Note

The Rule has been amended to clarify that in a civil case character evidence is never admissible to prove conduct in conformity therewith. The amendment resolves the dispute in the case law over whether the exceptions in subdivisions (a)(1) and (2) permit the circumstantial use of character evidence in civil cases. *See, e.g.*, *Carson v. Polley*, 689 F.2d

562, 576 (5th Cir. 1982) ("when a central issue in a case is close to one of a criminal nature, the exceptions to the Rule 404(a) ban on character evidence may be invoked"); *SEC v. Towers Financial Corp.,* 966 F.Supp. 203 (S.D.N.Y. 1997) (relying on the terms "accused" and "prosecution" in Rule 404(a) to conclude that the exceptions in subdivisions (a)(1) and (2) are inapplicable in civil cases). The amendment is consistent with the original intent of the Rule, which was to prohibit the circumstantial use of character evidence in civil cases. See *Ginter v. Northwestern Mut. Life Ins. Co.*, 576 F.Supp. 627, 629-30 (D. Ky.1984) ("It seems beyond peradventure of doubt that the drafters of F.R.Evi. 404(a) explicitly intended that all character evidence, except where 'character is at issue" was to be excluded" in civil cases).

The circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion and delay. See *Michelson v. United States,* 335 U.S. 469 (1948) ("The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."). In criminal cases, the so-called "mercy rule" permits a criminal defendant to introduce evidence of pertinent character traits of the defendant and the victim; but that is because the accused, whose liberty is at stake, may need "a counterweight against the strong investigative and prosecutorial resources of the government." Mueller and Kirkpatrick, *Evidence: Practice under the Rules*, pp. 264-5 (2d ed. 1999). See also Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U.Pa.L.Rev. 845, 855 (1982) (the rule prohibiting circumstantial use of character evidence "was relaxed to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the factfinder just what sort of person he really is.") Similar concerns do not apply to parties in civil cases.

The amendment also clarifies that evidence otherwise admissible under Rule 404(a)(2) may nonetheless be excluded in a criminal case involving sexual misconduct. In such a case, vidence of the victim's sexual behavior and predisposition is governed by the more stringent provisions of Rule 412.

Model Two: Expanding the Exceptions to Some Civil Cases

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~~ In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim.— ~~Evidence~~ In a criminal case, and except as provided in Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness. — Evidence of the character of a wtiness, as provided in rules 607, 608, and 609.

(4) Character in civil cases. — In a civil case, evidence of a pertinent character trait offered by a party accused of criminal misconduct, or by the accusing party to rebut the same; or evidence of character for violence of the alleged victim of assaultive conduct offered on the issue of self-defense by a party accused of the assaultive conduct, or evidence of peaceable character to rebut the same.

* * *

Model Committee Note

The Rule has been amended to permit the circumstantial use of character evidence in certain civil cases. Where a party to a civil case is charged with conduct that violates a criminal law, that party faces a stigma comparable to that of a criminal defendant. See *Perrin v. Anderson,* 784 F.2d 1040, 1044-5 (10th Cir. 1986) (permitting the circumstantial use of character evidence where defendants were charged with excessive force that led to the decedent's death, noting that in cases of this kind, "the civil defendant, like the criminal

defendant, stands in a position of great peril") The stigma of a charge of criminal misconduct warrants giving civil parties the same opportunity to present character evidence that is accorded to the criminal defendant. See David Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence,* 58 U. Colo. L. Rev. 1, 55 (1986) ("The wording of current Rule 404(a) strongly suggests that character evidence is inadmissible in civil cases when offered to prove conduct. This rule is too narrow. While for reasons associated with the substantive law, character is irrelevant in most civil actions, some actions have elements which are similar to criminal cases. A civil action for battery or other intentional tort, for example, may raise issues of mental state similar to those involved in a criminal prosecution.").

The amendment also clarifies that evidence otherwise admissible under Rule 404(a)(2) may nonetheless be excluded in a criminal case involving sexual misconduct. In such cases, evidence of the victim's sexual behavior and predisposition is governed by the more stringent provisions of Rule 412.

Reporter's Note on Second Alternative:

The draft uses criminal misconduct as the touchstone for admissibility of character evidence in a civil case. The Texas rule uses "moral turpitude" but that term seems unduly vague and subject to an overbroad construction. On the other hand, limiting character evidence to civil cases involving assault and battery cases makes little sense if the reason for allowing such evidence is that a civil party may be accused of conduct that could result in a stigma. Clearly, assault and battery cases are not the only cases in which a civil party can suffer a stigma. So the criminal misconduct line seems to be the most logical and most precise line that can be drawn.

The model adds a new subdivision for civil cases. This seems to be a better solution than to try to cram civil cases into the existing subdivisions (a)(1) and (a)(2). Those subdivisions are already cluttered enough. One possibility is to make the provision for civil cases a new subdivision (3), to group it logically with (1) and (2). But this would require moving existing subdivision (3) down to (4). And that renumbering would create a problem for anyone doing research on Rule 404(a).

III-C

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Committee Consideration of Whether an Amendment to Rule 408 Is Necessary
Date: October 1, 2002

At its April 2002 meeting the Evidence Rules Committee directed the Reporter to prepare a report on Rule 408–the Rule prohibiting admission of settlements and statements made in settlement when offered to prove the validity or amount of a claim–so that the Committee could determine whether it is necessary to propose an amendment to that Rule.

The possible need for amendment arises from three problems that have been raised in the application of the Rule. Those problems are: 1) the admissibility of compromise evidence in a subsequent criminal case; 2) the admissibility of statements made in settlement negotiations to impeach a party by way of contradiction or prior inconsistent statement; 3) whether Rule 408 prohibits settlement offers when it is the party who made the offer that wants it admitted.

Each of these questions has been the subject of conflicting interpretations among the courts, and so might be worth the Committee's consideration. Of course it if for the Committee to determine whether this case law conflict is serious enough, individually or cumulatively, to justify the costs of an amendment.

This report provides the Committee with an analysis of the case law and commentary on the three problems arising under Rule 408 that might justify an amendment. The report is divided into four parts. Part One sets forth the current Rule and the original Advisory Committee Note. Part Two sets forth the case law and commentary on the problems of use of compromise evidence in civil cases, use for impeachment, and use by the party who made the settlement offer; Part Two also considers whether Rule 408 should be considered a rule of privilege, which would mean that any amendment would have to be enacted directly by Congress. Part Three sets forth State law variations of Rule 408 that bear on the particular questions of use in criminal cases, use for impeachment, and use by the party who made the settlement offer. Part Four sets forth drafting alternatives that address the questions of use in criminal cases, use for impeachment, and use by the party who made the settlement offer.

It is important to note that this report takes no position on whether the Committee should propose an amendment to Rule 408. The intent is only to set out the policy arguments and case law on the three major problems arising under the Rule, and to advise how the Rule might be amended to possibly resolve these problems. It is for the Committee to determine whether the conflicting case law presents a problem significant enough to justify the substantial costs of an amendment.

I. Rule 408

Rule 408 currently provides as follows:

Rule 408. Compromise and Offers to Compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

The Advisory Committee Note to Rule 408 is as follows:

Advisory Committee's Note

As a matter of general agreement, evidence of an offer to compromise a claim is not receivable in evidence as an admission of, as the case may be, the validity or invalidity of the claim. As with evidence of subsequent remedial measures, dealt with in Rule 407, exclusion may be based on two grounds. (1) The evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position. The validity of this position will vary as the amount of the offer varies in relation to the size of the claim and may also be influenced by other circumstances. (2) A more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes. McCormick §§ 76, 251. While the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to completed compromises when offered against a party thereto. This latter situation will not, of course, ordinarily occur except when a party to the present litigation has compromised with a third person.

The same policy underlies the provision of Rule 68 of the Federal Rules of Civil Procedure that evidence of an unaccepted offer of judgment is not admissible except in a proceeding to determine costs.

The practical value of the common law rule has been greatly diminished by its

inapplicability to admissions of fact, even though made in the course of compromise negotiations, unless hypothetical, stated to be "without prejudice," or so connected with the offer as to be inseparable from it. McCormick § 251, pp. 540-41. An inevitable effect is to inhibit freedom of communication with respect to compromise, even among lawyers. Another effect is the generation of controversy over whether a given statement falls within or without the protected area. These considerations account for the expansion of the rule herewith to include evidence of conduct or statements made in compromise negotiations, as well as the offer or completed compromise itself. For similar provisions see California Evidence Code §§ 1152, 1154.

The policy considerations which underlie the rule do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lesser sum. McCormick § 251, p. 540. Hence the rule requires that the claim be disputed as to either validity or amount.

The final sentence of the rule serves to point out some limitations upon its applicability. Since the rule excludes only when the purpose is proving the validity or invalidity of the claim or its amount, an offer for another purpose is not within the rule. The illustrative situations mentioned in the rule are supported by the authorities. As to proving bias or prejudice of a witness, see Annot., 161 A.L.R. 395, contra, Fenberg v. Rosenthal, 348 Ill. App. 510, 109 N.E.2d 402 (1952), and negativing a contention of lack of due diligence in presenting a claim, 4 Wigmore § 1061. An effort to "buy off" the prosecution or a prosecuting witness in a criminal case is not within the policy of the rule of exclusion. McCormick § 251, p. 542.

For other rules of similar import, see Uniform Rules 52 and 53; California Evidence Code §§ 1152, 1154; Kansas Code of Civil Procedure §§ 60-452, 60-453; New Jersey Evidence Rules 52 and 53.

Reporter's Comment:

The social policy basis for the Rule led to the expansion of protection from the common law. The common law protected offers of settlement, but not factual statements made in the course of settlement negotiations. The Advisory Committee reasoned that the social policy of encouraging settlement required protection of all statements made in settlement negotiations. Otherwise parties would be deterred from the open and free-flowing discussions that are often necessary to reach agreement.

In determining how and whether to treat the three problems addressed in this Report–use of compromise evidence in civil cases, use for impeachment, and use by the party who makes a settlement offer–it is important to keep the social policy basis of the Rule in mind.

II. Analysis of Problems Arising Under Rule 408

A. Use of Compromise Evidence in a Subsequent Criminal Case

The basic factual scenario for the use of compromise evidence in a criminal case is illustrated by the facts of *United States v. Prewitt,* 34 F.3d 436, 439 (7th Cir. 1994). Prewitt was engaged in shady securities activity that led to a civil investigation by a state securities office, and ultimately to a civil suit brought by the government for securities fraud. In an attempt to settle that suit, Prewitt admitted that he knew that his conduct was wrongful. Then he was charged in a criminal indictment for mail fraud. The statements he made to the civil authorities were used against him in the subsequent criminal trial as an admission of guilt on the mail fraud charge.

The question for a court in a case like *Prewitt* is whether the protections of Rule 408 apply in a subsequent criminal case. The court in *Prewitt* found no error in admitting Prewitt's statements to the civil authorities. It held that Rule 408 is completely inapplicable to criminal cases. It reasoned as follows:

> Nothing in Rule 408 specifically prohibits the receipt of evidence in criminal proceedings concerning the admissions and statements made at a conference to settle claims of private parties. *United States v. Gonzalez*, 748 F.2d 74, 78 (2d Cir.1984). The public interest in the prosecution of crime is greater than the public interest in the settlement of civil disputes. Id. Rule 408 should not be applied to criminal cases.

Majority Rule

Prewitt represents the (narrow) majority view, that Rule 408 is inapplicable in criminal cases – though several circuits have not had cause to decide the issue at this point. The cases reaching the same result (though not necessarily the same rationale) as *Prewitt* include:

1. *United States v. Baker*, 926 F.2d 179, 180 (2d Cir. 1991): The defendant made incriminating statements while attempting to strike a deal with police officers. These statements could not be protected under Rule 410 (the rule protecting guilty plea negotiations) because that Rule requires that the statement be made to an "attorney for the prosecuting authority." Baker argued instead that his statements were protected under Rule 408, which contains no such limitation. But the court held that Rule 408 is not applicable in criminal cases. The court reasoned as follows:

> We believe it fairly evident that the Rule applies only to civil litigation. The reference to "a claim which was disputed as to either validity or amount" does not easily embrace an attempt to bargain over criminal charges. Negotiations over immunity from criminal charges or a plea bargain do not in ordinary parlance constitute discussions of a "claim" over which there is a dispute as to "validity" or "amount.""

Reporter's Comment: The rationale of *Baker* seems limited to its facts. The defendant was attempting to bargain on criminal charges, and the court held that Rule 408 could not apply because it uses such terms as "claim" and "amount." This rationale does not cover a situation like *Prewitt*, where the defendant was actually trying to settle a *civil* claim at the time he made the statements, and the statements were admitted in a subsequent criminal prosecution.

2. *United States v. Gonzalez,* 748 F.2d 74, 78 (2d Cir. 1984): The defendant was charged and convicted of wire fraud and mail fraud in connection with his solicitation of a loan from a Spanish bank. The trial court allowed testimony from an attorney for the bank that the defendant admitted his knowledge of the existence of false and forged documents. The trial judge also allowed into evidence a confession of judgment executed by the defendant, stating that the defendant was "personally liable for the full amount of the debt owing to [the Spanish bank]." The court relied on a policy argument to hold that Rule 408 is inapplicable in criminal proceedings, even if the statements are made in the course of a civil settlement:

> Rule 408 is premised on the idea that encouraging settlement of civil claims justifies excluding otherwise probative evidence from civil lawsuits. Fed.R.Evid. 408 advisory committee note. However, encouraging settlement does not justify excluding probative and otherwise admissible evidence in criminal prosecutions. The public interest in the disclosure and prosecution of crime is surely greater than the public interest in the settlement of civil disputes. It follows that since nothing in the Rule specifically prohibits receiving in evidence the admissions and statements made at a conference to settle claims of private parties, they are admissible in any criminal proceeding.

Reporter's Comment: *Gonzalez* relies on a policy argument, not a textual argument. It basically says that the need for probative evidence in a criminal case outweighs the need to encourage settlement and provide compensation to victims in civil cases.

The treatise *Jones On Evidence, Civil and Criminal*, § 22:16 (7th ed. 2000), has this to say about the *Gonzalez* decision:

> **The decision may have unfortunate consequences. A target of a potential criminal investigation may be unwilling to settle civil claims against him if by doing so he increases the risk of prosecution and conviction. If widely followed, *Gonzalez* could make it much more difficult for the victims of questionable conduct to obtain timely compensation for what they have lost.**

3. *Manko v United States*, 87 F.3d 50, 54-5 (2d Cir. 1996): The defendant was convicted of tax fraud related to interest expense deductions arising from sham transactions. In this case, it

was the defendant who sought to introduce evidence that the Internal Revenue Service ("IRS") and the defendant had settled civil tax claims that were based on the same facts and theory as the criminal charges. This evidence, the defendant claimed, was an admission by the IRS that the defendant was at least partially justified in deducting the losses that were claimed to be fraudulent in the criminal trial. However, the trial judge did not let the defendant present this evidence on the ground that it was precluded under Rule 408. The Second Circuit concluded that the district court erred by excluding the IRS settlement under Rule 408, holding again that Rule 408 does not apply to criminal proceedings.

The *Manko* court explicitly stated that it was balancing the policy goals of the criminal and civil justice systems to determine whether Rule 408 should apply to criminal proceedings. It concluded that the "policy favoring the encouragement of civil settlements, sufficient to bar their admission in civil actions, is insufficient, in our view, to outweigh the need for accurate determinations in criminal cases where the stakes are higher."

Reporter's Comment: Once again, the court relies on a policy/balancing of interest argument rather than a textual argument to hold that Rule 408 is inapplicable in criminal cases.

4. *United States v. Graham,* 91 F.3d 213, 218-219 (D.C. Cir. 1996)*:* This is a case like *Baker, supra,* in which a defendant sought to exclude statements made while trying to "negotiate" with criminal investigators. Again, these statements are not protected by Rule 410 since they were not made to a government attorney; so Graham sought to use Rule 408. The Court held 408 inapplicable under these circumstances:

> The subject of this rule is the admissibility of evidence (in a civil or criminal case) of negotiations undertaken to "compromise a claim" in a civil action, see Jack B. Weinstein et al., 2 Weinstein's Evidence ¶ 408[01] at 408- 17 & n.28 (citing cases) (1992); it does not address the admissibility of evidence concerning negotiations to "compromise" a criminal case. See United States v. Baker, 926 F.2d 179, 180 (2d Cir.1991) ("Negotiations over immunity from criminal charges or a plea bargain do not in ordinary parlance constitute discussions of a 'claim' over which there is a dispute as to 'validity' or 'amount' "); see also Charles Alan Wright and Kenneth W. Graham, 23 Federal Practice and Procedure § 5306 at 216-219 (1980) ("It seems odd to refer to the prosecution's case against a criminal defendant as a 'claim'.... The arguments [in favor of doing so] are not convincing"). Moreover, as the court pointed out in *Baker*, "[t]he very existence of Federal Rule of Criminal Procedure 11(e)(6) [and of Rule 410] strongly support[ ] the conclusion that Rule 408 applies only to civil matters.

Reporter's Comment: Read carefully, the explanation in *Graham* actually *supports* the

proposition that statements made while settling a civil claim will be excluded when offered in a subsequent criminal case. The Court is saying that the protection of the Rule depends on what is being settled, not on the case in which the evidence is proffered. If the party is attempting to settle a civil claim, that evidence is covered by Rule 408 and is inadmissible whenever it is proffered to prove liability or guilt. If the party is attempting to settle a criminal charge, that evidence is never covered by Rule 408 no matter where it is offered, because Rule 408 only covers an attempt to settle a "claim"; thus, attempts to settle a criminal case are protected by Rule 410 or not at all.

5. United States v. Logan, 250 F.3d 350, 367 (6th Cir. 2001): The defendant was subject to parallel civil and criminal investigations arising from his actions in obtaining grants from HUD. He settled the action brought by HUD. This settlement was offered in the criminal case in which he was charged with fraud. The Court found the evidence of compromise properly admitted. It relied on the Second and Seventh Circuit cases discussed above to hold that Rule 408 is not applicable in criminal cases:

> We find that the cases that exist in the Second and Seventh Circuits are correct in concluding that the plain language of Rule 408 makes it inapplicable in the criminal context. Although this conclusion arguably may have a chilling effect on administrative or civil settlement negotiations in cases where parallel civil and criminal proceedings are possible, we find that this risk is heavily outweighed by the public interest in prosecuting criminal matters. Based upon the foregoing, we conclude, as have the Second and Seventh Circuits, that Rule 408 does not serve to prohibit the use of evidence from settlement negotiations in a criminal case.

Reporter's Comment: Contrary to the assertion of the *Logan* Court, neither the Second nor the Seventh Circuit relied on the "plain language" of Rule 408 to hold it inapplicable in criminal cases. Rather, both these courts rely on a straight policy determination–that the interest in prosecuting criminal matters outweighs the interest in encouraging settlements and compensating victims. The only textual analysis of the Rule occurred in cases in which the defendant was attempting to settle a *criminal* case by making communications not covered by Rule 410. There, the courts relied on Rule 408's reference to a "claim" to deny protection. That analysis obviously does not apply where the defendant is actually trying to settle a civil "claim" and the evidence of that settlement is later offered in a criminal case.

Minority View

What follows is a description of the cases that have adopted the view that Rule 408 is applicable to criminal cases:

1. *United States v. Hays,* 872 F.2d 582, 589 (5th Cir. 1989): The defendants were charged with bank fraud. They had settled civil claims brought by the bank. The Court found it reversible error to admit the defendants' civil settlement in the criminal case. The Court reasoned as follows:

> Federal Rule of Evidence 408 permits evidence of settlement agreements for purposes other than proving liability, such as demonstrating the prejudice of a witness, negativing a contention of undue delay, or establishing the obstruction of a criminal investigation. The Government does not contend that it offered this evidence for any of the permissible purposes contemplated by Rule 408. Rather, the Government urges that evidence of the settlement agreement assisted the jury in its understanding of the breadth of the conspiracy. In our view, this purpose stands at direct odds with the clear mandates of Rule 408, and therefore the admission of the evidence regarding the settlement agreement between the Hays and Lancaster was error.
>
> As the appellants correctly contend in brief, and as the framers of Rule 408 clearly contemplated, the potential impact of evidence regarding a settlement agreement with regard to a determination of liability is profound. It does not tax the imagination to envision the juror who retires to deliberate with the notion that if the defendants had done nothing wrong, they would not have paid the money back.

Reporter's Comment: The Court's reasoning is not correct in one respect. It criticizes the government for not using one of the "permissible purposes" listed in Rule 408. In fact, the Rule states that there is only one *impermissible* purpose–where the compromise evidence is used to prove the liability for or the amount of the claim. If there is any purpose for the evidence other than that, Rule 408 does not apply.

The Court's confusion is understandable, because Rule 408 is poorly written. It would be better, and more effective in implementing the social policy of the Rule, if the Rule simply prohibited compromise evidence unless it were offered for a purpose specifically listed as an exception to the Rule. If the exceptions are narrowly drawn, this would limit the risk–that currently exists–of the exceptions swallowing the rule of exclusion.

2. *United States. v. Skeddle*, 176 F.R.D. 254 (N.D.Ohio1997): This case provides the most thorough discussion of whether Rule 408 applies to exclude evidence of civil settlements in subsequent criminal cases. Defendants made statements to corporate investigators in an attempt to settle the corporation's claim for fraud. These statements were turned over to government investigators. The Court held that those statements could not be admitted in a criminal trial.

The government argues that Rule 408 does not apply in criminal proceedings. I disagree: Rule 1101(b) explicitly states that the rules of evidence "apply generally" to criminal cases and criminal proceedings. Nothing in Rule 408 limits its application to civil litigation that was preceded by or included settlement negotiations. Looking only at the text of Rule 408 in the context required by Rule 1101(b) leads to the conclusion that exclusion of defendants' statements is required.

* * *

Not only does the plain language of Rule 408 * * * support this holding, but also the structure of Rule 408 and the framework of the Federal Rules of Evidence support such a ruling. As defendants point out, the plain language of Rule 408 provides for certain situations when statements made during compromise negotiations are admissible. For example, Rule 408 does not require exclusion when the evidence is offered for another purpose, such as to prove bias or prejudice, negative a contention of undue delay, or prove an effort to obstruct justice. I agree with defendants that if Rule 408 did not apply in criminal cases, there would be no need to carve out an exception for certain circumstances in criminal cases. As importantly, the drafters of the Federal Rules of Evidence were aware of the scope and breadth of the rules and that these rules would be applied in criminal cases. Not only does Rule 1101(b) explicitly contemplate that the rules will apply to criminal proceedings, but also, in certain situations, the drafters of the rules affirmatively limited admissibility under a rule to civil and not criminal cases. Thus, Rule 803(8)(b) provides that public records are not to be excluded as hearsay when setting forth matters observed pursuant to a duty imposed by law, except "in criminal cases [involving] matters observed by police officers and other law enforcement personnel."

When the drafters wanted to exclude certain settlement statements from the scope of Rule 408, they did so. Likewise, when the drafters wanted to remove application of the rules from a criminal context, they did so. Failure to limit the scope of Rule 408 to civil litigation lends support to my determination that Rule 408 makes the defendants' statements inadmissible unless offered for "another purpose" under the rule.

Reporter's Comment: The *Skeddle* court makes a persuasive case that the text of Rule 408 imposes no limitation on its use in criminal cases. But the Court did not have to deal with the fact situation of cases like *Baker, supra,* where a defendant relies on Rule 408 to try to exclude attempts to settle a *criminal* litigation. If Rule 408 really has no limitations in criminal cases, there is a risk that defendants will try to use Rule 408 in cases in which Rule 410 does not provide protection. Perhaps the solution, textually, is that while Rule 408 is applicable in criminal cases, it does not apply to attempts to settle a criminal case, because its language refers to "claims" and not "charges". In other words, it can be argued that both *Baker* and *Skeddle* construe Rule 408 correctly; evidence of a civil compromise is excluded from all cases and evidence of a criminal compromise is simply not covered by the Rule.

3. *United States v. Verdoorn*, 528 F.2d 103, 107 (8th Cir. 1976): In this case, the defendant wanted to introduce offers and statements made by the government during plea negotiations; the government had apparently offered a deal to every living soul, and the defendant wanted to use that evidence to show something about governmental motivation. The problem for the government was that statements and offers by the prosecution are not protected under Rule 410–that Rule states that evidence of guilty plea negotiations and statements are not "admissible against the defendant." So the government relied on Rule 408. The court agreed with the government, reasoning that the "principles" of Rule 408 warranted exclusion of the government's offers in a criminal case.

Reporter's Comment: It would seem hard for the government to have it both ways. Either Rule 408 applies in criminal cases or it does not. Moreover, the Court in *Verdoorn* ignored the fact that Rule 408 refers to compromising a "claim", which is a civil-based term. That was the reason that cases like *Baker* hold that evidence of negotiations in a criminal case must be protected under Rule 410 or not at all. If that is so, then arguably the same rule should apply to government attempts to settle a criminal case.

One possible way out of this conundrum is to use Rule 403 to exclude statements and offers by prosecutors during plea negotiations. In other words, while neither Rule 410 nor Rule 408 protect the government's statements or offers in plea negotiations, a court can use Rule 403 to exclude such evidence. The rationale is that a plea offer from the government may signal a desire for an efficient resolution rather than a recognition of a weak case, and is therefore thought to have minimal probative value. See, e.g., *United States v. Delgado*, 903 F.2d 1495 (11th Cir. 1990) (plea agreement and statements by the prosecutor cannot be offered as an admission by the government, since the deal may have been struck for reasons other than the government's belief in the innocence of the accused; relying upon Rule 403).

Another possibility is to argue that it is eminently fair to protect the statements of a prosecutor in plea negotiations under Rule 408, and yet not protect statements of criminal defendants. Protecting prosecution statements and offers made in plea negotiations brings parity to the Rules, because such statements and offers when made by the defendant are already protected by Rule 410. Criminal defendants want to use Rule 408 to protect statements made to police officers; prosecutors are only seeking exclusion of statements already excluded when made by the criminal defendant. Moreover, a prosecutor invoking Rule 408 is not really trying to end-run whatever limitations exist in Rule 410. The fact is that Rule 410 does not deal with prosecution statements at all. It is designed solely to protect defendants. In contrast, a defendant who seeks to go beyond the protections designed for him under Rule 410 can be seen as evading the structure and intent of the Evidence Rules.

In the end, however, it seems difficult to argue that Rule 408, whose basic thrust is to encourage the settlement of civil cases, should be amended to give the prosecution a special dispensation in criminal cases.

4. *United States v. Greene*, 995 F.2d 793, 798 (8th Cir.1993): This is a case, like *Verdoorn*, in which the defendant sought to admit statements by the government during plea negotiations. The court followed the circuit precedent of *Verdoorn* and concluded that "[u]nder the rationale of Fed.R.Evid. 408, which relates to the general admissibility of compromises and offers to compromise, government proposals concerning pleas should be excludable."

Discussion of Case Law:

There is obviously a good deal of conflict in the cases over the applicability of Rule 408 in civil cases. One aspect of the conflict is a policy argument: the slender majority of cases hold that the interests in criminal prosecution outweigh the interests of encouraging civil settlements and compensation of victims. The contrary view is that the need to encourage civil settlements and compensation of victims outweighs the need for evidence of compromise negotiations in criminal cases, which may be of limited probative value anyway.

There is also a textual argument, which depends on the fact situation involved. One fact situation is where a party is trying to settle a civil case and makes statements or offers that are later proffered in a criminal case. As to that factual scenario, the cases finding admissibility do not really rely on the text of Rule 408. They rely instead on policy. The cases supporting exclusion, like *Skeddle*, rely on the text of the Rule and the structure of the Federal Rules. The textual argument made in *Skeddle* seems persuasive, since there is nothing in Rule 408 that limits its exclusion of civil settlements to civil cases only. Indeed, one of the exceptions to the Rule–compromise evidence is admissible to prove an effort to obstruct a criminal investigation–seems unnecessary if Rule 408 provides no protection in criminal cases.

The other factual scenario is where a party is trying to settle a *criminal* case, makes statements or offers that are not covered by Rule 410, and seeks to use Rule 408 in lieu of Rule 410. Here, the cases rely on the text of Rule 408 to hold it inapplicable. This textual construction makes sense, because the Rule is cast in terms of protecting civil settlements only. There is also an important policy argument supporting the inapplicability of Rule 408 in these circumstances; that is that Rule 410 was written to protect against admission of statements and offers made to settle a criminal case. The drafters of Rule 410 specifically added language to limit the protection of the Rule to statements made to government attorneys–the drafters did not want statements made to police officers to be protected from disclosure at trial. It would make no sense if such statements were then to be protected by Rule 408.

Assuming that Rule 410 should provide exclusive coverage for statements made in criminal cases, what is to be done about statements and offers made by the prosecution? Such statements are clearly not protected under Rule 410, so protecting them under Rule 408 raises the same problem as exists with statements made by criminal defendants. Assuming further that prosecutors'

statements *should* be protected, how can that result be reached? There are several possibilities, but not all of them are practicable:

1. Rule 410 could be amended to provide protection of prosecutors' statements and offers in plea negotiations. If the Committee wishes to consider this possibility, I would be happy to prepare a memorandum on Rule 410 for the Committee's consideration.

2. The prosecution could rely on case law, like *Verdoorn*, which has construed Rule 408 to protect prosecution statements and offers in plea negotiation. The problem with this reliance is that Rule 408 does not really bear such a construction. It is clearly limited to the context of negotiation and settlement of civil claims.

3. The prosecution could rely on Rule 403. The potential problem with this result is that it involves a case by case approach and is dependent on the discretion of the particular judge. But the decided cases seem to be sympathetic with the prosecution argument that prosecutorial statements and offers in plea negotiations are not very probative and could confuse the jury.

4. Rule 408 could be amended specifically to protect prosecution statements and offers during plea bargaining. The problem with this result is that the Rule is basically designed to protect evidence of compromise of a civil claim. It seems odd, perhaps inappropriate, to provide a special dispensation to the prosecution in a rule that does not even deal with a criminal prosecution. It would seem that, if a change is to be made to protect prosecution statements in a criminal context, it should be made in Rule 410.

It is, of course, for the Committee to determine whether the conflict in the case law warrants an amendment to Rule 408 to clarify its applicability in criminal cases. If the Committee decides that the problem is serious enough to warrant amendment–or if the problem together with the other two problems discussed below is serious enough to warrant amendment–then models for such an amendment can be found in Part Four.

B. Use of Compromise Evidence For Impeachment Purposes

Rule 408 provides that statements and offers made in settlement negotiations are admissible if offered to prove "bias or prejudice of a witness." This raises the question of the scope of an "impeachment" exception to the Rule. The reference to "bias or prejudice of a witness" is intended to cover the situation where one potential defendant has settled and then testifies as part of the plaintiff's case. The policy of the Rule is that the jury should be able to know about the settlement, because it is probative evidence that the witness has a financial interest at stake. It is parallel to the criminal context, where the defendant is permitted to introduce the fact that a prosecution witness cut a deal with the government.

Beyond this standard and well-accepted rule permitting proof of bias, there is dispute over the scope of any "impeachment" exception to Rule 408. The real question in dispute is whether statements and offers made in compromise can be admitted to impeach a witness as a prior inconsistent statement or as contradiction. For example, if a defendant, in a settlement negotiation, admits that he could have been more careful, can that statement be introduced to impeach him when he testifies at trial that he was acting carefully?

Commentators

The commentators generally state that impeachment for contradiction or prior inconsistent statement should not be permitted under Rule 408. Mueller and Kirkpatrick, in *Evidence: Practice Under the Rules* at 350-51, summarize the issue this way:

> There is debate about whether statements made by a party during settlement negotiations are admissible to impeach that party or his witnesses at trial. The only form of impeachment expressly allowed by the rule is proof of "bias or prejudice of a witness" but not impeachment by prior inconsistent statements. FRE 408 was not intended to provide a shield for perjury by allowing a party to present one version of facts during settlement negotiations and another at trial. On the other hand, to permit prior inconsistent statement impeachment could significantly undermine the policies and protections of FRE 408 and inhibit the willingness of parties to talk freely during the negotiation process. Statements made in the course of settlement discussions should be admitted for impeachment only in egregious circumstances where the interests of justice compel their introduction. If the statements are admitted, the fact that they were made in the course of settlement negotiations should be withheld from the jury.

See also *McCormick on Evidence*, 5th ed. 1999 at 186: "Use of statements made in compromise negotiations to impeach the testimony of a party, which is not specifically treated in Rule 408, is fraught with danger of misuse of the statements to prove liability, threatens frank interchange of information during negotiations, and generally should not be permitted."

And see Saltzburg, Martin and Capra, *Federal Rules of Evidence Manual* §408.02 (8th ed. 2002): "The philosophy of the Rule is to allow the parties to drop their guard and to talk freely and loosely without fear that a concession made to advance negotiations will be used against them at trial. Opening the door to prior inconsistent statement impeachment evidence on a regular basis may well result in more restricted — or more stilted, with every statement preceded by an "assuming arguendo" — negotiations.

Fred S. Hjelmeset, in *Impeachment of Party by Prior Inconsistent Statement in Compromise Negotiations: Admissibility Under Federal Rule of Evidence 408*, 43 Clev. St. L. Rev. 75, 109-110 (1995), provides a good summary of the arguments against a broad impeachment exception in Rule 408:

> [C]ommentators warn that such use, if sanctioned, has the potential to "undercut," "eviscerate," or "destroy" the rule. One concern is that it would "allow evidence perilously close to the key issue of liability," such as "camouflaged causation evidence." It could also possibly be used as "a mere subterfuge to get before the jury evidence not otherwise admissible." * * *
>
> It has also been warned that if settlement statements are admitted at trial, "many attorneys would be forced to testify as to the nature of discussions and thus be disqualified as trial counsel." Moreover, "the almost unavoidable impact of disclosure about compromises is that juries will consider the evidence as a concession of liability," and "the tendency of juries to disregard instructions is so well known that the admission of the evidence for even a limited purpose would result in a frustration of the policy of encouraging settlements."

Judge Wayne Brazil, in *Protecting the Confidentiality of Settlement Negotiations,* 39 Hastings L. J. 955, 975-6 (1988), similarly argues that a broad impeachment exception would swallow the rule:

> The most important argument counsel can make under rule 408 is that to admit statements made during negotiations simply because they are arguably inconsistent with a party's prior trial testimony would eviscerate the rule completely. To admit such statements would make a mockery of the rule's promise of confidentiality and defeat the rationale that inspires it. This follows because it is extremely difficult to articulate positions at different times that are completely consistent and because it is so easy to find some tension between virtually any two statements on the same subject.

Judge Brazil also argues that the text of the Rule and the Committee Note support the notion that impeachment should be limited to an attack for bias:

Counsel can buttress these policy arguments by noting that the only form of impeachment acknowledged by the rule itself is proof of "bias or prejudice of a witness." In addition, all of the cases cited in the Advisory Committee's note supporting admissibility for purposes of impeachment involved evidence of generous settlements with former defendants who were subsequently called to testify at trial on behalf of plaintiff. It seems unlikely that the drafters of the rule would have failed to mention as common a form of impeachment as prior inconsistent statements, if they felt that it should constitute an exception to Rule 408. Moreover, it is difficult to imagine that the drafters did not see that the apparent promise of meaningful protection offered by Rule 408 would be a charade and a huge trap for the unwary if impeachment by a prior inconsistent statement were considered a sufficient basis for admission.

One argument in favor of a broad impeachment exception is that without it, a party might commit perjury, free in the knowledge that he could not be impeached with a previous statement. Hjelmeset rebuts that argument as follows:

> It has been proposed * * * that if a party could not be impeached by prior inconsistent settlement statements, the truth would not be fully "ascertained," since the effect of barring the use of inconsistent statements would be to "protect false representations." However, one commentator surveying the issue concluded that "it is questionable whether the narrower interpretation of the rule would contribute to the goal of deterring or detecting perjury at trial or lying during settlement negotiations." Moreover, "attack by prior inconsistent statements has the weakness of being indefinite: It indicates that the witness may have erred or lied, but not which or why." Besides, the classic notion that the prior statement is "often inherently more trustworthy than the testimony itself" has been challenged in the context of a trial following free-wheeling, but failed, negotiations.
>
> Finally, the degree of inconsistency required for impeachment is much lower than outright lying; "any material variance between the testimony and the previous statement will suffice." There is no way this variance can be ascertained with certainty; "Is bias at work, or bad character, or a defect in perception, memory or narrative ability or is it simple, human, error?"
>
> The questionable deterrence value of such impeachment, the uncertainty of what it indicates, the low degree of inconsistency required, and its inability to distinguish between innocent errors and deliberate lies indicate that protecting a compromising party from impeachment by prior inconsistent statements does not inhibit the truthfinding process to any considerable degree. This becomes particularly clear when the facts that the "danger that the evidence will be used substantively as an admission is greater," and "the need for additional evidence on credibility is less" (since the party's interest is obvious), are weighed in on the other side of the scale, together with the strong public policy of encouraging compromise.

Judge Brazil also notes that a broad use of inconsistent statement impeachment is not necessary to root out perjury, and will only serve to vitiate the policy of the Rule:

> [I]t is not true that only liars need fear an interpretation of Rule 408 that would permit admission of statements made in negotiations solely on the ground that they are arguably inconsistent with trial or deposition testimony. Human thought processes and forms of communication are so imperfect that there is a substantial risk that parties whose hearts are as pure as the driven snow will make statements at different times and in different contexts that are arguably inconsistent. In other words, since being perfectly consistent is virtually impossible, a rule that permits use of statements simply because they are not perfectly consistent would lead to massive penetration of settlement talks and could be used to penalize the pure of heart just as much as the unscrupulous. The choice clearly is not between protecting liars and exposing liars. Rather, the choice is between (1) an interpretation of the rule that might, to some unmeasured extent, deter some lying by permitting party opponents to expose it when negotiations do not lead to settlements, and (2) an interpretation of the rule that would give some reality to its promise of confidentiality and that might, to some unmeasured extent, make settlement negotiations more rational by encouraging parties to share the reasoning that supports their positions. Given the lack of evidence that the narrow view of the rule has any effect on lying, courts should reject that interpretation on the ground that it makes Rule 408 hollow and misleading and creates pressures on counsel and litigants that tend to defeat the rule's purposes.

Case Law

The courts are in conflict over whether Rule 408 permits the use of statements and offers in compromise to be admitted to impeach a witness by contradiction or with a prior inconsistent statement.

A case permitting broad impeachment is *County of Hennepin v. AFG Indus., Inc.*, 726 F.2d 149, 153 (8th Cir. 1984), where the court allowed statements and offers in settlement to be admitted for impeachment through contradiction and inconsistent statement. The court analyzed the question as follows:

> Rule 408 states that while evidence of settlement is not admissible to prove liability, "This rule does not require exclusion when the evidence is offered for another purpose, such as proving the bias or prejudice of a witness ...." The rule codifies a trend in case law that permits evidence of a settlement to impeach. Reichenbach v. Smith, 528 F.2d 1072, 1075 (5th Cir.1976); see 161 A.L.R. 395 (cases cited); Advisory Committee Notes to Rule 408; McCormick, Evidence § 274 at 665 (2d Ed.1972).

Reporter's Comment:

The problem with this analysis is that the only impeachment specifically listed as permissible in the Rule is impeachment for bias. It does not follow that the Rule permits all forms of impeachment.

The Eighth Circuit has adhered to the *County of Hennepin* precedent. See *Freidus v. First Nat'l Bank*, 928 F.2d 793 (8th Cir. 1991) (in a breach of contract suit, letters exchanged between the parties during compromise negotiations were properly admitted to impeach by specific contradiction testimony by plaintiff's agent/husband that defendant never gave reasons for its action regarding foreclosure).

In contrast, the Tenth Circuit rejects the use of compromise evidence when offered to impeach through prior inconsistent statement or contradiction. The leading case is *EEOC v. Gear Petroleum, Inc.*, 948 F.2d 1542, 1545-6 (10th Cir.1991). The employer stated in a letter to the EEOC that the employee had been laid off as part of implementing a mandatory retirement plan. At trial, the defense was that the employee was laid off as part of a reduction of work force and to hire a more competent person. The letter to the EEOC was written as part of a settlement negotiation. The court held that the letter could not be admitted as contradiction or a prior inconsistent statement. It analyzed the impeachment question as follows:

> The EEOC finally argues that it should have been allowed to introduce the Bauer letters in order to impeach the testimony of certain Gear executives. Specifically, the EEOC sought to show that the executives conferred with Bauer in producing the letters and had knowledge of the information therein, thereby impeaching their testimony that there was no mandatory retirement plan and that age was not a factor in Trowbridge's firing.
>
> Although Rule 408 explicitly states that it "does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution," commentators have noted that "[t]he clear import of the Conference Report as well as the general understanding among lawyers is that [inconsistent] conduct or statements [made in connection with compromise negotiations] may not be admitted for impeachment purposes." M. Graham, Federal Rules of Evidence 116 (2d ed. 1987). See also Steven A. Saltzburg & Kenneth R. Redden, Federal Rules of Evidence Manual 286 (4th ed. 1986) ("In most cases ... the Court should decide against admitting statements made during settlement negotiations as impeachment evidence when they are used to impeach a party who tried to settle a case but failed. The philosophy of the Rule is to allow the parties to drop their guard and to talk freely and loosely without fear that a concession made to advance negotiations will be used at trial. Opening the door to impeachment evidence on a regular basis may well result in more restricted negotiations.").

> "[T]he risks of prejudice and confusion entailed in receiving settlement evidence are such that often ... the underlying policy of Rule 408 require [s] exclusion even when a permissible purpose can be discerned." David W. Louisell & Christopher B. Mueller, Federal Evidence § 170, at 443 (rev. vol. 2 1985). In this case the proffer of the Bauer letters for impeachment purposes was but a thinly veiled attempt to get the "smoking gun" letters before the jury. See Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 408[05] at 408-31, 408-34 (1991) ("The almost unavoidable impact of the disclosure of such evidence is that the jury will consider the offer or agreement as evidence of a concession of liability.... The danger that the evidence will be used substantively as an admission is especially great when the witness sought to be impeached, by showing the compromise with a third party, is one of the litigants in the suit being tried."). Accord McCormick on Evidence § 274, at 813 (Edward W. Cleary ed., 3d ed. 1984). Given the propriety of the initial exclusion, we cannot say that it was clearly erroneous for the district court to exclude the Bauer letters the second time around.

The Fifth Circuit appears to be in accord with the Tenth Circuit's view, that Rule 408 protects against impeachment through contradiction or prior inconsistent statement. In *Williams v. Chevron U.S.A., Inc.*, 875 F.2d 501, 504 (5th Cir.1989), a person injury action, the plaintiff claimed that his injury caused a need for spinal surgery that he couldn't afford. The defendant sought to introduce evidence of a settlement between the plaintiff and another defendant to contradict the plaintiff's assertion that he had no money. The court found that the evidence was properly excluded, though it is somewhat vague on whether Rule 408 prohibits such impeachment:

> Over Williams' objection, Chevron attempted to introduce Williams' $7500 settlement with Land and Marine ostensibly to impeach Williams' testimony that he did not have the financial means to pay for the recommended surgical procedure. The objection was sustained. Generally, settlement agreements are not admissible to question the amount of damages sought. Fed.R.Evid. 408. Although Chevron introduced the evidence for impeachment purposes, it is undoubtedly possible that the jury would have confused its purpose for that precluded by Rule 408. Whenever the possibility of jury confusion substantially outweighs the probative value of the evidence, it may be excluded. Fed.R.Evid. 403. We conclude that the exclusion was not an abuse of discretion.

Thus, the *Williams* case could be construed as holding that Rule 408 prohibits admission of statements and offers of settlement when offered to impeach through contradiction. Or it could be read as saying that exclusion must come under Rule 403.

Conclusion on Impeachment

Rule 408 is not explicit on whether it permits impeachment through contradiction or prior inconsistent statement. Arguably, such impeachment is prohibited by inference, since the listed exception permits only impeachment for bias. On the other hand, the exceptions listed in the fourth sentence of the Rule are illustrative only, so it can be argued that a listed exception for bias does not preclude a broader exception for prior inconsistent statements or contradiction.

From a policy perspective, there are arguments both ways on whether broad impeachment should be permitted under Rule 408. On the one hand, the Rule should not be construed to give a license to commit perjury. But on the other hand, if broad impeachment were permitted, it could be used in virtually every case. It seems inevitable that something said or argued at trial could be contradicted in some way by a statement or offer made by the party in compromise negotiations. It is also important to note that extrinsic proof of such impeachment evidence, where permitted, would create the potential of a lawyer-witness disqualification; caution should be exercised before adopting a rule that would so easily result in disqualification of the lawyers in the case.

It is for the Committee to determine whether the conflict in the case law and the vagueness of the Rule create a problem substantial enough–either alone or together with the other problems discussed in this Report–to justify an amendment. Language that might address the problem of impeachment is set forth in Part Four.

C. Can Offers and Statements In Compromise Be Admitted in Favor of the Party Who Made the Offer or Statement?

The policy of Rule 408 is to encourage settlement discussion and offers. The concern is that a party will be reluctant to make statements and offers if they could be used as evidence against them at a trial. But what if a party *wants* to introduce compromise statements and offers on its own behalf at trial? The courts are in dispute about whether Rule 408 operates to exclude all statements and offers during settlement negotiations, even if they are proffered by the party who made them. What follows is a discussion and analysis of the case law on the subject.

1. *Pierce v. F.R. Tripler & Co.*, 955 F.2d 820 (2d Cir. 1992): *Pierce* was an employment discrimination suit arising out of the elimination of the plaintiff's position. The employer contended that the plaintiff was the victim of a realignment, not discrimination. The employer sought to introduce the fact that it had offered to settle the case by giving the plaintiff a job in a different subsidiary. The purpose for introducing the offer was to prove the employer's lack of intent to discriminate and to show that the plaintiff, who rejected the offer, had failed to mitigate damages. The employer argued that the exclusion mandated by Rule 408 was inapplicable because it was designed to protect those who *made* offers of settlement, not those who received them. In effect the defendant was trying to waive the protection of Rule 408.

Rejecting the defendant's policy argument, the *Pierce* Court held that settlement offers are subject to Rule 408 even if it is the offeror who seeks to admit them. The Court noted that the plain language of the Rule offers no distinction between offerors and offerees.

The *Pierce* Court also relied on an alternative policy ground to reject a rule that would allow more liberal use of settlement negotiations. The Court noted that settlement negotiations are almost always conducted between and among opposing attorneys, and that these attorneys are likely to have different interpretations of the seriousness of offers and negotiations, and are also likely to disagree on what terms were set forth in any proposed settlement. These disputes of fact would have to be resolved by the factfinder, probably through testimony of the attorneys themselves. The Court was thus concerned that the "widespread admissibility of the substance of settlement offers could bring with it a rash of motions for disqualification of a party's chosen counsel who would likely become a witness at trial." The Court concluded that "we prefer to apply Rule 408 as written and exclude evidence of settlement offers to prove liability for or the amount of a claim regardless of which party attempts to offer the evidence."

Reporter's Comment: The *Pierce* approach to the Rule is arguably problematic because it deprives employers and other defendants of probative evidence on mitigation of damages. This would be a supportable result if the policy of Rule 408 was in play. But even the *Pierce* Court recognized that the principal policy of the Rule — to encourage settlements — is not at stake when the party who made the offer wants to introduce it to prove lack of mitigation. See also Mueller and Kirkpatrick *Federal Evidence* at 344 ("the policies underlying FRE 408 are generally not offended when the evidence is introduced in favor of

the offering party").

On the other hand, the *Pierce* court's concern about attorneys testifying as witnesses does seem warranted in many circumstances.

2. *Kennon v. Slipstreamer, Inc.*, 794 F.2d 1067, 1069-1070 (5th Cir. 1986): This case presents the same issue as *Pierce*–does Rule 408 permit evidence of settlement in favor of the settling party?– but it is different procedurally because the Rule 408 objection is lodged by someone who was not even a party to the settlement. In this personal injury case, the Judge, with the plaintiff's acquiescence, told the jury that the plaintiff had settled with other defendants for a nominal sum. The remaining defendant objected under Rule 408 to the disclosure of the amount of the settlements, even though he was not a party to the settlements and even though the plaintiff wanted the jury to have this information. The Court found reversible error, reasoning as follows:

> Fed.R.Evid. 408 provides that evidence of a settlement is not admissible "to prove liability for or invalidity of the claim or its amount." While a principal purpose of Rule 408 is to encourage settlements by preventing evidence of a settlement (or its amount) from being used against a litigant who was involved in a settlement, the rule is not limited by its terms to such a situation. Even where the evidence offered favors the settling party and is objected to by a party not involved in the settlement, Rule 408 bars the admission of such evidence unless it is admissible for a purpose other than "to prove liability for or invalidity of the claim or its amount." * * *
>
> The district court's disclosure of the fact of settlement was clearly for the purpose of avoiding jury confusion, rather than for the purpose of showing liability. In a case such as this one, where the absence of defendants previously in court might confuse the jury, the district court may, in its discretion, inform the jury of the settlement in order to avoid confusion. The district court did not abuse its discretion in revealing the fact of settlement in this case.
>
> The district court's disclosure of the amount of settlement, however, is a different matter. While revealing the fact of settlement explains the absence of the settling defendants and thus tends to reduce jury confusion, disclosing the amount of settlement serves no such purpose. Disclosing the amount of settlement had no proper purpose in the circumstances of this case and therefore it violated Rule 408. The district court's disclosure of the amount of the settlement prejudiced Slipstreamer in two ways. First, the fact that the settlement was for a nominal amount suggests that the plaintiffs thought that the settling defendants were not liable for the plaintiff's injuries and therefore points the finger at Slipstreamer as the one responsible. * * * Furthermore, the willingness of the plaintiff to settle for a pittance with the other defendants could be taken by the jury as a reflection of the strength of the plaintiffs' case against Slipstreamer.

Second, revelation of the amount of the settlement informed the jury that if the plaintiff was to receive any compensation for his injuries, he would have to get it from Slipstreamer. Such information is clearly prejudicial in a case such as this one where a ten year old child is permanently injured and where defendant's liability is sharply contested.

The dissent * * * asserts that it is contrary to the purpose of Rule 408 to allow one who is not a party to a settlement to invoke the protection of the rule. Again, we disagree. The central purpose of Rule 408 is to exclude compromise negotiations as to all rights they do not expressly control. It does not discourage settlement to prohibit the use of the fact or amount of settlement as an offensive weapon which can reach beyond its terms. Literally and substantively Rule 408 would forbid Kennon advising the jury that his settlements with the other defendants netted him nothing. The court cannot do for Kennon what Kennon could not do for himself. * * * [W]e hold no more than that no party, or the court, should disclose to the jury the amount of a settlement with other defendants in the absence of compelling circumstances demanding disclosure which are not present here.

The dissenting judge in *Slipstreamer* argued that the policy of Rule 408 did not reach a situation where the settlement is admitted in favor of the party who made the offer:

In light of its purpose of promoting settlement, Rule 408 requires exclusion only when evidence of a settlement is offered against a party to the settlement. See Fed.R.Evid. 408 advisory committee note ("While the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to completed compromises *when offered against a party thereto.* ") (emphasis added); E. Cleary, McCormick on Evidence § 274, at 811 (3d ed. 1984) (under privilege rationale, "the rule would be available as an objection to one who made the offer in question"); C. Wright & K. Graham, supra, § 5302, at 174 (noting that "if the party who made the offer is willing to have it introduced, the privilege rationale does not provide any basis for objections by others"). Slipstreamer was not a party to the settlement at issue in this case. Properly understood, therefore, Rule 408 affords Slipstreamer no ground for objecting to introduction of the fact or amount of settlement. The majority's holding to the contrary substitutes literalism for careful consideration of the Rule's purpose.

Reporter's Comment: *Kennon* emphasizes the dichotomy between the policy of the rule–to encourage settlement–and the wording of the Rule, which appears to state that statements and offers in compromise can never be admitted to prove liability or amount of the claim, no matter who seeks to admit them.

3. *Crues v. KFC Corp.*, 768 F.2d 230, 233-4 (8th Cir. 1985): This is a case in which a franchisee alleged that it had been misled about the nature of a franchise. The franchisor offered proof that it offered to compromise the claim by setting the plaintiff up in a different franchise. This was offered to show that the plaintiff was unreasonable in continuing to rely on previous representations about the nature of the franchise. The court held that the offer was properly admitted, relying mainly on the policy of Rule 408:

> Crues cites no federal cases holding that Rule 408 applies to admissions of compromise against the offeree. The rule is concerned with excluding proof of compromise to show liability of the offeror. C. McCormick, McCormick on Evidence § 264, at 712 (E. Cleary 3d ed. 1984). KFC submitted the offer to show that Crues was unreasonable in relying on the initial representation in continuing the fish operation. This use of evidence violates neither the spirit nor the letter of Rule 408.

Reporter's Comment: *Crues* preceded *Pierce* and *Kennon*, which explains why the plaintiff in *Crues* could cite no case holding that Rule 408 applies to admissions of compromise in favor of the offeror.

Conclusion on Whether Rule 408 Allows Evidence of Compromise To Be Admitted On Behalf of the Offering Party

There is a clear conflict in the courts. The Second and Fifth Circuits hold that Rule 408 precludes all compromise evidence, no matter who offers it. The Eighth Circuit holds that the party who makes the offer can use the offer in its favor. In large part, the conflict is one between the policy of the Rule and the language of the Rule. The language of the Rule supports the Second and Fifth Circuit view, because Rule 408 does not base any exception on the identity of the party who offers the evidence. The policy of the Rule supports the Eighth Circuit view, because the Rule is clearly intended to protect the party who made the statement or offer in compromise. The only policy argument supporting the Second and Fifth Circuit view is that opening the door to compromise evidence raises the risk of disqualification of attorneys who become witnesses at the trial. This is not a trivial consideration, but it is not the predominant policy justification for Rule 408.

It is for the Committee to determine whether the conflict in the case law and the disconnect between the language and the policy of the Rule create problems substantial enough–either alone or together with the other problems discussed in this Report–to justify an amendment. Language that might address the problem of identity of the offering party is set forth in Part Four.

D. Potential Problem in Proposing an Amendment: Is Rule 408 a Rule of Privilege?

It could be argued that Rule 408 is a rule of privilege. Under this conception of the Rule, a party is granted a privilege against disclosure of communications and offers that it makes in settlement. Privileges exclude relevant evidence in deference to some countervailing social policy. It could be argued that Rule 408 operates in this way–excluding relevant evidence in deference to the countervailing social policy of encouraging settlements.

Why is it important to determine whether Rule 408 is a privilege rule? Because if it is a rule of privilege, it could only be amended by an affirmative act of Congress. Unlike other Evidence Rules, which become law unless Congress acts to block them, rules of privilege must be enacted directly by Congress. This obviously makes the amendment process more difficult and uncertain, and undoubtedly raises the already high threshold of necessity that must exist before an amendment is proposed.

There are arguments both in favor of and against the characterization of Rule 408 as a privilege. The arguments in favor of such a characterization have just been stated: the Rule protects communications from being admitted as admissions, due to a countervailing public policy. Thus it sounds something like a privilege. Judge Brazil puts it this way:

> Because its principal purpose is to encourage settlement by encouraging "freedom of communication with respect to compromise, even among lawyers," Rule 408 has something very important in common with traditionally recognized privileges. The principal reason the law cloaks communications between attorney and client with confidentiality, for example, is to encourage clients to "tell all" to their lawyers. The traditional privileges, in short, have been designed to open up lines of communication in certain settings in which full communication will serve important societal interests. The fact that Rule 408 is designed to serve a closely analogous function is a major argument in favor of viewing it as creating a privilege.

But ultimately it would appear that the arguments against the characterization of Rule 408 as a privilege are more persuasive. Those arguments can be summarized as follows:

1. *Not protecting a confidential relationship:* Most privileges protect important relationships that are based in trust and confidence. Rule 408 does not. Judge Brazil explains it this way:

> The traditional privileges attach to communications between persons who have ongoing, supportive, interdependent, nonadversarial relationships (e.g., between priest and penitent, husband and wife, doctor and patient, lawyer and client). One purpose of the traditionally recognized privileges is to strengthen these relationships, relationships that society has an interest in fostering. Parties to settlement negotiations, in sharp contrast, are by definition adversaries. While in a small percentage of cases they may end up with ongoing relationships, society usually has no independent interest in nurturing close ties between adverse litigants, at least none that parallels the kind of societal interest that inspires the traditional privileges. Because no special relationship that society is committed to fostering is involved in most settlement negotiations, it can be argued that a key rationale supporting traditional privileges is inapplicable to the kinds of communications covered by Rule 408.

2. *Exclusion under Rule 408 depends on the purpose for which the evidence is offered:* Most privileges exclude evidence regardless of the purpose for which it is offered. Rule 408's protection is purpose-specific. Again, Judge Brazil explains:

> [B]y its own terms Rule 408 erects no barrier to admission at trial of settlement communications when the evidence is offered for any purpose other than "to prove liability for or invalidity of the claim or its amount." Thus the protection Rule 408 offers is much more limited than the protection offered by a privilege like the attorney-client privilege. The attorney-client privilege attaches automatically to certain kinds of communications and can be penetrated only on an extraordinary showing. Rule 408, however, does not come into play at all unless a party wants to introduce the settlement communication at trial for the only purpose that is forbidden by the rule. The rule alone is not a bar if the party who wants to introduce the evidence can proffer any one of the scores of other purposes that might make the evidence relevant. Since Rule 408 promises so much less, it cannot serve as the source of an expectation of privacy that is nearly as strong as the expectation created by the attorney-client privilege.

3. *If it were a privilege, it would have been placed in Article V:* As is well-known, the Advisory Committee proposed a complete set of privileges in Article V. Congress rejected all of these privilege rules. If the rule on compromise evidence were a rule of privilege, it stands to reason that the Advisory Committee would have placed it in Article V. And even if it had not, Congress, which was concerned about all of the privilege rules, would surely have objected to Rule 408. But it did not.

4. *Courts have held that Rule 408 is not a privilege:* The question has arisen whether information excluded from trial under Rule 408 is nonetheless subject to discovery. If Rule 408 were a privilege, the answer would be clearly no. A party is not entitled to discovery of privileged information. Yet courts have consistently held that information protected by Rule 408 is nonetheless subject to discovery. In the words of Judge Richey, while settlement communications "are clearly not admissible at trial for a number of public policy reasons, such negotiations do not fall within the confines of the privileges recognized at common law." *Oliver v. Committee for the Re-Election of the President,* 66 F.R.D. 553, 556 (D.D.C. 1975). See also *Bennett v. LaPere,* 112 F.R.D. 136 (D.R.I. 1986) (settlement documents were "not privileged" and were discoverable; court relies on the facts that Rule 408 applies only to admissibility at trial, and that if settlement evidence were not discoverable, a party would not be able to show that the evidence fell within one of the exceptions to the Rule).

5. *Rules similar to Rule 408 have been amended through the rulemaking process:* Other social policy-based rules found in Article IV of the Federal Rules of Evidence have been amended through the ordinary rulemaking process, without direct congressional enactment. For example, Rule 407 could be argued to create a "privilege" excluding subsequent remedial measures. But it was amended in 1997 through the usual rulemaking process. And Criminal Rule 11, which contains a subdivision substantively identical to Evidence Rule 410, a policy-based rule, was recently amended as part of the restyling package, without direct enactment by Congress. If Rule 408 is a privilege, then Rule 410 and Criminal Rule 11 would have to be as well, because those Rules are nothing more than the criminal counterpart to Rule 408. And yet congressional enactment has not been required for amendment of those rules.

6. *Courts have held that Rule 408 cannot be waived:* If Rule 408 established a privilege, then its protections could be waived. Yet two courts–*Pierce* and *Kennon*, discussed in Section C, above– have held that a party who makes a settlement offer has no right to offer it at trial. In other words, the protections of Rule 408 are not waivable.

Conclusion on the Privilege Question

While there are arguments to the contrary, the better view is that Rule 408 does not establish a privilege. Therefore, if the Committee decides to propose an amendment to the Rule, it appears that it can proceed through the regular rulemaking process.

III. State Variations

A few states have addressed one or more of the problems discussed in Part Two. These pertinent state variations of Rule 408 are set forth in this section.

Alaska–impeachment language

RULE 408. COMPROMISE AND OFFERS TO COMPROMISE

Evidence of (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution, but exclusion is required where the sole purpose for offering the evidence is to impeach a party by showing a prior inconsistent statement.

Reporter's Comment: The Rule protects against the use of statements made in compromise negotiations that are inconsistent with trial testimony. As discussed in Part Two, a broad use of an impeachment exception threatens to vitiate the protections of the Rule. One possible problem with the Alaska Rule is that it does not prohibit the use of compromise evidence to impeach by way of contradiction. Indeed, by failing to mention contradiction as an improper use, the Rule seems by inference to permit such use. This can be a problem because it could be expected that most impeachment with compromise evidence will not be by prior inconsistent statement, since most statements in compromise negotiations are made by lawyers. So if a defendant testifies inconsistently with a position taken in settlement negotiations, it is likely that impeachment will not be by his own inconsistent statements, but rather by contradiction by his lawyer's statements.

Louisiana–Inapplicability in Criminal Cases

Art. 408. Compromise and offers to compromise

A. Civil cases. In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, anything of value in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This Article does not require the exclusion of any evidence otherwise admissible merely because it is presented in the course of compromise negotiations. This Article also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

B. Criminal cases. This Article does not require the exclusion in a criminal case of evidence of the actions or statements described in Paragraph A, above, or of a giving or offer to give anything of value by the accused in direct or indirect restitution to a victim.

Reporter's Comment: Louisiana has decided that compromise evidence should be admissible in criminal cases. As discussed in Part Two, this is a policy question on which reasonable minds can differ. If the Committee decides to treat the question of applicability of the Rule to criminal cases, it might consider a separate subdivision, like that in Louisiana. If the Committee were to decide that compromise evidence should be inadmissible in criminal cases, then the Louisiana model subdivision B could be changed to require exclusion of that evidence.

Maryland–Impeachment and Criminal Cases

RULE 5-408. COMPROMISE AND OFFERS TO COMPROMISE

(a) The following evidence is not admissible to prove the validity, invalidity, or amount of a civil claim in dispute:

(1) Furnishing or offering or promising to furnish a valuable consideration for the purpose of compromising or attempting to compromise the claim or any other claim;
(2) Accepting or offering to accept such consideration for that purpose; and
(3) Conduct or statements made in compromise negotiations or mediation.

(b) This Rule does not require the exclusion of any evidence otherwise obtained merely because it is also presented in the course of compromise negotiations or mediation.

(c) Except as otherwise provided by law, evidence of a type specified in section (a) of this Rule is not excluded under this Rule when offered for another purpose, such as proving bias or prejudice of a witness, controverting a defense of laches or limitations, establishing the existence of a "Mary Carter" agreement, or proving an effort to obstruct a criminal investigation or prosecution, but exclusion is required where the sole purpose for offering the evidence is to impeach a party by showing a prior inconsistent statement.

(d) When an act giving rise to criminal liability would also result in civil liability, evidence that would be inadmissible in a civil action is also inadmissible in a criminal action based on that act.

Reporter's Comment: The provision on impeachment is the same as the Alaska Rule, and raises the same possible problem involved in not covering impeachment by contradiction.

The provision limiting use in a criminal case only covers the situation in which a party makes statements or offers in a civil settlement and these are later offered against him in a criminal trial. The provision thus covers a fact situation like *Prewitt, supra.* It does not protect statements made in negotiations in a criminal case that are not otherwise covered by Rule 410. For reasons discussed above, statements by a criminal defendant that are not protected by Rule 410 should not receive backdoor protection under Rule 408. However, this will also mean that prosecutor's statements and offers in negotiation, which are not protected under Rule 410, will not receive backdoor protection under Rule 408.

Tennessee–impeachment and criminal cases

RULE 408. COMPROMISE AND OFFERS TO COMPROMISE

Evidence of (1) furnishing or offering to furnish or (2) accepting or offering to accept a valuable consideration in compromising or attempting to compromise a claim, whether in the present litigation or related litigation, which claim was disputed or was reasonably expected to be disputed as to either validity or amount, is not admissible to prove liability for or invalidity of a civil claim or its amount or a criminal charge or its punishment. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence actually obtained during discovery merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution; however, a party may not be impeached by a prior inconsistent statement made in compromise negotiations.

Reporter's Comment: The use of the term "related litigation" is intended and probably adequate to cover a situation like *Prewitt*, in which statements made by the defendant in civil negotiations are offered in a subsequent criminal case. The Tennessee Rule does not appear to protect statements made by prosecutors. The impeachment language is similar to that of Alaska and suffers the same arguable infirmity of failing to protect against impeachment by contradiction.

IV. Drafting Models

What follows is a model of a draft amendment intended to cover the three problems addressed in this Report: 1) Use of compromise evidence in a criminal case; 2) Use of compromise evidence for impeachment with inconsistent statements or for contradiction; and 3) Use of compromise evidence by the party who made the offer or statement.

The first model adheres to the existing policy of the rule to promote settlements. It would appear that under that policy, compromise evidence should not be admissible in a criminal case, should not be admissible as prior inconsistent statements or contradiction, and should be admissible if offered by the party who made the offer or statement and who decides to waive the protection of the rule.

The second model takes the exact opposite view on each of the three problems, providing that compromise evidence is admissible in criminal cases, is admissible for impeachment by prior inconsistent statement and contradiction, and is not admissible even if proffered in favor of the party who made the offer or statement.

After extensive consideration, I determined that the real problems of the Rule lie in the fact that it excludes evidence only if offered to prove the validity or amount of the claim. This leaves a lot of room for establishing vague exceptions that tend to vitiate the public policy basis, and even the relevance basis, of the Rule. So the models take a different approach, by providing a presumption of exclusion, with specific exceptions. Obviously it is for the Committee to decide whether this approach is workable.

If the Committee decides to propose some amendment to the Rule, it can mix and match the solutions presented by the two models. The Committee could decide to treat only one or two of the problems. The models are flexible enough to cover most options that the Committee could decide to take.

Drafting Model One: Inadmissibility in a Criminal Case, Inadmissibility for Impeachment by Inconsistent Statement and Contradiction, and Admissibility if Protections of the Rule are Waived.

Rule 408. Compromise and Offers to Compromise

(a) General Rule. Evidence of the following is not admissible for any purpose in any case, except as otherwise provided in subdivision (b):

(1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a civil claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.; and

(2) Evidence of conduct or statements made in compromise negotiations to compromise a civil case. is likewise not admissible.

(b) Exceptions. This rule does not require the exclusion of the following:

(1) any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving

(2) evidence offered to prove the bias or prejudice of a witness but not including evidence offered for impeachment through contradiction or prior inconsistent statement,;

(3) evidence offered in response to negativing a contention of undue delay,;

(4) evidence offered to prove or proving an effort to obstruct a criminal investigation or prosecution.or

(5) evidence of the offering party's own statements and efforts to compromise a civil case.

Model Committee Note

Rule 408 has been amended to emphasize and effectuate the public policy of encouraging settlement of civil cases. Commentary on the original rule noted that it provided only limited protection to settlement negotiations, because compromise evidence was excluded only if offered to prove the validity or amount of a claim. *See, e.g.,* Hon. Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations,* 39 Hastings L. J. 955, 966 (1988) ("Because there are so many other purposes for which such evidence might be admitted, because it is impossible to forecast the likelihood that any such purpose will surface at trial, and because the outcome of any given judge's balancing analysis under rule 403 is not predictable, the wise lawyer has no choice

but to be circumspect when negotiating directly with the opposition."). The amendment provides a that evidence of compromise of civil claims is presumptively excluded in all cases, civil and criminal, subject to carefully drawn exceptions.

The amendment provides that evidence of compromise of a civil claim is inadmissible in a subsequent criminal case. Without such protection, defendants may be reluctant to settle civil claims and compensate victims, for fear that this will be used as evidence admissible in a criminal case involving the same conduct. *See, e.g.*, Fishman, *Jones on Evidence, Civil and Criminal*, § 22:16 at 199, n.83 (7th ed. 2000) ("A target of a potential criminal investigation may be unwilling to settle civil claims against him if by doing so he increases the risk of prosecution and conviction.").

While Rule 408 can be invoked in both civil and criminal cases, it does not exclude statements or offers made in an effort to settle *criminal* charges; such statements or offers, to be protected, must fall within the confines of Rule 410. The amendment is therefore consistent with cases such as *United States v. Graham,* 91 F.3d 213, 218-219 (D.C. Cir. 1996), where a criminal defendant invoked Rule 408 to exclude statements made to criminal investigators. Those statements were not protected under Rule 410 because they were not made to an attorney for the prosecuting authority. The court held that Rule 408 "does not address the admissibility of evidence concerning negotiations to 'compromise' a criminal case" and that "the very existence" of Rule 410 and Criminal Rule 11(e)(6) "strongly support the conclusion that Rule 408 applies only to civil matters."

Statements and offers by a prosecuting attorney during plea negotiations are likewise not protected under Rule 408. Some courts have held that the "principles" of Rule 408 justify protection of such statements and offers. *See United States v. Verdoorn*, 528 F.2d 103, 107 (8th Cir. 1976) (noting that offers by the prosecutor are not protected under Rule 410, but reasoning that the "principles" of Rule 408 warranted exclusion of the government's offers in a criminal case). After considering this case law, the Committee concluded that if any amendment is necessary to protect prosecution statements and offers in guilty plea negotiations, that amendment should be placed in Rule 410 and not Rule 408. Even without a change to Rule 408 or Rule 410, statements and offers by a prosecutor remain subject to exclusion under Rule 403. *See, e.g., United States v. Delgado,* 903 F.2d 1495 (11th Cir. 1990) (plea agreement and statements by the prosecutor cannot be offered as an admission by the government, since the deal may have been struck for reasons other than the government's belief in the innocence of the accused; relying upon Rule 403).

The exception for impeachment is limited to impeachment for bias or interest. A typical case in which this exception would apply is where a plaintiff settles with one of several defendants, and the settling defendant then testifies for the plaintiff in the civil action. This situation is comparable to a criminal case in which the accused is allowed to impeach a witness who enters into a cooperation agreement with the government. Impeachment by prior inconsistent statement or through contradiction is not permitted under this rule. Such broad impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements. *See McCormick on Evidence*, 5th ed. 1999 at 186 ("Use of statements made in compromise negotiations

to impeach the testimony of a party, which is not specifically treated in Rule 408, is fraught with danger of misuse of the statements to prove liability, threatens frank interchange of information during negotiations, and generally should not be permitted."). *See also EEOC v. Gear Petroleum, Inc.*, 948 F.2d 1542, 1545-6 (10th Cir.1991). (letter sent as part of settlement negotiation cannot be used to impeach defense witnesses by way of contradiction or prior inconsistent statement; such broad impeachment would undermine the policy of encouraging settlement).

Subdivision (b)(5) provides that compromise evidence can be admitted on behalf of the party who made the statement or offer to compromise. The policy of the rule is to protect a party who would make a statement or offer in compromise from the threat of having it used as evidence against the party at trial. That policy is inapplicable if the party who made the statement or offer is the one proffering the evidence. *See Crues v. KFC Corp.*, 768 F.2d 230, 233-4 (8th Cir. 1985) (noting that Rule 408 "is concerned with excluding proof of compromise to show liability of the offeror," so when the evidence is admitted on behalf of the offeror, its use "violates neither the spirit nor the letter of Rule 408").

Second Model–Admissibility in Criminal Cases, Broad Impeachment, and Inadmissible Even If Offered by the Party Who Made the Protected Statement or Offer.

Rule 408. Compromise and Offers to Compromise

(a) General Rule. Evidence of the following is not admissible for any purpose in a civil case, except as otherwise provided in subdivision (b):

(1) furnishing or offering or promising to furnish, or ~~(2)~~ accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a civil claim which was disputed as to either validity or amount~~, is not admissible to prove liability for or invalidity of the claim or its amount.~~; and

(2) ~~Evidence of~~ conduct or statements made in ~~compromise~~ negotiations to compromise a civil case. ~~is likewise not admissible.~~

(b) Exceptions. This rule does not require the exclusion of the following:

(1) any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. ~~This rule also does not require exclusion when the evidence is offered for another purpose, such as proving~~

(2) evidence offered for impeachment ~~bias or prejudice of a witness~~ including evidence offered for impeachment through contradiction or prior inconsistent statement~~,~~;

(3) evidence offered in response to ~~negativing~~ a contention of undue delay~~,~~ ; or

(4) evidence offered to prove ~~or proving~~ an effort to obstruct a criminal investigation or prosecution.

Model Committee Note

Rule 408 has been amended to clarify the scope of the exceptions to the exclusionary rule. Commentary on the original rule noted that it provided only limited protection to settlement negotiations, because compromise evidence was excluded only if offered to prove the validity or amount of a claim. *See, e.g.,* Hon. Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations,* 39 Hastings L. J. 955, 966 (1988) ("Because there are so many other purposes for which such evidence might be admitted, because it is impossible to forecast the likelihood that any such purpose will surface at trial, and because the outcome of any given judge's balancing analysis under rule 403is not predictable, the wise lawyer has no choice but to be circumspect when negotiating directly with the opposition."). The amendment provides that evidence of compromise of civil claims is presumptively excluded in all civil cases, subject to carefully drawn exceptions.

The amendment clarifies that the exclusionary rule does not apply to compromise evidence

when it is offered in a civil case. *See, e.g.*, *United States v. Logan*, 250 F.3d 350, 367 (6th Cir. 2001) (while the inapplicability of Rule 408 to criminal cases "arguably may have a chilling effect on administrative or civil settlement negotiations in cases where parallel civil and criminal proceedings are possible, we find that this risk is heavily outweighed by the public interest in prosecuting criminal matters"); *Manko v United States*, 87 F.3d 50, 54-5 (2d Cir. 1996) (the "policy favoring the encouragement of civil settlements, sufficient to bar their admission in civil actions, is insufficient, in our view, to outweigh the need for accurate determinations in criminal cases where the stakes are higher"). Accordingly, statements and offers made during negotiations to settle a criminal case, if beyond the scope of Rule 410, are not inadmissible under Rule 408. *See United States v. Graham,* 91 F.3d 213, 218-219 (D.C. Cir. 1996) (declaring that Rule 408 "does not address the admissibility of evidence concerning negotiations to 'compromise' a criminal case" and that "the very existence" of Rule 410 and Criminal Rule 11(e)(6) "strongly support the conclusion that Rule 408 applies only to civil matters").

Statements and offers by a prosecuting attorney during plea negotiations are likewise not protected under Rule 408. Some courts have held that the "principles" of Rule 408 justify protection of such statements and offers. *See United States v. Verdoorn*, 528 F.2d 103, 107 (8th Cir. 1976) (noting that offers by the prosecutor are not protected under Rule 410, but reasoning that the "principles" of Rule 408 warranted exclusion of the government's offers in a criminal case). After considering this case law, the Committee concluded that if any amendment is necessary to protect prosecution statements and offers in guilty plea negotiations, that amendment should be placed in Rule 410 and not Rule 408. Even without a change to Rule 408 or Rule 410, statements and offers by a prosecutor remain subject to exclusion under Rule 403. *See, e.g.*, *United States v. Delgado*, 903 F.2d 1495 (11th Cir. 1990) (plea agreement and statements by the prosecutor cannot be offered as an admission by the government, since the deal may have been struck for reasons other than the government's belief in the innocence of the accused; relying upon Rule 403).

The exception for impeachment includes impeachment by prior inconsistent statement or through contradiction. While the public policy of encouraging settlement is important, it is also important to assure that a witness does not commit perjury under the assumption that he will be free from impeachment with probative evidence. *See County of Hennepin v. AFG Indus., Inc.*, 726 F.2d 149, 153 (8th Cir. 1984) (finding no error in the admission of compromise evidence to impeach through inconsistent statement and contradiction).

The amendment does not provide an exception for a party who seeks to admit its own settlement offer or statements made in settlement negotiations. The policy of the rule should not be based on the identity of the party proffering the evidence at trial. Moreover, proof of statements and offers made in settlement would often have to be made through the testimony of attorneys, leading to the risks and costs of disqualification. See generally *Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 828 (2d Cir. 1992) (settlement offers are excluded under Rule 408 even if it is the offeror who seeks to admit them; noting that the "widespread admissibility of the substance of settlement offers could bring with it a rash of motions for disqualification of a party's chosen counsel who would likely become a witness at trial").

III-D

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Committee Consideration of Whether an Amendment to Rule 412 Is Necessary
Date: October 1, 2002

At its April 2002 meeting the Evidence Rules Committee directed the Reporter to prepare a report on Rule 412–the Rule protecting against admission of a rape complainant's sexual behavior and predisposition–so that the Committee could determine whether it is necessary to propose an amendment to that Rule.

The possible need for amendment arises from two problems that have been noted under the Rule. Those problems are: 1) an unintended anomaly under which the Rule, read literally, means that evidence must be excluded even if the Constitution requires it to be admitted; and 2) controversy over whether the Rule excludes evidence that the complainant has previously made a false claim of rape.

In addition, there are two further "housekeeping" changes that the Committee might consider if it decides to propose an amendment to Rule 412: 1) amending the requirement of notice "in writing" and "service" to take account of the possibility of electronic filing; and 2) adding the word "alleged" before the word "victim" in the next to last sentence of the Rule (subdivision (c)(2)).

This report provides the Committee with an analysis of the nature of the suggested stylistic changes, as well as the case law and commentary on whether Rule 412 does or should exclude false claims of rape. The report is divided into four parts. Part One sets forth the current Rule, the relatively unique history of the Rule, and the Advisory Committee Note that was prepared for the 1994 amendment. Part Two sets forth the necessary background for possible stylistic or housekeeping changes in the Rule, and the case law and commentary on the question of false claims; Part Two also considers whether Rule 408 should be considered a rule of privilege, which would mean that any amendment would have to be enacted directly by Congress. Part Three sets forth State law variations of Rule 412 that bear on the admissibility of false claims. Part Four sets forth drafting alternatives that address the possible stylistic changes and the admissibility of false claims. Of course, it is for the Committee to determine whether the problems addressed in this memo are

serious enough, individually or collectively, to justify the costs of an amendment to the Rule.

Issues Not Covered In This Report:

The rape shield rule obviously poses a number of difficult and sensitive policy questions; but this Report focuses only on the specific problems described above. Broader questions could be considered, such as whether the Rule should apply in civil cases; whether the exceptions set forth for criminal cases are too narrow (or too broad); and whether the notice requirement is justified. But these questions are not addressed because Congress amended Rule 412 in 1994, making policy determinations that the Rule *should* be extended to civil cases, and that the exceptions for criminal cases and the notice requirement *should* be as set forth in the amended Rule. There is no indication that Congress is dissatisfied with the policy decisions it made at that time. Nor has there been dispute in the courts about the meaning of these provisions. So this Report covers only those issues on which there has been some dispute and as to which the language is vague (the false claims question), or which are in the nature of housekeeping changes completely in accordance with Congressional intent.

II. Rule 412, History, and the Committee Note

Rule 412 provides as follows:

Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

(a) *Evidence generally inadmissible* — The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) *Exceptions* —

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it had been placed in controversy by the alleged victim.

(c) *Procedure to determine admissibility* —

(1) A party intending to offer evidence under subdivision (b) must —

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing *in camera* and afford the victim and parties the right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

History Behind the Rule

Rule 412 was originally enacted as part of the Privacy Protection for Rape Victims Act of 1978, Public Law 95-540. Most recently, it was amended by Congress as part of the Violent Crime Control and Enforcement Act of 1994. That amendment took effect on December 1, 1994. Thus, the Rule is a product of Congressional enactment, rather than the rulemaking process.

However, the Rules Committee did have an impact on the current Rule, as amended in 1994. The Advisory Committee proposed an amendment that extended the rape shield law to civil cases, made some minor changes in the exceptions applicable to criminal cases, extended the rule to criminal cases involving any claim of sexual misconduct, and removed the language permitting the Trial Judge to exclude proffered evidence if the judge found that conditional facts had not been proven to the court's satisfaction. The Advisory Committee proposal to extend the Rule 412 protection to civil cases was originally rejected by the Supreme Court. Several Justices apparently believed that the amendment would violate the Enabling Act because it could render evidence on accepted substantive defenses to sexual harassment completely inadmissible, thus making the defenses impossible to prove. See letter from Chief Justice Rehnquist to the Chair of the Judicial Conference, H.R. Doc. No. 103-250 (1994). The Supreme Court referred to Congress a proposed amendment substantively similar to the Advisory Committee proposal but without the provisions on civil cases. Congress thereafter enacted an amendment to Rule 412 identical to that originally proposed by the Advisory Committee, as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322.

Because the Rule eventually enacted was identical to that proposed by the Advisory Committee, the Committee Note to the Rule is relied upon and often cited to determine the meaning of the Rule–including whether the Rule applies to exclude false claims. That Committee Note provides as follows:

Committee Note Pertinent to the 1994 Amendment to Rule 412

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.

Rule 412 seeks to achieve these objectives by barring evidence relating to the alleged victim's sexual behavior or alleged sexual predisposition, whether offered as substantive evidence or for impeachment, except in designated circumstances in which the probative value of the evidence significantly outweighs possible harm to the victim.

The revised rule applies in all cases involving sexual misconduct without regard to whether the alleged victim or person accused is a party to the litigation. Rule 412 extends to "pattern" witnesses in both criminal and civil cases whose testimony about other instances of sexual misconduct by the person accused is otherwise admissible. When the case does not involve alleged sexual misconduct, evidence relating to a third-party witness' alleged sexual activities is not within the ambit of Rule 412. The witness will, however, be protected by other rules such as Rules 404 and 608, as well as Rule 403.

The terminology "alleged victim" is used because there will frequently be a factual dispute as to whether sexual misconduct occurred. It does not connote any requirement that the misconduct be alleged in the pleadings. Rule 412 does not, however, apply unless the person against whom the evidence is offered can reasonably be characterized as a "victim of alleged sexual misconduct." When this is not the case, as for instance in a defamation action involving statements concerning sexual misconduct in which the evidence is offered to show that the alleged defamatory statements were true or did not damage the plaintiff's reputation, neither Rule 404 nor this rule will operate to bar the evidence; Rule 401 and 403 will continue to control. Rule 412 will, however, apply in a Title VII action in which the plaintiff has alleged sexual harassment.

The reference to a person "accused" is also used in a non-technical sense. There is no requirement that there be a criminal charge pending against the person or even that the misconduct would constitute a criminal offense. **Evidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412. However, this evidence is subject to the requirements of Rule 404.**

Subdivision (a). As amended, Rule 412 bars evidence offered to prove the victim's sexual behavior and alleged sexual predisposition. Evidence, which might otherwise be admissible under Rules 402, 404(b), 405, 607, 608, 609, or some other evidence rule, must be excluded if Rule 412 so requires. The word "other" is used to suggest some flexibility in admitting evidence "intrinsic" to the alleged sexual misconduct. *Cf.* Committee Note to 1991 amendment to Rule 404(b).

Past sexual behavior connotes all activities that involve actual physical conduct, i.e. sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact. *See, e.g., United States v. Galloway*, 937 F.2d 542 (10th Cir. 1991), *cert. denied*, 113 S. Ct. 418 (1992) (use of contraceptives inadmissible since use implies sexual activity); *United States v. One Feather*, 702 F.2d 736 (8th Cir. 1983) (birth of an illegitimate child inadmissible); *State v. Carmichael*, 727 P.2d 918, 925 (Kan. 1986) (evidence of venereal disease

inadmissible). In addition, the word "behavior" should be construed to include activities of the mind, such as fantasies or dreams. *See* 23 C. Wright & K. Graham, Jr., *Federal Practice and Procedure,* § 5384 at p. 548 (1980) ("While there may be some doubt under statutes that require 'conduct,' it would seem that the language of Rule 412 is broad enough to encompass the behavior of the mind.").

The rule has been amended to also exclude all other evidence relating to an alleged victim of sexual misconduct that is offered to prove a sexual predisposition. This amendment is designed to exclude evidence that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the factfinder. Admission of such evidence would contravene Rule 412's objectives of shielding the alleged victim from potential embarrassment and safeguarding the victim against stereotypical thinking. Consequently, unless the (b)(2) exception is satisfied, evidence such as that relating to the alleged victim's mode of dress, speech, or life-style will not be admissible.

The introductory phrase in subdivision (a) was deleted because it lacked clarity and contained no explicit reference to the other provisions of law that were intended to be overridden. The conditional clause, "except as provided in subdivisions (b) and (c)" is intended to make clear that evidence of the types described in subdivision (a) is admissible only under the strictures of those sections.

The reason for extending the rule to all criminal cases is obvious. The strong social policy of protecting a victim's privacy and encouraging victims to come forward to report criminal acts is not confined to cases that involve a charge of sexual assault. The need to protect the victim is equally great when a defendant is charged with kidnapping, and evidence is offered, either to prove motive or as background, that the defendant sexually assaulted the victim.

The reason for extending Rule 412 to civil cases is equally obvious. The need to protect alleged victims against invasions of privacy, potential embarrassment, and unwarranted sexual stereotyping, and the wish to encourage victims to come forward when they have been sexually molested do not disappear because the context has shifted from a criminal prosecution to a claim for damages or injunctive relief. There is a strong social policy in not only punishing those who engage in sexual misconduct, but in also providing relief to the victim. Thus, Rule 412 applies in any civil case in which a person claims to be the victim of sexual misconduct, such as actions for sexual battery or sexual harassment.

Subdivision (b). Subdivision (b) spells out the specific circumstances in which some evidence may be admissible that would otherwise be barred by the general rule expressed in subdivision (a). As amended, Rule 412 will be virtually unchanged in criminal cases, but will provide protection to any person alleged to be a victim of sexual misconduct regardless of the charge actually brought against an accused. A new exception has been added for civil cases.

In a criminal case, evidence may be admitted under subdivision (b)(1) pursuant to three possible exceptions, provided the evidence also satisfies other requirements for admissibility specified in the Federal Rules of Evidence, including Rule 403. Subdivisions (b)(1)(A) and (b)(1)(B) require proof in the form of specific instances of sexual behavior in recognition of the limited probative value and dubious reliability of evidence of reputation or evidence in the form of an opinion.

Under subdivision (b)(1)(A), evidence of specific instances of sexual behavior with persons other than the person whose sexual misconduct is alleged may be admissible if it is offered to prove that another person was the source of semen, injury or other physical evidence. Where the prosecution has directly or indirectly asserted that the physical evidence originated with the accused, the defendant must be afforded an opportunity to prove that another person was responsible. *See United States v. Begay*, 937 F.2d 515, 523 n. 10 (10th Cir. 1991). Evidence offered for the specific purpose identified in this subdivision may still be excluded if it does not satisfy Rules 401 or 403. *See, e.g., United States v. Azure*, 845 F.2d 1503, 1505-06 (8th Cir. 1988) (10 year old victim's injuries indicated recent use of force; court excluded evidence of consensual sexual activities with witness who testified at in camera hearing that he had never hurt victim and failed to establish recent activities).

Under the exception in subdivision (b)(1)(B), evidence of specific instances of sexual behavior with respect to the person whose sexual misconduct is alleged is admissible if offered to prove consent, or offered by the prosecution. Admissible pursuant to this exception might be evidence of prior instances of sexual activities between the alleged victim and the accused, as well as statements in which the alleged victim expressed an intent to engage in sexual intercourse with accused, or voiced sexual fantasies involving the specific accused. In a prosecution for child sexual abuse, for example, evidence of uncharged sexual activity between the accused and the alleged victim offered by the prosecution may be admissible pursuant to Rule 404(b) to show a pattern of behavior. Evidence relating to the victim's alleged sexual predisposition is not admissible pursuant to this exception.

Under subdivision (b)(1)(C), evidence of specific instances of conduct may not be excluded if the result would be to deny a criminal defendant the protections afforded by the Constitution. For example, statements in which the victim has expressed an intent to have sex with the first person encountered on a particular occasion might not be excluded without violating the due process right of a rape defendant seeking to prove consent. Recognition of this basic principle was expressed in subdivision (b)(1) of the original rule. The United States Supreme Court has recognized that in various circumstances a defendant may have a right to introduce evidence otherwise precluded by an evidence rule under the Confrontation Clause. *See, e.g., Olden v. Kentucky*, 488 U.S. 227 (1988) (defendant in rape cases had right to inquire into alleged victim's cohabitation with another man to show bias).

Subdivision (b)(2) governs the admissibility of otherwise proscribed evidence in civil cases. It employs a balancing test rather than the specific exceptions stated in

subdivision (b)(1) in recognition of the difficulty of foreseeing future developments in the law. Greater flexibility is needed to accommodate evolving causes of action such as claims for sexual harassment.

The balancing test requires the proponent of the evidence, whether plaintiff or defendant, to convince the court that the probative value of the proffered evidence "substantially outweighs the danger of harm to any victim and of unfair prejudice of any party." This test for admitting evidence offered to prove sexual behavior or sexual propensity in civil cases differs in three respects from the general rule governing admissibility set forth in Rule 403. First, it reverses the usual procedure spelled out in Rule 403 by shifting the burden to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence. Second, the standard expressed in subdivision (b)(2) is more stringent than in the original rule; it raises the threshold for admission by requiring that the probative value of the evidence *substantially* outweigh the specified dangers. Finally, the Rule 412 test puts "harm to the victim" on the scale in addition to prejudice to the parties.

Evidence of reputation may be received in a civil case only if the alleged victim has put his or her reputation into controversy. The victim may do so without making a specific allegation in a pleading. *Cf.* Fed. R. Civ. P. 35(a).

Subdivision (c). Amended subdivision (c) is more concise and understandable than the subdivision it replaces. The requirement of a motion before trial is continued in the amended rule, as is the provision that a late motion may be permitted for good cause shown. In deciding whether to permit late filing, the court may take into account the conditions previously included in the rule: namely whether the evidence is newly discovered and could not have been obtained earlier through the existence of due diligence, and whether the issue to which such evidence relates has newly arisen in the case. The rule recognizes that in some instances the circumstances that justify an application to introduce evidence otherwise barred by Rule 412 will not become apparent until trial.

The amended rule provides that before admitting evidence that falls within the prohibition of Rule 412(a), the court must hold a hearing in camera at which the alleged victim and any party must be afforded the right to be present and an opportunity to be heard. All papers connected with the motion and any record of a hearing on the motion must be kept and remain under seal during the course of trial and appellate proceedings unless otherwise ordered. This is to assure that the privacy of the alleged victim is preserved in all cases in which the court rules that proffered evidence is not admissible, and in which the hearing refers to matters that are not received, or are received in another form.

The procedures set forth in subdivision (c) do not apply to discovery of a victim's past sexual conduct or predisposition in civil cases, which will be continued to be governed by Fed. R. Civ. P. 26. In order not to undermine the rationale of Rule 412, however, courts should enter appropriate orders pursuant to Fed. R. Civ. P. 26(c) to protect the victim against

unwarranted inquiries and to ensure confidentiality. Courts should presumptively issue protective orders barring discovery unless the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery. In an action for sexual harassment, for instance, while some evidence of the alleged victim's sexual behavior and/or predisposition in the workplace may perhaps be relevant, non-work place conduct will usually be irrelevant. *Cf. Burns v. McGregor Electronic Industries, Inc.*, 989 F.2d 959, 962-63 (8th Cir. 1993) (posing for a nude magazine outside work hours is irrelevant to issue of unwelcomeness of sexual advances at work). Confidentiality orders should be presumptively granted as well.

One substantive change made in subdivision (c) is the elimination of the following sentence: "Notwithstanding subdivision (b) of Rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue." On its face, this language would appear to authorize a trial judge to exclude evidence of past sexual conduct between an alleged victim and an accused or a defendant in a civil case based upon the judge's belief that such past acts did not occur. Such an authorization raises questions of invasion of the right to a jury trial under the Sixth and Seventh Amendments. *See* 1 S. Saltzburg & M. Martin, *Federal Rules Of Evidence Manual*, 396-97 (5th ed. 1990).

The Advisory Committee concluded that the amended rule provided adequate protection for all persons claiming to be the victims of sexual misconduct, and that it was inadvisable to continue to include a provision in the rule that has been confusing and that raises substantial constitutional issues.

II. Background on Possible Changes to Rule 412

A. Housekeeping Changes

There are two textual anomalies in the existing Rule that could easily be changed. In addition, there are references to a "written motion", "service" and "papers" in subdivision (c) which, while not an anomaly, could be updated if the Committee decides to propose an amendment to the Rule. These three potential housekeeping changes are discussed in this section.

1. Subdivision (b)(1): "if otherwise admissible under these rules"

Roger Pauley has noted an anomaly arising from the language and structure of Rule 412(b)(1). That subdivision provides three exceptions for evidence to which the rape shield law does not apply. Those exceptions are (1) proof of source of semen or injury, (2) proof of prior sexual activity between the defendant and the victim where pertinent to consent, and (3) where the Constitution requires admission. When the Advisory Committee crafted the first two exceptions, it was concerned that a court might think it was required to admit evidence falling under these two exceptions, even if the evidence would be excluded under some other rule (such as the hearsay rule or Rule 403). So the Committee added a qualifying clause at the beginning of subdivision (b)(1): the evidence is admissible "if otherwise admissible under these rules". But that language creates an anomaly when applied to subpart (C), the exception for evidence constitutionally required to be admitted. It seems to say that evidence, if *not* admissible under other rules, must be excluded *even if* its exclusion would violate the constitutional rights of the defendant.

This anomaly could be solved by placing the qualifier "if otherwise admissible under these rules" directly into subparts (A) and (B) only. Proposed language to that effect is included in Part Four.

There is no indication that the textual anomaly has created a problem for litigants or in the case law. No court has relied on Rule 412 to exclude evidence that is constitutionally required to be admitted–nor could a court do so. Nonetheless, the Rule was clearly not intended to override the Constitution, the rule simply "reads wrong" which is not a good thing, and an amendment can be justified as a housekeeping measure completely consistent with Congressional intent. Ultimately it is for the Committee to determine whether the textual anomaly, either standing alone or together with the other issues addressed in this report, justify the cost of an amendment.

2. Subdivision (c)(2): "the victim"

The text of Rule 412 refers to the "victim" 10 times. For the first nine times, the term "alleged" is always placed in front of the term "victim." The Committee Note explains: "The terminology 'alleged victim' is used because there will frequently be a factual dispute as to whether sexual misconduct occurred." It is also notable that the 2000 amendment to Rule 404 placed the

term "alleged" in front of each reference to "victim." The rationale for the change was to bring the Rule into line with the terminology used in Rule 412.

And yet the last reference to "victim" in Rule 412, in the next to last sentence of the Rule, contains no "alleged" qualifier. Subdivision (c)(2) provides as follows:

> (2) Before admitting evidence under this rule the court must conduct a hearing *in camera* and afford the victim and parties the right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

There is no apparent reason for dropping the term "alleged" in this subdivision. It appears to be an oversight (an oversight discovered, by the way, not by me but by one of my students). An amendment to add the term "alleged" can be justified as a housekeeping measure that will bring stylistic consistency to the Rule. It is for the Committee to determine whether such an amendment, either standing alone or together with other amendments discussed in this report, is justified. In Part Four, the draft model adds the term "alleged" to subdivision (c)(2) and provides a short explanation in the Committee Note.

3. Subdivision (c)(1)– "file a written motion"/ "serve the motion on all parties"/ "related papers"

Subdivision (c)(1) sets forth the procedural requirements for invoking the exceptions to rape shield exclusion. Arguably, the language of the subdivision does not accommodate technological advances in filing and service that are promoted in Civil Rule 5 and the local rules of district courts that employ electronic case filing. The Rule refers to "written" motions. It requires parties to "serve" the motion, which implies some kind of physical act. And it refers to protection of "related papers."

Thus far, it appears that litigants and courts are not having a problem with the arguably outdated language. If the problem is encountered, for example when a defendant serves notice electronically, the court would undoubtedly read the Rule broadly, in tandem with Rule 5 and the applicable local rules. Moreover, the problem is unlikely to arise in criminal cases any time soon, since very few courts are using electronic case filing for criminal cases. However, since Rule 412 applies to civil cases as well, the Committee might be interested in amending the language of subdivision (c)(1) to accommodate technological change. Such a change would be consistent with the policy of the Standing Committee to bring the rules up-to-date with technology.

It is unlikely that the use of arguably outmoded language to govern the procedural requirements of Rule 412 presents a practical problem serious enough to justify an amendment on its own. But it does present a problem of continuing with outmoded language in an Evidence Rule. And if an amendment is to be proposed on other grounds, the Committee may wish to consider

whether it might be worthwhile to add a stylistic change to subdivision (c)(1). Language to that effect is set forth in Part Four.

B. Coverage of False Claims

The Committee Note to the Advisory Committee's proposed amendment to Rule 412 in 1994 – the proposal that was eventually enacted verbatim by Congress–states: "Evidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412. However, this evidence is subject to the requirements of Rule 404." It would appear that this statement in the Note is intended to describe a change in the Rule due to the amendment. However, the only apparent justification for arguing that the 1994 provision exempts false claims while the original Rule did not is a subtle change in the wording of the scope of the Rule's coverage. The original Rule prohibited proof of "reputation or opinion evidence of the past sexual behavior of an alleged victim"; the amended Rule prohibits "[e]vidence offered to prove that any alleged victim engaged in other sexual behavior."

Whatever difference there is between those two clauses, it is not obvious that it supports the statement in the Advisory Committee Note as to false claims of rape, at least if the Advisory Committee is saying that the 1994 Rule exempts proof of false claims from the Rule and the original Rule did not. Both Rules use the term "sexual behavior" to define the scope of the Rule's coverage; the only argument that can be made for a difference is that the amended rule refers to "other" sexual behavior; but the word "other" would clearly seem to refer to all sexual activity "other" than that which is at issue in the case.

Alternatively, the Advisory Committee Note could perhaps be interpreted as asserting that false claims have *never* been covered by the Rule, i.e., that false claims of rape are not and never have been "sexual behavior." But if that is the case, the Note should have made that point more clearly.

The bottom line is that it is unclear whether Rule 412 covers proof of false claims. Reasonable minds can differ on whether the term "sexual behavior" covers a false claim of rape.

Case Law

Most of the cases have held that proof of a false claim is covered by Rule 412. This means that false claim evidence is excluded in criminal cases (because it is not evidence of source of injury or other sexual activity between the victim and the accused) and subject to the strict balancing test for sexual behavior evidence in civil cases (that its probative value must substantially outweigh the

risks of prejudice and harm to the victim).

It is fair to state, however, that the cases taking that view are conclusory. Exclusively criminal cases, they simply hold that proof of false claims are excluded by Rule 412. The best analysis of the case law is found in *United States v. Berkley,* 1997 WL 657007 (4th Cir.(N.C.)), a case in which the defendant claimed error after the trial court prohibited him from cross-examining the victim about a prior claim of rape that the defendant asserted was a false claim:

> As a preliminary matter, we note that the evidence Berkley sought to introduce by cross-examination was not evidence of prior sexual behavior per se, which is plainly governed by Rule 412, but is instead evidence of a prior accusation of sexual assault. The Government says this is of no consequence, citing decisions from several federal courts which have held that Rule 412 applies as well to evidence of prior accusations of sexual assault. *See, e.g., United States v. Rouse,* 111 F.3d 561, 569 n. 7 (8th Cir.1997); *United States v. Provost,* 875 F.2d 172, 177-78 (8th Cir.1989); *United States v. Cardinal,* 782 F.2d 34, 36 (6th Cir.1986); *see also United States v. Stamper,* 766 F.Supp. 1396, 1399 (W.D.N.C.1991) (applying Rule 412 to past accusations of rape in federal court, but noting that many state courts have decided not to address prior accusations under state rape shield laws), *aff'd,* 959 F.2d 231 (4th Cir.1992). *But see United States v. Bartlett,* 856 F.2d 1071, 1088 (8th Cir.1988) (expressing doubt about whether prior rape charges are best governed by Rule 412 or Rule 608(b) but finding the analysis to be the same under both rules).
>
> Despite their near uniformity in application of Rule 412 to prior accusations of sexual assault, these cases are not dispositive because they either pre-dated or failed to take into account 1994 substantive amendments to Rule 412 that could affect the Rule's application. The Advisory Committee Notes accompanying the Amendments assert that under the law as so amended "[e]vidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412." As at least one circuit has pointed out, these Committee Notes have "interpretive weight" and "rather strongly suggest" that prior false accusations of sexual assault are not governed by Rule 412. *United States v. Cournoyer,* 118 F.3d 1279, 1282 (8th Cir.1997).

The *Berkley* Court found it unnecessary to decide whether Rule 412 precludes evidence of false claims. Even if Rule 412 did not preclude the evidence, it would have been inadmissible under Rule 403. This is because there was no clear evidence that the prior claim was actually false – for example, the complainant never admitted that the claim was false. The defendant argued that the claim was false because the person accused denied the act and charges were never brought; this was hardly enough to show the claim was false. So the Court concluded that proof of the disputed event would lead to a collateral inquiry that would waste time and confuse the jury. The Court also noted that even if the prior claim was false, it arose out of circumstances that were quite different from those at issue in the case–this difference diminished the probative value of a false claim when offered to impeach the complainant's credibility.

The court in *United States v. Cournoyer,* 118 F.3d 1279, 1282 (8th Cir. 1997), engaged in a review of the law on Rule 412 and false claims and came to the same uncertain conclusion as the *Berkley* Court. The Court reviewed the trial court's discussion in excluding testimony from Cournoyer's daughter that the complainant "always accuses guys" of rape:

> Cournoyer argues that the district court abused its discretion in excluding this testimony because Harmony was offering relevant evidence that M.K. had falsely accused others of rape in the past, and such evidence is not barred by the "rape shield" exclusion in Rule 412 of the Federal Rules of Evidence. The government responds that evidence of prior false rape allegations is barred by Rule 412 because such evidence is "inseparable from evidence of the victim's past sexual behavior, which [Rule 412] was designed to exclude." *United States v. Provost,* 875 F.2d 172, 178 (8th Cir. 1989).
>
> However, Rule 412 was amended in 1994, after our decision in *Provost.* According to the Advisory Committee's Notes, under the amended Rule, "[e]vidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412." Although the relevant textual change to Rule 412 does not lead us unambiguously to the Advisory Committee's conclusion, the Committee's Notes have interpretive weight and rather strongly suggest that this aspect of our decision in *Provost* has been legislatively overruled.

Like the *Berkley* Court, the *Cournoyer* Court ultimately found it unnecessary to decide whether Rule 412 precluded evidence of false claims of rape:

> We conclude that we may leave for another day the question whether evidence of prior false rape accusations must survive the rigors of Rule 412 scrutiny. Assuming that Rule 412 does not apply, then past false rape accusations may perhaps be "[e]vidence of a pertinent trait of character of the victim of the crime offered by the accused." Fed.R.Evid. 404(a)(2). But if a character trait is pertinent, it must still be proved in accordance with Fed.R.Evid. 405--either by admissible reputation or opinion testimony, see Rule 405(a), or, if the trait is an essential element of Cournoyer's defense, by specific prior conduct, see Rule 405(b). Here, the question put to Harmony and her stricken answer meet neither criterion. If viewed as opinion testimony regarding M.K.'s reputation, there was no foundation laid for Harmony's opinion; if offered as specific conduct proving a character trait of false rape accusations, even if potentially admissible on that ground, the testimony lacked sufficient specificity. *See generally* Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade,* 70 Minn. L. Rev. 763, 858-63 (1986). In either case, the ruling at issue was correct, and defense counsel's failure to follow up, for example, with foundation testimony to support an opinion as to reputation, or with an offer of proof to show relevant, specific prior conduct, leaves us nothing but that initial ruling to review.

What is at Stake?

The courts in both *Berkley* and *Cournoyer* found it unnecessary to decide whether Rule 412 precluded false claims of rape because the evidence would have been excluded under other Rules anyway. This raises the question whether it makes any difference if evidence of false claims is not covered by Rule 412. If it is always excluded under other rules anyway, the applicability of Rule 412 would make no difference, and a clarifying amendment would be unnecessary. The question, then, is whether evidence of false claims could be admissible, at least in some circumstances, under other Evidence Rules if it were not excluded by Rule 412.

If Rule 412 does not apply to false claims evidence, it could be argued to be admissible–with varying degrees of success–on at least four grounds:

1. *Impeach the Complainant's Character for Truthfulness:* Making a false claim of rape is an act of dishonesty or falsity. As a result, it is potentially admissible to impeach the complainant-witness's character for truthfulness under Rule 608. Whether cross-examination about the prior claim would be permitted would depend on the trial court's balancing under Rule 403; a trial court may be reluctant to permit the impeachment if the claim was made many years earlier, or was made under completely different circumstances, or if the parties vigorously dispute whether the claim was actually false. If the trial court does decide to allow inquiry into the false claim, the defendant must have good faith proof that the claim of rape was made and that it was false. See *Federal Rules of Evidence Manual* §608.02. Moreover, if the inquiry into the false claim is permitted to attack the witness' character, the defendant will not be permitted to prove the claim with extrinsic evidence. See Rule 608(b).

2. *Impeach the Witness for Bias:* Some prior false claims could be connected to the claim at issue in the case in some way so that an inference could be drawn that the complainant has a motive to falsify. For example, if a false claim might raise the inference that the complainant has an ulterior motive in charging people with rape (such as to extract money from those accused or to cover-up potentially embarrassing activity), then it could be admissible to show the witness has a similar motive in the instant case. See generally *United States v. Stamper,* 766 F.Supp. 1396 (W.D.N.C. 1991) ("In the instant case, Defendant offers evidence of complainant's prior allegations to show that, because she previously made false allegations of sexual abuse and fondling, the complainant is now making false accusations of a similar nature, with the same intent, motivation and plan to move her residence from one parent to another and to divert attention from herself and place it on an alleged perpetrator to show her motivation, intent and plan in this case."; court finds that constitution requires admission of evidence of false claims in the context of this case). Admissibility of bias evidence would still be subject to Rule 403. Unlike character for untruthfulness, the witness' bias can be proved through extrinsic evidence.

3. *Character Evidence:* Rule 404(a)(2) permits the defendant to offer evidence of a victim's pertinent character trait. If the victim has a lying character, evidence of that trait would be admissible as probative that the victim lied when accusing the defendant. As pointed up in *Cournoyer*, however,

evidence of a character trait under Rule 404 must be in proper form–either opinion or reputation evidence. It is unlikely that evidence of a single false claim can be proven by way of opinion or reputation; rather, such proof is in the nature of specific act evidence, prohibited when offered to prove character under Rule 404(a). As indicated in *Cournoyer*, it would not appear that evidence of false claims can be introduced in any effective way under Rule 404(a).

4. Rule 404(b): Specific acts of the complainant could be offered for a not-for-character purpose under Rule 404(b), to prove that the victim made a claim that was false in this case. Are there any potential not-for-character uses for evidence of a false claim of rape? A slim possibility, not reported in any federal cases, is that the defendant could claim that the complainant has a modus operandi for making false claims. But this would require a significant number of claims on substantially similar facts.

The bottom line is that if Rule 412 is inapplicable, false claims of rape are most likely to be admissible, if at all, to impeach the victim. Usually that will be a character impeachment, limited by Rule 608(b) and 403.

The Impact of Constitutional Law

Even if Rule 412 precludes evidence of false claims, those claims might be required to be admitted in a criminal case. (In a civil case, assuming that Rule 412 covers false claims, it does not exclude them–it simply subjects them to the same strict balance test that applies to all evidence of sexual behavior). In rape shield cases, criminal defendants often make the argument that the rape shield preclusion violates their constitutional right to confront the victim and their constitutional right to present an effective defense.

The most pertinent Supreme Court case for such a claim is *Davis v. Alaska,* 415 U.S. 308 (1974). In *Davis*, the defendant tried to introduce the prior juvenile adjudication of the prosecution's star witness. This would have impeached the witness for bias, because it showed that the witness had been in trouble with the law and so may have been the prime suspect in the crime charged to Davis, thereby raising a motive to falsely identify Davis as the perpetrator instead of himself. The impeachment was barred by a State rule prohibiting the use of juvenile adjudications as evidence. The Supreme Court held that the State rule violated the defendant's constitutional right to adequate impeachment and cross-examination of a prosecution witness. The Court noted that the impeachment evidence could show "possible biases, prejudices, or ulterior motives of the witness as they might relate directly to the issues or personalities in the case at hand." According to the *Davis* Court, the State's policy interest in preserving the anonymity of a juvenile offender "cannot require [the] yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness.... [T]he State cannot, consistent with the right of confrontation, require the [Defendant] to

bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records."

The *Davis* Court took care to emphasize that the Constitution was implicated only because the proffered evidence was probative of the witness's bias or motive to falsify. It implied that the Constitution would not require the introduction of impeachment evidence if it was probative only to show the witness's character for untruthfulness. This distinction is discussed in the leading case of *Boggs v. Collins,* 226 F.3d 728, 736-7 (6th Cir. 2000):

> Thus, although *Davis* trumpets the vital role cross-examination can play in casting doubt on a witness's credibility, not all conceivable methods of undermining credibility are constitutionally guaranteed. In particular, the *Davis* Court distinguished between a "general attack" on the credibility of a witness--in which the cross-examiner "intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony"--and a more particular attack on credibility "directed toward revealing possible biases, prejudices, or ulterior motives as they may relate directly to issues or personalities in the case at hand." 415 U.S. at 316, 94 S.Ct. 1105. The Court, concluding that "[t]he partiality of a witness ... is always relevant as discrediting the witness and affecting the weight of the testimony," found this latter type of attack to be part of the constitutionally protected right of cross-examination. Id. Faced with a situation where a trial court barred cross-examination bearing on a witness's bias and motive to testify, the Court concluded that the countervailing state interests "cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." In a concurrence, Justice Stewart underscored that the Confrontation Clause was implicated only because Davis was seeking to show bias or prejudice. "[T]he Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination" about past convictions. *Id.* at 321, 94 S.Ct. 1105 (Stewart, J., concurring). * * * Courts after *Davis* * * * have adhered to the distinction drawn by those cases and by Justice Stewart in his concurrence-- that cross-examination as to bias, motive or prejudice is constitutionally protected, but cross-examination as to general credibility is not.

When courts have held that a rape shield law precludes evidence of a false claim of rape, the constitutional challenge has been decided along the line set forth in *Davis*: the Constitution is violated if the false claim evidence is probative of the witness's bias or motive (assuming that credibility of the witness is important to the case, as it ordinarily will be in a rape case); but the Constitution is not violated if the only purpose for the evidence is to prove the witness's untruthful character. The Court in *Boggs* elaborates on this point as follows:

> When faced with alleged prior false accusations of rape, federal courts have adhered to the

fine line drawn in *Davis* * * * finding cross-examination constitutionally compelled when it reveals witness bias or prejudice, but not when it is aimed solely to diminish a witness's general credibility. In *Hughes v. Raines,* 641 F.2d 790 (9th Cir.1981), the trial court refused to allow defense counsel to cross-examine an alleged rape victim about an alleged prior false accusation of rape. The Ninth Circuit relied on the distinction drawn in *Davis* "between an attack on the general credibility of the witness and a more particular attack on credibility" through revealing biases, prejudices or ulterior motives. *Id.* at 793. Looking closely at the defendant's purpose for introducing the testimony, the Court found that the defense was simply asking the jury to make an inference "that because the complaining witness made a false accusation of attempted rape on a prior occasion, her accusation in this case was false." *Id.* In other words, the intended cross-examination "was not to establish bias against the defendant or for the prosecution; it merely would have been to attack the general credibility of the witness on the basis of an unrelated prior incident." *Id.* Under *Davis,* the *Hughes* Court concluded, limiting cross- examination for that purpose did not violate the Confrontation Clause. *See id.* at 793.

Similarly, in *United States v. Bartlett,* 856 F.2d 1071 (8th Cir.1988), a rape defendant challenged as unconstitutional the district court's refusal to admit evidence of a victim's alleged prior false accusation of rape. Like the Ninth Circuit, the Eighth Circuit noted the distinction between cross-examination regarding a witness/accuser's possible biases, prejudices or ulterior motives and cross-examination and evidence introduced simply to attack her general credibility. *See id.* at 1088-89. The court found that the latter purpose--and the inference that "because the victim made a false accusation in the past, the instant accusation is also false," *id.* at 1089-- fell below the Sixth Amendment threshold. Because in the case before it, "the evidence of the alleged prior false accusation of rape was offered solely to attack the general credibility of" the victim, the district court's refusal to allow the attempted cross-examination did not violate Bartlett's confrontation rights. Other courts have echoed the reasoning from *Hughes* and *Bartlett. See, e.g., Hogan v. Hanks,* 97 F.3d 189, 191 (7th Cir.1996) (noting that *Davis* and other cases did not suggest that "the longstanding rules restricting the use of specific instances and extrinsic evidence to impeach a witness's credibility pose constitutional problems"); *United States v. Berkley,* No. 96-4181, 1997 WL 657007, at *2 (4th Cir. Oct. 22, 1997) (unpublished opinion) (finding that alleged prior false accusation had little relevance "to the accuser's credibility or veracity respecting the charge being prosecuted"); *Rowan v. Kernan,* No. C95-01290, 1995 WL 674904, at *1 (N.D.Cal.1995) (unpublished opinion) (reading *Davis* to say that while the constitution protects cross-examination if it concerns bias, motive or prejudice, "general attacks on the credibility of a witness do not raise the constitutional concerns which the confrontation clause addresses"); Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform,* 24 J. Legis. 125, 141 (1998) (noting that whether an alleged false accusation of rape must be admitted under the Confrontation Clause turns on the distinction between proving bias or prejudice and proving general credibility).

It appears that only one reported Federal case has held that the Constitution would be violated if evidence of a false claim was excluded under Rule 412. In *United States v. Stamper,* 766 F.Supp. 1396, 1400 (W.D.N.C.1991), the defendant moved for permission to show that prior accusations revealed the accuser's motive to move her residence from the home of one parent to another; the defendant argued that the complainant had a similar motive with respect to the accusation at issue in the instant case. The trial court assumed that evidence of false claims was prohibited by the pre-1994 Rule 412. But because the defendant was entitled "to set before the jury the proffered evidence of ulterior motives of the complainant," the trial court held that the Sixth Amendment required the evidence of false claims to be admitted. The *Stamper* Court emphasized that Stamper did not wage a general credibility attack aimed to show a "propensity to fabricate," but instead sought to develop evidence of ulterior motive.

The *Stamper* Court also relied on the fact that there was no doubt that the prior claims were false–the complainant admitted in writing that she had lied when she accused three others of sexually assaulting her, and she admitted her motive for doing so as well. The court declared as follows:

> To square with the defense theory of a fabrication scheme, there must be proof of the falsity of the prior allegations. Galvin, 70 Minn.L.Rev. at 861. It is the substantial proof of falsity which sets the prior allegations of rape in this case apart from the prior allegations considered in the cases offered by the Government.

The Effect of the Constitution on the Need for an Amendment

Rule 412 already has an exception for evidence that is required to be admitted under the Constitution. Assume for the sake of argument that evidence of false claims should not be covered by the rape shield law. It could be argued that it is unnecessary to amend the Rule to reach that result, because even if false claims are considered "sexual behavior" under the Rule, the evidence of false claims will be admitted anyway whenever the Constitution requires it. But this argument does not guarantee full admissibility of evidence of false claims of rape–at least not the same admissibility as evidence of other false claims. If false claims are not covered by Rule 412 their admissibility would be governed under Evidence Rules 403, 404 and 608. This would mean that evidence of a false claim could be admissible to impeach the victim's character for truthfulness. But if Rule 412 applies to false claims, then such evidence would be admissible (under the "constitutionally-required" exception in the Rule) only when it is probative of the witness' *bias or motive to falsify*. As discussed above the Constitution does not require the admission of evidence offered to impeach a witness's character for truthfulness. In essence, then, the difference in applying Rule 412 to false claims is that if the Rule applies, the defendant will not be able to use that evidence to attack the victim's character for truthfulness.

Policy Questions

There are two basic questions for the Committee in determining whether Rule 412 should be amended to specify how false claims are to be treated. The first is whether there is a recurring problem that is not resolved by the text of the Rule. If the answer to this question is yes, then the Committee may decide that an amendment is necessary to solve that problem by amending the Rule. Assuming the Committee resolves that the problem is serious enough (or serious enough together with the other possible changes discussed in this Report), then the question is what result is better policy? Should Rule 412 generally preclude admission of false claims (subject to constitutional limitations and strictly limited admissibility in civil cases) or should 412 be made inapplicable to false claims, so that evidence of such claims would be governed by other Evidence Rules such as 403 and 608(b)?

As to the first question, the discussion in this section indicates that a fair argument can be made that the Rule should specifically treat the admissibility of false claims one way or another. There appears to be a good deal of confusion in the courts on the question. The Advisory Committee's opinion that false claims are not covered by the Rule is not very well substantiated by the text, which is vague; and it is definitely not substantiated by the minimal change of the relevant text in 1994. Courts have reached different results and seem to try to avoid the question (finding the evidence excluded or admissible regardless of what the Rule says). But such avoidance gives litigants little guidance about whether false claims are covered or not.

As to the second question, if the Rule is amended to preclude false claims, then evidence of false claims will only be admissible in criminal cases if the Constitution requires it –which is to say, when the claims were clearly false and where they are probative of the complainant's bias or motive to falsify. If the Rule is amended to exempt false claims from its coverage, then admissibility in both civil and criminal cases will be determined by Rules such as 403 and 608, and a trial court may in its discretion permit inquiry into false claims when probative of the witness's character for truthfulness.

This policy question boils down to whether evidence of false rape claims should be treated differently from evidence of other kinds of false claims. For example, if a witness makes a false claim for an insurance loss, or a false claim of personal injury, such claims can be inquired into on cross-examination, within the judge's discretion, under Rules 608 and 403. See *Federal Rules of Evidence Manual* §608.02. See, e.g., *Deary v. City of Gloucester,* 9 F.3d 191 (1st Cir. 1993) (filing a false overtime report is highly probative of witness' bad character for veracity and can be inquired into on cross-examination); *United States v. Beros*, 833 F.2d 455 (3d Cir. 1987) (Trial Judge properly permitted the government to cross-examine the defendant concerning his false swearing on a marriage license application; such an act is highly probative of a person's propensity to lie on the witness stand). The cross-examiner would have to establish a good faith basis to believe that the claims were really false. See, e.g., *United States v. Schwab*, 886 F.2d 509 (2d Cir. 1989) (requiring a plausible basis to believe a dishonest act occurred before a witness can be cross-examined about it).

One would think that the probative value of a false claim of rape in showing character for untruthfulness would, in a rape case, be just as probative as any other kind of false claim, if not moreso. The problem that has concerned many courts–how to determine whether the prior claims of rape were really false–can be solved the same way as it is with other claims, i.e., the cross-examiner must have a plausible basis to believe that the claim was false, and if falsity is disputable, that is a good reason to deny the impeachment under Rule 403. See *Hemphill v. WMATA*, 982 F.2d 572 (D.C. Cir. 1993) (prior claims of personal injury not admissible to impeach the witness's character for truthfulness where it was unclear whether the claims were false).

It would appear that the only good reason to differentiate false rape claims from other false claims, for purposes of impeaching the witness's character for truthfulness, is that false rape claims may be thought to bear upon the complainant's sexual mores, fantasies, etc., and therefore cross-examination about such claims will invade the complainant's privacy in an inappropriate way. In other words, the argument can be made that the policy reason for Rule 412–to protect the privacy of the victim about sexual matters and to encourage the reporting and prosecution of rape–is implicated when false rape claims are admitted.

It is for the Committee to determine whether the policy basis of Rule 412 extends to protecting against disclosure of false rape claims. It should be noted that the commentators contend that false rape claims are not sexual acts, but rather are simply acts of dishonesty. See, e.g., Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*, 24 J. Legis. 125, 145 (1998) (arguing that "prior false rape accusations represent evidence of lies, not sex, and do not fall within the protections of the rape shield statutes"); Hon. Denise Johnson, *Prior False Allegations of Rape: Falsus in Uno, Falsus in Omnibus?* 7 Yale J. L. and Feminism 243 (1995) (arguing that false claims of rape should be treated the same as any other false claim when offered for impeachment). Professor Clifford Fishman, in *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior,* 44 Cath. L. Rev. 711, 770 (1995), puts the argument this way:

> Rape shield legislation should not exclude evidence that the complainant previously made false sex offense accusations. * * * Rape shield legislation is designed to protect a complainant from exposure of her prior sexual conduct. A prior false accusation is not "sexual conduct," thus the statute should not protect the complainant from exposure of prior lies or falsehoods. * * * It is appropriate for the law to protect a woman's decision to have sex with other men from unnecessary exposure because, among other reasons, it has only minimal probative value as to whether or not she consented with the defendant. A false accusation of rape, by contrast, reveals flaws in character - a ruthless disregard of the truth and a willingness to use sexual allegations unjustly - which are highly relevant as to whether she has falsely accused the defendant. Such conduct deserves exposure, not protection.

In Part Four, two model amendments are provided. One model provides that false claims are within

the Rule 412 exclusionary rule, and the other model exempts false claims from the coverage of the Rule, leaving admissibility to other Evidence Rules. These models are for the Committee's reference, and should not be taken as a recommendation to amend the Rule.

C. Is Rule 412 a Privilege?

The memorandum on Rule 408 in this agenda book took up the question whether Rule 408 could be considered a rule of privilege. This is an important question because if an Evidence Rule is one of privilege, it must be enacted affirmatively by Congress. The Rule 408 memorandum concluded that the better view is that Rule 408 is not a privilege–while it has a policy basis, and so is similar to a privilege rule in that regard, it is basically a rule of relevance, as indicated by its placement in Article IV rather than Article V.

A similar question can be raised about Rule 412. It has a policy basis–protecting the privacy of rape victims–and so is similar to a privilege in that regard. But it is unlike a privilege in almost every other respect. First, it is not a confidence-based rule; it seeks to protect past acts, rather than confidential communications. Second, unlike privilege rules, Rule 412 is not designed to promote some relationship society deems important, like the relationship between attorney and client or husband and wife. Third, Rule 412 has a substantial grounding in relevance concepts. Privilege rules exclude evidence despite their relevance; Rule 412 excludes evidence of the victim's sexual activity in large part because its relevance is dubious. The relevance-basis of the Rule is indicated by its placement in Article IV rather than Article V. See Mueller & Kirkpatrick, *Evidence: Practice Under the Rules* 373, n. 9 (2d ed. 1999): ("The prevailing view, however, is that the Rule is predominantly concerned with relevance and countervailing prejudice, a view consistent with its legislative placement in Article IV of the Federal Rules of Evidence. See Althouse, *Thelma and Louise and the Law: Do Rape Shield Rules Matter?*, 25 Loy.L.A. L. Rev. 757, 764 n. 34 (1992).").

The history behind Rule 412 also provides a strong indication that it is not a rule of privilege. In the first place, the Rule *was* directly enacted by Congress, and Congress decided to place it in Article IV rather than Article V. Second, the Rule amendment in 1994 began with an Advisory Committee proposal. No concern was raised at that time that such a change might require direct Congressional enactment. The Supreme Court disapproved the proposal not because it was a rule of privilege but because it was concerned that the extension to civil cases was a substantive change. The Supreme Court proposed its own rule change, again without concern that Rule 412 was a rule of privilege. Congress eventually enacted the Advisory Committee's proposed amendment. All of this history seems to indicate a general understanding that Rule 412 is not a rule of privilege.

III. State Law Variations

Virtually every state's version of the rape shield law varies from Rule 412 in some respect. In many states, the rape shield law does not apply in civil cases. In other states the rape shield law is structured somewhat differently or subject to different procedures. The only variations considered in this memo are those that bear on the admissibility of false claims. Five states have provisions that deal specifically with the admissibility of false claims of rape.

Colorado

Col. Rev. Stat. § 18-3-407. Victim's and witness' prior history--evidentiary hearing

> (1) Evidence of specific instances of the victim's or a witness' prior or subsequent sexual conduct, opinion evidence of the victim's or a witness' sexual conduct, and reputation evidence of the victim's or a witness' sexual conduct shall be presumed to be irrelevant except:
>
> > (a) Evidence of the victim's or witness' prior or subsequent sexual conduct with the actor;
> >
> > (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease, or any similar evidence of sexual intercourse offered for the purpose of showing that the act or acts charged were or were not committed by the defendant.
>
> (2) In any criminal prosecution under sections 18-3-402 to 18-3-405.5, 18-6- 301, 18-6-302, 18-6-403, and 18-6-404, or for attempt or conspiracy to commit any crime under sections 18-3-402 to 18-3-405.5, 18-6-301, 18-6-302, 18-6-403, and 18-6-404, if evidence, that is not excepted under subsection (1) of this section, of specific instances of the victim's or a witness' prior or subsequent sexual conduct, or opinion evidence of the victim's or a witness' sexual conduct, or reputation evidence of the victim's or a witness' sexual conduct, ***or evidence that the victim or a witness has a history of false reporting of sexual assaults*** is to be offered at trial, the following procedure shall be followed:
>
> > (a) A written motion shall be made at least thirty days prior to trial, unless later for good cause shown, to the court and to the opposing parties stating that the moving party has an offer of proof of the relevancy and materiality of evidence of specific instances of the victim's or witness' prior or subsequent sexual conduct, or opinion evidence of the victim's or witness' sexual conduct, or reputation evidence of the victim's or witness' sexual conduct, or evidence that the victim or witness has a history of false reporting of sexual assaults that is proposed to be presented.
> >
> > (b) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated.
> >
> > (c) If the court finds that the offer of proof is sufficient, the court shall notify the other party of such and set a hearing to be held in camera prior to trial. In such

hearing, the court shall allow the questioning of the victim or witness regarding the offer of proof made by the moving party and shall otherwise allow a full presentation of the offer of proof including, but not limited to, the presentation of witnesses.
(d) An in camera hearing may be held during trial if evidence first becomes available at the time of the trial or for good cause shown.
(e) At the conclusion of the hearing, if the court finds that the evidence proposed to be offered regarding the sexual conduct of the victim or witness is relevant to a material issue to the case, the court shall order that evidence may be introduced and prescribe the nature of the evidence or questions to be permitted. The moving party may then offer evidence pursuant to the order of the court.

Reporter's Comment on Colorado Rule:

The Colorado Rule is problematic because while it mentions false claims, and implies that they are admissible (because the procedures apply to proof of false claims), the Rule doesn't come right out and say that false claims evidence is exempt from the rape shield law. Simply mentioning false claims in the text is not enough. It must be made clear whether or not they fall within the exclusionary power of the rape shield law.

Mississippi

RULE 412. SEX OFFENSE CASES; RELEVANCE OF VICTIM'S PAST BEHAVIOR

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of a sexual offense against another person, reputation or opinion evidence of the past sexual behavior of an alleged victim of such sexual offense is not admissible.
(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of a sexual offense against another person, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is:

(1) Admitted in accordance with subdivisions (c)(1) and (c)(2) hereof and is constitutionally required to be admitted; or
(2) Admitted in accordance with subdivision (c) hereof and is evidence of

(A) Past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen, pregnancy, disease, or injury; or
(B) Past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which a sexual offense is alleged; or
(C) *False allegations of past sexual offenses made by the alleged victim at any time prior to the trial.*

(c)(1) If the person accused of committing a sexual offense intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior or evidence of past false allegations made by the alleged victim, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.

(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which the sexual offense is alleged.

Reporter's Commentary on Mississippi Version

Mississippi adds proof of false claims as a special exception to the rape shield rule, in the same category as "source of injury" and prior activity with the defendant. This has the

benefit of clarity, without the need to further develop, define or limit the term "sexual behavior".

Oklahoma

OK ST T. 12 § 2412

Sexual offense against another person--Evidence of other sexual behavior inadmissible--Exceptions

A. In a criminal case in which a person is accused of a sexual offense against another person, the following is not admissible:

1. Evidence of reputation or opinion regarding other sexual behavior of a victim or the sexual offense alleged.
2. Evidence of specific instances of sexual behavior of an alleged victim with persons other than the accused offered on the issue of whether the alleged victim consented to the sexual behavior with respect to the sexual offense alleged.

B. The provisions of subsection A of this section do not require the exclusion of evidence of:

1. Specific instances of sexual behavior if offered for a purpose other than the issue of consent, including proof of the source of semen, pregnancy, disease or injury;
2. ***False allegations of sexual offenses***; or
3. Similar sexual acts in the presence of the accused with persons other than the accused which occurs at the time of the event giving rise to the sexual offense alleged.

C. 1. If the defendant intends to offer evidence described in subsection B of this section, the defendant shall file a written motion to offer such evidence accompanied by an offer of proof not later than fifteen (15) days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties by counsel for the defendant and on the alleged victim by the district attorney.

2. If the court determines that the motion and offer of proof described in paragraph 1 of this subsection contains evidence described in subsection B of this section, the court may order an in-camera hearing to determine whether the proffered evidence is admissible under subsection B of this section.

Reporter's Comment on Oklahoma Version

Like Mississippi, Oklahoma breaks out false rape claims as a freestanding exception to the rape shield.

Vermont

VT ST T. 13 § 3255. Evidence

(a) In a [claim involving sexual assault or abuse]:

(1) Neither opinion evidence of, nor evidence of the reputation of the complaining witness' sexual conduct shall be admitted;

(2) Evidence shall be required as it is for all other criminal offenses and additional corroborative evidence heretofore set forth by case law regarding rape shall no longer be required;

(3) Evidence of prior sexual conduct of the complaining witness shall not be admitted; provided, however, where it bears on the credibility of the complaining witness or it is material to a fact at issue and its probative value outweighs its private character, the court may admit:

(A) Evidence of the complaining witness' past sexual conduct with the defendant;

(B) Evidence of specific instances of the complaining witness' sexual conduct showing the source of origin of semen, pregnancy or disease;

(C) ***Evidence of specific instances of the complaining witness' past false allegations of violations of this chapter.***

[Procedural requirements follow]

Reporter's Comment on Vermont Version:

The Vermont version also breaks out false claims evidence as a special exception to the exclusion Rule. All of the exceptions to the rule are problematic, however, because they are subject to a special balancing test under which the probative value of the evidence must outweigh its "private character." This leaves difficult questions such as whether the other Evidence Rules, such as 403, remain applicable, and if they are applicable how they interface with the unusual balancing test in the rape shield law.

Wisconsin

WI ST 972.11

(1) [Referring to State procedures]

(2)(a) In this subsection, "sexual conduct" means any conduct or behavior relating to sexual activities of the complaining witness, including but not limited to prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangement and life-style.

(b) If the defendant is accused of a crime under s. 940.225, 948.02, 948.025, 948.05, 948.06 or 948.095, any evidence concerning the complaining witness's prior sexual conduct or opinions of the witness's prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence during the course of the hearing or trial, nor shall any reference to such conduct be made in the presence of the jury, except the following, subject to s. 971.31(11):

1. Evidence of the complaining witness's past conduct with the defendant.

2. Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered.

3. ***Evidence of prior untruthful allegations of sexual assault made by the complaining witness.***

* * *

IV. Drafting Models

This section contains three models for consideration by the Committee should it decide that an amendment to Rule 412 is justified. Model One makes only the technical changes discussed in this Report. There are three such changes: 1) providing that the "admission required by the Constitution" exception is not limited by other Evidence Rules; 2) providing for the possibility of electronic filing and service of the motion required by Rule 412(c); and 3) adding "alleged" before "victim" in the next to last sentence of the Rule.

Models Two and Three provide specific treatment of false claims of rape. Model Two provides an exemption from the Rule for false claims, and Model Three provides that false claims are covered by the Rule and therefore are excluded in criminal cases and subject to the strict balancing test in civil cases. Both Models Two and Three contain the technical changes set forth in Model One. If the Committee decides that it wants to adopt either Models Two or Three but without some or all of the technical changes, those models can easily be modified.

Model One: Technical Changes Only

Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

(a) *Evidence generally inadmissible* — The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) *Exceptions* —

(1) In a criminal case, the following evidence is admissible~~, if otherwise admissible under these rules~~:

(A) <u>if otherwise admissible under these rules,</u> evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

(B) <u>if otherwise admissible under these rules</u>, evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it had been placed in controversy by the alleged victim.

(c) *Procedure to determine admissibility* —

(1) A party intending to offer evidence under subdivision (b) must —

(A) file a ~~written~~ motion <u>in accordance with Rule 5 of the Federal Rules of Civil Procedure</u> at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties <u>in accordance with Rule 5 of the Federal Rules of Civil Procedure</u> and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing *in camera* and afford the <u>alleged</u> victim and parties the right to attend

and be heard. The motion, related ~~papers~~ materials, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

Model Committee Note for Technical Changes

The amendment is technical. No change in meaning is intended. The amendment to subdivision (c)(1) contemplates that the motion may be filed and service may be made electronically in those districts that permit electronic case filing and electronic service.

Model Two: Exception for False Claims; Technical Changes Included

Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

(a) *Evidence generally inadmissible* — The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior, but not including evidence of false allegations of sexual offenses.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) *Exceptions* —

(1) In a criminal case, the following evidence is admissible~~, if otherwise admissible under these rules~~:

(A) if otherwise admissible under these rules, evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

(B) if otherwise admissible under these rules, evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; ~~and~~

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it had been placed in controversy by the alleged victim.

(c) *Procedure to determine admissibility* —

(1) A party intending to offer evidence under subdivision (b) must —

(A) file a ~~written~~ motion in accordance with Rule 5 of the Federal Rules of Civil Procedure at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties in accordance with Rule 5 of the Federal Rules of Civil Procedure and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing *in camera* and afford the alleged victim and parties the right to attend and be heard. The motion, related ~~papers~~ materials, and the record of the

hearing must be sealed and remain under seal unless the court orders otherwise.

Model Committee Note For False Claims Exception, and Technical Changes

Subdivision (a) has been amended to clarify that Rule 412 does not exclude evidence that a witness made false claims of sexual assault. False claims of sexual assault are acts of dishonesty, not sex, and therefore the admissibility of such claims should be governed by the rules that are applicable to false claims generally. *See, e.g.,* Miss. R. Evid. 412; Okla. Stat. Ann. 12 § 2412. *See also* Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 Cath. L. Rev. 711, 770 (1995) ("It is appropriate for the law to protect a woman's decision to have sex with other men from unnecessary exposure because, among other reasons, it has only minimal probative value as to whether or not she consented with the defendant. A false accusation of rape, by contrast, reveals flaws in character - a ruthless disregard of the truth and a willingness to use sexual allegations unjustly - which are highly relevant as to whether she has falsely accused the defendant."). Thus, evidence that the witness has made false claims of rape is to governed not by Rule 412 but by Rules 403, 404 and 608. In deciding whether evidence of false claims is admissible under those Rules, the trial court should consider whether there is a clear indication that the claims are actually false. *See, e.g., United States v. Stamper,* 766 F.Supp. 1396, 1400 (W.D.N.C.1991) (holding that evidence of false claims of rape was admissible to prove the complainant's motive to falsify and noting the "substantial proof of falsity which sets the prior allegations of rape in this case apart from the prior allegations considered in the cases offered by the Government" in which such evidence was found inadmissible).*Cf. Hemphill v. WMATA*, 982 F.2d 572 (D.C. Cir. 1993) (prior claims of personal injury not admissible to impeach the witness's character for truthfulness where it was unclear whether the claims were false).

The other changes to Rule 412 are technical. The amendment to subdivision (c)(1) contemplates that the motion may be filed and service may be made electronically in those districts that permit electronic case filing and electronic service.

Model Three–False Claims Inadmissible Under Rule 412, and Technical Changes

Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

(a) *Evidence generally inadmissible* — The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior or made prior claims of sexual assault.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) *Exceptions* —

(1) In a criminal case, the following evidence is admissible~~, if otherwise admissible under these rules~~:

(A) if otherwise admissible under these rules, evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

(B) if otherwise admissible under these rules, evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it had been placed in controversy by the alleged victim.

(c) *Procedure to determine admissibility* —

(1) A party intending to offer evidence under subdivision (b) must —

(A) file a ~~written~~ motion in accordance with Rule 5 of the Federal Rules of Civil Procedure at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties in accordance with Rule 5 of the Federal Rules of Civil Procedure and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a

hearing *in camera* and afford the alleged victim and parties the right to attend and be heard. The motion, related ~~papers~~ materials, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

Model Committee Note for False Claims Covered by the Rule, and Technical Changes

Subdivision (a)(1) has been amended to provide that prior claims of sexual assault are within the protections of Rule 412. Evidence of prior claims of sexual assault raise the same sensitive issues and implicate the same privacy interests as other evidence of sexual conduct covered by the Rule. *See, e.g., United States v. Rouse,* 111 F.3d 561, 569, n7 (8th Cir. 1997) ("Evidence that the victim has accused others of sexual abuse is subject to Rule 412's limitations."). Under Rule 412, evidence of prior claims of sexual assault made by the alleged victim is admissible in a criminal case only if its exclusion would violate the constitutional rights of the accused. *See, e.g., United States v. Stamper,* 766 F.Supp. 1396, 1400 (W.D.N.C.1991) (holding that evidence of false claims of rape was admissible to prove the complainant's motive to falsify and noting the "substantial proof of falsity which sets the prior allegations of rape in this case apart from the prior allegations considered in the cases offered by the Government" in which such evidence was found inadmissible). *Compare Boggs v. Collins,* 226 F.3d 728 (6th Cir. 2000) (exclusion of evidence of false claims did not violate the defendant's constitutional rights where the evidence was proffered only to impeach the witness's character for truthfulness, and was not probative of a motive to falsify).

The other changes to Rule 412 are technical. The amendment to subdivision (c)(1) contemplates that the motion may be filed and service may be made electronically in those districts that permit electronic case filing and electronic service.

III-E

MEMORANDUM

To: Advisory Committee on Evidence Rules

From: Ken Broun, Consultant

Re: Proposed Amendment to Rule 803(4)

Date: September 17, 2002

The following memorandum contains a proposal for a possible amendment to Federal Rule of Evidence 803(4).

Part I contains some alternative proposed rules and Committee Notes. Part II is a background memorandum discussing the current state of the law and the reasons for the proposed change.

I. PROPOSED AMENDMENTS TO RULE 803(4)

The following alternative amendments are intended either to eliminate the application of the rule 803(4) exception in instances in which the statement is made for purposes of diagnosis only, with no treatment motivation on the part of the declarant, or to give the court the discretion to exclude any statements under this exception for lack of trustworthiness.

Alternative A

(4) Statements for purposes of medical ~~diagnosis or~~ treatment – Statements made for purposes of medical ~~diagnosis or~~ treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to ~~diagnosis or~~ treatment.

Alternative B [suggested by the Maryland and Pennsylvania rules]

(4) Statements for purposes of medical diagnosis or treatment – Statements made for purposes of medical ~~diagnosis or~~ treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to ~~diagnosis or~~ treatment or diagnosis in contemplation of treatment.

Alternative C [suggested by the Rhode Island rule]

(4) Statements for purposes of medical diagnosis or treatment – Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment, but not including statements made solely for the purposes of preparing for litigation or obtaining testimony for trial.

Alternative D [suggested by the New Hampshire, Mississippi and South Carolina rules]

(4) Statements for purposes of medical diagnosis or treatment – Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment unless the circumstances under which the statements were made indicate lack of trustworthiness.

PROPOSED COMMITTEE NOTE (FOR ALTERNATIVES A, B)

Rule 803(4) has been amended to exclude statements made in instances where the declarant had no treatment motive.

Former Rule 803(4) was based primarily on the strong motivation of the patient to be truthful where the treatment is sought. See Advisory Committee Note. Nothing in this amendment in intended to affect the admissibility of statements where that motivation exists. However, the original version of the rule extended the common law application of the rule to situations where a medical professional is consulted only for the purpose of diagnosis – with no treatment motive whatsoever. The extension of the exception to this situation was based on the drafters' concern that such statements would, in any event, ordinarily be admissible under Rule 703 as statements upon which the expert based her opinion and that the "distinction thus called for was one most unlikely to be made by juries."

The original justification for the extension of the rule to diagnosis only situations has been sharply criticized. Justice Powell, in a concurring opinion in Morgan v. Foretich, 846 F.2d 941, 952 (4th Cir. 1988) noted the lesser reliability of such statements. Several states have adopted versions of Rule 803(4) that reject extension of the exception to diagnosis only situations. See, e.g., Mich. R. Evid. 803(4), Md. R. Evid. 5-803(b)(4); Pa. R. Evid. 803(4). Some Court of Appeals cases have found that the application of the exception to statements made without a treatment motivation violates the Confrontation Clause. Olesen v. Class, 164 F.3d 1096, 1097-98 (8th Cir. 1999); United States v. Sumner, 204 F.3d 1182, 1184-86 (8th Cir. 2000); Guam v. Ignacio, 10 F.3d 608, 613 (9th Cir. 1993). See also Mosteller, The Maturation and Disintegration of the Hearsay Exception for Statements for Medical Examination in Child Sexual Abuse Cases, 65 Law & Contemp. Prob. 47, 87 (2002)

Whatever the wisdom of the original rule, the situation has changed dramatically. Rule 703 was amended in 2000. An expert may still rely upon facts or data that are not admissible in evidence. However, the rule now provides:

> Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Thus, the assumption made by the drafters of present rule 803(4) that the expert may testify to statements made by the patient if they provided the basis of her opinion is no longer necessarily true. Indeed, it is presumptively not true.

Under this amendment, the statement will be within the exception only if the statement

was made for purposes of receiving treatment or if the motivation of the declaration is to enable the professional to whom the statement is made to diagnose the declarant's condition *and* to base treatment upon that diagnosis. For example, statements made to a physician employed for purposes of giving testimony in a personal injury or medical malpractice case will ordinarily not be admissible under this rule. Similarly, statements made to a medical or other professional solely for purposes of giving evidence in a criminal sexual abuse trial would not come within the exception.

PROPOSED COMMITTEE NOTE (FOR ALTERNATIVE C)

(Delete first paragraph of the above proposed note)

(Substitute for last paragraph of the above proposed note)

Under this amendment, the exception does not include statements made solely for the purposes of preparing for litigation or obtaining testimony for trial. There is no treatment motivation in such instances and the statement thus lacks the kind of reliability that should be associated with a hearsay exception. For example, statements made to a physician employed for purposes of giving testimony in a personal injury or medical malpractice case will ordinarily not be admissible under this rule. Similarly, statements made to a medical or other professional solely for purposes of giving evidence in a criminal sexual abuse trial would not come within the exception.

PROPOSED COMMITTEE NOTE (FOR ALTERNATIVE D)

(Substitute for first paragraph of the above proposed note)

Rule 803(4) has been amended to give the trial discretion to exclude statements in which the circumstances indicate a lack of trustworthiness. Such discretion is most likely to be exercised in instances where the declarant had no treatment motive. For example, statements made to a physician employed for purposes of giving testimony in a personal injury or medical malpractice case should ordinarily not be admissible under this rule. Similarly, statements made to a medical or other professional solely for purposes of giving evidence in a criminal sexual abuse trial are not likely to come within the exception.

(Delete last paragraph of the above proposed note)

II. BACKGROUND INFORMATION WITH REGARD TO PROPOSED AMENDMENT TO RULE 803(4)

A. The Rationale for the Present Rule

The primary rationale for Rule 803(4) was the strong motivation of the patient to be truthful where treatment is sought. See Advisory Committee Note. However, different reasons lay behind the decision to draft the rule in a way that would also include statements to medical personnel even where there was no treatment motive – as in the case of a physician consulted for purposes of testimony at trial.

The original Advisory Committee's Note to Rule 803(4) noted that conventional doctrine had excluded statements to a physician consulted only "for the purpose of enabling him to testify." See also United States v. Nickle, 60 F.2d 372 (8th Cir. 1932). In rejecting that limitation, the Committee stated:

> While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. The rule accordingly rejects the limitation. This position is consistent with the provision of Rule 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field.

The premise of the drafters' argument was that the jury will hear a statement made to a physician consulted for purposes of testifying only, even if the statement is not admissible as an exception to the hearsay rule. However, the drafter's assumption was frequently not justified, even before the amendment to Rule 703. The witness relating the statement falling within the exception often may not be qualified as an expert. He or she may be an intermediary relaying the statement to the physician. No physician may ever use the statement as the basis for her testimony under Rule 703. Even if the medical professional is consulted for purposes of giving testimony, the court may find the testimony to be inadmissible. See discussion in Mosteller, Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment, 67 N.C. L. Rev. 257, 262, 279-81 (1989).

B. Amendment to Rule 703 and other Concerns About the Application of the Rule to Statements Made for Diagnosis Only

Whatever the wisdom of the original rule, the situation has changed dramatically. Rule 703 was amended in 2000. An expert may still rely upon facts or data that are not admissible in evidence. However, the rule now provides:

> Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative

value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Thus, the assumption made by the drafters of present rule 803(4) that the expert may testify to statements made by the patient if they provided the basis of her opinion is no longer necessarily true. Indeed, it is presumptively not true.

If there is still a justification for the extension of the exception to statements made for purposes of diagnosis only, it is that trustworthiness is based upon the skill of the auditor. With the presumptive rejection of information inadmissible in evidence but relied upon by an expert in the amendment to Rule 703, no other hearsay exception is based on such a rationale.

In Mosteller, The Maturation and Disintegration of the Hearsay Exception for Statements for Medical Examination in Child Sexual Abuse Cases, 65 Law & Contemp. Prob. 47, 87 (2002) the author raises serious constitutional questions about the admission of statements for diagnosis only in the criminal context. He notes:

> Admission of this hearsay based on the skill of the auditor runs contrary to the principal theory of hearsay trustworthiness. Wigmore's view of the basis for hearsay exceptions was adopted by [the Supreme Court in Idaho v. Wright, 497 U.S. 805 (1990)] as the theory for why firmly rooted exceptions require no further testing by cross-examination. As presented by the Court, the justification for receiving the out-of-court statement in the absence of an opportunity to cross-examine the declarant rests on factors such as the declarant's motivation and the circumstances of the statement. These factors make the speaker particularly worthy of belief and render cross-examination of marginal utility. Thus, the principal accepted theory does not permit basing admission of hearsay on the skill and training of the auditor.

In part, Mosteller is concerned with the fact that the interviewer's skill is subject to bias by adversarial motivation when an expert is selected to develop evidence for trial. Id. See also Capowski, An Interdisciplinary Analysis of Statements to Mental Health Professionals Under the Diagnosis or Treatment Hearsay Exception, 33 Ga. L. Rev. 353, 400 (1999)

The argument that the extension of the exception to statements made for purposes of diagnosis may violate the Confrontation Clause in criminal cases has been confirmed by Courts of Appeals in cases discussed later in this memorandum. See Olesen v. Class, 164 F.3d 1096, 1097-98 (8th Cir. 1999); United States v. Sumner, 204 F.3d 1182, 1184-86 (8th Cir. 2000); Guam v. Ignacio, 10 F.3d 608, 613 (9th Cir. 1993).

See also Perrin, Expert Witnesses Under Rules 703 and 803(4) of the Federal Rules of Evidence: Separating the Wheat from the Chaff, 72 Ind. L.J. 939 (1997).

Justice Lewis Powell, sitting by designation and concurring in result in Morgan v.

Foretich, 846 F.2d 941 (4th Cir. 1988) would have strictly applied rule 803(4), finding the exception applicable regardless of whether there was a treatment motive. But, referring to the Second Circuit decision in O'Gee v. Dobbs Houses, Inc., 570 F.2d 1084 (2d Cir. 1978) (noted below), which strictly applied rule 803(4) to statements made for purposes of diagnosis only, Justice Powell stated (Id. at 952):

> It is appropriate to recognize, however, that evidence admitted under the standard discussed by the Second Circuit and the Advisory Committee Notes has less inherent reliability than evidence admitted under the traditional common-law standard underlying the physician treatment rule. The professional objectivity of a physician responsible for treatment may well be greater than that of a witness employed and paid to testify as an expert. More importantly, the veracity of the declarant's statements to the physician is less certain where the statements need not have been made for purposes of promoting treatment or facilitating diagnosis in preparation for treatment.

C. Federal cases

Many, but not all, federal cases apply the clear language of the rule and hold that statements made to medical personnel for purposes of diagnosis only are within the exception. For example, O'Gee v. Dobbs Houses, Inc., 570 F.2d 1084 (2d Cir. 1978) (non-treating physician permitted to testify to statements made to him by plaintiff under Rule 803(4)); United States v. Farley, 992 F.2d 1122 (10th Cir. 1993) (child's statements to psychologist properly admitted under Rule 803(4) even though not clearly made for purposes of treatment); United States v. Whitted, 11 F3d 782, 787 (8th Cir. 1993) (statements made by victim of abuse properly admitted even though the doctor may have been consulted only for purposes of providing expert testimony; "Rule 803(4) applies to statements made for the sole purpose of diagnosis, which includes statements made to a doctor who is consulted only to testify as an expert witness"); Morgan v. Foretich, 846 F.2d 941 (4th Cir. 1988) (statements made to a psychologist admissible under Rule 803(4) regardless of why he was consulted). See also Gong v. Hirsch, 913 F.2d 1269, 1274, n. 4 (7th Cir. 1990) (court applies exception to case involving statements made for purposes of treatment but recognizes that the exception; "as a matter of policy, a fact reliable enough to serve as the basis for a diagnosis is also reliable enough to escape hearsay proscription").

In United States v. Iron Thunder, 714 F.2d 765 (8th Cir. 1983) the court found that statements made to a physician had been properly admitted under rule 803(4), without any showing that the patient was seeking treatment. The court noted that the statements "were intended . . . to shed light on [the victim's] physical, emotional and mental condition, but which also could serve as a basis for treatment." Id. at 772-73. The court went on to say (Id. at 773):

> That no treatment was contemplated or given does not prevent application of the Rule 803(4) exception. [The victim's] responses related solely to the cause of her present condition, were relevant in diagnosing that condition and thus were within the scope of admissible hearsay described in Rule 803(4).

In some instances, although finding a treatment motive, the courts have used language that might be interpreted as requiring both that the statement be made for purposes of treatment and that the statement be reliable enough to serve as the basis for a diagnosis. Perhaps the most cited case articulating this "two-part test" is United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980). The court, after articulating this two-part rationale set forth above, found that there was nothing in the record to indicate that the victim was making the statements other than as a patient seeking treatment. The court held that the doctor's examination was both for purposes of treatment and for the purpose of preserving available evidence. The court explicitly recognizes that the rule was intended to abolish the distinction between statements made to a physician for purposes of treatment and those made for purposes of diagnosis only.

Similarly, the same circuit, in United States v. Renville, 779 F.2d 430 (8th Cir. 1985) again articulated the two-part policy justifications for the rule, stating that the rule is based both on the patient's desire for treatment and the physician's need to rely on the information. In *Renville,* the court was primarily concerned about whether statements identifying the defendant as the victim's abuser were admissible under the exception. The court held that these accusations had properly been admitted because the statements were pertinent to diagnosis and treatment. The court found that the victim had a selfish treatment motivation and that the statements were of the type relied upon by physicians in diagnosing and treating child abuse victims. The court noted that the physician had explained to the victim that the "examination and his prospective questions were necessary to obtain information to treat her and help her overcome any physical and emotional problems which may been caused by the recurrent abuse." Id. at 438-39.

In *Iron Shell* and *Renville* the court found that the statements had been made, at least in part, for a selfish treatment motive. Later Eighth Circuit applying the tests set forth in those cases held that statements made under circumstances where no such motive was established were inadmissible. In Olesen v. Class, 164 F.3d 1096, 1097-98 (8th Cir. 1999) the court held that a victim's statement identifying her abuser had been improperly admitted. The issue arose on a habeas corpus petition from a South Dakota case involving the application of that state's version of Rule 803(4). The court held that the admission of the identification violated the defendant's rights under the Confrontation Clause. The state had failed to establish that the victim's frame of mind was that of a patient seeking treatment. The court cited *Renville* for the proposition that the physician must make it clear to the victim that the inquiry into the identity of the abuser is "important to diagnosis and treatment" and the victim must manifest such an understanding. Id. at 1098.

In United States v. Beaulieu, 194 F.3d 918, 920-21 (8th Cir. 1999), applying rule 803(4), the court also found statements to have been improperly admitted where the prosecution had

failed to show that the statements were consistent with the purpose of promoting treatment. In United States v. Sumner, 204 F.3d 1182, 1184-86 (8th Cir. 2000), the court held both that 803(4) was inapplicable and that the Confrontation Clause barred admission of statements where the doctor failed to tell the 6-year-old victim that she had been brought to him for medical diagnosis or treatment. The court found no indication of the need for "truthful revelations." Id. at 1185.

The Ninth Circuit also seems to have backed away from a literal application of Rule 803(4) although the precedent is not entirely clear. In Guam v. Ignacio, 10 F.3d 608 (9th Cir. 1993), the court held that a statement made by a child victim to a physician consulted for treatment at the local emergency room, in which she named the defendant as her abuser, had been properly admitted. The court held that a similar statement made to a staff social worker to whom the physician referred the child should have been excluded. The court explicitly recognized that the rule was intended to abolish the distinction between statements made to a physician for purposes of treatment and those made for purposes of diagnosis only. Nevertheless, it held that, even if the statement to the social worker fell within rule 803(4), there were not sufficient indicia of reliable to justify its admission under the confrontation clause under Idaho v. Wright, 497 U.S. 805 (1990) and White v. Illinois, 502 U.S. 346 (1992). The court found the statement inadmissible under Rule 803(4) because the "record fails to support the trial court's finding that the statement was made in the course of medical treatment." Id. at 613. The court held that the testimony of the social worker established that he questioned the child to determine whether he needed to notify Child Protective Services of a case of suspected child abuse, and therefore were aimed at the child's safety, not treating or "diagnosing" the child. Id. The nature of the inquiry in *Ignacio* was so clearly not medical that it is difficult to assess what the court would have done with a statement made for purposes of medical diagnosis but not treatment.

State Rules and Decisions

Although many states have adopted Rule 803(4) verbatim, some have modified their rules to deal with the question of statements made in the absence of a selfish treatment motivation.

Tennessee deals with the question simply by replacing the disjunctive "or" found in Rule 803(4) with the conjunctive "and."

Tenn. R. Evid. 803(4)

> (4) Statements for Purposes of Medical Diagnosis and Treatment. Statements made for purposes of medical diagnosis *and* treatment describing medical history; past or present symptoms, pain, or sensations; or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis *and* treatment.

Michigan and Louisiana add just a few more words.

Mich. R. Evid. 803(4)

(4) Statements Made for Purposes of Medical Treatment *or* Medical Diagnosis *in Connection With Treatment.* Statements made for purposes of medical treatment or medical diagnosis *in connection with treatment* and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

Louisiana C.E. Art 803(4)

4) Statements for purposes of medical treatment *and* medical diagnosis *in connection with treatment.* Statements made for purposes of medical treatment *and* medical diagnosis *in connection with treatment* and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis *in connection with treatment.*

The language in Maryland and Pennsylvania provides other variations on the same idea.

Md. R. Evid. 5-803(b)(4)

(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical treatment *or medical diagnosis in contemplation of treatment* and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment *or diagnosis in contemplation of treatment.*

Pa. R. Evid. 803(4)

(4) Statements for Purposes of Medical Diagnosis or Treatment. A statement made for purposes of medical treatment, *or medical diagnosis in contemplation of treatment,* and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to treatment, *or diagnosis in contemplation of treatment.*

New Jersey deals with the problem a little differently.

N.J. R. Evid. 803(c)(4)

(4) Statements for purposes of medical diagnosis or treatment. *Statements made in good faith* for purposes of medical diagnosis or treatment which describe medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or

external source thereof to the extent that the statements are reasonably pertinent to diagnosis or treatment.

Rhode Island's rule goes directly to the question of statements made to a physician consulted for the purpose of giving testimony.

Rhode Island R. Evid. 803(4)

> (4) Statements for Purposes of Medical Diagnosis or Treatment.
> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment, *but not including statements made to a physician consulted solely for the purposes of preparing for litigation or obtaining testimony for trial.*

Other states have chosen to deal with the issue by providing discretion on the part of the trial court judge, giving the court clear license to deal with situations in which the statements lack the trustworthiness inherent in the situation where the patient has a selfish motive. For example:

New Hampshire R. Evid. 903

> (4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment, *regardless of to whom the statements are made, or when the statements are made, if the court, in its discretion, affirmatively finds that the proffered statements were made under circumstances indicating their trustworthiness.*

Mississippi R. Evid. 803

> (4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment, *regardless of to whom the statements are made, or when the statements are made, if the court, in its discretion, affirmatively finds that the proffered statements were made under circumstances substantially indicating their trustworthiness.* For purposes of this rule, the term "medical" refers to emotional and mental health as well as physical health.

South Carolina ties the court's discretion directly into the problem of the statement made for purposes of litigation.

South Carolina R. Evid. 803(4)

> (4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment; *provided, however, that the admissibility of statements made after commencement of the litigation is left to the court's discretion.*

The language of North Carolina Rule 803(4) is identical to Federal Rule 803(4). However, the North Carolina Supreme Court has interpreted that rule as requiring a treatment motivation. In State v. Hinnant, 523 S.E.2d 663, 669 (N.C. 2000), the court stated:

> To ensure the inherent reliability of evidence admitted under Rule 803(4), we reaffirm our adherence to the common law rationale underlying the rule--that a patient has a strong motivation to be truthful in order to obtain appropriate medical treatment. . . . Accordingly, the proponent of Rule 803(4) testimony must affirmatively establish that the declarant had the requisite intent by demonstrating that the declarant made the statements understanding that they would lead to medical diagnosis or treatment.

Elsewhere in the opinion, the court makes clear that it intends to exclude statements made for purposes of trial preparation only. Id. at 668:

> Based on the rationale underlying Rule 803(4), we have held inadmissible statements to a doctor made solely for purposes of trial preparation rather than diagnosis or treatment. [Citing pre-Rule cases] In so holding, we recognized that the information the patient gave "lacked the indicia of reliability based on the self-interest inherent in obtaining appropriate medical treatment." [citation omitted]

Virginia, which has not adopted codified rules of evidence has reached a result similar to that in North Carolina. In Jenkins v. Commonwealth, 492 S.E.2d 131, 134-35 (Va. 1997) the court declined to recognize a hearsay exception equivalent to Federal Rule 803(4) stating:

> The Commonwealth contends that we should apply the hearsay exception extended in some jurisdictions to statements made by a patient to a treating physician. As the Commonwealth recognized on brief, "many of these out-of-state cases are partially based on their state's adoption of rules equivalent to Federal Rule of Evidence 803(4)". Neither this Court nor the General Assembly has adopted any such rule. The rationale for such an exception is that a patient making a statement to a treating physician recognizes that providing accurate information to the physician is essential to receiving appropriate treatment. . . . . Because the patient in this case was a two-year old child who could not appreciate the need for furnishing reliable information, we decline to apply the exception here.

Conclusion

The extension of Rule 803(4) to statements made without a treatment motive has always been questionable. Some federal courts have felt bound by the clear language of the rule. Others have reached a different result despite the rule's language. Two Circuits, the Eighth and the Ninth, have found that the admission of statements where there is no treatment motive violates the Confrontation Clause. There have been similar reactions in the states. Some legislatures have opted to define statements for diagnosis out of their exceptions; some others leave the issue to the judge's discretion. A few states have reached that result through judicial interpretation.

Regardless of the wisdom of the drafting of the original rule, the situation has changed dramatically since the amendment of Rule 703. It is no longer nearly as likely that the jury will be forced to distinguish between evidence admitted simply as the basis of an expert's opinion and the same statements admitted for substantive purposes. Evidence, otherwise inadmissible, upon which an expert has based his or her opinion, is unlikely to be presented to the jury in the first place.

IV

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter and Ken Broun, Consultant
Re: New Drafts of Privileges
Date: September 21, 2002

Attached are draft rules of some privileges and some supporting memoranda. All of this material has been reviewed and revised by the Subcommittee on Privileges.

The draft of the privilege for confidential marital communications has not yet been considered by the Committee as a whole. Attached to this memo is the draft privilege and a supporting memorandum prepared by Ken Broun.

Next in the packet are the draft privileges that have been modified in response to positions taken by the full Committee previous meetings. That material covers:

1. An amended draft of Rule 501, with supporting notes and comments, as well as a memorandum prepared by Dan Capra setting forth the governing law on the question of whether state or federal privilege law applies in cases where both federal and state claims are joined. The Committee requested further research on this matter to determine whether the draft of Rule 501 should include language (as it currently does) providing that federal law always controls in mixed claims cases. The attached memo reports on that research and sets forth the issues for the Committee to address.

2. An amended draft of the attorney-client privilege, with notes indicating the changes from the previous draft. One question remaining, to be addressed by the Subcommittee and Committee, is whether the language permitting confidences to be used by the lawyer for self-defense might be too broadly written for retaliatory discharge cases. Another question is whether language should be added to clarify that client identity and fees are generally not protected by the privilege.

3. An amended draft of the doctor and mental health provider-patient privilege, with a supporting memorandum prepared by Ken Broun. At the April 2002 meeting, the Committee directed Ken to implement the following changes from the initial draft: a) limiting the protection to communications to "licensed" health providers; b) include language in the draft that would allow the privilege to apply when the communication is made to a person under the supervision of a licensed physician or mental health provider, e.g., an intern; c) expand the crime-fraud exception to allow disclosure when the patient confers with the physician in an attempt to assist a third party in committing a fraud; d) expand the crime-fraud exception to allow disclosure when the patient confers with the physician in an attempt to "escape detection" from a completed crime; e) limit the dangerous patient exception to cases in which "the patient has expressed an intent to engage in conduct likely to result in imminent death or serious bodily injury to the patient or another individual"; f) delete an exception for communications that are required to be reported under state law; and g) include an exception to the privilege where there is a dispute between the patient and the physician or mental health provider, while specifying that if the dispute is over fees, the exception would permit disclosure of confidential communications only to the extent necessary to prove a fact at issue in the fee dispute. .

The amended draft of the doctor and mental health provider privilege, together with a supporting memorandum from Ken Broun, is attached to this report. Ken's memo prepared for the previous draft is also included for the information of the Committee.

In addition, there are three draft privilege rules on which the full Committee has passed preliminary judgment. These rules are:

1. The rule on waiver, the text of which was tentatively approved at the April 2001 meeting.

2. The rule granting a witness a privilege to refuse to testify against a spouse. At the April 2001 meeting, the Committee resolved not to proceed with such a privilege at this point.

3. The rule granting a privilege for confidential communications to clerics. At the April 2002 meeting, the Committee resolved not to proceed with such a privilege at this point.

These Rules are included at the end of the materials for the convenience of the Committee. As to the Rule on waiver, Professor Mosteller of Duke Law School has suggested that the provision on inadvertent disclosures should be shifted to the attorney-client privilege. A short memorandum describing the rationale for that proposal is included in these materials immediately after the waiver rule. If the Committee agrees with Professor Mosteller's suggestion, the Subcommittee on Privileges will make this change for the consideration of the full Committee at the next meeting.

Privilege for Confidential Interspousal Communications and Supporting Material

MARITAL COMMUNICATIONS PRIVILEGE

Draft Date: March 21, 2002

(a) Definitions. As used in this rule:

(1) A "communication" is any expression through which one spouse intends to convey information to another spouse or any record containing such an expression;

(2) A "spouse" is either partner to a marriage recognized as such under the law of the place of the origination of their marriage.

(3) A communication is "in confidence" if, at the time and in the circumstances of the communication, the communicating spouse reasonably believes that no one except the other spouse will learn the contents of the communication.

(b) General Rule of Privilege

A spouse has a privilege to refuse to disclose and to prevent any other person from disclosing a communication made in confidence between spouses during the existence of their marriage.

(c) Who may claim the privilege.

Either spouse may claim the privilege. However, notwithstanding any other provision of these rules, a waiver of the privilege by the communicating spouse is binding on both spouses.

(d) Exceptions. There is no privilege under this rule:

(1) in any civil proceeding in which the spouses are adverse parties;

alternative 1
[(2) in any criminal proceeding if the court finds by a preponderance of the evidence that the spouses acted jointly in the commission of the crime charged;]

alternative 2
[(2) in any criminal proceeding if the court finds by a preponderance of the evidence that the spouses acted jointly in the commission of the crime charged and the communication was in furtherance of that crime;]

alternative 3

[(2) if the court finds by a preponderance of the evidence that the spouses acted jointly in the commission of patently illegal activity;]

(3) in proceedings in which one spouse is charged with a crime or tort against the person or property of the other or of a child of either **[or of a child related to either spouse][or of a child living in the household of either]**, or with a crime or tort against the person or property of a third person committed in the course of committing a crime or tort against the other or a child of either **[or of a child related to either spouse][or of a child living in the household of either]** ; or

(4) if the interests of a minor child of either spouse **[or of a child related to either spouse][or of a child living in the household of either]** would be adversely affected by invocation of the privilege.

alternative 1

[(5) if the spouses were separated at the time of the communication in question and the marriage was irreconcilable.]

alternative 2

[(5) if the spouses were permanently separated at the time of the communication.]

Derivation of Marital Communications Privilege and Issues to be Discussed

Section (a)(1)

This is an adaptation of the communications definition in the lawyer-client draft. By adopting this definition, we would be limiting the privilege to expressions intended by one spouse to convey a meaning or message to the other. Many state courts go beyond this to include acts done privately in the presence of the spouse. The rule would have to be amended to include such acts. As expressed in 1 Strong et al, McCormick on Evidence, § 79 (5th Ed. 1999), an extension beyond intended expressions does not seem to be wise policy. For federal cases limiting the exception to communications, see *United States v. Lofton*, 957 F.2d 476 (7th Cir. 1992); *United States v. Estes*, 793 F.2d 465 (2d Cir. 1986). As in the case of the amendment made by the subcommittee to the lawyer-client privilege, this draft changes the phrase "attempts to convey" to "intends to convey."

Section (a)(2)

This definition was revised by the subcommittee to reflect the policy determination that the law of the place of origination of the marriage should govern. The parties have a reasonable expectation that the law governing their marriage will continue to be that place. The original draft of this subsection read as follows: *A "spouse" is either partner to a marriage recognized as such under the law of the place where the couple lived at the time of the communication in question or, if the couple was not living together at the time of the communication, the place of the origination of their marriage.* The first part of this definition, dealing with the place where the couple lived at the time of the communication, was based on case law. See particularly *People v. Schmidt*, 579 N.W. 2d 431 (Mich. App. 1998) (recognizing a common law marriage valid under the law of the place where the couple resided at the time of the communication); *Compare United States v. Acker*, 52 F.3d 509 (4th Cir. 1995) (no privilege where neither of the states in which couple had lived recognized common law marriages). The clause dealing with origination of the marriage was added in the original draft to deal with the unlikely, but possible, situation where the couple had temporarily separated and the partners were living in different states. There is little case law one way or the other to support the origination language, either in the original draft or in the subcommittee's version. However, at least one court has referred to the need to give full faith and credit to common law marriages "originating in other states." *State v. Williams*, 688 So.2d 1277 (La.App. 1997). In addition, the definition does not deal specifically with the question of a bigamous marriage. However, the word "marriage" is intended to mean a valid marriage. If the committee thinks it useful, the word "valid" can be added. However, a comment in the note should be sufficient to deal with the question. The issue that occurs when one spouse is not aware of the invalidity of the marriage can be dealt with by the courts without trying to anticipate the question in the rule.

The Committee Note to this subsection should make it clear that the place of origination of the marriage is the place where the marriage began to have legal effect. For example, assume that

a couple had lived in a state that did not recognize common law marriages, but then moved to a state that did recognize such unions. The applicable law would be the law of the state that recognized the marriage.

Section (a)(3)

The definition of "in confidence" is adapted from the draft of the lawyer-client privilege.

Section (b)

The general rule is adapted from the draft of the lawyer-client privilege. It was amended after the subcommittee meeting to conform to the suggested changes in the changes in the lawyer-client privilege. The new draft clearly states that a spouse may prevent "any other person from disclosing a communication." Obviously, this includes an eavesdropper, provided the communication was in confidence within the meaning of (a)(3). There are cases, especially older cases, that do not protect a spouse from the testimony of eavesdroppers. See cases collected in 1 Strong et al, McCormick on Evidence § 82 (5th Ed. 1999). However, the better policy would seem to be to protect confidential statements from disclosure from any source. See California Evidence Code § 980.

Section (c)

This statement varies from Uniform Rule 504, which states the privilege: "An individual has a privilege to refuse to testify and to prevent the individual's spouse or former spouse from testifying as to any confidential communication made by the individual to the spouse during their marriage." The Uniform Rule thus limits the privilege to the communicating spouse and we could certainly justify a similar statement. Such a limitation would be consistent with the policy of encouraging freedom of expression between spouses. However, there would seem to be no good policy reason to deny the listening spouse the right to assert the privilege. The privilege works both ways in conversations between lawyer and client. Similarly, in the case of marital communications, there may be situations in which one spouse's silence is itself a communication or an entire conversation is offered to show the collective expressions of both spouses. See discussion in Mueller & Kirkpatrick, Evidence §5.32, p. 457 (Aspen 1999). See also Calif. Evid. Code § 980. However, there would seem to be no reason to continue the existence of the privilege once it is waived by the communicating spouse. For example, the communicating spouse may want the statement in evidence because it is exculpatory. There is not a good policy reason to enable the listening spouse to prevent such a disclosure.

Section (d)(1)

Derived from Uniform Rule 504(1).

Section (d)(2)

There are three alternatives set out. The first alternative is taken from the draft of the Spousal Testimony Privilege. That draft is in turn borrowed from the Uniform Rule, although the burden is changed from "unrefuted" to a "preponderance."

The second alternative is based upon the discussion in 2 Saltzburg, Martin & Capra, Federal Rules of Evidence Manual, 742-43 (Lexis 1998) where the authors argue that a "joint participants" privilege may be applicable to the adverse testimony privilege, but is not well-suited to the marital communications privilege. The exception should rather go to the intent behind the communication rather than to the status of the communicant. Although the point made is a good one, there does not seem to be much federal case law support for it. Most cases, like *United States v. Hill,* 967 F.2d 902 (3d Cir. 1992), articulate a pure joint participant privilege without regard to whether the communications in question were in furtherance of the crime.

The third alternative is based upon the language of decisions in some circuits that limit the exception to "patently illegal activity." See *United States v. Evans,* 966 F.2d 398 (8th Cir. 1992); *United States v. Sims,* 755 F.2d 1237 (6th Cir. 1985). If the "patently illegal activity" test is used, there would seem to be little reason for limiting the exception to criminal cases or to communications dealing only with a crime charged in an indictment.

Section (d)(3)

Derived from the draft of the Spousal Testimony Privilege, which was borrowed from the Uniform Rule. This exception and exception (4) have been amended since the committee first saw a draft of this privilege to add optional language concerning the children covered by the exception. The first bracketed phrase would be used in lieu of the phrase "child of either." The second could be used either in lieu of that phrase, in addition to it or in addition to the first bracketed phrase. The bracketed language was added for the committee's consideration at the meeting of the subcommittee on privileges.

Section (d)(4)

Derived from the draft of the Spousal Testimony Privilege, which was borrowed from the Uniform rule. See above note with regard to the bracketed phrases.

Section (d)(5)

Many states consistently apply the marital communications privilege regardless of whether the spouses are living together at the time of the communication. See 1 Strong, et al, McCormick on Evidence, § 81 (5th Ed. 1999). However, all of the federal circuits which have dealt with the question have considered the continuing viability of the marriage in determining whether the privilege is applicable. The two alternatives reflect the two different tests used to determine viability. *Compare United States v. Murphy*, 65 F.3d 758 (9th Cir. 1995) (no privilege where the couple has separated and the marriage is irreconcilable) with *United States v. Porter,* 986 F.2d 1014 (6th Cir. 1993) (no privilege if the couple has permanently separated).

Rule 501 and Memorandum on Choice of Privilege Law In Mixed Claims Cases

Rule 501

Draft dated March 21, 2002

Rule 501. General Rule; State Law; Other Privileges.

(a) General rule. Except as otherwise provided by the Constitution of the United States, Act of Congress, these rules, or other rules prescribed by the Supreme Court pursuant to statutory authority, there is no privilege to:

(1) refuse to be a witness;

(2) refuse to disclose any matter;

(3) refuse to produce any object, writing, recording or other information, whether in tangible, electronic, or other form; or

(4) prevent another from being a witness, disclosing any matter or producing any object, writing, recording or other information, whether in tangible, electronic or other form.

(b) State law. In a civil action or proceeding with respect to an element of a claim or defense as to which state law supplies the rule of decision, and in which there is no federal claim **[to which the challenged evidence is relevant]**, privileges shall be determined in accordance with state law. The word "state" as used in this rule includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

(c) Other privileges. A privilege not recognized by Act of Congress, these rules, other rules prescribed by the Supreme Court pursuant to statutory authority, or existing federal common law, may be recognized only if the court finds in the light of reason and experience that the benefits of the privilege outweigh the cost in the loss of probative evidence that would result from application of the privilege.

Notes on Rule 501

1. The definition of "state" in subdivision (b) tracks the language of the diversity statute, 28 U.S.C. 1332(d). The minutes of the April 2001 meeting reflect the reason for this modification of the draft:

> After discussion at the meeting, it was determined that the reason that the District, Commonwealth and Territories should be treated on a par with the States is that Congress has provided for diversity jurisdiction for cases between citizens of different States, and the term "States" includes "the Territories, the District of Columbia, and the Commonwealth of Puerto Rico." See 28 U.S.C. § 1332(d). Because Congress has decided to treat those jurisdictions on a par with the States for purposes of diversity, it follows that the same considerations supporting the application of the State law of privilege in a diversity case apply to the District of Columbia, the Commonwealth of Puerto Rico and the Territories. Those considerations are grounded in the policy judgment of current Rule 501 that the choice of privilege law should be tied to the applicable substantive law. The Committee therefore agreed that the catchall provision should include language defining a "State" as any jurisdiction whose residents can qualify for diversity jurisdiction under 28 U.S.C. § 1332(d).

2. Subdivision (b) codifies the general rule that in cases where there are both federal and state claims, the federal rule of privilege applies. The Subcommittee decided to include the bracketed language to codify an exception, permitting the state rule of privilege to apply where the challenged evidence is relevant only to the state claim. In such a situation, the conflict would be between admitting the evidence under federal law and excluding it under state law. Where the evidence is only relevant to the state claim, there seems no basis to ignore the state privilege law–any cost in the loss of relevant evidence is borne by a state policy. Whether this language should be retained or modified is a question discussed in detail in a separate memo included in this agenda book.

3. The Committee resolved at the April 2001 meeting to include a statement in the Committee Note that the reference to "existing" common law privileges refers to privileges existing on the date of enactment of the rule. This will clarify that a court may not adopt a new common law privilege unless it is consistent with the balancing test required by this Rule 501.

4. The balancing test for new privileges in subdivision (c) was approved by the Committee at the April 2001 meeting; this is a change from an earlier draft which permitted new privileges only if "the benefits of the privilege substantially outweigh the loss of probative evidence that the privilege would entail."

Matters for Committee Note To Rule 501

1. If the rule of decision is supplied by foreign law, the court must determine whether to apply the federal or the foreign law of privilege. Cite cases discussing this issue.

2. There are some provisions in CFR that might be thought to have an effect on privileges. See, e.g., 27 C.F.R.§ 70.803 (disclosure of ATF records in criminal cases, privilege controlled by Director); 32 C.F.R. § 725.8 (national defense, release of information and testimony by Navy personnel). To the extent administrative rules impact on privileges, it is almost always by determining the application of privileges in administrative proceedings. These regulations have no effect on the Evidence Rules, which apply to court proceedings. Other administrative rules appear to affect discovery (e.g., rules exempting certain governmental officials from pretrial discovery in criminal cases). But these rules are not grounded in an evidentiary privilege. To the extent there are administrative rules that purport to exclude evidence on grounds of privilege in a federal court proceeding, it could be argued that such a privilege is not recognized under Rule 501 because the source of law language does not mention administrative rules. But administrative rules, to be valid, must proceed from a delegation in an Act of Congress. Therefore, the reference to Act of Congress in the rule is broad enough to cover valid administrative regulations.

3. Specify that some new privileges might serve public and private interests whereas others might serve only public interests.

4. Specify that the reference to privileges existing under common law refers only to those privileges not specifically recognized or abrogated by Congress in a codification. Pre-existing federal common law should not affect privileges that are part of the enactment (e.g., the attorney-client privilege)–if it did, there would be little reason for codification. New privileges not existing on the date of enactment can only be established by the balancing test in subdivision (c).

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposed Rule 501–applicability of state privileges in mixed federal-state cases.
Date: March 1, 2002

As you know, the privileges subcommittee is engaged in a long-term project to prepare rules that would codify the federal law of privileges. The subcommittee has drafted a proposed Rule 501 that has been twice considered by the full Committee. At its April 2001 meeting, the Committee approved most aspects of the subcommittee's draft of Rule 501, but directed the Reporter to research the case law on whether the state law of privilege is ever applied in cases where both federal and state claims are presented–called herein "mixed claims cases".

The minutes to the April 2001 meeting set forth the issue to be addressed in this memo:

> The Committee then considered how and whether the draft rule should treat "mixed" claims: specifically, which privilege law should apply in a case in which federal and state claims are joined? The Subcommittee's current draft provides that if there is a federal claim in the case, then federal privilege law applies to *all* of the claims. The Reporter stated that the circuit court cases considering this matter have held that federal privilege law applies to all claims in a mixed claims case. Those cases have found it untenable to apply different privilege laws to the different claims, because it would be impossible to regulate the evidence and properly instruct the jury. The question is therefore whether federal or state law should apply to all the claims. The circuit courts have reasoned that the need for uniformity and consistency in federal privilege law requires that federal law of privilege must apply in mixed claims cases. However, the Reporter noted that a few cases can be found applying the state law of privilege to all claims in mixed cases. One Committee member argued that applying federal law of privilege to state claims in mixed cases undermines the *Erie* concerns that are embodied in the current Rule 501. Another member stated that the crucial question is whether the courts have been consistent in applying federal privilege law in mixed claims cases. If some courts would apply the state law of privilege in mixed claims cases, then Congress might be legitimately concerned about an amendment that would limit the application of state privileges more than is the case under current law.

After further discussion, the Committee directed the Reporter to do further research on the case law concerning privilege applicability in mixed claims cases. If there is a fair body of case law on either side of the matter, then the draft rule should simply leave the treatment of mixed claims cases to a discussion of that case law in the Committee Note. However, if the vast body of authority mandates the application of the federal law of privilege in mixed claims cases, then the draft should codify this case law.

This memo discusses the case law on applicability of state privilege law in "mixed" federal -state cases. It is divided into five parts. Part one discusses the predominant rule in the cases, which is that federal and not state privilege law applies to all claims. Part two discusses the cases using state privilege law as a reference point if the federal law of privilege is unclear. Part three discusses cases applying state law when the challenged evidence is relevant only to the state law claim and not to the federal law claim. Part four discusses cases leaving open the possibility that the state law of privilege will apply to both federal and state claims, at least under certain circumstances. Part five sets forth the draft rule as it exists now, and how it might be changed if the issue of privilege applicability in "mixed" cases is either not addressed or addressed differently.

I. General Rule–Federal Law of Privilege Applies In Mixed Claims Cases

It is fair to state that the vast majority of federal courts have held that the federal law of privilege controls in cases presenting both federal and state claims. These cases generally involve an underlying federal question issue with pendent state law claims. *See, e.g., Hancock v. Hobbs,* 967 F.2d 462, 466 (11th Cir. 1992) (where jurisdiction is based on a federal question and pendent state claims give rise to conflicting federal and state privilege laws, federal privilege law controls; this is the case even where the evidence sought is relevant to a pendent state claim); *Hancock v. Dodson*, 958 F.2d 1367 (6th Cir. 1992) (existence of pendent state claim did not relieve the court of its obligation to apply the federal law of privilege in a section 1983 case); *von Bulow v. von Bulow*, 811 F.2d 136 (2d Cir. 1987) (federal law controlled question of the existence of a journalist's privilege, in a case where state claims were joined with civil RICO claims); *Memorial Hosp. for McHenry County v. Shadur,* 664 F.2d 1058, 1061 n.3 (7th Cir. 1981) (yes, that Shadur) (finding federal privilege law applied in federal antitrust action with pendent state law claim); *Robinson v. Magovern*, 83 F.R.D.79, 84 (W.D.Pa.1979) (federal law controlled on the question of privilege in a federal antitrust action, notwithstanding the presence of a pendent state claim); *Manzi v. DiCarlo,* 982 F. Supp. 125, 127 (E.D.N.Y. 1997) (where main claim in case arose under federal law, federal privilege law applied to both federal and state claims); *Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.,* 174 F.R.D. 609, 632 (M.D. Pa. 1997) ("In a federal question case with supplemental state law claims, the federal law of privileges governs the entire case."); *Damiano v. Sony Music Entm't, Inc.,*

168 F.R.D. 485, 494 (D.N.J. 1996) (applying federal privilege law where all pendent state law claims were "intimately connected" to the initial federal claim); *Robertson v. Neuromedical Ctr.*, 169 F.R.D. 80, 82-3 (M.S. La. 1996) (finding federal privilege law applied despite pendent state law claims in "primarily a federal question case"); *In Re Combustion, Inc.*, 161 F.R.D. 51, 54 (W.D. La. 1995) ("I further hold that the federal law of privilege provides the rule of decision with respect to privilege issues affecting the discoverability of evidence in this federal question case involving pendent state law claims."); *Reichhold Chems., Inc. v. Textron, Inc.*, 157 F.R.D. 522, 527-28 (N.D. Fla. 1994) (finding federal privilege law governs the entire case with mixed federal and state law claims); *Smith v. Alice Peck Day Mem'l Hosp.*, 148 F.R.D. 51, 53 (D.N.H. 1993) ("In federal question cases where pendent state law claims are raised, the asserted privileges are governed by federal common law."); *PPM America, Inv. V. Marriott Corp.*, 152 F.R.D.32, 34 (S.D.N.Y. 1993) (federal privilege law applies in cases involving both federal and state claims); *Hansen v. Allen Mem'l Hosp.*, 141 F.R.D. 115, 120-21 (S.D. Iowa 1992) (finding, "at least where the issue is the discoverability of evidence," federal privilege law is controlling in federal question cases with pendent state law claims); *Fittanto v. Children's Advocacy Cent.*, No. 91C6934, 1992 WL 350710, at *1 (N.D. Ill. Nov. 23, 1992) ("Federal question cases with pendent state law claims are controlled by federal law."); *Bayges v. Southeastern Pa. Transp. Auth.*, 144 F.R.D. 269, 271 (E.D. Pa. 1992) ("In cases where there are federal claims coupled with pendent state claims, the question of privilege is resolved by the federal law on privileges."); *Puricelli v. Borough of Morrisville*, 136 F.R.D. 393, 397 (E.D. Pa. 1991) (same); *Wei v. Bodner*, 127 F.R.D. 91, 95 (D.N.J. 1989) (where case contained both federal and state claims, the court found federal privilege law applied to the issue of whether a state peer review privilege should be recognized); *First Fed. Sav. & Loan Ass'n of Pittsburgh v. Oppenheim*, 110 F.R.D. 557, 560 (S.D.N.Y. 1986) ("When evidence that is the subject of an asserted privilege is relevant to both federal and state law claims, the courts have held consistently that federal law governs the privilege"); *Sneirson v. Chemical Bank*, 108 F.R.D. 159, 161 (D.C. Del. 1985) (federal law in favor of admissibility applies to cases containing both federal and state law claims).

Similarly, courts have held that federal privilege law applies to all privilege claims where jurisdiction is based on *both* diversity of citizenship and the presence of federal claims. *See, e.g., Alice Peck Day Mem'l Hosp., supra,* 148 F.R.D. at 53; *Auersperg v. Bulow*, 811 F.2d 136, 141 (2d Cir. 1987).

It is notable that the general rule–federal law applies to both state and federal claims in mixed claims cases–is consistent with the legislative history of Rule 501. The Senate Report states that it is "intended that the Federal law of privileges should be applied with respect to pendant [sic] State law claims when they arise in a Federal question case." S.Rep. No. 1277, 93rd Cong., 2d Session, reprinted in 1974 U.S.Code Cong. & Ad.News 7051, 7059 n. 16.

II. Where Federal Privilege Law Is Unclear

A few courts in mixed claims cases have looked to the state law of privilege when the relevant federal privilege law is *unsettled.* These courts have found that when federal law is unsettled courts "may resort to state law analogies for the development of a federal common law of privileges." *Brunt v. Hunterdon County,* 183 F.R.D. 181, 185-86 (D.N.J. 1998) (because "federal law in this District on the existence of the self-critical analysis privilege is unsettled, the Court should resort to state law analogies for guidance on the appropriate law to be applied in this case"). See also *Wm. T. Thompson Co. v. General Nutrition Corp., Inc.,* 671 F.2d 100, 104 (3d Cir. 1982) (although holding federal privilege law is controlling in cases presenting both federal and state claims, "Our holding does not, of course, preclude resort to state law analogies for the development of a federal common law of privileges in instances where the federal rule is unsettled"); *Ziemann v. Burlington County Bridge Comm'n,* 155 F.R.D. 497, 504 (D.N.J. 1994) ("Under Rule 501 . . . the court may look to state law as a guide if the federal law of privileges is unsettled on a particular issue."); *Roberts v. Heim,* 123 F.R.D. 614, 622 (N.D. Cal. 1988) (where no federal law existed on specific issues of the scope of attorney/client and work product privileges, the court would be guided by state privilege law).

While these cases *refer* to the state law of privilege in "mixed" cases, they are not inconsistent with the basic premise that the federal law of privilege controls in such cases. These cases are using state law as guidance for determining what the federal privilege is. This analysis–referring to state laws of privilege when the federal common law is unclear–is well-accepted, and is often applied even when there is no state claim in the case. For example, the Supreme Court in *Jaffee v. Redmond* looked to state law to determine whether to adopt a federal common law privilege for statements to psychotherapists. Thus, these cases are not an exception to the rule that the federal law of privilege is controlling in "mixed" federal-state cases.

III. Where the Privilege Is Relevant Only to the State Claim

A few cases can be found where the disputed evidence is relevant *only* to the state law claim. The choice is typically between excluding the evidence due to a state rule of privilege, or admitting the evidence because it is relevant under Federal Rules 401 and 402. Where the evidence is relevant only to the state claim, the courts appear to apply the state law of privilege, on the ground that to do so does not conflict with federal law, and indeed is mandated by Federal Rule 501. *See, e.g., Platypus Wear, Inc. v. K.D. Co., Inc.,* 905 F. Supp. 808 809-13 (S.D. Cal. 1995) (in a case primarily in diversity jurisdiction, where there was only one federal law counterclaim among several state law diversity claims, and where the disputed evidence went to the state claims *only*, the court found state law governed the privilege claims; the Court notes that "this Court would not be forced to apply two different privilege rules to the same evidence."); *Waterloov Gutter Prot. Sys. Co., Inc. v. Absolute Gutter Prot., LLC,* 64 F. Supp. 2d 398, 411-13 (D.N.J. 1999) (applying a state law litigation privilege

to a pendent state law counterclaim in a federal question case, in large part because the evidence was inapplicable to the underlying federal claims and therefore the state privilege did not "undermine any federal interest"); *Freeman v. Fairman,* 917 F. Supp. 586, 588 (N.D. Ill. 1996) (applying state privilege law where alleged privileged report was relevant only to the pendent state claims); *In re Carmean,* 153 B.R. 985, 990-91 (Bankr. S.D. Ohio 1993) ("[W]here the federal court tries a pendent state law claim and the evidence for which a state law privilege is invoked is relevant only to the state claim, federal courts have applied the state law of privilege. . . ."); *Shaklee Corp. v. Gunnell,* 110 F.R.D. 190, 192 (N.D. Cal. 1986) (in case containing both federal and state claims, the court found state privilege law applied where the disputed evidence affected only the state law claims).

At least one case takes the opposite view, applying the federal law of privilege whenever there is a federal claim in the case. See *Doe v. Special Investigations Agency, Inc.,* 779 F. Supp. 21, 23 (E.D. Pa. 1991) (rejecting state privilege and admitting the evidence even though it was relevant only to pendent state claims, noting that "there are sound policy reasons for maintaining a bright line rule even where the material claimed to be privileged is relevant only to the state claim").

Those cases applying the state law of privilege where it is relevant only to a state law claim seem consistent with and indeed mandated by the language of the current Rule 501. That Rule states that "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law provides the rule of decision, the privilege . . . shall be determined in accordance with State law." There is a problem applying this language in mixed cases where the challenged evidence is relevant to both state and federal claims and the state and federal privilege law is in conflict. The problem is that it is unworkable to apply the state law to the state claim and the federal law to the federal claim. But where the challenged evidence is applicable to the state claim only, there is every reason to apply the language of the Rule mandating the application of state privilege law. What this will ordinarily mean is that the evidence will be excluded when offered as proof on the state claim, and there is no risk of jury confusion because the evidence could not be admitted as proof on the federal claim.

IV. Courts Holding That the State Law of Privilege Is Potentially Applicable in Mixed Claims Cases.

Several courts, although reaffirming the general rule that federal privilege law applies to mixed federal and state law claims, have also declared that federal courts might nonetheless apply state privilege law to all the claims in the interest of federal-state comity. Applying a case-by-case approach, these courts have considered factors such as the need for full disclosure, the State's interest in truth-seeking, a particular state's policy interest behind a privilege, whether state courts recognize the privilege and whether the privilege is "intrinsically meritorious" in the federal court's own judgment. *See, e.g., Shadur, supra,* 664 F.2d at 1061-062 (factors used included State's truth-seeking interest, need for full disclosure and the state's policy interest in invoking the privilege);

Alice Peck Mem'l Hosp., supra, 148 F.R.D. at 54 (using two-pronged test: whether state courts recognize privilege and whether privilege is "intrinsically meritorious"); *Van Emrik v. Chemung Dep't of Soc. Servs.,* 121 F.R.D. 22, 24 (W.D.N.Y. 1988) (although finding that federal privilege law controlled in a mixed claims case, the court opined that courts should also consider "principles of federalism and comity" when determining what privilege law to apply).

Other courts have rejected the concept of comity and have simply applied federal law to all claims. *See, e.g., Folb v. Motion Picture Indus. Pension & Health Plans,* 16 F. Supp. 2d 1164, 1170 (C.D. Cal. 1998) (disapproving courts' application of state privilege law "as a matter of comity" in mixed federal/state claims).

It should be noted that the cases leaving open the possibility that comity principles may justify the application of state law have generally applied the federal law of privilege to all claims in the end. Thus, these cases really do not stand for the proposition that the state law of privilege controls in mixed federal-state cases. *See, e.g., Shadur,* 664 F.2d at 1061 (finding state privilege against discovery of hospital review records did not apply where the plaintiff could not bring the action without access to the allegedly privileged documents); *Alice Peck Mem'l Hosp.,* 148 F.R.D. at 55-6 (refusing to apply state quality assurance privilege mainly because its application would not be "intrinsically meritorious"); *Manzi v. DiCarlo,* 982 F. Supp. 125, 131 (E.D.N.Y. 1997) ("[I]n the interest of comity, courts should attempt to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy;" the court nonetheless granted the plaintiff's motion, with restrictions, to remove confidential designation of documents); *Fittanto, supra,* 1992 WL 350710, at *1-2 (finding state privilege should *not* be recognized under FRE 501, in large part, because the "need for the truth" outweighed the state policy behind the privilege in the case); *Hansen, supra,* 141 F.R.D. at 121-24 (in the interest of comity the court balanced the need for truth against the public policy behind the state confidentiality privilege and concluded the need for truth prevailed).

I have not found a case that relied on comity principles and actually held that the state law of privilege applied to federal claims in a mixed case.

A few courts have applied a balancing test in cases containing mixed federal and state claims to determine whether federal or state privilege law applies–as opposed to a *per se* application of federal privilege law in mixed federal and state law claims. This balancing test is not stated in terms of comity but in fact it is not much different from the cases relying on comity. See *United States v. Cartledge,* 928 F.2d 93, 96-7 (4th Cir. 1991) (reversing lower court decision because of court's failure to use a balancing test to determine whether a state law privilege prohibiting the use of evidence of seat belt violations other than in traffic violation proceedings should be applied; court held federal interest in enforcement of criminal statute outweighed state interests behind the privilege). At least one court, applying such a balancing analysis, has held that the state law of privilege controlled even the federal claims in a mixed case. *Hartsell v. Duplex Prods, Inc.,* 895 F. Supp. 100, 101-03 (W.D.N.C. 1995) (finding federal courts "must balance the interests underlying conflicting state and federal privilege law to determine which law controls the federal claim" and

concluding that the state interest in protecting the confidentiality of Employment Security Commission hearings outweighed the federal interest in relevant evidence in a Title VII action).

A few other cases can be found applying a balancing test to determine which privilege law to apply in mixed federal-state law cases. But in each of these cases, the court ultimately opted for the federal law of privilege. *See, e.g., United States v. Wilson,* 88 F.R.D. 583, 586 (7th Cir. 1992) (applying a balancing test in a mixed federal/state case, the court found federal interests in discovery and access to peer review reports outweighed state interests in favor of privilege where plaintiff would not be able to argue and prove its case without access to reports); *Doe v. St. Joseph's Hosp. of Ft. Wayne,* 113 F.R.D. 677, 679-80 (N.D. Ind. 1987) (applying a flexible multi-factor balancing test to determine whether a state peer review privilege could be applied in light of "the limited recognition of privileges in federal courts under Rule 501" and finding that the state privilege could be overcome on a showing of need); *Robinson v. Magovern,* 83 F.R.D. 79, 84-9 (W.D. Pa. 1979) (in federal question case with pendent state claims, the court applied a balancing test and determined the "need for relevant evidence" outweighed the confidentiality interests behind a state peer review privilege).

Conclusion on Case Law

The vast majority of cases apply the federal law of privilege to all claims in mixed claim cases. This includes cases that properly look to state law as a referent for developing the federal common law of privileges. There is a small body of well-reasoned cases that apply the state law of privilege if the challenged evidence is relevant only to the state law claims. A few cases admit of the possibility that the state law of privilege could apply to both federal and state claims, either due to comity or pursuant to a balance of state and federal interests. But the cases that actually apply the state law of privilege to federal claims under these analyses can be counted on one hand, and maybe one finger.

V. Privilege Law in Mixed Claims Cases Under the Current Draft of Rule 501

The current draft of Rule 501 provides as follows:

Rule 501. General Rule; State Law; Other Privileges.

(a) General rule. Except as otherwise provided by the Constitution of the United States, Act of Congress, these rules, or other rules prescribed by the Supreme Court pursuant to statutory authority, there is no privilege to:

(1) refuse to be a witness;

(2) refuse to disclose any matter;

(3) refuse to produce any object, writing, recording or other information, whether in tangible, electronic, or other form; or

(4) prevent another from being a witness, disclosing any matter or producing any object, writing, recording or other information, whether in tangible, electronic or other form.

(b) State law. In a civil action or proceeding with respect to an element of a claim or defense as to which state law supplies the rule of decision, *and in which there is no federal claim*, privileges shall be determined in accordance with state law. The word "state" as used in this rule includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

(c) Other privileges. A privilege not recognized by Act of Congress, these rules, other rules prescribed by the Supreme Court pursuant to statutory authority, or existing federal common law, may be recognized only if the court finds in the light of reason and experience that the benefits of the privilege outweigh the cost in the loss of probative evidence that would result from application of the privilege.

* * *

The italicized language is intended to codify the predominant case law holding that federal law applies to all privilege questions in mixed federal-state cases. As stated above, the rule is in some tension with the analysis in a handful of cases that look to comity or balancing of interests and consider the possibility that the state law of privileges might apply even to federal claims. And it is directly contrary to the even smaller number of cases that actually do apply state privilege law to federal claims.

The question for the Committee is whether it is worth the effort to codify the predominant case law, thus rejecting some contrary holdings and terminating a line of authority that permitted

balancing of interests under the circumstances. The alternative is simply to delete the italicized language and leave the matter to the Committee Note, which would emphasize the approach taken by the vast majority of cases but also mention the minority view.

One problem with the current language of the draft, however, is that it would appear to require an application of federal law in a mixed claims case even where the challenged evidence is relevant only to the state claims. The italicized language provides that the state law of privilege applies only in cases in which "there is no federal claim." Thus, the federal rule of privilege would apply in mixed claim cases even if the challenged evidence is relevant to the state claim but not to the federal claim.

If the Committee decides that the state rule of privilege should apply in those infrequent mixed claim cases in which the challenged evidence is relevant only to the state claim, there are two alternatives:

1. The draft could simply be amended to delete the italicized language, as discussed above, and the matter could be left to a Committee Note; or

2. The draft language could be changed to specify that the federal law of privilege generally applies in mixed claims cases, but not where the challenged evidence is relevant only to the state claims. For example, the subdivision could read as follows:

> **(b) State law.** In a civil action or proceeding with respect to an element of a claim or defense as to which state law supplies the rule of decision, *and in which there is no federal claim **to which the challenged evidence is relevant,*** privileges shall be determined in accordance with state law. The word "state" as used in this rule includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

The above option should be chosen if the Committee decides that the applicability of federal law in mixed claim cases should be codified, but that an exception should be left for cases where the challenged evidence is relevant only to the state claims.

The Subcommittee on privileges agreed that the above option should be added to the working draft of Rule 501. It is included in bracketed language in the working draft submitted to the Committee as a whole in this Agenda Book.

Attorney-Client Privilege and Supporting Material

ATTORNEY-CLIENT PRIVILEGE

(Draft, March 21, 2002)

(a) Definitions. As used in this rule:

(1) A "communication" is any expression through which a privileged person intends to convey information to another privileged person or any record containing such an expression;

(2) A "client" is a person who or an organization that consults a lawyer to obtain professional legal services.

(3) An "organization" is a corporation, unincorporated association, partnership, trust, estate, sole proprietorship, governmental entity, or other for-profit or not-for-profit association.

(4) An "attorney" is a person who is authorized to practice law in any domestic or foreign jurisdiction or whom a client reasonably believes to be an attorney;

(5) A "privileged person" is a client, that client's attorney, or an agent of either who is reasonably necessary to facilitate communications between the client and the attorney.

(6) A communication is "in confidence" if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one except a privileged person will learn the contents of the communication.

(b) General Rule of Privilege.

A client has a privilege to refuse to disclose and to prevent any other person from disclosing a communication made in confidence between or among privileged persons for the purpose of obtaining or providing legal assistance for the client. **[The client's identity and the fee paid to the attorney are privileged only if the disclosure of this information would thereby disclose a confidential communication, such as the client's motive for seeking representation.]**

(c) Who May Claim the Privilege.

A client, a personal representative of an incompetent or deceased client, or a person succeeding to the interest of a client may invoke the privilege. A client may, implicitly or explicitly, authorize an attorney, agent of the attorney, or an agent of a client to invoke the privilege on behalf of the client.

(d) Standards for Organizational Clients

With respect to an organizational client, the attorney-client privilege extends to a communication that

(1) is otherwise privileged;

(2) is between an organization's agent and a privileged person where the communication concerns a legal matter of interest to the organization within the scope of the agent's agency or employment; and

(3) is disclosed only to privileged persons and other agents of the organization who reasonably need to know of the communication in order to act for the organization.

(e) Privilege of Co-Clients and Common-Interest Arrangements.

If two or more clients are jointly represented by the same attorney in a matter or if two or more clients with a common interest in a matter are represented by separate attorneys and they agree to pursue a common interest and to exchange information concerning the matter, a communication of any such client that is otherwise privileged and relates to matters of common interest is privileged as against third persons. Any such client may invoke the privilege unless the client making the communication has waived the privilege. Unless the clients agree otherwise, such a communication is not privileged as between the clients. Communications between clients or agents of clients outside the presence of an attorney or agent of an attorney representing at least one of the clients are not privileged.

(f) Exceptions. The attorney-client privilege does not apply to a communication

(1) from or to a deceased client if the communication is relevant to an issue between parties who claim an interest through the same deceased client, either by testate or intestate succession or by an inter vivos transaction;

(2) that occurs when a client consults an attorney to obtain assistance to engage in a crime or fraud or aiding a third person to do so. Regardless of the client's purpose at the time of consultation, the communication is not privileged if the client uses the attorney's advice or other services to engage in or assist in committing a crime or fraud.

(3) that is relevant and reasonably necessary for an attorney to reveal in a proceeding to resolve a dispute with a client **[regarding the attorney's employment or the compensation or reimbursement that the attorney reasonably claims the client owes the attorney];**

(4) that is relevant and reasonably necessary for an attorney to reveal in order to defend against an allegation by anyone that the attorney, the attorney's agent, or any person for whose conduct the attorney is responsible acted wrongfully or negligently during the course of representing a client;

(5) between a trustee of an express trust or a similar fiduciary and anattorney or other privileged person retained to advise the trustee concerning the administration of the trust that is relevant to a beneficiary's claim of breach of fiduciary duties;

(6) between an organizational client and an attorney or other privileged person, if offered in a proceeding that involves a dispute between the client and shareholders, members, or other constituents of the organization toward whom the directors, officers, or similar persons managing the organization bear fiduciary responsibilities, provided the court finds

(A) those managing the organization are charged with breach of their obligations toward the shareholders, members, or other constituents or toward the organization itself;

(B) the communication occurred prior to the assertion of the charges and relates directly to those charges; and

(C) the need of the requesting party to discover or introduce the communication is sufficiently compelling and the threat to confidentiality sufficiently confined to justify setting the privilege aside.

Changes from Last Year's Draft, In Response to Committee's Instructions

1. All references to "lawyer-client" privilege changed to "attorney-client" privilege.

2. Subdivision (b)–General rule of privilege now specifically covers, in bracketed language, the question of client identity and fees.

3. Language in the second sentence of subdivision (c) was altered slightly to clarify that the client has the power to explicitly or implicitly authorize the lawyer or agent to invoke the privilege on the client's behalf.

4. Subdivision (e) (common interest rule)–previously bracketed language limiting the privilege to situations in which an attorney is present is now part of the rule.

5. Crime-fraud exception–bracketing language that would have expanded the exception to cover intentional torts is deleted.

6. Subdivision (f)(4)–bracketed language permitting disclosure where necessary to protect the lawyer from allegations of wrongful or negligent conduct is now made part of the rule.

Notes On Attorney-Client Privilege For Consideration By Full Committee:

1. The bracketed language in subdivision (b) was added at the request of the Committee to address the cases that hold that the name of the client and the fees paid to the lawyer are generally not privileged. At the Subcommittee's request, the Reporter has excerpted a section from the Federal Rules of Evidence Manual discussing this case law. That excerpt can be found at the end of the materials on the attorney-client privilege, infra.

2. The bracketed language in subdivision (f)(3) represents an unresolved issue from the April 2001 meeting–the question is whether the self-defense exception might be too broadly applied to cases of retaliatory dismissal. A memorandum from Ken Broun concerning the proposed language to add to the subdivision is included in these materials.

3. The Committee Note to the Rule should make clear that a mere declaration of an intent to commit a crime or fraud, although not within the crime/fraud exception because not made for the purpose of obtaining legal assistance, would not be covered by the privilege. It would simply not come within the language of the General Rule of Privilege, section (b). Under that section, the only communications within the privilege are those made "for the purpose of obtaining or providing legal assistance for the client."

Memorandum by Ken Broun on Privilege Exception for Disputes Between Client and Attorney

Date: March 21, 2002

Following are some thoughts on exception (3) to the attorney-client privilege. The exception is now drafted to read:

(3) that is relevant and reasonably necessary for an attorney to reveal in a proceeding to resolve a dispute with a client **[regarding compensation or reimbursement that the attorney reasonably claims the client owes the attorney];**

Does this exception apply in disputes between the lawyer and client that go beyond fees? As far as I can tell or think about, the only kind of dispute, other than one involving fees, in which an issue of client confidentiality has arisen is where an in-house lawyer has sued for retaliatory discharge or for employment discrimination. In these cases, the issue has involved confidentiality rather than privilege. See, *e.g., Karchmar v. Sungard Data Systems, Inc.,* 109 F.3d 173 (1997). In *Karchmar*, the court indicated that the lawyer, because she was involved in a dispute with her client, might be able to reveal confidences under Pennsylvania rule of Professional Conduct 1.6 (adopted from Model Rule of Professional Conduct 1.6) which provides that the lawyer may reveal confidences to the extent the lawyer reasonably believes necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client." As the court indicated in *Karchmar,* although the examples given in the commentary to the rule involve fees or disputes over misconduct, there is no statement that disputes are limited to those kinds of things. Thus, retaliatory discharge claims may be included and the court in *Karchmar* permitted the law suit to go forward despite the risk of disclosure of otherwise confidential information.

A similar case is *Breckinridge v. Bristol-Myers Co.*, 624 f. Supp. 79 (S.D.Ind. 1985) where the court refused to disqualify counsel for a lawyer bringing an age discrimination even though the lawyer had received client confidences. The court indicated that there would be some exoneration from the requirements of confidentiality where the lawyer is involved in a dispute with his client.

On the other side of the coin, courts have disqualified lawyers who have literally switched sides and brought actions against their former employer, including shareholder derivative suits. The dismissal is based on the likelihood that confidential information received by the lawyer would be used against the client. *See Cannon v. U.S. Acoustics*, 398 F.Supp. 209 (N.D. Ill. 1975), *affd,* 532 F.2d 1118 (7th Cir. 1978); *Doe v. A. Corp.,* 330 F.Supp. 1352 (S.D.N.Y. 1971) *affd. per curiam sub nom.*, 453 F.2d 375 (2nd Cir. 1972). *See also,* Wolfram, Modern Legal Ethics, § 7.1.7 at 330, n. 90.

Although the claims in these cases involved confidentiality under the rules governing professional conduct rather than privilege, the same kinds of issues may have to resolved in a

privilege context. What if the employer in a retaliatory discharge or discrimination case claims privilege in order to protect their confidences? Unless it is going to draft a rule that leaves the issue up to the courts, the committee must make a policy determination as to whether the privilege applies. The language without the brackets would govern all disputes; the bracketed language would limit those disputes to those involving compensation or reimbursement and probably exclude cases of retaliatory discharge or employment discrimination.

Restatement § 133 excepts from the privilege communications relevant and reasonably necessary for a lawyer to employ in a proceeding "to resolve a dispute with a client concerning compensation or reimbursement that the lawyer reasonably claims the client owes the lawyer; or to defend the lawyer against an allegation by any person that the lawyer . . . acted wrongfully during the course of representing a client." A suit for retaliatory discharge or other comparable disputes are not expressly included within the exception. However, the comments to the section state: "But a lawyer formerly employed as inside legal counsel by a corporation may invoke the exception in a good-faith suit against the corporation for compensation allegedly due."

Uniform Rule 502, excepts communications "relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer." Retaliatory discharge claims would seem clearly included.

A good argument can be made for the elimination of privilege in the case where the lawyer-employee sues for retaliatory discharge or discrimination. Arguably the lawyer should have the ability to make his or her case under those circumstances just as he or she could in a case involving fees. It seems unfair to let the client hide behind the privilege – although the court may intervene to make sure that the disclosures are not broader in either scope or dissemination than is necessary for the lawyer to make a case. However, where, as in the case where the lawyer decides to bring a derivative action against his or her former employer, there seems to be good reason to provide the client with the ordinary protections of the attorney-client privilege.

One way to seek to insure that the privilege would not apply in an employment case but would apply where the lawyer has changed sides would be to amend the language to read:

> (3) that is relevant and reasonably necessary for an attorney to reveal in a proceeding to resolve a dispute with a client **[regarding the attorney's employment or the compensation or reimbursement that the attorney reasonably claims the client owes the attorney];**

The Privileges Subcommittee agreed that this language should be included in brackets in the working draft of the Rule.

Excerpt From Federal Rules of Evidence Manual on Attorney-Client Privilege As It Relates To Client Identity and Fees

[11] Attorney-client Privilege — Confidences — Incidents of Representation

For obvious reasons, the privilege protects preliminary communications with an attorney about the subject of the representation, even if an attorney-client relationship has not been formalized at that point. This is because confidentiality may be necessary in order to determine whether the attorney can take on the representation.[1]

On the other hand, the privilege ordinarily does not protect the preliminary aspects of the attorney-client relationship itself. These matters, which have been referred to as the "incidents of representation," include the client's name, the amount and payment of a fee, and the fact of consultation. The incidents of representation are not generally considered privileged because they are independent of the confidential communications necessary for the representation. The identity of the client, the fee, and the fact and extent of representation are generally incidental to the formation and maintenance of the relationship, and have nothing to do with the free flow of information once that relationship has been established.[2] Thus, the focus of the privilege in most Courts is on those communications that the attorney can influence by informing the client that a free flow of information will not prejudice the client. Communications and information respecting the incidents of representation do not meet this standard.[3] As Judge Winter stated in the leading case of *In re Shargel*, 742 F.2d 61 (2d Cir. 1984):

> Absent special circumstances, disclosure of the identity of the client and fee

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[1]. See, e.g., In re Auclair, 961 F.2d 65 (5th Cir. 1992) (where three people go to an attorney on a matter that concerns them all, in order to determine whether the attorney can represent them all, the preliminary discussions with the attorney are presumptively protected under the common interest doctrine).

[2]. See, e.g., In re Grand Jury Proceedings, 33 F.3d 1060 (9th Cir. 1994) (upholding a judgment of contempt resulting from an attorney's refusal to produce records pertaining to fee information and fee arrangements with a client; while that information might have indicated that the client retained the attorney to represent him in a grand jury investigation, this fact did not "in and of itself reveal any confidential information"); United States v. Olano, 62 F.3d 1180 (9th Cir. 1995) (no privilege where the testimony provided "only general descriptions of the work" that the lawyer performed; the lawyer did not disclose the defendant's "motives, strategies or goals").

[3]. For more on this topic, see Capra, *Deterring the Formation of the Attorney-Client Relationship: Disclosure of Client Identity, Payment of Fees, and Communications by Fiduciaries*, 4 GEO. J. LEGAL ETHICS 235 (1990).

information stand on a footing different from communications intended by the client to explain a problem to a lawyer in order to obtain legal advice. * * * A general rule requiring disclosure of the fact of consultation does not place attorneys in the professional dilemma of cautioning against disclosure and rendering perhaps ill-informed advice or learning all the details and perhaps increasing the perils to the client of disclosure.[4]

A limited exception to the above rule exists, however: If information concerning the incidents of representation would, directly or indirectly, disclose a confidential communication, then this preliminary information is privileged. One example is where the disclosure of the fee payment or the fact of representation would reveal a confidential motive for seeking representation.[5] Another

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[4]. See also United States v. Leventhal, 961 F.2d 936 (11th Cir. 1992) (information concerning payment of more than $10,000 cash from a client to an attorney is not privileged, and can be obtained through enforcement of an IRS summons; fee arrangements and disclosure of the identity of the client are part of the preliminaries and incidents of the representation, and in the absence of extraordinary circumstances, they do not satisfy the requirement of the privilege that a communication must be made in the course of seeking legal advice). See also In re Grand Jury Matter No. 91-01386, 969 F.2d 995 (11th Cir. 1992) (identity of a client who paid the attorney with counterfeit bills held not privileged, where disclosure of identity "will not provide the government with a necessary link to, or revelation of, any confidential matters which fall within the attorney-client privilege"; disclosure of identity will only link the client with a payment by counterfeit money, "which is not a communication at all"); Tornay v. United States, 840 F.2d 1424 (9th Cir. 1988) (fee information not privileged since it is not a communication necessary to further legal advice); United States v. Ricks, 776 F.2d 455 (4th Cir. 1985) (fee information not privileged).

[5]. See, e.g., In re Subpoenaed Grand Jury Witness, 171 F.3d 511 (7th Cir. 1999) (fee payment and client identity privileged where "disclosure of this information would identify a client of Hagen's who is potentially involved in a targeted criminal activity which, on this record, would lead to revealing that client's motive to pay the legal bills for some of Hagen's other clients"). Compare Clarke v. American Commerce Nat'l Bank, 974 F.2d 127 (9th Cir. 1992) (billing statements containing information on the identity of the client, the case name for which the fee was paid, and the general nature of the services performed, are not protected by the attorney-client privilege; nothing in the statements reveals research or litigation strategy, or otherwise discloses the motive of the client in seeking representation); Vingelli v. DEA, 992 F.2d 449 (2d Cir. 1993) (benefactor payment made by an attorney on behalf of a client is not privileged; the fact that the attorney made a benefactor payment does not indicate why the client may have sought the attorney's advice); In re Grand Jury Subpoena, 204 F.3d 516 (4th Cir. 2000) (privilege inapplicable where disclosure of identity would reveal client's motive for seeking

example is where communications have been disclosed, and yet they remain confidential as a practical matter because they have not been attributed to an identifiable person. If disclosure of the client's identity would tie the client to the previously disclosed communications, then the client's identity is privileged.[6] It is apparent from the mere delineation of this exception that it is very limited; in the vast majority of cases, disclosure of fee, identity, etc., says nothing about the motive for seeking representation, nor does it tie the client to a previously disclosed yet unattributed communication.[7] As the Court stated in *Lefcourt v. United States,* 125 F.3d 79 (2d Cir. 1997):

> Although the contours of the special circumstance exception [to the rule that identity of the client is unprotected by privilege] have not been exhaustively developed, no doubt due to the fact special circumstances are seldom found to exist, it is clear that there is no special circumstance in this circuit simply because the provision of client-identifying information could prejudice the client in the case for which legal fees are paid.

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legal advice, but client had previously authorized his attorney to disclose the motive for representation).

[6]. See, e.g., United States v. Liebman, 742 F.2d 807 (3d Cir. 1984) (where the substance of a communication was already known, but not the identity of the communicator, then disclosure of identity would be tantamount to disclosure of a privileged communication).

[7]. See, e.g., United States v. Blackman, 72 F.3d 1418 (9th Cir. 1995) (upholding an order enforcing an IRS summons requiring an attorney to identify a client paying more than $10,000 in cash and the nature of the services rendered in exchange for the cash: "We have repeatedly held that the attorney-client privilege does *not* apply where disclosure might incriminate the client or fee-payer, but *only* where it would convey information tantamount to a confidential communication."). The *Blackman* Court declared itself "hard pressed" to imagine a case in which the receipt of fees could be so intertwined with the subject of the representation as to obviate compliance with Treasury Department reporting requirements. See also In re Subpoena to Testify Before Grand Jury, 39 F.3d 973 (9th Cir. 1994) (affirming the denial of a motion to quash a subpoena served on an attorney, demanding disclosure of the name of a client who paid the attorney with counterfeit money; communication of the client's name and counterfeit payment "were entirely distinct" from the traffic and assault matters on which the attorney represented the client; therefore, disclosure of the identity and payment of the client would not be "in substance a disclosure of the confidential communication in the professional relationship between the client and the attorney").

Physician and Mental Health Provider-Patient Privilege and Supporting Material

Physician and Mental Health Provider-Patient Privilege (Draft- 10/18/02)

(a)Definitions. As used in this rule:

(1) A "communication" is any expression through which a privileged person intends to convey information to another privileged person or any record containing such an expression;

(2) A "patient" is a person who consults a physician or mental health provider for the purpose of diagnosis or treatment of the patient's physical, mental, or emotional condition including addiction to alcohol or drugs.

(3) A "physician" is a person ~~authorized~~ licensed in any domestic or foreign jurisdiction, or reasonably believed by the patient to be ~~authorized~~ licensed, to practice medicine or a person acting under the supervision of a licensed physician.

(4) A "mental health provider" is a person ~~authorized~~ licensed in any domestic or foreign jurisdiction, or reasonably believed by a patient to be ~~authorized~~ licensed, to engage in the diagnosis or treatment of a mental or emotional condition, including addiction to alcohol or drugs or a person acting under the supervision of a licensed mental health provider.

(5) A "privileged person" is a patient, physician, mental health provider or an agent of any of these persons who is reasonably necessary to facilitate communications between the patient and the physician or mental health provider or who is participating in the diagnosis or treatment of the patient under the direction of a physician or mental health provider.

(5) A communication is "in confidence" if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one except a privileged person will learn the contents of the communication.

(b) General Rule of Privilege.

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a communication made in confidence between or among privileged persons for the purpose of obtaining or providing diagnosis or treatment of the patient's physical, mental, or emotional condition including addiction to alcohol or drugs.

(c) Who May Claim the Privilege.

A patient or a personal representative of an incompetent or deceased patient may invoke the privilege. A patient may, implicitly or explicitly, authorize a physician or mental health provider, the agent of either, or any person who participated in the diagnosis or treatment of the patient under the direction of a physician or mental health provider to invoke the privilege on behalf of the patient.

(d) Exceptions. The physician or mental health provider privilege does not apply to a communication

(1) relevant to an issue in proceedings to hospitalize the patient for physical, mental or emotional illness if the physician or mental-health provider, in the course of diagnosis or treatment, has determined that the patient is in need of hospitalization;

(2) made in the course of a court-ordered investigation or examination of the physical, mental, or emotional condition of the patient, whether a party or a witness, with respect to the particular purpose for which the examination is ordered, unless the court orders otherwise;

(3) relevant to the issue of the physical, mental, or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense;

(4) that occurs when a patient consults a physician or mental health provider to obtain assistance to engage in a crime or fraud or to escape detection or apprehension after the commission of a crime or fraud or to aid a third person to engage in a crime or fraud or to escape detection or apprehension after the commission of a crime or fraud. Regardless of the patient's purpose at the time of consultation, the communication is not privileged if the patient uses the physician's or mental health provider's services to engage in or assist in committing a crime or fraud or to escape detection or apprehension after the commission of a crime or fraud;

(5) in which the patient has expressed an intent to engage in conduct likely to result in imminent death or serious bodily injury to the patient or another individual; ~~and the disclosure of such information is necessary to prevent that death or injury;~~

(6) relevant to an issue in a proceeding challenging the competency of the physician or mental health provider;

(7) relevant to a breach of duty by the physician or mental-health provider~~;~~. Such statements are admissible only to the extent reasonably necessary to prove a fact at issue involving the breach of duty; ~~or~~

(8) relevant for a physician or mental-health provider to reveal in a proceeding to resolve a dispute with a patient. Such statements are admissible only to the extent reasonably necessary to prove a fact at issue in the dispute; or

(9) that is subject to a duty to disclose under the laws of the United States. ~~or of any State or political subdivision thereof.~~

Supplementary Memorandum on the Proposed Physician and Mental Health Provider - Patient Privilege (10/18/02)

At its meeting of April 19, 2002, the Committee considered a draft of a Physician and Mental Health Provider Privilege. The discussion of the draft produced several preliminary decisions with regard to aspects of the draft. A new draft of the privilege has been prepared based upon those decisions.

Following is a discussion of the decisions made at the April meeting. Where no change was made from the original draft, the original background memorandum (attached) should be consulted. The current draft proposal indicates the changes that have been made from the original (strikeouts indicate language stricken from the original draft, underlining indicates language added or alternative language selected). The minutes of the April meeting contain a complete account of the discussion.

1. Parts (a) (3) and (4) Definition of "physician" and "mental health provider".

The Committee opted to adopt the alternative language "licensed" as opposed to "authorized" in these two sections. As noted in the original memorandum, Uniform Rule 503 uses the term "authorized." Some federal cases have approved the application of the psychotherapist-patient privilege where the mental health provider was probably only authorized, as in the case of an Employee Assistant Program counselor, rather than licensed. See *Oleszko v. State Compensation Insurance Fund,* 243 F.3d 1154 (9th Cir. 2001). Nevertheless, the Committee determined that medical professionals covered by the rule should at least be licensed by some governmental agency and the current draft so provides.

However, in light of the adoption of the term "licensed," the Committee expressed concern that the rule be broad enough to cover interns working under the direction of a licensed professional. The additional language "or a person acting under the supervision of a licensed physician" is intended to deal with this situation. I could find no state statute that uses this or comparable language. The language is unnecessary in dealing with medical interns and residents; they are licensed physicians. However, interns to mental health providers may not always be licensed. In addition, students working with either physicians or mental health providers are not licensed. The Committee may want to consider whether such individuals are adequately covered by the language in (a)(5), which includes in the definition of a privileged person anyone "who is participating in the diagnosis or treatment of the patient under the direction of a physician or mental health provider."

2. Part (d) (4). The crime-fraud exception.

The language added ("or to escape detection or apprehension after the commission of a crime or fraud or to aid a third person to engage in a crime or fraud or to escape detection or apprehension after the commission of a crime or fraud") is based upon two decisions made by the Committee. First, the Committee elected to add previously bracketed language that would specifically apply the

exception in instances where the statements are made to aid in escaping detection or apprehension. The "detection or apprehension" language is based upon the Alaska and Kansas privileges. See Alaska R. Rev. 504(a); Kan. Stat. § 60-427 (2000). The Committee also opted to include language from the crime-fraud exception contained in its draft of the attorney-client privilege applying the exception to instances in which the statement is made to aid a third party in the commission of a crime or fraud. Both decisions were based upon concerns arising out of medical fraud cases where the patient's statements may be made after the fraud has been committed and where the patient himself or herself may not be the perpetrator of the fraud. The last added phrase ("or to escape detection or apprehension after the commission of a crime or fraud") is included to complete the range of instances in which the exception may apply.

3. Part (d)(5). The dangerous patient exception.

The dangerous patient exception is based upon a footnote in *Jaffee v. Redmond*, 518 U.S. 1, 18, n. 19 (1996):

> Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.

The exception has been made a part of Uniform Rule 503 (d)(5). The original draft of the privilege submitted to the Committee adopted the dangerous patient exception as it exists in the Uniform Rule, but added the language "and the disclosure of such information is necessary to prevent that death or injury." The additional language was based on two cases in which the courts had refused to apply a dangerous patient exception to the psychotherapist-patient privilege in instances in which the danger had past. *United States v. Glass*, 133 F.3d 1356 (10th Cir. 1998); *United States v. Hayes*, 227 F.3d 578 (6th Cir. 2000).

In its discussions, the Committee believed that the thrust of the *Jaffee* opinion was that statements including an imminent threat to individuals did not warrant the protection of the privilege under any circumstances. It therefore opted to include the language of Uniform Rule 503 (d) (5) without the suggested qualifying phrase.

Parts (d) (7) and (8). Breach of duty and disputes with patient.

The original draft of this privilege contained an exception for statements relevant to a breach of duty by the physician or mental-health provider. The Committee believed that statements relevant to other disputes (for example, disputes over fees) should also be covered by an exception. Such a separate exception exists in the Committee draft of the attorney-client privilege. (Part (f)(3)). An exception based on the attorney-client language governing disputes with patients is added as part (8).

In addition, the Committee expressed concern that statements relevant to disputes between

physicians or mental health providers and their patients be disclosed only to the extent necessary to prove a fact at issue in the fee dispute. The exception to the attorney-client privilege seeks to reach that result by the use of the phrase "relevant and reasonably necessary." Similar language is also used to convey the same idea in Rule 1.6 of the ABA Model Rules of Professional Conduct, which permits a lawyer to disclose confidential communications "to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer. . . ."

The Committee may want to consider whether the use of the phrase "reasonably necessary" as used in the exception to the attorney-client privilege is sufficient or whether the more specific language now contained in this draft ("Such statements are admissible only to the extent reasonably necessary to prove a fact at issue in the dispute") is preferable. Although the new language is somewhat cumbersome, it has the advantage of specifically providing that a statement relevant in part should be edited to exclude portions not relevant to the dispute. If the Committee opts for this more specific language, it may also want to reconsider the language used in the attorney-client privilege.

Although there appear to be no federal cases dealing with the issue of self-defense with regard to a medical privilege, case law confines the exception for lawyer self-defense to statements reasonably necessary to prove the fact in issue is consistent with case law. See, e.g. Greig v. Macy's Northeast, Inc., 1 F.Supp. 397 (D.N.J. 1998) (applying Rule 1.6 of the ABA Model Rules of Professional Conduct); *First Fed. Sav. & Loan Ass'n v. Oppenheimer, Appel, Dixon & Co.*, 110 F.R.D. 557 (S.D.N.Y. 1986). The cases do not distinguish between claims of lawyer wrongdoing and other disputes, for example those involving fees. See Imwinkelried, The New Wigmore, § 6.13.2 at 648-49 (2002). Thus, this draft includes language confining the exception to those statements reasonably necessary to prove a fact in issue in both parts (d) (7) and (8).

Arguably, the limitation on the admission of statements to those portions reasonably necessary to resolve the issue involved might also be applied to other exceptions, *e.g.*, statements relevant to the competency of the physician or mental health provider. However, codifications of the privilege have not included limitations of this kind, perhaps because the issue to which the statement goes is so broad that the need for the limitation does not usually arise and because the risk of patient blackmail is not likely to exist in these situations.

Part d(9) Duty to Disclose

The original draft of the privilege included bracketed language that would have excepted statements required to be disclosed under the laws of the United States **or of any State or political subdivision thereof.** The language was based on Uniform rule 503(d)(8) providing an exception for communications that are "subject to a duty to disclose under [statutory law].

The Committee agreed that there should be an exception for disclosure required by federal law. However, some Committee members expressed concern that deference to state law reporting

obligations would render the federal privilege subservient to state law. Furthermore, members noted that the existence of a federal privilege would not prevent the physician or mental health provider from complying with state reporting obligations. It would simply mean that the disclosed communications might still be privileged in a federal proceeding. Based upon these considerations, the Committee decided that the next draft should be limited to communications required to be reported under federal law, but that there be no exception for state or local reporting requirements.

Sources and Comments on the Physician and Mental Health Provider - Patient Privilege

(Draft, 2/28/02)

In form, this draft privilege is based upon our draft of the attorney-client privilege. However, much of the substantive content of the rule is based upon the 1999 amendment to Uniform Rule of Evidence 503. Most importantly, the concept of a "mental health provider" is based on that Rule as are the exceptions to the application of the privilege. Following are some comments with regard to specific aspects of the draft rule and my proposed variations from the content of the Uniform Rule.

1. A general physician-patient privilege?

A basic decision to be made with regard to this privilege is whether to extend it to general physician-patient communications. This draft extends the privilege.

Uniform Rule 503 provides options for what health professionals are to be included in the rule. A general physician-patient privilege is one of the options.

At present, there is no general physician-patient privilege in federal law. See, *e.g., Hancock v. Dodson,* 958 F.2d 1367 (6th Cir. 1992); *United States v. Moore*, 970 F.2d 48 (5th Cir. 1992); *United States v. Bercier*, 848 F.2d 917 (8th Cir. 1988). Language in *Jaffee v. Redmond,* 518 U.S. 1, 10 (1996), which recognized a psychotherapist-patient privilege, distinguished the need for confidentiality in that relationship from general physician-patient communications. On the other hand, the absence of a general physician-patient privilege in the Proposed Federal Rules of Evidence was the subject of considerable debate in Congress and the absence of such a privilege was, at least in part, why the privilege rules contained in the original proposal were rejected. *See, e.g.,* the arguments made in Charles L. Black., Jr., *The Marital and Physician Privileges – A reprint of a Letter to a Congressman,* 1975 Duke L. J. 45. Forty states have a general physician-patient privilege.

2. Mental Health Provider

The Uniform Rules adopt the term "mental health provider" in order to recognize the extension of the privilege beyond psychiatrists and psychologists in *Jaffee v. Redmond, supra.* The *Jaffee* case extended the privilege to licensed social workers. See Robert H. Aronson, *The Mental Health Provider Privilege in the Wake of* Jaffee v. Redmond, 54 Okla.L.Rev. 591 (2001). But, as stated in the Uniform Commissioner's comments, the intention of Uniform Rule 503 is to adopt a somewhat "narrower form of the privilege." As Aronson states, the "mental health provider" privilege, unlike the social worker privilege existing in many state statutes, would not include all communications with a social worker in all aspects of his or her work. Social worker privileges broadly define "social work" as the counseling of clients to "enhance or restore their capacity for

physical, social and economic functioning." Aronson, *supra* at 608-609, citing 59 Okla. Stat. §§ 1250.1(2), 1261.6 (1995). Uniform Rule 503 and this draft rule limit the privilege to communications relating to "diagnosis or treatment of a mental or emotional condition, including addiction to alcohol or drugs."

Lower court cases decided after *Jaffee* have, with somewhat mixed results, dealt with the application of the privilege articulated in that case to professionals such as rape crisis counselors, *United States v. Lowe,* 948 F. Supp. 97 (D. Mass. 1996) (privilege extended), Employee Assistance Program counselors, *Oleszko v. State Compensation Insurance Fund,* 243 F.3d 1154 (9th Cir. 2001) (privilege extended); Alcoholic Anonymous hotline volunteers, *United States v. Schwensow,* 151 F.3d 650 (7th Cir. 1998) (no privilege under circumstances where the patient did not seem to be seeking diagnosis or treatment), and Marriage, Family and Child Counselors, *Speaker v. County of San Bernardino,* 82 F. Supp.2d 1105 (C.D. Cal. 2000) (privilege applied where patient reasonably believed that the therapist was a licensed psychologist). See discussion in Aronson, *supra,* at 599-601.

The Uniform Rule would clearly cover licensed social workers under facts such as those in *Jaffee*. Aronson believes that the rule would also cover Employee Assistant Program counselors in cases such as *Oleszko. Supra* at 611. The question, however, is whether we want the federal rule to apply in such situations that may be beyond the reasoning of the Supreme Court in *Jaffee.* One way to further limit the application of the privilege would be to substitute the bracketed word "licensed" for "authorized" in sections (a) (3) and (4) of the rule. Such a substitution would require that any mental health provider at least have a state license to diagnose or treat mental or emotional conditions. It probably would preclude application of the rule to counselors in cases such as *Oleszko* and *Lowe.*

3. Definition of physician

The draft keeps the "practice medicine" language of the Uniform Rule. The Committee may want to consider whether this includes health professionals such as dentists, chiropractors, podiatrists and optometrists, and if so, whether we want to include them in the privilege. My intention, and I believe that of the Uniform Rule, is to exclude them from the coverage of the privilege.

4. Who may claim the privilege

This paragraph is, in form, based on the corresponding provision in our draft of the attorney-client privilege. The language of the second sentence is based upon the definition of "privileged person" contained in Paragraph (a)(5) of the Rule.

5. Hospitalization proceedings

Unlike the Uniform Rule, this draft expands the exception in part (d)(1) to include proceedings to hospitalize the patient for physical and emotional as well as mental illness. Although proceedings to hospitalize for other than mental illness are rare, they can occur. The change would

also avoid the problem of deciding what type of illness the hospitalization is for. The language is based on Alaska R. Rev. 504(d)(4). *See also* Neb. Rev. Stat. Ann. § 27-504(4)(a) (Michie 2001).

6. Crime or fraud

The language of this paragraph tracks, at least in part, the corresponding exception in our draft of the attorney-client privilege. The phrase "or aiding a third person to do so," contained in the attorney-client exception, is not included here. It is difficult to imagine a confidential communication between physician and patient that would aid a third party to commit a crime or fraud without also implicating the patient in the crime. The bracketed phrase referring to "escape detection or apprehension after the commission of a crime or fraud" is based on language contained in the rules of some states. See Alaska R. Rev. 504(d)(2); Kan. Stat. § 60-427 (2000). The language is probably not necessary in light of the fact that escape or avoiding detection is itself likely to be a crime or an act in furtherance of a fraud.

7. Dangerous Patient

This draft adds to the language of the Uniform rule the clause "and the disclosure of such information is necessary to prevent death or injury."

The dangerous patient exception, embraced by this exception, can be attributed to a footnote in the *Jaffee* case, where the Court said:

> Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.

Jaffee v. Redmond, 518 U.S. at 18, n. 19.

Despite this language, two lower court cases have refused to recognize such an exception where the danger to others had past. In *United States v. Glass,* 133 F.3d 1356 (10th Cir. 1998) recognized the possibility of a dangerous patient exception to the privilege but found it inapplicable.

> . . . on the record before us, we have no basis upon which we can discern how ten days after communicating with his psychotherapist, Mr. Glass' statement was transformed into a serious threat of harm which could only be averted by disclosure.

In United States v. Hayes, 227 F.3d 578 (6th Cir. 2000), the court refused to recognize a dangerous patient exception to the privilege. The court distinguishes between a duty to disclose in order to protect the patient or others and the disclosure of the threat in a court proceeding after the danger had past.

Based upon *Jaffee, Glass and Hayes,* this draft recognizes the possibility that the privilege ought not attach when there is a need to protect others based upon a threat from the patient. However, there seems to be no need to create an exception to the privilege once that danger has past. The Uniform Rule does not seem to recognize this distinction.

8. Duty to Disclose

Exception (d) (8) is based on a comparable exception in Uniform Rule 503. Without the bracketed language, it would leave the question of duty to disclose within the province of federal law. With the bracketed language, the exception would cover state law as well. If state duties to disclose are included, the Advisory Committee notes ought to make clear that the language is intended to address affirmative duties to disclose rather than simply the absence of a state privilege. Otherwise, narrower state privilege laws would automatically supplant the federal rule. The Committee should also consider whether the duty to disclose must be imposed by statute, rule or regulation as opposed to case law.

9. Other Possible Exceptions

Some states have other exceptions to their privileges. For example, Vermont R.Rev. 503(d)(4) excepts dentists dealing with identification issues. Wisconsin has a broad exception for homicide cases, see Wisc.Stat. Ann.§ 905.04(4)(d). There are a multitude of others.

Waiver Rule

(Already Tentatively Approved By the Committee)

With Memorandum Concerning the Possibility of Moving the Provision on Inadvertent Disclosure to the Attorney-Client Privilege

Rule 5–: Waiver

Draft dated March 1, 2002

(a) General rule. A privilege conferred by these rules is waived as to any communication if the holder of the privilege, or the holder's authorized representative:

(1) voluntarily discloses or consents to disclosure of the otherwise privileged information in a non-privileged communication;
(2) uses the privileged information, directly or indirectly, as part of a claim or defense; or
(3) fails to make a proper objection to an attempt by another person to give or obtain testimony or other evidence of a privileged communication.

(b) Inadvertent disclosure. An inadvertent disclosure of privileged information does not result in the loss of the privilege if the person responsible for the disclosure:

(1) exercised due care under the circumstances;
(2) discovered the disclosure with due diligence; and
(3) took all reasonable efforts to protect and retrieve the information once the disclosure was discovered.

If the court finds that an inadvertent disclosure does not result in the loss of the privilege, the party who received the privileged information is prohibited from proffering that information at trial. The receiving party is also prohibited from proffering any evidence that is derived directly or indirectly from the privileged information. The party who disclosed the privileged information has the burden of showing, by a preponderance of the evidence, that information proffered by the receiving party is derived from the privileged information.

Derivation of Waiver Rule

Subdivision (a) is taken from the Restatement's provision concerning waiver of attorney-client privilege.

Subdivision (b) is an attempt to codify the case law concerning inadvertent disclosures. This case law is not uniform; the language attempts to codify the majority rule. The last two sentence of the final paragraph, concerning "fruits", deals with a matter on which there is not much case law. It attempts to stake out a position that would be fair to a party who innocently receives privileged information from an adversary. The Committee previously agreed that shifting the burden of showing taint to the party who made the mistaken disclosure would be a fair result.

Matters for the Advisory Committee Note to the Waiver Rule–

1. Note that some courts are upholding agreements between the parties that inadvertently disclosed information will not constitute a waiver, especially in cases with a large amount of electronic information.

2. Discuss the advice of counsel defense.

3. Discuss the *Westinghouse* case and the rejection of the concept of selective waiver.

4. The note should include a discussion about the distinction between waiver and forfeiture. The Note might state that the committee decided against making such a distinction in the text of the rule given the extensive case law treating both waivers and forfeitures under the umbrella term, "waiver."

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter and Ken Broun, Consultant
Re: Waiver Rule
Date: September 21, 2002

In previous meetings, the Committee has tentatively approved a draft rule on waiver of privileges. That rule is set forth in the agenda book immediately preceding this memorandum.

Professor Robert Mosteller was kind enough to review the drafts to date of the work of this Committee on Privileges. He suggests that the waiver rule on inadvertent disclosures should be shifted to the attorney-client privilege. His explanation for such a change is set forth in an email exchange that is reproduced below. To summarize quickly, Professor Mosteller believes that the rules developed by the courts on inadvertent waiver are particular to the attorney-client privilege and mistaken disclosures in the discovery context; he argues that the same principles and standards are not applicable to other privileges.

If the Committee agrees with Professor Mosteller's suggestion, the Privileges Subcommittee will make the change and present it to the full Committee at the next meeting.

Email Correspondence with Professor Mosteller on the waiver rule and its provision concerning inadvertent disclosure of privileged material.

>>> "Robert Mosteller" <RPM@law.duke.edu> 05/22/02 05:30PM >>>
Dan,

I believe my disagreement is largely with generalizing from principles developed in the area of "inadvertent disclosure" law under the attorney client privileges to privileges generally and from derivative protection that may be developed there to other types of disclosures not constituting waiver particularly as to other privileges. I want to suggest that you consider an alternative approach.

I do not believe the law of "inadvertent disclosure" is purely privilege law. It is a relatively well settled body of law that is important but I think it is based on more than just privilege principles. The test you set out has three factors; some courts use four; others five. Then there are the strict and the lenient approaches.

In inadvertent disclosure law I believe you see the influence of ethics rules, concens about professionalism, something about the reality of modern complex civil discovery, the existence of an on-going relationship between professionals, and other concerns. You also see some approximations about the likely intent of the client. When you think about other privileges that may be governed by a general waiver rule, I think you see almost none of this. Think about husband-wife, doctor-patient, cleric privilege, and I don't think a concept of "inadvertent disclosure" with these multiple factors fits very well or very often.

While "inadvertent disclosure" may not fit, all these privileges need a general rule of waiver.

My suggestion is to consider putting the "inadvertent disclosures" solution under the attorney-client privilege. I think in your commentary you may well wind up explaining the factors as part of a settled body of law based on special circumstances in the modern world of discovery.

I don't want to disagree with your point that the working premise in the lower courts as to "inadvertent disclosures" among lawyers is that derivative use is prohibited. That's what the court in the In re Shell case did, but I don't think it is a generally recognized result that operates across privileges.

I suggest switching to consider "fruits" analysis in an entirely different area. Consider a disclosure of husband-wife privilege that gets to the prosecutor from a source not clearly identified as privileged and reveals leads to a crime solution. The prosecutor could build a case critically upon the evidence derived from this disclosure and have no way to show alternative sources. The prospect of a taint hearing here would, I believe, frighten prosecutors. With respect to Kastigar, prosecutors

can contain the problem because federal prosecutors guard immunity grants very carefully. Before they grant immunity, they record or "can" the evidence. If, however, a private party could taint a prosecution, I think you might have room for some real gamesmanship.

I hope some of this is helpful to you.

My research does suggest to me that the fruits principle is not applied generally to evidentiary privileges.

Bob

Bob,

I am not sure that your distinction between the fifth amendment and private privileges, with regard to Kastigar-type issues, plays out in the cases. Your distinction is that prosecutors can control fruits problems in the fifth amendment area by canning the evidence. Yet in the North case, this very concern was expressed by prosecutors. They argued that there should be no fruits analysis when it comes to tainted witnesses, because they couldn't control the witnesses. The court rejected this distinction as a "look ma, no hands" excuse.

Still, on further reflection, there are some concerns about extending the fruits analysis beyond mistaken disclosures. More broadly, it might make more sense to put the provision on mistaken disclosures in the attorney-client privilege rule, because that is where the issue comes up--it could be confusing to put it in the general waiver rule.

Thanks so much for your observations.

Dan

Privilege Protecting Against Adverse Spousal Testimony

(Tentatively Rejected By the Committee)

Draft of Spousal Privilege Against Providing Adverse Testimony

Rule 5__. Spousal Testimony In a Criminal Proceeding.

(a) General rule of privilege. In a criminal proceeding the spouse of an accused has a privilege to refuse to testify against the accused spouse.

(b) Exceptions. There is no privilege under this rule:

(1) if the court finds by a preponderance of the evidence that the spouses acted jointly in the commission of the crime charged;

(2) in proceedings in which one spouse is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other or a child of either; or

(3) if the interests of a minor child of either spouse would be adversely affected by invocation of the privilege.

Derivation–

Subsection (a) is derived from Rule 504 of the Uniform Rules. The original Advisory Committee proposal is not a proper model because it provides that the accused has a privilege to prevent his spouse from testifying. This is no longer the law after *Trammel v. United States*.

Subsection (b)(1) is the joint participants exception, derived from the Uniform Rules. Federal courts are split on the exception–for example, the Second Circuit rejects it and the Tenth Circuit accepts it. So the Committee must decide whether such an exception is good policy. The problem with the exception is that it tends to swallow the privilege since most spouses who invoke the privilege are probably involved in one way or another in their spouse's criminal activity. Casting the language in terms of "acting jointly in the commission" of the crime tends to limit the exception

somewhat (e.g., it probably would not cover accessories after the fact), and that is probably a good thing.

Subsection (b)(2) is derived from Rule 505 as initially proposed by the Advisory Committee. There is similar language in the Uniform Rule.

Derivation (cont.)

Note that Advisory Committee Rule 505 also provided the privilege did not apply as to testimony concerning matters occurring prior to the marriage. Only one federal court (the Seventh Circuit) has adopted this exception, meaning that in this Circuit the spouse must testify to adverse facts about the accused if the facts arose before their marriage. This rule makes little sense assuming that one believes that the adverse testimonial privilege is needed to preserve marital harmony at the time of the testimony. Since the focus is on the relationship at the time of the testimony, it shouldn't matter that the act testified to occurred before the marriage. Therefore, the "pre-marital acts" exception to the privilege is not included in the draft.

Subsection (b)(3) is derived from the Uniform Rule. Whether to establish a "harm to minors" exception–and whether to provide for an exception more limited than that set forth in the draft–are policy questions for the Committee.

Note: There is an a priori question of whether the adverse testimonial privilege should even be promulgated. Many states do not have such a privilege, and federal courts have not given the privilege a generous reading.

Matters for Advisory Committee Note on Adverse Testimonial Privilege–

1. The privilege does not apply to civil cases because the threat to marital harmony, and the emotional pressure on the witness, is not as severe as in criminal cases. Federal courts using a common law approach have refused to apply the privilege to civil cases.

2. The rule does not prohibit the government from seeking cooperation from a witness-spouse, e.g., by a plea agreement.

3. The rule does not prohibit the use of a spouse's out-of-court statement that is otherwise admissible under the hearsay rule.

4. Who is a spouse is defined by state law.

5. Where the privilege exists, it covers activity occurring before the marriage. The sham marriage exception entertained by some common law courts makes no sense after *Trammel*, which held that the privilege is held by the witness-spouse, not by the litigant. Thus, an accused would not likely engage in a sham marriage to invoke the privilege, because the invocation of the privilege is not within his control.

Privilege for Communications to Clerics

With Notes and Comments

(Tabled by Committee)

Rule 5–: Privilege for Confidential Communications to Clerics

Draft date March 21, 2002

(a) Definitions. As used in this rule:

(1) A "communication" is any expression through which a person intends to convey information to another person or any record containing such an expression;

(2) A "cleric" is a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the cleric.

(3) A communication is "in confidence" if, at the time and in the circumstances of the communication, the communicating person is seeking spiritual counsel, solace or absolution from a cleric and reasonably believes that no one except the cleric and others present in furtherance of the purpose of the communication will learn its contents.

(b) General Rule of Privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a communication made in confidence by that person to a cleric in the cleric's professional capacity as a spiritual adviser.

(c) Who May Claim the Privilege. The privilege under this rule may be claimed

(i) by the person who made the protected communication to a cleric;

(ii) by that person's guardian or conservator;

(iii) by that person's personal representative if that person is deceased; or

(iv) by the cleric to whom the communication was made, but only on behalf of the person who made the communication. A person who makes a communication in confidence under this Rule may, implicitly or explicitly, authorize a cleric to invoke the privilege on behalf of the communicating person.

Sources

The draft is derived from proposed Rule 506, as modified slightly by the Uniform Rules Committee. But it is adapted in form to comport with the structure in our drafts of the Lawyer-Client privilege and Physician-Patient privilege.

Notes and Issues for the Committee

1. As with all other privileges, the Committee must consider the *a priori* question of whether a privilege for communications to clerics merits codification. This privilege was one of those proposed by the original Advisory Committee, and it has been recognized under Federal Common Law.

2. A specific reference to Christian Science practitioners is added. This is also done in the Uniform Rules and in several states such as New York. The specific reference appears to be a recognition that the relationship between Christian Science practitioners and their religious organization is somewhat different from that of clerics and other organizations.

3. Mississippi adds a subdivision providing as follows:

> "A cleric's secretary, stenographer, or clerk shall not be examined without the consent of the cleric concerning any fact, the knowledge of which was acquired in such capacity."

This paragraph seems overbroad. It would appear to protect against disclosure of a cleric's records

of personal criminal activity, child sexual abuse, etc. But perhaps there should be some specific protection that would shield secretaries and the like who have information of confidential communications made by a "penitent".

4. Consideration might be given to exceptions to this privilege that parallel other privileges, specifically:

a. An exception for declarations of imminent bodily harm, analogous to the psychotherapist-patient privilege.

b. A crime-fraud exception, analogous to the attorney-client privilege.

c. An exception for statements concerning child and domestic abuse, analogous to the interspousal privilege.

My instinct is that these exceptions are not necessarily fully applicable to the clergy-communicant relationship. For example, the future harms exception is based on substantive law duties that psychotherapists have to protect third parties from imminent harm from patients. I am unaware of any substantive law that extends the *Tarasoff* duty to members of the clergy. If such an exception were adopted, however, it could read something like this:

There is no privilege under this rule for any communication in which a person has expressed an intent to engage in conduct likely to result in imminent death or serious bodily injury to any person and the disclosure of the communication is necessary to prevent that death or injury.

Beyond any substantive duty owed by the cleric to prevent imminent harms, the Committee may decide that such an exception is appropriate anyway as a matter of public policy.

As to the crime-fraud exception: it arises from a concern that a client may be using the attorney's legal services to violate the law. This concern is often well-founded. In contrast, it seems rather unlikely that a "penitent" would be using the cleric's services to further a plan of crime or fraud (as opposed to confessing past crimes, which should be protected by the privilege). However, if a crime-fraud exception were added to the clergy-communicant privilege, it could read something like this:

> **There is no privilege under this rule if a person consults a cleric to obtain assistance in engaging in a crime or fraud or aiding a third person to do so.**

As to confessions of child abuse, some states are proposing to add such an exception to the clergy-communicant privilege, with an exception if the cleric's religion would not permit disclosure. This is basically a policy question for the committee. If the exception were adopted, it could read something like this:

> **There is no privilege under this rule for a communication that is relevant to prove conduct related to physical or sexual abuse of a child.**

Alternatively, language might be lifted from the draft of the physician-patient privilege, which raises similar issues of disclosure of child abuse, but frames the exception more broadly to cover any statutory reporting obligation:

> **There is no privilege under this rule for a communication that is subject to a duty to disclose under the laws of the United States [or of any State or political subdivision thereof].**

As with the psychotherapist-patient privilege, it is for the Committee to decide whether there should be an exception for state-mandated (as opposed to federal-mandated) disclosure. The argument against permitting state mandated disclosure is that the federal privilege would then be controlled by state law.

5. The Committee Note should emphasize that the privilege is not limited to one-on-one sessions, but can protect communications where a number of people with a common problem confer with a cleric in order to obtain religious advice. The language in the Rule, declaring that a communication is confidential if made with "others present in furtherance of the purpose of the communication" is intended to cover multi-party exchanges. See *In re Grand Jury Investigation,* 918 F.2d 374 (3d Cir. 1990) (Becker, J.) ("As is the case with the attorney-client privilege, the presence of third parties, if essential to and in furtherance of the communication, should not void the privilege.").

6. The last line of the Rule parallels the implicit authorization language of the lawyer-client privilege. The original Advisory Committee proposal used a different approach, one that has been adopted in the Uniform Rule. Those rules treat the "who may claim?" question as follows:

(c) Who May Claim the Privilege. The privilege under this rule may be claimed

(i) by the person who made the protected communication to a cleric;

(ii) by that person's guardian or conservator;

(iii) by that person's personal representative if that person is deceased; or

(iv) by the cleric to whom the communication was made, but only on behalf of the person who made the communication. **The cleric's authority to invoke the privilege is presumed in the absence of evidence to the contrary.**

The presumption-based language in the original Advisory Committee proposal is probably based on the unique nature of a cleric's dilemma when ordered to disclose information received during spiritual counseling. The Privileges Subcommittee agreed that the language of implicit authorization should be used instead, to provide parallelism with the other proposed privileges. But if the Committee as a whole wishes to track the original Advisory Committee proposal, the presumption-based language can be substituted.

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Possible Future Amendments to the Evidence Rules, Including Changes to Accommodate Technology
Date: October 1, 2002

At its April 2001 meeting the Advisory Committee directed the Reporter to review scholarship, case law, and other bodies of Evidence law to determine whether there are any Evidence Rules that might be in need of amendment. At the April 2002 meeting the Committee reviewed a number of potential changes and directed the Reporter to prepare a report on each of 17 different rules, so that the Committee could take an in-depth look at whether these rules require amendment. The Committee's decision to investigate these rules further was not intended to indicate that the Committee had actually agreed to propose any amendments. Rather, the Committee determined that with respect to these rules, a more extensive investigation and consideration is warranted.

At the October 2002 meeting, the Evidence Rules Committee will begin to consider the Reporter's memoranda on some of the rules that have been found worthy of in-depth consideration. Of course, the Committee will not be able to consider all of these rules in a single meeting–it would be impossible for the Reporter to prepare detailed memoranda on, and for the Committee to give in-depth consideration to, each of the rules at one meeting.

It would seem to make sense to consider as many of the rules as can be fit into a single meeting, and if the Committee decides to propose an amendment to any of those rules, to defer any formal proposal until the Committee has considered all of the targeted rules at subsequent meetings. In other words, it would make sense to delay amendment proposals in order to prepare a *package* of amendments, should the Committee decide to propose any amendments at all.

There is precedent for the "packaging" approach to proposed amendments. The self-study of federal judicial rulemaking conducted by the Standing Committee recommends that Advisory Committees propose amendments as a package, rather than seriatim. In accordance with that policy, the Appellate Rules Committee deferred formal proposal of individual amendments until they could be proposed as a package after the restylized Rules took effect.

The timeline for a package of amendments would probably mean that the package, if any,

would go to the Standing Committee at its June meeting in *2004*, with a recommendation that the proposals (again, if any) be released for public comment.

At its last meeting, the Evidence Rules Committee did not have time to complete preliminary consideration of all of those Evidence Rules that have been highlighted either by scholarship, case law, or the Uniform Rules project as candidates for a possible amendment. With that in mind, the remainder of this memorandum proceeds in two parts. Part One sets forth the rules that the Committee decided to investigate further to determine whether an amendment is warranted. Part Two provides a short description of the rules that the Committee has not yet reviewed to determine whether a more in-depth investigation is necessary. These rules remain for preliminary consideration as an agenda item for the October, 2002 Committee meeting.

Nothing herein should be taken as a recommendation that any Rule should actually be amended. The Rules cited are those in which either scholarship, case law, or the Uniform Rules project has indicated some possible problem in the existing text of a Federal Rule. It is for the Committee to determine whether the substantial costs of amending a Rule are outweighed by the benefits of clarification or reformulation.

Changes to Accommodate Technology

Judge Smith has suggested that the Committee consider whether any of the Evidence Rules need to be amended to accommodate technological change. The Reporter previously prepared a report on whether the Evidence Rules need amendment in light of technological changes. That report concluded that the Evidence Rules appeared to be flexible enough to accommodate technological change without the necessity of a full-scale series of amendments to the Rules, and that courts and litigants have not had a significant problem in regulating electronic evidence under the existing Rules. The Committee considered that report and voted not to proceed with any amendments to the Rules at that time. For the convenience of the Committee, that Report is attached to this memorandum.

Also attached to this memorandum is an article by Greg Joseph on internet and email evidence. The article discusses how courts have sought to regulate technology-based evidence under the existing Rules.

It should be noted that the attached Report considered whether the Evidence Rules *as a whole* should be amended to accommodate technological change – for example, whether *all* of the Rules referring to "writings" or "papers" should be amended. The Report concluded that such a massive set of amendments could not at that point be justified, given the fact that the courts are construing the Rules broadly enough to accommodate electronic evidence. The Committee might determine,

however, that individual Rules are creating a problem or causing a controversy that justifies an amendment to a particular Rule. For example, the learned treatise exception, Rule 803(18), by its terms limits admissibility to "hardcopy" publications. This has led to arguments over whether the Rule is broad enough to cover electronic publications. The Committee has already instructed the Reporter to prepare a report on this matter; that report will be considered at a future meeting.

The Committee might also consider whether, if a Rule needs amendment on other grounds, it should also be amended to update its language to accommodate technology. For example, the report on Rule 412, set forth in this Agenda Book, notes that the procedural requirements in the Rule are cast in terms of a motion "in writing" and "papers." These outmoded terms probably do not themselves justify the cost of an amendment to Rule 412; but if the Rule is to be amended to address other problems that have arisen, it may well be appropriate to propose an update to the outmoded language as part of that amendment.

Accordingly, when the Committee directs the Reporter to prepare a report on the problems arising under a particular Rule, that report will consider whether any language in the text of the subject Rule might be changed to accommodate technological advancements in filing, in service, and in the presentation of evidence.

I. Rules Viewed By the Committee As Warranting Further Investigation

The consensus of the Committee at the April 2002 meeting was that the following rules should be the subject of in-depth consideration as candidates for possible amendment:

1. Rule 106

Should Rule 106 be amended to provide a rule of admissibility for completing evidence that would otherwise be excluded as hearsay? Should it be amended to cover oral as well as written statements? Should the "fairness" standard of the Rule be sharpened by including more specific criteria?

2. Rule 404(a)

Should the Rule be amended to clarify that defendants in civil cases are not permitted to offer character evidence circumstantially?

3. Rule 408

Should the Rule provide that a civil settlement cannot be admitted in a subsequent criminal case?

4. Rule 412

Should the Rule be amended to eliminate a textual anomaly? Should the Rule exclude evidence of false rape claims from its coverage?

5. Rule 606(b)

Should the Rule be amended to provide that juror testimony or affidavit is admissible to prove a clerical or mathematical error?

6. Rule 607

Should the Rule be amended to provide that a party is not permitted to call a witness solely for the purpose of impeachment with evidence that would not otherwise be admissible?

7. Rule 609

Should the Rule be amended in accordance with the Uniform Rule, which defines and clarifies the crimes that are automatically admissible under Rule 609(a)(2)?

8. Rule 613(b)

Should the Rule return to the common-law procedure, under which the proponent must lay a foundation for a prior inconsistent statement at the time the witness testifies?

9. Rule 704(b)

Should this Rule, excluding expert testimony about the mental state of the accused, be amended to limit its coverage to the testimony of mental health experts?

10. Rule 706

Should the Rule be amended to eliminate the reference to a show cause order and to clarify the procedure for appointing an expert?

11. Rule 801(d)(1)(B)

Should the Rule be amended to provide that a prior consistent statement is admissible as "not hearsay" whenever the statement would be admissible to rehabilitate the witness's credibility?

12. Rule 803(3)

Should the Rule be amended to provide that it does, or does not, provide a hearsay exception for statements offered to prove the state of mind and subsequent conduct of a non-declarant?

13. Rule 803(4)

Should this hearsay exception be amended to exclude from its coverage those statements made to medical personnel for purposes of litigation?

14. Rule 803(5)

Should the hearsay exception for past recollection recorded be amended to clarify that it covers records in which one party relates information to another and both parties vouch for the accuracy of the record?

Should the Rule be amended to provide coverage for records in electronic form?

15. Rule 803(6)

Should the Rule be amended to clarify that those who report information included in a business record must be under a business duty to do so?

16. Rule 803(8)

Should the Rule be amended to delete the subdivisions, in favor of a Rule that provides an exception for any public report unless the circumstances of preparation indicate untrustworthiness?

17. Rule 803(18)

Should the Rule be amended to provide a hearsay exception for authoritative sources that are in electronic form?

II. Rules Remaining For Initial Consideration By the Committee

Rule 804(a)(5)

Rule 804(a)(5) contains a deposition preference for statements that are offered under the declaration against interest exception when the asserted ground of unavailability is that the declarant is absent. It provides that a declarant is unavailable due to absence if the declarant:

> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

The following discussion from the *Federal Rules of Evidence Manual* sets out the problem with the drafting of the Rule:

> A declarant is not absent under the terms of Rule 804(a)(5) simply because he is out of the jurisdiction or cannot be located. The party relying on absence to support an offer of hearsay evidence, in the case of any of the basic exceptions covered by subdivision (b) of Rule 804 aside from former testimony, must demonstrate that it has not been possible to take a deposition. The Senate objected to the requirement that an attempt to depose be required. But the Rule follows the House provision in requiring a showing of inability to obtain *testimony* of a declarant before a dying declaration, statement against interest, or statement of pedigree can be admitted on the ground that the declarant is absent. As a practical matter, the issue does not arise for statements offered as dying declarations or statements of pedigree. The ground of unavailability for dying declarations is ordinarily death, not absence; and statements of pedigree are rarely offered. So the deposition requirement with respect to the absence ground of unavailability is really limited to situations in which the proponent has a statement that would otherwise be admissible as a declaration against interest, and the asserted ground of unavailability is absence.
>
> Rule 804(a)(5) requires an attempt to depose. The rationale is that if a deposition can be taken, the deposition testimony will be admissible as prior testimony; and prior testimony is preferred to the declaration against interest, for the very reason that prior testimony has been subject to cross-examination. Consequently, if the attempt to depose is successful, the hearsay declarant is no longer considered unavailable and statements falling within 804(b)(3), (or technically (2) or (4)) are no longer admissible for their truth.
>
> The problems created by the deposition preference in Rule 804(a)(5) are well-illustrated by *Campbell v. Coleman Co.*, 786 F.2d 892 (8th Cir. 1986). The minor plaintiffs

alleged that they were severely burned by a defective gasoline lantern that exploded. Coleman had a different theory: that Johnnie Hayes, who was babysitting the children, overfilled the lighted lantern with gasoline, then panicked and threw the burning lantern out of the house where it accidentally hit the children. Coleman had deposed Hayes, but at the deposition, Hayes flatly denied having anything to do with the accident. The deposition was not introduced at trial. However, Hayes had made several statements to various people implicating himself in the accident, and these were introduced at trial as declarations against interest. Coleman contended that Hayes was unavailable on the ground of absence because it had made good faith attempts to locate him before trial, and he could not be found. The Trial Court admitted the statements, but the Court of Appeals found that this was reversible error, because Hayes was not absent within the meaning of Rule 804(a)(5). As the Court put it, the "subsection is concerned with the absence of testimony, rather than the physical absence of the declarant." Thus, while Hayes was absent from the trial, his testimony was available (i.e., the deposition), and his hearsay statements were therefore not admissible under Rule 804(b)(3).

The result in *Coleman* shows that the deposition preference can create anomalous results. Hayes' deposition was undoubtedly a *less* reliable indicator of what happened than were his informal statements against interest. The congressional assumption that a declaration against interest is not necessary where a deposition can be or has been taken assumes that the proponent will get the same information, only better, from the deposition as from the declaration against interest. But *Coleman* shows that this is not always the case. The anomaly of the Rule is even more striking when it is considered that if Hayes were dead or declaring the privilege at the time of trial, the declarations against interest would have been admissible. The deposition preference is applied only when absence is the asserted ground of unavailability. Clearly, this makes no sense. If nothing else it is inconsistent with the general goal of Rule 804(a), which was to provide a unitary test of unavailability for all hearsay exceptions. Finally, the deposition preference is problematic because it ends up penalizing parties who depose witnesses in a timely fashion. If Coleman had not bothered to depose Hayes before he disappeared, the declarations against interest would have been admissible. It seems odd to penalize Coleman for engaging in diligent efforts to prepare for litigation.

Because there is a deposition preference in Rule 804(a)(5), however misguided it might be, it follows that a declarant will not be considered absent for purposes of Rules 804(b)(2)-(4) simply because he is outside the jurisdiction and beyond the subpoena power. The Federal Rules of Civil and Criminal Procedure make provision for deposing witnesses who are beyond the territorial jurisdiction of the Court. If the witness is deposeable, he is not absent under Rule 804(a)(5).

The anomaly of the deposition preference could be remedied by simply deleting it, thereby providing that the declarant is unavailable due to absence when the declarant:

> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance ~~(or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony)~~ by process or other reasonable means.

Rule 804(b)(1)

The Rule provides a hearsay exception for prior testimony when offered against a party who either 1) had a similar motive and opportunity to develop the testimony at the time it was given, or 2) in civil cases, had a predecessor in interest with such a similar motive and opportunity at the time the testimony was given. Some courts have defined a "predecessor in interest" as *anyone* who had a similar motive and opportunity to develop the testimony, at the time it was given, as the opponent would have at the instant trial; these courts do not require some legal relationship between the prior party and the party against whom the evidence is now offered. This construction collapses the term "predecessor in interest" with the term "similar motive". See, e.g., *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3rd Cir. 1978) (prior testimony properly admitted against plaintiff, where prior party had a similar motive to develop the testimony as the plaintiff in the instant case would have were the declarant to testify at trial; Judge Stern, concurring, states that such an expansive definition of "predecessor in interest" effectively reads that term out of the Rule); *Horne v. Owens-Corning Fiberglass Corp.*, 4 F.3d 276 (4th Cir. 1993) (prior testimony from a different case properly admitted against the plaintiff, where the previous plaintiff, though not affiliated in any way with the plaintiff, had a similar motive to develop the testimony). Other courts have admitted such evidence not as prior testimony (for want of a predecessor in interest) but as residual hearsay. See *Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir. 1985).

If the Committee were to decide to codify the cases that read the predecessor in interest requirement out of the Rule, the amendment might look like this:

> (1) Former testimony.—Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, ~~a predecessor in interest~~ any other party, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Rule 806

Rule 806 provides as follows:

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

The Rule states that a hearsay declarant's credibility may be attacked "by any evidence which would be admissible" if the declarant had testified as a witness. The language raises a problem when the proponent wishes to attack the declarant by proffering specific bad acts to prove the witness' character for untruthfulness. Rule 608(b) prohibits extrinsic proof of bad acts when offered to show the witness' character for untruthfulness. Rule 806 could therefore be read literally as imposing a substantial limitation on bad acts impeachment of a hearsay declarant–because extrinsic evidence will often be the only way to introduce such acts without the witness being there to admit them. Some courts have refused to read the Rule literally, holding that extrinsic evidence of a bad act offered to prove a hearsay declarant's character for veracity is admissible (subject to Rule 403). The reasoning is that since the declarant is not available for cross-examination, extrinsic evidence is "the only means of presenting such evidence to the jury." *United States v. Friedman,* 854 F.2d 535, n.8 (2d Cir. 1988).

Professor Cordray, in *Evidence Rule 806 and the Problem of the Nontestifying Declarant*, 56 OHIO STATE L.J. 495, 526 (1995), discusses the problems arising from a literal interpretation of Rule 806 that would prohibit extrinsic evidence of bad acts offered to prove the untruthful character of the declarant:

> If the attacking party cannot impeach the declarant with specific instances of conduct, she is clearly worse off than she would have been if her opponent had called the declarant to testify. * * *
>
> In addition, if Rule 806 is applied to enforce the prohibition on extrinsic evidence, parties might be encouraged to offer hearsay evidence rather than live testimony. For example, if a party felt that a witness was vulnerable to attack under Rule 608(b), that party might attempt to insulate the witness from this form of impeachment by offering his out-of-court statements, rather than calling him to testify. If, however, the attacking party were allowed to impeach a nontestifying declarant with extrinsic evidence of untruthful conduct, the incentive to use hearsay evidence would be removed. * * *

These considerations militate strongly in favor of modifying Rule 608(b)'s ban on extrinsic evidence when the attacking party seeks to impeach a nontestifying declarant with specific instances of conduct showing untruthfulness.

But at least one Court has held that extrinsic evidence may never be admitted to prove a bad act offered to impeach a hearsay declarant's character for truthfulness. The Court in *United States v. Saada*, 212 F.3d 210 (3d Cir. 2000), relied on the "plain language" of Rule 806, which it read as creating exactly the same impeachment rules for in-court witnesses and hearsay declarants, with one exception–impeachment with inconsistent statements (as to which the requirement at trial of confronting the witness with the statement is specifically excused under Rule 806). The *Saada* Court found that the Rule's express exception for different treatment of inconsistent statements cut against any judicially-created exception for bad acts impeachment of a declarant. The Court recognized that the ban on extrinsic proof, as applied to impeachment of hearsay declarants, "prevents using evidence of prior misconduct as a form of impeachment, unless the witness testifying to the hearsay has knowledge of the declarant's misconduct." Nevertheless, this drawback "may not override the language of Rules 806 and 608(b)."

The problem with the reasoning in *Saada* is that it is inconsistent with the *intent* of Rule 806, which is to give the opponent of the hearsay the same leeway for impeachment as it would have if the declarant testified at trial. Under *Saada*, the opponent of the hearsay is put in a worse position with respect to bad acts of the hearsay declarant. The bad acts could at least be referred to if the declarant were to testify, whereas if the statement is introduced as hearsay it is unlikely that the jury will hear about the hearsay declarant's bad acts (unless by chance there is a witness bringing in the hearsay statement who has personal knowledge about the declarant's bad acts).

Another problem with the language of the Rule is that the first sentence treats agent and coconspirator admissions (admitted under Rule 801(d)(2)) the same as the hearsay statements of any other declarant admitted under the "exceptions." This is the proper result, because there is no analytical distinction, for purposes of impeaching a hearsay declarant, between statements offered under the exceptions and statements offered under the "not hearsay" category of agency admissions. The problem is that the last two sentences of the rule refer to "hearsay" statements–as such these sentences would not seem to cover impeachment of declarants whose statements are admitted under the exceptions for agency admissions. This would mean that a party could not admit the inconsistent statement of an agent for impeachment purposes without confronting the declarant with the statement, and could not examine such a declarant as if on cross-examination if the party decided to call the agent. There seems to be no reason to treat agents of a party the same as other hearsay declarants for one purpose (the first sentence of Rule 806), but to differentiate them for other purposes (the second and third sentences of Rule 806). Thus, an argument can be made that the Rule should be amended so that agent-declarants are subject to the same treatment as hearsay declarants for all purposes of the Rule.

If Rule 806 were to be amended to solve both anomalies discussed above, it might read like this:

> When a hearsay statement, or a statement defined in rule 801(d)(2) (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's ~~hearsay~~ statement that is admitted in evidence, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. Extrinsic evidence offered to show the declarant's character for untruthfulness is admissible subject to Rule 403. If the party against whom ~~a hearsay~~ the declarant's statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

If the Committee does decide to have a go at this Rule, it might be advised to scrap its rambling structure and use subdivisions to make the various points.

Rule 807

Rule 807 permits the admission of residual hearsay only if that hearsay is "not specifically covered" by another exception. This might seem to indicate that hearsay that "nearly misses" one of the established exceptions should not be admissible as residual hearsay--because it is specifically covered by, and yet not admissible under, another exception. In fact, however, most courts have construed the term "not specifically covered" by another hearsay exception to mean "not admissible under" another hearsay exception. See, e.g., *United States v. Fernandez,* 892 F.2d 976 (11th Cir. 1989) (grand jury statement is "not specifically covered" by another hearsay exception because it is not admissible under any such exception). Compare *United States v. Dent,* 984 F.2d 1453 (7th Cir. 1993) (Easterbrook, J., concurring) (arguing that grand jury testimony can never be admissible as residual hearsay, since such testimony is specifically covered by, though not admissible under, the hearsay exception for prior testimony).

The predominant construction of the term "not specifically covered" indicates a much more liberal use of the residual exception than was contemplated by Congress. It is fair to state that Congress intended the residual exception to be used in only exceptional circumstances. But the courts have used the residual exception to create whole new categories of hearsay exceptions, e.g., a hearsay exception for grand jury statements and another for statements by children in sex abuse prosecutions. It is notable that the Uniform Rules Committee has added language to its version of Rule 807 to limit its scope to "exceptional circumstances".

Another possible problem with the residual exception involves the notice requirement. The Rule states that "a statement may not be admitted" under this exception unless the proponent gives notice "sufficiently in advance of trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it." Most courts have read the notice requirement far more flexibly than its language would seem to indicate. For example, most courts have held that the notice requirement can be satisfied by providing notice at trial, so long as the adversary is given sufficient time to prepare. See, e.g., *United States v. Baker,* 985 F.2d 1248 (4th Cir. 1993). Other courts have read a good cause exception into the notice requirement. See, e.g., *United States v. Lyon,* 567 F.2d 777 (8th Cir. 1977). But see *United States v. Ruffin*, 575 F.2d 346 (2d Cir. 1978) (rejecting a good cause exception as not permitted by the text of the Rule).

If the Committee wishes to retain the rigid notice requirement in Rule 807, there is not much it can do to amend the Rule that could make the courts comply. The Rule already says that a statement may not be admitted if the notice provision is not met. An amendment such as "and we really mean it" would not seem workable. On the other hand, the Committee might wish to amend the notice requirement to codify the predominant case law, which essentially reads a "good cause" requirement into the Rule.

Assuming that the Committee wishes to amend Rule 807 to limit its scope to its original intent, and also wishes to codify the case law on notice, the Rule might look like this:

Rule 807. Residual Exception

In exceptional circumstances a ~~A~~ statement not specifically covered by Rule 801(d), 803 or 804 but having equivalent, though not any of the same, circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent ~~of it makes known to the~~ gives all adverse ~~party~~ parties ~~sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it,~~ reasonable notice in advance of trial of the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant, unless the court excuses pretrial notice for good cause shown.

Reporter's Note: The amendment to the first sentence is not related to the amendment to the notice provision, so the Committee could choose to pursue one or the other, both, or neither. If the Committee decides to pursue an amendment to both sentences to the Rule, it might consider restructuring the Rule so that it flows better stylistically.

Rule 901(b)

Judge Victor E. Bianchini & Harvey Bass, in *A Paradigm for the Authentication of Photographic Evidence in the Digital Age,* 20 T. Jefferson L. Rev. 303 (1998), argue that the traditional authentication methods under the Evidence Rules may be inadequate to deal with the special risks of alteration and forgery presented by digitally produced photographic evidence. The authors contend, with some justification, that the chances of detecting a digital manipulation of a photograph are substantially less than the chances of detecting manipulation of a traditional photo. The authors propose an amendment that would add a new subdivision to Rule 901(b), to create a special category for digitally created evidence. The amendment to Rule 901(b) would read as follows:

> (b) Illustrations.—By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> * * *
>
> (11) In the case of photographic evidence generated digitally from computer sources, the proponent of such evidence shall make the original computer data files available for examination upon request. Computer generated negatives, prints or other images created by emulsion-based "film recorders" or other such devices capable of masking the digital nature of the source, shall not be admissible unless such prints are digitally imprinted with a "fingerprint" identifying such print as having been so generated.

Reporter's Note: This proposal might have some merit, but it probably should not be placed in Rule 901(b). That Rule simply provides illustrations of ways to authenticate evidence. It does not impose limitations. Perhaps this proposal is better placed at the end of Rule 901(a), which sets forth the standard for authenticity, or as a separate rule at the end of Article IX.

Rule 902(1)

The Rule provides for self-authentication of domestic documents under seal, as follows:

(1) Domestic public documents under seal.—A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

There is no longer a Canal Zone, so that reference has become outmoded. An amendment might be proposed to delete that reference as part of general housekeeping.

Rule 902(2)

The Advisory Committee has previously considered, and tabled, a proposal that would provide an alternative to the requirement of a seal for self-authenticating public documents. The proposed amendment and draft Committee Note follows:

Rule 902. Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. – A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution. **[See previous page for clerical amendment to this paragraph]**

(2) Domestic public documents not under seal. – A document not bearing a seal but purporting to bear a signature of an officer or employee of any entity listed in paragraph (1) of this rule, affixed in the officer's or employee's official capacity. ~~A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.~~

* * *

Committee Note for this Alternative

The Rule has been amended to provide for a means of self-authentication of public documents other than through the use of a seal. A number of states have established a presumption of authenticity for certain public documents that purport to bear a signature of a public official in his or her official capacity. See, e.g., Cal. Evid. Code § 1453; Fla. Stat. Ann. § 90.902; La. Code Evid. Art. 902(2); Nev. Stat. Ann. § 52.125; N.J. R. Evid. 902(b); R.I. R.Evid. 902(2); Vt. R.Evid. 902(2). Litigants in federal court have not surprisingly found it difficult to obtain a public document with a seal from these states. A relaxation of the requirements for self-authentication of public documents is justified by the diminished importance of the seal and improved methods of detecting forgeries.

Reporter's Note: This proposal was deferred so that the Justice Department could make a showing that the existing sealing requirement was imposing hardships for government attorneys in practice. While no such showing has been made, it may be appropriate to consider

the proposal on its merits. The proposal is consistent with the law in many states. Those states seem to be finding a sealing requirement to be an unnecessary formality.

Rule 902(6)

Greg Joseph, a former member of the Advisory Committee member, has suggested that if the Committee would ever consider amending Rule 902 again, that it might consider as part of the amendment a change to Rule 902(6). Rule 902(6) provides that extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to:

> (6) Newspapers and periodicals. – Printed materials purporting to be newspapers or periodicals.

Greg notes that it is difficult to use paragraph (6) to authenticate electronic or hardcopy of material made available over the internet. This would include everything from Slate magazine to wire service reports like Reuters. Under the text of the Rule, there is no presumption of authenticity for these electronic materials. However, under Rule 901, the proponent can still show on the facts that the electronic material is what the proponent claims it to be.

If the Committee wishes to provide that online materials in the nature of newspapers or periodicals are self-authenticating, then the following change can be made to the Rule:

Rule 902. Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

* * *

(6) Newspapers, ~~and~~ Periodicals, and Other Regularly Published Information. – ~~Printed materials~~ Materials purporting to be newspapers, ~~or~~ periodicals, or other regularly published information, whether in printed or electronic form.

* * *

The Committee Note might read as follows:

COMMITTEE NOTE

The Rule has been amended to extend the presumption of authenticity from printed newspapers and periodicals to similar electronic and online sources. The importance and prevalence of these sources, together with improved methods of detecting forgery, justify a presumption of authenticity.

Rule 1006

Rule 1006 allows admission of summaries in lieu of having the voluminous originals presented at trial. This use of summaries in this manner should be distinguished from charts and summaries used only for demonstrative purposes to clarify or amplify argument based on evidence that has already been admitted. *See, e.g., Air Disaster at Lockerbie Scot. on Dec. 21, 1988*, 37 F.3d 804 (2d Cir. 1994) (finding no error where experts gave their opinions on the adequacy of PanAm security measures, relying from time to time on trial transcripts displayed on a projection screen; Rule 1006 objection was misplaced because the trial transcripts were records of testimony at the trial itself). Some courts have considered the "admissibility" of charts and summaries of trial evidence under Rule 1006, but this is a mistake; the Rule is really not applicable because pedagogical summaries are not evidence. See, e.g., *United States v. Sawyer,* 85 F.3d 713 (1st Cir. 1996) (applying Rule 1006 to approve the use of summaries based on evidence that had already been admitted at trial); *United States v. Stephens,* 779 F.2d 232 (5th Cir. 1985) (same).

It might be possible to alleviate some confusion by clarifying that Rule 1006 does not regulate the presentation of summaries of trial evidence. An amendment might look like this:

Rule 1006. Summaries

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court. <u>This rule does not govern the presentation of summaries of evidence that has been admitted at trial</u>.

Appendix to Report on Consideration of Possible Amendments

Memo Concerning Possible Amendments to the Evidence Rules to Take Account of Technological Advances in the Presentation of Evidence

Note to Committee for October 2002 meeting: See information update on page 15 of this Report.

Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Progress Report on Accommodating Technological Advances in the Presentation of Evidence
Date: March 1, 1998

At the last Committee meeting, I was instructed to review the Evidence Rules to determine whether an amendment or amendments might be necessary to make the rules compatible with technological developments in the presentation of evidence. I have conducted a review of all of the reported federal cases concerning the admissibility of "computerized" evidence, broadly defined. I have also read most of the published literature on the subject--though I probably could have stopped after reading Greg Joseph's materials because everything else is derivative of his work (some with attribution, some not). And I have reviewed some of the other legislative attempts to treat computerized evidence, including the Uniform Rules project and the new Maryland Rules.

This memo contains a description of the above-mentioned background information; a discussion of the rules that might be considered problematic in relation to computerized evidence; a description of the potential scope of any attempt to amend the rules in light of new technology; a discussion of some possible solutions; and some suggestions of where the Committee might go from here.

Rules That Might Be Affected By Technology

Computerized evidence is evidence. Therefore, any reference in the Rules to "evidence" can accommodate any technological change without need for amendment. However, computerized evidence is not necessarily a "document" or a "writing" or a "record" or a "memorandum." That is, any reference to a paper or other tangible product might be considered in tension with evidence that is produced through an electronic medium. Therefore, any Rule that uses one of those terms is, at least potentially, one that might need to be amended to accommodate technology. What follows is a list of the rules containing these potentially problematic terms. I have separated out the rules that refer to "writings" from the rules that refer to other written instruments such as "records." The reason for this is that one possible way to amend the rules is to expand the applicability of the broad definition of "writings" in Rule 1001 to other rules. This solution only works, of course, if the rule to be effected refers to a "writing."

Note that the references to "writings" and "recordings" in Article 10 are not considered in this section, because those terms are expansively defined in Rule 1001 to include "letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other forms of data compilation." This definition is at least arguably expansive enough to cover computer-generated information.

It should be noted, however, that the Uniform Rules proposal to amend Rule 1001 would delete the term "data compilation" and replace it with "other technology in perceivable form." Any broad-scale attempt to amend the rules might consider whether the term "data compilation" is itself an outmoded way to define computer-generated evidence. This point will be discussed later on in this memorandum.

Rules That Refer to "Writing" or "Written"

1. Rule 106. Remainder of or Related Writings or Recorded Statements

When a **writing** or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other **writing** or recorded statement which ought in fairness to be considered contemporaneously with it.

2. Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

* * *

(c) PROCEDURE TO DETERMINE ADMISSIBILITY –

(1) A party intending to offer evidence under subdivision (b) must –

(A) file a **written** motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing *in camera* and afford the victim and parties the right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

Note also that Rule 412 refers to "papers" in subdivision (c)(2). This could also be a potential problem with respect to computerized information.

3. Rule 609. Impeachment by Evidence of Conviction of Crime

* * *

(b) *Time limit.* — Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its

prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance **written** notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

4. Rule 612. Writing Used to Refresh Memory

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a **writing** to refresh memory for the purpose of testifying, either —

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the **writing** produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the **writing** contains matters not related to the subject matter of the testimony the court shall examine the **writing** in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a **writing** is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

5. Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement.* — A ``statement'' is (1) an oral or **written** assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant.* — A ``declarant'' is a person who makes a statement.

(c) *Hearsay.* — ``Hearsay'' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

6. Rule 901. Requirement of Authentication or Identification

* * *

(b) *Illustrations.* — By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

* * *

(7) Public **records** or reports. — Evidence that a **writing** authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public **record**, report, statement, or **data compilation**, in any form, is from the public office where items of this nature are kept.

Note that Rule 901(7) also refers to "records" and this could be problematic in light of computerization. However, the word "record" is grouped with "data compilation" and it is at least arguable that this term is comprehensive enough to accommodate advances in technology. Note also, however, that the Uniform Rules proposal would replace the term "data compilation" with the phrase "other technology in perceivable form". This updated language does seem more flexible and thus able to cover all types of computer-generated information, including advances in communication and presentation that might be developed in the future.

7. Rule 903. Subscribing Witness' Testimony Unnecessary

The testimony of a **subscribing** witness is not necessary to authenticate a **writing** unless required by the laws of the jurisdiction whose laws govern the validity of the **writing**.

The reference to a "subscribing" witness may or may not be considered potentially outmoded.

Rules That Refer to "Document", "Record" "Certificate," "Memorandum", or Other Terms That Might Not Accommodate Electronic Proof.

1. Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(5) *Recorded recollection.* — A **memorandum** or **record** concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the **memorandum** or **record** may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) *Records of regularly conducted activity.* — A **memorandum**, **report**, **record**, or **data compilation, in any form**, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the **memorandum, report, record, or data compilation**, all as shown by the testimony of the custodian or other qualified witness, 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.

Note that while Rule 803(6) contains problematic references to memoranda, records and reports, it also includes "data compilations in any form". It is possible, though not certain, that this term is broad enough to cover any computerized evidence that would otherwise be admissible under this Rule. The Uniform Rules proposal would replace the term "data compilation" with the phrase "other technology in perceivable form". This updated language does seem more flexible and thus able to cover all types of computer-generated information, including advances in communication and presentation that might be developed in the future.

(7) *Absence of entry in records kept in accordance with the provisions of paragraph (6).* — Evidence that a matter is not included in the **memoranda, reports, records**, or **data compilations, in any form**, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a **memorandum, report, record, or data compilation** was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

See the note after Rule 803(6).

(8) *Public records and reports.* — **Records, reports**, statements, or **data compilations, in any form**, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

See the note after Rule 803(6).

(9) *Records of vital statistics.* — **Records or data compilations, in any form**, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

See the note after Rule 803(6).

(10) *Absence of public record or entry.* — To prove the absence of a **record, report,** statement, or **data compilation, in any form**, or the nonoccurrence or nonexistence of a matter of which a **record, report,** statement, or **data compilation, in any form,** was regularly made and preserved by a public office or agency, evidence in the form of a **certification** in accordance with rule 902, or testimony, that diligent search failed to disclose the **record**, **report,** statement, or **data compilation**, or **entry**.

See the note after Rule 803(6).

(11) *Records of religious organizations.* — Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept **record** of a religious organization.

(12) *Marriage, baptismal, and similar certificates.* — Statements of fact contained in a **certificate** that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) *Family **records**.* — Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

Note: Besides the reference to records in the title, the items described in the rule are physically-oriented. Query whether the language "or the like" would be broad enough to cover electronically stored or generated family records.

(14) ***Records** of documents affecting an interest in property.* — The **record** of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded **document** and its execution and delivery by each person by whom it purports to have been executed, if the **record** is a **record** of a public office and an applicable statute authorizes the recording of **documents** of that kind in that office.

(15) *Statements in **documents** affecting an interest in property.* — A statement contained in a **document** purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the **document**, unless dealings with the property since the **document** was made have been inconsistent with the truth of the statement or the purport of the **document.**

(16) *Statements in ancient **documents**.* — Statements in a **document** in existence twenty years or more the authenticity of which is established.

* * *

2. Rule 901. Requirement of Authentication or Identification

* * *

(b) *Illustrations.* — By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

* * *

(8) Ancient **documents or data compilation**. — Evidence that a **document or data compilation**, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

Again, note that the term "data compilation" may render any amendment unnecessary. Though again, the term "data compilation" itself might be considered outmoded. Also note that the hearsay exception for ancient documents refers only to documents and not data compilations--meaning that, under the current rules, an electronically generated "ancient"

data compilation might be authenticated and yet not admissible if offered for its truth.

3. Rule 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) *Domestic public **documents** under seal.* — A **document** bearing a **seal** purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a **signature** purporting to be an attestation or execution.

Note that the word "signature" may be problematic, or at least it might need to be clarified that "signature" could include some kind of electronic transmission. Also, the term "seal" denotes a physical act that might not be considered to encompass an electronic process.

(2) *Domestic public **documents** not under seal.* — A **document** purporting to bear the **signature** in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee **certifies** under **seal** that the **signer** has the official capacity and that the **signature** is genuine.

See the comment to Rule 902(1).

(3) *Foreign public **documents**.* — A **document** purporting to be **executed** or **attested** in an official capacity by a person authorized by the laws of a foreign country to make the **execution** or **attestation**, and accompanied by a final **certification** as to the genuineness of the **signature** and official position (A) of the **executing** or **attesting** person, or (B) of any foreign official whose **certificate** of genuineness of **signature** and official position relates to the **execution** or **attestation** or is in a chain of **certificates** of genuineness of **signature** and official position relating to the **execution** or **attestation**. A final **certification** may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official **documents**, the court may, for good cause shown, order that they be treated as presumptively authentic without final **certification** or permit them to be evidenced by an **attested** summary with or without final **certification**.

This rule is rife with references which could be read to be limited to physical, as opposed to electronic, sources of proof.

(4) ***Certified copies of public records.*** — A **copy** of an official record or report or entry therein, or of a **document** authorized by law to be **recorded or filed** and actually **recorded or filed** in a public office, including **data compilations in any form**, **certified** as correct by the custodian or other person authorized to make the **certification,** by **certificate** complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

Again, the term "data compilation" probably makes the rule broad enough to cover electronic records. However, the records must be "certified" and that could be read as a reference to physical rather than electronic proof.

(5) *Official publications.* — **Books, pamphlets**, or other **publications** purporting to be issued by public authority.

Note that while "Books" and "pamphlets" could be read as limited to "hardcopy", the reference to "other publications" is probably broad enough to cover electronic evidence.

(6) *Newspapers and periodicals.* — **Printed materials** purporting to be newspapers or periodicals.

This rule clearly limits self-authentication to printed, as opposed to online, materials. Though maybe it could be argued that an online publication becomes "printed" if it gets printed out.

(7) *Trade inscriptions and the like.* — Inscriptions, signs, tags, or labels purporting to have been **affixed** in the course of business and indicating ownership, control, or origin.

(8) ***Acknowledged documents.*** — **Documents** accompanied by a **certificate of acknowledgment executed** in the manner provided by law by a notary public or other officer authorized by law to take **acknowledgments**.

(9) *Commercial* ***paper*** *and related* ***documents.*** — Commercial **paper, signatures** thereon, and **documents** relating thereto to the extent provided by general commercial law.

The reference to paper may not be as problematic as it sounds, since the Uniform Commercial Code defines commercial paper with reference to wire and electronic communication.

(10) *Presumptions under Acts of Congress.* — Any **signature, document**, or other matter declared by Act of Congress to be presumptively or *prima facie* genuine or authentic.

The term "other matter" can probably be construed expansively enough to cover computerized evidence that might be declared prima facie genuine by an Act of Congress.

Overview of the Possible Need to Modernize the Evidence Rules in Light of Computerization.

There are 29 rules set forth above that are arguably in tension with technological innovations in the presentation of evidence. If the term "data compilation" is considered sufficient to cover any kind of electronically generated evidence, then the number of rules arguably in need of amendment is reduced to 22. Amending 29 or even 22 rules is a daunting task that should only be undertaken if absolutely necessary.

It does not appear, at this point, that it is necessary to amend any of the Evidence Rules to accommodate electronic presentation of evidence. If the reported cases are any indication, the courts have handled computerized evidence quite well under the Rules as they exist. The following discussion describes the current use of electronic evidence, and the treatment of that evidence in the reported federal cases.

Computerized evidence comes in five basic forms at this time:

1. First, a business record is often presented in the form of a computer print-out. Courts have had little problem in using Rules 803(6) and 901 to admit computerized business records. Basically, a computerized business record is admissible whenever a comparable hardcopy record would be admissible. They are authenticated as are other records, and no special rule change seems to be required to allow the courts to rule on the admissibility or authenticity of business records. See *United States v. Whitaker,* 127 F.3d 595 (7th Cir. 1997) (authenticity and admissibility of computerized business records is established by general principles applicable to noncomputerized records); *Potamkin Cadillac Corp. v. B.R.I. Coverage Corp.*, 38 F.3d 627 (2d Cir. 1994) (computerized records were not admissible as business records where the underlying information was prepared in anticipation of litigation and would not itself have been admissible). See also *Monotype Corp. v. International Typeface Corp.*, 43 F.3d 443 (9th Cir. 1994) (no error in excluding e-mail from employee of Microsoft to a superior, since such a communication was not regularly conducted activity within the meaning of Rule 803(6)).

2. Second, a computerized presentation may be offered as proof of how an event occurred. For this purpose, the use of a computer to recreate an event is no different in kind from videotaping a reconstruction of a car crash. Courts consistently apply Rule 403 to determine whether the recconstruction is substantially similar to the original conditions. If the conditions are substantially different, the purported reconstruction, computerized or not, is excluded as substantially more prejudicial than probative. See, e.g., *Racz v. R.T. Merryman Trucking, Inc.*, 1994 WL 124857 (E.D.Pa. 1994) (computerized accident reconstruction held inadmissible under Rule 403, because not all data was taken into account). Any problems of authenticating such a computerized demonstration are handled by Rule 901(b)(9), which permits authentication for "[e]evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result."See Greg Joseph, *A Simplified Approach to Computer-Generated Evidence and Animations,* SB67 ALI-ABA 81 (1997) (noting ways in which authentication questions

can be easily handled under current Rule 901(b)(9)). There might also be hearsay problems in the preparation of the demonstration, and there might be problems of reliability under *Daubert* due to the probable use of experts in the recreation process. But these problems are dealt with under standard evidentiary principles that apply to noncomputerized evidence. Fulcher, *The Jury as Witness,* 22 U.Dayton L.Rev. 55 (1996) (noting that the admissibility of computerized recreations can be and has been handled by standard evidentiary principles).

3. Third, a computerized presentation may be offered to illustrate an expert's opinion or a party's version of the facts. As with any other such illustration, a computerized presentation is admissible if it helps to illustrate the expert's opinion, or a party's version of the facts, and does not purport to be a recreation of the disputed event. Again, standard evidentiary principles such as Rule 403 and Rule 702 have appeared to work well. See *Hinkle v. City of Clarksburg,* 81 F.3d 416 (4th Cir. 1996) (finding no "practical distinction" between computer-animated videotapes and other types of illustrations; computer animation was properly admitted where the jury "fully understood this animation was designed merely to illustrate appellees' version of the shooting and to demonstrate how that version was consistent with the physical evidence.").

4. Fourth, a computerized presentation may be offered as a pedagogical device, either to illustrate or summarize the trial evidence to the party's advantage, or to aid in the questioning of a witness. Such computerized presentations are not evidence at all. They are no different in kind from a hardcopy summary or the highlighting of trial testimony or critical language from documents at issue in the case. The question is whether the presentation fairly characterizes the evidence. If the presentation is unfair, computerized or not, it will be prohibited under Rules 403 and 611. See Borelli, *The Computer as Advocate: An Approach to Computer-Generated Displays in the Courtroom,* 71 Ind.L.J. 439 (1996):

> If one treats the [computerized] display as an extension of the attorney's argument, then it should be subject to the same guidelines that govern what an attorney may say. Proper argument is supposed to be confined to facts introduced in evidence, facts of common knowledge, and logical inferences based on the evidence. Similarly, an attorney cannot argue about facts not in the record, misstate testimony, or attribute to a witness testimony not actually given. If the lawyer discloses the display to the opposing counsel and the judge beforehand, which is the recommended procedure anyway, then its basis in the evidence can be verified and the program altered, if need be. If an attorney using a computer display abides by these ground rules, then it should be allowed as a pedagogical device [without any need to change the evidence rules].

5. A computerized presentation might be offered as a summary of otherwise admissible evidence that is too voluminous to be conveniently examined in court. Such a presentation would be treated as a summary under Rule 1006. Computerized summaries are treated no differently from non-computerized summaries for purposes of Rule 1006. See Federal Rules of Evidence Manual at 2077.

In conclusion, neither the case law nor the commentary supports the argument that the Evidence Rules must be changed immediately to accommodate electronically-generated evidence. I could find no case holding that electronically-generated evidence was inadmissible because it was electronically-generated and therefore not within the language of a Federal Rule. The rules generally appear flexible enough to permit the trial court to exercise its discretion to admit or exclude computerized evidence depending on its probative value, prejudicial effect and reliability.

Some Problems Not Yet Encountered

While the courts currently seem to be handling computerized evidence quite well under current evidence rules, it is possible that new innovations might create problems. To take one example, the use of virtual reality technology might create special evidentiary problems, such as placing the factfinder right at the virtual scene of the crime or the accident. However, it is likely that even this technology can be handled under flexible rules such as Rule 403. See Kelly and Bernstein, *Virtual Reality: The Reality of Getting It Admitted,* 13 J. Marshall J. Computer & Info.L. 145 (1994) (concluding that VR technology should be treated in the same manner as other computerized demonstrative evidence). Other technologies might be developed in the future. Yet even if these new technologies cannot fit within the built-in flexibility of the Federal Rules, any need to amend the rules is hardly pressing. It seems more prudent to await future technological developments and then to determine if the Rules are inadequate.

Even under the current state of technology, some problems in presenting electronic evidence under the Rules can be envisioned, even though these problems have not yet been reported in the cases. Some examples follow:

1. A witness refreshes his recollection with a computerized presentation. Must this be produced for inspection and use by the adversary? Rule 612 refers to a "writing" and the argument could be made that a computerized presentation does not fall within that term.

2. A party seeks to admit a portion of a computerized presentation as substantive evidence. Can the adversary admit another portion under the rule of completeness? Like Rule 612, Rule 106 is cast in terms of a "writing", and therefore is at least arguably inapplicable.

[Reporter's Note: This problem is addressed in the Report on Rule 106 in the Agenda Book for this October 2002 meeting].

3. A computerized presentation contains underlying assertions that are offered for their truth. The argument is made that the hearsay rule does not apply, since to be hearsay, the evidence must constitute a "statement", and "statement" is defined in Rule 801(a) as an "oral or written assertion." While courts have naturally considered the hearsay rule to be applicable in such a situation, the argument can at least be made that the hearsay rule is completely inapplicable to electronically-generated evidence.

4. Computerized information that would otherwise qualify under hearsay exceptions for past recollection recorded, family records, learned treatises, etc. might be argued to be inadmissible if they are in electronic rather than hardcopy form.

[Reporter's Note: Since this memo was written, the problem has indeed arisen in the context of learned treatises. The Committee has already directed the Reporter to prepare a Report on Rule 803(18). That Report will be considered at a subsequent meeting.]

Whether these *potential* concerns, and others like them, warrant amendments to the Rules at this point is a question for the Committee to decide.

The Uniform Rules Solution

The drafting committee for the Uniform Rules of Evidence is considering all-encompassing amendments to the Uniform Rules that would cover all current modes of electronic evidence. The proposal essentially proceeds in three steps.

1. The Rule 1001 definitions are expanded to apply to all the rules, not just Article 10. An expansive definition of "record" is also added to Rule 1001. "Record" is defined as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."

2. All of the references to "writings", "documents", etc. are recast in terms of "record." For example, Rule 801(a), which currently refers to oral or written assertions, is changed to "an oral assertion or an assertion in a record." The reference in Rule 106 to "writing" is changed to "record." And so forth.

3. Finally, reference in the Rule to "data compilations" is expanded to include "other technology in "perceivable form."

Representative rules and comment from the latest draft of the Uniform Rules proposal is attached to this memorandum.

Reporter's Comment on Uniform Rules Proposal:

The Uniform Rules proposal is a comprehensive and effective means of expanding the language in the Rules to cover technological advances in the presentation of evidence. However, it results in the amendment of a very large number of rules. This is a reasonable task for the Uniform Rules project, since the goal of that drafting committee is to conduct a complete overview and full-scale revision, where necessary, of the Uniform Rules. The goal of the Advisory Committee on Evidence Rules is, by general consensus, far more limited--to respond to specific instances where the Rules are not working. With respect to computerization, the Federal Rules, as indicated above, seem to be working quite well, at least at this point. Moreover, since the Uniform Rules are not widely adopted, amendments to those rules can be promulgated without the concern that settled practices and substantial case law will be disrupted. The concern over upsetting settled expectations must obviously be taken into account in any attempt to amend the Federal Rules.

Finally, the Uniform Rules proposals on computerized evidence must be considered in the context of other Uniform Rules ventures, particularly in the area of Uniform Commercial Code and electronic contracting. The Uniform Rules project is, quite understandably, integrating language pertinent to computerization throughout all the Uniform Rules. There is no such need for integration, at this time, with respect to the Federal Rules of Evidence.

Ultimately it is for the Committee to decide whether it is worth the effort to amend so many rules. If the decision is in the affirmative, the Uniform Rules proposal should provide an excellent model.

The Solution of a Single Amendment to Rule 1001

In a preliminary discussion at a previous Advisory Committee meeting, the possibility was suggested that it might be sufficient to expand the definitions set forth in Rule 1001 so that they would apply to all the rules. That proposal would look something like this:

Rule 1001. Definitions

For purposes of ~~this article~~ these rules the following definitions are applicable:

(1) *Writings and recordings.* — ``Writings'' and ``recordings'' consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) *Photographs.* — ``Photographs'' include still photographs, X-ray films, video tapes, and motion pictures.

(3) *Original.* — An ``original'' of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An ``original'' of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an ``original.''

(4) *Duplicate.* — A ``duplicate'' is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

Reporter's Comment on the Proposal:

This proposal has the virtue of simplicity. However, it appears to be quite limited in its impact on the rules that potentially create a problem with respect to electronic evidence. The only term that is usefully modified by this change is the term "writing." The reference to "recordings" doesn't match up with the rules, since the rules refer to "records". It is even a fair question whether expanding the definition of "writings" will cover the use of the term "written" in the Rules. For example, Rule 801 defines hearsay as an oral or "written" assertion. Will the definition of "writing" in Rule 1001 cover a "written" assertion? At the very least, the proposal, while simple, would create an ambiguity.

At most, the proposal would affect the rules that refer either to "writing" or to "written." As discussed above, those rules are 106, 412, 609, 612, 801, 901(7) and 903. If "writing" does not cover "written", then Rules 412, 609, and 801 would remain unaffected, leaving only four Rules usefully amended by the expansion of Rule 1001.

The Solution of a More Expansive Amendment to Rule 1001

Arguably, if it is worth it to amend Rule 1001 at all, it is worth it to amend Rule 1001 to provide greater coverage of the problematic rules. This could be accomplished by adding to and expanding upon the current definitions set forth in Rule 1001. Taking the liberty of borrowing from the Uniform Rules draft, an amendment might read something like this:

Rule 1001. Definitions

For purposes of ~~this article~~ these rules the following definitions are applicable:

(1) *Writings and recordings.* — ``Writings" and ``recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, ~~magnetic impulse~~, mechanical or electronic recording, or ~~other form of data compilation~~ or other technology in perceivable form. "Written" includes any process that results in a writing.

(2) *Photographs.* — ``Photographs" are forms of a record which include still photographs, X-ray films, video tapes, and motion pictures.

(3) *Original.* — An ``original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An ``original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an ``original."

(4) *Duplicate.* — A ``duplicate" is a counterpart reproduced by any technique that reproduces the original in perceivable form or that is produced by the same impression as the original, or from

the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

(5) *Records, documents and certificates.* — "Records", "documents" and "certificates" include information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(6) *Data Compilation* — A "data compilation" is any collection or presentation of information retrieved in perceivable form.

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Reporter's Comment on the Proposal:

The above proposal has a far broader effect than the simple proposal to expand the current 1001 definitions to the other Rules. The proposal has the following possible advantages:

1. It provides a technology-based definition of "record", "certificate" and "data compilation." As such, the effect of the more expansive definitions is extended to 19 more rules. These Rules are: 803(5), (6), (7), (8), (9), (10), (11), (13), (14), (15), (16), 901(b)(8), 902(1)(2)(3)(4)(8)(9) and (10). The only arguably problematic rules not modified by this change are Rule 803(12), 902(5),(6) and (7). Nobody is going to lose much sleep over the fact that these latter Rules remain unaffected.

2. The definition of "writings" is modified to take account of possible technological advances. The reference in the current rule to "magnetic impulse" is probably outmoded and at least unduly limiting.

3. The term "written" is defined to make it certain that the expansive definition applies to those rules which refer to "written" rather than "writing."

4. Changes are made to the current Rule 1001 definition of "duplicate" to take account of technological advances.

5. The amendment follows the same principle as the simpler proposal addressed above--

instead of amending 29 rules, it amends only one.

The proposal has some disadvantages, however:

1. The definitional section is placed in the Best Evidence Rule. A lawyer researching the meaning of "writing" in Rule 106, for example, might not think of looking in Rule 1001 for guidance. This same criticism is applicable, of course, to the proposal that would simply extend the current Rule 1001 definitions to the other rules. The criticism also applies to the Uniform Rules proposal.

The alternative to using 1001 is to place a separate "definitions" rule in the Federal Rules of Evidence. This might be a daunting task, however. It would seem awkward to set up a new article or rule for definitions, when the only definitions would deal with computerized evidence. Yet it would be equally problematic to draft a definitions rule that goes beyond computerized evidence to cover other terms that are used in the rules. What terms should be defined? What would be the benefit of such definitions? Given the entrenched understandings of most of the terms used in the Rules, based on over 20 years of case law, there is probably little to be gained and much to be lost in adding a full-fledged definitions rule to the Evidence Rules.

2. Because only one Rule is amended, some of the affected rules would have surplus language that would not be deleted. For example, Rule 803(5) refers to a "memorandum or record". With the expansive definition of "record" in an amended Rule 1001, the reference to "memorandum" is unnecessary. There is nothing that a "memorandum" could be that a "record" is not. Arguably, this could lead to unwarranted speculation that the terms are meant to cover different types of evidence. And even if it is not confusing, it is arguably sloppy to retain outmoded or unnecessary terms in a rule. (It is for this reason that the Uniform Rules proposal deletes the term "memorandum" from Rule 803(5)).

On balance, however, the fact that an expanded Rule 1001 will leave unnecessary language in some of the affected rules is not a reason for rejecting the proposal. Assuming that an amendment is necessary to accommodate technological changes, the question really is how that can be done effectively with the fewest amendments to the fewest rules. The benefits of deleting unnecessary language from each of the affected rules is probably outweighed by the costs of having to amend so many rules. At any rate, extraneous language is hardly unheard of in federal legislation and rulemaking. The use of the phrase "right, title and interest" is common. Indeed, even without any amendments, the reference to "memorandum" in Rule 803(5) is probably superfluous, given the inclusion of "records" in the Rule. See also Rule 803(17) (referring to "tabulations, lists, directories, or other published compilations."). Thus, the Committee might wish to consider an expanded Rule 1001, despite the fact that some of the affected Rules will contain superfluous language--again assuming that it is worth it to amend the Rules at all.

3. It could be argued that the proposed amendment tends to equate all of the terms--"writing", "record", "document" and "certificate"--when in fact those terms were intended to, and should, have separate meanings. Nothing in the original Advisory Committee Notes indicate that there was an intent to create some substantive distinctions among the evidence encompassed within these various terms. The Committee may wish to consider, however, whether separate meanings should be attached to these various descriptions, should it decide to venture into the amendment process in order to accommodate computerized evidence.

The Maryland "Solution"

Maryland has recently passed rules concerning the presentation of computerized evidence. These rules are attached to this memorandum. It is apparent from a reading of these rules that they are procedural, rather than evidentiary. They do not deal with admissibility, but rather provide protection to the adversary by way of notice and hearing requirements. While this might be a solution to some of the problems arising from computerized evidence, it is not a solution within the purview of the Evidence Rules.

Conclusion

This is a preliminary report, intended to give the Committee some background into whether the Evidence Rules should be amended to accommodate technological innovations in the presentation of evidence. The Committee must now decide the following questions:

1. Do the Rules currently provide sufficient guidance and flexibility for courts and litigants to handle the special problems created by computerized evidence?

2. If an amendment is necessary, should it be a comprehensive amendment in the manner of the Uniform Rules, or should it be a more limited attempt to employ a single definitional rule?

3. If a definitional rule is to be employed, should it be an amended Rule 1001, or should it be a new rule?

4. If Rule 1001 is to be employed, is it sufficient to expand the current rule so as to apply to all the rules, or should the definitions currently in the rule be modified and expanded as well?

Appendix to Report on Consideration of Possible Amendments

Report By Greg Joseph on the Admissibility of Internet and Email Evidence Under the Existing Evidence Rules

INTERNET AND EMAIL EVIDENCE

Gregory P. Joseph*

The explosive growth of the Internet and burgeoning use of electronic mail are raising a series of novel evidentiary issues. The applicable legal principles are familiar — this evidence must be authenticated and, to the extent offered for its truth, it must satisfy hearsay concerns. The novelty of the evidentiary issues arises out of the novelty of the media — thus, it is essentially factual. These issues can be resolved by relatively straightforward application of existing principles in a fashion very similar to the way they are applied to other computer-generated evidence and to more traditional exhibits.

I. Internet Evidence

There are primarily three forms of Internet data that are offered into evidence — (1) data posted on the website by the owner of the site ("website data"); (2) data posted by others with the owner's consent (a chat room is a convenient example); and (3) data posted by others without the owner's consent ("hacker" material). The wrinkle for authenticity purposes is that, because Internet data is electronic, it can be manipulated and offered into evidence in a distorted form. Additionally, various hearsay concerns are implicated, depending on the purpose for which the proffer is made.

A. Authentication

Website Data. Corporations, government offices, individuals, educational institutions and innumerable other entities post information on their websites that may be relevant to matters in litigation. Alternatively, the fact that the information appears on the website may be the relevant point. Accordingly, courts routinely face proffers of data (text or images) allegedly drawn from websites. The proffered evidence must be

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authenticated in all cases, and, depending on the use for which the offer is made, hearsay concerns may be implicated.

The authentication standard is no different for website data or chat room evidence than for any other. Under Rule 901(a), "The requirement of authentication ... is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *United States v. Simpson,* 152 F.3d 1241, 1249 (10th Cir. 1998).

In applying this rule to website evidence, there are three questions that must be answered, explicitly or implicitly:

1. What was actually on the website?
2. Does the exhibit or testimony accurately reflect it?
3. If so, is it attributable to the owner of the site?

In the first instance, authenticity can be established by the testimony of any witness that the witness typed in the URL associated with the website (usually prefaced with *www*); that he or she logged on to the site and reviewed what was there; and that a printout or other exhibit fairly and accurately reflects what the witness saw. This last testimony is no different than that required to authenticate a photograph, other replica or demonstrative exhibit.[1] The witness may be lying or mistaken, but that is true of all testimony and a principal reason for cross-examination. Unless the opponent of the evidence raises a genuine issue as to trustworthiness, testimony of this sort is sufficient to satisfy Rule 901(a), presumptively authenticating the website data and shifting the burden of coming forward to the opponent of the evidence. It is reasonable to indulge a presumption that material on a web site (other than chat room conversations) was placed there by the owner of the site.

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[1] *See, e.g., Actonet, Ltd. v. Allou Health & Beauty Care*, 219 F.3d 836, 848 (8th Cir. 2000) ("HTML codes may present visual depictions of evidence. We conclude, therefore, that HTML codes are similar enough to photographs to apply the criteria for admission of photographs to the admission of HTML codes").

The opponent of the evidence must, in fairness, be free to challenge that presumption by adducing facts showing that proffered exhibit does not accurately reflect the contents of a website, or that those contents are not attributable to the owner of the site. First, even if the proffer fairly reflects what was on the site, the data proffered may have been the product of manipulation by hackers (uninvited third parties). Second, the proffer may not fairly reflect what was on the site due to modification — intentional or unintentional, material or immaterial — in the proffered exhibit or testimony.

Detecting modifications of electronic evidence can be very difficult, if not impossible. That does not mean, however, that nothing is admissible because everything is subject to distortion. The same is true of many kinds of evidence, from testimony to photographs to digital images, but that does not render everything inadmissible. It merely accentuates the need for the judge to focus on all relevant circumstances in assessing admissibility under Fed.R.Evid. 104(a)[2] — and to leave the rest to the jury, under Rule 104(b).[3]

In considering whether the opponent has raised a genuine issue as to trustworthiness, and whether the proponent has satisfied it, the court will look at the totality of the circumstances, including, for example:

The length of time the data was posted on the site.

Whether others report having seen it.

Whether it remains on the website for the court to verify.

Whether the data is of a type ordinarily posted on that website or websites of similar entities (*e.g.*, financial information from corporations).

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[2] Fed.R.Evid. 104(a) provides that:

Questions of admissibility generally.—Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

[3] Fed.R.Evid. 104(b) provides that:

Whether the owner of the site has elsewhere published the same data, in whole or in part.
Whether others have published the same data, in whole or in part.
Whether the data has been republished by others who identify the source of the data as the website in question.

A genuine question as to trustworthiness may be established circumstantially. For example, more by way of authentication may be reasonably required of a proponent of Internet evidence who is known to be a skilled computer user and who is suspected of possibly having modified the proffered website data for purposes of creating false evidence.[4]

In assessing the authenticity of website data, important evidence is normally available from the personnel managing the website ("webmaster" personnel). A webmaster can establish that a particular file, of identifiable content, was placed on the website at a specific time. This may be done through direct testimony or through documentation, which may be generated automatically by the software of the web server. It is possible that the content provider — the author of the material appearing on the site that is in issue — will be someone other than the person who installed the file on the web. In that event, this second witness (or set of documentation) may be necessary to reasonably ensure that the content which appeared on the site is the same as that proffered.

Self-Authentication. Government offices publish an abundance of reports, press releases and other information on their official web sites. Internet publication of a governmental document on an official website constitutes an "official publication" within

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Relevancy conditioned on fact.—When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

[4] *See, e.g., United States v. Jackson,* 208 F.3d 633, 637 (7th Cir. 2000) ("Jackson needed to show that the web postings in which the white supremacist groups took responsibility for the racist mailing actually were posted by the groups, as opposed to being slipped onto the groups' web sites by Jackson herself, who was a skilled computer user.").

Federal Rule of Evidence 902(5).[5] Under Rule 902(5),official publications of government offices are self-authenticating.[6]

Chat Room Evidence. A proffer of chat room postings generally implicates the same authenticity issues discussed above in connection with web site data, but with a twist. While it is reasonable to indulge a presumption that the contents of a website are fairly attributable to the site's owner, that does not apply to chat room evidence. By definition, chat room postings are made by third parties, not the owner of the site. Further, chat room participants usually use screen names (pseudonyms) rather than their real names.

Since chat room evidence is often of interest only to the extent that the third party who left a salient posting can be identified, the unique evidentiary issue concerns the type and quantum of evidence necessary to make that identification — or to permit the finder of fact to do so. Evidence sufficient to attribute a chat room posting to a particular individual may include, for example:

Evidence that the individual used the screen name in question when participating in chat room conversations (either generally or at the site in question).

Evidence that, when a meeting with the person using the screen name was arranged, the individual in question showed up.

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[5] Fed.R.Evid. 902(5) provides that the following are self-authenticating:

Official publications.--Books, pamphlets, or other publications purporting to be issued by public authority.

[6] *See, e.g., Sannes v. Jeff Wyler Chevrolet, Inc.*, 1999 U.S.Dist.LEXIS 21748 at *10 n. 3 (S.D. Ohio March 31, 1999) ("The FTC press releases, printed from the FTC's government world wide web page, are self-authenticating official publications under Rule 902(5) of the Federal Rules of Evidence"). *See also Elliott Assocs., L.P. v. Banco de la Nacion,* 194 F.R.D. 116, 121 (S.D.N.Y. 2000) (discussed below; holding that prime rates published on the Federal Reserve Board website satisfy the hearsay exception of Federal Rule of Evidence 803(17). *But see State v. Davis,* 141 Wash.2d 798, 854, 10 P.3d 977, 1010 (2000) (no abuse of discretion in excluding, in death penalty case, defendant's proffer of state population statistics obtained from official state website; affirming exclusion on hearsay grounds but stating that "[a]n unauthenticated printout obtained from the Internet does not ... qualify as a self authenticating document under ER 902(e) [the Washington State equivalent of Federal Rule of Evidence 902(5)]").

Evidence that the person using the screen name identified him- or herself as the individual (in chat room conversations or otherwise), especially if that identification is coupled with particularized information unique to the individual, such as a street address or email address.

Evidence that the individual had in his or her possession information given to the person using the screen name (such as contact information provided by the police in a sting operation).

Evidence from the hard drive of the individual's computer reflecting that a user of the computer used the screen name in question.

See generally United States v. Tank, 200 F.3d 627, 630-31 (9th Cir. 2000); *United States v. Simpson*, 152 F.3d 1241, 1249-50 (10th Cir. 1998).

B. Hearsay.

Authenticity aside, every extrajudicial statement drawn from a website must satisfy a hearsay exception or exemption if the statement is offered for its truth. *See United States v. Jackson,* 208 F.3d 633, 637 (7th Cir. 2000) ("The web postings were not statements made by declarants testifying at trial, and they were being offered to prove the truth of the matter asserted. That means they were hearsay.")

To establish that material appeared on a website, it is sufficient for a witness with knowledge to attest to the fact that the witness logged onto the site and to describe what he or she saw. That obviates any hearsay issue as to the contents of the site. *Van Westrienen v. Americontinental Collection Corp.*, 94 F.Supp.2d 1087, 1109 (D. Or. 2000) ("The only remaining question is whether the content of the website is hearsay under FRE 801.... Here, [plaintiff], by his own account, personally viewed the website and submitted an affidavit detailing specifically what he viewed. Therefore, the contents of the website are not hearsay for purposes of this summary judgment motion").

Data Entry. Some website data is entered into Internet-readable format in the same way that a bookkeeper may enter numbers into a computer. This act of data entry is

an extrajudicial statement — *i.e.*, assertive nonverbal conduct within Rule 801(a) — which means that the product is hearsay, within Rule 801(c). Since each level of hearsay must satisfy the hearsay rule, under Rule 805 (Hearsay within Hearsay), the act of data entry must be addressed separately from the content of the posted declaration.

Data entry is usually a regularly-conducted activity within Rule 803(6) (or, in the context of a government office, falls within Rule 803(8) (public records exception)). It also often falls within Rule 803(1) (present sense impression exception).

The real question about the data entry function is its accuracy. This is, in substance, an issue of authenticity and should be addressed as part of the requisite authentication foundation whenever a genuine doubt as to trustworthiness has been raised. If the foundational evidence establishes that the data have been entered accurately, the hearsay objection to the data entry function should ordinarily be overruled. *See also* Rule 807 (residual exception).

Much Internet evidence does not involve data entry, in the sense described above. If the webmaster is simply transferring an image or digitally converting an electronic file into web format, that is a technical process that does not involve assertive non-verbal conduct within Rule 801(a) and is best judged as purely an authentication issue. The difference, analytically, is between the grocery store clerk who punches the price into the check-out computer (this is assertive non-verbal conduct), and the clerk who simply scans the price into the computer (non-assertive behavior). Only assertive non-verbal conduct raises hearsay issues and requires an applicable hearsay exception or exemption.

Business and Public Records. Businesses and government offices publish countless documents on their websites in ordinary course. Provided that all of the traditional criteria are met, these documents will satisfy the hearsay exception for "records" of the business or public office involved, under Rules 803(6) or (8). Reliability and trustworthiness are said to be presumptively established by the fact of actual reliance in the regular course of an enterprise's activities. (Recall that public records which satisfy

Rule 803(8) are presumptively authentic under Rule 901(b)(7) (if they derive from a "public office where items of this nature are kept") and even self-authenticating under Rule 902(5) (discussed above in note 6 and the accompanying text).)

As long as the website data constitute business or public records, this quality is not lost simply because the printout or other image that is proffered into evidence was generated for litigation purposes. Each digital data entry contained on the website is itself a Rule 803(6) or (8) "record" because it is a "data compilation, in any form."[7] Consequently, if each entry has been made in conformance with Rule 803(6) or Rule 803(8), the proffered output satisfies the hearsay exception even if it: (a) was not printed out at or near the time of the events recorded (as long as the entries were timely made), (b) was not prepared in ordinary course (but, *e.g.*, for trial), and (c) is not in the usual form (but, *e.g.*, has been converted into graphic form).[8] If the data are simply downloaded into a printout, they do not lose their business-record character. To the extent that significant selection, correction and interpretation are involved, their reliability and authenticity may be questioned.[9]

While website data may constitute business records of the owner of the site, they are not business records of the Internet service provider (*e.g.*, America Online, MSN, ATT). "Internet service providers...are merely conduits.... The fact that the Internet service provider may be able to retrieve information that its customers posted...does not turn that material into a business record of the Internet service provider." *United States v. Jackson,* 208 F.3d 633, 637 (7th Cir. 2000) ("The Internet service providers did not

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7 *See, e.g., United States v. Sanders*, 749 F.2d 195, 198 (5th Cir. 1984) (dealing with computerized records); *United States v. Catabran,* 836 F.2d 453, 456 (9th Cir. 1988) (same).

8 *See, e.g., United States v. Russo*, 480 F.2d 1228, 1240 (6th Cir.), *cert. denied,* 414 U.S. 1157 (1973) (dealing with computerized records).

9 *See, e.g., Potamkin Cadillac Corp. v. B.R.I. Coverage Corp.*, 38 F.3d 627, 631, 633 (2d Cir. 1994) (dealing with computerized business records).

themselves post what was on [the relevant] web sites. [Defendant] presented no evidence that the Internet service providers even monitored the contents of those web sites.").

Rules 803(6) and (8) effectively incorporate an authentication requirement. Rule 803(6) contemplates the admission of hearsay, if its criteria are satisfied, "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Rule 803(8) contains substantially identical language. This trustworthiness criterion parallels the Rule 901(a) requirement of "evidence sufficient to support a finding that the matter in question is what its proponent claims." As a result, untrustworthy proffers of business or public records may be excluded on hearsay as well as authenticity grounds.[10]

Admissions. Website data published by a litigant comprise admissions of that litigant when offered by an opponent. *See, e.g., Van Westrienen v. Americontinental Collection Corp.*, 94 F.Supp.2d 1087, 1109 (D. Or. 2000) ("the representations made by defendants on the website are admissible as admissions of the party-opponent under FRE 801(d)(2)(A)"). Accordingly, even if the owner of a website may not offer data from the site into evidence, because the proffer is hearsay when the owner attempts to do so, an opposing party is authorized to offer it as an admission of the owner.[11]

Non-Hearsay Proffers. Not uncommonly, website data is not offered for the truth of the matters asserted but rather solely to show the fact that they were published on the web, either by one of the litigants or by unaffiliated third parties. For example, in a punitive damages proceeding, the fact of Internet publication may be relevant to show that the defendant published untruths for the public to rely on.[12] Or, in a trademark action,

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[10] *United States v. Jackson,* 208 F.3d 633, 637 (7th Cir. 2000) ("Even if these web postings did qualify for the business records hearsay exception, 'the business records are inadmissible if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness'") (citation omitted).

[11] *Potamkin Cadillac Corp v. B.R.I. Coverage Corp.*, 38 F.3d 627, 631, 633-34 (2d Cir. 1994) (dealing with computerized business records).

[12] *See, e.g., Van Westrienen v. Americontinental Collection Corp.*, 94 F.Supp.2d 1087, 1109 (D. Or. 2000).

Internet listings or advertisements may be relevant on the issue of consumer confusion or purchaser understanding.[13] In neither of these circumstances is the website data offered for its truth. Accordingly, no hearsay issues arise.

Judicial Skepticism. As they were with computerized evidence prior to the mid-1990s, some judges remain skeptical of the reliability of anything derived from the Internet. *See, e.g., St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F.Supp.2d 773, 774-75 (S.D. Tex. 1999) ("While some look to the Internet as an innovative vehicle for communication, the Court continues to warily and wearily view it largely as one large catalyst for rumor, innuendo, and misinformation.... Anyone can put anything on the Internet. No web-site is monitored for accuracy and nothing contained therein is under oath or even subject to independent verification absent underlying documentation. Moreover, the Court holds no illusions that hackers can adulterate the content on any web-site from any location at any time. For these reasons, any evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretations of the hearsay exception rules found in Fed.R.Evid. 807"). While there is no gainsaying a healthy judicial skepticism of any evidence that is subject to ready, and potentially undetectable, manipulation, there is much on the web which is not subject to serious dispute and which may be highly probative. As with so many of the trial judge's duties, this is a matter that can only be resolved on a case- by-case basis.

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[13] *See, e.g. ,Microware Sys. Corp. v. Apple Computer, Inc.*, 2000 U.S.Dist.LEXIS 3653 at *7 n.2 (S.D. Iowa March 15, 2000) ("Microware's internet and e-mail submissions are not ideal proffers of evidence since their authors cannot be cross-examined. However, in a case involving an industry where e-mail and internet communication are a fact of life, these technical deficiencies must go to the weight of such evidence, rather than to their admissibility. In any case, to the extent any of these stray comments bear on the issue of confusion, they come in for that purpose...") (citations omitted); *Mid City Bowling Lanes & Sports Palace, Inc. v Don Carter's All Star Lanes-Sunrise Ltd.*, 1998 U.S.Dist.LEXIS 3297 at *5-*6 (E.D.La. March 12, 1998).

II. Email Evidence

Like Internet evidence, email evidence raises both authentication and hearsay issues. The general principles of admissibility are essentially the same since email is simply a distinctive type of Internet evidence — namely, the use of the Internet to send personalized communications.

Authentication. The authenticity of email evidence is governed by Federal Rule of Evidence 901(a), which requires only "evidence sufficient to support a finding that the matter in question is what its proponent claims." Under Fed.R.Evid. 901(b)(4), email may be authenticated by reference to its "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." *See generally United States v. Siddiqui*, 215 F.3d 1318, 1322 (11th Cir. 2000).

If email is produced by a party from the party's files and on its face purports to have been sent by that party, these circumstances alone may suffice to establish authenticity. *See, e.g., Superhighway Consulting, Inc. v. Techwave, Inc.*, 1999 U.S.Dist.LEXIS 17910 at *6 (N.D.Ill. Nov. 15, 1999).

It is important, for authentication purposes, that email generated by a business or other entity on its face generally reflects the identity of the organization. The name of the organization, usually in some abbreviated form, ordinarily appears in the email address of the sender (after the @ symbol). This mark of origin has been held to self-authenticate the email as having been sent by the organization, under Fed.R.Evid. 902(7), which provides for self-authentication of: "*Trade inscriptions and the like*.--Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin." *See Superhighway Consulting, Inc. v. Techwave, Inc.*, 1999 U.S.Dist.LEXIS 17910 at *6 (N.D.Ill. Nov. 15, 1999).

Independently, circumstantial indicia that may suffice to establish that proffered email were sent, or were sent by a specific person, include evidence that:

A witness or entity received the email.

The email bore the email address of a particular individual.

This email contained the typewritten name or nickname of this individual in the body of the email.

The email recited matters that would normally be known only to the individual who is alleged to have sent it (or to a discrete number of persons including this individual).

Following receipt of the email, the recipient witness had a discussion with the individual who purportedly sent it, and the conversation reflected this individual's knowledge of the contents of the email.

See generally United States v. Siddiqui, 215 F.3d 1318, 1322-23 (11th Cir. 2000).

As with all other forms of authentication, the testimony of a witness with knowledge is prerequisite to authenticate email. It is insufficient to proffer email through a witness with no knowledge of the transmissions at issue, unless the witness has sufficient technical knowledge of the process to be in a position to authenticate the email through expert testimony. *See, e.g., Richard Howard, Inc. v. Hogg,* 1996 Ohio App. LEXIS 5533 at *8 (Ohio App. Nov. 19, 1996) (affirming exclusion of email where the authenticating witness "was neither the recipient nor the sender of the E-mail transmissions and he offered no other details establishing his personal knowledge that these messages were actually sent or received by the parties involved. Furthermore, the transmissions were not authenticated by any other means").

Hearsay. The hearsay issues associated with email are largely the same as those associated with conventional correspondence. The prevalence and ease of use of email, particularly in the business setting, makes it attractive simply to assume that all email generated at or by a business falls under the business-records exception to the hearsay rule. That assumption would be incorrect.

In *United States v. Ferber*, 966 F.Supp. 90 (D. Mass. 1997), the government offered into evidence a multi-paragraph email from a subordinate to his superior describing a telephone conversation with the defendant (not a fellow employee). In that

conversation, the defendant inculpated himself, and the email so reflected. Chief Judge Young rejected the proffer under Fed.R.Evid. 803(6) because, "while it may have been [the employee's] routing business practice to make such records, there was not sufficient evidence that [his employer] required such records to be maintained.... [I]n order for a document to be admitted as a business record, there must be some evidence of a business duty to make and regularly maintain records of this type." *Id.*, 996 F.Supp. at 98. The *Ferber* Court nonetheless admitted the email, but under 803(1), the hearsay exception for present sense impressions.[14]

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[14] Fed.R.Evid. 803(1) sets forth the hearsay exception for present sense impressions, which are defined to include any "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."

AGENDA DOCKETING

ADVISORY COMMITTEE ON EVIDENCE RULES

Proposal	Source, Date, and Doc #	Status
[EV 101] — Scope		6/92 — Approved by ST Cmte. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 102 — Purpose and Construction		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 103] — Ruling on EV		9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 103(a)] — When an *in limine* motion must be renewed at trial (earlier proposed amendment would have added a new Rule 103(e))		9/93 — Considered 5/94 — Considered 10/94 — Considered 1/95 — Approved for publication by ST Cmte. 5/95 — Considered. Note revised. 9/95 — Published for public comment 4/96 — Considered 11/96 — Considered. Subcommittee appointed to draft alternative. 4/97 — Draft requested for publication 6/97 — ST Cmte. recommitted to advisory cmte for further study 10/97 — Request to publish revised version 1/98 — Approved for publication by ST Cmte. 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved 4/00 — Approved by Supreme Court 12/00 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV104] — Preliminary Questions		9/93 — Considered 1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 105] — Limited Admissibility		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 106] — Remainder of or Related Writings or Recorded Statements		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 106] — Admissibility of "hearsay" statement to correct a misimpression arising from admission of part of a record	Prof. Daniel Capra (4/97)	4/97 — Reporter to determine whether any amendment is appropriate 10/97 — No action necessary **COMPLETED**
[EV 201] — Judicial Notice of Adjudicative Facts		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Decided not to amend **COMPLETED**
[EV 201(g)] — Judicial Notice of Adjudicative Facts		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Decided to take no action **DEFERRED INDEFINITELY**
[EV 301] — Presumptions in General Civil Actions and Proceedings. (Applies to evidentiary presumptions but not substantive presumptions.)		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Deferred until completion of project by Uniform Rules Committee **PENDING FURTHER ACTION**
[EV 302] — Applicability of State Law in Civil Actions and Proceedings		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 401] — Definition of "Relevant Evidence"		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 402] — Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 403] — Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 404] — Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes	Sen. Hatch S.3, § 503 (1/97)(dealing with 404(a)	9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 10/94 — Considered with EV 405 as alternative to EV 413-415 4/97 — Considered 6/97 — Stotler letter to Hatch on S.3 10/97 — Recommend publication 1/98 — Approved for publication by the ST Cmte. 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved 4/00 — Approved by the Supreme Court 12/00 — Effective **COMPLETED**
[EV 404(b)] — Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes: Other crimes, wrongs, or acts. (Uncharged misconduct could only be admitted if the probative value of the evidence substantially outweighs the prejudicial effect.)	Sen. Hatch S.3, § 713 (1/97)	9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 10/94 — Discussed 11/96 — Considered and rejected any amendment 4/97 — Considered 6/97 — Stotler letter to Hatch on S.3 10/97 — Proposed amendment in the Omnibus Crime Bill rejected **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 405] — Methods of Proving Character. (Proof in sexual misconduct cases.)		9/93 — Considered 5/94 — Considered 10/94 — Considered with EV 404 as alternative to EV 413-415 **COMPLETED**
[EV 406] — Habit; Routine Practice		10/94 — Decided not to amend (Comprehensive Review) 1/95 — Approved for publication by ST Cmte. **COMPLETED**
[EV 407] — Subsequent Remedial Measures. (Extend exclusionary principle to product liability actions, and clarify that the rule applies only to measures taken after injury or harm caused by a routine event.)	Subcmte. reviewed possibility of amending (Fall 1991)	4/92 — Considered and rejected by CR Rules Cmte. 9/93 — Considered 5/94 — Considered 10/94 — Considered 5/95 — Considered 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Approved & submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by ST Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Enacted **COMPLETED**
[EV 408] — Compromise and Offers to Compromise		9/93 — Considered 5/94 — Considered 1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 409] — Payment of Medical and Similar Expenses		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 410] — Inadmissibility of Pleas, Plea Discussions, and Related Statements		9/93 — Considered and recommended for CR Rules Cmte. **COMPLETED**
[EV 411] — Liability Insurance		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 412] — Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition	Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92)	4/92 — Considered by CR Rules Cmte. 10/92 — Considered by CR Rules Cmte. 10/92 — Considered by CV Rules Cmte. 12/92 — Published 5/93 — Public Hearing, Considered by EV Cmte. 7/93 — Approved by ST Cmte. 9/93 — Approved by Jud. Conf. 4/94 — Recommitted by Sup. Ct. with a change 9/94 — Sec. 40140 of the Violent Crime Control and Law Enforcement Act of 1994 (superseding Sup. Ct. action) 12/94 — Effective **COMPLETED**
[EV 413] — Evidence of Similar Crimes in Sexual Assault Cases		5/94 — Considered 7/94 — Considered by ST Cmte. 9/94 — Added by legislation 1/95 — Considered 1/95 — Reported to but disregarded by Congress 7/95 — Effective **COMPLETED**
[EV 414] — Evidence of Similar Crimes in Child Molestation Cases		5/94 — Considered 7/94 — Considered by ST Cmte. 9/94 — Added by legislation 1/95 — Considered 1/95 — Reported to but disregarded by Congress 7/95 — Effective **COMPLETED**
[EV 415] — Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation		5/94 — Considered 7/94 — Considered by ST Cmte. 9/94 — Added by legislation 1/95 — Considered 1/95 — Reported to but disregarded by Congress 7/95 — Effective **COMPLETED**
[EV 501] — General Rule. (Guarantee that the confidentiality of communications between sexual assault victims and their therapists or trained counselors be adequately protected in Federal court proceedings.)	42 U.S.C., § 13942(c) (1996)	10/94 — Considered 1/95 — Considered 11/96 — Considered 1/97 — Considered by ST Cmte. 3/97 — Considered by Jud. Conf. 4/97 — Reported to Congress **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 501] — Privileges, extending the same attorney-client privilege to in-house counsel as to outside counsel		11/96 — Decided not to take action 10/97 — Rejected proposed amendment to extend the same privilege to in-house counsel as to outside counsel 10/98 — Subcmte appointed to study the issue **COMPLETED**
[Privileges] — To codify the federal law of privileges	EV Rules Committee (11/96)	11/96 — Denied 10/98 — Cmte. reconsidered and appointed a subcmte to further study the issue 4/99 — Considered pending further study 10/99 — Subcomte established to study 4/00 — Cmte considered subc's drafts 4/01 — Cmte considered subc's drafts 4/02 — Cmte considered subc's drafts **PENDING FURTHER ACTION**
[EV 501] Parent/Child Privilege	Proposed Legislation	4/98 — Considered; draft statement in opposition prepared **COMPLETED**
[EV 601] — General Rule of Competency		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 602] — Lack of Personal Knowledge		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 603] — Oath or Affirmation		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 604] — Interpreters		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 605] — Competency of Judge as Witness		9/93 — Considered 10/94 — Decided not to amend (Comprehensive Review) 1/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 606] — Competency of Juror as Witness		9/93 — Considered 10/94 — Decided not to amend (Comprehensive Review) 1/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 607] —Who May Impeach		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 608] — Evidence of Character and Conduct of Witness		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 608(b)] — Inconsistent rulings on exclusion of extrinsic evidence		10/99 — Considered 4/00 — Cmte directed reporter to prepare draft amendment 4/01 — Cmte recommended publication 6/01 — Approved for publication by ST Cmte 8/01 — Published for public comment 4/02 — Cmte approved amendments with modifications 6/02 — ST Committee approved **PENDING FURTHER ACTION**
[EV 609] — Impeachment by EV of Conviction of Crime. See 404(b)		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Considered 4/97 — Declined to act **COMPLETED**
[EV 609(a) — Amend to include the conjunction "or" in place of "and" to avoid confusion.	Victor Mroczka 4/98 (98-EV-A)	5/98 — Referred to chair and reporter for consideration 10/98 — Cmte declined to act **COMPLETED**
[EV 610] — Religious Beliefs or Opinions		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 611] — Mode and Order of Interrogation and Presentation		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 611(b)] — Provide scope of cross-examination not be limited by subject matter of the direct		4/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Decided not to proceed **COMPLETED**
[EV 612] — Writing Used to Refresh Memory		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 613] — Prior Statements of Witnesses		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 614] — Calling and Interrogation of Witnesses by Court		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 615] — Exclusion of Witnesses. (Statute guarantees victims the right to be present at trial under certain circumstances and places some limits on rule, which requires sequestration of witnesses. Explore relationship between rule and the Victim's Rights and Restitution Act of 1990 and the Victim Rights Clarification Act of 1997 passed in 1996.)	42 U.S.C., § 10606 (1990)	9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Considered 4/97 — Submitted for approval without publication 6/97 — Approved by ST Cmte. 9/97 — Approved by Jud. Conf. 4/98 — Sup Ct approved 12/98 — Effective **COMPLETED**
[EV 615] — Exclusion of Witnesses	Kennedy-Leahy Bill (S. 1081)	10/97 — Response to legislative proposal considered; members asked for any additional comments **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 701] — Opinion testimony by lay witnesses		10/97 — Subcmte. formed to study need for amendment 4/98 — Recommend publication 6/98 — Stg. Cmte approves request to publish 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved 4/00 — Sup Ct approved 12/00 — Effective **COMPLETED**
[EV 702] — Testimony by Experts	H.R. 903 and S. 79 (1997)	2/91 — Considered by CV Rules Cmte. 5/91 — Considered by CV Rules Cmte. 6/91 — Approved for publication by ST Cmte. 8/91 — Published for public comment by CV Rules Cmte. 4/92 — Considered and revised by CV and CR Rules Cmtes. 6/92 — Considered by ST Cmte. 4/93 — Considered 5/94 — Considered 10/94 — Considered 1/95 — Considered (Contract with America) 4/97 — Considered. Reporter tasked with drafting proposal. 4/97 — Stotler letters to Hatch and Hyde 10/97 — Subcmte. formed to study issue further 4/98 — Recommend publication 6/98 — Stg. Cmte approves request to publish 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved 4/00 — Sup Ct approved 12/00 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 703] — Bases of Opinion Testimony by Experts. (Whether rule, which permits an expert to rely on inadmissible evidence, is being used as means of improperly evading hearsay rule.)		4/92 — Considered by CR Rules Cmte. 6/92 — Considered by ST Cmte. 5/94 — Considered 10/94 — Considered 11/96 — Considered 4/97 — Draft proposal considered. 10/97 — Subcmte. formed to study issue further 4/98 — Recommend publication 6/98 — Stg. Cmte approves request to publish 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved 4/00 — Sup Ct approved 12/00 — Effective **COMPLETED**
[EV 705] — Disclosure of Facts or Data Underlying Expert Opinion		5/91 — Considered by CV Rules Cmte. 6/91 — Approved for publication by ST Cmte. 8/91 — Published for public comment by CV Rules Cmte. 4/92 — Considered by CV and CR Rules Cmtes 6/92 — Approved by ST Cmte. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective **COMPLETED**
[EV 706] — Court Appointed Experts. (To accommodate some of the concerns expressed by the judges involved in the breast implant litigation, and to determine whether the rule should be amended to permit funding by the government in civil cases.)	Carnegie (2/91)	2/91 — Tabled by CV Rules Cmte. 11/96 — Considered 4/97 — Considered. Deferred until CACM completes their study. **PENDING FURTHER ACTION**
[EV 801(a-c)] — Definitions: Statement; Declarant; Hearsay		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 801(d)(1)] — Definitions: Statements which are not hearsay. Prior statement by witness.		1/95 — Considered and approved for publication 5/95 — Decided not to amend (Comprehensive Review) 9/95 — Published for public comment **COMPLETED**
[EV 801(d)(1)] Hearsay exception for prior consistent statements that would otherwise be admissible to rehabilitate a witness's credibility	Judge Bullock	4/98 — Considered; tabled **DEFERRED INDEFINITELY**

Proposal	Source, Date, and Doc #	Status
[EV 801(d)(2)] — Definitions: Statements which are not hearsay. Admission by party-opponent. (*Bourjaily*)	Drafted by Prof. David Schlueter, Reporter, 4/92	4/92 — Considered and tabled by CR Rules Cmte 1/95 — Considered by ST Cmte. 5/95 — Considered draft proposed 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 802] — Hearsay Rule		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 803(1)-(5)] — Hearsay Exceptions; Availability of Declarant Immaterial		1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 803(6)] — Hearsay Exceptions; Authentication by Certification (See Rule 902 for parallel change)	Roger Pauley, DOJ 6/93	9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 11/96 — Considered 4/97 — Draft prepared and considered. Subcommittee appointed for further drafting. 10/97 — Draft approved for publication 1/98 — Approved for publication by the ST Cmte. 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved 4/00 — Sup Ct approved 12/00 — Effective **COMPLETED**
[EV 803(7)-(23)] — Hearsay Exceptions; Availability of Declarant Immaterial		1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 803(8)] — Hearsay Exceptions; Availability of Declarant Immaterial: Public records and reports.		9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered regarding trustworthiness of record 11/96 — Declined to take action regarding admission on behalf of defendant **COMPLETED**
[EV 803(18)] — Should "learned treatises" be received as exhibits	Judge Grady	4/00— Considered; comte decides not to act **COMPLETED**
[EV 803(24)] — Hearsay Exceptions; Residual Exception	EV Rules Committee (5/95)	5/95 — Combined with EV804(b)(5) and transferred to a new Rule 807. 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 803(24)] — Hearsay Exceptions; Residual Exception (Clarify notice requirements and determine whether it is used too broadly to admit dubious evidence)		10/96 — Considered and referred to reporter for study 10/97 — Declined to act **COMPLETED**
[EV 804(a)] — Hearsay Exceptions; Declarant Unavailable: Definition of unavailability	Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92)	4/92 — Considered by CR Rules Cmte. 6/92 — Considered by ST Cmte. for publication 1/95 — Considered and approved for publication 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 804(b)(1)-(4)] — Hearsay Exceptions		10/94 — Considered 1/95 — Considered and approved for publication by ST Cmte. 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 804(b)(3)] — Degree of corroboration regarding declaration against penal interest		10/99 — Considered by cmte 4/00 — Cmte directed reporter to prepare draft amendment 4/01 — Cmte recommended publication 6/01 — Approved for publication by ST Cmte 8/01 — Published for public comment 4/02 — Cmte considered in light of public comments and revised. Cmte approved revised rule and recommended publication 6/02 — ST Committee approved for publication **PENDING FURTHER ACTION**
[EV 804(b)(5)] — Hearsay Exceptions; Other exceptions		5/95 — Combined with EV804(b)(5) and transferred to a new Rule 807. 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 804(b)(6)] — Hearsay Exceptions; Declarant Unavailable. (To provide that a party forfeits the right to object on hearsay grounds to the admission of a statement made by a declarant whose unavailability as a witness was procured by the party's wrongdoing or acquiescence.)	Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92)	4/92 — Considered by CR Rules Cmte. 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by ST Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 805] — Hearsay Within Hearsay		1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 806] — Attacking and Supporting Credibility of Declarant. (To eliminate a comma that mistakenly appears in the current rule. Technical amendment.)	EV Rules Committee 5/95	5/95 — Decided not to amend 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 806] — To admit extrinsic evidence to impeach the character for veracity of a hearsay declarant		11/96 — Declined to act **COMPLETED**
[EV 807] — Other Exceptions. Residual exception. The contents of Rule 803(24) and Rule 804(b)(5) have been combined to form this new rule.	EV Rules Committee 5/95	5/95 — This new rule is a combination of Rules 803(24) and 804(b)(5). 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 10/96 — Expansion considered and rejected 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 807] — Notice of using the provisions	Judge Edward Becker	4/96 — Considered 11/96 — Reported. Declined to act. **COMPLETED**
[EV 901] — Requirement of Authentication or Identification		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 902] — Self-Authentication		5/95 —Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte 9/95 — Published for public comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — ST Comte approved **COMPLETED**
[EV 902] — Use of seals	DOJ Committee member	10/99 — Cmte considered 4/00 — Cmte considered and rejected **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 902(6)] — Extending applicability to news wire reports	Committee member (10/98)	10/98 — to be considered when and if other changes to the rule are being considered 4/00 — Considered **PENDING FURTHER ACTION**
[EV 902 (11) and (12)] — Self-Authentication of domestic and foreign records (See Rule 803(6) for consistent change)		4/96 — Considered 10/97 — Approved for publication 1/98 — Approved for publication by the ST Cmte. 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — ST Cmte Approved 9/99 — Judicial Conference Approved 4/00 — Approved by Supreme Court 12/00 — Effective **COMPLETED**
[EV 903] — Subscribing Witness' Testimony Unnecessary		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1001] — Definitions		9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1001] — Definitions (Cross references to automation changes)		10/97 — Considered **PENDING FURTHER ACTION**
[EV 1002] — Requirement of Original. Technical and conforming amendments.		9/93 — Considered 10/93 — Published for public comment 4/94 — Recommends Jud. Conf. make technical or conforming amendments 5/95 — Decided not to amend 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1003] — Admissibility of Duplicates		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1004] — Admissibility of Other Evidence of Contents		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 1005] — Public Records		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1006] — Summaries		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1007] — Testimony or Written Admission of Party		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1008] — Functions of Court and Jury		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1101] — Applicability of Rules		6/92 — Approved by ST Cmte. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective 5/95 — Decided not to amend 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/98 — Considered 10/98 — Reporter submits report; cmte declined to act **COMPLETED**
[EV 1102] — Amendments to permit Jud. Conf. to make technical changes	CR Rules Committee (4/92)	4/92 — Considered by CR Rules Cmte. 6/92 — Considered by ST Cmte. 9/93 — Considered 6/94 — ST Cmte. did not approve 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1103] — Title		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[Admissibility of Videotaped Expert Testimony]	EV Rules Committee (11/96)	11/96 — Denied but will continue to monitor 1/97 — Considered by ST Cmte. **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[Attorney-client privilege for in-house counsel]	ABA resolution (8/97)	10/97 — Referred to chair 10/97 — Denied **COMPLETED**
[Automation] — To investigate whether the EV Rules should be amended to accommodate changes in automation and technology	EV Rules Committee (11/96)	11/96 — Considered 4/97 — Considered 4/98 — Considered **PENDING FURTHER ACTION**
[Circuit Splits] — To determine whether the circuit splits warrant amending the EV Rules		11/96 — Considered 4/97 — Considered **COMPLETED**
[Obsolete or Inaccurate Rules and Notes] — To identify where the Rules and/or notes are obsolete or inaccurate.	EV Rules Committee (11/96)	5/93 — Considered 9/93 — Considered. Cmte. did not favor updating absent rule change 11/96 — Considered 1/97 — Considered by the ST Cmte. 4/97 — Considered and forwarded to ST Cmte. 10/97 — Referred to FJC 1/98 — ST Cmte. Informed of reference to FJC 6/98 — Reporter's Notes published **COMPLETED**
[Statutes Bearing on Admissibility of EV] — To amend the EV Rules to incorporate by reference all of the statutes identified, outside the EV Rules, which regulate the admissibility of EV proffered in federal court		11/96 — Considered 4/97 — Considered and denied **COMPLETED**
[Sentencing Guidelines] — Applicability of EV Rules		9/93 — Considered 11/96 — Decided to take no action **COMPLETED**