# ADVISORY COMMITTEE
# ON
# EVIDENCE RULES

**Washington, D.C.**
**April 25, 2003**

# ADVISORY COMMITTEE ON EVIDENCE RULES

**AGENDA FOR COMMITTEE MEETING**
**Washington, D.C.**
**April 25, 2003**

## I. Opening Remarks of the Chair

Including approval of the minutes of the Fall 2002 meeting, and a report on the January, 2003 meeting of the Standing Committee. The Draft minutes of the Fall 2002 meeting and this Committee's report to the Standing Committee are included in the agenda book.

## II. Consideration of Proposed Amendments Released for Public Comment

A. *Summary of Public Comment.* A memorandum containing a summary of all public comments received on the proposed amendment to Rule 804(b)(3) is included in the agenda book. If the Rule is referred to the Standing Committee for adoption, the summarized public comments for the Rule will be included in an appendix.

B. *Rule 804(b)(3).* A memorandum discussing public comment on the proposed amendment, and possible changes to the proposal, is included in the agenda book.

## III. Consideration of Evidence Rules

### A. Rule 106

The Reporter's memorandum concerning Rule 106, in response of the resolution of the Committee on a possible amendment at the last meeting, 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, as well as a consideration of a proposal to amend the Rule submitted by a member of the public, is included in the agenda book.

### C. Rule 408

The Reporter's memorandum concerning Rule 408, in response to the resolution of the Committee on a possible amendment at the last meeting, is included in the agenda book.

### D. Rule 410

The Reporter's memorandum concerning the possibility of amending the Rule to protect statements and offers by the prosecution, and other matters, is included in the agenda book.

### E. Rule 606(b)

The Reporter's memorandum concerning the possibility of amending Rule 606(b) to provide an exception for correcting errors in the rendering of the verdict, is included in the agenda book.

### F. Rule 803(6)

Professor Ken Broun's memorandum, on whether the Rule should be amended to clarify the need, or lack of need, for a business duty to report the information, is included in the agenda book.

## IV. Privileges

The agenda book includes Ken Broun's draft of the "survey rule" on the psychotherapist-patient privilege, as well as the commentary on the survey rule. This is intended as a model of the "Survey of Privileges" project for the Committee to consider.

## V. New Business

### A. "De Bene Esse" Depositions

A memorandum from the Reporter, concerning the Evidence Rules Committee's possible response to a proposal from Judge Irenas (referred by the Civil Rules Committee) for broader use of "de bene esse" depositions, is included in the agenda book.

### B. Preserving Exhibits Pending Appeal

A memorandum from the Reporter, concerning a proposal from Judge Roll (referred to this Committee by the Administrative Office) for a Rule that would require a court to retain custody of trial exhibits during an appeal, is included in the agenda book.

### C. Legislative Initiatives

A memorandum by the Reporter analyzing bills in Congress that would affect the Federal Rules of Evidence is included in the agenda book.

## VI. Next Meeting

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April 8, 2003
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April 8, 2003
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# Advisory Committee on Evidence Rules

Draft Minutes of the Meeting of October 18, 2002

Seattle, Washington

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 18, 2002, at the Madison Renaissance Hotel in Seattle, Washington.

*The following members of the Committee were present:*

Hon. Jerry E. Smith, Chair
Hon. Robert L. Hinkle
Hon. Jeffrey L. Amestoy
Patricia Lee Refo, Esq.
Thomas W. Hillier, Esq.
Christopher A. Wray, Esq.

*Also present were:*

Hon. David C. Norton, former member of the Evidence Rules Committee
Hon. Christopher M. Klein, Liaison from the Bankruptcy Rules Committee
Hon. Richard H. Kyle, Liaison from the Civil Rules Committee
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
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee

## Opening Business

The meeting began at 7:30 a.m. Judge Smith, the newly appointed Chair of the Committee, welcomed the members. He asked for approval of the draft minutes of the April 2002 Committee meeting. The minutes were approved unanimously.

Judge Smith expressed his regret that Judge Shadur, the former Chair of the Committee, could not make it to the meeting. He noted that the Committee looked forward to having Judge Shadur attend the Spring 2003 meeting of the Committee.

The Reporter gave a short report on the June 2002 Standing Committee meeting, at which that committee approved the proposed amendment to Evidence Rule 608(b) and referred it to the Judicial Conference. Subsequently, the Judicial Conference approved the proposed amendment and referred it to the Supreme Court. Barring any unforeseen developments, the amendment will become effective December 1, 2003.

The proposed amendment to Rule 804(b)(3) had been substantially revised by the Committee at its April 2002 meeting, and as revised was submitted to the Standing Committee with the recommendation that it be released for a new round of public comment. The Standing Committee unanimously approved the proposal. The Reporter noted that, so far, there have been no public comments submitted on the proposed amendment; a public hearing on the proposal is scheduled for January 27, 2003.

Judge Smith asked Committee members whether, upon review of the proposed amendment to Rule 804(b)(3), any member had found substantial problems with the proposed change in the text or with the Committee Note. No Committee member had any problem with the proposal.

## Long-Range Planning — Consideration of Possible Amendments to Certain Evidence Rules

At its April 2001 meeting, the Committee directed the Reporter to review scholarship, caselaw, 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 a number of 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 Committee began to consider the Reporter's memoranda on some of the rules that have been found worthy of in-depth consideration. The Committee agreed that the problematic rules should be considered over the course of four Committee meetings, and that if any rules are found in need of amendment, the amendment proposals would be delayed in order to package them as a single set of amendments to the Evidence Rules. This would mean that the package of amendments, if any, would go to the Standing Committee at its June 2004 meeting, with a recommendation that the proposals (again, if any) be released for public comment.

With that timeline in mind, the Committee considered reports on five possibly problematic Evidence Rules at its Fall 2002 meeting. The goal of the Committee was not to vote definitively on whether to propose an amendment to any of those rules, but, rather, to determine whether to proceed

further with the rules as part of a possible package of amendments. Thus, a "no" vote from the Committee would mean that no action would be taken to propose an amendment. A "yes" vote would mean only that the Committee was interested in further inquiry into a possible amendment and would consider possible language for an amendment at a later date.

## 1. Rule 106

The Reporter's memorandum on Rule 106, the rule of completeness, indicated that courts and commentators are in dispute over two important questions about the scope of the rule. One question is whether the rule operates as an independent rule of admissibility—admitting completing evidence even if it would otherwise be excluded as hearsay or under some other rule of exclusion. This is called a "trumping" function. The other major question is whether the rule should permit completing evidence of oral statements and actions as well as the written statements currently covered by the rule. The Reporter prepared model drafts that would cover these points.

Discussion indicated that most Committee members were skeptical about including a trumping function in Rule 106. The Justice Department representative argued that if a trumping function were included in the rule, this would give parties an incentive to argue that evidence is necessary for completeness purposes, even though it is not really necessary to clarify a misleading impression. The Justice Department representative also pointed out that a number of exclusionary rules, such as Rules 403 and 412, should never be trumped by Rule 106.

Another Committee member questioned whether it was necessary, as a practical matter, to amend Rule 106 to include a trumping function. He noted that if admission of evidence indeed were necessary to correct a misleading impression, a trial judge would find a way to admit it even without Rule 106—for example, the trial court could hold that the proponent of misleading evidence opened the door, or waived the right to complain about completing evidence. Thus, the trial judge will reach a fair result without a change to Rule 106. Other members noted that the concept of "opening the door" is a principle that runs through many evidentiary doctrines, including admission of hearsay and evidence that is otherwise prejudicial. It might be considered misleading to codify an "open the door" principle with respect to completing evidence only, while failing to treat the use of that concept in other situations.

One member in favor of a proposed change to Rule 106 argued that in criminal cases, the government often proffers selected parts of a statement, and it is only fair to allow defendants to admit other portions that are necessary to place the initially admitted parts in context. If the rule were to include a trumping function, it is more likely that defendants will receive a fair ruling on completing evidence.

Members of the Committee also expressed skepticism about amending Rule 106 to cover oral as well as written statements. This could lead to attempts of an opponent to disrupt the proponent's

order of proof by contending that the proponent's witness testified to a misleading portion of an oral statement; disputes will often arise about what the oral statement actually was. There often will have to be a sidebar hearing to determine who said what.

Committee members also noted that many courts have used Rule 611(a) to admit completing evidence of an oral statement—from this they concluded that there was no reason to amend Rule 106 to cover the presentation of completing oral statements. The change would be one of form only, not of substance.

The Committee took a tentative vote on whether to continue work on a possible amendment to Rule 106. Two members of the Committee voted against continuing work on Rule 106. All members of the Committee voted against any amendment to Rule 106 that would cover oral statements. A majority of the Committee, however, agreed to consider further an amendment to Rule 106 that would provide some form of trumping function in the rule.

## 2. Rule 404(a)

The Reporter's memorandum on Rule 404(a) indicated that there is a split among the circuits as to whether character evidence can be used circumstantially in a civil case. A typical situation in which the question is presented is where an official is sued for assault in a 42 U.S.C. § 1983 case. Can the defendant introduce evidence of his own peaceful character to show that he acted peacefully on the time in question? Can the defendant introduce evidence of the plaintiff's aggressive character to show that the plaintiff was the aggressor at the time in question? Conversely, can the plaintiff introduce evidence of his own peaceful character and/or the defendant's violent temperament to prove how the parties acted?

Most courts have held that character evidence is not admissible to prove conduct in a civil case. Those courts rely on the language of the rule, which permits circumstantial use of character evidence only with respect to the "accused" and the "victim." Those courts reason that the term "accused" is a term of art applied to criminal cases only. Moreover, the Advisory Committee Note to Rule 404(a) says that the rule rejects the circumstantial use of character evidence in a civil case. But two circuits, the Fifth and the Tenth, hold that character evidence can be offered circumstantially where the defendant in a civil case is accused of conduct that is tantamount to a crime.

The Committee considered which view among the circuits is better policy. It concluded unanimously that as a policy matter, character evidence should not be admitted to prove conduct in a civil case. The circumstantial use of character evidence is fraught with peril in *any* case, because it could lead to a trial of personality and could cause the jury to decide the case on improper grounds. But the risks of character evidence historically have been considered worth the costs where a criminal defendant seeks to show his good character or the pertinent bad character of the victim. This so-called "rule of mercy" is thought necessary to provide a counterweight to the resources of the

government, and is a recognition of the possibility that the accused, whose liberty is at stake, may have little to defend with other than his good name. None of these considerations is operative in civil litigation. In civil cases, the substantial problems raised by character evidence were considered by the Committee to outweigh the dubious benefit that character evidence might provide.

The question, then, for the Committee was whether it is necessary to propose an amendment to Rule 404(a) explicitly to prohibit the circumstantial use of character evidence in a civil case. The Committee tentatively agreed to work on a proposed amendment to Rule 404(a) to achieve the desired policy. Members noted that the circuits are split on the question, and this causes both disruption and disuniform results, especially in civil rights cases. Such cases arise relatively frequently in the federal courts, so an amendment to the rule would have a helpful impact on a fairly large number of cases.

Committee members noted that if Rule 404(a) is to be amended, the amendment should include a reference in the text that evidence of a victim's character, otherwise admissible under the rule, nonetheless could be excluded under Rule 412 in cases involving sexual assault. Although the need for such clarification does not justify an amendment on its own, the Committee determined that clarifying language would be useful as part of a larger amendment.

The Reporter was instructed to prepare a proposed amendment and supporting memorandum for the Committee to consider as part of the Committee's long-range planning.

## 3. Rule 408

The Reporter's memorandum on Rule 408 noted that the courts are divided on three important questions concerning the scope of the rule:

1) Some courts hold that evidence of compromise is admissible against the settling party in subsequent criminal litigation, relying on a policy argument that the interest in admitting relevant evidence in a criminal case outweighs the interest in encouraging settlement. Other courts hold that compromise evidence is excluded in subsequent criminal litigation, noting that there is nothing in the language of Rule 408 that would permit the use of evidence of civil compromise to prove criminal liability.

2) Some courts hold that statements in compromise can be admitted to impeach by way of contradiction or prior inconsistent statement. Other courts disagree, noting that the only use for impeachment specified in the Rule is impeachment for bias, and noting further that if statements in compromise could be admitted for contradiction or prior inconsistent statement, this would chill settlement negotiations, in violation of the policy behind the rule.

3) Some courts hold that offers in compromise can be admitted in favor of the party

who made the offer; these courts reason that the policy of the rule, to encourage settlements, is not at stake where the party who makes the statement or offer is the one who wants to admit it at trial. Other courts hold that settlement statements and offers are never admissible to prove the validity or the amount of the claim, regardless of who offers the evidence. These courts reason that the text of the rule does not provide an exception based on identity of the proffering party, and that admitting compromise evidence would raise the risk that lawyers would have to testify about the settlement negotiations, thus risking disqualification.

The Committee began its discussion on whether Rule 408 should be amended to clarify whether that compromise evidence is admissible in criminal cases. The Justice Department representative noted that the Department had not yet come to a conclusion on whether, as a matter of policy, such evidence should be admissible in criminal cases. On the one hand, if compromise evidence is excluded from criminal cases, it eliminate a disincentive that a party otherwise would have to settle with the government in related civil matters; and it will make it more likely that victims of wrongdoing will receive compensation from wrongdoers in a timely fashion. On the other hand, if compromise evidence is admitted in criminal cases, it might make it more likely that a meritorious criminal prosecution will be successful. The Justice Department representative asked that ultimate consideration of a proposed amendment to Rule 408 be deferred until the Department can formulate a position on the matter. The Reporter responded that any consideration of an amendment to Rule 408 was tentative at this stage—the only question for the Committee at this point was whether the rule should be considered a candidate for an amendment as part of long-range planning.

Other Committee members stated that policy arguments weigh strongly in favor of excluding evidence of a civil compromise in a later criminal case. If such evidence is admissible in a criminal case, it significantly diminishes the incentive to settle civil litigation. Moreover, excluding compromise evidence in criminal cases would not result in the loss of evidence in such cases—without a rule protecting compromise evidence, there is likely to be no settlement that could ever be admitted in a criminal case. In other words, the only evidence "lost" is that generated by the rule protecting compromise evidence.

Committee members argued that it is necessary to amend Rule 408 to provide specifically that evidence of a civil compromise is inadmissible in subsequent criminal litigation. Under the caselaw interpreting the current rule, such evidence is admissible in some circuits and not in others. This is a poor state of affairs, because there may be no way, at the time of a civil settlement, to predict where a criminal litigation might be brought; moreover it is unfair to have such powerful evidence admissible against some defendants and not others. Finally, the possibility that a civil settlement will be admissible in a criminal case presents a trap for the unwary. Rule 408, by its terms, does not specify that civil settlements are admissible in criminal litigation, so a lawyer and client may enter into civil settlement negotiations under the mistaken impression that such negotiations and settlement never could be used against the client.

The Committee then discussed whether the rule should permit impeachment by way of prior

inconsistent statement and contradiction. Committee members agreed that the rule should not permit such broad impeachment, because to do so would unduly prohibit settlement. Parties justifiably would be concerned that something said in settlement negotiations later could be found inconsistent with some statement or position taken at trial; it is virtually impossible to be absolutely consistent throughout the settlement process and trial. The Committee resolved that if Rule 408 is to be amended, it should include a provision specifically stating that compromise evidence cannot be offered to impeach by way of prior inconsistent statement or contradiction. The Reporter noted that such a provision exists in several states.

The Committee then turned to whether compromise evidence should be admissible in favor of the party who made the statement or offer of settlement. The Committee determined that such evidence should not be admissible. If a party were to reveal its own statement or offer, this would itself reveal the fact that the adversary entered into settlement negotiations; such evidence is entitled to protection on its own. Thus, it would not be fair to hold that the protections of Rule 408 can be waived unilaterally, because the rule, by definition, protects both parties from having the fact of negotiation disclosed to the jury. Moreover, a party that admits its own offer or statement in compromise would open the door to evidence of counter-offers, responses to offers and counter-offers, and the like—all with the possibility that lawyers will have to be disqualified because of the need to testify about the tenor and import of the settlement negotiations. The Committee concluded that allowing a party to admit its own settlement statements and offers would open up a "can of worms" and could not be justified by any corresponding benefit. The Committee resolved that any amendment to Rule 408 that might be proposed as part of long-range planning should include a provision specifically stating that compromise evidence is excluded even if proffered by the party that made the statement or offer in compromise. Such a provision is necessary, because the circuits are divided on the point, and differing results on the question are not justifiable.

The Committee next considered whether Rule 408 is a rule of privilege; if it is a privilege, any amendment would have to be enacted directly by Congress. If an amendment to Rule 408 went through the ordinary rulemaking process, the question of whether it is a privilege would be resolved definitively only if a court were to render an opinion on the subject. The Committee resolved, however, that the weight of the argument strongly favors the conclusion that Rule 408 is not a privilege. The arguments against a privilege include: a) Rule 408 was placed in Article 4 of the Federal Rules, not in the body of privileges originally proposed as Article 5; b) at least some courts have held that the protections of Rule 408 are not waivable, in contrast to privileges which are waivable; c) privileges ordinarily protect some important confidential relationship—Rule 408 does not; and d) other policy-based rules of exclusion have been amended through the rulemaking process, specifically Rule 407 and the restylized Criminal Rule 11(e)(6), which was substantively identical to Evidence Rule 410. Thus, the Committee preliminarily determined that if an amendment to Rule 408 were to be proposed, it could proceed through the ordinary rulemaking process.

Finally, the Committee reviewed the caselaw holding that Rule 408 protects against admission of statements made by the government during plea negotiations in a *criminal* case. Rule 410 applies to plea negotiations, but it does not by its terms protect statements and offers made by the

government: It provides that statements and offers in plea negotiations are not admissible "against the defendant." The inapplicability of Rule 410 to government statements and offers in plea negotiations has led some courts to hold that such evidence is excluded under Rule 408. The Committee noted, however, that Rule 408, by its terms, does not apply to negotiations in criminal cases—Rule 408 refers to efforts to compromise a "claim," as distinct from criminal charges.

As a policy matter, the Committee determined that government statements and offers in plea negotiations should be excluded from a criminal trial, in the same way that a defendant's statements are excluded. A mutual rule of exclusion would encourage a free flow of discussion that is necessary to efficient guilty plea negotiations; there is no good reason to protect only the statements of a defendant in a guilty plea negotiation. The Committee also determined, however, that if an amendment is required to protect government statements and offers in guilty plea negotiations, that amendment should be placed in Rule 410, not Rule 408, which, by its terms, covers statements and offers of compromise made in the course of attempting to settle a *civil* claim. Rule 410, which governs efforts to settle criminal charges, is the appropriate place for any amendment that would exclude statements and offers in guilty plea negotiations.

At the end of its discussion, the Committee directed the Reporter to prepare the following for the Committee's consideration at the next meeting: 1) a draft of an amendment to Rule 408 that would provide that compromise evidence is inadmissible in a criminal case; 2) a draft of an amendment that would provide, in contrast, that such evidence is admissible in a criminal case; 3) provisions in both model drafts of Rule 408 that would provide that compromise evidence may not be used for impeachment by prior inconsistent statement or contradiction; 4) provisions in both model drafts that would provide that compromise evidence is not admissible, even if proffered by the party who made the statement or offer in compromise; and 5) a draft of an amendment to Rule 410 that would exclude statements and offers made by the government during guilty plea negotiations.

## 4. Rule 412

The Reporter's memorandum on Rule 412 raised two possible problems for the Committee's consideration. One possible problem is that the Rule has three stylistic anomalies: 1) The rule seems to provide that evidence rules other than Rule 412 can operate to exclude evidence offered by a criminal defendant, even though the Constitution would require it to be admitted; 2) when referring to the victim, the rule uses the qualifying term "alleged" in every place but one—this seems merely to have been an oversight; and 3) the notice requirement is drafted in terms that might raise a question whether notice can be submitted and served electronically in those courts permitting electronic case filing.

The Committee reviewed these stylistic problems and concluded unanimously that they do not, together or cumulatively, require an amendment to the rule. No part of the problematic language

has actually created a problem in the cases. The Committee resolved that the benefit of any purely stylistic change is never sufficient in itself to justify the cost of amending an evidence rule. Committee members agreed that stylistic changes to an evidence rule would not be proposed unless a particular rule needed to be amended on other, substantive grounds.

The second possible problem addressed in the Reporter's memorandum on Rule 412 is that there has been some confusion in the courts about whether evidence of a victim's prior false claims of rape are covered by the rule. If such claims are covered, then they would rarely be admissible under Rule 412—in a criminal case, they would be admissible only if constitutionally required, and caselaw indicates that the constitution would mandate admissibility only if the false claim were probative of the victim's bias or motive. In contrast, if false claims are not covered by Rule 412, they could be admissible to prove the victim's character for untruthfulness under Rule 608(b).

After discussion, the Committee determined not to proceed further with any amendment to Rule 412. The admissibility of false claims under Rule 412 has created some confusion in the courts, but there is not a substantial body of caselaw on the subject, and the courts still seem to be working out the problem. The problem does not seem substantial enough to justify the costs of amendment–especially an amendment to a rule grounded in sensitive and complicated policy concerns. Moreover, there are many difficult questions about proof of false claims—such as when is a claim considered "false" and when is a false claim probative of bias—that are probably better left to caselaw development than to rulemaking. Finally, members noted that Congress directly enacted the amendment to Rule 412 in 1994, and apparently deliberately chose not to address the question of false claims; this counsels against rulemaking on the subject.

## 5. Rule 803(4)

At its last meeting, the Committee directed Professor Ken Broun, a consultant to the Committee, to prepare a report on whether Rule 803(4) should be amended. The rule currently sets forth a hearsay exception for statements made for purposes of medical treatment or diagnosis. The rule specifically provides that statements made to doctors for purposes of litigation are within the exception—because the doctor in preparing testimony would be diagnosing the patient's condition.

Professor Broun reported that the original rationale for including, within the exception, statements made for purposes of litigation was that the doctor would ordinarily use such statements as part of a basis for forming an expert opinion, and the statements therefore would be heard by the jury anyway. Professor Broun noted, however, that this rationale has been undermined by the 2000 amendment to Rule 703, under which hearsay used as the basis for expert opinion cannot be disclosed to the jury unless its probative value substantially outweighs its prejudicial effect. Professor Broun also noted that a few courts had held, in criminal cases, that a statement to a doctor solely in anticipation of litigation was not reliable enough to satisfy the accused's right to confrontation. Professor Broun presented four alternative models that might be used to amend Rule 803(4) to prevent

the admission of statements made for purposes of litigation under that rule.

After an extensive discussion, the Committee decided not to pursue an amendment to Rule 803(4). The following points were made by various Committee members during the course of discussion:

1. It will be difficult in many cases to determine the motivation of the patient who speaks to a doctor, especially after an accident or injury. Is the patient seeking treatment, or an expert witness, or both? The current rule avoids this difficult line-drawing.

2. If the rule were amended to exclude only those statements made *solely* for litigation purposes, it would have very little effect. Competent counsel would make sure that consultations with doctors for litigation purposes would have some treatment motivation. Moreover, statements of the patient's current physical condition (e.g., "my neck hurts") will still be admissible under Rule 803(3) even if made to a doctor for purposes of litigation. Thus, the exception as amended would exclude only those statements where counsel has done nothing to work around the rule. The costs of an amendment do not justify a rule that will apply so infrequently.

3. There will still be some situations in which a doctor, testifying as an expert, will be able to disclose hearsay when used as the basis for an expert opinion. Rule 703 does not prohibit such disclosure; it simply makes it more difficult. Thus, the original rationale for admitting statements under Rule 803(4)—that the jury would hear the statements anyway and would not differentiate between statements offered for truth and statements offered as the basis for an expert opinion—has been undermined somewhat, but it is still applicable.

4. A rule change that would exclude statements made by an injured plaintiff to medical experts would encounter substantial opposition from the plaintiffs' bar.

5. To the extent the amendment would be intended to deal with statements made by victims of child abuse for purposes of litigation, this is an enormously complicated question that is better left to caselaw development.

## 6. Other Rules for Future Consideration

As part of long-range planning, the Reporter prepared a short memorandum on other rules that might be raising problems. The Committee reviewed the rules highlighted by the Reporter, to determine whether to direct the Reporter to prepare a full memorandum on any of those rules.

**After discussion, the Committee requested the Reporter to prepare a memorandum on the problems raised by the following two rules:**

1. **Rule 806**: The rule provides that if a hearsay statement is admitted under a hearsay exception or exemption, the opponent may impeach the hearsay declarant to the same extent as if the declarant were testifying in court. The courts are in dispute, however, about whether a hearsay declarant's character for truthfulness may be impeached with prior bad acts under Rule 806. If the declarant were to testify at trial, he could be asked about pertinent bad acts, but no evidence of those acts could be proffered—Rule 608(b) prohibits extrinsic evidence of bad acts offered to impeach the witness's character for truthfulness. For hearsay declarants, however, the only way to impeach with bad acts is to proffer extrinsic evidence, because the witness is not on the stand to be asked about the acts. Rule 806 does not explicitly say that extrinsic evidence of bad acts is allowed. As a result, some courts prohibit bad acts impeachment of hearsay declarants, and some permit it.

The Committee recognized that impeachment of hearsay declarants often can be critically important, and to preclude extrinsic evidence of bad acts would mean that a hearsay declarant could not be impeached for untruthful character. This could lead to abuse—a party who wished to avoid impeachment of a witness through bad acts might engineer a hearsay statement to substitute for in-court testimony. The Committee agreed to consider whether Rule 806 should be amended specifically to provide that a hearsay declarant may be impeached through extrinsic evidence of bad acts where the acts are otherwise admissible under Rule 403.

2. **Rule 901:** The Reporter noted that some commentators have suggested that the use of digital photography poses special concerns for establishing and challenging authenticity. Digital photographs can be altered fairly easily, and such alteration might be difficult to detect. The Committee discussed, on a preliminary basis, whether it would be useful to amend Rule 901, or to propose a new evidence rule for Article 9, to provide special rules for authenticating digital photography—such as requiring evidence of a digital "fingerprint."

Committee members were skeptical that such a rule would be necessary. The general feeling was that Rule 901 was flexible enough to allow the judge to exercise discretion to assure that digital photographs are authentic and have not been altered. The Reporter noted, however, that it might be worthwhile for the Committee to allow the Reporter to conduct further research on the problem and to provide a background memorandum to the Committee, especially given the Standing Committee's interest in assuring that the rules are updated when necessary to accommodate technological changes. The Committee directed the Reporter to prepare a background memorandum on the use of digital photographs as evidence, to be considered at a future meeting.

**The Committee decided not to proceed with any further investigation as to the following Rules:**

1. *Rule 804(a)(5)*—The Rule establishes a "deposition preference" for hearsay exceptions premised on unavailability. Occasionally this preference has led to anomalous results—hearsay statements otherwise admissible under Rule 804(b)(3) have been excluded when the declarant has given a deposition on the subject, and the asserted ground of unavailability is absence. The Committee determined that, although the rule has created problems and anomalous results from time to time, those cases are relatively infrequent. The problems are not so serious or prevalent to justify the costs of an amendment.

2. *Rule 804(b)(1)*—The Rule provides that in a civil case, prior testimony may be admitted against a party who had a similar motive to develop the testimony at the time it was given, or whose "predecessor in interest" had such a motive. The courts have divided over whether the term "predecessor in interest" is broad enough to cover parties in prior litigation with no legal relationship to the party against whom the testimony is now offered, but whose development of that testimony was as effective as the current party could have done.

Committee members noted that any dispute among the courts is one of form rather than substance. Even those courts that refuse to interpret the term "predecessor in interest" expansively will find a way to admit testimony from a prior litigation where the party who developed the testimony did as good a job as the party against whom the testimony is admitted could have expected to do; thus, courts that have refused to admit such testimony under Rule 804(b)(1) have admitted it anyway under the residual exception. Consequently, the Committee decided not to proceed further with an amendment to Rule 804(b)(1).

3. *Rule 807*—The Reporter noted that two possible problems have arisen in the application of the residual exception. First, there is some dispute about the breadth of the exception, specifically whether statements that "nearly miss" the other exceptions can qualify as residual hearsay. Second, the notice requirement of the residual exception is written in unbending, bright-line terms, but courts have applied it flexibly, excusing compliance for good cause or finding harmless error.

Committee members observed that the breadth of the residual exception presented a policy question that most courts had already worked through. Almost all courts apply the exception expansively; even assuming that the exception should be applied more narrowly as a matter of policy, there would be little that could be added to the rule that could guarantee that result. Application of the exception requires a case-by-case approach that depends on the circumstances and the discretion of the judge—such a flexible inquiry is difficult to constrain by textual language in an evidence rule.

As to notice, it was clear to the Committee that courts would apply the notice requirement flexibly, regardless of the language of the rule. Therefore, the only question is whether it would be worthwhile to amend the rule to "codify" the flexible approach already taken by the courts. The Committee agreed that changing the language of the text to codify the result already reached by the courts might be useful, but the benefits of such codification are outweighed by the costs of an amendment—including the risk of upsetting settled expectations and the risk that the amendment will be misinterpreted as broader than intended.

4. *Rule 902(1)*—Rule 902(1) provides for self-authentication of domestic public records under seal, including records of the Canal Zone. Because there is no longer a Canal Zone, it has been suggested that the rule be amended to delete the reference. The Committee decided not to proceed with such an amendment, however. Such an amendment would be the kind of stylistic, non-substantive change that the Committee has decided as a matter of policy is insufficient to justify on its own the substantial costs of amending an evidence rule. Moreover, it is possible that a public record from the former Canal Zone might still be used in litigation.

5. *Rule 902(2)*—The rule provides for self-authentication of public documents not under seal if a public officer having a seal certifies that the document was signed by a person in an official capacity and the signature is genuine. The former Justice Department representative on the Committee had suggested that the rule should be amended because many state officials who certify documents no longer use a seal. When that suggestion was made, the Committee decided that if the Department of Justice representative could determine that the rule was creating a problem for government lawyers in authenticating public records, the Committee would consider proposing an amendment to the rule to provide an alternative to the sealing requirement. To this date, no showing of a problem has been made. The current Justice Department representative informed the Committee that he would look into the matter to determine whether Department lawyers were having a problem with the sealing requirement. Any further consideration of an amendment to Rule 902(2) was tabled pending a report from the Department of Justice representative.

6. *Rule 902(6)*—Rule 902(6) provides that printed materials purporting to be newspapers or periodicals are self-authenticating. It has been suggested that this rule should be expanded to permit self-authentication of internet materials that serve the same function as printed newspapers or periodicals, such as the electronic version of the *New York Times* or *Slate Magazine*.

The Committee decided not to proceed with an amendment to Rule 902(6). All that is at stake is self-authentication; internet materials can still be authenticated by making the necessary showing of authenticity under Rule 901. Moreover, Committee members ex-

pressed concern that there might be legitimate questions of authenticity of material taken from the internet, as distinguished from printed newspapers that are obviously likely to be authentic. Internet material is more subject to alteration; this counsels caution before extending the rule of self-authentication that currently applies to printed materials only.

7. *Rule 1006*—This Rule provides for the admissibility of summaries of evidence that is too voluminous to be formally admitted at trial. The Reporter noted that there has been some confusion in distinguishing between summaries admissible under Rule 1006 and summaries of evidence already admitted at trial. These latter summaries are often called pedagogical summaries, and they are designed to make the evidence already admitted more understandable to the factfinder. Pedagogical summaries are not governed by Rule 1006. It has been argued that Rule 1006 should be amended to clarify that it does not apply to summaries of evidence admitted at trial.

The Committee decided not to proceed with an amendment to Rule 1006, on the ground that any confusion among litigants has been handled adequately by the courts, and has not created a problem that has affected the results in the cases. Thus, any problem is one of form rather than substance and does not justify the substantial costs of an amendment to an evidence rule.

# Privileges

The Subcommittee on Privileges has been working for more than a year on a draft of privileges. At the request of the Subcommittee, the Committee discussed what the goal of this privilege project should be. It has become increasingly apparent that the Committee would not propose a new set of privileges for enactment. Privilege rules must be enacted by Congress directly. Submitting a new set of privileges to Congress could result in problematic rules, given the likelihood that interest groups would seek to change or establish certain privileges to their benefit.

This does not mean, however, that the privilege project should be terminated. Committee members noted that from time to time, Congress has proposed rules of privilege; the Committee needs to be prepared to comment on such proposals, and the work of the Privileges Subcommittee will be helpful in responding to such Congressional ventures. It was also emphasized that the Committee could perform a valuable service to the bench and bar by giving guidance on what the federal common law of privilege currently provides. This could be accomplished by a publication outside the rulemaking process, such as has been previously done with respect to outdated Advisory Committee Notes and caselaw divergence from the Federal Rules of Evidence.

After discussion, the Committee agreed to continue with the privileges project, and deter-

mined that the goal of the project would be to provide, in the form of a draft rule and commentary, a "survey" of the existing federal common law of privilege. This essentially would be a descriptive, non-evaluative presentation of the existing federal law, not a "best principles" attempt to write how the rules of privilege "ought" to look. Rather, the survey would be intended to help courts and lawyers determine what the federal law of privilege actually is. The Committee determined that the survey will be structured as follows:

1. An introduction setting forth the purpose and plan of the project.

2. The project would be divided into sections, one for each privilege as well as a general section for a discussion of principles such as choice of law and invocation and waiver of a privilege.

3. The first section for each rule would be a draft "survey" rule that would set out the existing federal law of the particular privilege. Where there is a significant split of authority in the federal courts, the rule would include alternative clauses or provisions.

4. The second section for each rule would be a commentary on existing federal law. This section would provide case law support for each aspect of the survey rule and an explanation of the alternatives, as well as a description of any aberrational caselaw. This commentary section is intended to be detailed but not encyclopedic. It would include representative cases on key points rather than every case, and important law review articles on the privilege, but not every article.

5. The third section would be a discussion of reasonably anticipated choices that the federal courts, or Congress if it elected to codify privileges, might take into consideration. For example, it would include the possibility of different approaches to the attorney-client privilege in the corporate context and the possibility of a general physician-patient privilege. This section, like the project itself, will be descriptive rather than evaluative.

The Committee instructed the Subcommittee on Privileges to prepare a draft of one of the privileges as an example for the Committee to review at the next meeting. Professor Broun agreed to provide a draft of the survey rule on the psychotherapist-patient privilege, and the necessary commentary, for the Committee's consideration at the Spring 2003 meeting.

## Other Business

*Outgoing Committee Member, Judge Norton*

Judge Smith expressed the Committee's appreciation to Judge Norton for his stellar work as a member of the Committee. Judge Norton was presented with a plaque commemorating his contributions to the Committee.

*Liaisons to Other Rules Committees*

Judge Smith raised the possibility that members of the Committee could serve as liaisons to the other rules committees, particularly the Civil and Criminal Rules Committees. John Rabiej stated that he would inquire into that possibility and would report back to the Committee.

*Digital Evidence Project*

Jennifer Marsh, the representative of the Federal Judicial Center, informed Committee members that the ABA Section of Science and Technology Law has formed a task force and launched the "Digital Evidence Project." The goal of the project is to publish an authoritative treatise on all things law-and-computer-related, including the presentation of electronic evidence. She also noted that the Computer Forensics and Electronic Discovery (CFED) group, affiliated with University of California at San Diego, is also working on a project to write a supplement, future chapter, or stand-alone complement to the scientific evidence manual on computer forensics issues. The Federal Judicial Center is encouraging these two groups to work together to prepare a publication on law and technology issues. Ms. Marsh encouraged any member of the Committee who is interested to get involved in this project. The Reporter stated that he would contact the interested parties and monitor developments on behalf of the Committee.

## Next Meeting

The next meeting of the Committee is tentatively scheduled for April 25, 2003, in Washington, D.C.

The meeting was adjourned at 2:30 p.m., October 18.

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law
Reporter

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

**FROM:** **Jerry E. Smith, Chair**
**Advisory Committee on Evidence Rules**

**DATE:** **December 5, 2002**

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

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# I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on October 18, 2002, in Seattle, Washington. It worked on and reviewed a number of possible long-term projects, but it is not proposing any action items for the Standing Committee at its January 2003 meeting. The proposed amendment to Evidence Rule 804(b)(3) is still in the public comment period, so no action is required on that proposal at this time. At its Spring 2003 meeting, the Committee will consider the comments received on the proposed amendment to Rule 804(b)(3) and will determine how and whether to proceed with the proposal.

Part III of this Report provides a summary of the Committee's long-term projects. A complete discussion can be found in the draft minutes of the October meeting, attached to this Report.

# II. Action Items

**No Action Items**

## III. Information Items

### A. Long-Term Project on Possible Changes to Evidence Rules

The Committee has directed the Reporter to review scholarship, caselaw, and other sources of evidence law to determine whether there are any evidence rules that might be in need of amendment. At its April 2002 meeting, the Committee reviewed a number of potential changes and directed the Reporter to prepare a report on a number of different rules, so the Committee could take an in-depth look at whether those rules require amendment. The Committee's decision to investigate those rules is not intended to indicate that the Committee has agreed to propose any amendments. Rather, the Committee determined that with respect to those rules, a more extensive investigation and consideration is warranted.

At its October 2002 meeting, the Committee began to consider the Reporter's memoranda on some of the rules that have been found worthy of in-depth consideration. The Committee agreed that the problematic rules should be considered over the course of four Committee meetings and that if any Rules are found in need of amendment, the amendment proposals would be delayed in order to package them as a single set of amendments to the Evidence Rules. This would mean that the package of amendments, if any, would go to the Standing Committee at its June 2004 meeting, with a recommendation that the proposals (again, if any) be released for public comment.

The Committee considered reports on a number of possibly problematic evidence rules at its Fall 2002 meeting. The goal of the Committee was not to vote definitively on whether to propose an amendment to any of those Rules, but rather to determine whether to proceed further with the rules as part of a possible package of amendments. Thus, a "no" vote from the Committee meant rejection of any proposed amendment. A "yes" vote meant only that the Committee was interested in further inquiry into a possible amendment and might consider possible language for an amendment at a later date.

### The Committee voted to reject the following proposals:

1. *Rule 106:* Commentators have suggested that Rule 106, the rule of completeness, should be expanded to cover oral as well as written statements. But the Committee determined that such a change would be unnecessarily disruptive to the order of proof at a trial.

2. *Rule 412*: The rule has certain stylistic and technical anomalies, and it has been suggested that the rule be amended to correct those anomalies. But the Committee determined that those tech-

nical matters have not created any practical problems in the application of the rule, so the costs of an amendment are not justified. The Committee also rejected a proposed amendment that would have clarified whether false claims of rape were covered by the Rule 412 exclusionary rule. The question of the admissibility of false claims has not arisen with sufficient frequency to justify the costs of an amendment.

3. *Rule 803(4)*: The Committee considered and rejected a proposal that would have excluded from this hearsay exception (covering statements to medical personnel) those statements made solely for purposes of litigation. The Committee determined, among other things, that it would be too difficult to distinguish between statements made solely for purposes of litigation and statements made for purposes of both treatment and litigation. The Committee also concluded that, to the extent the amendment would be intended to exclude statements made by victims of child abuse to medical personnel for purposes of litigation, this is an enormously complicated question that is better left to caselaw development.

4. *Rule 804(a)(5)*. The rule establishes a "deposition preference" for hearsay exceptions premised on unavailability. Occasionally, this preference has led to anomalous results—hearsay statements otherwise admissible as declarations against interest under Rule 804(b)(3) have been excluded when the declarant has given a deposition on the subject, and the asserted ground of unavailability is absence. The Committee determined that although the rule has created problems and anomalous results from time to time, those cases are relatively infrequent. The problems were not found to be so serious or prevalent as to justify the costs of an amendment.

5. *Rule 804(b)(1)*. The rule provides that in a civil case, prior testimony may be admitted against a party who had a similar motive to develop the testimony at the time it was given, or whose "predecessor in interest" had such a motive. The courts have divided over whether the term "predecessor in interest" is broad enough to cover parties in a prior litigation with no legal relationship to the party against whom the testimony is now offered, but whose development of that testimony was as effective as the current party could have done. The Committee determined that it was not necessary to propose an amendment to the rule, because any dispute among the courts over the scope of the rule is one of form rather than substance. Courts that have refused to interpret "predecessor in interest" expansively nonetheless admit prior testimony under the residual exception where the party who initially cross-examined the declarant was as effective as the current party could have been.

6. *Rule 807*. It has been suggested that the residual exception to the hearsay rule should be modified to clarify both the breadth of the exception and the notice requirement of the Rule. The Committee determined that the breadth of the residual exception presented a policy question that most courts had already worked through—therefore an amendment on this ground was unjustified. As to notice, the Committee noted that courts have applied the notice requirement flexibly even

though the language of Rule 807 does not seem to permit excuses for late notice or the failure to notify. The Committee determined that it might be useful to change the language of the text to codify the result already reached by the courts, but the benefits of such codification would be outweighed by the costs of an amendment. Those costs including the risk of upsetting settled expectations and the risk that the amendment will be misinterpreted as broader than intended.

7. *Rule 902(1).* This rule contains a possible stylistic anomaly, because it provides for self-authentication of domestic public records of the Canal Zone. Because there is no longer a Canal Zone, it has been suggested that the rule be amended to delete the reference. The Committee decided not to proceed with an amendment to the rule, however, because such an amendment would be the kind of stylistic, non-substantive change that the Committee has decided, as a matter of policy, is insufficient to justify, on its own, the substantial costs of amending an evidence rule.

The Committee also rejected, at least tentatively, a proposal to provide for self-authentication of public documents without the necessity of affixing a seal. The former Justice Department representative on the Committee had suggested that the Rule should be amended, because many state officials who certify documents no longer use a seal; but to this date, the Department has made no showing that the sealing requirement has created a problem in practice. The Committee invited the DOJ representative to look into the matter to determine whether DOJ lawyers were in fact having a substantial problem in complying with the sealing requirement. Any further consideration of an amendment to Rule 902(2) was tabled pending a report from the DOJ representative.

Finally, the Committee rejected a proposal to amend Rule 902(6) to permit self-authentication of internet materials that serve the same function as printed newspapers or periodicals. The Committee reasoned that a party can authenticate internet materials by making the necessary showing of authenticity under Rule 901. The benefits of permitting self-authentication in this single area were found to be outweighed by the cost of amendment. Moreover, Committee members expressed concern that there might be legitimate questions concerning the authenticity of material taken from the internet, as distinguished from printed newspapers that are obviously likely to be authentic.

8. *Rule 1006.* The Committee observed that there has been some confusion in distinguishing between summaries admissible under Rule 1006 and summaries of evidence already admitted at trial. Summaries of evidence admitted at trial are demonstrative or pedagogical devices that are not governed by Rule 1006. It has been argued that Rule 1006 should be amended to clarify that it does not apply to summaries of evidence admitted at trial. But the Committee decided not to proceed with an amendment to Rule 1006, because it concluded that any confusion among litigants as to the scope of the Rule has been handled adequately by the courts and has not created a problem that affected any result in the reported cases. Thus, any problem is one of form rather than substance and does not justify the substantial costs of an amendment to an evidence rule.

**The Evidence Rules Committee voted to give further consideration to the following proposals:**

1. *Rule 106*: The Committee agreed to further consider a proposal to provide that evidence necessary to complete a misleading written statement could be admissible even if it is hearsay. The Committee instructed the Reporter to determine whether the apparent conflict in the circuits about the use of Rule 106 has actually led to a difference in result in the cases.

2. *Rule 404(a)*: The Committee resolved to inquire further into whether an amendment is necessary to clarify that evidence of character is never admissible to prove a person's conduct in a civil case. The text of Rule 404(a) seems to prohibit the circumstantial use of character evidence in a civil case, and yet two circuits have held that such evidence is admissible when a defendant is charged by the plaintiff with what amounts to criminal activity.

3. *Rule 408:* The Committee agreed to investigate whether an amendment to Rule 408, which limits the admissibility of evidence of settlement and compromise, is necessary. Currently there is substantial dispute over three important questions: a) whether evidence of a civil compromise is admissible in subsequent criminal litigation; b) whether statements made during settlement negotiations can be admitted to impeach a party for prior inconsistent statement; and c) whether an offer to settle can be admitted in favor of the party who made the offer. The Reporter's memorandum on Rule 408 indicated that there is direct conflict in the caselaw on all three of these questions; that the conflicts on each of these issues raise important policy questions about the need to encourage settlement and the intent of Rule 408; and that each of the problems derives from the fact that the current Rule 408 is (as is widely acknowledged) poorly drafted.

4. *Rule 410:* The Committee agreed to consider whether Rule 410—the rule that, among other things, limits the admissibility of statements and offers made during guilty plea negotiations—could be amended to cover the statements and offers of prosecutors as well as defendants and defense counsel. Currently the rule does not protect statements and offers of prosecutors from admissibility at trial. Some courts have relied on Rule 408 to provide such protection, but that rule plainly is applicable only to offers and settlements made in civil litigation. The Committee resolved, at least tentatively, that the policy of encouraging plea bargaining would be furthered by providing protection for the statements of all of the parties to a plea negotiation.

5. *Rule 806*: The Rule provides that if a hearsay statement is admitted under a hearsay exception or exemption, the opponent may impeach the hearsay declarant to the same extent as if the declarant were testifying in court. The courts are in dispute, however, about whether a hearsay declarant's character for truthfulness may be impeached with prior bad acts under Rule 806. The

Committee directed the Reporter to prepare a report on whether the conflict in the cases is significant enough to require an amendment to the rule.

6. *Rule 901:* Some commentators have argued that the use of digital photography poses special concerns for establishing and challenging authenticity and have suggested that Rule 901 should be amended to provide special rules for authenticating digital photography—such as requiring evidence of a digital "fingerprint." Committee members were skeptical that such a rule would be necessary, because the current Rule 901 probably is flexible enough to allow the judge to exercise discretion to assure that digital photographs are authentic and have not been altered. The Reporter noted, however, that it might be worthwhile for the Committee to allow the Reporter to conduct further research on the problem and to provide a background memorandum to the Committee, especially given the Standing Committee's interest in assuring that the rules are updated, where necessary, to accommodate technological changes. The Committee directed the reporter to prepare a background memorandum on the use of digital photographs as evidence, to be considered at a future meeting.

**In addition, and as set forth in the Report to the Standing Committee in June 2002, the Committee has directed the Reporter to prepare memoranda on the following rules, to determine whether any changes to these rules are necessary:**

Rule 606(b) (to consider whether statements by jurors should be admissible where 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 where 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 because of 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).

I wish to emphasize that in regard to any rules or other items as to which the Committee has indicated possible interest, this should by no means be read as an indication that the Committee ultimately will propose, or has a substantial likelihood of proposing, an amendment. The Committee merely wishes to be thorough in its consideration of any potential problems in the existing rules, but the Committee continues to be wary of recommending changes that are not considered absolutely necessary to the proper administration of justice.

## B. Privileges

The Committee's Subcommittee on Privileges has been working on a long-term project to prepare provisions that would state, in rule form, the federal common law of privileges. At its October 2002 meeting, the Committee once again considered what the proper goal and scope of the privilege project should be. The Committee resolved that it would not propose any privilege rules as amendments to the Federal Rules of Evidence. Privilege rules must be enacted by Congress directly; and submitting a new set of privileges for congressional consideration could create far more problems than it would solve.

It should be noted, however, that, from time to time, Congress has proposed rules of privilege. Therefore the Committee believes that it needs to be prepared to comment on such proposals and that the work of the Privileges Subcommittee will be helpful in responding to such Congressional ventures. The Committee also believes that it would perform a valuable service to the bench and bar by giving guidance on what the federal common law of privilege currently provides. This could be accomplished by a publication outside the rulemaking process, such as has been done previously with respect to outdated Advisory Committee Notes and caselaw divergence from the Federal Rules of Evidence.

The Committee therefore has resolved to continue with the privileges project and has determined that the goal of the project will be to provide, in the form of a draft rule and commentary, a "survey" of the existing federal common law of privilege. Any end-product will be intended as a descriptive, non-evaluative presentation of the existing federal law. It will not be a "best principles" attempt to write how the rules of privilege "ought" to look. Rather, any survey would be intended to help courts and lawyers determine what the federal law of privilege actually is.

The Committee has directed the Subcommittee on Privileges to prepare a draft of one of the privileges as an example for the Committee to review. The Subcommittee has chosen the psychotherapist-patient privilege as an exemplar and will prepare a survey on that rule and the necessary commentary for the Committee's review at the Spring 2003 meeting.

## IV. Minutes of the October 2002 Meeting

The Reporter's draft of the minutes of the Committee's October 2002 meeting is attached to this report. These minutes have not yet been approved by the Committee.

Attachment:

Draft minutes

# EVIDENCE RULES DOCKET

## ADVISORY COMMITTEE ON EVIDENCE RULES

The docket sets forth suggested changes to the Federal Rules of Evidence considered by the Advisory Committee since 1992. The suggestions are set forth in order by (1) evidence rule number, or (2) where there is no rule number, or several rules may be affected — alphabetically by subject matter.

| Suggestion | Docket Number, Source, and Date | Status |
|---|---|---|
| | | |
| **Rule 106**<br>Remainder of, Related Writings, or Recorded Statements | | 4/02 - Committee referred to reporter<br>10/02 - Committee considered<br>**PENDING FURTHER ACTION** |
| **Rule 201(g)**<br>Judicial Notice of Adjudicative Facts | | 5/94 - Committee decided not to amend (comprehensive review)<br>6/94 - Standing Committee approved for publication<br>9/94 - Published for public comment<br>11/96 - Committee declined to take action<br>**DEFERRED INDEFINITELY** |
| **Rule 301**<br>Presumptions in General Civil Actions and Proceedings (applies to evidentiary presumptions but not substantive presumption.) | | 5/94 - Committee decided not to amend (comprehensive review)<br>6/94 - Standing Committee approved for publication<br>9/94 - Published for public comment<br>11/96 - Committee deferred until completion of project by Uniform Rules Committee<br>**PENDING FURTHER ACTION** |
| **Rule 404(a)**<br>Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes (prohibits character evidence to prove conduct in civil cases) | | 4/02 - Committee referred to reporter<br>10/02 - Committee considered<br>**PENDING FURTHER ACTION** |
| **Rule 408**<br>Compromise and Offers to Compromise | | 4/02 - Committee referred to reporter<br>10/02 - Committee considered<br>**PENDING FURTHER ACTION** |

| Suggestion | Docket Number, Source, and Date | Status |
|---|---|---|
| **Rule 501**<br>Privileges (codifies the federal law of privileges) | | 11/96 - Committee declined to take action<br>10/98 - Committee reconsidered and appointed a subcommittee to study the issue<br>4/99 - Committee deferred consideration pending further study<br>10/99 - Subcommittee appointed<br>4/00 - Committee considered subcommittee's proposals<br>4/01 - Committee considered subcommittee's proposals<br>4/02 - Committee considered subcommittee's proposals<br>10/02 - Committee considered<br>**PENDING FURTHER ACTION** |
| **Rule 608(b)**<br>Inconsistent rulings on exclusion of extrinsic evidence | | 10/99 - Committee considered<br>4/00 - Committee directed reporter to prepare draft amendment<br>4/01 - Committee approved amendments<br>6/01 - Standing Committee approved for publication<br>8/01 - Published for public comment<br>4/02 - Committee approved amendments with revisions<br>6/02 - Standing Committee approved<br>9/02 - Judicial Conference approved<br>3/03 - Supreme Court approved<br>**PENDING FURTHER ACTION** |
| **Rule 706**<br>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) | | 2/91 - Civil Rules Committee considered and deferred action<br>11/96 - Committee considered<br>4/97 - Committee considered and deferred action until CACM completes its study<br>**PENDING FURTHER ACTION** |
| **Rule 801(d)(1)**<br>Hearsay exception for prior consistent statement that would otherwise be admissible to rehabilitate a witness's credibility | | 4/98 - Committee considered and deferred action<br>**DEFERRED INDEFINITELY** |

| Suggestion | Docket Number, Source, and Date | Status |
|---|---|---|
| **Rule 804(b)(3)**<br>Degree of corroboration regarding declaration against penal interest | | 10/99 - Committee considered<br>4/00 - Committee directed reporter to prepare draft amendment<br>4/01 - Committee approved<br>6/01 - Standing Committee approved for publication<br>8/01 - Published for public comment<br>4/02 - Committee approved with substantive revisions. Committee requested re-publication for public comment<br>6/02 - Standing Committee approved re-publication<br>8/02 - Published for public comment<br>**PENDING FURTHER ACTION** |
| **Rule 902(6)**<br>Extending applicability to news wire reports | | 10/98 - Committee considered<br>4/00 - Committee considered<br>**PENDING FURTHER ACTION** |
| **Rule 1001**<br>Definitions (Cross references to automation changes) | | 10/97 - Committee considered<br>**PENDING FURTHER ACTION** |
| | | |
| **[Admissibility of Videotaped Expert Testimony]** | | 11/96 - Committee declined to take action but will continue to monitor rule<br>1/97 - Standing Committee considered<br>**PENDING FURTHER ACTION** |
| **[Automation]** — To investigate whether the Evidence Rules should be amended to accommodate changes in automation and technology | | 11/96 - Committee considered<br>4/97 - Committee considered<br>4/98 - Committee considered<br>10/02 - Committee considered<br>**PENDING FURTHER ACTION** |

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Summary of Public Comments Received on the Proposed Amendments to Rule 804(b)(3)
Date: March 1, 2003

Below is a summary of all public comments received on the proposed revised amendment to Rule 804(b)(3). The summaries of public comment will be placed after the proposed rule change if the Committee decides to recommend it to the Standing Committee for final approval. Many of these comments will receive detailed consideration and analysis in the memo on Rule 804(b)(3), found in this agenda book.

# Summary of Public Comment on the Proposed Amendment to Rule 804(b)(3)

**Robert E. Leake, Jr., Esq. (02-EV-001)** would apply the "particularized guarantees of trustworthiness" requirement to "exculpatory as well as incriminating matter."

**G. Daniel Carney, Esq. (02-EV-002)** approves of the proposed amendment.

**Jack E. Horsley, Esq. (02-EV-003)** endorses the proposed change to Rule 804(b)(3).

**The General Accounting Office (02-EV-004)** has no comments to offer with respect to the proposed amendment.

**The Commercial and Federal Litigation Section of the New York State Bar Association (02-EV-005)** supports the proposed changes to Rule 804(b)(3) and advocates further analysis of other possible changes to the Rule. The Section notes that the text of the Rule is "misleading" in two respects. First, "in civil cases recent federal cases have held that an out-of-court statement against penal interest must be supported by corroborating circumstances to be admissible" – even though that requirement is not imposed by the text of the Rule. Second, where such statements are offered in a criminal case to inculpate the accused, the Confrontation Clause requires a showing of "particularized guarantees of trustworthiness" – a requirement that does not exist in the current text of the Rule. The Section notes that the proposed amendment would incorporate these two "judicial glosses" into the text of the Rule. The section supports the proposed amendment "as a useful codification of current law." But it urges the Advisory Committee to address two further questions: 1) whether the standard of "particularized guarantees of trustworthiness" should be applied to statements against penal interest offered in civil cases; and 2) whether the "particularized guarantees of trustworthiness" requirement should be applied to declarations against penal interest offered by an accused.

**Professor Richard Friedman (02-EV-006),** appreciates and applauds "at least much of the impetus" behind the proposed amendment. But he fears that the proposed amendment may cause confusion and that it "foregoes the opportunity to make more significant improvements in the operation of Rule 804(b)(3)." He advocates the elimination of the corroborating circumstances requirement as applied to hearsay statements offered by an accused. Professor Friedman also opposes an extension of the corroborating circumstances requirement to statement against penal interest offered in civil cases. He concludes that the Rule should provide that a statement made to law enforcement personnel "shall not be admissible against the accused." He also suggests that the proposed amendment be changed to add language that would reject the Supreme Court's analysis in *Williamson v. United States,* 512 U.S. 594 (1994), by providing that a non-adverse statement that

is part of a broader inculpatory statement would be admissible if "it appears likely that the declarant would make the statement in question only if believing it to be true." Finally, Professor Friedman suggests that the text of the Rule include language (currently in the proposed Committee Note) providing that the credibility of the in-court witness is irrelevant to the reliability of the hearsay statement.

**David Romine, Esq. (02-EV-007)**, opposes the extension of the corroborating circumstances requirement to civil cases. He contends that the extra evidentiary requirement will have a deleterious effect on the prosecution of civil antitrust cases. He states that the "relatively easy ways in which the corroborating circumstance requirement is satisfied by defendants in criminal cases will usually not be available to antitrust plaintiffs." Mr. Romine concludes that the "Committee should not endorse a revision that will have the perverse effect of making it harder to introduce such evidence in a private antitrust case than to exculpate the accused in a criminal case."

**The Federal Magistrate Judges Association (02-EV-008)** supports the proposed amendment to Rule 804(b)(3), as an appropriate revision in light of the Supreme Court's decision in *Lilly v. Virginia,* 527 U.S. 116 (1999).

**Professor Roger Kirst (02-EV-009)** opposes the amendment on the ground that it is "not possible to anticipate the evolving contours of confrontation doctrine for the hearsay exception in this Rule." He recommends that if the Rule is to be amended on other topics, "a caution about the right to confrontation should be included only in an Advisory Committee Note without attempting to define what the Sixth Amendment requires."

**The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (02-EV-010)** agrees with the proposed amendment "insofar as it articulates the constitutional requirement that a declaration against penal interest, offered to inculpate a defendant in a criminal case, be supported by particularized guarantees of trustworthiness." The Committee states that "[i]ncorporating the 'particularized guarantees' language into the rule does not change the law; it simply carries on the mission of the Rules of Evidence of codifying court-made evidentiary law and making it more accessible." However, the Committee disagrees with the proposal "insofar as it would import into the law of civil evidence the 'corroborating circumstances' requirement that traditionally has been thought to apply only to declarations against penal interest offered in criminal cases." Extension of the corroborating circumstances requirement to civil cases would, in the Committee's view, "move a difficult aspect of the criminal procedural law into the civil procedural law, without any compelling reason to do so."

**Professor Clifford Fishman (02-EV-011),** complains that "the proposal's language provides no explanation as to why different standards are imposed in the first place and offers no guidance as to what the different standards mean." Professor Fishman suggests that the text of the Rule be expanded to clarify that "corroborating circumstances" requires the court to consider the nature or strength of independent evidence that tends to corroborate the hearsay statement, while "particularized guarantees of trustworthiness" prohibits consideration of corroborating evidence.

**The Federal Bar Association (02-EV-012),** "supports the substance of the proposed amendment" but "recommends a change in format to provide additional clarity." The Association's proposal would place statements against penal interest offered by the prosecution into a separate subdivision. The Association "also agrees with the Committee's recommendation that the specific factors to be considered in assessing whether a proffered statement meets the applicable requirement be left to the Committee Note and to case law rather than being specified in the text of the Rule."

**The Committee on Federal Courts of the California State Bar (02-EV-013),** supports the proposed amendment to Rule 804(b)(3).

**The National Association of Criminal Defense Lawyers (02-EV-014)**, opposes the amendment and argues that "'corroborating circumstances' should be required, and not merely 'particularized guarantees of trustworthiness', before the prosecution is allowed to obtain admission of hearsay statements on the basis of their having been made against the declarant's penal interest."

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Public comments on, and possible revisions to, Proposed Amendment to Evidence Rule 804(b)(3)
Date: March 15, 2003

This memorandum discusses some of the comments received on the proposed amendment to Evidence Rule 804(b)(3), and analyzes whether the Committee should decide to proceed with the amendment and, if so, whether any changes might or should be made to the proposed amendment as it was issued for public comment. The memorandum is also intended to assist the Committee in evaluating the public testimony that will be heard at the meeting on April 25th.

The memorandum is divided into six parts. Part One sets forth the proposed amended Rule as it was approved by the Advisory Committee and the Standing Committee to be released for public comment. Part Two discusses the problem addressed by the amendment, the pertinent case law and the history of the proposed amendment to this point. Part Three discusses those comments that disagree with the two fundamental premises of the amendment, i.e., that the constitutional requirement of particularized guarantees of trustworthiness" should be codified for statements offered by the prosecution, and that the corroborating circumstances requirement should be retained with respect to statements offered by the accused. Part Four analyzes the public comment suggesting that the proposal provide more clarification (either stylistic or substantive) on the difference between "corroborating circumstances" and "particularized guarantees of trustworthiness." Part Five considers the substantial objections that have been made to the proposed amendment's extension of the corroborating circumstances requirement to civil cases. Part Six analyzes some of the more far-ranging, and undoubtedly less pragmatic, suggestions for change. Part Seven sets forth models that would incorporate the more credible suggestions for modification addressed in the memorandum.

# I. The Proposed Amendment to Rule 804(b)(3), as Released for Public Comment

The proposed amendment would extend the corroborating circumstances requirement to civil cases. It would retain that requirement for statements offered by the accused. And it would require, consistently with the Constitution, that all government-proffered declarations against interest in criminal cases must carry particularized guarantees of trustworthiness. The proposed amendment and Committee Note read as follows:

**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:

(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 guarantees" therefore must be independent from the fact that the statement tends to subject the declarant to criminal liability. The "against penal interest" factor should not be double-counted as a

particularized guarantee. *See Lilly v. Virginia,* 527 U.S. at 138 (fact that statement may have been disserving to the declarant's interest does not establish particularized guarantees of trustworthiness because it "merely restates the fact that portions of his statements were technically against penal interest").

The amendment does not affect the existing requirement that the accused provide corroborating circumstances for exculpatory statements. The case law identifies some factors that may be useful to consider in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors include (*see, e.g., United States v. Hall,* 165 F.3d 1095 (7th Cir. 1999)):

> (1) the timing and circumstances under which the statement was made;
>
> (2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie;
>
> (3) whether the declarant repeated the statement and did so consistently, even under different circumstances;
>
> (4) the party or parties to whom the statement was made;
>
> (5) the relationship between the declarant and the opponent of the evidence; and
>
> (6) the nature and strength of independent evidence relevant to the conduct in question.

Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses.

## II. Background to the Proposed Amendment

### *The Current Rule*

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.

A hypothetical illustrates the asymmetry in the text of the current Rule: A bank robber comes home one day and is having a casual, intimate conversation with his girlfriend. She asks him how his day went. He says:

> "Fine. I robbed a bank with Bill. I wanted to get Jimmy to help me because it was a complex job, but I couldn't persuade him to come. Things went well, except for Bill shot the teller."

Virtually all of this statement is against the declarant's penal interest under *Williamson v. United States,* 512 U.S. 594 (1994). *Williamson* requires each declaration, including identification of other individuals, to be "truly self-inculpatory." In this example, identification of Bill is disserving to the speaker because it demonstrates inside information and involves the declarant in a conspiracy as well as felony murder. Identification of Jimmy is also inculpatory of the speaker because it is an admission that he tried to enlist another specific, identified, person into the conspiracy. Moreover, the declarant made his statement to a trusted loved one, with no apparent intent to shift blame to others or curry favor with the authorities. Statements such as those in the example are routinely found to be disserving even after *Williamson.* See, e.g., *United States v. Shukri,* 207 F.3d 412 (7th Cir. 2000) (statements made by cohorts to another cohort about a prior crime involving Shukri and identifying Shukri by name were against the declarants' penal interest, because they were made to friends and "because Kartoum discussed his intimate knowledge of and involvement in the multiple thefts for which both he and Shukri were arrested."); *United States v. Desena,* 260 F.3d 150 (2d Cir. 2001) (statement at a Hell's Angel's meeting about an arson in which defendant was involved was disserving because it was made to associates and identified the declarant and the defendant as conspirators).

The way the Rule currently reads, the declarant's statement to his girlfriend (assuming he is unavailable) would be admissible against Bill simply because it is against the declarant's penal interest – no additional admissibility requirement must be met (putting aside confrontation clause issues for the moment). In contrast, more is required for Jimmy to have the exact same statement admitted in his favor at his trial. Jimmy must show not only that the statement was disserving to the declarant, but also that there are corroborating circumstances clearly indicating the trustworthiness of the statement.

But despite the text of the Rule, the simple fact that the prosecution-proffered statement disserves the declarant will not be enough to support its admissibility. This is because the Confrontation Clause, as construed by the Supreme Court, has been held to require an extra showing of "particularized guarantees of trustworthiness" for statements fitting hearsay exceptions that are not "firmly-rooted." And courts applying the Supreme Court's decision in *Lilly v. Virginia, supra*, have held that the hearsay exception for declarations against penal interest is not firmly rooted. See the discussion of the Confrontation Clause as it relates to Rule 804(b)(3), *infra*.

### *The Legislative History*

The legislative history of the asymmetrical corroborating circumstances requirement can be summarized as follows (most of this is taken from Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 Georgetown L.J. 851 (1981)):

1. The corroborating circumstances requirement was not included in the initial Advisory Committee draft. To the contrary, the initial proposal provided that "a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused", was not admissible under the exception. That is, the exception covered only statements offered *by* an accused. Members of Congress adamantly demanded that a corroborating circumstances requirement be added for exculpatory statements. They were concerned that defendants would get unsavory characters to claim out of court that they and not the defendant did the crime charged--then these unreliable declarants would simply invoke the privilege and refuse to testify at the defendant's trial. The Advisory Committee complied by adding a corroborating circumstances requirement for exculpatory statements against penal interest.

2. Nobody focused on whether an additional requirement of evidentiary reliability should apply to inculpatory statements, because at the time the "corroborating circumstances" sentence was added, the Rule prohibited all statements that implicated both the declarant and the accused. Thus, there was no need to consider an additional evidentiary requirement for inculpatory statements because they were inadmissible anyway.

3. Congressional pressure was then put on the Advisory Committee to delete the sentence that precluded admissibility of inculpatory statements. The Advisory Committee succumbed to this pressure and deleted the sentence. (It was later restored and then deleted again, this time by Congress). But the Committee never addressed or recognized the disparity it then created by imposing a corroborating circumstances requirement on the accused but not on the prosecution. This seems simply to have been an oversight due to the sequencing of the changes--first the addition of a corroborating circumstances requirement at a time when inculpatory statements were inadmissible under the Rule; then a change to the Rule to permit some admissibility for inculpatory statements,

without thinking about how the two changes would fit together.

4. Only one person in the entire legislative process flagged the anomaly of the one-way corroborating circumstances requirement. During a markup session in the House Subcommittee, Representative Holtzman asked why the corroborating circumstances requirement should not be imposed on the government. Associate counsel to the Subcommittee responded that a corroborating circumstances requirement imposed on the government would be superfluous "because *Bruton* created a confrontation clause bar to all government offered penal interest statements by an unavailable declarant." In fact this was a misreading of *Bruton*, as subsequent case law has clearly proved out. *Bruton* does not prohibit inculpatory declarations against penal interest that are admissible under Rule 804(b)(3). Thus, the Subcommittee was (mis)informed that inculpatory penal interest statements would *never* be admissible as a constitutional matter, which would have made an additional evidentiary requirement for such statements unnecessary.

## *Case Law on the Corroborating Circumstances Requirement*

Most of the Circuits apply the corroborating circumstances requirement equally to inculpatory and exculpatory against penal interest statements. That is, most courts apply the Rule differently from the way it actually reads.

**Here is a short summary of case law in the circuits imposing a corroborating circumstances requirement on the prosecution:**

**First Circuit:**

*United States v. Barone,* 114 F.3d 1284 (1st Cir. 1997) ("Although this court has not expressly extended the corroboration requirement to statements that inculpate the accused, we have applied the rule as if corroboration were required for such statements."). (post-*Williamson*).

**Fifth Circuit:**

*United States v. Alvarez,* 584 F.2d 694 (5thCir. 1978) ("by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)").

**Sixth Circuit:**

*United States v. Tocco,* 200 F.3d 401 (6th Cir. 2000) (specifically requiring corroborating circumstances for statements offered by the prosecution, and finding such circumstances met because the declarant made statements to his son without a motive to shift blame or curry favor, and independent evidence indicated that the statements were true).

**Seventh Circuit:**

*United States v. Shukri,* 207 F.3d 412 (7th Cir. 2000) ("For the Rule 804(b)(3) exception to apply, the proponent of an inculpatory statement must show that * * * corroborating circumstances bolster the statement's trustworthiness."). (post-*Williamson*).

**Eighth Circuit:**

*United States v. Gjerde,* 110 F.3d 595 (8th Cir. 1997) (corroborating circumstances required for statements offered by the prosecution; here, the truthfulness of the declarant's statement was corroborated by the defendant's own statement) (post-*Williamson*); *United States v. Hazelett,* 32 F.3d 1313 (8th Cir. 1994) (requiring corroborating circumstances for inculpatory declarations against penal interest; confession of accomplice to police officers inadmissible because it was not truly self-inculpatory under *Williamson*).

**Eleventh Circuit:**

*United States v. Taggart,* 944 F.2d 837 (11th Cir. 1991): (requiring corroborating circumstances for prosecution-offered statements; no analysis given).

**Some Circuits have not decided whether to impose a corroborating circumstances requirement on statements offered by the government:**

**D.C. Circuit:**

No discussion found.

**Third Circuit:**

*United States v. Moses,* 148 F.3d 277 (3rd Cir. 1998) (statement found disserving after *Williamson* where it was made to a friend and there was no indication that the declarant was shifting blame; no discussion of corroborating circumstances in the context of the hearsay exception, but the court looks to corroborating circumstances and determines that they are sufficient to meet the trustworthiness requirement of the Confrontation Clause); *United States v. Palumbo,* 639 F.2d 123 (3d Cir. 1981) (post-custodial statement implicating defendant was not sufficiently disserving to be admissible; concurring opinion urges that prosecution be required to provide corroborating circumstances clearly indicating trustworthiness).

**Ninth Circuit:**

*United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995): In a prosecution arising out of arson of a home, the Court declined to decide whether corroborating circumstances are required when a declaration against interest is offered to inculpate an accused. The Court found that, even if such circumstances are required, they existed in this case.

**Two Circuits have case law going both ways:**

**Second Circuit:**

*United States v. Desena,* 260 F.3d 150 (2d Cir. 2001) (statement at a Hell's Angel's meeting about an arson in which defendant was involved was properly under Rule 804b3–it was disserving because made to associates, and it was sufficiently corroborated by other witnesses and by the fact that the identified perpetrators had a motive to commit the crime).

*United States v. Casamento,* 887 F.2d 1141 (2d Cir. 1989) ("this Circuit requires corroborating circumstances even when the statement is offered, as here, to inculpate the accused.").

*United States v. Bakhtiar,* 994 F.2d 970 (2d Cir. 1993) (noting that corroborating circumstances are required only if the statement is offered to exculpate the accused: "here, of course, it was offered by the government" so the statement could be admitted without a showing of corroborating circumstances).

**Fourth Circuit:**

*United States v. Workman,* 860 F.2d 140 (4th Cir. 1988) ("The statement by Davis subjected him to criminal liability under the first sentence of the rule. It did not exculpate an accused, so it is

not subject to the second sentence of the rule.").

*United States v. Carvalho,* 742 F.2d 146 (4th Cir. 1984) (inculpatory statement excluded because the government presented no corroborating evidence indicating the trustworthiness of the statement).

## *The Problem With Applying the Corroborating Circumstances Requirement To Statements Offered By the Government in Criminal Cases*

On the surface, it appears to make sense to apply a corroborating circumstances requirement to declarations against penal interest offered by the government. Such a change would appear to provide a symmetry to the Rule–both the defendant and the government would be subject to the same evidentiary requirements for admitting declarations against penal interest. The analysis is more complicated, however, because of the Supreme Court's analysis of the Confrontation Clause. Of course, only the government must meet the confrontation standards that apply to hearsay offered in criminal cases.

With hearsay offered under most of the Federal Rules exceptions, the Confrontation Clause has little or no effect. This is because almost all of the basic hearsay exceptions have been found to be "firmly rooted" and the Supreme Court has held that hearsay statements fitting a firmly rooted exception automatically satisfy the requirements of the Confrontation Clause. *See generally Ohio v. Roberts,* 448 U.S. 56 (1980) (hearsay statement that fits a "firmly rooted" hearsay exception automatically satisfies the defendant's right to confrontation); *White v. Illinois*, 502 U.S. 346 (1992) (finding that Federal Rules exceptions for excited utterances and statements for purposes of treatment are "firmly rooted" because they are included in the Federal Rules and are "widely accepted among the states").

Statements offered under the hearsay exception for declarations against penal interest are treated differently, however. After *Lilly v. Virginia,* 527 U.S. 116 (1999), courts have held that the federal hearsay exception for declarations against penal interest is not "firmly rooted", meaning that a hearsay statement does not automatically satisfy the Confrontation Clause simply because it fits into the exception. See, e.g., *United States v. Robbins,* 197 F.3d 829 (7th Cir. 1999) (Rule 804(b)(3) is not a firmly-rooted exception, relying on the plurality opinion in *Lilly*). [A plurality of the Court in *Lilly* held that a state version of the exception was not firmly rooted. What to make of *Lilly* is a question that will be discussed in Part Three of this memo.]. If the exception is not "firmly rooted" then a hearsay statement falling within it can satisfy the Confrontation Clause only if the prosecution can show that it carries "particularized guarantees of trustworthiness." *Roberts, supra; Lilly, supra.* 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.

The term "particularized guarantees of trustworthiness" (applicable to confrontation) is not the same as "corroborating circumstances clearly indicating trustworthiness" (applicable to the hearsay exception). Under Rule 804(b)(3), many courts have found that corroborating *evidence* can help to satisfy the standard of "corroborating circumstances clearly indicating the trustworthiness of the statement." So for example, corroborating circumstances can be found if, among other things, the declarant's statement is verified by the defendant's own confession, the testimony of eyewitnesses, or the existence of physical evidence. See, e.g., *United States v. Desena,* 260 F.3d 150 (2d Cir. 2001) (declarant identified himself and the defendant as perpetrators of an arson; the corroborating circumstances requirement was met in part by the testimony of an eyewitness whose description of the scene of the arson the day of the crime matched the declarant's description of the defendant's actions). In contrast, under the Confrontation Clause, the requirement of "particularized guarantees of trustworthiness" cannot be met by reference to corroborating evidence; the statement must be found reliable solely by reference to the circumstances surrounding the statement, e.g., that it was spontaneous, made to a trusted person, etc.. See *Idaho v. Wright,* 497 U.S. 805 (1990) ("[W]e are unpersuaded by the State's contention that evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears 'particularized guarantees of trustworthiness.' To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.").

So the Rule will not in fact be symmetrical if the corroborating circumstances requirement is applied to declarations against penal interest offered by the government in criminal cases. The government will not only have to meet the corroborating circumstances requirement but it will also have to meet the somewhat different "particularized guarantees of trustworthiness" requirement before the statement could be admitted against the accused consistently with the Confrontation Clause. Whether the difference between "corroborating circumstances" and "particularized guarantees" is so great as to impose a substantial burden on the government is a question that might be debated. But it is clear that applying the corroborating circumstances requirement to government-proffered declarations against penal interest does not make Rule 804(b)(3) completely symmetrical in criminal cases.

## *Previous Determinations By the Advisory Committee*

### *The 2001 proposal–an attempt at symmetry*

At its April 2001 meeting, the Advisory Committee agreed to propose an amendment to Rule 804(b)(3) that would apply the corroborating circumstances requirement to all declarations against penal interest offered in all cases. Under the proposal the government, as well as parties in civil cases, would have been subject to the corroborating circumstances requirement. The primary stated purpose of the proposal was to provide for symmetry and fairness in criminal cases. Members of the Committee reasoned that it was also important to extend the corroborating circumstances requirement to civil cases: the stakes are often as high in civil as in criminal cases, and therefore the risks of admitting unreliable hearsay were considered just as profound. Committee members also saw a positive benefit to a unitary treatment of against penal interest statements in all cases.

Committee members at the 2001 meeting expressed the opinion that it would be helpful to set forth in the Note some guidelines on how the courts have applied the corroborating circumstances requirement. It was generally agreed that the Note simply should be descriptive of the case law, rather than an expression of the Committee's opinion on how the corroborating circumstances requirement should be applied. Members also agreed that the Note should make clear that the factors supporting corroborating circumstances must be independent of the fact that the statement is against the declarant's penal interest. That is, the against-interest factor is not to be double-counted as a corroborating circumstance indicating the trustworthiness of the statement.

The Standing Committee approved the 2001 proposal for release for public comment. During the public comment period, the Department of Justice voiced substantial concerns about the proposal. Most importantly, DOJ argued that imposing a corroborating circumstances requirement on government-proffered declarations against penal interest would be unduly burdensome and would make the rule asymmetrical in favor of the accused. Under existing law, the government must already show that a declaration against penal interest is "truly self-inculpatory" of the declarant's interest. This requirement will not be met if the declarant implicates the defendant in a statement to a law enforcement officer. See *Williamson v. United States,* 512 U.S. 594 (1994). Moreover, the government after *Lilly* must show that the statement carries "particularized guarantees of trustworthiness", i.e., some reliability factors beyond the fact that the statement is disserving to the declarant's interests. DOJ contended that if the government must also show that there are corroborating circumstances that clearly guarantee the trustworthiness of the statement, the combination of these three requirements will be so rigorous that it will be virtually impossible to admit an against penal interest statement. And at the very least, the Rule would not provide the symmetry intended by the Advisory Committee, because it would impose an admissibility requirement on the government that is not imposed on the accused.

***The 2002 proposal–alleviating constitutional concerns***

At its meeting in April, 2002 the Committee carefully considered, and ultimately agreed with, the Justice Department's concerns about the original proposal to amend Rule 804(b)(3). Committee members were especially troubled that under the proposal the government would have to meet three separate admissibility standards (against-interest, particularized guarantees of trustworthiness, and corroborating circumstances), none of which were particularly clear.

But the Committee rejected the option of simply withdrawing the proposed amendment and doing nothing. Several Committee members noted that, after *Lilly*, 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, and 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, because no particularized guarantees of trustworthiness had been shown. *United States v. Westmoreland*, 240 F.3d 618 (7th Cir. 2001).

The Committee found it unacceptable to retain an Evidence Rule that is inconsistent with the Constitution. 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.

Committee members found it notable that courts have struggled mightily to read Evidence Rules as if their text was consistent with the Constitution; they are obviously uncomfortable with having Evidence Rules that are inconsistent with the Constitution. 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 in the text of those Rules. The rationale for that tenuous construction is that otherwise the Rules would violate the due process rights of a defendant charged with a sex crime. See *Federal Rules of Evidence Manual*, sections 413-414. The Committee

concluded that if courts are going to read language into a Rule to prevent the possibility that the Rule is unconstitutional, it makes sense to write the Rule in compliance with the Constitution in the first place.

Some Committee members noted another major 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. 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 this Circuit requires corroborating circumstances for inculpatory statements against penal interest). 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."

The Committee unanimously adopted this proposal. Committee members recognized that the reformulated amendment would have to be submitted for a new round of public comment. The proposed amendment initially 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. This was a substantial change, so a new round of public comment was found warranted.

The Standing Committee, at its June 2002 meeting, unanimously approved the reformulated proposal, and authorized its publication for a new round of public comment.

***Rejected alternatives:***

In the course of its discussions 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 to the initial proposal 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 rejection of years of 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 on the 2001 proposal 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:* One public comment to the 2001 proposal 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 has 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.

## III. Comments Concerning "Particularized Guarantees" and "Corroborating Circumstances" In Criminal Cases

Most of the public comment to the 2002 proposal approved the Advisory Committee's distinction between "particularized guarantees of trustworthiness" (applicable to government-proffered statements in criminal cases) and "corroborating circumstances" (applicable to all other statements). There are several criticisms in the public comment that attack this dichotomy, however. This section will consider those criticisms that make what might be called a "substantial" attack on the structure of the proposed amendment. This section focusses on criminal cases only; a separate section, below, considers the criticism of applying the corroborating circumstances requirement to declarations against penal interest in civil cases. Other less direct criticisms, e.g., accepting the dichotomy but suggesting stylistic changes, will be discussed in a later section.

### *1. The Committee Should Not Try to Codify Constitutional Law By Adding the Term "Particularized Guarantees of Trustworthiness"*

Professor Roger Kirst and Professor Richard Friedman both express concern that an attempt to codify constitutional doctrine might misfire because that constitutional doctrine might change. This change could occur in two ways: 1) The Supreme Court might rework its Confrontation Clause jurisprudence, rejecting such analytical concepts as "firmly rooted" hearsay exceptions and "particularized guarantees of trustworthiness"; or, more narrowly, 2) The Supreme Court might hold that Rule 804(b)(3) is a firmly-rooted exception as is, in which case an extra showing of particularized guarantees of trustworthiness would not be required by the Constitution. If either of these events come to pass, then inclusion of a particularized guarantees of trustworthiness requirement would saddle the prosecution with an evidentiary requirement that would not be mandated by the Constitution.

Of course there is always a theoretical risk in codifying existing constitutional law: if the law changes, the statute is left behind. One question for the Committee is whether the risk of constitutional law change is high enough to outweigh the benefit found in assuring that the rule of evidence will always be applied consistently with the Constitution. The rest of this subsection considers, in order, 1) the likelihood that the Supreme Court will revamp its Confrontation Clause jurisprudence; and 2) the likelihood that the Court will retain the same structure but hold that the existing Rule 804(b)(3) is a firmly-rooted hearsay exception.

#### *The risk of a sea-change in Confrontation Clause doctrine:*

The current Confrontation Clause doctrine, as applied to hearsay statements offered against an accused under a hearsay exception, can be capsulized into four principles. First, if the hearsay

exception is "firmly-rooted", a hearsay statement fitting within that exception automatically satisfies the Confrontation Clause. *Ohio v. Roberts,* 448 U.S. 56 (1980). Second, a hearsay exception is "firmly-rooted" if it has significant historical acceptance and/or current general acceptance in a substantial majority of American jurisdictions. *Bourjaily v. United States,* 483 U.S. 171 (1987) (relying on historical pedigree of coconspirator exception to find it "firmly rooted"); *White v. Illinois,* 502 U.S. 346 (1992) (relying on recognition in the Federal Rules of Evidence and wide acceptance among the states to find that hearsay exception for statement for treatment or diagnosis is firmly rooted). Third, if the hearsay exception is not firmly-rooted, a hearsay statement offered under that exception will satisfy the Confrontation Clause only if it carries "particularized guarantees of trustworthiness." *Roberts, supra; Idaho v. Wright,* 497 U.S. 805 (1990) (finding that the residual exception is not firmly rooted and therefore requiring a showing of "particularized guarantees of trustworthiness"); *Lilly, supra,* (plurality opinion) (holding that declarations against penal interest are not firmly rooted and requiring a showing of "particularized guarantees of trustworthiness"). Fourth, those trustworthiness factors for non-firmly rooted hearsay must be found in the circumstances under which the statement is made; the prosecution may not answer reliability concerns by pointing to corroborating independent evidence indicating that the statement is true. *Idaho v. Wright, supra; Lilly, supra.*

This general structure was established in *Roberts,* 23 years ago, and every Supreme Court decision since then on the relationship between the Confrontation Clause and hearsay exceptions has followed this structure. There would seem little reason to abandon this structure, since the Federal Courts have, over the 23 year period, basically merged the hearsay exceptions with the Confrontation Clause, so that any statement fitting within one of the Federal Rules hearsay exceptions will (with one exception) automatically satisfy the Confrontation Clause. In other words, the work in this area seems basically complete. See generally *Federal Rules of Evidence Manual* ¶¶ 801.02, 803.02, 804.02.

But there is one exception to this principle of automatic admissibility: Rule 804(b)(3), and that is because the plurality in *Lilly* made broad statements that the hearsay exception for declarations against penal interest is not firmly-rooted, and lower courts after *Lilly* have so held. So at least it can be argued that the Supreme Court may want to look at the relationship between Rule 804(b)(3) and the Confrontation Clause. It is highly debatable that a question about this single exception will give the court an interest in totally revising its Confrontation Clause jurisprudence, thus throwing all of the settled exceptions up for renewed debate. What seems somewhat more likely is that the Court (assuming it is interested) would distinguish *Lilly* and find Rule 804(b)(3) to be firmly rooted, a possibility discussed below.

Despite the apparent unlikelihood of a paradigm shift in Confrontation Clause jurisprudence in light of the settled nature of the law, the Committee should note that there are three Justices on the Court who are on record as advocating a complete revision of the Court's jurisprudence on the relationship between hearsay and the Confrontation Clause. In a concurring opinion in *White v. Illinois, supra,* Justice Thomas, joined by Justice Scalia, had this to say about the *Roberts* "firmly rooted" analysis:

> The Court reaches the correct result under our precedents. I write separately only to suggest that our Confrontation Clause jurisprudence has evolved in a manner that is perhaps inconsistent with the text and history of the Clause itself. The Court unnecessarily rejects, in dicta, the United States' suggestion that the Confrontation Clause in general may not regulate the admission of hearsay evidence. The truth may be that this Court's cases unnecessarily have complicated and confused the relationship between the constitutional right of confrontation and the hearsay rules of evidence.

Justice Thomas relied on the historical antecedents of the Confrontation Clause and concluded that the requirements imposed by that clause on hearsay were far more limited than might be thought from the Supreme Court's "firmly-rooted exceptions" jurisprudence.

> I believe it is possible to interpret the Confrontation Clause along the lines suggested by the United States in a manner that is faithful to both the provision's text and history. One possible formulation is as follows: The federal constitutional right of confrontation extends to any witness who actually testifies at trial, but the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions. It was this discrete category of testimonial materials that was historically abused by prosecutors as a means of depriving criminal defendants of the benefit of the adversary process, and under this approach, the Confrontation Clause would not be construed to extend beyond the historical evil to which it was directed.

Thus, the Thomas-Scalia view is that the Confrontation Clause only excludes hearsay that is tantamount to formalized testimonial evidence prepared in anticipation of or during a trial, such as prior testimony, affidavits or confessions. This is why those Justices could support the result in *White*, in which the victim of sexual abuse made statements implicating the defendant, and the statements were admitted as excited utterances and statements for purposes of treatment. None of the statements were engineered by the authorities in expectation of a prosecution. This is also why the two Justices could support the result in *Lilly,* in which the Court held that the Confrontation Clause was violated when the government admitted a hearsay statement made by an accomplice while in custody. The statement accused the defendant of taking the laboring oar in the crime–such a statement was clearly the kind that was engineered for a prosecution.

Justice Breyer has also expressed an interest in rethinking the Court's *Roberts* line of jurisprudence. In a concurring opinion in *Lilly*, Justice Breyer argued that the current "hearsay-based" test of confrontation is problematic, in part because it constitutionalizes the question of admissibility of such accepted hearsay as business records. [In fact, however, this constitutionalization is in name only, because the business records exception is firmly rooted so any hearsay fitting the business records exception will automatically satisfy the Confrontation Clause.]

Justice Breyer appeared inclined to adopt the Thomas-Scalia view that the Confrontation Clause limits only that hearsay that is equivalent to formalized testimony prepared for trial. He concluded his concurring opinion in *Lilly* as follows:

> We need not reexamine the current connection between the Confrontation Clause and the hearsay rule in this case, however, because the statements at issue violate the Clause regardless. I write separately to point out that the fact that we do not reevaluate the link in this case does not end the matter. It may leave the question open for another day.

In sum, there is some possibility that the Supreme Court as a whole will revisit the structure that it has imposed on the relationship between hearsay and the Confrontation Clause. Three Justices of the current Court are interested in revision. But as a pragmatic matter, it is questionable whether it is worth it to revise a body of law which, while perhaps removed from the original intent of the Confrontation Clause, is in fact so settled and so dispositive of the questions encountered by the courts. Usually, the Court does not engage in such an academic exercise.

It is for the Committee to determine whether the risk of revision of Confrontation Clause doctrine is so great as to justify withdrawing the proposed amendment insofar as it requires the government to establish "particularized guarantees of trustworthiness." Another alternative might be to substitute the "particularized guarantees" language with more generic language referring to the constitutional rights of the accused, as is done in Rule 412. That possibility is discussed below.

***The possibility that the Supreme Court will find Federal Rule 804(b)(3) to be a firmly-rooted exception:***

In deciding whether the Supreme Court might ever hold the current Rule 804(b)(3) to be a firmly-rooted exception, it is important to determine the scope of that exception as it exists today. That scope can be set forth in three principles that can be found in the Supreme Court's decision in *Williamson* and the lower court cases applying *Williamson*:

1. If an accomplice makes a statement to law enforcement officers while in custody, or while appearing to have a motive to cooperate with authorities, and the statement specifically identifies the defendant as one of the perpetrators, this identification will not be admissible. Because of the motive to curry favor, identification of accomplices is not considered "squarely self-inculpatory" to the declarant under *Williamson*.

2. Statements made by accomplices in law enforcement situations can still be admissible under the exception if they implicate the defendant only circumstantially, rather than directly. This point is made by Justice O'Connor's hypotheticals in *Williamson*:

> For instance, a declarant's squarely self-inculpatory confession — "yes, I killed X" — will likely be admissible under Rule 804(b)(3) against accomplices of his who are being tried under a coconspirator liability theory. Likewise, by showing that the declarant knew something, a self-inculpatory statement can in some situations help the jury infer that his confederates knew it as well. And when seen with other evidence, an accomplice's self-inculpatory statement can inculpate the defendant directly: "I was robbing the bank on Friday morning," coupled with someone's testimony that the declarant and the defendant drove off together Friday morning, is evidence that the defendant also participated in the robbery.

Justice O'Connor's hypotheticals are borne out in the line of cases after *Williamson* in which the government has admitted plea allocution statements from the defendant's accomplices under Rule 804(b)(3). Those statements have been found admissible so long as all direct references to the defendant's involvement have been redacted. See, e.g., *United States v. Centracchio,* 265 F.3d 518 (7th Cir. 2001) (plea allocutions of coconspirators were properly admitted to show that a conspiracy existed; defendant not directly named, and limiting instruction given; the court notes that "the plea allocution is admissible under Rule 804(b)(3) even if it tends to incriminate the other defendants when coupled with other evidence at trial"). The plea allocution statement, as redacted, is not considered to "curry favor" with the authorities because after redaction it directly implicates only the declarant. *Compare United States v. Tropeano,* 252 F.3d 653 (2d Cir. 2001) (three people allegedly involved in a conspiracy and two enter plea allocutions; a plea allocution statement that the declarant conspired with "more than one person" was not disserving under *Williamson*; it would have been sufficient to say that he conspired with one person; the reference to more than one person did not disserve the declarant's interest, and may have been currying favor with the prosecution because the third conspirator was still to be tried).

3. Statements of accomplices made under informal circumstances to friends, associates, etc., are usually considered admissible against the defendant even if they identify him directly. The lower courts after *Williamson* have distinguished that case as one concerned with the special circumstances of statements to law enforcement personnel, and have found that statements made under informal circumstances are usually "truly self-inculpatory" of the declarant even though they directly identify the defendant. This is because, by directly identifying the defendant, the declarant is disserving his own interests by implicating himself in conspiratorial or other more serious criminal activity. At least this is so if the declarant is not blame-shifting, i.e., if the declarant is admitting his own responsibility and not blaming everything on the defendant. See, e.g., *United States v. Shukri,* 207 F.3d 412 (7th Cir. 2000) (statements made among cohorts about a prior crime involving Shukri and identifying Shukri by name; the statements were self-inculpatory, even insofar as they identified Shukri, because they were made to friends and "because Kartoum discussed his intimate knowledge of and involvement in the multiple thefts for which both he and Shukri were arrested."); *United States v. Robbins,* 197 F.3d 829 (7th Cir. 1999) (accomplice's statement to his former fiancé that he "sold pot" with Robbins was self-inculpatory as to the accomplice; the statement was not a confession to law enforcement officers, where the declarant may have been trying to shift blame to others; rather, the statement was made voluntarily in a conversation between the declarant and a trusted confidante); *United States v. Boone*, 229 F.3d 1231 (9th Cir. 2000) (statement by an accomplice who implicated

himself and the defendant in a robbery was self-inculpatory as to the accomplice; the statement was not made to police, and "[h]e simply was confiding to his girlfriend, unabashedly inculpating himself while making no effort to mitigate his own conduct."); *United States v. Moses,* 148 F.3d 277 (3d Cir. 1998) (statement that declarant was bribing the defendant, a public official, was properly admitted as a declaration against penal interest; the statement was made to a friend long before the declarant was arrested; by identifying Moses, the declarant "provided self-inculpatory information that might have enabled the authorities to better investigate his wrongdoing").

So the question for discussion is whether the Supreme Court might hold that a hearsay exception covering two kinds of statements–statements made in law enforcement situations that do not directly implicate the defendant, and statements made under informal circumstances that do directly implicate the defendant–constitutes a "firmly rooted" hearsay exception under the *Roberts* line of cases. If so, then the Committee arguably might be acting precipitously in adding a "particularized guarantees of trustworthiness" requirement to the Rule for government-proffered declarations against penal interest.

The plurality in *Lilly* declared broadly that the hearsay exception for declarations against penal interest is not a firmly-rooted hearsay exception. Justice Stevens' plurality opinion stated that a hearsay exception cannot be considered "firmly rooted" unless it has been established as reliable in light of "longstanding judicial and legislative experience." Justice Stevens argued that the declaration against penal interest exception failed this standard, because it is "of quite recent vintage" and "typically includes statements that, when offered in the absence of the declarant, function similarly to those used in the ancient ex parte affidavit system." Also the exception "encompasses statements that are inherently unreliable," i.e., those statements, like the one in this case, in which an accomplice may be shifting the blame to another in a custodial confession. Justice Stevens concluded that "accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence."

It is certainly possible to distinguish *Lilly* as a case involving accomplice confessions to law enforcement that directly identify the defendant. The plurality's analysis rejecting "firmly-rooted" status seems colored by its assumption that accomplice confessions to law enforcement actually fit within the exception for declarations against penal interest–when in fact such statements do not fit within Rule 804(b)(3), after *Williamson*, to the extent they implicate another person. This point was made by Chief Justice Rehnquist for three Justices concurring in the judgment in *Lilly*. He argued that the issue in *Lilly*, involving an accomplice confession made to law enforcement "does not raise the question whether the Confrontation Clause permits the admission of a genuinely self-inculpatory statement that also inculpates a codefendant, and our precedent does not compel the broad holding suggested by the plurality today." The Chief Justice declared that it remained an open question whether the declaration against penal interest exception — properly construed as encompassing only statements that actually tend to implicate the declarant — is a firmly rooted hearsay exception. The Chief Justice "would limit our holding here to the case at hand, and decide only that Mark Lilly's custodial confession laying sole responsibility on petitioner cannot satisfy a firmly rooted hearsay

exception."

While *Lilly* can be distinguished – thus leaving the possibility that the Court may take a case and find the narrower federal hearsay exception to be firmly rooted – it would seem that the likelihood of the Court doing so would depend in large part on whether the lower courts are having confrontation-based problems with admitting statements that qualify for admissibility under Rule 804(b)(3). This does not appear to be the case.

The dominant analysis in the lower courts after *Lilly* either to hold that Rule 804(b)(3) is not firmly rooted after *Lilly*, or to find it unnecessary to decide the question, and then to hold that the particular statement before the court carries "particularized guarantees of trustworthiness" that satisfy the standard for non-firmly-rooted hearsay under the Confrontation Clause. For example, in *United States v. Moskowitz*, 215 F.3d 265 (2d Cir. 2000), the court found that a plea allocution of an accomplice was properly admitted against the defendant after it was redacted to take out all explicit references to the defendant. As redacted, it was found sufficiently disserving to be admissible under Rule 804(b)(3). As to the right to confrontation:

> Although we have declined to decide whether a declaration against interest admitted under Rule 804(b)(3) is a firmly rooted exception to the hearsay rule, we have found "particularized guarantees of trustworthiness" where, inter alia, (1) the plea allocution "undeniably subjected [the defendant] to the risk of a lengthy term of imprisonment, even if it was also made in the hope of obtaining a more lenient sentence"; (2) "the allocution was given under oath"; and (3) "the district court instructed the jurors that they could consider [the defendant's] allocution only as evidence that a conspiracy existed and not as direct evidence that defendants were members of that alleged conspiracy or that they were otherwise guilty of the crimes charged against them." *Gallego,* 191 F.3d at 167. The instant case having the same "particularized guarantees of trustworthiness" found sufficient in *Gallego*, there was no Confrontation Clause violation in the admission of the plea allocution.

See also *United States v. Tocco,* 200 F.3d 401 (6th Cir. 2000) (*Lilly* requires a showing of particularized guarantees of trustworthiness for statements offered under Rule 804(b)(3), but that showing was made here because the declarant made the statement to his son in confidence rather than to law enforcement for the purposes of currying favor or shifting blame); *Bruton v. Phillips,* 64 F.Supp.2d 669 (E.D. Mich. 1999) (noting that it is likely that after *Lilly,* Rule 804(b)(3) is not a firmly rooted exception, but finding it unnecessary to decide the question because the statements at issue bore particularized guarantees of trustworthiness: "These statements were not made to police while in custody under potentially coercive conditions or done with the motivation of currying favor or shifting blame from the declarant to petitioner. Most of Davis's statements were made to his friends and acquaintances shortly after the murders of the victims and prior to arrest. Davis did not attempt to shift blame from himself to petitioner but clearly acknowledged his active role in this crime to the witness."); *United States v. Centracchio,* 265 F.3d 518 (7th Cir. 2001) (redacted plea allocution properly admitted under Rule 804(b)(3), and finding it unnecessary to decide whether the

exception is firmly rooted: "We need not decide whether statements, like Sapoznik's plea allocution, which do not spread or shift blame, fall within such an exception because, as explained below, we conclude that the allocution contains particularized guarantees of trustworthiness to justify its admission into evidence."); *United States v. Aguilar,* 295 F.3d 1018 (9th Cir. 2002) (redacted plea allocution does not violate Confrontation Clause because it carries particularized guarantees of trustworthiness, therefore it is unnecessary to decide whether Rule 804(b)(3) is firmly rooted).

So as a practical matter, it seems unlikely that the Supreme Court would find the need to take a case to decide whether Rule 804(b)(3) is a firmly rooted exception. The courts do not appear to need such a holding to admit statements offered under Rule 804(b)(3) that are truly reliable.

If the courts seem to be handling the matter in absence of guidance from the Supreme Court, it might be asked whether it is necessary to *include* language concerning particularized guarantees of trustworthiness in the text of the Rule. Put another way, if virtually all statements that are admissible under Rule 804(b)(3) after *Williamson* also carry particularized guarantees of trustworthiness and so satisfy the Confrontation Clause, then what is the point of amending the Rule?

The best answer is that the "particularized guarantees of trustworthiness" found in the cases above go beyond the fact that the hearsay statement is disserving to the declarant's interest. As indicated in the cases discussed above, courts finding "particularized guarantees of trustworthiness" focus on such factors as:

1) whether the declarant was speaking informally;
2) whether the statement was made to a trusted confidante;
3) whether the statement was consistent with other statements made by the declarant;
4) whether the statement appeared to be an attempt to shift blame;
5) whether the statement was relatively contemporaneous with the event described;
6) whether the statement was under oath; and
7) whether the declarant was being properly counseled (especially in the plea allocution cases)

None of these factors would be required under the current text of the Rule–all that is required is a finding that the statement tend to disserve the declarant's penal interest. Thus, a statutory requirement of particularized guarantees of trustworthiness is in fact necessary to make the text of the rule congruent with the cases construing the Confrontation Clause.

Moreover, the argument that "particularized guarantees" is equivalent to "against interest" after *Williamson* is wrong on the merits. The plurality in *Lilly* noted that the Constitution's "particularized guarantees of trustworthiness" requirement was completely distinct from the "against interest" requirement. The Commonwealth in *Lilly* argued that the accomplice's confession satisfied the "particularized guarantees of trustworthiness" requirement in part because the accomplice knew he was exposing himself to criminal liability. But the Court rejected this as a particularized guarantees factor because it "merely restates the fact that portions of his statements were technically

against penal interest." Thus, the against interest factor cannot be double-counted as a particularized guarantees factor–a point made in the Committee Note to the proposed amendment.

*Professor Friedman's Concerns*

Professor Friedman argues that the addition of a particularized guarantees of trustworthiness requirement does not do the prosecution "much good" because meeting that requirement would also satisfy the standards of the residual exception. Of course, the response is that it is not the intent of the amendment to do the prosecution "much good." The intent of the amendment is to codify the constitutional standard for non-firmly-rooted hearsay required by *Lilly*–so that the Rule will not be inconsistent with the Constitution and so it will not be a trap for the unwary. The important point is that the amendment does not do the prosecution "much bad." The revised proposal (unlike the previous one) does not impose any new or additional evidentiary requirement on the government–it only requires the government to satisfy existing constitutional standards for non-firmly-rooted hearsay.

As to the criticism that the particularized guarantees of trustworthiness requirement simply tracks the residual exception–that may well be true. But the reason for this congruence is that under current law, both the residual exception and the exception for declarations against penal interest are considered non-firmly-rooted exceptions. In order for a statement fitting a non-firmly-rooted exception to satisfy the Confrontation Clause, it must carry particularized guarantees of trustworthiness. So the congruence between the two exceptions is based on the Supreme Court's confrontation cases, not on any policy decision, or oversight, by the Advisory Committee.

Professor Friedman argues that the amendment is "unduly restrictive" in imposing a "particularized guarantees of trustworthiness" requirement on government-proffered statements that are made in informal circumstances to persons other than law enforcement officers. He argues that these statements might well fit within a firmly rooted exception, and therefore would require no extra showing of particularized guarantees of trustworthiness. Professor Friedman's contention is based on an assumption that the Supreme Court (or perhaps lower courts) will find such statements to fit a firmly-rooted exception. But as discussed above, the chances of the Supreme Court taking a new case and reaching this decision do not seem to be very high. And as to lower courts, they are on record that in the absence of further Supreme Court guidance, Rule 804(b)(3) is not firmly-rooted and the government must show that declarations against penal interest (even those not made to law enforcement officers) carry particularized guarantees of trustworthiness beyond the fact that they are disserving to the declarant's interest.

Finally, Professor Friedman suggests alternative language that would simply prohibit the admission against the accused of a statement knowingly made to law enforcement or under circumstances in which a reasonable person would realize that the statement would likely be passed on to law enforcement. There are at least two problems with this proposal. First, it would be contrary to the Supreme Court's decision in *Williamson* and would preclude admissibility of some important

statements that are admissible under current law. The Court in *Williamson* did *not* hold that all statements to law enforcement personnel are inadmissible under Rule 804(b)(3). Rather, it held those statements inadmissible to the extent that they specifically identify the defendant as an accomplice. Recall Justice O'Connor's discussion of the kind of statement that could be admissible against the defendant even if made to a law enforcement officer:

> For instance, a declarant's squarely self-inculpatory confession — "yes, I killed X" — will likely be admissible under Rule 804(b)(3) against accomplices of his who are being tried under a coconspirator liability theory. Likewise, by showing that the declarant knew something, a self-inculpatory statement can in some situations help the jury infer that his confederates knew it as well. And when seen with other evidence, an accomplice's self-inculpatory statement can inculpate the defendant directly: "I was robbing the bank on Friday morning," coupled with someone's testimony that the declarant and the defendant drove off together Friday morning, is evidence that the defendant also participated in the robbery.

Professor Friedman's proposed language, with its blanket exclusion of *all* statements made to law enforcement, would exclude many statements that are in fact disserving of the declarant's interest and not made to curry favor; as such, it is far more restrictive than *Williamson* permits and accordingly far more restrictive than the current Rule 804(b)(3).

On the other hand, Professor Friedman's proposal is too permissive. It would admit all disserving statements made to persons other than law enforcement officials, even without an additional showing of particularized guarantees of trustworthiness. Thus it suffers from the infirmity of the current Rule 804(b)(3)–it is inconsistent with the Constitution after *Lilly*.

***Alternative Solution: General Constitutional Language***

If the Committee is concerned that the Supreme Court might revise Confrontation Clause doctrine so that particularized guarantees of trustworthiness is not required for declarations against penal interest (a prospect that seems unlikely for the reasons discussed above), it might consider another alternative to solve the existing problem of the unconstitutionality of the existing Rule. The analogy would be found in Rule 412, which provides that evidence of a rape victim's sexual behavior is generally excluded, unless it "would violate the constitutional rights of the defendant." As applied to Rule 804(b)(3), such generalized language would provide that a statement fitting the exception would be *admissible* unless admission would violate the constitutional rights of the defendant. The NACDL supports the addition of generalized constitutional language to the Rule.

One disadvantage of this proposal is that it would not direct lawyers to the specific standard that governs the defendant's constitutional rights–i.e., the requirement of particularized guarantees

of trustworthiness. But the advantage of this generalized language is that it reminds lawyers of the constitutional standards that require more than the language of the rule; it goes some way toward avoiding a trap for the unwary; it avoids the poor result of an Evidence Rule that is inconsistent with the Constitution; and it avoids the possibility of being overtaken by revision of the Confrontation Clause case law.

Professor Kirst suggests that this general language should be left for the Committee Note rather than the text. He gives no real explanation for this preference. But it is clear that if any change should be made, it should be made in the text. The dominant reason for including the language is to assure that the Evidence Rule cannot be applied in violation of the Constitution. That problem will not be solved by including language in the Committee Note. An Evidence Rule does not comply with the Constitution by language in the Committee Note. It only does so by language in the text, as construed by the courts. The other basic reason for including the language is to avoid a trap for the unwary, i.e., that counsel will assume that the Constitution is satisfied simply because a statement is disserving. That trap is alleviated by language in the Committee Note only if it is assumed that unwary lawyers read Committee Notes. That by definition is an unjustified assumption.

It is for the Committee to determine whether the risks of a changed jurisprudence justify the substitution of more generalized constitutional language for the "particularized guarantees of trustworthiness" requirement in the current proposal. A proposal including generalized constitutional language, as opposed to "particularized guarantees of trustworthiness" is included in the models at the end of this memo.

### *2. The Committee Should Delete the Requirement of Corroborating Circumstances as Applied to Statements Offered by the Accused*

Professor Friedman argues that the Advisory Committee should delete the corroborating circumstances requirement as applied to statements offered by the accused. Similar suggestions were made by a member of the public when the initial proposal was issued for public comment. At every stage in which the Committee has considered this suggestion, the Committee has unanimously rejected it. So the discussion on this proposal will be short and will simply summarize prior positions taken by the Committee.

The deletion of the corroborating circumstances requirement as it applies to exculpatory statements would be contrary to the legislative history of the Rule and would reverse thirty years of case law. If one thing is clear, it is that Congress was extremely concerned about the reliability of exculpatory declarations against interest–in fact so concerned that it was prepared to scuttle the whole project unless the "corroborating circumstances" requirement was included in Rule 804(b)(3).

Assuming that Congressional concern had some merit, nothing in the past thirty years has occurred to indicate that exculpatory declarations against penal interest are more reliable than they once were. There is still the danger that an accomplice will make a statement to a friend or associate that takes responsibility for a crime, in an attempt to get the defendant off the charges, with the declarant safe in the knowledge that there is insufficient evidence to convict him, or that he can simply disappear, or invoke the privilege.

An example, discussed in previous memos, will show the importance of the corroborating circumstances requirement when applied to exculpatory statements. In *United States v. Lowe,* 65 F.3d 1137 (4th Cir. 1995), the defendant was charged with shooting somebody who crossed a picket line. Evidence indicated that the shooter used a Colt revolver, and that the defendant owned a Colt revolver. The defendant offered a hearsay statement from a fellow union member, Starkey, in which Starkey claimed that he bought the gun from the defendant before the incident. This statement was probably disserving under *Williamson*, because it could tend to subject Starkey to a risk of prosecution. But the Court held the statement properly excluded for lack of corroborating circumstances. The Court noted that there was no other evidence to indicate that Starkey ever had the gun. Moreover, the government could place the defendant at the scene, but not Starkey.

*Lowe* shows the danger of admitting exculpatory declarations against penal interest without any corroborating circumstances requirement. Starkey might well have made the statement in an effort to free Lowe, a fellow union member, from any charges, knowing that the actual risk of being charged himself was minimal–after all, no evidence put him at the scene of the crime. *Lowe* is simply one of a large number of cases that have excluded exculpatory declarations against penal interest for lack of corroboration. See, e.g., *United States v. Johnson,* 19 F.Supp.2d 720 (W.D.Tex. 1998); *United States v. Doyle,* 130 F.3d 523 (2d Cir. 1997); *United States v. Millan,* 230 F.3d 431 (1st Cir. 2000); *United States v. Hall,* 165 F.3d 1095 (7th Cir. 1999); *United States v. Bradshaw,* 281 F.3d 278 (1st Cir. 2002) (insufficient corroboration where declarant stated an alternative theory of the crime for which there was no supporting evidence). The proposal to delete the corroborating circumstances requirement would invalidate all this case law.

Professor Friedman charges that the Committee is simply afraid to propose a deletion of the corroborating circumstances requirement on the ground that it will be rejected by other bodies in the rulemaking process. He states that if the current rule is wrong on the merits (which is itself a dubious proposition) it is the responsibility of the Committee to propose a change even if the proposal would face certain rejection. This argument posits an unduly activist and inappropriate role for the Evidence Rules Committee in the rulemaking process. Committee members have always agreed that the Evidence Rules Committee is not an experimental laboratory whose role is to propose amendments to rules it thinks is "wrong" and leave it up to others in the process to reject its work. If the Committee took on the role of an academic "think tank" regardless of the outcome of its proposals, it seems clear that it would quickly lose credibility with the Standing Committee and the Judicial Conference.

If the Committee, despite all these reservations, approves a proposal to delete the

corroborating circumstances requirement, the question arises whether that change could be made without another round of public comment. It would seem that the change is relatively sweeping in effect by abrogating a good deal of case law; and it is clearly a change that is substantially different from the amendments previously released for public comment. So there is a strong argument that deletion of the corroborating circumstances requirement necessitates another round of public comment.

## IV. Clarifying the Difference Between "Corroborating Circumstances" and "Particularized Guarantees of Trustworthiness"

The basic difference between the statutory standard of "corroborating circumstances" and the constitutional standard of "particularized guarantees of trustworthiness" is that the former standard can be satisfied by a showing of independent, corroborating evidence (some courts require such evidence, the rest permit it) while the latter standard must be met by a showing of trustworthiness inherent in the making of the statement itself. An illustration might be helpful to show the distinction.

Assume the declarant, a bank robber, says to his girlfriend at dinner, "I robbed a bank with Bill today; I tried to get Jim to come along, but he wouldn't be a part of it." The government takes the position that both Bill and Jim are involved in the bank robbery, and both are being tried for the offense in separate trials. The government wants to admit this statement under Rule804(b)(3) against Bill in his trial, while Jim wants to use the statement in his favor at his trial. For the government to admit the statement, it must show (under the Confrontation Clause) particularized guarantees of trustworthiness in addition to the fact that the statement was disserving to the declarant's interest. Those guarantees might be that the statement was made (1) informally, (2) to a trusted person, (3) shortly after the event, (4)with no reason to falsify, and (5) no indication that the declarant had a bad motive or was shifting blame. It would not matter whether there was actual evidence indicating that Bill was involved, e.g., that he was seen at the crime, that he was seen spending money afterward, that he needed money badly before the robbery, etc. The statement is admissible, or not, regardless of the strength or weakness of corroborating evidence. For the statement to be admitted in Jim's favor, however, Jim will have to show at least some of the same circumstantial guarantees of trustworthiness, but he can also show (and in some courts is *required* to show) that there is independent evidence supporting the truth of the declarant's account of Jim's innocence (e.g., (1) that Jim was at work when the bank was robbed, (2) that Jim had no money problems, or (3) that nobody identified anyone looking like Jim at the bank).

This distinction between the standards, grounded in the applicability or inapplicability of corroborating evidence, is probably not recognized by most practicing lawyers. As a result, two public comments argue that the Committee should do more to explicate the distinction between these two evidentiary standards. One suggestion, by Professor Fishman et al., would add clarifying language to the text of the proposed amendment. The other suggestion, proposed by the Federal Bar Association, is a stylistic change that would put the two standards into two separate subdivisions. These proposals will be discussed in turn.

***Fishman proposal:***

Professor Fishman (together with other professor and lawyer signatories) argues that the distinction in the proposed amendment between "corroborating circumstances" and "particularized

guarantees of trustworthiness" is one that "only someone who is already knowledgeable in this difficult and arcane aspect of the law can understand." He suggests that the following explanatory language be added to the text (with changes marked from the existing proposal):

> (3) Statement against interest. – A statement 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 statement tending to expose the declarant to criminal liability is admissible 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 its trustworthiness. In evaluating trustworthiness, the court shall consider the circumstances surrounding the making of the statement and the nature and strength of the extrinsic evidence that tends to corroborate or contradict the contents of the statement; or
> >
> > (B) if offered to inculpate an accused, it is supported by particularized guarantees of trustworthiness. In evaluating trustworthiness, the court shall consider the circumstances surrounding the making of the statement, but shall not consider the nature or strength of the evidence that tends to corroborate or contradict the statement.

***Reporter's Comment on Fishman Proposal***

The proposal seems to be a useful addition to the text of the amendment. It is true that the distinction between corroborating circumstances and particularized guarantees is arcane and confusing. Any language that might help to alleviate that confusion should be welcome. The reference to "extrinsic evidence" is consistent with language used in Rule 608(b). While not specifically defined, it seems clearly enough to refer to evidence other than the proffered hearsay

statement itself.

An alternative to the Fishman proposal is to include the clarifying language in the Committee Note. But if at least one goal is to prevent a trap for the unwary, it would seem better to put clarifying language in the text where that is possible. Otherwise we are assuming that confused lawyers will routinely refer to the Committee Note.

Professor Fishman's suggested change is included as one of the models for the Committee to consider at the end of this memorandum.

***Federal Bar Association Suggestion:***

The Federal Bar Association supports the content of the proposed amendment, but suggests that the exception for declarations against interest be subdivided. Specifically, the proposal is that Rule 804(b)(3) should cover only those statements as to which the corroborating circumstances test is applicable (i.e., statements offered in civil cases and by the accused in criminal cases); and a new Rule 804(b)(4) should cover statements offered by the prosecution.

***Reporter's Comment on FBA proposal:***

The proposal is well-intentioned as it would be helpful, all things considered, to provide as much distinction as possible between those statements subject to the corroborating circumstances requirement and those subject to the particularized guarantees requirement. But the suggestion of a completely separate hearsay exception is problematic on a number of counts.

First, there is already an exception numbered Rule 804(b)(4), for statements of pedigree. It would be quite disruptive to insert a different exception under that number. It would disrupt computerized searches, it would make previous cases construing Rule 804(b)(4) confusing. It is further problematic to bump down and renumber the current Rule 804(b)(4) as Rule 804(b)(5). Rule 804(b)(5) was originally one of the two residual exceptions; in 1997 it was combined with Rule 803(24) and transferred to Rule 807. So Rule 804(b)(5) currently reads: "[Other exceptions.] [Transferred to Rule 807]". It would obviously be disruptive and confusing to move a new exception into the gap left in 1997. It would be particularly confusing in light of the fact that pre-1997 cases cite and apply Rule 804(b)(5) as a catch-all exception to the hearsay rule. Note that when a new exception was added to Rule 804 in 1997, it was numbered 804(b)(6).

Second, there is no other hearsay exception that is broken into two separate exceptions depending on where the statement is used. For example, public reports are treated differently when they are offered by the prosecution in criminal cases. But the solution is not a completely

independent exception. Rather, Rule 803(8) makes the differentiation by creating subdivisions within a single rule. So the FBA proposal of a separate hearsay exception is inconsistent with the existing organization of the hearsay exceptions in the Federal Rules.

Third, the proposed amendment *does* distinguish between statements offered by the government and all other statements. It does so by creating different subsections in the Rule. If the subsections are indented, they will highlight the proposed distinction as well as separate hearsay exceptions, without the confusion rendered by renumbering.

It is of course for the Committee to determine whether the FBA's suggested renumbering scheme should be implemented. But it seems clear that the proposed solution creates several problems that could better be answered by the use of separate subdivisions in a single hearsay exception.

## V. Applying the Corroborating Circumstances Requirement to Civil Cases

Several of the public comments are critical of the proposed amendment's extension of the corroborating circumstances requirement to civil cases. For example, David Romine argues that the proposal will significantly hamper the prosecution of civil antitrust cases–and the same could be said for securities actions. The American College of Trial Lawyers opposes the extension on the ground, among others, that it would "move a difficult aspect of the criminal procedural law into the civil procedural law, without any compelling reason to do so." Trial Lawyers also argues that the proposal is problematic "because the admissibility of against-interest declarations would now vary, depending upon whether the interest implicated was thought to be penal, on the one hand, or pecuniary-proprietary-cause of action, on the other." In other words, confusion will be created because declarations against penal interest will be subject to the corroborating circumstances requirement, while declarations solely against pecuniary interest will not.

Other commentators, such as Professor Friedman, argue that the case has not been made that declarations against penal interest are as a class so unreliable that a corroborating circumstances requirement is needed in civil cases. Nor is the application of the corroborating circumstances requirement to civil cases necessary to adhere to the original intent of the Rule, as it is for statements offered by the accused criminal cases. To the contrary, the original intent of the Rule was to provide a clear distinction between criminal cases, in which the accused might generate an unreliable exculpatory statement, from civil cases, in which no such threat was perceived.

### *Reporter's Comment*

The Advisory Committee relied upon two reasons, in its first proposal, to extend the corroborating circumstances requirement to civil cases. First, such an extension would provide a unitary treatment for all declarations against penal interest, no matter the case, no matter by whom offered. Second, there was no reason to think that the reliability problems of declarations against penal interest are different depending on the case in which they are offered.

The first rationale–unitary treatment–no longer supports the extension of the corroborating circumstances requirement to civil cases. This is because the revised proposed amendment does not provide for unitary treatment of all declarations against penal interest. It provides different admissibility requirements for statements offered by the prosecution and those offered by the accused. It is also notable that the only civil case with any discussion of the corroborating circumstances requirement–the *Fishman* case, relied upon in the Committee Note–justifies extension of the corroborating circumstances requirement to civil cases solely on the ground that unitary treatment would be desirable. Thus, the only case providing a considered holding on the matter relies on a rationale that is undermined by the current proposed amendment.

The second rationale–that reliability problems of against-penal-interest statements are the same no matter the case in which they are offered–is undoubtedly as true today as it has been

throughout the Committee's consideration of Rule 804(b)(3). Declarations against penal interest are either reliable or not at the time they are *made*; trustworthiness is not effected by the time or circumstances under which they are *offered*. But there is one distinction that may make a difference and that does depend on the type of case in which the statement is offered–that distinction lies in the *consequences* of admitting a potentially unreliable statement. Those consequences are much more serious in criminal than in civil cases.

The ultimate question is whether the concerns over unreliability of against-penal-interest statements in civil cases are outweighed by the risks and costs of amendment. Those risks and costs can be capsulized as follows:

1. One of the original justifications for the amendment – unitary treatment – is no longer relevant. This could be thought to hurt the legitimacy of the amendment.

2. The case law is not heavily in favor of the amendment; there are only two cases imposing a corroborating circumstances requirement in civil cases and the only one with a discussion is based on the unitary treatment concept that is no longer pertinent. This dearth of case law can also be thought to impair the legitimacy of the amendment.

3. There is some risk that legitimate civil antitrust and securities actions will be impaired by a corroborating circumstances requirement. While it is hard to tell how great the risk is, it does seem that in light of Enron, Global Crossing, and Sarbanes-Oxley, an amendment that makes it harder to bring civil actions to challenge corporate misconduct is at the very least running against the tide.

4. The extension rejects the original, fully-fought-out dichotomy between civil and criminal cases that was part of the original rule. Without some very substantial justification for change, there is a risk of impairing the legitimacy of the amendment insofar as it departs from original understandings.

5. There is at least some risk of confusion in a rule that imposes a corroborating circumstances requirement for statements against penal interest and not pecuniary interest. It is true that the distinction can certainly be justified. The common law suspicion of against penal interest statements, as compared to statements exposing the declarant to civil liability, recognizes the difference between the kind of person who makes one statement rather than the other. Statements exposing the speaker to civil liability (e.g., "I owe you $100" or "I'm sorry I sideswiped your car") can be made by any reliable, upstanding individual–doctors, lawyers, plumbers, rescue workers, everyone. In contrast, declarations against penal interest by definition are made by those of dubious credibility. A person who admits to a crime either committed the crime–so that his character for truthfulness is questionable (see Rule 609)–or is lying about committing the crime. One way or another, such a person is not the most reliable of hearsay declarants. And besides the general concern over the questionable character of a declarant who admits a crime, there are a number of suspect motivations that

are often at play when a declarant confesses to a crime and that confession is offered against another person. The declarant may have the motive to cast blame, to get somebody else in trouble, to brag, to get somebody off from a charge, etc. Rarely are these motives at work when a person admits to civil liability.

However, while the reliability-based distinction between pecuniary and penal interest makes sense, there is an undeniable cost in the inevitable arguments that will occur when parties want to admit a statement in a civil case under Rule 804(b)(3). The opponent of the evidence will argue that the statement subjects the declarant to a risk of criminal liability, and so corroborating circumstances should be presented. The proponent will argue that the only risk is pecuniary liability, and so no corroborating circumstances are required. It is to be expected, in some civil cases, that litigant and court time will be taken to work through these arguments–arguments that are not necessary in civil cases under the current Rule, because no showing of corroborating circumstances is currently required.

It is for the Committee to determine whether the above costs and risks outweigh the benefit of providing extra reliability guarantees for declarations against penal interest offered in civil cases. If the Committee decides to reject a corroborating circumstances requirement in civil cases, it can refer to one of the models at the end of the memo that makes such a change to the current proposal.

## VI. Other Suggestions for Change

Professor Friedman has two further suggestions for change to the proposed amendment that can quickly be considered:

*Suggestion to Abrogate the Williamson Rule on Neutral Declarations:*

Professor Friedman suggests that the Committee should take this occasion to reject the Supreme Court's decision in *Williamson v. United States,* 512 U.S. 594 (1994). In that case, the Court held that every statement admitted under Rule 804(b)(3) had to be truly self-inculpatory of the declarant's interest. The Court specifically rejected the notion that a disserving statement could carry into evidence other related statements made at the same time even though those latter statements were not themselves disserving. That is, neutral or selfserving aspects of a broader declaration are not admissible under the Rule. Justice O'Connor, writing for six Justices on this point, began her analysis by noting two possible readings of the term "statement" in the Rule:

> One possible meaning, "a report or narrative," Webster's Third New International Dictionary 2229, defn. 2(a) (1961), connotes an extended declaration. Under this reading, Harris' entire confession — even if it contains both self-inculpatory and non-self-inculpatory parts — would be admissible so long as in the aggregate the confession sufficiently inculpates him. Another meaning of "statement," "a single declaration or remark," ibid., defn. 2(b), would make Rule 804(b)(3) cover only those declarations or remarks within the confession that are individually self-inculpatory.

Justice O' Connor contended that the narrower meaning of "statement" was mandated by the "principle behind the Rule." She elaborated as follows:

> Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true. This notion simply does not extend to the broader definition of "statement." The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.
>
> In this respect, it is telling that the non-self-inculpatory things Harris said in his first statement actually proved to be false, as Harris himself admitted .... And when part of the confession is actually self-exculpatory, the generalization on which Rule 804(b)(3) is founded becomes even less applicable. Self-exculpatory statements are exactly the ones which people are most likely to make even when they are false; and mere proximity to other, self-inculpatory, statements does not increase the plausibility of the selfexculpatory statements.

...

> In our view, the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. The district court may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else.

Professor Friedman would have the Committee reject the *Williamson* construction of the Rule and insert new language to provide that a neutral or self-serving statement is admissible if such a statement is made "in conjunction with" a disserving statement and "given that the declarant made those [disserving] statements notwithstanding their impact on the declarant's interests, it appears likely that the declarant would make the statement in question only if believing it to be true."

***Reporter's Comment on the Proposed Rejection of the Williamson Rule:***

The most obvious problem with the proposal is that it would upset a clear Supreme Court precedent, as well as about 100 lower court cases construing that precedent, while providing no major advantage. The lower federal courts have embraced the *Williamson* definition of "statement" and have indeed *extended* that definition to declarations against interest offered in civil cases, (*Silverstein v. Chase,* 216 F.3d 142 (2d Cir. 2001); to statements offered under the residual exception (*United States v. Canan*, 48 F.3d 954, 960 (6th Cir.1995) ( relying on *Williamson* to declare that the term "statement" must mean "a single declaration or remark for purposes of all of the hearsay rules."); and to statements construing what is admissible as a party-admission under Rule 801(d)(2) (*United States v. Ortega,* 203 F.3d 675 (9th Cir. 2000) (noting that an exculpatory part of a confession is not admissible simply because it is part of a broader inculpatory narrative, citing *Williamson)*. Thus, any rejection of *Williamson* would constitute a rejection of a consistent body of case law and would affect not only Rule 804(b)(3) but other hearsay exceptions as well–indeed potentially all the hearsay exceptions, because the exceptions do not apply unless the evidence offered is a "statement" under Rule 801. See *Canan, supra,* noting that its ruling applying the *Williamson* definition of "statement" to all hearsay exceptions "is consistent with the idea implicit in Rule 801(a): that there is an overarching and uniform definition of 'statement' applicable under all of the hearsay rules. Rule 801(a) indicates that its definition of statement covers Article VIII (Hearsay) of the Federal Rules of Evidence entirely. It would make little sense for the same defined term to have disparate meanings throughout the various subdivisions of the hearsay rules."

Thus, rejecting the *Williamson* definition of "statement" would be to take an aggressive, activist position that is inconsistent with this Committee's traditional approach to rulemaking, and that is therefore unlikely to be successful. Moreover, the costs to the Committee, to the courts, and to the rulemaking process of such a disruptive amendment do not appear in any way to be justified

by any benefit. The concern over the reliability of declarations against penal interest is longstanding and justified by experience. That concern is alleviated, somewhat, by the assurance that only those statements that are truly self-inculpatory will be admitted under the exception. In contrast, the concern over reliability is exacerbated if neutral and even self-serving statements can be admitted as "tag-alongs" to disserving statements.

Nor is this concern alleviated by Professor Friedman's proposed test that a neutral or self-serving statement should only be admissible if, given its temporal relationship with a disserving statement, "it appears likely that the declarant would make the statement in question only if believing it to be true." How is one to determine whether that standard has been met if the statement itself is not disserving to the declarant's interest? Is one to rely on residual-exception-type circumstantial guarantees of reliability? If so, why not use the residual exception to admit the statements? Why rely on a vague addendum to Rule 804(b)(3)?

Moreover, a strong argument can be made that the Supreme Court in *Williamson* was indeed correct on the merits. Experience indicates that people who make disserving statements also include neutral and self-serving statements as part of a broader narrative, and that these statements are often found to be false.

It thus appears that any attempt to reject the *Williamson* definition of "statement" in favor of a vague "likely to believe it to be true" standard imposes substantial costs without anything near a corresponding benefit. It is for the Committee to decide whether this change should be made, however. If the Committee agrees with Professor Friedman that the Rule should be amended to reject *Williamson*, then the proposed amendment would have to be released for a third round of public comment, because such a change would constitute a substantial change from the previous proposals. Language for such a change is included in Professor Friedman's statement to the Committee.

*Credibility of the Declarant Irrelevant:*

The Advisory Committee Note to the proposed amendment states:

> The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses.

This provision is made necessary by the fact that a few courts have incorrectly held that "corroborating circumstances" cannot be found when the in-court witness is an unreliable person. See, e.g., *United States v. Rasmussen,* 790 F.2d 55 (8th Cir. 1986) (requiring an assessment of the "probable veracity of the in-court witness"). Compare *United States v. Katsougrakis,* 715 F.2d 769 (2d Cir. 1985) (credibility of in-court witness may not be considered because to do so would usurp the authority of the jury).

Professor Friedman argues essentially that the language in the Committee Note concerning the credibility of the witness should be elevated to the text of Rule 804(b)(3).

***Reporter's Comment:***

Amending the text of Rule 804(b)(3) to provide that the credibility of the in-court witness is irrelevant would likely cause confusion. This is because the credibility of the in-court witness is *never* relevant to determine the admissibility of *any* hearsay statement. The credibility of the in-court witness is pertinent only to the question of whether a hearsay statement was *made*–and whether a hearsay statement was made is inherently a jury question, because the jury can assess the in-court witness' credibility when she testifies that she heard the statement. The hearsay question focuses on whether the out-of-court statement is *reliable, assuming it was made.* So it is a classic error to confuse the admissibility of a hearsay statement with the credibility of an in-court witness.

Thus, if language rejecting the relevance of the credibility of the witness is to be added to Rule 804(b)(3), it should also be added to every other hearsay exception. Put another way, if the language is added *only* to Rule 804(b)(3), a negative, confusing and misleading inference will be raised, i.e., that the credibility of the witness *is* pertinent to the admissibility of a statement offered under any of the other hearsay exceptions.

For that reason, it seems better not to state the obvious in the text of the Rule. The Committee Note is a good place to provide a reminder, within the specific context of determining "corroborating circumstances" under the Rule. If the Committee wishes, the Note could be expanded somewhat by adding a sentence that the same rationale applies to admissibility of a hearsay statement under the other Federal Rules exceptions. Or the provision about the credibility of the witness in the proposed Committee Note could simply be deleted.

If the Committee decides to include the language concerning the irrelevance of the credibility of the in-court witness to the text of the amendment, there is language in Professor Friedman's statement that can be used.

## VII. Models for Possible Change to the Proposed Amendment to Rule 804(b)(3)

This section sets forth three models for possible change to the current proposed amendment to Rule 804(b)(3). These models are based on the most credible proposals for change in the public comment.

Model One provides explication of the two evidentiary standards–"corroborating circumstances" and "particularized guarantees of trustworthiness"– in the text of the Rule. The Committee might consider this change if it finds that the current statement of the standards would not be sufficiently helpful to lawyers unfamiliar with the difference between the two standards.

Model Two substitutes generalized constitutional language for the "particularized guarantees of trustworthiness" language that would currently be applied to declarations against penal interest offered by the prosecution. As stated above, the Committee might consider this model if it is concerned that the Supreme Court will change its constitutional analysis, and yet is also concerned about an Evidence Rule that is currently inconsistent with the Constitution.

Model Three provides that corroborating circumstances are not required if the declaration against interest is offered in a civil case. Put another way, this Model preserves existing law in civil cases. As stated above, the Committee might consider this Model if it determines that extension of the corroborating circumstances requirement to civil cases (1) would be disruptive, (2) would impair the prosecution of civil antitrust and securities cases, or (3) that the extension is no longer justified by any rationale of a unitary treatment of declarations against penal interest. Note that Model Three can be combined with either Model One or Model Two, and those combinations are also set forth below.

The Models are marked for changes *from the existing Rule 804(b)(3)*, not from the current proposed amendment. The Committee Note for each Model is, however, adapted from the Note to the proposed amendment as it currently exists. This was done for ease of reference for the Committee. At least that was the intent.

Note that the Models have already been reviewed by Joe Kimble of the Style Subcommittee of the Standing Committee. He made minor suggestions that have been incorporated.

(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 ~~of the statement~~. In evaluating trustworthiness, the court must consider the circumstances that surrounded the making of the statement and may consider the nature and strength of the extrinsic evidence that tends to corroborate or contradict the contents of the statement; or

(B) if offered to inculpate an accused, it is supported by particularized guarantees of trustworthiness. In evaluating trustworthiness, the court must consider the circumstances that surrounded the making of the statement but must not consider the nature or strength of the evidence that tends to corroborate or contradict the statement.

* * *

**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 guarantees" therefore must be independent from the fact that the statement tends to subject the declarant to criminal liability. The "against penal interest" factor should not be double-counted as a particularized guarantee. *See Lilly v. Virginia,* 527 U.S. at 138 (fact that statement may have been disserving to the declarant's interest does not establish particularized guarantees of trustworthiness because it "merely restates the fact that portions of his statements were technically against penal interest").

The "particularized guarantees" requirement cannot be met by a showing that independent corroborating evidence indicates that the declarant's statement might be true. This is because under current Supreme Court Confrontation Clause jurisprudence, the hearsay exception for declarations against penal interest is not considered a "firmly rooted" exception (*see Lilly, supra*) and a hearsay statement admitted under an exception that is not "firmly rooted" must "possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Idaho v. Wright,* 497 U.S. 805, 822 (1990).

The amendment does not affect the existing requirement that the accused provide corroborating circumstances for exculpatory statements. The case law identifies some factors that may be useful to consider in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors include (*see, e.g., United States v. Hall,* 165 F.3d 1095 (7th Cir. 1999)):

(1) the timing and circumstances under which the statement was made;

(2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie;

(3) whether the declarant repeated the statement and did so consistently, even under

different circumstances;

(4) the party or parties to whom the statement was made;

(5) the relationship between the declarant and the opponent of the evidence; and

(6) the nature and strength of independent evidence relevant to the conduct in question.

Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses.

## Model Two: Adding Generalized Constitutional Language in Place of Particularized Guarantees of Trustworthiness

(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 ~~of the statement~~.; or

(B) if offered to inculpate an accused, its admission would not violate the constitutional right to be confronted with adverse witnesses.

* * *

### 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. Under current Supreme Court Confrontation Clause jurisprudence,

the hearsay exception for declarations against penal interest is not considered a "firmly rooted" exception and statements admitted under exceptions that are not "firmly rooted" must "possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Idaho v. Wright*, 497 U.S. 805, 822 (1990). *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 of trustworthiness" requirement, currently applicable to statements offered under Rule 804(b)(3), 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 guarantees" therefore must be independent from the fact that the statement tends to subject the declarant to criminal liability. The "against penal interest" factor should not be double-counted as a particularized guarantee. *See Lilly v. Virginia*, 527 U.S. at 138 (fact that statement may have been disserving to the declarant's interest does not establish particularized guarantees of trustworthiness because it "merely restates the fact that portions of his statements were technically against penal interest").

The amendment does not affect the existing requirement that the accused provide corroborating circumstances for exculpatory statements. The case law identifies some factors that may be useful to consider in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors include (*see, e.g., United States v. Hall*, 165 F.3d 1095 (7th Cir. 1999)):

(1) the timing and circumstances under which the statement was made;

(2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie;

(3) whether the declarant repeated the statement and did so consistently, even under different circumstances;

(4) the party or parties to whom the statement was made;

(5) the relationship between the declarant and the opponent of the evidence; and

(6) the nature and strength of independent evidence relevant to the conduct in question.

Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses.

## Model Three: Deleting the Corroborating Circumstances Requirement for Declarations Against Penal Interest Offered in Civil Cases

(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 in a criminal case a ~~A~~ statement tending to expose the declarant to criminal liability ~~and offered in a criminal case to exculpate the accused~~ is ~~not~~ admissible ~~unless~~ under this subdivision in the following circumstances only:

(A) if offered to exculpate an accused, it is supported by corroborating circumstances that clearly indicate ~~the~~ its trustworthiness ~~of the statement~~.; or

(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~~ 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 guarantees" therefore must be independent from the fact that the statement tends to subject the declarant to criminal liability. The "against penal interest" factor should not be double-counted as a particularized guarantee. *See Lilly v. Virginia,* 527 U.S. at 138 (fact that statement may have been disserving to the declarant's interest does not establish particularized guarantees of trustworthiness because it "merely restates the fact that portions of his statements were technically against penal interest").

The "particularized guarantees" requirement cannot be met by a showing that independent corroborating evidence indicates that the declarant's statement might be true. This is because under current Supreme Court Confrontation Clause jurisprudence, the hearsay exception for declarations against penal interest is not considered a "firmly rooted" exception (*see Lilly, supra*) and a hearsay statement admitted under an exception that is not "firmly rooted" must "possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Idaho v. Wright,* 497 U.S. 805, 822 (1990).

The amendment does not affect the existing requirement that the accused provide corroborating circumstances for exculpatory statements. The case law identifies some factors that may be useful to consider in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors include (*see, e.g., United States v. Hall,* 165 F.3d 1095 (7th Cir. 1999)):

(1) the timing and circumstances under which the statement was made;

(2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie;

(3) whether the declarant repeated the statement and did so consistently, even under different circumstances;

(4) the party or parties to whom the statement was made;

(5) the relationship between the declarant and the opponent of the evidence; and

(6) the nature and strength of independent evidence relevant to the conduct in question.

Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses.

**Note: Model Three, deleting the corroborating circumstances requirement in civil cases, can be combined with either of the first two models, and the Committee Notes can easily be adjusted accordingly.**

**1. What follows is the text of an amendment that combines Model One (explication of different evidentiary standards) and Model Three (deletion of corroborating circumstances requirement in civil cases). Changes in the text are from the existing Rule.**

(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 in a criminal case 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 to exculpate an accused, it is supported by corroborating circumstances that clearly indicate ~~the~~ its trustworthiness ~~of the statement~~. In evaluating trustworthiness, the court must consider the circumstances that surrounded the making of the statement and may consider the nature and strength of the extrinsic

evidence that tends to corroborate or contradict the contents of the statement; or

(B) if offered to inculpate an accused, it is supported by particularized guarantees of trustworthiness. In evaluating trustworthiness, the court must consider the circumstances that surrounded the making of the statement but must not consider the nature or strength of the evidence that tends to corroborate or contradict the statement.

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Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses.

**2. What follows is a combination of Model Two (generalized constitutional language) and Model Three (deleting the corroborating circumstances requirement in civil cases):**

(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 in a criminal case 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:

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to other evidence at trial." *Idaho v. Wright*, 497 U.S. 805, 822 (1990). *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).

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(5) the relationship between the declarant and the opponent of the evidence; and

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Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in

assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses.

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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: April 1, 2003

At its October 2002 meeting, the Evidence Rules Committee considered a memorandum prepared by the Reporter on Rule 106–the Federal Rule on completeness–to determine whether it is necessary to propose an amendment to that Rule. That Report laid out a number of possible problems with the Rule, the two most important being: 1) whether the rule does or should provide a "trumping" function, so that evidence necessary for completeness must be admitted under Rule 106 even if it would be otherwise inadmissible under the hearsay rule or some other rule of exclusion; and 2) whether the Rule should cover oral statements.

The Committee's resolution of these questions is described as follows:

1. Most members were skeptical of the need for an amendment that would codify a trumping function. Members generally believed that if the evidence was necessary for completion, the court would find some way in fairness to admit it, even without an amendment to Rule 106. For example, the trial court could admit the completing evidence under the rationale that the adversary "opened the door" by the selective admission of a portion of a writing. Another possibility is that the omitted portion could be admitted for the non-hearsay purpose of providing "context" for the already admitted portion. Finally, a trial court could exercise its discretion under Rule 403 to exclude the misleading portion unless the proponent agreed to admit the completing portions as well.

2. The Reporter was directed to review the case law to determine whether a misleading portion of a document or writing had ever been permitted to stand on the ground that a completing portion was inadmissible under some other rule of evidence. If not, then the apparent conflict in the cases (i.e., some cases declaring that Rule 106 has a trumping function and some cases declaring to the contrary) would be more an academic problem than a practical one.

3. Members of the Committee expressed even more skepticism about amending Rule 106 to cover oral as well as written statements. Members were concerned that such an amendment would encourage opponents to disrupt the proponent's order of proof by contending that the proponent's witness testified to a misleading portion of an oral statement; disputes would arise about what the oral statement actually was. Sidebar hearings would be required to determine who said what. Committee members also noted that many courts have used Rule 611(a) to admit completing evidence of an oral statement—from this they concluded that there was no reason to amend Rule 106 to cover the presentation of completing oral statements. The change would be one of form only, not of substance.

4. The Committee took a tentative vote on whether to continue work on a possible amendment to Rule 106. Two members of the Committee voted against continuing work on Rule 106. All members of the Committee voted against any amendment to Rule 106 that would cover oral statements. A majority of the Committee, however, agreed to consider further an amendment to Rule 106 that would provide some form of trumping function in the rule.

This report is intended to provide guidance to the Committee on whether an amendment that would add a trumping function to Rule 106 is justified. It surveys the case law on the subject to determine whether the split in the courts over that question has any practical effect. It also provides a model amendment and committee note should the Committee decide–tentatively at this point–to proceed with an amendment to the Rule.

This report assumes that any amendment to the Rule will not cover oral statements. If the Committee wishes to reconsider the question of oral statements under Rule 106, it is free to do so at a later meeting and I would be happy to prepare a memorandum on that subject.

This report is divided into five parts. Part One sets forth the current Rule. Part Two provides background on the trumping function and discusses in some detail the case law on that subject. Part Three discusses some other, less important problems with the Rule that might be addressed if an amendment on the trumping function is proposed–these less important problems were discussed in the memo prepared for the October 2002 meeting, but were not the subject of much discussion. Part Four sets forth State law variations of Rule 106 that focus on the trumping function. Part Five sets forth drafting alternatives that address the trumping function and some of the less important problems arising under 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.. 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. The Trumping Function–Background and Case Law on the Subject

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 Apparent Conflict–Any Practical Effect?*

Statements in the case law indicate a 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.

The cases rejecting the trumping function would be patently unfair if the evidence proffered was truly necessary to rectify a misleading impression, and the court nonetheless excluded the completing evidence on the ground that Rule 106 is not an independent rule of admissibility. Such a result would mean that a proponent could make a completely misleading proffer of a portion of a writing, and then rely on the hearsay rule, or some other rule of exclusion, to prevent rebuttal.

The actual holdings from the cases rejecting the trumping function, however, indicate that the Rule has not been used to reach an unfair result. It must be recalled that the "fairness" aspect of Rule 106 is implicated only when the omitted portion is necessary to correct a misleading impression. Rule 106–with or without a trumping function–does not justify wholesale admission of the remainder of a document simply because some portions have already been admitted.

*Case Law Rejecting the Trumping Function*

What follows is a discussion of the cases rejecting a trumping function in Rule 106. This review indicates that most of the evidence offered under Rule 106 is excluded on grounds other than, or in addition to, the fact that the evidence proffered as completing is otherwise inadmissible.

1. *United States Football League v. National Football League,* 842 F.2d 1335 (2d Cir. 1988) This was an antitrust action brought against the NFL. The NFL offered evidence of Jets owner Leon Hess' reply to Mayor Koch concerning the possibility of the Jets returning to New York City. In response, the USFL offered the letter written by Koch, to which Hess had replied. The Court declares that Rule 106 "does not compel admission of otherwise inadmissible hearsay evidence." But the letter was excluded not only as hearsay, but also under Rule 403. Any amendment that would include a trumping function in Rule 106 would have to exempt Rule 403, because it would be inappropriate to permit completing evidence where the probative value is substantially outweighed by the prejudicial effect. Thus, the result in this case would not change if the Rule were amended to include a trumping function.

2. *United States v. Terry,* 702 F.2d 299 (2d Cir. 1983): The Government offered proof that the defendants refused to supply palmprints. The defendants argued that the doctrine of completeness required admission of the fact that their refusal was conditioned on consulting counsel first. The court declares that Rule 106 is not a trumping rule, but this is clear dicta because the court found that the defendants' completing statements should have been admitted under the state of mind exception to the hearsay rule. Thus, the case would be decided the same way whether or not Rule 106 is amended to include a trumping function.

3. *United States v. Wilkerson*, 84 F.3d 692 (4th Cir. 1996): This was a typical case in which the prosecution proffered the inculpatory portions of a confession admitted and the defendant wanted to admit some omitted portions by way of explanation. The court holds it that the omitted portions cannot be admitted under Rule 106, for three reasons: 1) because it is an oral statement, and Rule 106 does not cover oral statements; 2) because the omitted portion was not necessary to correct a misimpression; and 3) because Rule 106 "would not render admissible the evidence which is otherwise inadmissible under the hearsay rule." The Court elaborated on its second rationale–that the rule of completeness was not even applicable–in the following passage:

> In this case, during direct examination Agent Parker testified that the agents found a black case containing some of the bait money while searching Wilkerson's car. No other testimony about any portions of a conversation between the agents and Wilkerson regarding that particular cache of money was introduced. Thus, the rule of completeness, if it applied to oral conversations, would not have applied here where there was no partially-introduced conversation that needed clarification or explanation

So it is clear that the result in *Wilkerson* would not be changed if Rule 106 were amended to include a trumping function–the omitted portion, even if in a written statement, was not needed

to correct a misimpression. Put another way, Rule 106 does not need a trumping function to prevent an unfair result in a case like *Wilkerson*, because the result is not unfair.

4. *United States v. Woolbright,* 831 F.2d 1390 (8th Cir. 1987): Drugs were found in a suitcase. The defendant introduced a portion of Randle's hearsay statement, made to a police officer after the drugs were found, that the suitcase was hers. This statement was admitted as a declaration against penal interest under Rule 804b3. The government in response proffered an omitted part of the statement: that Randle was on a honeymoon with the defendant. This was offered to prove the defendant's constructive possession of the suitcase. The government argued that the honeymoon statement was properly admitted under Rule 106. The court declared as follows:

> We conclude, however, that neither Rule 106, the rule of completeness, which is limited to writings, nor Rule 611, which allows a district judge to control the presentation of evidence as necessary to the "ascertainment of the truth," empowers a court to admit unrelated hearsay in the interest of fairness and completeness when that hearsay does not come within a defined hearsay exception. *See* Fed. R. Evid. 802.

This statement was, however, dictum for at least two reasons. First, the honeymoon statement was not necessary to correct any misimpression. Randle simply said it was her suitcase. The defendant didn't proffer a statement like "Woolbright never touched my suitcase and didn't know anything about it." Second, and more importantly, the court held that the honeymoon statement was properly admitted as residual hearsay–so the case is not about the trumping function at all.

5. *United States v. Costner,* 684 F.2d 370 (6th Cir. 1982) : The defendant introduced a portion of a document to impeach a witness. The government in response introduced another portion that had nothing to do with impeachment, it rather was proof of a prior bad act of the defendant and a guilty state of mind. So it was completely unrelated and should have been excluded under Rule 403. In the course of holding the government's proffered portion erroneously admitted, the court declared that "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." But in fact the Rule was not applicable because the portion offered by the defendant was not misleading, and the portion offered by the government did not correct any misimpression.

6. *United States v. Burreson,* 643 F.2d 1344 (9th Cir. 1981): In a criminal case involving securities fraud, the government admitted portions of the testimony of the defendants in a prior SEC proceeding. The trial court required admission of other portions to put the testimony in context, but the defendants argued that additional exculpatory portions should have been admitted. The court declared:

> The court concluded that the portion appellants wished to submit was irrelevant and was inadmissable hearsay. This decision was not an abuse of the District Court's discretion, and appellants' argument is therefore without merit.

So this is a relevance ruling, as well as a hearsay ruling. Adding a trumping function to Rule 106 would not change the result in *Burreson*, because the rule of completeness cannot operate to admit irrelevant evidence.

7. *United States v. Edwards,* 159 F.3d 1117 (8th Cir. 1998): In a multiple defendant case, many defendants had confessed to group activity. Ostensibly to satisfy *Bruton*, the confessions were redacted and neutral pronouns were used in place of specific identifications of accomplices. Some defendants wanted to use the rule of completeness to show that they were not mentioned in certain of the statements. The court held that the rule of completeness did not apply for two reasons.

> The rule is violated "only when the [out-of-court] statement in its edited form, while protecting the sixth amendment rights of the co-defendant, effectively distorts the meaning of the statement or excludes information substantially exculpatory of the nontestifying defendant." United States v. Smith, 794 F.2d 1333, 1335 (8th Cir. 1986). Second, the rule of completeness does not help Frank Sheppard here because the only reference to him (by omission) was exculpatory, and exculpatory out-of-court declarations are not admissible hearsay, even if they include a statement against the declarant's penal interest.

So while rejecting a trumping rule, the court also emphasizes that the initially proffered portions of the various confessions were not misleading. Thus no rule of completeness was necessary. Again, it appears that an amendment to include a trumping function in Rule 106 would not change the result in *Edwards*–nor would a change of result be necessary.

8. *United States v. Ortega,* 203 F. 3d 675 (9th Cir. 1996). This was a typical case of a confession where the government offers the inculpatory parts, the defendant offers the exculpatory parts as completing, and the government objects on hearsay grounds. The court found that the defendant's proffer was properly rejected, for two reasons: 1) the statement was oral, and Rule 106 does not apply to oral statements; and 2) the proffered completing portions were hearsay and Rule 106 does not have a trumping function. Since the Committee has decided that it does not wish to amend Rule 106 to cover oral statements, it appears that the result in *Ortega* would be the same even if the Rule *were* amended to include a trumping function. However, unlike the cases discussed above, it is unclear whether the result in *Ortega* is fair. The Court does not say that the prosecution's portions were misleading. If they were, then the result is unfair because the prosecution was able to leave the jury with a misimpression of the evidence. It should also be noted that while Rule 106 does not by its terms apply to oral statements, most courts have used Rule 611 as a rule of completeness for oral statements. The Court in *Ortega* did not mention this point.

9. *United States v. Collicott,* 92 F.3d 973 (9th Cir. 1996): The defendant, when cross-examining a prosecution witness, brought out prior inconsistent statements. The government argued that this opened the door to the witness' prior statements about a drug deal that would implicate the defendant. The court viewed the "open door" rule and the rule of completeness as essentially equivalent. It finds that the door was not opened far enough to justify admission of the drug deal statements, because the omitted statements were not necessary to place the inconsistent statements in context; for similar reasons, the statements were not necessary for completeness. The court in passing also says that Rule 106 is not a trumping rule, but this is clearly unnecessary to the result.

10. *Phoenix Associates III v. Stone,* 60 F.3d 95 (9th Cir. 1995): In a tax fraud case, the government admitted a report prepared by the defendant's accountant. The defendant argued that

the accountant's working papers were necessary to provide a proper understanding of how the accountant's report tabulated certain figures. The defendant invoked Rule 106, and the court declared that Rule 106 is not a trumping rule. However, this declaration is not necessary to the decision, because the working papers were found independently admissible as business records.

*Summing up on cases rejecting a trumping function:*

It appears that few if any of the above cases would be affected by the addition of a trumping function in Rule 106. That is to say, even if the trumping function were added, the proffered evidence would still be excluded in almost all of the cases on other grounds, most commonly because the proffered statements were not needed to correct any misimpression. Put another way, there are few if any cases in which the trumping function is needed to mandate a fair result–there is nothing unfair in excluding, on hearsay grounds, when there is no misleading presentation of the evidence to correct.

*Cases Finding a Trumping Function in Rule 106:*

A minority of cases hold that Rule 106 already contains a trumping function. A rule change would codify those cases; it is clear, however, that a rule change was not necessary for the courts to reach the results in these cases. It is for the Committee to determine whether the benefits of codification outweigh the costs of amending the Rule.

It bears noting that in the cases finding a trumping function in Rule 106, the same results could have been reached by using the "opening the door" principle. Thus, in *United States v. Sutton*, 801 F.2d 1346 (D.C. Cir. 1986), the government introduced taped conversations in which the defendant, a DOE official, admitted giving documents to a supervisor who was selling them to an oil company. The defendant's taped statements were admissible to show consciousness of guilt. But other portions of the tape appeared to show that the defendant gave the documents innocently because the official was a superior and the defendant was acting under orders, and that the defendant never received money. These omitted portions were found admissible under Rule 106, even though hearsay. But they would probably be admissible under an open door theory anyway. Similarly, in *United States v. Gravely,* 840 F.2d 1156 (4th Cir. 1988), the prosecution was allowed to admit completing portions of a grand jury transcript that would otherwise have been excluded as hearsay; but those statements would have been admitted under the open door theory–the defendant opened the door by admitting select portions that gave a misleading impression. In *United States v. Rubin,* 609 F.2d 51 (2d Cir. 1979), Rule 106 was used to admit prior consistent statements not otherwise admissible under Rule 801(d)(1)(B). But the statements were probably admissible anyway for the nonsubstantive purpose of explaining the witness' inconsistent statements that were brought out on cross-examination. Finally, in *United States v. LeFevour*, 798 F.2d 977 (7th Cir. 1986), the court declared:"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." But this is dictum because the portions proffered by the defendant were found not necessary to correct any misimpression

***Summing Up on the Case Law and the Need for Amendment***

One of the traditional reasons for a rule amendment is that the courts are split over the meaning of a Rule. The courts clearly are split over whether Rule 106 contains a trumping function. But because the costs of amendment are substantial, it can be argued that an amendment should not be proposed if the "split" has no real effect on the results of the cases. That is to say, if all or virtually all of the cases would come out the same way whether or not the Rule is amended, and if the results currently reached are fair, then there would appear to be little reason to amend the rule.

On the other hand, an amendment to Rule 106, clarifying that the rule contains a trumping function, would make the analysis in the cases "cleaner", less roundabout, and more uniform. 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.

It is for the Committee to determine whether the process-oriented gains of an explicit trumping function will justify the costs of an amendment.

## III. Other Possible Problems With the Rule That Might Be Treated If the Rule Is To Be Amended

This section considers some other problems that have arisen in the application of Rule 106. These problems were discussed in the memorandum prepared by the Reporter for the October 2002 meeting and are largely replicated here. None of the problems discussed in this section are serious enough to justify an amendment to Rule 106. However, if Rule 106 is to be amended to include a trumping function, then the problems discussed below might be treated as part of that amendment.

### A. 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 Four, at least one state uses the more specific term "utilized in evidence." In Part Five, the "utilized in evidence" language is used in the drafting model, for the Committee's consideration.

## B. 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 to include a trumping function, 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 Five of this report.

## C. 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 to include a trumping function, 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 Five.

## IV. State Law Variations

This section sets forth the State versions that include a trumping function , or that address one or more of the subsidiary problems arising in the federal rule. Where possible, the state model is set forth as a blacklined version of the Federal model.

## 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 Three.

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. However, the California version would have to be altered to refer only to writings or recordings, as the Committee has resolved not to extend the rule of completeness to oral statements.

## 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. If the Committee were to use the Iowa Rule as a model, it would have to be altered to exclude oral statements and actions from the coverage of the Rule.

## 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.

## 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.

## 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.

## 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).

Because Texas Rule 107 applies to oral statements and actions, it would have to be modified for use as a Federal model.

## IV. Drafting Alternatives

What follows is a draft model of an amendment that would accomplish four objectives:

1) Codify a trumping function;

2) Sharpen the triggering mechanism of the Rule by amending the term "introduced";

3) Clarify that the rights granted under the Rule are effectuated by motion to the court; and

4) Accomodate technological change in the presentation of "written" and "recorded" evidence.

The model also distinguishes the timing function of the rule from the trumping function. This is necessary to give the adversary flexibility to proffer completing evidence either on cross-examination or in its own case-in-chief.

No change is proposed that would expand the rule to cover oral statements or actions.

## Drafting Model

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

a. When a 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 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 evidence admissible under subdivision (a) to be admitted contemporaneously with evidence initially proffered by the proponent.. 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 several problems that arose in the application of the original rule:

1. The amendment clarifies that completing evidence is admissible even if it would otherwise be excluded as hearsay or under the best evidence 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 recognizes that a party might make unfair use of a misleading portion 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.

3. 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").

The amendment specifies that the decision whether to interrupt a proponent's presentation with completing evidence is left to the trial court's discretion. In some circumstances the disruption involved in interrupting the usual order of proof may well not be justified. 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.

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposal to amend Rule 404(a)
Date: March 1, 2003

At its October 2002 meeting the Evidence Rules Committee tentatively approved for further consideration, as part of its long-range project, an amendment to Rule 404(a) that explicitly would prohibit the circumstantial use of character evidence in civil cases. Part One of this memorandum summarizes the work of the Committee on the proposed amendment to this point. Part Two analyzes another amendment to the rule proposed since the last meeting by a member of the public.

## I. The Committee's Tentative Approval for Further Consideration

The Committee's rationale for continuing with an amendment to Rule 404(a) was twofold:

1) An amendment might be appropriate because the circuits are split over whether character evidence can be offered to prove conduct in a civil case. The question arises frequently in civil rights cases, so an amendment to the rule would have a helpful impact on a fairly large number of cases.

2) This split is best resolved by a rule prohibiting, rather than permitting, the circumstantial use of character evidence in civil cases. A rule of prohibition is consistent with the existing language of the rule, the original Advisory Committee Note, and the majority of the cases. It is also the better rule as a matter of policy. The circumstantial use of character evidence is fraught with peril in *any* case, because it could lead to a trial of personality and could cause the jury to decide the case on improper grounds. The risks of character evidence historically have been considered worth the costs where a criminal defendant seeks to show his good character or the pertinent bad character of the victim. This so-called "rule of mercy" is thought necessary to provide a counterweight to the resources of the government, and is a recognition of the possibility that the accused, whose liberty is

at stake, may have little to defend with other than his good name. None of these considerations is operative in civil litigation. In civil cases, the substantial problems raised by character evidence were considered by the Committee to outweigh the dubious benefit that character evidence might provide.

The Committee also agreed that if Rule 404(a) is to be amended, the amendment should include a reference in the text that evidence of a victim's character, otherwise admissible under the rule, nonetheless could be excluded under Rule 412 in cases involving sexual assault. Although the need for such clarification might not justify an amendment on its own, the Committee determined that clarifying language would be useful as part of a larger amendment.

What follows is a working draft of a proposed amendment to Rule 404(a). This amendment will be taken up again as part of a possible package of future amendments:

## Working Draft of Proposed Amendment to 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~~ 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. *Compare 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"), *with 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.").Those 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, evidence of the victim's sexual behavior and predisposition is governed by the more stringent provisions of Rule 412.

## II. Proposal To Amend Rule 404(a) Submitted By Member of the Public

Professor Thomas Reed proposes that Rule 404(a) be amended "to explicitly authorize admission of character evidence to prove a trait of character when it is essential to a claim or defense." (Professor Reed's letter is attached to this memo.) Professor Reed contends that most lawyers "believe that character evidence is simply inadmissible in any civil case." Of course, this is untrue, because character evidence is admissible when a person's character is an essential element of a claim or defense. The prohibition on character evidence in Rule 404(a)(1) applies by its terms only when character evidence is offered "for the purpose of proving action in conformity therewith on a particular occasion" – i.e., when character is offered to prove circumstantially to prove conduct. Professor Reed nonetheless argues that the Rule should be amended to clarify that character evidence is admissible when character is "in issue."

Professor Reed's proposed amendment would add a subparagraph (4) to Rule 404(a). If added to the amendment tentatively approved for consideration by the Committee, the proposal would read as follows:

**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 a pertinent trait of character of a witness is admissible as provided in rules 607, 608 and 609.

(4) Character of witness in civil actions. Evidence of a pertinent trait of character of any party or other important actor in a civil action where character is an essential element of a claim or defense.

***Reporter's Comment on Amendment Proposed By Member of the Public***

Rule 404(a)(1) already provides, by clear inference, what the proposed amendment would purport to make explicit. 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 403.

Federal courts have routinely found character evidence to be admissible when character is "in issue." Examples include:

1. *Schafer v. Time, Inc.,* 142 F.3d 1361 (11th Cir. 1998): The court found that in a libel action, proof of the plaintiff's character is an element of the claim and therefore character evidence is governed by Rules 401 and 403, not Rule 404(a). The court declared as follows:

> Rule 404 forbids the use of character evidence to prove "action in conformity therewith on a particular occasion," or as the Advisory Committee's notes describe it, the "circumstantial" use of character evidence. Rule 404 does not bar the admission of character evidence when character or a particular character trait is actually at issue. Rule 404 permits the character evidence in dispute here, and Rule 405 governs the acceptable methods for introducing it.

2. *Van Houten-Maynard v. ANR Pipeline Co.,* 1995 WL 311367 (N.D. Ill.): This was a personal injury case in which the plaintiff argued that the defendant entrusted a vehicle to an incompetent driver. This put the driver's "competence" in issue, so evidence of that character trait was not barred by Rule 404(a). The court declared as follows:

> As a general rule, evidence of character of a party to a civil action, or specific instances of conduct indicating that character, is inadmissible for the purpose of proving action in conformity therewith on a particular occasion. Fed.R.Evid. 404(a) and (b). In a negligent entrustment case, however, the competence and fitness of the driver are issues of fact. As a result, evidence of prior specific acts indicating incompetence or unfitness are admissible on the separate questions of the entrustee's (the driver's) fitness or competence and the entrustor's (the employer's) knowledge of that fitness or competence. *See* Original Advisory Committee Note on Rule 404; Fed.R.Evid. 405(b); *Lockett v. Bi-State Transit Authority,* 445 N.E.2d 310, 314 (Ill.1983); *See also, Crawford v. Yellow Cab Company,* 572 F.Supp. 1205, 1209-10 (N.D.Ill.1983) (the court held that evidence of a driver's prior driving record and employment history with his employer was admissible in a wrongful entrustment action).

3. *Thacher v. Brennan,* 657 F.Supp. 6 (S.D. Miss. 1986). Plaintiff brought a personal injury action against an employer for negligent hiring of an employee who injured the plaintiff in a violent

attack. The court held that evidence of the employee's violent character would have been admissible because that character trait was in issue. In the absence of such evidence, summary judgment was granted to the employer.

4. *In re Air Crash in Bali,* 684 F.2d 1301 (9th Cir. 1982) (aircraft pilot's training records were admissible under Rules 401 and 403 to show that the employer had notice of the pilot's incompetence and should not have allowed him to fly).

5. *United States v. Mendoza-Prado,* 314 F.3d 1099 (9th Cir. 2002): Evidence of the defendant's criminal disposition was properly admitted because the defendant claimed entrapment. Admissibility of character evidence in entrapment cases is governed by Rules 403 and 405 (as to form) in entrapment cases. The court declared as follows:

> Generally, evidence of character, or prior bad acts, is inadmissible when used to prove a defendant's propensity to commit the crime in question. When the defendant raises an entrapment defense, however, such evidence becomes relevant. * * * The character of the defendant is one of the elements – indeed, it is an essential element – to be considered in determining predisposition. As Federal Rule of Evidence 405(b) provides: "In cases in which character or a triat of character of a person is an essential element of a charge, claim, or defense, proof may . . . be made of specific instances of that person's conduct.

In sum, the case law appears uniform in finding that Rule 404(a) does not bar evidence of a person's character when that character is an element of the claim, charge, or defense. It therefore seems unnecessary to amend the Rule to make it more explicit. However, while such a change would not on its own justify the costs of an amendment, the Committee might consider whether it would be worth it to add explicit language governing the use of character evidence when character is "in issue" as part of the amendment to the Rule that it has already agreed to consider.

However, even assuming that the Committee might want to add explicit language on the "character in issue" question as part of a larger amendment, it should not use Professor Reed's proposal as a model. Professor Reed's proposed change is flawed on a number of grounds. A discussion of these flaws follows:

1. *The added subparagraph is misplaced.* The proposed subparagraph (4) would provide an exception to the general rule that character is not admissible for the purpose of proving action in conformity therewith. Thus, the rule does not even cover the use of character evidence when character is in issue. It therefore makes no sense to include an exception to a rule that does not cover the circumstance excepted. It would be like having an amendment which provided:

> Meetings shall be held on Thursdays, except:
> (1) No meeting shall be held on a national holiday; and
> (2) No meeting shall be held on a Wednesday.

It would seem to be very confusing to add an exception for a situation that is not even encompassed by the general rule. Readers of the rule might be led to think that the general rule doesn't mean what it says, given the fact that the rulemakers thought it necessary to exempt a situation that does not seem to be covered by the terms of the rule.

Thus, if the Committee decides to include a specific reference to "character in issue", it cannot do so by simply tacking on an exception.

2. *The suggested caption is incorrect:* Professor Reed's suggested caption is "Character of witness in civil actions." This is incorrect for at least two reasons. First, the "character in issue" rule is not limited to, and in fact does not even pertain to, the character of a witness. Evidence of a witness' character is covered by subparagraph (3) of the rule, which refers the court to Rules 607, 608 and 609. Second, the "character in issue" rule is not limited to civil cases. As seen above in *Mendoza-Prado,* character is "in issue" in criminal cases where the defendant interposes an entrapment defense. By referring only to civil cases, Professor Reed's proposal would create unnecessary confusion about the use of character evidence when character is "in issue" in criminal cases.

3. *The text of the rule is faulty:* The text of the proposed rule, like the caption, refers only to civil cases. This is problematic, as discussed above. Also, the proposal would permit evidence of a trait of character "of any party or other important actor in a civil action where character is an essential element of a claim or defense." The term "important actor" is nowhere defined, and seems likely to lead to confusion. What the rule wants to say is that character evidence is admissible whenever it is offered to prove a character trait that is an essential element of a claim, charge or defense. It need not refer to whose character it is.

***Alternative: Separate Subdivision Authorizing the Use of Character Evidence to Prove Character In Issue.***

While Professor Reed's proposal is flawed, there might be other ways to amend the rule to permit explicitly the use of character evidence when character is "in issue." The Oregon version of Rule 404(a) provides one possible model:

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; * * *

***Reporter's Comment***

The Oregon Rule gives separate treatment to character evidence offered to prove character "in issue" and character evidence offered to prove conduct. As such, it does not fall into the trap of creating an "in issue exception" to a rule that does not cover the use of character in issue. However, it would be problematic to replicate the Oregon rule in Federal Rule 404(a). The Oregon character in issue provision is its own subdivision (1), while the rule on the circumstantial use of character evidence is in a separate subdivision (2). This would require renumbering the current subdivisions in the Federal Rule, and that would lead to disruption. It would create problems for computerized searches of older cases by lawyers and judges unschooled in the rule's restructure. The restructuring of numbered paragraphs in a rule should be avoided where possible.

***Alternative: Adding Character In Issue As Permitted Use at the Beginning of the Rule***

A less radical proposal would be to add language permitting the use of character evidence to prove character "in issue" in a new opening sentence to the Rule. This would have the advantage of not changing the current numbering system in the Rule. If such a sentence were included, along with the language tentatively approved by the Committee that would prohibit the circumstantial use

of character evidence in civil cases, the Rule could look like this:

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

(a) Character evidence generally.— Evidence of a person's character or trait of character is admissible when it is an essential element of a charge, claim or defense. But ~~E~~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 a pertinent trait of character of a witness is admissible as provided in rules 607, 608 and 609.

**Possible Committee Note–With New Language Covering "Character in Issue" Underlined**

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.").Those 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, evidence of the victim's sexual behavior and predisposition is governed by the more stringent provisions of Rule 412.

Finally, the amendment explicitly provides that the traditional prohibitions on character evidence are inapplicable when character is an element of a charge, claim or defense. This was implicit in the original Rule. See Advisory Committee Note to Rule 404(a), noting that the general prohibition on character evidence does not apply where character is "an element of a crime, claim or defense." The amendment codifies Federal case law recognizing that the prohibitory language of Rule 404(a) is inapplicable when character is an element of a claim, charge or defense. *See, e.g., Schafer v. Time, Inc.*, 142 F.3d 1361 (11th Cir. 1998), where the court found that in a libel action, proof of the plaintiff's character is an element of the claim and therefore character evidence is not prohibited by Rule 404(a). *See also Crawford v. Yellow Cab Company*, 572 F.Supp. 1205, 1209-10 (N.D.Ill.1983) (holding that evidence of a driver's prior driving record and employment history with his employer was admissible in a wrongful entrustment action).

***Reporter's Comment***

It is for the Committee to determine whether it is worthwhile to amend Rule 404(a) to make explicit what was already implicit and well-understood by the courts: that the rule prohibiting character evidence applies only when character is offered to prove conduct and not when character is in issue. Certainly such a change is not justified as a freestanding amendment. But it might be considered as part of the amendment to prohibit the circumstantial use of character evidence in civil cases.

If the Committee does wish to add language concerning "character in issue", it should probably be done as an opening sentence to the Rule. The Oregon version has the virtue of separate treatment, but would impose the substantial cost of renumbering the existing Federal Rule.

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19 November 2002

Prof. Daniel Capra
Fordham University School of Law
140 W. 62nd St.
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RE: Amendment to Rule 404(a), review of

Dear Prof. Capra:

This letter is a position paper in favor of an amendment to Rule 404(a) that makes the rule consistent with Rule 405(a) and eliminates the cognitive dissonance between the two rules in civil litigation. Most lawyers believe that character evidence is simply inadmissible in any civil case. Rule 404(a) seems to foreclose admissibility of such evidence. However, a party's character can be a material issue in a civil case, much as it can be in a criminal case. Rule 405(a) specifically provides for determining the appropriate mode of proof "when character is an essential element of a claim or defense " Rule 404(a) and 405(a) have co-existed in cognitive dissonance since 1975

**PROPOSED AMENDED 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

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

(3) Character of witness. Evidence of a pertinent trait of character of a witness is admissible as provided in Rules 607, 608 and 609.

(4) Character of witness in civil actions. Evidence of a pertinent trait of character of any party or other important actor in a civil action where character is an essential element of a claim or defense.

## 1. Character Evidence

Although Rule 404 does not specifically provide for admission of character evidence in a civil action, Rule 405 opens the door to admissibility of character evidence in civil cases where character is at issue. The dissonance between the two rules has been a source of concern to the circuits. Some courts, notably the 5th Circuit, have manufactured a rule permitting proof of an actor's character for a certain trait when the facts of civil litigation are like that of a criminal prosecution. *See, e.g., Crumpton v. Confederation Life Ins. Co.*, 672 F.2d 1248 (5th Cir. 1982). This helped the circuit explain why it did not follow *Reyes v. Missouri Pacific Ry.*, 589 F.2d 791 (5th Cir. 1979) in *Crumpton,* decided 3 years later, and why *Bolton v.Tesoro Petroleum Co.*, 871 F.2d 1267 (5th Cir. 1989) (character evidence admissible in civil RICO case) followed *Crumpton* rather than *Reyes*. The 4th Circuit adopted *Crumpton* in a non-precedential opinion, *Campbell v. Southeast Emergency Physicians Group, P.C.* No. 94-1273 , 1995 U.S. App. LEXIS 6491 *16 (4th Cir. 31 Mar. 1995) and the 9th Circuit found its own way to admit character evidence in a civil rights case, *Heath v. Cast,* 813 F.2d 254 (9th Cir. 1987 ).

Other circuits, notably the 2nd , 6th and 7th Circuits have decisions that read Rule 404(a) in a highly positivist way, finding no express authorization of admissibility for character evidence in civil cases whatsoever. *See, e.g. Dupard v. Kringle*, CA No. 92-35195, 1196 U.S. App. LEXIS 3365 (9th Cir. 12 Sep. 1995) (character of marshal charged with police brutality not admissible in evidence); *Continental Cas. Co. v. Howard,* 775 F.2d 876, 878 n.1 (7th Cir. 1985), cert denied, 475 U.S. 1122 (1986) (evidence of defendant's bad character inadmissible in suit in which defendant alleged plaintiff insured was an arsonist); *Securities & Exchange Comm'n v. Towers Financial Corp.*, 966 F. Supp. 203, 204-06 (S.D.N.Y. 1997); *Securities Exchange Comm'n v. Morelli*, 1993 WL 603275 (S.D.N.Y. Dec. 21, 1993); *Ginter v. Northwestern Mut. Life Ins. Co.*, 576 F. Supp. 627 (E.D. Ky. 1984); *Fryou v. Gaspard*, 1991 U S. Dist LEXIS 5571 (E.D. La. 25 Apr. 1991) (dicta: "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 ") Apparently the attention of these courts was not called to Rule 405(a)'s authorization of character evidence in civil actions where character is an essential element of a claim or defense

## 2. Common Law Support for Admission of Character Evidence in Certain Civil Actions

Since Rules 404 and 405 were adopted against a 150 year common law history that permitted admission of character evidence in civil cases, a quick examination of the evidence. Given the split of authority within the 5th Circuit and among other circuits on admissibility of character evidence when character is at issue, one needs to have a grasp of the common law background for admissibility The courts have traditionally admitted reputational character evidence in the following civil actions:

(1) Slander & libel actions in which the plaintiff's reputation for having committed acts like those in the allegedly defamatory statement diminishes damages, or alternatively justify the defendant's

publication as fair and accurate reporting, *McDonald v. Louthen*, 136 Ark. 368, 206 S W 674 (1918) (slander); *Getchell v. Auto Bar Systems Northwest, Inc.*, 73 Wash.2d 831, 440 P.2d 843 (1968) (libel);

(2) Alienation of affection and seduction actions in which the victim's reputation for chastity affects the plaintiff's right to recover damages for injury to reputation, *White v. Murtland*, 71 Ill. 250 (1874); *Browning v. Browning*, 226 Mo.App. 322, 41 S.W.2d 860 (1931);

(3) Wills contests and actions to set aside deeds, contracts or trust instruments on grounds of lack of capacity or undue influence. In the former case, the testator's character is at issue regarding mental state, in the latter, the testator and the alleged undue influencer's character is at issue. *Mays v. Mays*, 153 Ga. 835, 113 S.E. 154 (1922) (character of defendant relevant to action to cancel deeds on grounds of forgery); *In re Estate of Lunder*, 74 Idaho 448, 263 P 2d 1002 (1953) (will contest: undue influence); *In re Estate of Soderland*, 239 Iowa 569, 30 N W.2d 121 (1947)(will contest: undue influence);

(4) Divorce proceedings based on cruelty in which the defendant's predisposition towards cruel and abusive treatment is at issue; *Reynolds v. Reynolds*, 217 Ga. 234, 123 S.E.2d 115 (1961); *Campbell v. Campbell*, 129 Pa.Super. 106, 194 A. 760 (1937);

(5) Divorce, custody, support and termination of parental rights proceedings in which the fitness of one parent for custody is an issue; *Reynolds v. Reynolds*, 149 Cal.App.2d 409, 308 P.2d 921 (1957); *S. v. G.*, 298 S.W.2d 67 (Mo.App. 1957); *Burnham v. Burnham*, 208 Neb. 498. 304 N.W.2d 58 (1981) (moral character at issue in custody);

(6) False imprisonment and malicious prosecution actions in which the defendant may show probable cause based on plaintiff's prior behavior, *Fergson v. Simmons*, 226 Mo.App 178, 43 S.W.2d 875 (1931) (probable cause to search); *Doyle v. Douglas*, 390 P.2d 871 (Okla. 1974) (prior thefts gave probable cause to stop shop lifter);

(7) Assault & battery cases in which the defendant may claim self-defense or provocation; *Bell v. City of Philadelphia*, 341 Pa.Super. 534, 491 A.2d 1386 (1985); *Peoples Loan & Inv. Co. v. Travelers Ins.Co.*, 151 F.2d 437 (8th Cir. 1945);

(8) Actions to remove public officials from office on grounds of malfeasance, in which the defendant's bad moral character is at issue; *Fannin v. Commonwealth*, 331 S.W.2d 726 (Ky. 1960); and

(9) Administrative proceedings to deny or cancel a license to conduct a business on the grounds of bad moral character; *McLaughlin v. Bd. of Medical Examiners*, 35 Cal.App.3d 1010, 111 Cal.Rptr. 353 (1973); *Morra v. State Bd. of Psychologists*, 212 Kan. 103, 510 P.2d 614 (1983).

**3. Uncharged Misconduct Evidence is Admissible in Civil Cases**

Meanwhile, a substantial number of cases have countenanced proof of uncharged misconduct in civil actions, applying Rule 404(b)'s pull-down menu of pigeonholes to civil cases and permitting uncharged misconduct evidence with an innuendo of bad character to be admitted. In a consumer fraud and civil RICO action, the 9th Circuit recognized that similar acts of fraud could be offered to prove intent, but held the court below did not commit reversible error by excluding the other fraudulent acts evidence on Rule 403 grounds. *Poling v. Morgan*, 829 F.2d 882 (9th Cir 1987)

The 9th Circuit has permitted proof of uncharged misconduct evidence in an action brought under 42 U.S.C. § 1983 to show the plaintiff's bias against the police in a police brutality case. *See, e.g., Schiszler v. Ishii*, No. 96-15425, 1997 U.S. App. LEXIS 18926 (9th Cir. 18 Jul. 1997); *Rodrigues v. City and County of Honolulu*, No. 95-16294, 1997 U.S. App. LEXIS 12504 (9th Cir 5 May 1997); *Heath v. Cast*, 813 F.2d 254 (9th Cir. 1987). *See also Brandon v. Village of Maywood*, 179 F. Supp. 2d 847 (N.D Ill 2001) in which the court acknowledged that specific instances of misconduct of the plaintiffs in a civil rights case that resulted in prior arrests was relevant to show bias, although rejecting the evidence on Rule 403 issues

Other courts have rigidly excluded uncharged misconduct evidence in Civil Rights cases, offered to prove intent, motive or other intermediate issues. *See, e.g., Hynes v. Coughlin*, 79 F.3d 285 (2nd Cir. 1996); *Simplex, Inc. v. Diversified Energy Systems, Inc.*, 847 F.2d 1290 (7th Cir. 1988); *Outley v. City of New York*, 837 F.2d 587 (2d Cir. 1988) (civil rights case. plaintiff's litigiousness).

**4. Why Rule 405 Implicitly Authorizes Admission of Character Evidence in Civil Cases--a Lesson on the Law of Unintended Consequences.**

Rule 405 was adopted to control the manner in which character evidence may be proved, if otherwise authorized by Rule 404. Rule 405(a) is an innocuous provision allowing character to be proved by reputation or opinion witnesses "in all cases in which evidence of character or a trait of character is admissible. . ." Rule 405(b) adds "In cases in which character or a trait of character of a person is an *essential element of a charge, claim or defense*, proof may also be made of specific instances of that person's conduct." In a number civil actions, the elements of the claim or defense include proof of a character trait. Without belaboring the point, a civil RICO action (18 U.S.C §§ 1961-62, 1964 (2001) requires proof of a"pattern of racketeering activities" as defined by the RICO statute. The 5th Circuit has recognized that the statute permits proof of character of the persons engaged in the "pattern of racketeering activities." *Bolton v. Tesoro Petroleum Co.*, (871 F.2d 1267 5th Cir. 1989). The 1st Circuit has recognized that Rule 405(b) creates a narrow exception for admission of character evidence when deemed essential to a claim or defense, but refused to admit evidence of a incarcerated person's prior acts of aggression toward prison guards to prove that the plaintiff was the first aggressor in a 1983 action. *Lataille v. Ponte*, 754 F.2d 33, 35-36 (1st Cir. 1985)

### 5. Character Evidence in Civil Cases Involving Sexual Misconduct

Although the Committee could decide that there need be no harmony between Rule 404(a) and Rule 415, Congress chose to adopt Rule 415 to provide for admission of evidence showing a sex offender's predisposition to commit sexual misconduct in a civil action founded on some form of sexual misconduct. We may believe Congress did the wrong thing ten years ago: the fact remains that Rule 415 is one of the three icebergs in the way of a categorical rule explicitly excluding all character evidence in a civil action. My suggested change has the advantage of bringing Rule 404(a) into harmony with Rule 415. If a plaintiff is suing a defendant on the grounds that the defendant has engaged in sexual harassment of the plaintiff in the workplace, including prohibited touching, then the defendant's predisposition to commit such acts becomes an essential element in the case. *See, e.g., James v. Tilghman*, 194 F.R.D. 398; (D. Conn. 1999); *Shea v. Galaxie Lumber & Constr. Co.*, No. 94 C 906, 1996 U.S. Dist. LEXIS 2904 (N.D. Ill. 12 Mar. 1996).

## CONCLUSION: RULE 404(a) NEEDS AN OVERHAUL

The state of confusion set forth in Parts (2) and (4) demonstrates that Rules 404 and 405 have not been harmoniously construed by the courts of the United States. Part (3) shows that state courts regularly admit character evidence in civil actions whenever a trait of character is an essential element of a claim or defense. The state judicial systems could hardly function in domestic relations cases if not permitted to hear character evidence relating to fault-based divorce and custody issues. Claims of self-defense in intentional tort cases could not be tried without taking evidence on the predisposition towards violence of the victim. Some U.S. Acts of Congress such as civil RICO actually require proof of a character trait for racketeering activity.

All the commentators admit that rule 404(b) applies in some fashion in civil actions although the case law shows confusion among U.S. Courts on how to apply the rule in Civil Rights Act cases. The best result for the U.S. judicial system is to amend Rule 404(a) to explicitly authorize admission of character evidence to prove a trait of character when it is essential to a claim or defense.

Sincerely,

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Possible Amendment to Rule 408
Date: April 1, 2003

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. At its Fall 2002 meeting the Committee reviewed the Rule and agreed to continue its consideration of a possible amendment.

The possible need for amendment arises from three problems that have been raised in the application of the Rule. Those problems are: 1) whether compromise evidence is admissible in a subsequent criminal case; 2) whether statements made in settlement negotiations are admissible 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.

This report is divided into two parts. Part One describes the Committee's consideration of a possible amendment up to this point. Part Two sets forth two models for an amendment. If the Committee decides that one of the models is acceptable, then this model can be kept for consideration as part of a possible package of amendments at the Spring 2004 meeting.

## I. Rule 408 and the Committee's Determinations Up To This Point

### *The Rule*

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.

***Committee Consideration and Resolution at the Fall 2002 Meeting***

The Reporter's memorandum prepared for the Fall 2002 meeting noted that the courts are divided on three important questions concerning the scope of the rule:

1) Some courts hold that evidence of compromise is admissible against the settling party in subsequent criminal litigation, relying on a policy argument that the interest in admitting relevant evidence in a criminal case outweighs the interest in encouraging

settlement. Other courts hold that compromise evidence is excluded in subsequent criminal litigation, noting that there is nothing in the language of Rule 408 that would permit the use of evidence of civil compromise to prove criminal liability.

2) Some courts hold that statements made in settlement negotiations can be admitted to impeach by way of contradiction or prior inconsistent statement. Other courts disagree, noting that the only use for impeachment specified in the Rule is impeachment for bias, and noting further that if statements in compromise could be admitted for contradiction or prior inconsistent statement, this would chill settlement negotiations, contrary to the policy behind the rule.

3) Some courts hold that offers in compromise can be admitted in favor of the party who made the offer; these courts reason that the policy of the rule, to encourage settlements, is not at stake where the party who makes the statement or offer is the one who wants to admit it at trial. Other courts hold that settlement statements and offers are never admissible to prove the validity or the amount of the claim, regardless of who offers the evidence. These courts reason that the text of the rule does not provide an exception based on identity of the proffering party, and that admitting compromise evidence would raise the risk that lawyers would have to testify about the settlement negotiations, thus risking disqualification.

**The Reporter 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 Reporter prepared models for a possible amendment that take a different approach from the existing Rule. The models provide a presumption of exclusion of statements and offers in settlement negotiations, with specific and limited exceptions.**

The Committee began its discussion on whether Rule 408 should be amended to specify that compromise evidence is either admissible or inadmissible in criminal cases. The Justice Department representative noted that the Department had not yet come to a conclusion on whether, as a matter of policy, such evidence should be admissible in criminal cases. On the one hand, if compromise evidence is excluded from criminal cases, a party will be more likely to settle with the government in related civil matters; and victims will be more likely to receive compensation from wrongdoers in a timely fashion. On the other hand, if compromise evidence is admitted in criminal cases, it might make it more likely that a meritorious criminal prosecution will be successful. The Justice Department representative asked that ultimate consideration of a proposed amendment to Rule 408 be deferred until the Department can formulate a position on the matter. The Reporter responded that any consideration of an amendment to Rule 408 was tentative at this stage—the only question for the Committee at this point was whether the Rule should be considered a candidate for

an amendment as part of long-range planning. [A few months after the Fall meeting, the Justice Department representative notified the Reporter that the Department would have a position on the admissibility of settlement evidence in criminal cases by the time of the Spring 2003 meeting.]

Other Committee members stated that policy arguments weigh strongly in favor of excluding evidence of a civil compromise in a later criminal case. If such evidence is admissible in a criminal case, it significantly diminishes the incentive to settle civil litigation. Moreover, excluding compromise evidence in criminal cases would not result in the loss of evidence in those cases—without a rule protecting compromise evidence, there is likely to be no settlement that could ever be admitted in a criminal case. In other words, the only evidence "lost" is that generated by the rule protecting compromise evidence.

Committee members argued that it is necessary to amend Rule 408 to provide specifically that evidence of a civil compromise is inadmissible in subsequent criminal litigation. Under the case law interpreting the current Rule, such evidence is admissible in some circuits and not in others. This is a poor state of affairs, because there may be no way, at the time of a civil settlement, to predict where a criminal litigation might be brought; moreover it is unfair to have such powerful evidence admissible against some defendants and not others. Finally, the possibility that a civil settlement will be admissible in a criminal case presents a trap for the unwary. Rule 408, by its terms, does not specify that civil settlements are admissible in criminal litigation, so a lawyer and client may enter into civil settlement negotiations under the mistaken impression that such negotiations and settlement never could be used against the client.

The Committee then discussed whether the rule should permit impeachment by way of prior inconsistent statement and contradiction. Committee members agreed that the Rule should not permit such broad impeachment, because to do so would unduly inhibit settlement. Parties justifiably would be concerned that something said in settlement negotiations later could be found inconsistent with some statement or position taken at trial; it is virtually impossible to be absolutely consistent throughout the settlement process and trial. The Committee resolved that if Rule 408 is to be amended, it should include a provision specifically stating that compromise evidence cannot be offered to impeach by way of prior inconsistent statement or contradiction. The Reporter noted that such a provision exists in several states.

The Committee then turned to whether compromise evidence should be admissible in favor of the party who made the statement or offer of settlement. The Committee determined that such evidence should not be admissible. If a party were to reveal its own statement or offer, this would itself reveal the fact that the adversary entered into settlement negotiations; such evidence is entitled to protection on its own. Thus, it would not be fair to hold that the protections of Rule 408 can be waived unilaterally, because the Rule, by definition, protects both parties from having the fact of negotiation disclosed to the jury. Moreover, a party that admits its own offer or statement in compromise would open the door to evidence of counter-offers, responses to offers and counter-offers, and the like—all with the possibility that lawyers will have to be disqualified because of the need to testify about the tenor and import of the settlement negotiations. The Committee concluded that

allowing a party to admit its own settlement statements and offers would open up a "can of worms" and could not be justified by any corresponding benefit. The Committee resolved that any amendment to Rule 408 that might be proposed as part of long-range planning should include a provision specifically stating that compromise evidence is excluded even if proffered by the party that made the statement or offer in compromise. Such a provision is necessary, because the circuits are divided on the point, and differing results on the question are not justifiable.

Finally, the Committee reviewed the case law holding that Rule 408 protects against admission of statements made by the government during plea negotiations in a *criminal* case. Rule 410 applies to guilty plea negotiations, but it does not by its terms protect statements and offers made by the government: It provides that statements and offers in plea negotiations are not admissible "against the defendant." The inapplicability of Rule 410 to government statements and offers in plea negotiations has led some courts to hold that such evidence is excluded under Rule 408. The Committee noted, however, that Rule 408, by its terms, does not apply to negotiations in criminal cases—Rule 408 refers to efforts to compromise a "claim," as distinct from criminal charges.

As a policy matter, the Committee determined that government statements and offers in plea negotiations should be excluded from a criminal trial, in the same way that a defendant's statements are excluded. A mutual rule of exclusion would encourage a free flow of discussion that is necessary to efficient guilty plea negotiations; there is no good reason to protect only the statements of a defendant in a guilty plea negotiation. The Committee also determined, however, that if an amendment is required to protect government statements and offers in guilty plea negotiations, that amendment should be placed in Rule 410, not Rule 408. Rule 408 by its terms only covers statements and offers of compromise made in the course of attempting to settle a *civil* claim. Rule 410, which governs efforts to settle criminal charges, is the appropriate place for any amendment that would exclude statements and offers in guilty plea negotiations.

**At the end of its discussion, the Committee directed the Reporter to prepare the following for the Committee's consideration at the next meeting:**

**1) a draft of an amendment to Rule 408 that would provide that compromise evidence is inadmissible in a criminal case;**

**2) a draft of an amendment that would provide, in contrast, that such evidence is admissible in a criminal case;**

**3) provisions in both model drafts of Rule 408 that would provide that compromise evidence may not be used for impeachment by prior inconsistent statement or contradiction;**

**4) provisions in both model drafts that would provide that compromise evidence is not admissible, even if proffered by the party who made the statement or offer in compromise; and**

**5) a draft of an amendment to Rule 410 that would exclude statements and offers made by the government during guilty plea negotiations.**

The next section of this memorandum sets forth the two model drafts and accompanying Committee Notes for a possible amendment to Rule 408, as requested by the Committee. The draft of a possible amendment to Rule 410 is included in the agenda book in a separate memo.

## II. Models for Consideration of a Possible Amendment to Rule 408

The two models below follow the same structure. Each sets forth a basic rule excluding compromise evidence, with delineated exceptions. This structure is different from the current Rule, which is essentially a rule of exclusion only if the compromise evidence is offered for a certain, vaguely drafted purpose.

The two models differ from each other in only one respect. Model One provides that compromise evidence is inadmissible in subsequent criminal litigation. Model Two provides that compromise evidence is admissible in subsequent criminal litigation.

## Model One: Exclusion in Criminal Litigation, Exclusion as Impeachment for Inconsistent Statement or Contradiction, and Exclusion Even if Offered by the Party Who Sought Settlement.

**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~~;~~ ; 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 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

that evidence of compromise of civil claims is presumptively excluded in all cases, civil and criminal, subject to carefully drawn exceptions.

Under the amendment, 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 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 the corresponding Criminal Rule "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, because 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. This Rule prohibits the use of statements made in settlement negotiations to impeach by prior inconsistent statement or through contradiction. 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).

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. If a party were to reveal its own statement or offer, this would itself reveal the fact that the adversary entered into settlement negotiations. Thus, it would not be fair to hold that the protections of Rule 408 can be waived unilaterally, because the Rule, by definition, protects both parties from having the fact of negotiation disclosed to the jury. 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").

## Model Two: Admissibility in Criminal Litigation, Exclusion as Impeachment for Inconsistent Statement or Contradiction, and Exclusion Even if Offered by the Party Who Sought Settlement.

**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 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; ; 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 criminal 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"). It follows that statements and offers made during negotiations to settle a criminal case are not protected by 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, because 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. This Rule prohibits the use of statements made in settlement negotiations to impeach by prior inconsistent statement or through contradiction. 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).

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. If a party were to reveal its own statement or offer, this would itself reveal the fact that the adversary entered into settlement negotiations. Thus, it would not be fair to hold that the protections of Rule 408 can be waived unilaterally, because the Rule, by definition, protects both parties from having the fact of negotiation disclosed to the jury. 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").

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News

DOMESTIC RELATIONS LAW

# Terms of Separation Pact: 'Boden,' 'Gravlin' and Parallel Issues

Leonard G. **Florescue**

Most attorneys are familiar with the Court of Appeals' two seminal decisions in Matter of Boden v. Boden, 42 NY2d 210 (1977) and Matter of Brescia v. Fitts, 56 NY2d 132 (1982).

In this column, I wish to explore not only the Court of Appeals' further explication of those rules in Matter of Gravlin v. Ruppert, 98 NY2d 1 (2002) and the potentially very significant decision of the Court of Appeals in Tompkins County Support Collection Unit v. Chamberlin, 2003 WL 297558 (Ct. of Appeals; Feb. 13, 2003), but also a parallel area of interest with respect to amelioration of stipulations of settlement.

## In 'Boden'

The terms of a separation agreement incorporated into a judgment of divorce but not merged therein, of course, remain fully binding on the parties. In Boden, the parties had provided for a life insurance endowment policy with a 15-year maturity that was intended to pay for their daughter's college education. The sum involved was probably not unreasonable when the agreement was signed, but, by the time the child got to college, as too many of us know from personal experience, it was far from adequate. In the interim, both parents had done reasonably well and the custodial mother was able to pay for college on her own. The father, however, had ample funds to make a greater contribution. The Court of Appeals held that where the parties had provided for child support that they assume to be adequate for the children's reasonably foreseeable needs, that the parents would be left where they were. "Absent a showing of unanticipated and unreasonable change in circumstances, the support provisions of the agreement should not be disturbed." (42 NY2d at 213) In other words, where the custodial parent could have seen the need for more money in the future and the choice was solely that of rearranging the obligations of the two parents to be more "equitable," the courts would not intervene to remake the bargain. Boden (during its five-year solo run) came to be interpreted as drastically limiting the ability to obtain upward modifications of child support. Such things as increased expenses of growing children and inflation were found to be fully capable of being anticipated. As almost anything can be anticipated (particularly once it has happened), custodial parents rarely succeeded in obtaining upward modifications of child support. In Brescia, the Court declared that the child's needs had to take precedence over the agreement and that when it appeared the best interests of the child were not being met by the agreed-upon support, the courts could intervene.

In Gravlin, the parties entered into a settlement that departed from the Child Support Standards Act (CSSA) guidelines. One prime consideration in that departure was the fact that the agreement provided that the child would spend about 35 percent of her time with her father and that he would be paying all of her expenses during

that time. Moreover, he would pay for all the child's clothing and would fund a college trust. Some three years later, the agreement broke down because the anticipated visitation between the child and her father essentially came to an end, and, perforce, the intended indirect support assistance (during the 35 percent of the time) came to an end as well. The Appellate Division found that while the mother had demonstrated some increase in child-related expenses, she had not demonstrated her inability to meet them on her own without additional moneys from the father, and, therefore, that Brescia had not been triggered.

The Court of Appeals did not directly address the Boden doctrine, specifically noting that it was not required to engage in a "needs of the child" analysis under Brescia. It instead concluded that the complete breakdown of the anticipated visitation arrangement had effectively extinguished the father's child support obligation and made performance of the original agreement impossible. That per se constituted an "unanticipated change in circumstances that created the need for modification of the child support obligations." (98 NY2d at 6) It held that the expectation that the child would live with her father "were part of the basis for the parties' agreement to deviate from the CSSA. The unanticipated change in [the father's] relationship with his daughter created a need for modification of the support terms ... as those terms became unworkable." (emphasis supplied). Under those circumstances, a de novo application of the CSSA standards was found to be warranted. (Id. at 6, 7)

The facts underlying Gravlin may become relatively common because more and more the actual parenting time ratios are becoming far closer to even than historically was the case. In those situations, a child support agreement like Gravlin's may become quite common for obvious reasons. Based on the well-known fact that 15-year-olds generally don't want to live with either of their parents, these facts will repeat too and this case will become more important.

## Using 'Gravlin'

Gravlin's ambit has already been construed in some parallel situations. In Levinson v. Levinson, 298 AD2d 673 (3rd Dept. 2002), the parties' agreement had a built-in mechanism for seeking child support modifications which entailed the parties exchanging tax returns by May 1 of each year and to give notice by June 1 if a modification was sought. In that case, the ex-wife sought a modification but she had failed to provide the return by May 1 as she had mailed them on May 3. The hearing examiner determined that she was too late and dismissed the petition and was upheld by the family court. The Third Department affirmed. Citing Gravlin, it found that the agreement had to be followed and refused to ignore the minimal lateness of her tender of her return.

In Messen v. Messen, 2003 NY Slip Opinion 10740 (3rd Dept. Feb. 6, 2003), the parties' agreement provided that whenever the husband's taxable income exceeded $100,000 he would make an additional payment to the wife for child support of 10 percent of his W-2 income as reported on line 7 of his 1040 for the previous year. Eventually, the husband shifted some of his business activity to another entity, also owned by him, the income of which was reported on line 17 and not line 7. The hearing examiner and family court found that no provision of the agreement prevented the husband from making the business decisions which lowered his line 7 income and denied the wife's claims. The wife contended in the Appellate Division that the husband circumvented the agreement's provisions. It is not clear but likely that she claimed under Gravlin that the "essence" of the agreement's child-support provisions had failed. If she did, it was of no avail to her. The court affirmed, holding that (with no Brescia) implications present, there was no reason not to enforce the agreement's terms as they were written and that she could have anticipated that there might be income on other lines of the 1040 form -- something obvious at a glance.

'Organic Wholes'

Gravlin, while straightforward, does have some unanticipated practical concerns of its own floating in the background I believe. Agreements are organic wholes and other aspects of agreements that do not relate directly to child support can change as well. What if the child support provisions were negotiated with those other provisions in mind? Should the case's logic apply to the father who agreed to pay $5,000 per month in child support (which we can assume for the moment was more than the child's real needs) when he was making $250,000, and who seeks a modification downward when his income drops to $180,000? What if he had made other concessions to the mother, which are also undone or made less practicable because of circumstances? See Brockunier v. Brockunier, 2002 WL 31817940, 2002 NY Slip Opinion 50479 (U), Family Court, Orange County, Dec. 3, 2002. There two teenage daughters left the father's house and went to the mother's. Gravlin was applied to provide for an increase but the court expressly took into account the father's other obligations under the agreement and to his new family in determining the application of the CSSA percentages over $80,000 in combined parental income.

With that long exposition, I turn now to Justice Spolzino's recent decision in Skeet v. Waters, NYLJ, Feb. 7, 2003, p. 22, col. 4, (Sup. Ct. Westchester Co.) In that case, the wife sought relief from a two- and-one-half-year-old stipulation (entered into at an initial conference) that provided for a valuation of the marital residence which was alleged to be 45 percent below that prevailing at the time of trial. The wife argued that she could not have been expected to have anticipated the trial would be delayed so long and that the real estate market would so drastically rise. (Sounds like Boden, doesn't it?) Because it was not unreasonable for her to assume that the trial would occur soon and because a court can relieve a party from the stipulation where the interests of justice so dictate, the court determined to allow relief from the stipulation. [In Smerling v. Smerling, 177 AD2d 429 (1st Dept. 1991), the husband owned a movie theater chain which, as an active asset, would normally have been valued at commencement. However, during the pendency of that case, the chain was sold. The trial court applied the actual sales price when it determined the equitable distribution, holding that the expert valuation of what the value would have been at commencement was speculative and had to bow to the reality of the sale. The Appellate Division affirmed.]

Both Skeet and Smerling involved pre-trial changes in valuation. However, the logic of Skeet, in particular is not all that dissimilar from the rationale of Gravlin. I have long thought that in the right circumstances equitable distribution and distributive awards (even post-judgment) might properly be modified when some major aspect of the parties' agreement failed completely.

The Latest: 'Tompkins'

The Court of Appeals' very recent decision in Tompkins County, while arising in the context of an application under Family Court Act 413-a for a Cost of Living Increase in a child support award, held that when a COLA application is made and an objection ensues that "prompts a hearing, which results either in a new order of support or an order of no adjustment" (Opinion, p. 3), under the governing statute the court may issue an adjusted order without proof of change of circumstances. This could, conceivably, result in a complete, albeit unintended and indirect, reversal of the Boden, Brescia, line of cases. The Court of Appeals was not oblivious to this significant concern. It wrote, in language that I consider intentionally hortatory to both Bench and Bar to be careful not to go down that road while providing a road map for avoiding that road:

We recognize that the parties to support agreements that consciously deviate from the CSSA guidelines are concerned that the statutory review and adjustment procedures not eviscerate the purpose of those agreements, including the desire for

certainty over time. While the review and adjustment procedures apply equally to orders based on an agreement and those based solely on the child support standards, parties to an agreement that deviated from the guidelines may demonstrate why, in light of the agreement, it would be unjust or inappropriate to apply the guideline amounts *** Parties are encouraged to advance such arguments to the court during the objection process. (emphasis supplied) Verbum sat sapienti.

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News

DOMESTIC RELATIONS LAW

# 'McSparron': 'Angels on Head of Pin' Distinctions on Income Sources

Leonard G. **Florescue**

JUSTICE JUDITH J. Gische of State Supreme Court in Manhattan's lucid decision in Grunfeld v. Grunfeld, The New York Law Journal, Oct. 17, 2002 (p. 21, col. 4, NYCo.) beckons me to once again discuss in detail the essential and, to me, irremediable problem with the Court of Appeals' decision in McSparron v. McSparron, (87 NY2d 275 (1995)), which, in my respectful opinion, forces our courts to make "angels on the head of a pin "distinctions between sources of income.

Real money (bank accounts and stock) is completely fungible within itself, but calculated money (e.g., enhanced earning capacity and licenses) is not fungible with the real stuff and comparing and trading them off against one another inevitably leads to confusion and error. Moreover, we equitably distribute other assets (i.e., the tangible ones) without a thought as to their future earning capacity; we just deal with present value and don't worry about how those sums might be invested (except, to a degree, in fixing maintenance). Why should we make this distinction for intangible ones? But enough of that except to state: McSparron delenda est.

## Discerning Portions

Justice Gische was faced, on remand from the Court of Appeals, with attempting to discern which portion of the maintenance that Mr. Grunfeld was to pay was derived from his "uncapitalized "income (McSparron's word) and the portion derived from his capitalized assets (i.e., his practice and license). If the latter, it was clearly double counting for the court to consider that income as being available to pay for maintenance and if the former, it was not. The late Justice Friedman (who had originally tried the case) had held that, because the value of the maintenance award exceeded 50 percent of the value of the law license, there was no residuum of the license available for equitable distribution. The Appellate Division reversed that portion of the decision and awarded Mrs. Grunfeld one-half of the value of the license. The Court of Appeals, while affirming that holding (as to whatever was left of the license after accounting for the maintenance), remanded the case to make a determination if there was any such residual value. That is to say, the Court reasoned that, if all of the maintenance could be paid from "uncapitalized sources, "there was no double counting. Crucially, for what was to follow, the Court indicated that a proportional analysis was to be applied. It was in this posture that the matter came before Justice Gische.

Justice Gische used Justice Friedman's determination that the total value of the law license was $1,547,000. The Court also utilized the values as of the 1996 trial date and did not attempt to bring them up to date. There were $2,230,000 in assets available to generate "unearned income "and, thus, Mr. Grunfeld's share, available for the prospect, was $1,165,000.

Mrs. Grunfeld's expert witness argued for a projected rate of return of 11.8 percent until Dec. 31, 2001 and 12.14 percent (rounding) thereafter. The Court rejected this approach completely. Initially, it was based upon post-1996 events (which had been ruled out of bounds) and that the rates were far too high as they assumed a rate of return only available on risky investments. [See discussion of Miklos below.] Despite the wife's claims that the parties had always made risky investments, the Court noted that the tax returns did not bear that out. [Even if they had, I would still think that courts should use conservative and completely safe rates in these calculations for at least two reasons. First, we are de facto binding the payor spouse to the ability to reap those returns for substantial periods of time (and here the maintenance was permanent). If we do not make our investment advisers the guarantors of our investments, we certainly should not make our spouses. Second, except among the super-wealthy, after equitable distribution, neither party will have (at least for a substantial time) the same amount of capital available to invest. I think it is a fairly solid assumption that people will undertake riskier investments when they have lots of "fall back "money than they will when they do not.]

Exploring the Issues

Although the Court's rejection of one important portion of Mr. Grunfeld's expert's views was precisely in line with the limited remand from the Court of Appeals and, therefore, correct, I would nonetheless like to explore that issue a bit further. [The Court also noted that the rate was just an assumed one since, given the expert's analysis, it would not matter what the actual rate was.] Mr. Grunfeld's expert asserted that the rate of return was a "wash "as Mrs. Grunfeld was going to make the same return on her own half of these "uncapitalized "assets. Thus, he concluded that what Mr. Grunfeld earned on those assets should not be considered. (That is to say, his view was that as long as we are indulging in one fictional calculation, we should indulge in two.) Putting the specifics of the Court of Appeal's remand aside, is this position cogent? In this context, I do not think so. The argument depends, it seems to me, upon the unspoken assumption that Mrs. Grunfeld, with more money, would need less support. However, the level of maintenance had already been set and affirmed. The place, if ever, to make that argument was at the earlier level. In that context, I think the argument has much force, and both by statute and case law our courts regularly apply it. However, where the only issue is a McSparron analysis with respect to the husband's law license, the argument would not seem to belong.

Justice Gische then turned her own analytic powers to determining the proper rate of unearned income to be inserted into the calculation. After analyzing a number of cases she concluded that, at most, the rate was nine percent.

Next, the court applied the proportional analysis mandated by the Court of Appeals. The Court of Appeals had directed the court to consider the "proportionate share "of maintenance attributable to Mr. Grunfeld's unearned income. It is logically possible to use the accounting concepts of LIFO and FIFO in this context, but Justice Gische felt that to do so would be outside the bounds of fairness and that a strict proportionality would be the best way to proceed. Accordingly, she concluded that, even at the maximum nine percent rate, Mr. Grunfeld's unearned income could not exceed 26 percent of his total income and, therefore, 26 percent of the income available for paying maintenance. On that analysis, as the amount of the "earned "income (i.e., the income that was capitalized) to be applied to maintenance exceeds the value of one-half of the law license, there is no remaining, residual value of the license to distribute to Mrs. Grunfeld.

The court also noted that, since the value of half of the law license and the calculated amount used for maintenance were quite close, there was no basis for reducing the maintenance by claiming that it was a double dip into the same stream. Here I must depart from the court's analysis somewhat. In using a nine percent

assumed rate (as the maximum possible rate), the court demonstrated that the maintenance stream coming out of the license had to exceed the value of one-half of the license. Accordingly, there could not possibly be any residuum to distribute. However, even a nine percent rate of return is pretty high. If a lower rate is used, the difference would likely become large enough to warrant a reasonable argument that the maintenance award was, indeed, a double dip.

Proportionate Analysis

This proportionate analysis applied by the court could providently, properly and logically be utilized in another area, i.e., the discerning of the amounts of separate property and marital property in commingled accounts. There are some cases (such as Sarafian 528 NYS2d 192 (3rd Dept. 1980) and Heine 580 NYS2d 231 (1st Dept. 1992)) that find that commingled property is separate based upon what I call the "sore thumb "theory - i.e., there cannot be any other possible source. (In Heine, the house was bought too soon after the marriage to have acquired enough marital property.) Why wouldn't this apply as well to more complex commingling questions? For example, wife earns (after taxes) $6 million in the marriage and inherits $3 million. She commingles the funds completely in a joint account. Why wouldn't it be reasonable, and fair, to assume that two-thirds of the remaining moneys are marital and one-third separate? Is it fair to do otherwise? I would be willing to bet a lot that she had no idea that she was so gravely affecting her rights by choosing, while in love, to pool these funds. No, unless we give warnings with marriage licenses that say "keep your inherited funds only in accounts in your own name, "it is unreasonable to assume, as our case law has been doing, that all of the funds are marital. Consider how different the result would be (under current case law) if she had used separate accounts, even if both were in her own name. Or take another situation. Suppose she inherited $6 million and earned $3 million, doesn't at least $3 million have to be her separate property? The logic of the law cannot allow us to disregard the logic of Aristotle and von Neumann. I strongly urge that this proportionality argument be applied - not only in the McSparron context but in the tracing context as well.

The 'Niklos' Case

I had adverted earlier to the Niklos case. (I am not certain that it has been published yet.)

As you will recall, Justice Gische rejected the wife's experts interest rates as being unrealistic. Justice Elaine Jackson Stack (Nassau County) did the same in Niklos, only the expert there was the court's own neutral. In that case, the neutral valuation of a negligence practice was only a fraction of what the firm had just paid another, withdrawing, partner as a buy out figure. The court rejected that valuation as not passing the "economic reality "or "sanity " tests. See Harmon v. Harmon, 578 NYS2d 897 (1st Dept. 1992)

The court accepted as a valuation what the other partner had been paid. Without expressly saying so, the court accepted the principle that the optimum valuation of anything is what someone has actually paid for it. We must not forget that and allow our calculations to take on a life of their own divorced from reality. See also, Joyce v. Joyce, NYLJ, Aug. 8, 2002, p. 22, col. 3 (Sup. Ct. Nassau Co.; Ross, J.): "Notwithstanding our determination of a valuation date (as of the date of commencement) ... the value of a marital asset cannot be speculative and must be based upon 'economic reality.' "The court, accordingly, determined to permit the husband to produce evidence of an alleged financial downturn of his company after the valuation date in order to establish the "true worth "of the business. Also in this vein, and although I do not have the space to discuss it here, I wanted to call my readers' attention to Robert A. Spolzino's decision in Fanelli v. Fannelli, 740

NYS2d 823 (Sup. Ct. Westchester Co. 2002), in which he held that an engineering license would be valued at a much lower value (only 6 percent of what the standard calculation of its value would have yielded) because the husband made little use of it during his career.

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Possible Amendment to Rule 410
Date: April 1, 2003

This memorandum addresses a question that is an offshoot from the Committee's work on Rule 408. As the Committee and the Reporter considered a possible amendment to Rule 408, it encountered some case law holding that Rule 408 excluded statements and offers made by prosecutors in guilty plea negotiations. The Committee noted that the analysis in these cases was faulty, because Rule 408, by its terms, covers only those statements and offers that are made in the course of settling *civil* claims. The Committee determined that if statements and offers by prosecutors are to be protected, that protection should be provided by Rule 410–the Rule designed to cover statements and offers made in guilty plea negotiations.

The problem, however, is that Rule 410 does not, by its terms, protect the government. It provides that certain statements and offers in guilty plea negotiations cannot be admitted "against the defendant". The Committee at its Fall 2002 meeting determined that, on the merits, statements and offers made by the prosecutor during plea negotiations should be as protected as similar statements and offers by the defendant. The Committee directed the Reporter to prepare a memorandum discussing a possible amendment to Rule 410 that would provide such protection for prosecution statements and offers.

This memorandum is in five parts. Part One sets forth the existing Rule 410, and provides a short discussion of case law treatment of prosecution statements and offers under that Rule and under Rule 408. Part Two discusses whether an amendment to the Rule is necessary to protect prosecution statements and offers made in plea negotiations, or whether existing doctrine provides sufficient protection so that the costs of amendment outweigh any benefits. Part Three discusses other problems courts and commentators have found with the Rule, and whether an amendment is necessary to remedy those problems as well. Part Four sets forth pertinent state law variations. Part Five provides models for amending Rule 410 should the Committee decide to proceed.

Of course, as always, it is for the Committee to determine whether the benefits of an

amendment will outweigh its substantial costs. This memorandum in no way advocates that an amendment actually should be proposed.

If the Committee does decide to proceed with an amendment, it can be carried forward as part of a possible "package" of amendments that could be presented to the Standing Committee in the Spring of 2004.

## I. RULE 410 AND THE CASE LAW ON THE ADMISSIBILITY OF PROSECUTION STATEMENTS AND OFFERS MADE IN GUILTY PLEA NEGOTIATIONS

### *The Rule*

Rule 410 provides as follows:

**Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements**

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible **against the defendant** who made the plea or was a participant in the plea discussions:
>
> (1) a plea of guilty which was later withdrawn;
>
> (2) a plea of *nolo contendere;*
>
> (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or
>
> (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.
>
> However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness to be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

### *The Case Law*

There are only a handful of cases discussing the admissibility of statements and offers by prosecutors in guilty plea negotiations. What follows is a description of those cases:

1. *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 other than the defendant, and the defendant wanted to use that evidence to show something improper about governmental motivation. The problem for the government was that statements and offers by the prosecution are not protected under Rule 410. 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.

**Comment: While the result may be correct on the merits, the analysis is faulty. It is clear that Rule 408 does not cover anything that happens in guilty plea negotiations. It only covers efforts to settle a civil claim.**

2. *United States v. Delgado,* 903 F.2d 1495 (11th Cir. 1990): The defendants argued that the government's agreement to drop conspiracy charges against a cooperating accomplice should have been admitted as a government admission that no conspiracy existed. The Court found no error in excluding the agreement. The Court noted that "by holding that the government admits innocence when it dismisses charges under a plea agreement, we would effectively put an end to the use of plea agreements to obtain the assistance of defendants as witnesses against alleged co-conspirators."

The *Delgado* Court did not rely on, or even mention, Rules 408 or 410. Rather, it concluded that the government's agreement to drop charges was properly excluded under Rule 403:

> Even if such evidence is relevant, it would not be admissible under Rule 403. If the evidence were admitted, the government's counsel likely would take the stand and testify that the charges were dropped for reasons unrelated to the guilt of the defendant. The reasons expressed by the government's counsel could be highly incriminating with regard to the defendant who is seeking to have the evidence admitted. Thus, the district court should probably hold the technically admissible opinion evidence inadmissible because it would open the door to evidence on collateral issues that would likely confuse the jury.

**Comment: The *Delgado* Court's analysis seems sound, and it raises a question: If government statements and offers are to be excluded under Rule 403, is it really necessary to amend Rule 410 to provide for such exclusion? This question is considered in Part Two, infra.**

3. *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."

4. *United States v. Biaggi*, 909 F.2d 662 (2d Cir. 1990): One of the defendants wanted to admit the fact that he had rejected an immunity deal offered by the government. His theory was that the rejection of immunity was evidence of "consciousness of innocence." The Court held that it was error to exclude the evidence. The government relied on Rule 410 as a source of exclusion. The Court analyzed the applicability of Rule 410 to the rejection of immunity agreements in the following passage:

> The Government also contends that evidence of immunity negotiations should be excluded because of the same considerations that bar evidence of plea negotiations. Preliminarily, we note that plea negotiations are inadmissible "against the defendant," Fed. R. Crim. P. 11(e)(6); Fed. R. Evid. 410, and it does not necessarily follow that the Government is entitled to a similar shield. More fundamentally, the two types of negotiations differ markedly in their probative effect when they are sought to be offered against the Government. When a defendant rejects an offer of immunity on the ground that he is unaware of any wrongdoing about which he could testify, his action is probative of a state of mind devoid of guilty knowledge. Though there may be reasons for rejecting the offer that are consistent with guilty knowledge, such as fear of reprisal from those who would be inculpated, a jury is entitled to believe that most people would jump at the chance to obtain an assurance of immunity from prosecution and to infer from rejection of the offer that the accused lacks knowledge of wrongdoing. That the jury might not draw the inference urged by the defendant does not strip the evidence of probative force.
>
> Rejection of an offer to plead guilty to reduced charges could also evidence an innocent state of mind, but the inference is not nearly so strong as rejection of an opportunity to preclude all exposure to a conviction and its consequences. A plea rejection might simply mean that the defendant prefers to take his chances on an acquittal by the jury, rather than accept the certainty of punishment after a guilty plea. We need not decide whether a defendant is entitled to have admitted a rejected plea bargain. *Cf.* United States v. Verdoorn, 528 F.2d 103 (8th Cir. 1976) (approving exclusion of a rejected plea bargain offered by a defendant to prove prosecutor's zeal, rather than defendant's innocent state of mind). The probative force of a rejected immunity offer is clearly strong enough to render it relevant.

The Court found that under the circumstances the probative value of rejection of complete immunity was not substantially outweighed by any prejudicial effect or confusion. Therefore it should have been admitted under Rule 403.

**Comment: *Biaggi* does not deal directly with the question of whether statements and offers by the government are excluded by Rule 410 or any other Evidence Rule. The question in *Biaggi* was whether the defendant's *rejection* of a prosecutor's offer should be admitted. Moreover, the Court takes pains to distinguish rejection of immunity from rejection of an offer to plead guilty, so the case doesn't say much at all about statements and offers to plead guilty made by prosecutors. Nonetheless, the Court goes out of its way to point out that Rule 410, as written, is not a two-way street, so the case is somewhat in tension with the proposition that government statements and offers made in guilty plea negotiations should be excluded.**

One question raised by *Biaggi* is this: if Rule 410 is amended to exclude government statements and offers during guilty plea negotiations, should anything be said about the admissibility of the defendant's *rejection* of such offers? On the one hand, an argument that rejection of the offer should be admissible leads to the dilution of any rule excluding offers; evidence of rejection obviously creates an inference that an offer was indeed made. On the other hand, it seems clear that in some cases, like *Biaggi*, evidence that the defendant rejected an offer could be quite probative of his belief in his own innocence–at least this is so if the defendant rejects an offer of immunity. If the government gets to admit evidence of consciousness of guilt, why should equivalent evidence of consciousness of innocence be excluded? At the very least, the problem of the admissibility of rejection of an offer of immunity counsels some caution on whether to propose an amendment excluding evidence of government statements and offers.

**Note that there is authority from state courts holding that the defendant's rejection of the government's offer to plead guilty to a lesser charge is not admissible to prove consciousness of innocence. These courts recognize that Rule 410 is not directly applicable, and so rely on Rule 403. See, e.g., *State v. Davis,* 70 Ohio App.2d 48 (1980) (recognizing that the decision to offer a guilty plea to a lesser charge, and the decision to reject it, are not necessarily dependent on factual guilt or innocence). The *Davis* Court also relied on a public policy argument to exclude the defendant's rejection of the prosecution's offer to plead to a lesser charge. It noted that "[i]f the prosecutor must bargain with a defendant whose responses are framed with an eye toward their self-serving use at trial, we see little profit to be anticipated from their discussions, and little incentive to begin the process." But note also that in *Davis* the evidence was the defendant's rejection of a guilty plea to a lesser charge. As recognized in *Biaggi*, the defendant's rejection of an offer of *immunity from prosecution* is far more probative of consciousness of innocence than is rejection of an offer to plead guilty.**

**The models in Part Five provide language in the Committee Note that the result in *Biaggi* is not affected by an amendment that would protect the statements and offers made by the prosecutor in a guilty plea negotiations. The language can be changed or deleted if the Committee opts for a different result.**

*5. Brooks v. State,* 763 So. 2d 859 (Miss. 2000): This is an interesting state case construing Mississippi Evidence Rule 410, which is virtually identical to the Federal Rule. The defendant contended that it was error for the prosecutor to argue in closing argument that the government offered the defendant a plea bargain and the defendant rejected it. The prosecutor contrasted the defendant's actions with those of a codefendant who did accept a plea bargain; thus the inference sought was that the defendant was guilty and was just wasting everyone's time by going to trial. The Court agreed with the defendant that the prosecution violated Rule 410. It recognized that evidence of a plea offer made by the prosecution and rejected by the defendant "does not fall squarely under" any of the exclusionary language in Rule 410. It declared, however, that "the prosecutor's statement violates the spirit of Rule 410."

**Comment: The Court is not completely correct that the evidence did not fall squarely under the language of the Rule. Part of the evidence did. The defendant's rejection of a plea bargain, when offered by the government, is clearly covered by the Rule, which excludes all statements made in the course of plea discussions that do not result in a guilty plea. The defendant's rejection of the government's offer in *Brooks* is certainly a "statement" covered by the Rule. But the prosecution's offer is not itself covered by the Rule, which is undoubtedly why the Court got somewhat confused.**

## II. COST-BENEFIT ANALYSIS FOR AMENDING RULE 410 TO PROTECT STATEMENTS AND OFFERS MADE BY THE PROSECUTION DURING GUILTY PLEA NEGOTIATIONS

Based on the determination at the Fall 2002 meeting, the Committee is in agreement that statements and offers made by prosecutors during guilty plea negotiations should be excluded from evidence. The public policy supporting the confidentiality of plea bargaining is equally applicable to statements and offers of prosecutors and defendants. And as noted in the discussion above, the Committee's view is consistent with the results in the cases, which have generally held (one way or another) that statements and offers made by prosecutors during guilty plea negotiations cannot be admitted as evidence.

This section of the memorandum therefore assumes that a rule excluding statements and offers by prosecutors during plea negotiations is desirable. The question addressed in this section is whether that rule needs to be promulgated by an amendment to Rule 410. Put simply, if the case law already establishes a rule that excludes such evidence, is it necessary to undertake the costs of amending Rule 410?

### *Benefits of a Rule Change*

There are three different sources of authority that have been relied upon by the cases excluding statements and offers by the prosecution during guilty plea negotiations: 1. The "spirit" of Rule 410; 2. The "spirit" of Rule 408; and 3. Rule 403. Each of these sources raises a problem that may justify an amendment making it clear that Rule 410 protects statements and offers made by prosecutors during plea negotiations.

#### *The "spirit" of Rule 410.*

It is true that excluding prosecution statements and offers is within the "spirit" of Rule 410. Indeed, any amendment to Rule 410 to make the exclusion explicit is justified by the fact that the change would be absolutely consistent with the policy basis of the Rule. However, under the current Rule, the plain fact is that statements and offers of prosecutors are not protected by the text. The Supreme Court has required a "plain meaning" construction of the text of the Evidence Rules. See *United States v. Salerno,* 505 U.S. 317 (1992). Under *Salerno*, it is not enough to rely on the "spirit" of a Rule if the text is to the contrary. This makes questionable the case law relying on the "spirit" of Rule 410.

#### *The "spirit" of Rule 408.*

This source of authority is even weaker than the "spirit" of Rule 410. At least Rule 410 deals

with guilty plea negotiations. Rule 408 covers evidence of efforts to compromise *civil* claims only. Reliance on the "spirit" of Rule 408 will be even more dubious if the Committee proceeds successfully with an amendment to Rule 408. That amendment, and the Committee Note, would make clear that if prosecution statements and offers in guilty pleas are to be protected, those protections should come from Rule 410, not 408.

*Rule 403*

Unlike the dubious reliance on the "spirit" of rules with unsupportive text, a court's reliance on Rule 403 to exclude statements and offers of prosecutors in guilty plea negotiations is fundamentally sound. The text of Rule 403 clearly supports such a result, as does logic and experience. A statement or offer during a guilty plea negotiation is only marginally probative of the prosecution's belief in guilt or innocence. Moreover, there is a substantial risk that the jury will be confused by the evidence, not knowing the proper weight to give it.

The only potential problem with relying on Rule 403 to exclude prosecution statements and offers is that it involves a case by case approach rather than a bright line rule. It may be that some court, in its discretion, would find such evidence admissible under Rule 403, and under the abuse of discretion standard an appellate court would be unlikely to reverse. Also, because Rule 403 is a case by case approach, it has a degree of unpredictability. Therefore the prosecutor, uncertain about whether a statement or proffer would be admissible at trial, might be deterred from negotiating freely. In other words, a bright line rule would probably do more to encourage free and open negotiations than does a case by case balancing approach.

*Another Possibility: The Hearsay Rule*

When a prosecutor makes a statement or offer during plea negotiations, the result is an out-of-court statement. If admitted for its truth, it would seem to run afoul of the hearsay rule. Statements by defendants and their counsel in such negotiations are also hearsay, but if not for Rule 410, they would be admitted as party or agent-admissions. Does the hearsay exception for agency-admissions also cover statements by prosecutors? If the exception is not applicable, then it could be argued that statements and offers by prosecutors are not admissible because they are hearsay with no applicable exception; and therefore no amendment to Rule 410 would be necessary because the hearsay rule would do the job of exclusion.

There is at least one case that holds that statements by prosecutors are not admissible as admissions against the government. See *United States v. Zizzo,* 120 F.3d 1338 (7th Cir. 1997). The *Zizzo* Court relied on "the common law principle that no person should be able to bind the sovereign." The vast majority of courts have held, however, that statements by the prosecutor *do* bind the sovereign; these courts reason that because plea agreements made by the prosecutor bind the

sovereign, statements made during plea agreements (or in other circumstances, such as during a trial) should be binding as well. See *United States v. Bakshinian,* 65 F.Supp.2d 1104, 1106 (C.D. Cal. 1999), and the cases cited therein. Thus, the hearsay rule is not a general source of exclusion for statements and offers made by prosecutors during guilty plea negotiations.

*Conclusion on Existing Case Law and Benefits of a Rule Change*

It bears noting that I have not found a case in which a statement or offer made by a prosecutor in a guilty plea negotiation has been found admissible. The only close case is *Biaggi, supra*, where the Court held that the defendant's *rejection* of an offer of *immunity* had to be admitted as probative of consciousness of innocence. Thus, the Courts have generally reached the proper result (excluding statements and offers of prosecutors) even without an amendment to Rule 410.

On the other hand, they have reached that proper result either through shaky constructions of the Rules, or through a case by case approach that might lack predictability. The uncertainty is if anything exacerbated by a passing comment of the Supreme Court in *United States v. Mezzanatto,* 513 U.S. 196, 205 (1995), where it noted that the language of Rule 410 "leave[s] open the possibility that a defendant may offer" statements and offers made in plea negotiations. A court that considers the somewhat dubious constructions of Rules 408 and 410 in the case law discussed above, against the language in *Mezzanatto*, may be tempted to find that prosecution statements and offers are to be excluded, if at all, only under the Rule 403 balancing approach.

It is for the Committee to determine whether the shakiness and/or unpredictability of the existing case law is serious enough to justify an amendment to Rule 410. Put another way, it is for the Committee to determine whether clarifying Rule 410 will provide a benefit over existing case law that outweighs the cost of the amendment. It is to those costs that this memo now turns.

***Costs of a Change to Rule 410***

There are two kinds of costs that might be considered if an amendment to Rule 410 were adopted. First are the costs imposed by any amendment to the Evidence Rules. They include: 1) Disruption of expectations; 2) Mistakes made by courts and litigants who are unaware that a Rule has been amended; 3) Raising accusations that the Committee is engaging in rulemaking "activism"; 4) The possibility of inadvertently creating problems for settled law that the amendment is not intended to address (for example, by changing one part of the rule but not another, can a negative inference be derived?).

The other kind of cost is that specific to an amendment to Rule 410 that would exclude statements and offers made by prosecutors. There are at least two possible problems that can be

envisioned:

*1. Evidence of Rejection of Offers:* As discussed above, the Second Circuit in *Biaggi* held that the defendant's rejection of a prosecutor's offer of immunity was admissible as evidence of consciousness of innocence. One of the costs of an amendment to Rule 410 would be the necessity of dealing with the *Biaggi* precedent. The Committee would have to decide whether it wanted to retain that precedent, and if it did, how it would do so.

If the Committee decided to say nothing about the *Biaggi* rule, the costs of uncertainty would have to be added to the general costs of the amendment.

If the Committee decided that it did *not* wish to retain that precedent, then one of the costs of the amendment would be the overruling of considered case law in at least the Second Circuit, and a possible conflict with the defendant's constitutional right to present exculpatory evidence.

If the Committee decided that it wanted to retain the *Biaggi* precedent, then the problem lies in how to do so. The basic conundrum is that the amendment would provide that the government's offer is excluded, while nonetheless providing that the defendant's rejection is admissible. There is obviously some tension, and possible confusion, in that state of affairs. Perhaps one way to alleviate confusion is to provide some explanation in the Committee Note. It would also be important for the Rule or Committee Note to distinguish between the rejection of a plea agreement and the rejection of an offer of immunity. As the Court in *Biaggi* noted, the rejection of a plea agreement is not very probative of consciousness of innocence because there are many reasons that a defendant may reject a plea even if guilty.

The model for a possible amendment sets forth some language dealing with the *Biaggi* question in the Committee Note, should the Committee decide to retain the result in *Biaggi.*

*2. Interface With Criminal Rule 11:* One possible cost of an amendment to Rule 410 is that it might create a problem in interfacing with Criminal Rule 11, which also governs the admissibility of plea discussions. At one time, this would have been a significant problem because a change to the Evidence Rule would have created questions about the status of the detailed language in the Criminal Rule. But there is no longer any problem in integrating the two rules. Rule 11(f) of the restylized Federal Rules of Criminal Procedure provides as follows:

> The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

Thus, any change to Rule 410 is automatically integrated into the Criminal Rules.

*Conclusions on Cost of a Change to Rule 410:*

The costs of amending Rule 410 do not appear particularly profound, so long as the Committee could decide how to proceed on the question of the admissibility of the rejection of an immunity agreement. On the other hand, the benefits of an amendment are not that profound, either, given the fact that the courts, as analytically shaky as some of the decisions may be, have found a way to exclude statements and offers made by the prosecutor during plea negotiations. It is for the Committee, of course, to determine whether the arguably marginal costs outweigh the arguably marginal benefits of an amendment.

As part of its cost-benefit analysis, the Committee may wish to consider the possibility of solving some other problems that have cropped up in the application of Rule 410. None of these problems independently justify any amendment to Rule 410. However, if the Rule is to be amended to protect statements and offers by the prosecution, then a collateral benefit of such an amendment might be the opportunity it provides to remedy other problems in the Rule. The next section analyzes those secondary-order problems.

## III. OTHER PROBLEMS UNDER RULE 410 THAT MIGHT BE TREATED IN AN AMENDMENT

### *1. Unaccepted Pleas:*

Criminal Rule 11(c)(5) allows the trial judge to reject certain plea agreements reached between the defendant and the prosecution. Does Rule 410 exclude evidence of such an agreement, and the statements related to that agreement, in a subsequent criminal trial?

The text of the Rule is not directly on point. It refers to "withdrawn" guilty pleas, and related statements, as being protected. But there is a difference between a plea that is "withdrawn" and one that is "rejected" by the court.

Wright and Graham, Federal Practice and Procedure sec. 5341, provide this analysis of the question:

> Does Rule 410 apply to a guilty plea that is tendered but not accepted by the trial judge under Criminal Rule 11(d) or 11(e)(3)? The common law apparently excluded evidence of unaccepted guilty pleas and many state rules, including one that was cited by the Advisory Committee on Criminal Rules in its Note to Criminal Rule 11(e)(6), cover both withdrawn and unaccepted pleas. Since the reasons that justify refusal to accept a plea are similar to those that support withdrawal, it would seem that the same policy should apply to the evidentiary use of unaccepted pleas as is applicable to withdrawn pleas. Although the language of Rule 410 is not completely apt, it would seem that an unaccepted plea could be brought within the rule either as a form of withdrawn plea or as an offer to plead guilty.

See also Mueller and Kirkpatrick, Evidence, sec. 4.28, n. 1 (arguing that Rule 410 should apply to guilty pleas that are tendered but not accepted).

I could not find any case in which statements and offers made pursuant to a plea agreement rejected by the court were later offered against the defendant at trial. Thus, the applicability of Rule 410 to rejected plea agreements may be a practical non-problem. However, if the Rule is to be amended on other grounds, the Committee may wish to treat the question. There seems no reason to distinguish between plea agreements that are later withdrawn and those that are rejected by the court. In Part Five, one of the models contains language to cover rejected pleas.

### *2. Vacated Guilty Pleas*

There is a similar gap in the Rule with respect to guilty pleas that are vacated by a court. Wright and Graham explain as follows:

> A closely related question concerns a guilty plea that is set aside as invalid on direct or collateral attack. Here again, the policy that supports exclusion of withdrawn guilty pleas would seem to be equally applicable when the guilty plea is set aside by an appellate court; i. e., the decision to set aside the plea would be almost a meaningless gesture if the plea could be used against the defendant as an admission in the ensuing trial. Some state rules cover both withdrawn pleas and those that are invalidated on appeal. The draftsman of the Vermont version of Rule 410 suggests that a guilty plea that is subsequently set aside should be treated as a withdrawn plea under the rule. If rejected pleas are found to be within the scope of Rule 410, the language need only be stretched a few inches more to encompass pleas that are invalidated on appeal; the policy of the rule will probably lead most courts to so hold.

See also Mueller and Kirkpatrick, Evidence, sec. 4.28, n. 1 (arguing that Rule 410 should apply to guilty pleas set aside by appeal or on collateral attack).

Again, I could find no case in which statements and offers made pursuant to a plea agreement vacated by a court were later offered against the defendant at trial. Thus, the applicability of Rule 410 to vacated plea agreements may be a practical non-problem. However, if the Rule is to be amended on other grounds–especially if it is amended to cover rejected plea agreements–the Committee may wish to treat the question. There seems no reason to distinguish between plea agreements that are later withdrawn and those that are vacated on appeal or collateral attack. In Part Five, one of the models contains language to cover vacated pleas.

### *3. Breached Guilty Pleas*

What happens if the defendant breaches the terms of the plea agreement? Do the statements he made during the negotiations become admissible, on the ground that all bets are now off? Judge McLaughlin, in Weinstein's Evidence, sec. 410.09 [7], has this to say:

> Rule 410 is strangely silent as to whether the defendant's plea bargaining statements are admissible if the defendant violates the bargain, e.g., by withdrawing the plea or by refusing to testify as agreed. One strain of authority holds that the defendant's statements should remain excludable. [Citing *United States v. Grant,* 622 F.3d 308, 315 (8th Cir. 1980) ("If statements made by an accused person during plea bargaining negotiations are admissible if that person decides to change the plea after the plea bargain is struck, then Rule 410 would be . . . rendered effectively meaningless.").] Other courts hold that when the defendant withdraws the guilty plea and refuses to carry out any promise to help the government, the defendant loses the protection of the plea agreement, and as a result, plea bargaining statements would not be excluded under Rule 410. [Citing, inter alia, *United States v. Arroyo-Angulo,* 580 F.2d 1137, 1149 (2d Cir. 1978) ("In view of Arroyo's blatant breach of the cooperation arrangement with the Government, to prohibit the introduction of his admissions would make a mockery of the investigative processes employed to secure evidence of serious

crimes."), and *United States v. Davis,* 617 F.2d 677 (D.C. Cir. 1979)].

See also *United States v. Young,* 223 F.3d 905 (8th Cir. 2000) (defendant waived the protections of Rule 410 by breaching the plea agreement, at least where the agreement ).

If the Committee decides to amend Rule 410 on other grounds, it may wish to consider amending Rule 410 to treat specifically the question of admissibility of statements made during plea negotiations where the defendant subsequently breaches the plea agreement. There are three possible solutions to the problem:

1. The amendment could provide that the defendant's statements are protected even if the agreement is breached. This option would seem to be a tough sell–it would mean that relevant evidence is excluded even though the defendant breached a plea agreement. On the other hand, it could be argued that the social policy basis of the rule is to encourage free negotiations at the time the statements are to be made. At that time, the defendant doesn't know that he is going to breach a plea agreement. It might be contrary to the policy behind the Rule to deprive the defendant of its protection based on conduct occurring subsequently to the negotiation.

2. The amendment could provide that the defendant's statements are not protected if he breaches the plea agreement. This position would be based on a kind of "dirty hands" theory–that a defendant who exploited the plea bargaining process should not benefit by a rule designed to protect that process.

3. The rule could be that the defendant's statements are not protected if the plea agreement expressly provides for the use of the defendant's testimony in case of breach (as in *Young, supra).* This position is based on a waiver theory. This position would not necessarily require an amendment to Rule 410, because the Supreme Court has held that waiver principles are implicit in the Rule. Whether waiver language should be included in the Rule is taken up immediately below.

**Finally, it is important to note that if the Rule is amended to cover breaches by the defendant, the amendment should apply equally to breaches by the government. Any party that breaches the agreement should be held to forfeit the protections of Rule 410, or not–the consequences should be the same for any party that breaches the agreement. That parity would be consistent with the parity that gives rise to the amendment in the first place.**

One of the models in Part Five includes language providing that the statements of a breaching party are admissible against the party. If the Committee reaches a different resolution on the admissibility of statements after a breach, the language can be adjusted.

### *4. Waiver*

Rule 410 is silent on whether its protections can be waived. In *United States v. Mezzanatto*, 513 U.S. 196 (1995), the Court held that an agreement to waive the protections of Rule 410 is valid and enforceable if the defendant entered the agreement knowingly and voluntarily. The Court rejected the defendant's argument that waiver was not permitted because not expressly provided for in the Rule. It concluded that Rule 410 was enacted "against a background presumption that legal rights generally, and evidentiary provisions specifically, are subject to waiver by voluntary agreement of the parties."

The Court in *Mezzanatto* stressed that a waiver of Rule 410 protections would not be recognized unless the prosecution can establish that the defendant made a knowing and voluntary waiver. This was no problem for the prosecution under the facts of *Mezzanatto*, where the defendant initiated discussions with the government, and conferred with an attorney before agreeing to waive the protections of Rule 410.

Mezzanatto's agreement with the government waived the protections of Rule 410 only insofar as the statements could be offered to impeach him at trial. This leaves open the question whether the defendant has the power to agree that his statements during plea negotiations can be used against him as substantive evidence should the case go to trial. The majority in *Mezzanatto* found it unnecessary to address this question. Justice Ginsburg, in a concurring opinion, expressed the view that if such a braod waiver were enforceable, it would "severely undermine a defendant's incentive to negotiate, and thereby inhibit plea bargaining." Justice Souter, in dissent, pointed out that the free market rationale of the majority opinion in *Mezzanatto* extended to permitting the defendant to agree to the substantive use of plea negotiation statements at trial.

At least two cases after *Mezzanatto* have upheld an agreement by which the defendant waived his right to exclude evidence under Rule 410. The court in *United States v. Burch,* 156 F.3d 1315 (D.C. Cir. 1998) reasoned that the holding in *Mezzanatto* logically extended to agreements to use the defendant's statements as substantive evidence:

> On reflection, * * * we cannot discern any acceptable rationale for not extending the majority opinion in *Mezzanatto* to this case. Justice Thomas' opinion rests on three principles. First, it finds that in the absence of an affirmative indication that Congress intended to preclude or to limit the waiver of statutory protections, including evidentiary rules, voluntary agreements to waive these protections are presumptively enforceable. Second, the opinion rejects the argument that [the Rule expresses] congressional disfavor towards waivability. Finally, the opinion stresses that in weighing whether to override a presumption of waivability, a court should assess the public policy justifications, if any, which counsel in favor of departing from that norm. Cumulatively, we believe these principles do not countenance drawing any distinction in this case between permitting waivers for purposes of impeachment or rebuttal and permitting waivers for the prosecution's case-in-chief.

See also *United States v. Rebbe,* 314 F.3d 402 (9th Cir. 2002) (while the Supreme Court had only decided that waivers were enforceable for use of plea statements in impeachment, the Supreme Court's rationale in *Mezzanatto* applied equally to waivers permitting use of such statements in rebuttal).

Assuming the Committee decides to propose an amendment to the Rule, the question is whether that amendment should address the waiver question discussed in *Mezzanatto* and subsequent cases.

A strong argument can be made that it is unnecessary, and perhaps counterproductive, to attempt to codify *Mezzanatto* in the text of an amendment to Rule 410. It seems unnecessary because it is fundamental that the protection of *any* Federal Rule of Evidence can be waived, simply by failing to make a proper and timely objection, or by advance stipulation. It also seems counterproductive on a number of grounds. First, the addition of waiver language in Rule 410 could create a negative inference that the protection of other Rules could *not* be waived, because there is no waiver language in any other Rule. Second, the precise scope of the *Mezzanatto* waiver doctrine has not yet been determined by the Courts. As discussed above, *Mezzanatto* dealt only with the use of plea bargaining statements for impeachment; while other cases have extended the waiver rationale to permit such statements to be admissible in the case-in-chief or in rebuttal, there are only a few such cases discussing the scope of *Mezzanatto.* Because this is a point that is in development, it seems problematic to attempt to codify it.

On the other hand, a problem could be created by amending Rule 410 without providing any reference to *Mezzanatto* and the possibility of waiver. A negative inference could be created that the amendment was rejecting *Mezzanatto* by changing the Rule on other grounds and not mentioning the possibility of waiver. This is a legitimate concern, but it does not mean that waiver language must be added to the text of the Rule, especially where it would be difficult to codify the law that is developing after *Mezzanatto.*

Perhaps a better alternative is to add language to the Committee Note indicating that nothing in the amendment is intended to affect the development of waiver principles under *Mezzanatto* and its progeny. There is precedent for this approach. The Committee Note to the amendment to Rule 103 provided that: "Nothing in the amendment is intended to affect the rule set forth in *Luce v. United States,* 469 U.S. 38 (1984), and its progeny." The Committee determined that this was the proper approach after noting that the scope of the *Luce* rule was still being developed in the lower courts; that it would therefore be difficult to codify *Luce* in the text of the Rule; but that the failure to mention *Luce* at all might create a negative and incorrect inference that the Committee had rejected the *Luce* rule. If the Committee decides to propose an amendment to Rule 410, these same concerns arise with respect to the *Mezzanatto* waiver rule–suggesting the same approach that was taken in the amendment to Rule 103.

The models in Part Five each include language in the model Committee Note providing that the amendment is not intended to affect the rule set forth in *Mezzanatto* and its progeny. If the

Committee decides that waiver language must instead be added to the text of the Rule, such language can be included as the Committee continues to consider an amendment to Rule 410.

## IV. MAJOR STATE VARIATIONS ON RULE 410

Very few state versions of Rule 410 are identical to the Federal Rule. Most of the variations, however, are technical. For example, some states do not permit *nolo contendere* pleas, while others use different terminology for those pleas; and state versions refer to their own Rules of Criminal Procedure rather than Federal Rule 11. Some states do not include the final paragraph of Federal Rule 410, which provides exceptions for when evidence is necessary for completeness and for subsequent perjury prosecutions. Some states specifically provide that statements are admissible to impeach the defendant if he testifies at trial.

This section highlights only those state variations that might shed some light on the problems that an amendment to Federal Rule 410 might usefully address, i.e., those problems discussed in this memorandum. Specifically, state variations are included to the extent they deal with 1) admissibility of prosecution statements and offers; 2) admissibility of unaccepted pleas; 3) admissibility of vacated pleas; 4) admissibility of the defendant's statements after the defendant breaches the plea agreement; and 5) waiver of Rule 410 protections.

***Alaska***

RULE 410. INADMISSIBILITY OF PLEA DISCUSSIONS IN OTHER PROCEEDINGS

(a) Evidence of a plea of guilty or nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements or agreements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case or proceeding **against the government or an accused person who made the plea or offer** if:
(i) A plea discussion does not result in a plea of guilty or nolo contendere, or
(ii) A plea of guilty or nolo contendere **is not accepted** or is withdrawn, or
**(iii) Judgment on a plea of guilty or nolo contendere is reversed on direct or collateral review.**
(b) This rule shall not apply to (1) the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas when offered in subsequent proceedings as prior inconsistent statements, and (2) proceedings by a defendant to attack or enforce a plea agreement.

**Comment**:

**The Alaska version specifically provides that statements and offers are not admissible against the government. It also provides that the protections of the Rule apply if the plea is not accepted or if it is vacated. The Alaska version appears to provide a useful model if the Committee wishes to proceed with an amendment to Rule 410.**

*Florida*

Fla. Evid. Code sec. 90.410:

Evidence of a plea of guilty, later withdrawn; a plea of nolo contendere; or an offer to plead guilty or nolo contendere to the crime charged or any other crime is inadmissible in any civil or criminal proceeding. Evidence of statements made in connection with any of the pleas or offers is inadmissible, except when such statements are offered in a prosecution under chapter 837.

**Comment:**

**The Florida version appears to protect the government as well as the defendant because it states simply that statements and offers in plea negotiations are inadmissible. Given the current text of the Federal Rule, however, which specifically protects only the defendant, it may be better to use language like that of Alaska, which specifically states that the evidence is inadmissible when offered against the government. This would eliminate any ambiguity.**

*Louisiana*

Art. 410. Inadmissibility of pleas, plea discussions, and related statements

A. General rule. Except as otherwise provided in this Article, evidence of the following is not, in any civil or criminal proceeding, admissible **against the party** who made the plea or was a participant in the plea discussions:

(1) A plea of guilty or of nolo contendere which was later withdrawn **or set aside**;
(2) In a civil case, a plea of nolo contendere;
(3) Any statement made in the course of any court proceeding concerning either of the foregoing pleas, or any plea discussions with an attorney for or other representative of the prosecuting authority regarding either of the foregoing pleas; or
(4) Any statement made in the course of plea discussions with an attorney for or other representative of the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn **or set aside**.

B. Exceptions. However, such a statement is admissible:
(1) In any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it; or
(2) In a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Comment:

**By providing that pleas and statements are not admissible "against the party", the Louisiana Rule excludes statements and offers by the prosecutor. Many other states (e.g., Minnesota and New Jersey) use the terminology "against the person", but that language is not a good way of protecting prosecution statements, because at trial the evidence would not be offered "against the person" (i.e., the prosecutor) but rather "against the party" (i.e., the government). But in the final analysis, the Alaska version seems preferable, because it specifically provides protection to the "government", eliminating any ambiguity about whether the term "party" is intended to protect the government as well as any individual party.**

**The Louisiana Rule also attempts to cover guilty pleas that are not accepted or vacated by adding the phrase "or set aside." That terminology seems vague, however, and it would be better to refer to more standard terminology such as "vacated" and "not accepted".**

***Oregon***

Rule 410
1) A plea of guilty or no contest which **is not accepted or** has been withdrawn shall not be received against the defendant in any criminal proceeding.

2) No statement or admission made by a defendant or a defendant's attorney during any proceeding relating to a plea of guilty or no contest which **is not accepted** or has been withdrawn shall be received against the defendant in any criminal proceeding.

**Comment: The Oregon version specifically protects statements and offers pursuant to plea agreements that are not accepted by the court.**

*Tennessee*

RULE 410. INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible **against the party** who made the plea or was a participant in the plea discussions:
(1) a plea of guilty which was later withdrawn;
(2) a plea of nolo contendere;
(3) any statement made in the course of any proceedings under Rule 11 of the Tennessee Rules of Criminal Procedure regarding either of the foregoing pleas; or
(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. Such a statement is admissible, however, in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel

**Comment:**

**The Tennessee Rule uses the same "against the party" terminology as Louisiana.**

## V. MODELS FOR A POSSIBLE AMENDMENT TO RULE 410

This section sets forth two models for a possible amendment to Rule 410, should the Committee determine that such an amendment is necessary. Model One deals only with the problem that initiated the Committee's inquiry–protection of statements and offers made by the prosecution during guilty plea negotiations. Model Two supplements Model One by treating the additional problems of pleas that are not accepted, pleas that are vacated, and pleas that are breached. Should the Committee decide that some but not all of these supplementary problems should be addressed, then Model Two easily can be revised accordingly.

Both models deal with the question of waiver and *Mezzanatto* in the Committee Note, by indicating that there is no intent to affect that case and its progeny. If the Committee wishes to treat the problem of waiver in the text of the Rule, then the models can be adjusted accordingly.

Both models also deal with the *Biaggi* question–the admissibility of the defendant's rejection of an offer of immunity–in the Note. Again, the models can be adjusted accordingly if the Committee opts for a different result.

## *Model One: Protecting Statements and Offers by the Prosecution During Guilty Plea Negotiations*

**Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements**

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the government or against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty ~~which~~ that was later withdrawn;

(2) a plea of *nolo contendere*,

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority ~~which~~ that do not result in a plea of guilty or ~~which~~ that result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness to be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

## Model One Committee Note

Rule 410 has been amended to provide that the government, as well as the defendant, is entitled to invoke the protections of the Rule. Courts have held that statements and offers made by prosecutors during guilty plea negotiations are inadmissible, using a variety of theories. See, e.g., *United States v. Verdoorn,* 528 F.2d 103, 107 (8th Cir. 1976) (relying on the "principles" of Rule 408 even though that Rule, by its terms, only governs attempts to compromise a civil claim); *United States v. Delgado,* 903 F.2d 1495 (11th Cir. 1990) (government offer properly excluded under Rule 403 because it would have confused the jury); *Brooks v. State,* 763 So. 2d 859 (Miss. 2000) (relying on the "spirit" of state version of Rule 410 substantively identical to the Federal Rule). The amendment endorses the results of this case law, but provides a unitary source of authority for excluding statements and offers made by prosecutors during guilty plea negotiations. Protecting those statements and offers will encourage the unrestrained candor from both sides that produces effective plea discussions.

Nothing in the amendment is intended to affect the rule and analysis set forth in *United States v. Mezzanatto*, 513 U.S. 196 (1995), and its progeny. The Court in *Mezzanatto* upheld an agreement in which the defendant knowingly and voluntarily waived the protections of Rule 410 insofar as statements could be used to impeach him at trial. See also *United States v. Burch,* 156 F.3d 1315 (D.C. Cir. 1998) (reasoning that the holding in *Mezzanatto* logically extends to permit agreements to use the defendant's statements during the prosecution's case-in-chief); *United States v. Rebbe,* 314 F.3d 402 (9th Cir. 2002) (reasoning that the rationale in *Mezzanatto* applies equally to waivers permitting use of the defendant's statements in rebuttal). Nor is the amendment intended to cover the admissibility of the defendant's rejection of an offer of immunity from prosecution, when that rejection is probative of the defendant's consciousness of innocence. *See generally United States v. Biaggi,* 909 F.2d 662 (2d Cir. 1990) ("a jury is entitled to believe that most people would jump at the chance to obtain an assurance of immunity from prosecution and to infer from rejection of the offer that the accused lacks knowledge of wrongdoing").

## *Model Two: Protecting Government Statements and Offers; Protecting Statements and Offers Where Guilty Plea is Rejected or Vacated; and Providing Exception Where the Defendant Breaches the Plea Agreement.*

**Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements**

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the government or against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty ~~which~~ that was later withdrawn, rejected or vacated;

(2) a plea of *nolo contendere;*

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority ~~which~~ that do not result in a plea of guilty or ~~which~~ that result in a plea of guilty later withdrawn, rejected or vacated.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness to be considered contemporaneously with it, ~~or~~ (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel, or (iii) against a party that breaches the terms of the plea agreement.

## Model One Committee Note

Rule 410 has been amended to provide the following changes:

1. The government, as well as the defendant, is entitled to invoke the protections of the Rule. Courts have held that statements and offers by prosecutors during guilty plea negotiations are inadmissible, using a variety of theories. See, e.g., *United States v. Verdoorn,* 528 F.2d 103, 107 (8th Cir. 1976) (relying on the "principles" of Rule 408 even though that Rule, by its terms, only governs attempts to compromise a civil claim); *United States v. Delgado,* 903 F.2d 1495 (11th Cir. 1990) (government offer properly excluded under Rule 403 because it would have confused the jury); *Brooks v. State,* 763 So. 2d 859 (Miss. 2000) (relying on the "spirit" of state version of Rule 410 substantively identical to the Federal Rule). The amendment endorses the results of this case law, but provides a unitary source of authority for excluding statements and offers by prosecutors during guilty plea negotiations.

Protecting those statements and offers will encourage the unrestrained candor from both sides that produces effective plea discussions.

2. The protections of the Rule apply to statements and offers related to guilty pleas that are rejected by the court or vacated on appeal or collateral attack. Given the policy of the rule to promote plea negotiations, there is no reason to distinguish between guilty pleas that are withdrawn and those that are either rejected by the court or vacated on direct or collateral review.

3. A party loses the protections of the Rule by breaching the terms of the plea agreement. *See United States v. Arroyo-Angulo*, 580 F.2d 1137, 1149 (2d Cir. 1978) ("In view of Arroyo's blatant breach of the cooperation arrangement with the Government, to prohibit the introduction of his admissions would make a mockery of the investigative processes employed to secure evidence of serious crimes."). *See also United States v. Young*, 223 F.3d 905 (8th Cir. 2000) (defendant forfeited the protections of Rule 410 by breaching the plea agreement, at least where the agreement ).

Nothing in the amendment is intended to affect the rule and analysis set forth in *United States v. Mezzanatto*, 513 U.S. 196 (1995), and its progeny. The Court in *Mezzanatto* upheld an agreement in which the defendant knowingly and voluntarily waived the protections of Rule 410 insofar as statements could be used to impeach him at trial. See also *United States v. Burch*, 156 F.3d 1315 (D.C. Cir. 1998) (reasoning that the holding in *Mezzanatto* logically extends to permit agreements to use the defendant's statements during the prosecution's case-in-chief); *United States v. Rebbe*, 314 F.3d 402 (9th Cir. 2002) (reasoning that the rationale in *Mezzanatto* applies equally to waivers permitting use of the defendant's statements in rebuttal). Nor is the amendment intended to cover the admissibility of the defendant's rejection of an offer of immunity from prosecution, when that rejection is probative of the defendant's consciousness of innocence. *See generally United States v. Biaggi*, 909 F.2d 662 (2d Cir. 1990) ("a jury is entitled to believe that most people would jump at the chance to obtain an assurance of immunity from prosecution and to infer from rejection of the offer that the accused lacks knowledge of wrongdoing").

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Possible Amendment to Rule 606(b)
Date: April 1, 2003

Rule 606(b) generally excludes juror affidavits or testimony concerning jury deliberations. The stated exceptions to the Rule are where the juror statements are offered "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."

The rule is silent on whether juror statements are admissible to prove that the verdict reported by the jury was different from that actually agreed upon by the jurors. Courts have generally allowed juror statements to prove errors in the rendering of the verdict, but there is dispute among the courts as to the scope of this court-created exception to the Rule.

At its April 2002 meeting, the Committee directed the Reporter to prepare a report on a possible amendment to Rule 606(b) that would clarify whether and to what extent juror testimony can be admitted to prove some disparity between the verdict rendered and the verdict intended by the jurors. 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 such exception to the Rule.

This memorandum is divided into five parts. Part One sets forth the Rule, the Committee Note, and the legislative history that bears on the question of what will be referred to in this memorandum as a "differential" error, that is a difference between the result that the jury wished to reach and the actual verdict rendered. Part Two discusses the case law, noting while all courts have found some kind of exception for differential error, there is a split among the circuits as to its breadth–some circuits hold that juror testimony can be used to prove that the jury misunderstood the court's instructions, while other circuits limit the exception to pure "clerical" errors. Part Three briefly discusses whether the divergent case law might justify further consideration of an amendment to Rule 606(b). Part Four provides a short discussion of state law variations–short because no state version mentions or addresses the problem of differential error. Part Five sets forth models for amending Rule 606(b) should the Committee decide that an amendment to the Rule is worthy of

further consideration

## I. RULE 606(b) AND THE RELEVANT LEGISLATIVE HISTORY

***The Rule:***

Rule 606(b) provides as follows:

> **Rule 606. Competency of Juror as Witness**
>
> (a) *At the trial.* — A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.
>
> (b) *Inquiry into validity of verdict or indictment.* — Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

***Advisory Committee Note:***

The Advisory Committee Note to Rule 606(b) provides in pertinent part as follows:

> **Subdivision (b).** Whether testimony, affidavits, or statements of jurors should be received for the purpose of invalidating or supporting a verdict or indictment, and if so, under what circumstances, has given rise to substantial differences of opinion. The familiar rubric that a juror may not impeach his own verdict, dating from Lord Mansfield's time, is a gross oversimplification. **The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment. McDonald v. Pless, 238 U.S. 264, 35 S. Ct. 785, 59 L. Ed. 1300 (1915). On the other hand, simply putting verdicts beyond effective**

**reach can only promote irregularity and injustice. The rule offers an accommodation between these competing considerations.**

The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment. See Grenz v. Werre, 129 N.W.2d 681 (N.D. 1964). The authorities are in virtually complete accord in excluding the evidence. Fryer, Note on Disqualification of Witnesses, Selected Writings on Evidence and Trial 345, 347 (Fryer ed. 1957); Maguire, Weinstein, et al., Cases on Evidence 887 (5th ed. 1965); 8 Wigmore § 2349 (McNaughton Rev. 1961). As to matters other than mental operations and emotional reactions of jurors, substantial authority refuses to allow a juror to disclose irregularities which occur in the jury room, but allows his testimony as to irregularities occurring outside and allows outsiders to testify as to occurrences both inside and out. 8 Wigmore § 2354 (McNaughton Rev. 1961). However, the door of the jury room is not necessarily a satisfactory dividing point, and the Supreme Court has refused to accept it for every situation. Mattox v. United States, 146 U.S. 140, 13 S. Ct. 50, 36 L. Ed. 917 (1892). Under the federal decisions the central focus has been upon insulation in the manner in which the jury reached its verdict, and this protection extends to each of the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process. **Thus testimony or affidavits of jurors have been held incompetent to show a compromise verdict, Hyde v. United States, 225 U.S. 347, 382 (1912); a quotient verdict, McDonald v. Pless, 238 U.S. 264 (1915); speculation as to insurance coverage, Holden v. Porter, 405 F.2d 878 (10th Cir. 1969) and Farmers Coop. Elev. Ass'n v. Strand, 382 F.2d 224, 230 (8th Cir. 1967), *cert. denied*, 389 U.S. 1014; misinterpretation of instructions, Farmers Coop. Elev. Ass'n v. Strand, *supra;* mistake in returning verdict, United States v. Chereton, 309 F.2d 197 (6th Cir. 1962); interpretation of guilty plea by one defendant as implicating others, United States v. Crosby, 294 F.2d 928, 949 (2d Cir. 1961).** The policy does not, however, foreclose testimony by jurors as to prejudicial extraneous information or influences injected into or brought to bear upon the deliberative process. Thus a juror is recognized as competent to testify to statements by the bailiff or the introduction of a prejudicial newspaper account into the jury room, Mattox v. United States, 146 U.S. 140 (1892). See also Parker v. Gladden, 385 U.S. 363 (1966).

This rule does not purport to specify the substantive grounds for setting aside verdicts for irregularity; it deals only with the competency of jurors to testify concerning those grounds. Allowing them to testify as to matters other than their own inner reactions involves no particular hazard to the values sought to be protected. The rule is based upon this conclusion. It makes no attempt to specify the substantive grounds for setting aside verdicts for irregularity.

***Legislative History:***

The legislative history that is pertinent to the scope of any exception for proving differential error was well described by Judge Jerry Smith in *Robles v. Exxon Corporation,* 862 F.2d 1201, 1205 (5th Cir. 1989). *Robles* was a case in which the jurors were instructed that if they found the plaintiff more than 50% negligent, the plaintiff would not be entitled to recovery. The jury found the plaintiff 51% negligent. The judge, before discharging the jury, observed that the plaintiff would take nothing. After the jury was discharged, several jurors reported to the marshal that there was a "misunderstanding"–the jury thought that if they found the plaintiff more than 50% negligent, then the judge rather than the jury would assess damages. The judge took statements from the jurors, found that there was a misunderstanding about the instructions and that the jury intended that the plaintiff should recover "some money." The judge instructed the jury to resume deliberations, and the jury thereafter found the plaintiff 49% liable and assessed damages. On appeal, the defendant argued that the judge erred in taking jury statements that were not permitted by Rule 606(b). The plaintiff argued that juror statements could be used to prove that the jury misunderstood the court's instructions.

Judge Smith rejected the plaintiff's argument, relying on the following legislative history:

> After the Supreme Court adopted the present version of rule 606(b) and transmitted it to Congress, the House Judiciary Committee, noting the restrictive scope of the proposed rule, rejected it in favor of a broader formulation that would have allowed juror testimony on "objective jury misconduct" occurring at any point during the trial or the jury's deliberations. *See* H.R.Rep. No. 93-650, 93d Cong., 2d Sess. 9-10 (1973), *reprinted in* 1974 U.S.Code Cong. & Admin.News 7051, 7083. The Senate Judiciary Committee did not disagree with the House Judiciary Committee's interpretation of the rule proposed by the Court, but it left no uncertainty as to its view of the effects or wisdom of the House's proposed rule:
>
> > Although forbidding the impeachment of verdicts by inquiry into the jurors' mental processes, [the House's proposed rule] deletes from the Supreme Court version the proscription against testimony 'as to any matter or statement occurring during the course of the jury's deliberations.' This deletion would have the effect of opening verdicts up to challenge on the basis of what happened during the jury's internal deliberations, *for example, where a juror alleged that the jury refused to follow the trial judge's instructions....*
> >
> > Permitting an individual to attack a jury verdict based upon the jury's internal deliberations has long been recognized as unwise by the Supreme Court....
> >
> > ....
> >
> > Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function

> effectively if their deliberations are to be scrutinized in post-trial litigation. In the interests of protecting the jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors.

S.Rep. No. 93-1277, 93d Cong., 2d Sess. 13-14 (1974), *reprinted in* 1974 U.S.Code Cong. & Admin.News 7060 (emphasis added).

When the competing versions of rule 606(b) went to the Conference Committee, the Committee adopted, and Congress enacted, the version of rule 606(b) originally proposed by the Court and preferred by the Senate.

## II. CASE LAW ON DIFFERENTIAL ERROR

It is well-established that there is some exception to Rule 606(b) that permits the use of juror testimony to prove a disparity between the intent of the jury and the actual verdict reported. This is so even though the Rule, by its terms, does not provide an exception. Besides this fairly serious problem of case law divergence from the text of the Rule, there is an even more serious problem that might be addressed by an amendment: the courts are in clear conflict over the scope of the court-made exception to the Rule.

The dispute among the courts over the scope of the differential error exception is best understood by considering the two different kinds of fact situations in which such an error can arise. The first situation is where the jury decides on a verdict and it is simply misreported: for example, the foreman reports the verdict as "guilty" on a certain count when in fact the jury decided that the defendant was not guilty on that count, or the amount of damages is written incorrectly so that one or more zeroes are dropped from the end. This type of mistake has been called by the courts a "clerical error". The second kind of error is like that in *Robles*: the jury intends to come to a certain result but the result reported is different from that intent because the jury misunderstood the court's instructions. Thus, in *Robles*, the jurors unanimously agreed that the plaintiff should receive "some money"; yet under the verdict they rendered, the plaintiff actually received "no money" because the jury misunderstood the court's instructions. Another example of juror misunderstanding (or disregard) of instructions is *Plummer v. Springfield Railway Co.*, 5 F.3d 1 (1st Cir. 1993). In *Plummer*, the jury was told to assess damages in the gross amount, and was informed that this amount would then be reduced by the percentage of the plaintiff's fault that the jury had already found. The jury in fact reported damages in a net amount–reducing the damages by the plaintiff's percentage of fault. The trial judge then reduced the damages *again* by the plaintiff's percentage of fault. In *Plummer*, the jury wanted the plaintiff to get the net amount of damages that it had found; but it misunderstood, or ignored, the court's instruction that the amount they reported would be reduced.

### *Clerical Error*

All courts are in agreement that juror statements can be used to prove and correct what is referred to above as a "clerical error." For example, in *United States v. Dotson,* 817 F.2d 1127 (5th Cir. 1987), the Court found it permissible to take juror testimony after the trial court was informed that the foreman reported a guilty verdict on a count when the jury had in fact voted unanimously that the defendant was not guilty on that count. The rationale for this exception is that it does not implicate the policy of the Rule. Rule 606(b) is intended to protect the finality of jury verdicts and to prevent intrusions into jury deliberations. But there is no offense to the finality of jury verdicts if the court seeks to enforce the verdict that the jury actually rendered. And there is no intrusion into jury deliberations because the court is only trying to determine what the jury *decided*: it is not trying to determine how the jury reached its decision.

For other cases approving the "clerical error" exception to Rule 606(b), *see, e g., Teevee Toons, Inc. v. MP3.Com, Inc.,* 148 F.Supp.2d 276 (S.D.N.Y. 2001) (numbers entered on the verdict sheet were incorrect because of calculation errors caused by use of a Palm Pilot; inquiries into this "mechanical" error are unlikely to infringe on the jury's confidential deliberations); *Karl v. Burlington R.R.,* 880 F.2d 68 (8th Cir. 1988) ("The admission of a juror's testimony is proper to indicate the possibility of a 'clerical error' in the verdict, but not the 'validity' of the verdict.").

*Misunderstanding Instructions*

While all courts agree that juror statements can be used to correct clerical errors despite Rule 606(b), the courts are in disagreement about whether the Rule supports a broader exception allowing the use of juror statements when it appears that the verdict rendered is different from that intended because of a misunderstanding or disregard of the court's instructions.

***The following cases support the broader exception for juror misunderstandings:***

1. *Attridge v. Cencorp.,* 836 F.2d 113 (2d Cir. 1987): This was a case, like *Plummer*, in which the jurors thought they were giving the plaintiffs a true amount of damages adjusted for comparative negligence, but failed to understand that the adjustment for negligence would be made by the court. The Court noted that the Rule "is silent regarding inquiries designed to confirm the accuracy of a verdict." The Court stated that the instant case "involved correction of a clear miscommunication between the jury and the judge" and the trial court's interviews "were intended to resolve doubts regarding the accuracy of the verdict announced, and not to question the process by which those verdicts were reached." The Court concluded that the trial court's inquiry did not impinge upon the confidential juror deliberations that Rule 606(b) was designed to protect. The court concluded that "Unyielding refusal to question jurors is without sound judgment where the court surmises that the verdict announced differs from the result intended."

2. *Eastridge Development Co. v. Halpert Assoc., Inc.,* 853 F.2d 772 (10th Cir. 1988): This was another case in which the jury reduced an award for proportional fault, even though they were instructed that the adjustment would be made by the court. The Court found no violation of Rule 606(b), and simply declared that the trial court "properly amended the verdict to reflect the jury's true decision."

3. *McCullough v. Consolidated Rail Corp.,* 937 F.2d 1167 (6th Cir. 1991): This is yet another case in which the jury thought that it was supposed to report a "net" award of damages, reducing for proportionate fault, when in fact it was instructed to report a "gross" award that the trial judge would reduce. The Court noted that there is a "split of opinion from the other Circuit Courts" on whether Rule 606(b) permits proof of the error through juror statements. The Court opted for the broad exception to the Rule that permits proof of jury misunderstanding. It explained as follows:

In utilizing this approach, the interests of justice are served in assuring that McCullough receives the award that the jury intended and the values protected by FRE 606(b) are not violated. The amendment of the award in no way threatens the jury's freedom of deliberation. The district judge was careful to limit his inquiry to whether the jury intended an award of $235,000 minus 50 percent. He did not inquire into the thought processes of jurors, but merely asked for clarification of the final award.

***The following cases reject the broader exception for juror misunderstandings, and limit the court-made exception to clerical errors:***

1. *Plummer v. Springfield Term. Ry. Co.,* 5 F.3d 1 (1st Cir. 1993): As discussed above, *Plummer* was another case in which the jury returned a net award (reduced for plaintiff's proportionate fault) when it was instructed to return a gross award. The Court found that Rule 606(b) prohibited proof of such an error through juror statements. The Court's analysis is as follows:

> A number of circuits hold, and we agree, that juror testimony regarding an alleged clerical error, such as announcing a verdict different than that agreed upon, does not challenge the validity of the verdict or the deliberation or mental processes, and therefore is not subject to Rule 606(b). *See, e.g., Karl v. Burlington Northern Ry. Co.,* 880 F.2d 68, 73-74 (8th Cir.1989); *Eastridge Development Co. v. Halpert Associates,* 853 F.2d 772, 783 (10th Cir.1988); *see also Robles v. Exxon Corp.,* 862 F.2d 1201, 1207-08 (5th Cir.1989).
>
> In the present case, Plummer similarly argues that the rendered verdict was not the one agreed upon by the jury, and therefore that his requested inquiry does not invoke Rule 606(b).
>
> Several circuits might find this argument acceptable. In *Eastridge Development Co.,* for example, the jury, contrary to the court's instructions, reduced its verdict by the percentage of the plaintiff's own negligence. The district court interrogated the jury, accepted affidavits from the jury as to their damages calculation, and amended the ultimate award to reflect the jury's decision. The Tenth Circuit accepted the district court's rationale that the jury made a clerical error, and that the inquiry therefore did not violate Rule 606(b). *See also Attridge v. Cencorp Div. of Dover Tech. Int'l, Inc.,* 836 F.2d 113, 116-17 (2d Cir.1987).
>
> By contrast, the Eighth Circuit in *Karl,* 880 F.2d at 73-74, reversed similar actions by a district court judge when the jury made the same mistake. The court in that case found that the inquiry was improper because it went to the thought processes underlying the verdict, rather than the verdict's accuracy in capturing what the jurors had agreed upon.
>
> We agree with the district court that *Karl*'s approach better reflects the goals of Rule

606(b) . . . because it better insulates jury deliberations. In the present case, the verdict form, which the judge went over with the jury, instructed the jury not to reduce the damages verdict based on Plummer's negligence, and Plummer never objected to these instructions. Plummer's current allegations, however, suggest that the jurors believed that the rendered verdict would have a different effect on the parties, based on their understanding of the court's instructions. Plummer does not contend that the jurors never agreed upon the rendered verdict--the number that the jury chose is not in dispute. Accordingly, the requested inquiry went to what the jurors were thinking when they chose the number that they did and whether their thinking was sound.

2. *Robles v. Exxon Corp.,* 862 F.2d 1201 (5thCir. 1989): As discussed above, the jury thought that by finding the plaintiff 51% negligent, the judge would determine damages. They were wrong. The Court held that there was no exception to Rule 606(b) that would permit proof that the jury misunderstood instructions. The court noted that the Advisory Committee Note cited with favor a case precluding proof through juror statements when the contention was that the jury misunderstood instructions. (See the Committee Note, above). The Court also relied on the legislative history, set forth above, which expressed concern that a broad exception to the rule would permit proof through juror statements whenever the jury was alleged to have misunderstood instructions. The Court distinguished the narrow "clerical error" exception from the broader exception for juror misunderstanding in the following passage:

> The district court was correct when it noted that we have held that rule 606(b) does not bar juror testimony as to whether the verdict delivered in open court was actually that agreed upon by the jury. *See United States v. Dotson,* 817 F.2d 1127, 1130 (5th Cir.), *modified on rehearing,* 821 F.2d 1034 (5th Cir.1987); *University Computing Co. v. Lykes-Youngstown Corp.,* 504 F.2d 518, 547-48 n. 43 (5th Cir.1974). These holdings simply embody the sound reasoning that such inquiries are not directed at the "validity" of the verdict and thus are not covered by the rule. In *Dotson,* we noted that the admission of such testimony was proper to investigate the possibility of "a clerical error in a verdict," not its "validity" in the sense of being correct or proper, and that the cases to which this exception would apply are "few and far between." 817 F.2d at 1130. . . . . The category of "clerical" errors described in *Dotson,* therefore, can be understood to refer only to discrepancies between the verdict delivered in court and the precise verdict physically or verbally agreed to in the jury room, not to discrepancies between the verdict delivered in court and the verdict or general result which the jury testifies it "intended" to reach.
>
> . . . The error here is not "clerical," as would be the case where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon by the jury, or mistakenly stated that the defendant was "guilty" when the jury had actually agreed that the defendant was not guilty. Rather, the error alleged here goes to the substance of what the jury was asked to decide, necessarily implicating the jury's mental processes insofar as

it questions the jury's understanding of the court's instructions and application of those instructions to the facts of the case.

> The testimony from one of the jurors, for example, makes this point painfully obvious. Juror Nicholas testified that the jury understood the court's instructions to mean that "if we couldn't decide [on an award] and if it [i.e., the percentage of fault attributable to Robles] were 51 percent or more, that you would decide from the bench whether she should be rewarded." The testimony on its face violates rule 606(b) because it relates to how the jury interpreted, or as juror Nicholas put it, "misinterpretated," the court's instructions, and thus unquestionably constitutes testimony as to a "juror's mental processes" that is forbidden by the rule. In short, therefore, rule 606(b) operates in cases such as this to "[e]xclude [ ] ... testimony that a juror ... was confused about the legal significance of the jury's answers to special interrogatories...." 6 Weinstein ¶¶ 606[04] at 606-33 through 606-35 (footnotes omitted).

3. *Karl v. Burlington R.R. Co.,* 880 F.2d 68 (8th Cir. 1988): This is yet another case in which the jury rendered a net award when it was instructed to render a gross award. The Court held that Rule 606(b) precluded the use of juror statements to prove this error. The Court noted that the jury's error was not clerical in the sense that the verdict reported was not the one intended. The jury actually intended to render a verdict for the net amount. That intent was based on a misunderstanding, but it was nonetheless the exact verdict that the jury had agreed upon. The Court concluded:

> The jurors did not state that the figure written by the foreman was different from that which they agreed upon, but indicated that the figure the foreman wrote down was intended to be a net figure, not a gross figure. Receiving such statements violates Rule 606(b) because the testimony relates to how the jury interpreted the court's instructions, and concerns the jurors' mental processes, which is forbidden by the rule.

***Summary of the case law***

The courts are in general agreement that Rule 606(b) permits juror testimony to rectify a clerical error–defined as a mistransmission of what the jury actually decided–even though the text of the Rule does not provide such an exception. The courts are severely split, however, on whether the Rule permits juror testimony to prove that the jury intended to render a different verdict than it actually did, where the error was caused by a misunderstanding or disregard of the court's instructions.

## III. THE CASE FOR AND AGAINST AN AMENDMENT TO RULE 606(B)

The case for an amendment to Rule 606(b) is simply stated. First, there is a divergence between the case law and the text of the Rule: the courts have created an exception that is not set forth in the text. This problem of divergence previously has been recognized by the Evidence Rules Committee as a reason to consider an amendment to the Rule. Where case law diverges from the text, this can create a trap for the unwary–a lawyer may think that the text of the Rule defines its scope, and that would not be the case. Moreover, case law that diverges from the text of one of the Federal Rules of Evidence can be considered doubtful because the Supreme Court has stated that the Federal Rules must be construed for their "plain meaning." *United States v. Salerno,* 505 U.S. 317 (1992). Thus, a lawyer who relies on divergent case law does so at some peril.

The second justification for a possible amendment is that there is a serious split in the case law over the scope of the exception. Circuit splits are a well-recognized justification for an amendment to the Evidence Rules. By rectifying circuit splits, a rule amendment provides for uniform application of the Evidence Rules and eliminates significant uncertainty.

One argument against an amendment (beyond the recitation of the costs of *any* amendment) is that the existence and scope of the exception to Rule 606(b) for differential error are not issues that arise with much frequency. Other than *Dotson,* most of the cases are civil cases that fit a specific fact situation–the jury misconstrues some aspect of comparative fault. It is certainly possible that a failure to understand instructions could result in jury error in a large number of different kinds of cases, but so far almost all of the cases are limited to a fairly specific kind of case. Moreover, clerical errors by the jury are usually recognized before the jury is discharged and so can be corrected without violating Rule 606(b).

Another possible deterrent to an amendment could be the difficulties in deciding on and describing the scope of the exception in the text of the Rule. First, the Committee must decide whether to adopt the broader "jury misunderstanding" exception or the narrower "clerical error" exception. This is a policy question that requires some deliberation. It would appear that the narrower view is more consistent with the policy of the Rule to protect the confidentiality of juror deliberations, as the *Robles* court so forcefully stated. While that is probably so, it is nonetheless a somewhat difficult policy choice. The second difficulty is finding the right language that will not be misinterpreted.

It is for the Committee to determine whether the benefits of an amendment outweigh the costs. For now, all the Committee needs to decide is whether it will give further consideration to an amendment to Rule 606(b).

## IV. STATE LAW VARIATIONS

None of the state law versions of Rule 606(b) provide an exception for differential error in any form. (Several states do not have a version of Rule 606(b)). What follows are some state variations that deal with other questions that the Committee may, or may not, wish to address if it decides to continue its consideration of an amendment to Federal Rule 606(b).

### Alabama

Alabama adds a sentence permitting juror testimony in *support* of a verdict:

> **(b) Inquiry Into Validity of Verdict or Indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify in impeachment of the verdict or indictment as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes. *Nothing herein precludes a juror from testifying in support of a verdict or indictment.*

**Comment: Rule 606(b) is based on two policies: protecting the finality of verdicts and protecting the confidentiality of juror deliberations. Only one of these policies is implicated by excluding juror statements offered in support of a verdict–the confidentiality policy. The finality policy in fact cuts in favor of the Alabama rule–finality principles are furthered by allowing juror testimony in support of a verdict. The Alabama rule raises an interesting question that the Committee may wish to consider if it decides to give further consideration to an amendment to Rule 606(b).**

### Idaho

Idaho adds an exception for verdicts rendered by chance.

> **(b) Inquiry to Validity of Verdict or Indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or

indictment or concerning the juror's mental processes in connection therewith, nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes, but a juror may testify on the questions whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror *and may be questioned about or may execute an affidavit on the issue of whether or not the jury determined any issue by resort to chance.*

**Comment: Several other states have included exceptions for verdicts reached by chance, e.g., Montana, Ohio and Tennessee.**

**Indiana**

Indiana allows testimony concerning drug and alcohol abuse by jurors. It also numbers the exceptions.

**(b) Inquiry into Validity of Verdict or Indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify *(1) to drug or alcohol use by any juror,* (2) on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or (3) whether any outside influence was improperly brought to bear upon any juror. A juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying may not be received for these purposes.

**Comment: Amending the Federal Rule to include an exception for drug and alcohol abuse would require rejection of the Supreme Court decision in *Tanner v. United States,* 483 U.S. 107 (1987), where the Court held that Rule 606(b) prohibited the use of juror statements to prove that two jurors were using drugs during the trial.**

**Minnesota**

Minnesota adds proof of threats and violence as an exception:

> **(b) Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention, or whether any outside influence was improperly brought to bear upon any juror, *or as to any threats of violence or violent acts brought to bear on jurors, from whatever source, to reach a verdict.* Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

**Comment: Threats of violence from outsiders are already covered by the exception for "outside influence." The Minnesota Rule goes one step further and permits proof by juror testimony that one juror threatened another with violence or committed an act of violence on another juror.**

**Vermont**

Vermont adds an exception for evidence that any juror discussed the trial with anyone other than fellow jurors.

> **(b) Inquiry Into Validity of Verdict or Indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received; but a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention, whether any outside influence was improperly brought to bear upon any juror, *or whether any juror discussed matters pertaining to the trial with persons other than his fellow jurors.*

## V. MODELS FOR A POSSIBLE AMENDMENT TO RULE 606(b)

What follows are two models for a possible amendment to Rule 606(b) that can be used if the Committee decides to continue its consideration of a possible amendment. If the Committee does agree to continue its consideration of Rule 606(b), it will obviously be for the Committee to determine whether it wishes to pursue a narrow ("clerical error") exception or a broader ("misunderstood instruction") exception. Model One attempts to codify the narrow "clerical error" exception. Model Two attempts to codify the broader "intent of the jury" exception which would permit proof that the jury misunderstood the court's instructions.

Note that both models contain stylistic changes to the last sentence of the Rule. That sentence is awkward because it begins with a "Nor" that should connect to the general exclusionary principle that begins the Rule. But the exceptions to the Rule are placed in between the exclusionary rule and the "Nor" sentences. So the Rule reads awkwardly in its current form. Hence the stylistic change.

### *Model One: Clerical Error Exception*

**Rule 606. Competency of Juror as Witness**

(a) *At the trial.* — A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) *Inquiry into validity of verdict or indictment.* — Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith~~; .except that~~ But a juror may testify ~~on the question~~ about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) ~~or~~ whether any outside influence was improperly brought to bear upon any juror, or (3) whether the verdict reported is the verdict that was rendered by the jury. ~~Nor may a~~ A juror's affidavit or evidence of any statement by the juror ~~concerning~~ may not be received on a matter about which the juror would be precluded from testifying ~~be received for these purposes~~.

**Committee Note**

Rule 606(b) has been amended to provide that juror testimony may be used to prove that the verdict rendered was tainted by a clerical error. The amendment responds to a divergence between

the text of the Rule and the case law that has established an exception for proof of clerical errors. *See, e.g., Plummer v. Springfield Term. Ry. Co.*, 5 F.3d 1, 3 (1st Cir. 1993) ("A number of circuits hold, and we agree, that juror testimony regarding an alleged clerical error, such as announcing a verdict different than that agreed upon, does not challenge the validity of the verdict or the deliberation of mental processes, and therefore is not subject to Rule 606(b)."); *Teevee Toons, Inc., v. MP3.Com, Inc.*, 148 F.Supp.2d 276, 278 (S.D.N.Y. 2001) (noting that Rule 606(b) has been silent regarding inquiries designed to confirm the accuracy of a verdict).

In adopting the exception for proof of clerical errors, the amendment specifically rejects the broader exception, adopted by some courts, permitting the use of juror testimony to prove that the jurors were operating under a misunderstanding about the consequences of the result that they agreed upon. *See, e.g., Attridge v. Cencorp Div. of Dover Techs. Int'l, Inc.*, 836 F.2d 113, 116 (2d Cir. 1987); *Eastridge Development Co., v. Halpert Associates, Inc.*, 853 F.2d 772 (10th Cir. 1988). The broader exception is rejected because an inquiry into whether the jury misunderstood or misapplied an instruction goes to the jurors' mental processes underlying the verdict, rather than the verdict's accuracy in capturing what the jurors had agreed upon. *See, e.g., Karl v. Burlington Northern R.R. Co.*, 880 F.2d 68, 74 (8th Cir. 1989) (error to receive juror testimony on whether verdict was the result of jurors' misunderstanding of instructions: "The jurors did not state that the figure written by the foreman was different from that which they agreed upon, but indicated that the figure the foreman wrote down was intended to be a net figure, not a gross figure. Receiving such statements violates Rule 606(b) because the testimony relates to how the jury interpreted the court's instructions, and concerns the jurors' 'mental processes,' which is forbidden by the rule."); *Robles v. Exxon Corp.*, 862 F.2d 1201, 1208 (5th Cir. 1989) ( "the alleged error here goes to the substance of what the jury was asked to decide, necessarily implicating the jury's mental processes insofar as it questions the jury's understanding of the court's instructions and application of those instructions to the facts of the case"). Thus, the "clerical error" exception to the Rule is limited to cases such as "where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon the by the jury, or mistakenly stated that the defendant was 'guilty' when the jury had actually agreed that the defendant was not guilty." *Id.*

## *Model Two: Exception For Misunderstood Instructions*

**Rule 606. Competency of Juror as Witness**

(a) *At the trial.* — A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) *Inquiry into validity of verdict or indictment.* — Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith; ~~.except that~~ But a juror may testify ~~on the question~~ about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) ~~or~~ whether any outside influence was improperly brought to bear upon any juror, or (3) whether the verdict reported is the result that was intended by the jury. ~~Nor may a~~ A juror's affidavit or evidence of any statement by the juror ~~concerning~~ may not be received on a matter about which the juror would be precluded from testifying ~~be received for these purposes~~.

**Committee Note**

Rule 606(b) has been amended to provide that juror testimony may be used to prove that the verdict rendered is different from the result that the jury intended. The amendment responds to a divergence between the text of the Rule and the case law that has established an exception for proof of errors in rendering the verdict. *Teevee Toons, Inc., v. MP3.Com, Inc.,* 148 F.Supp.2d 276, 278 (S.D.N.Y. 2001) (noting that Rule 606(b) has been silent regarding inquiries designed to confirm the accuracy of a verdict).

The intent of the amendment is to codify the case law permitting juror testimony not only to correct clerical errors, but also to correct verdicts that were rendered by a jury that misunderstood or misapplied instructions. This exception furthers the interests of justice in assuring the accuracy of the verdict, and does not permit unnecessary intrusion into the thought processes of jurors. *See, e.g., Attridge v. Cencorp Div. of Dover Techs. Int'l, Inc.,* 836 F.2d 113, 114 (2d Cir. 1987) ("Unyielding refusal to question jurors is without sound judgment whether the court surmises that the verdict differs from the result intended"); *McCullough v. Consolidated Rail Corp.,* 937 F.2d 1167, 1171 (6th Cir. 1991) (permitting juror testimony to prove that the jury intended that the amount of damages it announced would not be reduced: "The district court judge was careful to limit his inquiry to whether the jury intended an award of $235,000 minus fifty per cent. He did not inquire into the thought processes of the jurors, but merely asked for clarification of the final award."). The amendment accordingly rejects those cases that limited juror testimony to correct a verdict to the narrow circumstance of "clerical error." *See, e.g., Karl v. Burlington Northern R.R. Co.,* 880 F.2d 68, 74 (8th Cir. 1989).

Memorandum to: Advisory Committee on Evidence Rules
From: Ken Broun, Consultant
Re: Consideration of possible amendment to Rule 803(6)
Date: April 3, 2003

The Committee has asked me to prepare a report on the possibility of amending Rule 803(6).. The Rule 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, and if it was the regular practice of that business activity to make the memorandum." The issue is whether language should be added that would clarify the need, or lack of need, for a business duty to report the information.

Part A of this report outlines the history of the Rule with regard to the question of whether the person reporting information is required to be under a business duty. Part B looks at federal case authority on the issue. Part C considers state approaches to the issue. Part D sets forth some alternative proposals for the Committee.

This report does not take a position with regard to the question of possible amendment, but rather simply attempts to lay out the options for the committee.[1]

## A. History

The general business records hearsay exception originated in English law in the early 1600's. 5 Wigmore, Evidence § 1517, 1518 (Chadbourn rev. 1974). Wigmore identified three distinct motives that indicate the unusual reliability of business records. *Id.* at § 1522. First, the very habit and system of making the entry for purposes of business helps to ensure accuracy. *Id.* Second, because the entry is made for business purposes, any mistake or error is likely to be detected and corrected. *Id.* Third, if the record is made by other than the entrepreneur, such as an agent or employee, the duty inherent in the relationship and the risk of reprimand create a motive for accuracy. *Id.* These motivations have been widely recognized. *See e.g.* John W. Strong, McCormick on Evidence §§ 281, 286, 287 (5th ed. 1999); Advisory Committee Note to FRE 803(6).

Wigmore's statement of the common law rule contained the requirement that, if information was supplied by one person to another, both had to be acting in the regular course of business. 5 Wigmore at § 1530. American courts initially adopted the English business records exception with its inherent business duty requirement. *See Nicholls v. Webb*, 21 U.S. (8 Wheat.) 326, 337(1823), (memoranda made by a person in the ordinary course of his business, "of acts or matters which his duty in such business requires him to do for others") However, over time state courts interpreted the common law requirements differently and some rejected the business duty requirement altogether.

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[1]In preparing this report, I appreciate and acknowledge the particularly useful research done by my research assistant, UNC second-year student, Chad Hansen.

*See e.g. Lebrun v. Boston & Maine R.R.*, 142 Atl. 128, 133 (1928) ("Under the American rule there is no requirement that the entry shall have been made in the performance of a duty to another").

The first model statute setting forth a business record exception, the Commonwealth Fund Act (subsequently adopted in substantially this form as the Federal Business Records Act, 28 U.S.C. § 695 (1940) and recodified in 28 U.S.C. § 1732 (1994)), required that the document be "made in the regular course" of business but did not specifically require that there be a business duty on behalf of the person reporting the information. Likewise, the Uniform Business Records as Evidence Act approved in 1936 required that the record be "made in the regular course of business" but did not expressly address the business duty issue.

The matter was addressed in New York's landmark decision in *Johnson v. Lutz,* 170 N.E. 517 (N.Y. 1930). In that case, the New York Court of Appeals interpreted section 374-a of New York's Civil Practice Act of 1928, which contained a business records exception identical in language to that of the Commonwealth Fund Act. The court held that a police accident report, containing hearsay information from accident witnesses, was not admissible under New York's business records exception because the witnesses furnishing the information were not acting under a duty to furnish it. The court said (170 N.E. 2d at 518):

> The purpose of the Legislature in enacting section 374-a [of the Civil Practice Act], was to permit a writing or record, made in the regular course of business, to be received in evidence, without the necessity of calling as witnesses all of the persons who had any part in making it, provided the record was made as a part of the duty of the person making it, or on information imparted by persons who were under a duty to impart such information. The amendment permits the introduction of shopbooks without the necessity of calling all clerks who may have sold different items of account. It was not intended to permit the receipt in evidence of entries based upon voluntary hearsay statements made by third parties not engaged in the business or under any duty in relation thereto.

The court found that the "made in the regular course of business" requirement contained in the business records exception implicitly imposes a business duty to report. Put differently, a document is not "made in the regular course of business" if the supplier of the information to the entrant is an outsider, as distinguished from a person acting under a business duty.

The Supreme Court's version of Rule 803(6) incorporated the essential features of the Commonwealth Fund Act and the Uniform Business Records as Evidence Act. 1 McCormick on Evidence §286 at 251. Although the Rule did not expressly establish a business duty requirement, the Advisory Committee's comment relies upon *Johnson v. Lutz,* and clearly states the drafter's intention that such a duty is implicit in the rule. The Committee stated:

> All participants, including the observer or participant furnishing the information to be recorded, were acting routinely, under a duty of accuracy, with employer reliance on the result, or in short "in the regular course of business." If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. An illustration is the police report incorporating information obtained from a bystander: the officer qualifies as acting in the regular course but the informant does not. The leading case, *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930), held that a report thus prepared was inadmissible. Most of the authorities have agreed with the decision. *Gencarella v. Fyfe*, 171 F.2d 419 (1st Cir.1948); *Gordon v. Robinson*, 210 F.2d 192 (3d Cir.1954); *Standard Oil Co of California v. Moore*, 251 F.2d 188, 214 (9th Cir.1957), cert. denied 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148; *Yates v. Bair Transport, Inc.*, 249 F.Supp. 681 (S.D.N.Y.1965);

The Rule proposed by the Committee and promulgated by the Supreme Court was amended by Congress. The phrase "in the course of regularly conducted activity" was replaced by "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." There seems to be nothing in the change made in Congress that was intended to address the business duty issue. The Congressional Committee Reports do not mention the business duty requirement. *See* Vt. R. Evid. 803(6) reporter's notes (Rejecting construing Congress's changes to Supreme Court's text of 803(6) as eliminating the requirement of a business duty to transmit).

**B. Federal Cases**

**1. Cases Requiring a Business Duty**

Most of the federal courts that have considered the question have found an implicit business duty requirement. Some imply a business duty as part of the "regular course of business" requirement. *See e.g., U.S. v. Ismoila*, 100 F.3d 380, 392 (5th Cir. 1996) ("business records exception to hearsay rule 'applies only if person who makes statement is himself acting in regular course of business'"; quoting *Rock v. Huffco Gas & Oil Co., Inc.*, 922 F.2d 272, 279 (5th Cir. 1991)); *Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260, 271 (5th Cir. 1991) (double hearsay, in context of business record, exists when record is prepared by employee with information supplied by another person; if both source and recorder of information, as well as every other participant in chain producing record, are acting in regular course of business, multiple hearsay is excused by business records exception to hearsay rule); *Gardner v. Chevron U.S. A., Inc.*, 675 F.2d 658, 660 (5th Cir. 1982) (reports purportedly made by employer's production foreman, containing facts reported to him by

other employees, were admissible because made in regular course of employer's business and were sufficiently trustworthy to be admitted into evidence); *U.S. v. Turner*, 189 F.3d 712, 720 (8th Cir. 1999) ("If both the source and recorder of the information were acting in the regular course of the organization's business . . . the hearsay upon hearsay problem may be excused by the business records exception to the rule against hearsay"); *Grogg v. Missouri Pacific R. Co.*, 841 F.2d 210, 213-14 (8th Cir. 1988) (if both source and recorder of information contained in railroad's document were acting in regular course of railroad's business, multiple hearsay contained in document prepared by individual who relied on hearsay information when he filled out document was excused by business record evidence rule); *U.S. v. Baker*, 693 F.2d 183, 188 (D.C.Cir. 1982) ("if both the source and the recorder of the information, as well as every other participant in the chain producing the record, are acting in the regular course of business, the multiple hearsay is excused by Rule 803(6)"); *U.S. v Smith*, 521 F.2d 957, 964 (D.C.Cir. 1975) ("while [803(6)] exempts the maker of the record from the requirement of personal knowledge, it allows admission of the hearsay only if it was reported to the maker, directly or through others, by one who is himself acting in the regular course of business, and who has personal knowledge").

Other opinions couch the requirement in explicit terms of a business duty to report. *See e.g., U.S. v. Bortnovsky*, 879 F.2d 30, 34 (2d Cir. 1989) (statement contained within insurance adjuster's report not admissible because person giving information had no duty to report information); *Sana v. Hawaiian Cruises, Ltd.*, 181 F.3d 1041, 1046-47 (9th Cir. 1999) (report of investigator for vessel owner's insurer was admissible as business record because owner had duty to investigate crewmember's injuries, co-workers had corresponding duty to cooperate in investigation, and fulfilling such duties was usual or ordinary fact of life for maritime industry); *Bemis v. Edwards*, 45 F.3d 1369, 1372 (9th Cir. 1995) (tape of 911 conversation between operator and citizen held inadmissible because "citizens who call 911 are not under any 'duty to report'"). Others apply the business duty in terms of a duty of accuracy. *See e.g., U.S. v. Pazsint*, 703 F.2d 420, 424 (9th Cir. 1983) (business records exception to hearsay rule applies only if person furnishing information to be recorded is acting routinely, under duty of accuracy, with employer reliance on the result, or in regular course of business); Clark v. City of Los Angeles, 650 F.2d 1033, 1037 (9th Cir. 1981) ("Hearsay statements are admissible only if the observer or participant in furnishing the information to be recorded was 'acting routinely, under a duty of accuracy, with employer reliance on the result, or in short in the regular course of business'").

Accident occurrences reported from consumers or retailers to the manufacturers in product liability cases have been held inadmissible absent a duty to report. *Cameron v. Otto Bock Orthopedic Industry, Inc.*, 43 F.3d 14, 16-17 (1st Cir. 1994) ("product failure reports" that prosthetic component manufacturer required prosthetists to fill out were not admissible under business record exception to hearsay rule in patient's products liability action against manufacturer; information contained in reports was provided to manufacturer from independent prosthetists who themselves derived some or all information from their own patients); *Weir v. Crown Equipment Corp.*, 217 F.3d 453, 458-59 (7th Cir. 2000) (accident

reports held inadmissible where injured forklift operator failed to show that accident reports prepared by forklift manufacturer from information transmitted by customers fell within exception).

Law enforcement reports containing information provided by third parties have likewise been held inadmissible where the third party is not under a business duty. *U. S. v. Davis*, 571 F.2d 1354, 1359 (5th Cir. 1978) (statements made by gun manufacturer's records custodian and incorporated into an ATF report held inadmissible because custodian under no duty business duty); *Florida Canal Industries, Inc. v. Rambo*, 537 F.2d 200, 203 (5th Cir.1976) (Coast Guard report containing a statement by a yacht owner as to the causation of a marine accident offered to prove the truth of the statement was appropriately excluded by the district court).

Other cases requiring a business duty include *T. Harris Young & Assocs. v. Marquette Elecs., Inc.*, 931 F.2d 816, 828 (11th Cir. 1991) (employees of other businesses in responding to survey were not acting in regular course of surveying company's business); *ADP-Financial Computer Services, Inc. v. First Nat. Bank of Cobb County*, 703 F.2d 1261, 1266 (11th Cir.1983) (contents of customer surveys did not qualify as a business records exception to the hearsay rule).

**2. Cases requiring a business duty but excusing it**

The business duty requirement has not been an obstacle to admission where the recorded statements are independently subject to a hearsay exception or exemption. Thus statements have been admitted under the business records exception when the underlying declarations were nonhearsay statements offered as admission of a party opponent under FRE 801(d)(2)(A). *Bondie v. Bic Corp.*, 947 F.2d 1531, 1534 (6th Cir.1991) (admission of party received through social worker's report, where recording such statements was part of social worker's regular activity); *U.S. v. Johnson*, 28 F.3d 1487, 1498-99 (8th Cir. 1994) (money transfer applications were held admissible as business records despite being partially filled out by nonemployees of company because that portion of the applications allegedly completed by defendants themselves constituted admissions of party-opponent); *U.S. v. Basey*, 613 F.2d 198, 202, n. 1 (9th Cir. 1979) (not error for District Court to admit defendant's college records to establish her addreses where a sufficient custodian testified that the records were made and kept in the regular course of college business). The same theory applies for prior inconsistent statements. *U.S. v. Smith*, 521 F.2d 957, 965 (D.C.Cir. 1975) (entry in police record of what complaining witness said not competent to prove truth of what was said, since he was not acting in the course of business, but usable for impeachment as prior inconsistent statement). It has also been applied where statements were offered for their effect upon the listener under FRE 803(3). *Woods v. City of Chicago*, 234 F.3d 979, 986-87 (police report containing hearsay statements admissible as business record when underlying hearsay offered to show the effect that the statements had on the officers).

*See also Wolff v. Brown*, 128 F.3d 682, 685 (8th Cir. 1997) (in employment discrimination case, internal documents containing hearsay from third party relied upon by employer in making employment decision are not offered to prove truth of matters asserted and, thus, are not hearsay).

If the matter recorded itself satisfies the conditions of some other hearsay exception, the requirement that the person initially acquiring the information must be acting in the regular course of the business does not apply. This rationale has been applied frequently in cases where the statements have been made for the purpose of medical treatment or diagnosis under FRE 803(4). *See e.g., Petrocelli v. Gallison*, 679 F.2d 286, 289-90 (1st Cir. 1982) (entries in hospital records relaying what patient or his wife told the reporting physicians when providing medical history would have been admissible through Rule 803(6) when combined with Rule 803(4)).

Where the underlying hearsay exception for transmission fails, the business records exception for recording fails as well. *Gray v. Busch Entertainment Corp.*, 886 F.2d 14, 15-16 (2d Cir. 1989) (business record rule did not provide basis for admitting hearsay statement in amusement park's first aid report concerning patron's fall from small train where underlying statement did not fall within any hearsay exception); *Rock v. Huffco Gas & Oil Co., Inc.*, 922 F.2d 272, 279 (5th Cir. 1991) (statements of fault made by patient to his physicians, recorded in his medical records, were not admissible under business records exception to the hearsay rule, since patient was not acting in the usual course of his business); *Cook v. Hoppin*, 783 F.2d 684, 690 (7th Cir. 1986) (statements contained in medical records pertained to fault and were therefore not within Rule 803(4)).

### 3. Cases relaxing business duty

Some federal cases have relaxed the business duty requirement when the underlying data has been verified. The relaxation has occurred under two different theories: (1) a more moderate theory requiring contemporaneous verification; and (2) a more liberal theory allowing independent, noncontemporaneous verification. Other cases have relaxed the rule based upon a contractual duty to furnish information. Some other courts have abrogated the requirement where there are other adequate guarantees of trustworthiness.

#### A. Relaxation for verification.

##### (i) Contemporaneous verification

Of those that have adopted the verification theory, a majority of the courts only allow verification where the information is easily verifiable by credit card, driver's license or other form of identification, such as name, address, or date of birth.

Contemporaneous verification has been allowed where hearsay statements were included on retails sales forms and receipts. *U.S. v. Sutton*, 248 F.3d 1161 (7th Cir. 2000) (unpublished opinion) (pawn shop receipt admissible where pawn shop employee verified and copied defendant's drivers license); *U.S. v. Bland*, 961 F.2d 123, 127 (9th Cir. 1992) (customer's name on firearm purchase record admissible because customer was under a legal duty to report truthful information and employee verified customer's name from identification); *U.S. v. David*, 96 F.3d 1477, 1482 (D.C.Cir. 1996) (pager company receipt forms admitted to prove address and telephone number of defendant where employee of company verified information from photo identification). The same rationale has been applied to a prison visitor logbook. *See U.S. v. Reyes*, 157 F.3d 949, 952-53 (2d Cir. 1998) (prison visitor logbook held admissible where prison personnel verify names through ID verification and such verification is a regular practice; "The person making the record need not have a duty to report so long as someone has a duty to verify the information reported"). Some courts have recognized the possibility of bringing the record within the exception through verification but find no such verification present under the circumstances. *E.g., U.S. v. Patrick*, 959 F.2d 991, 1001-02 (D.C.Cir. 1992) (receipt from Circuit City containing defendant's name and address held inadmissible to prove that defendant resided in apartment where cocaine and weapon were found, because no proof offered of employee verification procedures).

Hotel registration cards containing personal information provided by the hotel customer have been regularly admitted. *See United States v. Saint Prix*, 672 F.2d 1077, 1084 (2d Cir. 1982) (hotel registration cards filled out by guests admitted when government showed sufficient corroboration of card information); *U.S. v. Lieberman*, 637 F.2d 95, 100-01 (2nd Cir. 1980) (hotel registration card held admissible where hotel employee verified names and addresses of guests by requiring identification; "Evidence that it was someone's business duty in the organization's routine to observe the matter will be prima facie sufficient to establish actual knowledge. This does not dispense with the need for personal knowledge, but permits it to be proved by evidence of practice and a reasonable assumption that general practice was followed in regard to a particular matter"); *U.S. v. Zapata*, 871 F.2d 616, 625-26 (7th Cir. 1989) (hotel guest registration card held admissible where manager testified to standard practice of verifying the information provided; "In applying the business records exception of the hearsay rule to hotel guest registrations, the inquiry is not controlled by the status of the recording person as a hotel employee or a guest").

Courts have also recognized the possibility of qualifying Western Union money transfers containing hearsay statements made by customers where verified by an employee through appropriate identification. *See U.S. v. Vigneau*, 187 F.3d 70, 74-76 (1st Cir. 1999) (portion of Western Union form completed by customer and containing the sender's name held inadmissible because the customer had no duty to report information and Western Union had no verification system in place); *U.S. v. Mitchell*, 49 F.3d 769, 778 (D.C. Cir. 1995) (if business records contain information obtained from customer, thus constituting hearsay within hearsay, information will come within business records exception to hearsay rule only

if it is shown that business' standard practice was to verify information provided by customer).

### (ii) Independent, Noncontemporaneous Verification

A more liberal approach to the verification theory has been applied in a few opinions. These cases show a trend to allow hearsay upon hearsay when independent verification of the original record occurs by someone with a business duty to verify. *See U.S. v. Sokolow*, 91 F.3d 396, 403 (3rd Cir. 1996) (claims audit of proof of claim forms performed in the regular course of business held sufficient verification to allow admission of the forms under the business records exception; "Although the Inservco business records were derived in part from information provided by outside persons not under a business compulsion, the business records exception may still apply 'if the business entity has adequate verification'"); *U.S. v Console*, 13 F.3d 641, 657-58 (3rd Cir. 1993) (spiral notebook "Accident Book" created by physician's employees from patients, which listed date of accident patients' first visits, held admissible when offered by government in chart as proof of fraud, because of independent verification). Other courts have recognized the principle but refused to apply it under the circumstances. *See U.S. v. Santos*, 201 F.3d 953, 963 (7th Cir. 2000) (in prosecution of former city treasurer for extorting campaign contributions, complaints filed by treasurer's office employee about city treasurer with the city's board of ethics should not have been admitted under hearsay rule's business records exception, since complaints based in ethics board's files were never verified by the business so as to become the business's own statements); *Datamatic Services, Inc. v. U.S.*, 909 F.2d 1029, 1033, n. 2 (7th Cir. 1990) (letter created from questionnaire responses inadmissible where no verification of client's responses occurred and clients not under business duty). *See also Saks Intern., Inc. v. M/V Export Champion,* 817 F.2d 1011, 1013-14 (2nd Cir. 1987) (African loading tallies prepared by company providing stevedoring services at several ports held admissible under the business records exception because of the reliance of the shipping company and the presence of customary spot checks for accuracy)

### B. Relaxation for Contractual Duty to Furnish Information

The court in *White Industries, Inc. v. Cessna Aircraft Co.*, 611. F. Supp. 1049, 1059 (W.D. Mo. 1985) recognized the business duty requirement inherent in FRE 803(6) but would relax the business duty requirement where the outsider declarant has a contractual duty to the entrant to furnish the information. The court identified "circumstantial guarantees of trustworthiness" found in the more traditional business duty relationships of employer-employee and principal-agent (611 F. Supp. at 1060-61):

> . . . (a) a business interest in obtaining the information on the employer or principal's part, usually expressed by way of some custom, policy or directive and reflected in the employer or principal's reliance on and use of the information, coupled with steps (training programs, audits, etc.) to insure that those requirements are accurately

carried out; (b) a corresponding duty on the employee or agent's part to collect and record the information, accompanied by an element of potential detriment to the employee or agent--as by discipline, failure of advancement, termination of relationship, etc.--if the duty is breached; and (c), the general trustworthiness which attends the fact that most employees and agents are loyal and have an interest in reporting correct business information to their employer or principal.

The court knowingly relaxed the business duty requirement to include contractual duties to supply information because the court believed that the continuing contractual duty to report is analogous to the more traditional relationships and shared many of the circumstances that assure trustworthiness. The court left open the possibility that there were other relationships that would fit the framework for a business duty, but was "reluctant to venture further afield except where comparable elements of trustworthiness are present." The court recognized that relaxing the business duty requirement risked "leaving behind the assurances and rationale which support this aspect of Rule 803(6)"(611 F.Supp. at 1061).

**C. Relaxation Where There Are Other Adequate Guarantees of Trustworthiness**

On occasion, courts have seemingly carved out an even more liberal exception to the business duty requirement that allows admission of evidence that has adequate guarantees of trustworthiness.

Some Tenth Circuit cases indicate that that court would accept guarantees of trustworthiness derived from a business's self interest in determining the application of the business records exception even in the absence of a business duty to report. *See U.S. v. Cestnik*, 36 F.3d 904, 908 (10th Cir. 1994) (portion of "to-send-money" forms that were completed by costumer and contained personal information not admissible under business records exception because the Western Union agents " did not verify senders' identifications, and nothing else in the record indicates that Western Union had a sufficiently compelling self-interest in ensuring the accuracy of information filled out by its customers to justify an inference of reliability"); *U.S. v. McIntyre*, 997 F.2d 687, 700-01 (10th Cir. 1993) (arrival and departure log and registration form from motels held inadmissible under the business records exception where completed by employee from information provided by guest because the financial self-interests of the business were not sufficient; no plain error; "We do not feel that in every case there must be direct testimony that an employee actually verified the information, nor is it necessary that there be an express policy that identification be checked. In some cases, the interests of the business may be such that there exists a sufficient self-interest in the accuracy of the log that we can find its contents to be trustworthy").

Business reliance is another guarantee of trustworthiness accepted in several cases, although it may very well be the same "self interest" suggested by the Tenth Circuit. *See U.S. v. Duncan*, 919 F.2d 981, 987 (5th Cir. 1990) (records of insurance company compiled

from business records of hospitals held admissible because the records are the type that both hospitals and insurance companies rely in conducting business); *Baxter Healthcare Corp. v. Healthdyne, Inc.*, 944 F.2d 1573, 1577 (11th Cir. 1991), *opinion vacated based on settlement,* 956 F.2d 226 (1992) (customer complaint records sent from physicians to manufacturer of medical devices held admissible because both physician and manufacturer relied upon the information to improve product); *Air Land Forwarders, Inc. v. U.S.*, 172 F.3d 1338, 1341-42 (Fed.Cir. 1999) (repair estimates produced by third parties and submitted by the service members as "business records" of the military held admissible because it was the regular practice of the military to obtain, integrate, and rely upon the estimates for day-to-day business and because potential criminal prosecution for falsity indicates trustworthiness).

Some opinions have referred to guarantees of trustworthiness generally. *See Mississippi River Grain Elevator, Inc v. Bartlett & Co* , Grain. 659 F.2d 1314, 1319 (5th Cir. 1981) (certificates of weight prepared by third party businesses were held admissible as business records because they were inherently trustworthy); *U.S v. Veytia-Bravo*, 603 F.2d 1187, 1191-92 (5th Cir. 1979) (logs and forms recording firearm sales including information provided by both manufacturer and retailer held admissible as business records against defendant because the records possessed the requisite trustworthiness); *U. S. v. Pfeiffer*, 539 F.2d 668, 671 (8th Cir. 1976) (even if persons preparing business records are nonparticipants, trial judge has discretion in admitting business records if records are otherwise trustworthy).

**C. State Approaches to the Business Duty Issue**

Currently, thirty-seven states have a business records exception patterned on FRE 803(6). Of that number, fifteen states – Alabama, Arkansas, Colorado, Delaware, Maine, Minnesota, New Hampshire, New Mexico, North Carolina, Oregon, Rhode Island, Utah, Vermont, West Virginia, and Wyoming – have adopted the language of FRE 803(6) verbatim. Eighteen states – Alaska, Arizona, Florida, Iowa, Indiana, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Montana, New Jersey, Ohio, Oklahoma, South Carolina, South Dakota, Texas, and Tennessee – have adopted the language of FRE 803(6) with some modification. Four states – Hawaii, Nebraska, Nevada, and Wisconsin – have adopted the Supreme Court's draft text verbatim or with some modification.

Seven states – California, Idaho, Kansas, South Dakota, Pennsylvania, South Carolina, and Washington – have patterned their rules on the Uniform Business Records as Evidence Act. Five states – Connecticut, Georgia, Illinois, Massachusetts, and New York – and the District of Columbia have patterned their rules on the Commonwealth Fund Act. Virginia has a non-codified business records exception. *See Ford Motor Co. v. Phelps*, 389 S.E.2d 454, 457 (Va. 1990).

With the exception of Louisiana and Tennessee, no state has enacted a rule explicitly requiring that the person who furnished the information acted under a business duty to report. However, most have judicially adopted the business duty requirement as outlined in *Johnson*

*v. Lutz. See e.g., Reeves v. King*, 534 So.2d 1107, 1114 (Ala. 1988) (routine business duty); *Hartford Div., Emhart Industries, Inc. v. Amalgamated Local Union* 376, U.A.W., 461 A.2d 422, 430 (Conn. 1983); *Meaders v. United States*, 519 A.2d 1248, 1255 (D.C. 1986); *Eichholz v. Pepo Petroleum Co.*, 475 So. 2d 1244, 1245-46 (Fla. Dist. Ct. App. 1985); *Wingate v. Emery Air Freight Corp.*, 432 N.E.2d 474, 478 (Mass. 1982) (requiring duty to report and duty to inform); Matter of Leon RR, 397 N.E.2d 374, 377 (N.Y. 1979) (requiring duty to record and corresponding duty to report); *McCormick v. Mirrored Image, Inc.*, 454 N.E.2d 1363, 1365 (Ohio Ct. App. 1982) (duty to report).

Alaska (AK R. Evid. 803(6)) and Arizona (Ariz. R. Evid. 803(6) come close to specifically requiring a business duty by requiring that knowledge be "acquired in the course of a regularly conducted business activity." The Alaska courts seem committed to the business duty requirement, *see e.g., Norcon, Inc. v. Kotowski*, 971 P.2d 158, 169 (Alaska 1999) (memorandum prepared by security firm hired by the defendant to investigate safety matters held inadmissible where the substance of the memorandum was provided by outside informants). However, even with the additional language, some Arizona cases have relaxed the standard. *State v. Taylor*, 2002 WL 1539755, 13 (Ariz. Ct. App. 2002) (identity of telephone call recipient obtained from answering machine by employee of bank and written in telephone log admitted notwithstanding hearsay upon hearsay because it was in the bank's "interest to obtain the name of the individual who had received a call to help ensure that collection efforts on a past-due account were being taken seriously."); *State v. Morales*, 824 P.2d 756, 759-60 (Ariz. Ct. App. 1991) (hospital records introduced for purposes of proving identity of patient held admissible despite fact that patient himself or his family had provided the information to the hospital because "It is very much in [the hospital's] interest to make certain that [information] is accurate.").

A few states have relaxed the business duty requirement. The Comments to New Jersey's Rule 803(6) clearly disavow a business duty requirement:

> . . . Police reports in civil cases in which the police officer making the report has no interest in the anticipated litigation are generally admissible under established law. *See Sas v. Strelecki*, supra, 110 N.J. Super. at 19-22; *Schneiderman v. Strelecki*, 107 N.J.Super. 113, 118-119 (App. Div.1969), certif. denied, 55 N.J. 163 (1969); *Brown v. Mortimer*, 100 N.J. Super. 395, 402-406 (App. Div.1968). The admissibility of a business record, however, does not mean that all parts of the record are necessarily admissible. For example, in Sas the court held inadmissible portions of a police report which contained statements given to a police officer because the statements were made by persons not under a "business duty" to render a truthful account of the automobile accident involved in the case. 110 N.J. Super. at 22. *See* also *State v. Lungsford*, 167 N.J. Super. 296, 309-310 (App. Div.1979). Nevertheless, the rule does not condition admissibility of business records on proof that all information which they contain came from persons with a business duty to report the information accurately. The duty to report accurately may enhance the reliability of the business

record. *See State v. Matulewicz,* supra, 101 N.J. at 30-31. But many business organizations regularly keep, use and rely upon information derived from sources without such a duty. Thus, to the extent that the holding in *Phoenix Associates, Inc. v. Edgewater Park Sewerage Auth.*, 178 N.J. Super. 109, 116 (App.Div.1981), aff'd on other grounds sub nom. *Phoenix Apartments, Inc. v. Edgewater Park Sewerage Auth.*, 89 N.J. 2 (1982), was based on the lack of a duty on the informant to report truthfully and accurately, it is not followed here. *See* Matter of Ollag Constr. Equip. Corp., 665 F.2d 43, 46 (2d Cir.1981), which upheld the admissibility of financial statements prepared on a bank's form by the debtor, although the debtor was not under a business duty to supply the information.

Comments to N.J. St. REV Rule 803.

Colorado courts initially adopted a business duty requirement and have applied it regularly. *See e.g., Thirsk v Ethicon, Inc.*, 687 P.2d 1315, 1319 (Colo. Ct. App. 1983). More recently, however, the Colorado courts have relaxed the business duty requirement where one business "substantially relied" upon the information contained in the records or where the information was the type "typically relied upon by that business in making decisions." *Schmutz v. Bolles*, 800 P.2d 1307, 1314 (Colo.1990) (recognizing trend in relaxation of business duty where one or more of the following features are present: "(1) the business had standardized forms to be filled out by outsiders; (2) outsiders provided information at the business' request; or (3) the document was of a type regularly relied upon by the business in making decisions"); *People in Interest of R.D.H.*, 944 P.2d 660, 665 (Colo. Ct. App. 1997) ("Statements by an outside party included within a business record are not necessarily granted the presumption of accuracy that attaches to statements made in the regular course of business because the outside party does not have a business duty to report the information. However, records containing such information are admissible when, as here, the information is provided as part of a business relationship between a business and an outsider and there is evidence that the business substantially relied upon the information contained in the records.").

Maine offers another example of a state that has relaxed the standard. *See Leen Co. v. Web Electric Inc*, 611 A.2d 83, 84 (Me. 1992) ("In certain circumstances, business records may include information prepared outside the business" provided the information contained "indicia of reliability that form the basis of the business records exception."); *Northeast Bank & Trust Co. v.* Soley, 481 A.2d 1123, 1126 (Me. 1984) (reliance sufficient).

Louisiana and Tennessee have explicitly adopted a business duty requirement in their business records exception.

The Louisiana code of evidence rule 803(6) provides:

(6) Records of regularly conducted business activity. A memorandum, report, record, or data compilation, in any form, including but not limited to that which is stored by

> the use of an optical disk imaging system, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if made and kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make and to keep 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. *This exception is inapplicable unless the recorded information was furnished to the business either by a person who was routinely acting for the business in reporting the information or in circumstances under which the statement would not be excluded by the hearsay rule.* 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. Public records and reports which are specifically excluded from the public records exception by Article 803(8)(b) shall not qualify as an exception to the hearsay rule under this Paragraph.

La. Code Evid. Ann. 803(6) (Emphasis added). The comments to the Louisiana rule clarify the business duty requirement:

> *The second sentence of the Paragraph has been added for the purpose of more clearly capturing the intent that underlies the federal provision. The clear intent of Federal Rule 803(6), and the uniform effect of the cases interpreting that rule is to require as a prerequisite to admissibility that the initial supplying of information, as well as all subsequent transmitting and recording of it, have been performed in the course of a regularly conducted business activity, and by persons owing a duty to that business.* Alternatively, the "hearsay within hearsay" analysis pursuant to Article 805 may make it unnecessary to find in a particular case that the person initially furnishing the information had a business duty, for reliability may be guaranteed by the presence of a hearsay exception, e.g., Article 803(1) (excited utterance); Article 803(4) (statements for purpose of diagnosis). *See* also Article 801(D). This possibility is reflected in the language "or in circumstances under which the statement would not be excluded by the hearsay rule", an addition to the federal source provision. The text presented here loosely follows the original federal version as promulgated by the Supreme Court prior to the deletion of the relevant language by Congressional amendment.

Comments to La. Code Evid. Ann. 803(6) (Emphasis added).

The Tennessee rule explicitly requires the declarant have personal knowledge and a business duty to "record or transmit." Tenn. R. Evid. 803(6). The rule provides:

> (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 and a business duty to record or transmit 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 or by certification that complies with Rule 902(11) or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, profession, occupation, and calling of every kind, whether or not conducted for profit.

*Id.* (Emphasis added). The Advisory Committee Comment to the Tennessee rule provides that the business duty requirement was inserted into the body of the rule to avoid interpretive mistakes. Advisory Committee Comment to Tenn. R. Evid. 803(6). The Comment provides:

> This rule essentially is the same as the Uniform Business Records as Evidence Act, T.C.A. § 24-7-111. To avoid interpretive mistakes such as that in *Wheeler v. Cain*, 62 Tenn.App. 126, 459 S.W.2d 618 (1970), the proposal specifically requires that the declarant have "a business duty to record or transmit" information. Without that duty, a business record would lack the trustworthiness necessary to carve out a hearsay exception.

## D. Alternatives for Committee Consideration

### 1. Possibilities for adding specific business duty requirement

If the Committee elects to amend Rule 803(6) in order to make the business duty requirement specific, it could select either the Louisiana or the Tennessee model.

**Alternative 1 (Louisiana model)**

> **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, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. <u>This exception is inapplicable unless the recorded information was furnished to the business either by a person who was routinely acting for the business in reporting the information or</u>

in circumstances under which the statement would not be excluded by the hearsay rule. 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.

**Alternative 2 (Tennessee model)**

**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 and a business duty to record or transmit, 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, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

**Alternative 3**

Another possibility would be a variation on the Tennessee model, but with somewhat simpler language.

**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 and a business duty to report, 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, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

**Alternative 4**

Although there are no rules that specifically reject a business duty requirement, the committee could elect to do so by amending the rule to read:

**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, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The absence of a business duty on the part of the person transmitting the information shall not preclude the application of this exception, but may be considered as a factor indicating 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.

**Alternative 5**

The final suggested alternative is to do nothing. Although there are some differences in the federal courts in dealing with the issue, for the most part a consistent pattern has emerged. Ordinarily, there will be a required business duty to report. However, that duty may be supplanted by a clear motive to verify or other circumstances that bring the communication within the policy behind the business records exception. The courts have approached the matter in a flexible and not unreasonable manner. A significant argument can be made to give this common law development an opportunity to continue without amendment of the rule.

# A SURVEY OF THE LAW OF TESTIMONIAL PRIVILEGE IN THE FEDERAL COURTS

**Kenneth S. Broun**

## Introduction

The current treatment of the law of testimonial privileges in the federal courts results from a unique rule pattern. Federal Rule of Evidence 501 tells the courts to apply either federal common law or state law depending on the issue to be resolved. The Rule provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision therefore shall be determined in accordance with State law.

Some other Federal Rules of Evidence set forth a federal rule, but provide that state law should apply where that law provides the rule of decision (Rules 301-302, 601). But only Rule 501 provides for the application of federal *common law* when federal as opposed to state law is to be applied.

The existence of Rule 501 is best explained by historical reference to the promulgation of what are now the Federal Rules of Evidence. A proposed set of evidence rules was submitted by the United States Supreme Court to Congress in 1972. Those rules contained nine rules governing specific privileges, all of which had existed at common law. The specific privileges included in the proposed rules were privileges for required reports, communications between lawyer and client, communications between psychotherapist and patient, spousal testimony, communications to clergymen, political vote, trade secrets, secrets of state and identity of an informer. Another proposed rule precluded common-law development of privileges by limiting privileges to those required by the Constitution, Act of Congress or rules of court. Other rules governed questions of voluntary disclosure, protection of privileged matter disclosed under compulsion or without opportunity to claim privilege and prohibition of adverse comment or inference regarding the assertion of a privilege. The rules were to govern all federal cases, criminal and civil, including both federal-question and diversity cases.[1]

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[1]See Proposed Rules of Evidence for the United States District and Magistrates Courts, 56 F.R.D. 183, Rules 501 to 513 at 230-61 (1972).

The privilege rules were immediately controversial.[2] Representative William L. Hungate, chair of the subcommittee that held hearings on the Supreme Court's rules, commented that "50 percent of the complaints in our committee related to the section on privileges."[3] The Senate Report on the rules called the content of the proposed privilege provisions "extremely controversial."[4]

There were several prongs to the arguments made in opposition to the privilege rules. First, there was strong displeasure expressed at a codification of federal privilege rules that ignored state privileges, especially in diversity cases. Even assuming that the rules were arguably procedural so as to satisfy *Hanna v. Plumer*, 389 U.S. 460 (1965), scholars, practitioners and judges argued that the strong policies behind the law of a state giving rise to a privileged relationship should be considered, especially in dealing with marital privileges. Many opined that such policies were strong enough to call for adherence to a state privilege not only in diversity cases, but also in federal question cases where a failure to recognize the existence of a privilege could have an adverse impact on a relationship privileged under state policy and law.

Second, objections were raised in the academic community and by others in testimony before Congress to the elimination of the ability of courts to formulate new privileges if the circumstances warranted. Judge Henry J. Friendly, then chief Judge of the United States Court of Appeals for the Second Circuit, expressed concern that the proposed rules would "freeze the law of evidence."[5]

Finally, the specific decisions made by the drafters with regard to individual privileges were questioned. The exclusion of spousal communications from the marital privileges and the narrowing of the physician-patient privilege to one involving psychotherapists only were the most frequent targets of attack. The absence of a journalist's privilege was also an object of concern for many. On

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[2]The following account of the history of the Proposed Federal Rules of Evidence dealing with privileges is taken largely from Kenneth S. Broun, *Giving Codification a Second Chance – Testimony Privileges and the Federal Rules of Evidence,* 53 HASTINGS L. J. 769 (2002). Other treatments of the same history include: Edward J. Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis,* 73 NEB. L. REV. 511, 517-23 (1994); Thomas G. Krattenmaker, *Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach,* 64 GEO. L. J. 613, 635-46 (1976); CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5421 (1980).

[3]*Hearings Before the Comm. on the Judiciary, United States Senate on Fed. Rules of Evidence H.R. 5463,* 93d Cong. 6 (1974).

[4]S. REP. NO. 93-1277, at 6 (1974).

[5]*Proposed Rules of Evidence, 1973: Hearings Before the Special Subcomm. On Reform of Fed. Criminal Laws,* 93d Cong. 248 (1973).

the other side of the coin, the juxtaposition of the consideration of the rules with the events surrounding Watergate, focused a storm of protest against the broad scope of the proposed secrets of state and official information privileges.

Rather than dealing with the specific and substantive criticisms of the proposed privilege rules head-on, Congress sidestepped the issue. There would be a substantial codification of much of the law of evidence including topics such as presumptions, relevancy and hearsay, but there would be no codification of the law of privilege. There was to be a federal law of privilege, but it would be governed by the "principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." State law would govern in cases in which that law provided the rule of decision.

The controversy over the Proposed Federal Rules of Evidence was not only a controversy over the merits of the proposals, but also about process. Many of the opponents of the privilege rules expressed concern that the policy issues inherent in the recognition or non-recognition of privileges were ill-suited to the court-initiated rulemaking process. Congress ultimately enacted the Federal Rules of Evidence, rather than permitting them to be promulgated under the Rules Enabling Act. However, it returned the rulemaking function as to most evidence rules back to the judiciary with regard to future additions, deletions and amendments. An exception was made for rules governing privilege. Congress kept the prerogative for creation of privilege rules for itself. Any such rule would have to be adopted by Congress rather than simply allowed to come into existence under the provisions of the Rules Enabling Act as is the case with other rules of evidence. Under 28 U.S.C. 2074(b), any rule "creating, abolishing, or modifying an evidentiary privilege" must be approved by an Act of Congress. Otherwise, the law of privilege was to develop in the federal courts in common law fashion – case-by-case and fact situation by fact situation.

Questions involving evidentiary privileges have been frequently litigated since the enactment of Rule 501.[6] The federal law of attorney-client privilege has evolved in hundreds of cases at all federal court levels, led by the Supreme Court of the United States in four cases since 1976. In those cases, the Court has made significant pronouncements with regard to procedural aspects of the privilege,[7] its relationship to the Fifth Amendment,[8] its application in the corporate setting,[9] and its survival beyond the death of the client.[10] The Court recognized the existence of a psychotherapist

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[6]*See* 2 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL §§501.01-03 (8th ed. 2002).

[7]United States v Zolin, 491 U.S. 554 (1989).

[8]Fisher v. United States, 425 U.S. 391 (1976).

[9]Upjohn Co. v. United States, 449 U.S. 383 (1981).

[10]Swidler & Berlin v. United States, 524 U.S. 399 (1998).

privilege in its landmark decision in *Jaffee v. Redmond.*[11] A spousal testimony privilege has been recognized, although limited to invocation by the testifying spouse.[12] In that same case, the Court, by dictum, recognized the existence of a marital communications privilege,[13] and lower court cases have frequently applied the privilege.[14] Although the Supreme Court did not find that the United States Constitution compels recognition of a journalist's privilege,[15] a limited form of that privilege exists under the case law of most circuits.[16] The federal courts have also confirmed other privileges proposed in the Supreme Court draft, including the clergy-communicant privilege,[17] a qualified trade secrets privilege[18] and a state secrets privilege.[19]

Other privileges have been rejected by the federal courts. The Supreme Court has rejected a privilege for academic peer review[20] and one for state legislators.[21] Lower courts have consistently

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[11]518 U.S. 1 (1996)

[12]Trammel v. United States, 445 U.S. 40 (1980).

[13]*Id.* at 51.

[14]*E.g.,* United States v. Bahe, 128 F.3d 1440, 1441-42 (10th Cir. 1997); United States v. Hill, 967 F.2d 902, 911-12 (3d Cir. 1992); United States v. Evans, 966 F.2d 398, 404 (8th Cir. 1992); United States v. Sims, 755 F.2d 1239, 1240-43 (6th Cir. 1985).

[15]Branzburg v. Hayes, 408 U.S. 665 (1972).

[16]*E.g.*, Zerilli v. Smith, 656 F.2d 705, 712-14 (D.C. Cir. 1981); Shoen v. Shoen, 5 F.3d 1289, 1292-93 (9th Cir. 1993); United States v. Cuthbertson, 651 F.2d 189, 195-96 (3d Cir. 1981); Ashcraft v. Conoco, Inc. 218 F.3d 282, 287 (4th Cir. 2000).

[17]In re Grand Jury Investigation, 918 F.2d 374, 384 (3d Cir. 1990); United States v. Mohanlal, 867 F. Supp. 199, 200 (S.D.N.Y. 1994).

[18]*E.g.*, Carpenter Tech.Corp. v. Armco, Inc. 132 F.R.D. 24 (E.D..Pa. 1990).

[19]*E.g.* In re under Seal, 945 F.2d 1285 (4th Cir. 1991).

[20]Univ. Of Pa. v. EEOC, 493 U.S. 182 (1990).

[21]United States v. Gillock, 445 U.S. 360 (1980).

rejected accountants' privileges[22] parent-child privileges,[23] a general physician patient privilege,[24] and others.[25]

Given the exclusion of rules governing privilege from the Rules Enabling Act process, the Advisory Committee on the Federal Rules of Evidence has not considered privilege rules in its review of the existing rules for possible amendment. The Advisory Committee has believed that it would be inappropriate for it to attempt to advise the legislative branch on this subject. However, the Committee does believe it useful for it to survey the current federal law of privilege to determine how the federal courts have treated testimonial privileges since the adoption of rule 501. The Committee determined that the survey should attempt to state the law as it now exists, identifying areas of uncertainty or conflict. Such a survey may be useful to the courts and to lawyers in applying the law of privilege. The survey may also be useful to Congress should it decide to codify the federal law of privileges or to enact legislation dealing with specific privileges.

Following is the result of that survey. The study is divided into sections, each corresponding to what might be a rule under a codification. Thus, there is a section dealing with general principles governing privilege and a section dealing with waiver of privileges as well as sections dealing with specific privileges. Each section is, in turn, divided into three parts. Part 1 is a survey rule, stating the law as it currently exists in the federal courts. Where there is a significant split of authority on an issue, alternative provisions are set out. Part 2 is a commentary on the existing law. The commentary is intended to be detailed, with representative cases and scholarly articles cited with regard to each aspect of the survey rule. However, no attempt has been made to include every federal case decided on the issue or every law review article written about it. Part 3 deals with choices for the future. In that part of the section, the Committee will discuss not only reasons for choosing among alternatives set out in Parts 1 and 2, but possible changes in the law that either the courts or Congress might consider. No attempt is made to argue the wisdom or policy behind any possible change. Part 3 is intended simply to set forth the available choices.

The privileges covered are those that were part of the original Proposed Federal Rules of

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[22]*E.g.*,United States v. Frederick, 182 F.3d 496, 500 (7th Cir. 1999); In re International Horizons, Inc. 689 F.2d 996, 1004 (11th Cir. 1982).

[23]*E.g.,* In re Grand Jury, 103 F.3d 1140 (3d Cir. 1997).

[24]*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). In adopting the psychotherapist-patient privilege in *Jaffee,* the Court distinguished communications to a psychotherapist from communications to a physician for the purpose of diagnosing physical ailments. Jaffee v. Redmond, 518 U.S. 1, 10 (1996).

[25]*E.g.,* In re Sealed Case, 148 F.3d 1073 (D.C.Cir. 1998) (protective function privilege for secret service) .

Evidence and similar kinds of rules that have been considered by the federal courts since the promulgation of Rule 501. It does not include rules of evidence law that some call privileges, but which are actually based on considerations more akin to those involving relevancy principles. For example, the Committee does not consider rules such as those governed by Federal Rules of Evidence 407(subsequent remedial measures); 408 (compromise and offers to compromise), 409 (payment of medical and similar expenses), 410 (inadmissibility of pleas, plea discussions and related statements), 411 (liability insurance), 412 (sex offense cases; relevance of alleged victim's past sexual behavior or alleged sexual predisposition) to be privileges. Rules of privilege exempt someone from the general duty to provide information to a tribunal and are enforced to prevent the introduction of evidence even though the witness invoking the rule has no connection to the litigation at hand. The rules contained in Article IV of the Federal Rules of Evidence, are directed only to the question of admissibility of evidence in the proceeding between the parties to the litigation. Privileges deal with the question of whether someone, a party or a nonparty to the litigation, can be compelled in discovery, before a grand jury or in another setting to disclose information.[26]

[26]See CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR, FEDERAL PRACTICE AND PROCEDURE §5422, at 668 (1980); 1 JOHN W. STRONG, ET AL, MCCORMICK, EVIDENCE §72.1 (5th ed. 1999).

**Survey Rule:**

**Psychotherapist-Patient Privilege**

**(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 psychotherapist for the purpose of diagnosis or treatment of the patient's mental or emotional condition;**

**(3) A "psychotherapist" is a person licensed [authorized] in any domestic or foreign jurisdiction, or reasonably believed by the patient to be licensed [authorized] to engage in the diagnosis or treatment of a mental or emotional condition;**

**(4) A "privileged person" is a patient, psychotherapist or an agent of either who is reasonably necessary to facilitate communications between the patient and the psychotherapist or who is participating in the diagnosis or treatment of the patient under the direction of a psychotherapist;**

**(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 purposes of obtaining or providing diagnosis or treatment of patient's mental or emotional condition.**

**(c) Who May Invoke 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 psychotherapist, the agent of either, or any person who participated in the diagnosis or treatment of the patient under the direction of a psychotherapist to invoke the privilege on behalf of the patient.**

**(d) Exceptions. The psychotherapist privilege does not apply to a communication**

**(1) relevant to an issue in proceedings to hospitalize the patient for mental or emotional illness if the psychotherapist, 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 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 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 psychotherapist 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 psychotherapist'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 death or injury];**

**(6) relevant to an issue in a proceeding challenging the competency of the psychotherapist;**

**(7) relevant to a breach of duty by the psychotherapist. 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 psychotherapist 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.**

## COMMENTARY ON THE PSYCHOTHERAPIST-PATIENT PRIVILEGE SURVEY RULE

### *In General*

The parameters of the psychotherapist-patient privilege in the federal courts effectively began to be formed with the recognition of that privilege in the 1996 Supreme Court decision in *Jaffee v. Redmond*, 518 U.S. 1 (1996). To be sure, the Proposed Federal Rules of Evidence contained such a privilege (Proposed Rule 504) and some circuits had recognized its existence prior to *Jaffee, e.g., In re Doe*, 964 F.2d 1325 (2d Cir. 1992) (qualified privilege exists); *In re Zuniga*, 714 F.2d 632, 640 (6th Cir. 1983) (privilege exists but does not apply to identity or fact and time of treatment). But Congress had refused to adopt rule 504 and, prior to *Jaffee*, some circuits refused to recognize it, *e.g. United States v. Burtrum*, 17 F.3d 1299 (10th Cir. 1994) (no psychotherapist-patient privilege in criminal child sexual abuse case); *In re Grand Jury Proceeding*, 867 F.2d 562 (9th Cir. 1989) (no psychotherapist-patient privilege in federal criminal case); *United States v. Corona*, 849 F.2d 562, 566-67 (11th Cir. 1988) (same).

The Court in *Jaffee* recognized a psychotherapist-patient privilege and applied it to confidential communications to a licensed social worker. The Court's rationale was utilitarian: the privilege serves the public interest by facilitating the process of appropriate treatment for individuals suffering from a mental or emotional problem. Communications to a psychotherapist were distinguished from those made to a physician for physical ailments where "treatment . . . can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests." The Court noted (518 U.S. at 10):

> Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

The Court's was influenced by the adoption of some form of psychotherapist privilege in all 50 states. Most, like the Court in *Jaffee*, extend the privilege to social workers.

The Court was careful to reject any notion that the privilege be qualified by a balancing component (518 U.S. at 17):

> Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege.

Nevertheless, by footnote, the Court noted that "there are situations in which the privilege

must give way," thus opening the door for exceptions such as those existing with regard to other privileges now recognized under federal common law. (518 U.S. at 18, n.19).

Not surprisingly, the lower federal courts dealing with the privilege have turned first to *Jaffee* for guidance as to its dimensions. Moreover, because of the limited opportunity for guidance in that decision and the short length of time that has existed for development of a body of law, the courts are often creating new law with every decision about the privilege.

The survey rule seeks to reflect the Court's description of the privilege in *Jaffee* as well as the interpretation and refinement of that rule by the lower federal courts in the relatively short time since 1996. Many potentially significant issues involving the privilege have yet to reach the federal courts. The survey rule seeks to set forth the position taken by the lower courts where such a position is clear and consistent. In some instances, such as whether a psychotherapist must in all instances be licensed, a minority view is set forth as an alternative. In other instances, as with regard to the requirement in some courts that the patient actually call the psychotherapist in question to testify or use the communications to him or her before the privilege is deemed waived, a small minority view is ignored. Where there is no federal authority on the question, the survey rule borrows from holdings in connection with other privileges, especially the more frequently litigated attorney-client privilege. The approach of looking to the attorney-client privilege for guidance in connection with the psychotherapist privilege is one that is commonly used by the courts in setting the parameters of the latter.

As is the case with the other privileges in this survey, the rule is intended to reflect existing case law or a prediction of what that case law would be like rather than to make judgments with regard to the wisdom of any of the privilege's parameters. Some policy considerations for the future are set forth in the next section.

The form and much of the language of the survey rule is the same as that used for other privileges in this survey. It is borrowed to some extent from the Proposed Federal Rules of Evidence with regard to privilege, from the latest draft of the Uniform Rules of Evidence and from other sources including the Restatement with Regard to Lawyers.

Some significant differences exist between the survey rule and the recently recast Uniform Rule 503 setting forth a Physician/Mental Health Provider privilege. Particular substantive differences are based upon federal case law and are discussed in connection with the provisions of the rule in which they exist. The survey rule also differs in form from the Uniform Rule.

The most important difference between the survey rule and Uniform Rule 503 concerns the more limited applicability of the survey rule, at least if the broader options of the Uniform Rule are selected. Uniform Rule 503 provides four options for application of the privilege: 1)psychotherapists, 2) physicians and psychotherapists, 3) physicians and mental health-providers and 4) mental-health providers. *See, generally,* Robert H. Aronson, *The Mental Health Provider Privilege in the Wake of* Jaffee v. Redmond, 54 Okla.L.Rev. 591 (2001). The survey rule applies to psychotherapists only, although the term is broadly defined so as to reach other professionals,

including social workers licensed (or optionally, authorized) to provide diagnosis or treatment of mental or emotional conditions. There is no federal authority for a privilege that applies to physicians generally, *See, e.g., Hancock v. Dodson,* 958 F.2d 1367, 1373 (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). or even for one that uses the broader term "mental health provider." The dictum in the *Jaffee* case, as discussed above, would seem authoritative on the rejection of a general physician-patient privilege. Moreover, the term "mental health provider" has not been used in federal cases and may imply a broader application of the privilege than would be recognized in the federal courts, especially if the rule is limited to professionals who are licensed rather than simply authorized. See discussion in connection with Survey Rule (a)(3), below.

(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;**

The primary source for this definition is the law involving attorney-client communications. *See* Survey Rule, Attorney-client Privilege. *See, e.g., United States v. Sayan,* 968 F.2d 55, 63-64 (D.C. Cir. 1992) (privilege applied only to communications not observations made by an accountant serving as the attorney's agent). There was no attempt to define communication in Proposed Federal Rule 504. Similarly, Uniform Rule 503 contains no such definition.

The Court in *Jaffee* refers to "confidential communications" and relies on the need for an "atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories and fears."(518 U.S. at 10) More specifically, the Court in *Jaffee* protected the social worker's notes as well as her recollection of the communications from the patient. *See also Jane Student 1 v. Williams*, 206 F.R.D. 306, 310 (S.D. Ala. 2002), where the court notes that the privilege is limited to communications between the patient and her psychotherapist, but that the privilege includes notes made by the psychotherapist. "It also necessarily protects information from such conversations appearing in records prepared by someone other than the psychotherapist (as long as the third person's receipt of the information does not destroy confidentiality and thus the privilege)."

As in the case of the survey rule dealing with the attorney-client privilege, this definition includes communications going from the professional (in this case, the psychotherapist) to the person seeking his or her professional assistance (in this case, the patient) as well as communications going the other way. As discussed in connection with the attorney-client survey rule, there are some federal cases dealing with the attorney-client privilege that protect communications from the attorney only to the extent they would disclose confidential client communications. *See, e.g., Potts v. Allis-Chalmers Corp.* 118 F.R.D. 597 (N.D. Ill. 1987). Other cases take a broader view that provides protection for confidential communications from the attorney to the client. *See Sprague v. Thorn Americas, Inc.* 129 F.3d 1355, 1369-70 (10th Cir. 1997). For reasons more fully discussed in

connection with the attorney-client privilege, the survey rule adopts the broader position of the *Sprague* case for both privileges.

**(2) A "patient" is a person who consults a psychotherapist for the purpose of diagnosis or treatment of the patient's mental or emotional condition;**

This definition is based on the language of the *Jaffee* case. Uniform Rule 503 defines patient as an individual who consults or is examined or interviewed by one of the professionals listed in that rule. The language and holding of the Court in *Jaffee* would seem to require that the patient be a person who not only consults a psychotherapist but who does so for the purpose of diagnosis or treatment of the patient's own mental or emotional condition. *See, e.g., Tesser v Board of Education,* 154 F.Supp.2d 388 (E.D.N.Y. 2001). In *Tesser*, the court held that plaintiff's husband's consultation with his own psychiatrist about his wife's depression would be privileged only to the extent that the communications involved his own feelings and emotions. The court stated that communications must be made in the course of treatment, even if there was an expectation of privacy.

**(3) A "psychotherapist" is a person licensed [authorized] in any domestic or foreign jurisdiction, or reasonably believed by the patient to be licensed [authorized] to engage in the diagnosis or treatment of a mental or emotional condition.**

The language of the definition of a psychotherapist is borrowed in large measure from Uniform Rule 503. However, optional language that would expand the definition to persons authorized but not necessarily licensed is added based upon federal cases that have expanded the privilege to cover such persons. The definition also excludes language included in the Uniform Rule 503 definition of psychotherapist specifically referring to treatment for addiction to alcohol or drugs. There are no cases that specifically deal with the application of the privilege where the treatment is only for addiction to alcohol or drugs. It is possible, perhaps likely, that a federal court would conclude that such treatment comes within the licensing or authorization of a person engaging in diagnosis or treatment of a mental or emotional condition, but there is no case law that would support the addition of such specific language to the definition.

There is no question that licensed psychotherapists are included in the privilege as applied in the federal courts. The Court in *Jaffee* stated (518 U.S. at 15):

> . . . we hold that confidential communications between a *licensed* psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence. (emphasis added)

The Court goes on to extend the privilege to confidential communications made to "licensed social workers." (518 U.S. at 15). Although the definition contained in this survey rule neither uses the term "social worker" or the broader term used in Uniform Rule 503, "mental health provider,"

the language of the definition is intended to cover any licensed [or authorized] social worker engaging in the treatment of mental or emotional conditions.

The more troubling question for the federal courts has not been the application of the privilege to licensed social workers; that is clearly stated in *Jaffee*. Rather, the cases raise the issue of whether the privilege should be extended to persons who are engaged in the kind of treatment involved in *Jaffee*, but who are not licensed by any state. The Court in *Jaffee* used the term "licensed." Yet, some lower courts have applied the psychotherapist-patient privilege in instances in which the communication was made to a person who was not licensed.

In *Oleszko v. State Compensation Insurance Fund,* 243 F.3d 1154 (9th Cir.2001), the court applied the privilege to unlicensed counselors employed by an Employee Assistance Program (EAP). The court found an analogy to the licensed social worker in *Jaffee* stating (243 F.3d at1157-58):

> EAPs, like social workers, play an important role in increasing access to mental health treatment.... Growing numbers of EAPs help employees who would otherwise go untreated to get assistance. The availability of mental health treatment in the workplace helps to reduce the stigma associated with mental health problems, thus encouraging more people to seek treatment. EAPs also assist those who could not otherwise afford psychotherapy by providing and/or helping to obtain financial assistance."

The court went on to note that the EAPs work as part of a team with licensed psychologists or social workers (243 F.3d at 1158). Based upon this language, one could argue that the EAP in *Oleszko* would have come within the language of section (a)(4) of the survey rule, defining a privileged person as including "an agent of either [the patient or the psychotherapist] who is reasonably necessary to facilitate communications between the patient and the psychotherapist or who is participating in the diagnosis or treatment of the patient under the direction of a psychotherapist." Nevertheless, it is also possible that the court would have reached the same conclusion even if an agency relationship were not established or there was no showing that the EAP was working under the direction of a licensed psychotherapist.

Other cases in which the courts have used a definition of psychotherapist that went beyond licensed persons are *Greet v. Zagrocki,* 1996 WL 724933 (E.D.Pa. 1996) (privilege protects files with regard to police officer's consultation of department's Employee Assistance Program. The consultation was with regard to department's "in-house alcohol dependency program."); *United States v. Lowe,* 948 F.Supp. 97 (D.Mass. 1996) (communications to unlicensed rape crisis counselor privileged. The victim waived the privilege to a limited extent by agreeing to in camera review of records.)

Not all federal courts dealing with the question have applied as generous a definition as did the courts in *Oleszko, Greet* and *Lowe.* In *U.S. v. Schwensow,* 151 F.3d 650, 657-58 (7th Cir. 1998) statements to Alcoholics Anonymous volunteer telephone operators were not protected. The court noted that the operators did not possess credentials that might qualify as "licensed." However, in

*Schwensow,* there were other factors upon which the court relied that prevented the application of the privilege and might well have prevented its application even if the operators had been fully licensed. In that case, the operators did not identify themselves as therapists or counselors. They did not confer with the defendant in a fashion that resembled a psychotherapy session. There was no indication that the AA office provided counseling services. The telephone calls in question were made for the purpose of finding out the address of a detoxification center, not for help in coping with alcoholism. The court stated that the interactions did not relate to diagnosis, treatment or counseling and "under no circumstances can these communications be interpreted as 'confidential communications' entitled to protection from disclosure under Rule 501." (151 F.3d at 658).

In *Jane Student 1 v. Williams,* 206 F.R.D. 306, 310 (S.D. Ala. 2002), the court held that licensed counselors were covered by the privilege, but unlicensed counselors were not. The court specifically rejected the reasoning of *Oleszko* based in part upon the language in *Jaffee* applying the privilege to "licensed" social workers. The court also believed that there needed to be a brighter line for the boundaries of the privilege than would exist if unlicensed mental health providers were included. The court noted that all but eight states recognizing a social worker privilege limit that privilege to persons actually licensed.

*See also Carman v. McDonnell Douglas Corp.,* 114 F.3d 790 (8th Cir. 1997) (no privilege for communications to company ombudsman despite presumed confidentiality of such communications).

The language of the definition, "reasonably believed by the patient," finds support in *Speaker ex rel. Speaker v. County of San Bernardino*, 82 F. Supp.2d 1105, 1112 (C.D. Calif. 2000) where the court stated ". . . if he reasonably believed that Dr. Mathews was a psychologist or a licensed social worker." The court supported its holding by reference to the similar holdings under the attorney-client privilege.

The definition of psychotherapist in the survey rule is intended to be broad enough to cover physicians dealing with mental or emotional health questions. *See Finley v. Johnson Oil Co.,* 199 F.R.D. 301 (S.D. Ind. 2001) (privilege applies to communications to general practitioners dealing with mental health questions).

**(4) A "privileged person" is a patient, psychotherapist or an agent of either who is reasonably necessary to facilitate communications between the patient and the psychotherapist or who is participating in the diagnosis or treatment of the patient under the direction of a psychotherapist;**

The language of this definition is based upon similar language in the survey rule dealing with the attorney-client privilege. The most significant language in the definition deals with the application of the privilege to agents who either facilitate communications between the patient and the psychotherapist or who participate in the diagnosis or treatment "under the direction of a psychotherapist." There is little case law involving questions of agency under the psychotherapist-

patient privilege. In *Jane Student 1 v. Williams,* 206 F.R.D. 306, 310 (S.D. Ala. 2002), the court held that notes will be privileged even if they are written by someone other than a psychotherapist, provided that confidentiality is maintained. Other authority for the language in the definition would require analogy to cases dealing with the attorney-client privilege. *See, e.g., Winchester Capital Management Co. V. Manufacturers Hanover Trust Co.,* 144 F.R.D. 170, 172 (D. Mass. 1992) (privilege extended to principal of corporate client where disclosure by attorney was reasonable and necessary); *United States v. Kovel,* 296 F.2d 918 (2d Cir. 1961) (privilege extended to accountant hired by attorney to aid in understanding the client's financial situation).

**(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.**

Again, the language of this definition tracks the definition of "in confidence" in the survey rule governing the attorney-client privilege. In the case of this definition, there is federal authority dealing with the issue in connection with the psychotherapist-patient privilege. Some of that authority pre-dates the *Jaffee* case in lower court cases where courts recognized the existence of the privilege but limited its application to communications that were truly confidential.

For example, in *In re Doe,* 711 F.2d 1187, 1193-94 (2d Cir. 1983), the court did not reach a definitive conclusion as to whether a psychotherapist-privilege existed. Instead, the court held that, even if it existed, the privilege would not apply where there were no communications of "the intensely personal nature that the psychotherapist patient privilege is designed to protect from public scrutiny." In *Doe*, the communications were from 70 patients a day who were seeking the dispensing of a controlled substance.

Similarly, *In re Zuniga,* 714 F.2d 632 (6th Cir. 1983) involved records from psychotherapists accused of defrauding Blue Cross-Blue Shield. The court recognized the existence of psychotherapist privilege but refused to protect the identity, or fact and time of his treatment, stating (714 F.2d at 640):

> In weighing these competing interests, the Court is constrained to conclude that, under the facts of this case, the balance tips in favor of disclosure. The essential element of the psychotherapist-patient privilege is its assurance to the patient that his innermost thoughts may be revealed without fear of disclosure. Mere disclosure of the patient's identity does not negate this element. Thus, the Court concludes that, as a general rule, the identity of a patient or the fact and time of his treatment does not fall within the scope of the psychotherapist-patient privilege.

*See also In re Grand Jury Subpoenas Duces Tecum Date Jan. 30, 1986,* 638 F.Supp. 794, 797-99 (D. Me. 1986), where the court, citing *Zuniga,* held that the psychotherapist privilege does not preclude disclosure of the identity of a patient or the fact and time of his treatment.

Post-*Jaffee* cases holding that identity of patient or dates of treatment not within the privilege include *Santelli v. Electro-Motive,* 188 F.R.D. 306 (N.D.Ill. 1999); *Vanderbilt v. Town of Chilmark,* 174 F.R.D. 225 (D. Mass. 1997); *Hucko v. City of Oak Forest,* 185 F.R.D. 526 (N.D.Ill. 1999); *Booker v. City of Boston,* 1999 WL 734644 (D. Mass. 1999).

Other issues that have arisen after *Jaffee* in connection with the confidentiality of communications involve instances in which a session with a psychotherapist was mandatory and whether, if mandatory, a report of the session was to be made to someone other than the patient. Most of the cases dealing with the issue have involved situations where, like *Jaffee*, a police officer has been ordered to undergo some kind of psychological evaluation.

Courts have held that the privilege still applies despite the mandatory nature of the psychological evaluation. *Speaker v. County of San Bernardino,* 82 F. Supp.2d 1105, 1116-17 (C.D.Calif. 2000) (fact that session is mandatory does not destroy privilege where the patient is told by his employer that the session would be confidential); *Caver v. City of Trenton,* 192 F.R.D. 154, 162 (D.N.J. 2000) (privilege applied where no confidential information disclosed by psychologist to police chief, but rather only a "yes" or "no" as to whether the officer was fit to return to duty).

The opposite result with regard to the application of the privilege has occurred where the police officer knew that the results of the sessions would be reported to his or her superiors. *See, e.g., Barrett v. Vojtas,* 182 F.R.D. 177, 181 (W.D. Pa. 1998). In *Barrett,* the court held that the privilege did not apply where a police officer was ordered to seek treatment and "more importantly" knew that the psychiatrist would report back to the police department with regard to the examination. The officer knew that a status report and recommendations would be made. The fact that he thought communications themselves would be confidential did not make the privilege applicable.

In *Kamper v. Gray,* 182 F.R.D. 597 (E.D.Mo. 1998), the court also refused to apply the privilege where a police officer knew that the results of an evaluation would be reported to his superiors. In contrast, with regard to another police officer, a voluntary professional counseling session was held to be protected.

*See also Scott v. Edinburg,* 101 F. Supp. 2d 1017, 1020 (N.D.Ill. 2000) (no privilege existed where the police officer knew that testing results would be reviewed by the police chief);

**(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 purposes of obtaining or providing diagnosis or treatment of patient's mental or emotional condition.**

The language of the general rule is consistent with the language used in the other survey privileges including the attorney-client privilege. It is also consistent with Uniform Rule 503, except

that there is no specific reference to addiction to alcohol or drugs. As in the case of the definition of psychotherapist, this language is left out of the survey rule because of the absence of specific federal authority dealing with the issue.

Although some pre-*Jaffee* decisions had described a qualified psychotherapist-patient privilege, see, *e.g., In re Doe,* 964 F.2d 1325 (2d Cir. 1992), the Court in *Jaffee* was clear in its holding that the privilege should be absolute rather than qualified. Nevertheless, a few district courts cases after *Jaffee* have held the privilege to be qualified where the defendant seeks information otherwise within the privilege to assist in making out a defense in a criminal case. In *United States v. Alperin,* 128 F. Supp. 2d 1251 (N.D. Cal. 2001), the defendant sought psychiatric records of the victim in an assault case in which he had claimed self-defense. The court applied the federal privilege announced in *Jaffee,* but stated that the need for confidentiality had to be balanced against the defendant's Sixth Amendment rights to a fair trial and to confront witnesses. Although applying the privilege in a case governed by federal law, the court looked to California cases that had balanced the privilege against the rights of an accused in a criminal case. The court ordered an *in camera* review of the psychiatric records to determine the value of the evidence to the defendant. In *United States v. Hansen,* 955 F. Supp. 1225 (D. Montana 1997), the court dealt with a request for psychiatric records of a now-deceased victim. The court held that the psychiatrist could assert the privilege on behalf of the deceased patient. However, the court ordered production of the records, stating (955 F. Supp. at 1226):

> The holder of the privilege has little private interest in preventing disclosure, because he is dead. The public does have an interest in preventing disclosure since persons in need of therapy may be less likely to seek help if they fear their most personal thoughts will be revealed, even after their death . . . . However, I find that the defendant's need for the privileged material outweighs this interest.

The court did not elaborate as to whether it would have reached a different result had the patient still been alive.

In *United States v. Haworth,* 168 F.R.D. 660 (D.N.M. 1996), the court recognized the defendant's Sixth Amendment rights to information relevant to his defense, but nevertheless held that there was no right to examine records that were privileged under psychotherapist-patient privilege. However, the defendant would be permitted to cross-examine the patient in question with regard to his treatment.

On the other side of the ledger, the court in *United States v. Doyle,* 1 F. Supp.2d 1187 (D. Or. 1998), involving a sentencing hearing, held that defendant's Sixth Amendment rights did not trump the confidentiality of victim's statements to psychotherapist.

The survey rule describes a privilege that is absolute. Based upon cases such as *Alperin, Hanson* and *Haworth,* there may be instances in which the Sixth Amendment rights of the accused will cause the court to qualify that privilege. Despite this possibility, it does not seem useful to

qualify the rule. Any rule excluding evidence has the potential to be trumped by an application of the United States Constitution.

**c) Who May Invoke 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 psychotherapist, the agent of either, or any person who participated in the diagnosis or treatment of the patient under the direction of a psychotherapist to invoke the privilege on behalf of the patient.**

The language of this section tracks the language with regard to invocation of the privilege in the survey rule governing attorney-client privilege. Although the language differs, the substantive rule of the section is the same as Uniform Rule 503(c). The substance of the section is supported by the few federal cases that have been decided dealing with the issue in connection with the psychotherapist-patient privilege.

Examples of federal court holdings with regard to standing to invoke the psychotherapist-patient privilege are *United States v. Schlette,* 842 F.2d 1574, 1583, n. 5, *amended,* 854 F.2d 359 (9th Cir. 1988) (pre-*Jaffee;* government could not assert the psychotherapist privilege on behalf of a deceased person; only personal representative of the deceased could claim privilege); *United States v. Lowe,* 948 F.Supp. 97 (D. Mass. 1996) (rape crisis center had no standing to assert privilege on behalf of a victim).

**(d) Exceptions. The psychotherapist privilege does not apply to a communication**

Section (d) of the survey rule deals with exceptions to the application of the psychotherapist-patient privilege. General waiver considerations, such as the communication of information to non-privileged persons are treated under the general waiver rule. The issue of waiver by conveying information to non-privileged persons may present some unique problems in the psychotherapist context. See *In re Zuniga,* 714 F.2d 632 (6th Cir. 1983) (waiver by submitting information to insurer); *In re Pebsworth*, 705 F.2d 261 (7th Cir. 1983) (same – but with strong concurring opinion where judge would not destroy privilege, but rather view the disclosure to the insurer as the same as a disclosure to a nurse or a paralegal).

**(1) relevant to an issue in proceedings to hospitalize the patient for mental or emotional illness if the psychotherapist, in the course of diagnosis or treatment, has determined that the patient is in need of hospitalization;**

There are no federal cases directly dealing with this exception and no comparable situation involving other privileges covered by the survey rules. Despite this absence of authority, the situation seems to be one in which the courts would almost certainly create an exception. Authority may be gleaned from the footnote in the *Jaffee* opinion noting that there are situations in which the privilege "must give way." 518 U.S. at 18, n.19. In that footnote, the court refers to "a serious threat

of harm to the patient or to others can be averted only by means of a disclosure by the therapist." The Court's suggestion is most pertinent to the "dangerous patient" exception set forth in section (d)(5). However, it would also lend support to this subsection.

The language of the subsection tracks that of Uniform Rule 503(d)(1).

**(2) made in the course of a court-ordered investigation or examination of the 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;**

Again, there is no express federal authority for this subsection. The rationale for its inclusion in the survey rule is the same as with regard to subsection (1): the courts would almost certainly recognize it based upon footnote 19 in *Jaffee* (518 U.S. at 18, n. 19). The language of the subsection tracks that in Uniform Rule 503(d)(2).

**(3) relevant to the issue of the 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;**

Although treated as an exception to the privilege in this survey rule, most courts dealing with the question of the application of the privilege in instances in which the patient relies on a mental or emotional condition refer to the issue as one of waiver. One could therefore argue that the issue should be treated in the survey rule governing waiver. However, although there are analogous questions in connection with other privileges (most significantly, attorney-client), the questions raised by this subsection are sufficiently unique to call for a specific provision in this survey rule dealing with the issue.

There are many cases, almost all from the district courts, dealing with whether a party has waived the psychotherapist privilege by asserting a claim emotional distress or similar damage claim. The courts have taken several approaches to the issue. A clear majority of the cases favors the rule that a party waives the claim by asserting a claim for emotional damages. The cases following this majority rule are divided into those cases that find that a mere claim in a pleading is sufficient for there to be a waiver(referred to below as the "broad" rule) and those that require some indication that the plaintiff will offer some form of expert testimony on the issue(referred to below as the "in-between" rule). A minority of cases holds that a plaintiff does not waive the privilege unless he or she introduces the testimony of the psychotherapist to whom the confidential statements were made or testifies about those statements (referred to below as the "narrow" rule).

***The Broad Rule***

Several courts have held that the mere pleading of emotional distress is sufficient to waive the privilege. *E.g., Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127 (E.D. Pa. 1997) (see discussion

below); *Lanning v. Southeastern Pennsylvania Transportation Authority*, 1997 WL 597905 (E.D. Pa. 1997); *EEOC; v. Danka Industries, Inc.*, 990 F.Supp. 1138 (E.D.Mo. 1997); *Sidor v. Reno*, 1998 WL 164823 (S.D.N.Y. 1998) (in *Sidor*, the plaintiff not only sought damages for emotional distress but challenged the decision of her employer to terminate her on the grounds that she was dangerous to herself and to others); *Kirchner v. Mitsui & Co.(U.S.A.), Inc.*, 184 F.R.D. 124 (M.D. Tenn. 1998); *Doe v. City of Chula Vista*, 196 F.R.D. 562 (S.D. Cal. 1999) (reversing magistrate judge opinion adopting narrow view of privilege); *Sanchez v. U.S. Airways, Inc.* 202 F.R.D. 131 (E.D. Pa. 2001). See also *Dixon v. City of Lawton, Okla.*, 898 F.2d 1443 (10th Cir. 1990) (pre-*Jaffee*).

The *Sarko* case is illustrative of the reasoning of courts taking this position. In *Sarko*, the court gave three basic reasons for finding waiver. First, it relied on pre-*Jaffee* decisions that had found waiver, citing *Topol v. Trustees of University of Pennsylvania*, 160 F.R.D. 476, 477 (E.D. Pa. 1995) and *Price v. County of San Diego*, 165 F.R.D. 614, 622 (S.D. Cal. 1996). Secondly, it noted that the *Jaffee* decision had analogized the policy considerations supporting the psychotherapist privilege to those supporting the attorney-client privilege and that the latter privilege is waived when the advice of counsel is in issue. Lastly, quoting from *Premack v. J.C.J. Ogar, Inc.*, 148 F.R.D. 140, 145 (E.D. Pa. 1993), the courted stated: ". . . we agree that allowing a plaintiff 'to hide . . . behind a claim of privilege when that condition is placed directly at issue in a case would simply be contrary to the most basic sense of fairness and justice.'" (170 F.R.D. at 130)

***The In-Between Rule***

Several courts have held that a party waives the privilege, not simply by filing a pleading claiming emotional distress, but by designating an expert to testify on that issue even though the expert is not the psychotherapist involved in the confidential communications.

In *Santelli v. Electro-Motive*, 188 F.R.D. 306 (N.D.Ill. 1999), the court rejected a bright line narrow test or a bright line broad test. It specifically rejected *Vanderbilt v. Town v. Chilmark*, 174 F.R.D. 225 (D. Mass. 1997), discussed below, that the privilege is waived only by introducing evidence of the communication or by calling the particular psychotherapist as a witness. The court expressed concern that this narrow view would permit the plaintiff to call a non-treating psychotherapist and prevent cross-examination based upon what she told her treating psychotherapist. However, the court said that the mere assertion of a claim for emotional distress was not sufficient. In *Santelli*, the plaintiff had expressly limited her claim to negative emotions she suffered from alleged sex discrimination and retaliation and indicated she would forego introducing evidence about emotional distress that necessitated care or treatment by a physician. Describing its view of the application of the waiver rule in this instance, the court stated (188 F.R.D. at 309):

> While we believe that a party waives her psychotherapist-patient privilege by electing to inject into a case either the fact of her treatment or any symptoms or conditions that she may have experienced, Santelli is doing neither.

Other cases with similar views are *Allen v. Cook County Sheriff's Department*, 1999 WL

168466 (N.D. Ill. 1999) (mere seeking of damages for emotional distress does not waive privilege; plaintiff would waive privilege if she put her mental condition at issue by disclosing that she intended to call her psychotherapist or another expert to establish her claim); *Hucko v. City of Oak Forest,* 185 F.R.D. 526 (N.D. Ill. 1999) (no waiver merely by asserting claim for emotional distress; distinguishes cases where plaintiff has offered or indicated any intent to offer prior consultation with psychiatrist in order to support claim; court did find waiver based upon plaintiff's assertion that the statute of limitations should be tolled because he was preoccupied with treatment and medications); *Adams v. Ardcor*, 196 F.R.D. 339 (E.D.Wis. 2000) (following Santelli and Hucko; mere inclusion of a request for damages based on emotional distress does not waive privilege, but naming a psychologist as an expert witness waived privilege as to other consultations with psychotherapists).

Another relevant authority is *Speaker v. County of San Bernardino,* 82 F. Supp.2d 1105, 1118-20 (C.D. Cal. 2000). *Speaker* involved a claim against a law enforcement officer who had shot and killed plaintiffs' deceased. The court held that the defendant police officer waived privilege as to question of perception distortion by testifying that his perception of the incident was distorted and by submitting the report of an expert that the distortion resulted from the trauma of the incident. However, court found no waiver with regard to other aspects of the defendant's consultation with a psychotherapist. The court discusses both the broad a narrow views of the privilege but states that it would have reached the same result under either rule. The patient, whether he or she is the plaintiff or defendant, must actually place his or her condition in issue in order to waive the privilege.

*See also Noggle v. Marshall*, 706 F.2d 1408, 1415-16 (6th Cir. 1983) (pre-*Jaffee*) (privilege waived, not merely by plea of insanity, but by the defense putting medical experts on the stand who testified that he was insane).

***The Narrow Rule***

The leading case setting forth the narrow view of waiver is *Vanderbilt v. Town v. Chilmark,* 174 F.R.D. 225, 228-30 (D. Mass. 1997). In *Vanderbilt,* the plaintiff sought damages for gender discrimination claiming emotional distress. The court disagreed with the broad view of waiver as set forth in *Sarko v. Penn-Del Directory Co.,* discussed above. Unlike the court in *Sarko,* the court in *Vanderbilt* rejected any argument based on pre-*Jaffee* decisions, noting that the Court in *Jaffee* had made a point of rejecting any balancing in connection with the psychotherapist privilege. The court equated a finding a waiver of the privilege because the evidence becomes relevant to a claim made by the patient with the sort of balancing, or qualified privilege, rejected in *Jaffee.* In *Sarko,* the court had analogized the situation to waivers under the attorney-client privilege where there is waiver if the client relies on advice of counsel. The court in *Sarko* argued that the case before it was not based on the advice of the psychotherapist but was rather more like a suit for attorney's fees where, the court said, there is no waiver.[1] Third, the court in *Sarko* had based its holding in part on

[1]The survey rule with regard to the attorney-client privilege in fact provides for an exception to the privilege where the evidence is relevant and reasonably necessary for an attorney

the fairness of permitting the opposing party to introduce the communications with the psychotherapist where the patient relies on his emotional condition as an element of his claim or as a basis for damages. The court in *Vanderbilt* rejected the *Sarko* analysis in this regard, finding that waiver would be justified only if the plaintiff were to introduce the substance of the conversations with the psychotherapist.

Another case taking the narrow view is *Booker v. City of Boston*, 1999 WL 734644 (D. Mass. 1999) (privilege not waived unless plaintiff makes positive use of the privileged material).

*The Survey Rule*

Subsection (d) (3) rejects the narrow view with regard to waiver of the privilege based upon a claim involving mental or emotional distress. Although there certainly are cases expressing the view that waiver should be limited to instances in which the plaintiff actually relies upon conversations with a psychotherapist or calls that psychotherapist as a witness, the bulk of authority does not support such a limited approach. Although a minority rule has been left as an option in the survey rule in other instances (most significantly with regard to the issue of whether a psychotherapist must be licensed or simply authorized), in this instance the narrow view seems out of step with the approach of the privilege taken by most courts and unsupported by the language in *Jaffee*

On the other hand, the survey rule does not attempt to provide language that would cause a court to choose between the broad rule, finding a waiver of the privilege merely by raising an emotional or mental condition in the pleadings, and an "in-between" rule that would require some more affirmative step to raise the issue, such as disclosing that an expert will be called to testify to that condition. Subsection (d)(3) refers simply to cases in which a patient "relies upon the condition" as an element of a claim or defense. The case law will have to develop further to determine when the mere raising of the condition in the pleadings is sufficient to call the exception into play.

The language of this subsection closely tracks that of Uniform Rule 503(d)(3).

**(4) that occurs when a patient consults a psychotherapist 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 psychotherapist'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;**

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to reveal in a proceeding to resolve a dispute with a client. The applicability of the exception to disputes over fees is consistent with the general law. See Restatement of the Law Governing Lawyers, § 133.

Proposed Federal Rule 504, setting forth a psychotherapist-patient privilege, did not contain a crime-fraud exception. Uniform Rule 503(d)(4) does provide for a crime-fraud exception. Although the language of the survey rule differs from that of the Uniform rule, the general content of the exceptions are the same. The language of the survey rule closely tracks that of the similar exception in the survey attorney-client privilege.

The matter has arisen infrequently since the rejection of that rule by Congress. However, those courts that have considered the question have consistently found the existence of such an exception to the privilege as it has developed as part of the federal common law.

The leading case is *In re Grand Jury Proceedings (Gregory P. Violette)*, 183 F.3d 71 (1st Cir. 1999). In *Violette*, the defendant was charged with presenting trumped up disabilities for the purpose of obtaining credit disability insurance payments. The government sought information through grand jury subpoenas from defendant's psychiatrists; the defendant claimed privilege. The lower court had found the *Jaffee* privilege to be inapplicable because the defendant did not have a *bona fide* therapeutic purpose in consulting the psychiatrists. While not necessarily disagreeing with that analysis, the Court of Appeals preferred to deal with the situation as one in which the privilege as articulated in *Jaffee* applied, but where an exception for statements made for the purpose of facilitating a criminal act came into play. The court used precedent involving the attorney-client privilege to reach its result, especially *United States v. Jacobs*, 117 F.3d 82, 87-89 (2d Cir. 1997) The court described the exception to the attorney-client privilege as applying in cases such as *Jacobs* when the client was engaged in (or was planning) criminal or fraudulent activity when the communications took place and the communications were intended by the client to facilitate or conceal the criminal activity (183 F.2d at 75). The court applied the same policy to the psychotherapist-patient privilege. The mental health benefits of protecting such communications "pale in comparison to the normally predominant principal of utilizing all rational means for ascertaining truth." (183 F.3d at 77 (quotation marks deleted)) The court stated that the exception applies when communications "are intended directly to advance a particular criminal or fraudulent endeavor." (183 F.3d at 77) The court found that the evidence in *Violette*, consisting of the government agent's affidavit establishing that the defendant was engaged in illegal and fraudulent conduct and that he obtained assistance from the psychiatrists, was sufficient for the exception to be invoked. The court noted that the exception applied even though the doctors may have been "unwitting pawns" in the defendant's scheme (183 F.3d at 78).

A similar exception to the psychotherapist privilege was suggested in United States v. Witt, 542 F. Supp. 696 (S.D.N.Y. 1982) (pre-*Jaffee*), although there were multiple other reasons for rejecting the existence of the privilege in that case.

**(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 death or injury];**

The primary support for this exception is contained in a footnote to the *Jaffee* case, where

the Court said (518 U.S. at 18, n. 19):

> 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 language of the exception tracks that of Uniform Rule 503(d)(5), although the Uniform Rule subsection does not contain anything that is the equivalent of the bracketed language in the survey rule, which would require that the disclosure of the information be "necessary to prevent death or injury." The additional language is added based upon federal cases that provide authority for that limitation on the exception. In *United States v. Glass*, 133 F.3d 1356 (10th Cir. 1998), the court recognized the existence of a "dangerous patient" exception but treated it in such a way as to suggest the qualifying language contained in brackets. In *United States v. Hayes*, 227 F.3d 578 (6th Cir. 2000), the court rejected the exception as applied in an instance in which it could not be said that disclosure was necessary to the safety of another individual.

In *Glass*, the defendant had expressed a threat to his psychotherapist to kill President Clinton and his wife. A psychotherapist had prescribed outpatient mental health treatment for him while the defendant was residing at his father's home. An outpatient nurse informed local law enforcement when the defendant left his father's home. The Secret Service contacted the psychotherapist who disclosed defendant's threats. The court noted the *Jaffee* footnote and stated that it would recognize the existence of an exception to the privilege that would apply to a threat that was serious when uttered and where disclosure was the only means of averting harm. However, the court was unable to decide the application of the privilege on the record before it. It stated (133 F.3d at 1359):

> . . . 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 a harm which could only be averted by disclosure.

The court remanded for inquiry into the psychotherapist's and Secret Services's view as to the seriousness of the threat.

In *Hayes*, the court dealt with threats to federal officers and a claim of privilege based upon the psychotherapist-patient privilege. The court distinguished between the ethical duty of a psychotherapist to disclose threats to prevent harm to others and a required disclosure at a court hearing after the threat had passed. The court found the footnote in *Jaffee* to relate to the former situation, but not the latter. There is a strong dissent in *Hayes* to the effect that once the psychotherapist has informed the patient of the need to disclose threats for the protection of others, the privilege no longer attaches.

The court recognized the existence of the dangerous patient exception in *United States v. Chase*, 301 F.3d 1019, *reh'g en banc granted,* 314 F.3d 1031 (9th Cir. 2002) under circumstances

in which there was no necessity and therefore in which the exception would apply without the language bracketed in subsection (d) (5). In *Chase*, defendant was charged with threats to federal officers. The threats were relayed to federal authorities by defendant's psychiatrist. The court interpreted the *Glass* case as recognizing a dangerous patient exception if the threat was serious when it was uttered and its disclosure was the only means of averting harm when the disclosure was made. The court adopted the exception as articulated in *Glass,* but stated it applies even though the threat was not immediate and even though there were alternate means of providing protection to the threatened persons. The court viewed the critical issue as whether the psychotherapist reasonably viewed the disclosure as necessary and as the only effective way of averting harm at the time it was made.

There is little doubt that even the court in *Hayes* would recognize an exception to the rule in a proceeding conducted at a time when there is still a danger to the threatened person. The court specifically refers to involuntary hospitalization proceedings, thus providing additional support for the exception set forth in subsection (d)(1). The critical issue, however, is whether the privilege exists after the time of danger has passed. The federal courts have simply not reached a definitive answer to that question. Therefore, the bracketed alternative language is provided in this survey rule.

**(6) relevant to an issue in a proceeding challenging the competency of the psychotherapist;**

**(7) relevant to a breach of duty by the psychotherapist. 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 psychotherapist 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**

Subsections (d)(6)(7) and (8) have no federal case authority nor was anything comparable contained in Proposed Rule 504. The subsections are based upon similar exceptions contained in the survey rule governing the attorney-client privilege. Subsections (6) and (7) track similar exceptions in Uniform Rule 503.

**(9) that is subject to a duty to disclose under the laws of the United States.**

Uniform Rule 503 provides that there is an exception to the privilege where there is a duty to disclose under "[statutory law]." This exception is borrowed from that provision, but limited to disclosures required under federal law. There is no federal case law on the subject. There is nothing that would lead to the conclusion that a duty to disclose under state law would be recognized by the federal courts.

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: "De Bene Esse" Depositions
Date: April 1, 2003

The Civil Rules Committee has referred a proposal from Judge Irenas to the Evidence Rules Committee for its consideration. That proposal advocates rule changes that would permit more general use of "de bene esse" depositions, i.e., depositions prepared as a substitute for trial testimony. The memorandum from Judge Irenas to the Civil Rules Committee containing the proposal, and the letter from Judge Levi (chair of the Civil Rules Committee) to Judge Smith are both attached to this memorandum. This memorandum is intended to provide background to the Evidence Rules Committee so that the Committee may formulate a response to the Civil Rules Committee concerning any amendment that would support more general use of a "de bene esse" deposition practice.

"De bene esse" depositions are distinguished as a practical matter from discovery depositions because they are taken for the express purpose of substituting for trial testimony. Currently, however, there is nothing in the Civil Rules or in the Evidence Rules that distinguishes between discovery and "de bene esse" depositions. The question for the Evidence Rules Committee is whether a rule supporting more general use of a "de bene esse" deposition will run into some conflict with the Federal Rules of Evidence.

***Conflict Between Evidence Rules and General Use of "de bene esse" Depositions?***

There are two possible sources of conflict between "de bene esse" depositions and the Evidence Rules. They are 1) the hearsay rule, and 2) the criteria controlling the mode of interrogating witnesses and presenting evidence in Rule 611(a).

*1. The Hearsay Rule.*

A "de bene esse" deposition is hearsay when offered for its truth at trial. One possibly applicable hearsay exception is Rule 804(b)(1), the exception for prior testimony. That exception requires that the opponent have a "similar motive" to attack the testimony as it would have at trial. Certainly the "similar motive" requirement is satisfied with a "de bene esse" deposition, because such a deposition is by definition a trial-like event. But admissibility of the deposition under Rule 804(b)(1) is also conditioned on the unavailability of the deponent. If the deponent of a "de bene esse" deposition is unavailable (dead, infirm, beyond the subpoena power, etc.), then the deposition would be admissible under Rule 804(b)(1) and there would be no conflict between the Evidence Rules on hearsay and a rule that validates "de bene esse" depositions. But as Judge Irenas points out, the deponent of a "de bene esse" deposition will often not qualify as unavailable within the meaning of Rule 804(a). To quote Judge Irenas: "In the usual case, the most that can be said is that it is inconvenient for the witness to be present." Thus, a Civil Rule providing general admissibility for a "de bene esse" deposition would run afoul of the Federal Rules excluding hearsay.

It could be argued that a "de bene esse" deposition might be admissible under Rule 807, the residual exception. Certainly a strong argument can be made that the "de bene esse" deposition satisfies the "circumstantial guarantees of trustworthiness" requirement of the residual exception–it is taken under oath, the adversary cross-examines with the same motive as she would have at trial, and the deposition is edited to cut out irrelevant or prejudicial material. The problem with admissibility under Rule 807, however, is that the proponent must show not only that the deposition is trustworthy, but also that it is "more probative" than any other evidence that is reasonably available to prove the point. If the deponent is available for trial (as is assumed, otherwise the deposition would be admissible under Rule 804(b)(1)), then the opponent will have a successful argument that the deposition is not more probative than other evidence that is reasonably available–the other reasonably available evidence being the deponent's in-court testimony. *See, e.g., United States v. Sinclair,* 74 F.3d 753 (7th Cir. 1996) (a hearsay statement offered by the defendant as residual hearsay was properly excluded, in part because the defendant did not seek to fly the declarant to the trial to testify in person); *Larez v. City of Los Angeles,* 946 F.2d 630 (9th Cir. 1991) (newspaper reports of a disputed quotation were trustworthy because the reports were identical; however, the reports were not admissible as residual hearsay because the newspaper reporters were available to testify and would have provided equally probative evidence of the statements); *Polansky v. CNA Ins. Co.*, 852 F.2d 626 (1st Cir. 1988) (a letter prepared by the plaintiff as to his understanding of a certain transaction was not the most probative evidence reasonably available because the plaintiff could have testified about these matters on the stand); *United States v. Azure*, 801 F.2d 336 (8th Cir. 1986) (in a second trial on the same matter, where the witness testified in the first trial, an out-of-court statement by that witness could not be admitted as residual hearsay; if the witness were available for the second trial, her in-court testimony would be as probative as the residual hearsay; if the witness were not available at the second trial, her prior testimony at the first trial would be as probative as the residual hearsay; therefore, the "more probative" requirement of the Rule would not be met).

In sum, general admissibility of a "de bene esse" deposition would run afoul of the existing hearsay limitations in the Federal Rules of Evidence. It is for the Committee to determine whether another exception to the hearsay rule is justified by the convenience afforded from the use of "de bene esse" depositions.

It should be noted that there already is a rule admitting evidence that might otherwise be excluded by the Evidence Rules on hearsay–that is Civil Rule 32, discussed below. Thus, the Evidence Rules Committee may wish to consider not only whether an Evidence Rule amendment is justified for "de bene esse" depositions, but also whether it is problematic to have an additional hearsay exception that might be placed in the Civil Rules rather than the Evidence Rules. It seems obvious that any hearsay exception that might be promulgated by rulemaking ought to be adopted as an Evidence Rule or not at all. Anyone looking for a hearsay exception should be required to look only in one place–the Evidence Rules.

It is important to note that if an exception for "de bene esse" depositions were to be adopted it would have to be limited to civil cases. The Supreme Court's recent rejection of the amendment to the Criminal Rules that would have permitted videoconference testimony indicates the Court's sensitivity to rules that would impair the accused's right to face-to-face confrontation. It should also be noted that there is precedent for a hearsay exception that would be applicable in civil cases only. See Rule 803(8), which excludes law enforcement reports in criminal cases but would presumably admit such reports in civil cases.

*2. Rule 611(a)*

Evidence Rule 611(a) provides that the trial court "shall exercise reasonable control over the mode . . . of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

Assuming arguendo that the hearsay problem is satisfied, it would appear that a trial court has plenty of discretion under Rule 611(a) to permit the use of "de bene esse" deposition testimony. An order permitting such testimony to be used at trial would govern the mode of interrogating witnesses and presenting evidence and so is within the terms of the Rule. And the trial court might well find under certain circumstances that the "de bene esse" deposition would be effective for the ascertainment of truth; would avoid needless consumption of time; and would protect witnesses from harassment or undue embarrassment.

But if a Rule is adopted that would *require* the admission of "de bene esse" depositions, that Rule would probably be in conflict with Rule 611. Rule 611 envisions a case-by-case approach, and there are certainly situations in which a "de bene esse" deposition would not be effective for the ascertainment of the truth, at least as compared to in-court testimony from the deponent.

Moreover, the promotion of videotaped trial testimony is at least in tension with the preference for live testimony expressed in some of the cases. Some courts construing Rule 611(a) have cautioned against the routine use of videotaped testimony as a substitute for live testimony. For example, in *Traylor v. Husqvarna Motor,* 988 F.2d 729 (7th Cir. 1993), the plaintiff's expert testified on direct on Friday, and stated that he would not be available for cross-examination on Monday; the Judge decided that the cross-examination would be videotaped on Saturday and played for the jury on Monday. The plaintiffs argued that the witness should have instead been recalled for cross-examination on Tuesday or Wednesday, when he would have been available; the Court of Appeals stated:

> Although we have no objection to videotaped testimony and do not believe that the fact that this witness's direct testimony was live and his cross-examination taped was a reversible error, we do think this sort of dual media testimony is generally a bad idea. * * * By presenting its expert witness's direct testimony live but his cross-examination taped, Omark was able to give artificially greater salience to the part of his examination that favored Omark than to the part that favored its opponent. There was a thumb on the scale. It should be removed in the retrial.

The *Traylor* case does not hold that "de bene esse" depositions should not be admitted at trial. It was concerned with the difference between a live direct examination and a videotaped cross-examination. But the reason for this concern is the court's presumption that there indeed *is* a differential between live and taped testimony. The inference to be derived is that live testimony is preferable. And a rule that would *require* the admission of a "de bene esse" deposition would run counter to that preference, thus creating at best a tension and at worst a conflict with Rule 611(a). *See also Bregman v. District of Columbia,* 1998 U.S. Dist. LEXIS 22793 (D.D.C.) (denying admission of "de bene esse" deposition in lieu of live testimony: "the new courtroom technology, while marvelous, does not mean that a court has the right to equate videotaped testimony with an actual appearance before the finder of fact.").

It must also be emphasized that for reasons previously discussed, any Rule that would admit a "de bene esse" deposition would have to be limited to civil cases. The preference for live testimony under Rule 611(a) is obviously ratcheted up in criminal cases given the defendant's constitutional right to face-to-face confrontation.

*Conclusion on Conflict With Evidence Rules*

It would appear that a rule granting broad admissibility of "de bene esse" depositions would create a conflict with the hearsay rule, and would at a minimum be in tension with the discretionary standard of Rule 611(a) that is applied with a preference for live testimony. Thus, an amendment to the Evidence Rules (or, far less preferably, to the Civil Rules) would be required to provide broad admissibility of "de bene esse" depositions. It is for the Committee to determine, in consultation with the Civil Rules Committee, whether the benefits of admissibility of videotaped depositions

outweighs the costs of an amendment.

***Admission By Stipulation***

One possibility, not specifically mentioned but perhaps assumed in Judge Irenas' letter, is that the current practice–and the premise of the rule sought by Judge Irenas–is that the parties have agreed at the time of the deposition that it is to be used as a substitute for trial testimony. If the parties have agreed in advance to admissibility, then the use of a "de bene esse" deposition at trial does not appear to implicate the Evidence Rules. The admission of evidence stipulated in advance would be analogous to the law on polygraph results. Polygraph results are generally held inadmissible–unless the parties stipulate in advance to their admissibility. *See, e.g., United States v. Gilliard,* 133 F.3d 809 (11th Cir. 1998) (no abuse of discretion in the trial court's exclusion of the defendant's exculpatory polygraph results, where the parties did not stipulate in advance that the tests would be admissible).

It appears that in most of the cases involving the admission of "de bene esse" depositions, the parties have stipulated in advance to admissibility. See, e.g., *Hague v. Celebrity Cruises, Inc.*, 2001 U.S. Dist. LEXIS 6687 (S.D.N.Y.) (party may not complain that "unavailability" requirements of Rule 32 are not met where party stipulated in advance to the admission of the "de bene esse" deposition).

***Possible Course of Action***

The Civil Rules Committee requests the Evidence Rule's Committee's comments on Judge Irenas' proposal, specifically on whether that proposal affects any of the Evidence Rules. It would seem that what is called for is a letter to the Civil Rules Committee indicating that the Evidence Rules Committee has reviewed the proposal and has found that there is a conflict between a rule permitting broad use of "de bene esse" depositions and the Evidence Rules–specifically the hearsay rule and, to a lesser extent, Rule 611(a). The Committee may wish to determine whether it is interested in considering the possibility of making the necessary change to the Evidence Rules that would be required to permit a broader admissibility of "de bene esse" depositions. At least two changes would be required: 1) the adoption of a new hearsay exception; and 2) some modification of Rule 611(a) that would probably be most effective by simply referring to a deposition prepared for trial and declaring that it is a permissible substitute for live testimony in a civil case.

If the Committee is reluctant to propose such changes, that reluctance should be reported to the Civil Rules Committee. If the Committee wishes to defer consideration of such changes until the next meeting or a later meeting, then that decision should be reported to the Civil Rules Committee.

It would also appear that the Evidence Rules Committee should try to clarify the proposal. If the proposal is to admit "de bene esse" depositions only upon advance stipulation of the parties, then this Committee should report to the Civil Rules Committee that such a proposal does not affect the Evidence Rules.

Finally, it might also be appropriate that the Committee emphasize that if any rule is to be adopted providing for broader admissibility of "de bene esse" depositions, that rule should be added to the Evidence Rules, not the Civil Rules. It would seem to be good policy that all rules governing the admissibility of evidence at trial should be placed in a single body of rules.

***Civil Rule 32***

One final issue that could be addressed in the letter to the Civil Rules Committee is related to, but goes beyond, the specific question of "de bene esse" depositions. There has always been an uneasy relationship between depositions admitted under Civil Rule 32 and depositions admitted under Evidence Rule 804(b)(1). The unavailability requirement applicable to depositions admitted under Rule 804(b)(1) is different from, and generally more stringent than, the requirements under Civil Rule 32. The most obvious difference is that to be unavailable on grounds of absence under Rule 804, the deponent must be beyond the subpoena power. In contrast, under Rule 32, the deponent need only be more than 100 miles from the place of trial. See *Battle v. Memorial Hospital,* 228 F.3d 544 (5th Cir. 2001) (witness not unavailable under Rule 804(a), but deposition is admissible under Civil Rule 32 because the witness was more than 100 miles from the courthouse).

The relationship between Rule 32 and the Federal Rules hearsay exceptions is illustrated in *Ueland v. United States.* 291 F.3d 993 (7th Cir. 2002). The Court in *Ueland* reversed a judgment for the United States in a Federal Tort Claims Act action brought by a prisoner after the prison van in which he was riding struck another car. The plaintiff proffered the deposition of another prisoner in the van, who corroborated the plaintiff's account. The deposition was taken in a separate lawsuit. The Trial Judge excluded the deposition on grounds of hearsay. But the Court found that the deposition was admissible under the terms of Fed.R.Civ.P. 32(a)(3). The Court elaborated as follows:

> Ueland's lawyer pointed out that Chon-Won Tai [the deponent] was being held by the United States at a prison more than 100 miles from Chicago, making the deposition admissible under Rule 32(a)(3)(B). In excluding the deposition as hearsay, the district judge relied on Fed.R.Evid. 804, treating the testimony as out-of-court statements offered for the truth of the matter asserted. Yet Rule 32(a) says that a deposition may be used if "admissible under the rules of evidence applied as though the witness were then present and testifying." If Chong-Won Tai had been "then present and testifying", none of his statements could have been excluded as hearsay. He was reporting what he claims to have experienced, not relaying what someone else told him. Rule 32(a), as a freestanding exception to the hearsay rule, is one of the "other rules" to which Fed.R.Evid. 802 refers.

The *Ueland* Court also held that Rule 32(a)(3)(B) does not require the proponent to make efforts to produce a witness who is more than 100 miles from the place of trial.

The Committee may well ask why there is a completely freestanding hearsay exception outside the Federal Rules of Evidence. There seems no reason to have an exception that is so similar to Rule 804(b)(1) and yet based on subtly different admissibility requirements–and to have such an exception in a completely separate set of rules can only be deemed a source of confusion and a trap for the unwary. Indeed, the trial court in *Ueland* was apparently unaware of the different admissibility standards of the two rules.

The Evidence Rules Committee may wish to inform the Civil Rules Committee, as part of its response to the related question of admissibility of "de bene esse" depositions, that it would be happy to assist the Civil Rules Committee in considering whether it makes sense to retain a separate hearsay exception in Civil Rule 32.

**Attachments:**

In addition to the memorandum from Judge Irenas and the letter from Judge Levi, I have attached excerpts from six recent cases discussing the use of "de bene esse" depositions. Only two of these cases deal with evidentiary admissibility. The other cases are attached to provide informational background on the distinction, if any, between discovery depositions and "de bene esse" depositions.

# United States District Court

EASTERN DISTRICT OF CALIFORNIA
501 "I" STREET, 14TH FLOOR
SACRAMENTO, CALIFORNIA 95814
(916) 930-4090

CHAMBERS OF
David F. Levi
UNITED STATES DISTRICT JUDGE


October 23, 2002

Honorable Jerry E. Smith
United States Court of Appeals
12621 Bob Casey United States
Courthouse
515 Rusk Avenue
Houston, TX 77002-2698

Dear Judge Smith:

At its October 3-4, 2002, meeting, the Advisory Committee on Civil Rules considered adoption of rule changes suggested by Judge Joseph E. Irenas (D.N.J.) to support more general use of a "de bene esse" deposition practice. Under the proposal, videotaped depositions could be taken shortly before trial to be used in place of live witness testimony, with the parties' consent. The committee briefly discussed the proposal but did not take a position on it. Instead, the committee deferred further consideration pending consultation with the Evidence Rules Committee because the proposal might implicate the evidence rules.

We would welcome your comments on the proposal and, in particular, whether you believe it affects Evidence Rule 611, governing the presentation of testimony at trial, or any other evidence rule. It is unclear, for example, whether under the proposal a party who has agreed to the use of videotaped testimony, but is subsequently disappointed with the results of the videotaping, could demand to substitute live trial testimony. If you decide that the proposal should not be rejected at this time, perhaps we can develop some plan of action either handling this matter jointly or separately, serially or simultaneously.

I have enclosed Judge Irenas's proposal for your consideration. I recognize that you may wish to consult with your full committee on this matter at its next meeting. Please do not feel that an immediate reply is necessary. Our committee will hold off consideration until you and your committee have had as much time as you wish to review the proposal. Thank you for your consideration, and congratulations on your appointment as chair.

I look forward to meeting you and send best wishes.

Sincerely,

David F. Levi

Enclosure

cc: Honorable Anthony J. Scirica (without encl.)
Honorable Richard H. Kyle (with encl.)
Professor Edward H. Cooper (with encl.)
✓Professor Daniel J. Capra (with encl.)

# MEMORANDUM

TO: Hon. Anthony J. Scirica
United States Court of Appeals

FROM: Hon. Joseph E. Irenas
United States District Court

DATE: June 7, 2002

RE: *De Bene Esse* Depositions

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I would like to suggest to the Committee which governs the Federal Rules of Civil Procedure that amendments should be made to recognize that *de bene esse* depositions taken for the express purpose of being introduced at trial in lieu of live testimony are different from discovery depositions and should be governed at least in part by separate rules.

Discovery depositions are generally taken early in the case. They are taken by the lawyer who is adverse to the party who is likely to offer the witness. As a practical matter, there is little or no examination of the witness by the party who intends to offer his or her testimony. Also, the questioning by the adverse party is designed not only to elicit information, but to develop testimony which will harm the party for whom the witness will be testifying.

*De bene esse* depositions, which occur frequently in my court, generally take place just a few days or a few weeks before

trial. They are invariably videotaped. In my experience in ten years on the bench, I do not recall a single discovery deposition which was videotaped. Moreover, the party who does the questioning in a *de bene esse* deposition, and in fact arranges for the deposition, is a party who intends to call the witness. Unlike a discovery deposition, there is full cross-examination by the adverse party, since the very reason for the deposition is to use it as a substitute for the live witness.

There are yet other differences. A party seeking to use a deposition as direct evidence to the extent permitted by Fed.R.Civ.P. 32(a) is only required to offer such parts of the deposition as he or she chooses, subject to the fairness rule in Fed.R.Civ.P. 32(a)(4). On the other hand, if a party is taking a *de bene esse* deposition for the express purpose of offering it in lieu of the witness, the party cannot pick and chose which parts he is going to offer. Once he does his direct and the adverse party cross-examines, both parties are stuck with the result just as they would be if the witness was offered live.

During a discovery deposition, parties are encouraged not to make objections to the witness' testimony, and objections as to "competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, . . ." Fed.R.Civ.P. 32(d)(3)(A). This rule would not apply in a *de bene esse* deposition where both sides are required to

object to the same extent as in a trial, since this witness is being offered as a trial witness. Before playing the videotape of a *de bene esse* witness, the court is required to rule on objections made during the course of the deposition just as the judge would rule at trial. The videographer edits the tape based on the judge's rulings before it is played to the jury. On appeal, the failure to object at a *de bene esse* deposition should be treated as a waiver subject to the plain error rule. By contrast, in determining the admissibility of a discovery deposition being offered under Fed.R.Civ.P. 32(a), the court could and should consider objections not raised when the deposition was taken. See Fed.R.Civ.P. 32(d)(3)(A).

An earlier version of the rule did distinguish between discovery depositions and *de bene esse* depositions, but that distinction was eliminated apparently on the theory that the current rules are adequate to cover both. I respectfully suggest that an analysis of the rules shows that they really apply only to discovery depositions. Fed.R.Civ.P. 43(a) provides that the testimony of witnesses shall be taken in open court unless an existing federal rule or statute provides otherwise. There is also provision in the rule for testimony from remote locations, but no provision for *de bene esse* depositions in lieu of testimony. Fed.R.Civ.P. 32(a) does allow use of discovery depositions in a variety of situations which generally reflect standard exceptions

to the hearsay rule found in the Federal Rules of Evidence. Deposition testimony can be used to impeach a witness, can be used as direct evidence by an adverse party, and can be used in the event of certain types of witness unavailability. Compare Fed.R.Civ.P. 32(a)(3) with Fed.R.Evid. 804(a); Fed.R.Civ.P. 32(a)(2) with Fed.R.Evid. 801(d)(2).

The basic principle here is that the federal deposition rules have their roots in the use of discovery depositions. The typical *de bene esse* witness is not a party, the deposition is not being used to impeach, and he or she is not unavailable as defined in Fed.R.Civ.P. 32(a)(3). In the usual case, the most that can be said is that it is inconvenient for the witness to be present.

The disclosure requirements of Fed.R.Civ.P. 26(a)(3)(B) are also geared to discovery depositions. First, the portions of the deposition used must be identified at least thirty (30) days before trial. Generally, *de bene esse* depositions are taken much closer to trial. This rule also anticipates that only parts of the deposition are going to be used, which is fine for discovery depositions, but not the operative rule for *de bene esse* depositions which must be offered in their entirety.

The failure to distinguish between *de bene esse* depositions and discovery depositions also can be confounding on the issue of costs to the prevailing party. These costs provided by Fed.R.Civ.P. 54(d)(1) are governed by 28 U.S.C. § 1920(2) which

provides that the Clerk may tax as costs "fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; . . ." This very general designation is generally thought to apply to discovery depositions, not to transcripts of the trial itself. New Jersey's Local Rule 54.1 generally provides that discovery depositions can be taxed if the transcripts are "used at trial," a somewhat ambiguous term. Local Rule 54.1(g)(7). Trial transcripts are generally taxable only if transcribed at the request of the judge or as needed on appeal. Local Rule 54.1(g)(6). *De bene esse* depositions to some extent should really be treated as trial transcripts rather than discovery materials used at trial in accordance with Fed.R.Civ.P. 32(a).

It should be noted here that *de bene esse* depositions specifically prepared to be used at trial in lieu of live testimony are more expensive than discovery depositions. One must have a videographer as well as a court reporter who must prepare a written transcript, if for no other reason than allowing the court to rule on objections made when the deposition is being taken. If the court orders certain testimony excised, the videographer can use the references in the written transcript to adjust the tape machine accordingly. Thus, we have a videographer and his equipment which must be used twice, once at the taking of the deposition and again at the playback. We still have a court reporter who often has to

prepare the transcript on a rush basis, thus increasing the cost, because these depositions are often taken only a few days before trial.

I suggest at the least there ought to be rule modifications specifically recognizing the difference between discovery depositions and *de bene esse* depositions. The use of *de bene esse* depositions should be freed from the constraints of Fed.R.Civ.P. 32(a), but subject to the specific condition that if offered it must be used in its entirety. I also believe that either Rule 54 or the statute, 28 U.S.C. § 1920, should be amended to elaborate on the same subject. The use of *de bene esse* depositions is a useful tool for moving along a trial calendar, since trying to accommodate a court's trial schedule to witnesses' availability often results in substantial delays, sometimes after a jury is already picked. My trial instructions encourage the use of *de bene esse* depositions and further indicate that the court will be uninclined to grant adjournments or trial delays based on a witness' alleged schedule unavailability.

Enclosed for your review is a brief memo from my law clerk discussing some of the cases involving *de bene esse* depositions. This memo was originally prepared in connection with a dispute over the taxation of costs. It was that dispute which led to my reconsidering the whole place of *de bene esse* depositions in the Rules of Civil Procedure. I appreciate your time and the

time of your Committee in considering this matter. If there is anything further I can do, please let me know.

Thanks for taking the time to hear me out.

JEI

:lok
Enclosure

# Appendix to "De Bene Esse" Memorandum to Evidence Rules Committee

## Excerpted Cases Discussing "de bene esse" Depositions

**1. De Bene esse depositions can be covered by discovery time limitations. Civil Rules make no distinction:**

CHRYSLER INTERNATIONAL CORPORATION, a Delaware corporation, Plaintiff-Appellant, versus JOHN CHEMALY, individually, MICHAEL DEL MARMOL, individually, et al., Defendants-Appellees.

No. 00-16087

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

280 F.3d 1358

February 1, 2002, Decided
February 1, 2002, Filed

Chrysler on appeal does not argue that the district court abused its discretion in not again extending the discovery deadline. Instead, Chrysler asserts on appeal -- as it did before the trial court in its motion opposing the protective order -- that it was intrinsically a legal error to treat *de bene esse* depositions as subject to the discovery deadline. We cannot agree.

In allowing or disallowing a deposition to be taken for use at trial, it is appropriate that the district court consider all the circumstances, including fairness to the adverse party and the amount of time remaining before the date set for trial. The district court can set a definite time limit for the taking of the very deposition it is permitting to be taken. And the district court can make that time limit the same as the time limit for discovery depositions. Nothing about this approach to the setting of time limits is inherently unlawful. The only question is whether the specific time limits that are selected are themselves an abuse of discretion.

**The district court's identical treatment (for timing purposes) of discovery and *de bene esse* depositions is consistent with the language of the Federal Rules of Civil Procedure, which draw no distinction between the two. The federal rules simply limit the instances in which a deposition can be used at trial. See Fed. R. Civ. P. 32. Depositions are generally devices for discovery. But in the right circumstances, all or almost all depositions potentially could be used at trial. For a court to treat discovery deadlines as applying to all depositions is not an uncommon or inherently unreasonable kind of shorthand to say "be done with deposition taking by 'X' date." So, parties who delay in taking a needed deposition and who assume that a district court will draw (when the Rules do not and if the pretrial order does not) a distinction, for pretrial scheduling purposes, between different kinds of depositions assume a risk: they cannot count on the trial court's allowing a deposition to be taken closer to the trial**

**date.**

Given the circumstances in this case, we are unconvinced that the district court's discretion has been abused. At least when, as here, the district court -- more than three months before the discovery deadline finally expired -- has warned that all depositions will be subject to the same timing restrictions and when the district court has also determined that the party seeking to take a deposition for use at trial has unduly delayed in undertaking to obtain it, we cannot consider the grant of the protective order or the exclusion of the deposition at trial to have been an abuse of discretion.

**2. If admissible under Rule 32, it can't be excluded because it was a discovery deposition. The rules do not distinguish between discovery and de bene esse depositions:**

REBECCA TATMAN, Administratrix of the Estate of Monte Tatman; REBECCA TATMAN, individually, Plaintiffs-Appellants, v. BOBBY WAYNE COLLINS; H & T TRUCK SERVICES, INC., Defendants-Appellees

No. 90-2611

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

938 F.2d 509

February 7, 1991, Argued
July 9, 1991, Decided

In refusing to admit the deposition of Dr. Amico because it was a "discovery" deposition rather than one taken for use at trial, the district court stated, "the deposition that's involved here is a discovery deposition; it is one that was taken by the defense counsel at an early juncture in the case; it is one that the defense counsel should not be chargeable with at last minute -- at the trial because plaintiff's counsel did not produce the physician." J.A. 189.

The Federal Rules of Civil Procedure make no distinction for use of a deposition at trial between one taken for discovery purposes and one taken for use at trial (*de bene esse*). *See* Rule 32 (use of depositions in court proceedings). Moreover, we are unaware of any authority which makes that distinction. See Savoie v. Lafourche Boat Rentals, Inc., 627 F.2d 722, 724 (5th Cir. 1980) (no authority "in support of the proposition that discovery depositions may not be used at trial against the party who conducted them"); United States v. IBM Corp., 90 F.R.D. 377 (S.D.N.Y. 1981). In *IBM Corp.* the court provided a historical explanation of how any distinction between a "discovery" deposition and a "*de bene esse*" deposition was deliberately eliminated from the rule:

> Prior to the revision of the Federal Rules of Civil Procedure in 1970, Rule 26(a) provided that depositions could be taken "for the purpose of discovery or for use as evidence in the action or for both purposes." Rule 26(d), the predecessor of Rule 32(a), which governed the use of depositions at trial, did not, however, state any distinction between discovery and evidentiary depositions. Recognizing a possible ambiguity in the rule, courts nevertheless refused to recognize a distinction between "discovery" and "evidentiary" depositions with regard to admissibility at trial. When the subject matter of Rule 26(a) was transferred to Rule 30(a) in the 1970 revision of the rules, the language authorizing depositions "for the purpose of discovery or for use as evidence in the action or for both purposes" was omitted.

Fed. R. Civ. P. 32 provides that a deposition may be offered at trial, subject to the rules of evidence, as though the witness were present and testifying, and no distinction is now made in the rule with respect to the purpose for which the deposition was taken. While the rule makes distinctions in the circumstances when depositions of parties and witnesses may be used, it provides in section (a)(3) that when a witness is unavailable as therein provided, the deposition of the witness may be used for any purpose. Parties cognizable of the rule can overcome limitations of the deposition format and its timing in the discovery process by appropriate cross-examination, objections, and motions as permitted by Rules 30 and 32 (both of which govern depositions), Rule 29 (regarding stipulations), and Rule 26 (governing discovery in general). When, as here, the witness' deposition was duly noticed and all parties had the opportunity to attend (and did attend), it may be introduced at trial, subject to the rules of evidence, if the witness is unavailable as described in Rule 32(a)(3). It is irrelevant to the issue that one party or the other initiated the deposition, that it was initiated only for discovery purposes, or that it was taken before other discovery was completed.

The district court, of course, is afforded broad discretion to admit or exclude any deposition testimony by applying the rules of evidence. But it cannot exclude deposition testimony on the basis that the defendant intended that the deposition be taken for discovery purposes and did not expect that it would be used at trial.

**3. Party's stipulation to the use of a de bene esse deposition constitutes a "special circumstance" under Rule 32, so the witness need not be more than 100 miles from the courthouse.**

RAYMOND HAGUE and MARY RUTH HAGUE, Plaintiffs, - against - CELEBRITY CRUISES, INC., FANTASIA CRUISING, INC., ESSEF CORPORATION, PAC-FAB, INC., and STRUCTURAL EUROPE, N.V., Defendants.

95 Civ. 4648 (BSJ) (JCF)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2001 U.S. Dist. LEXIS 6687

I need not decide at this time whether a physician's responsibility to his or her patients is, by itself, an exceptional circumstance sufficient to excuse the witness from testifying in person. In this case there are two additional circumstances that tip the balance. First, counsel previously agreed that they would conduct a de bene esse deposition of Dr. Yu. (Order dated March 21, 2001). Having so stipulated, Celebrity examined the witness just as it would at trial. Indeed, the prior understanding of counsel that a deposition would later be admissible was an exceptional circumstance cited by the courts in both Bobrosky v. Vickers, 170 F.R.D. 411, 415-16 (W.D. Va. 1997) (admitting agreed upon deposition while excluding others), and Reber v. General Motors Corp., 669 F. Supp. 717, 720 (E.D. Pa. 1987).

Second, the fact that Dr. Yu's deposition was videotaped satisfies, at least in part, the preference for live testimony.

> Videotaped testimony prepared specifically for use at trial mitigates the concerns militating against the use of depositions in lieu of live testimony. First, although the witness is not physically present in the courtroom, the jury has the opportunity to observe his manner and hear his voice during the testimony. Second, the witness is questioned just as he would be at trial by counsel for both parties.

Id. This is not the case of a party seeking to introduce the cold written transcript from a discovery deposition. Accordingly, the videotape of Dr. Yu's deposition shall generally be admissible.

**4. De bene esse depositions denied because discovery time has run out, witnesses had already been deposed for discovery, and the party should have used the opportunity to cross-examine on the previous occasion.**

Donk v. Miller

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2000 U.S. Dist. LEXIS 1871

The federal courts have not drawn a distinction between discovery depositions and trial depositions for many years. See, e.g., United States v. IBM, 90 F.R.D. 377, 381 (S.D.N.Y. 1981)("Rule 32 does not 'evince a distinction as to the admissibility at trial between a deposition taken solely for purposes of discovery and one taken for use at trial . . . .'")(quoting Rosenthal v. Peoples Cab Co., 26 F.R.D. 116, 117 (W.D. Pa. 1960)). Accordingly, any deposition taken by a party may be used at trial if the deponent subsequently becomes unavailable through no fault of the party proffering the testimony. See Fed. R. Civ. P. 32(a)(3).

Suffice it to say, the Florida Defendants, along with every other party, have had ample opportunity to participate in the discovery process. Accordingly, the Florida Defendants could have taken any depositions that they needed for trial during the period allotted for that purpose. That they chose not to notice such depositions, or once noticed by the Plaintiffs chose not to cross-examine, does not provide a justification for additional depositions -- *de bene esse* or otherwise -- at this late date. As the Fifth Circuit noted in Wright Root Beer v. Dr. Pepper Co., 414 F.2d 887, 889-90 (5th Cir. 1969), whether a lawyer chooses to cross-examine at a deposition is a matter "left to counsel's judgment, and to the strategy that is inherent in a trial lawyer's decision." The fact that the Florida Defendants unilaterally decided to participate only selectively in pretrial discovery is not a justification for allowing them to take additional depositions now.

Nor is the Court persuaded that the *de bene esse* depositions should be permitted to save the Florida taxpayers unwarranted expense. First, the Florida Defendants have presented nothing other than counsel's conclusory assertion that each of these witnesses will "need to testify at trial concerning the issues that will be before the Court." (See 1/31/00 letter from Ms. Weissenborn to the Court at 3). Second, even if one were to assume that fifteen such trial witnesses were required, depositions *de bene esse* "are properly used when it is impossible for the witness to appear as required due to circumstances beyond that witness's control. The gravity of a final illness and the near certainty of a sudden death are, for example grounds for such a deposition." Bregman v. District of Columbia, 1998 U.S. Dist. LEXIS 22793, No. Civ. A. 97-789, 1998 WL 665018 (D.D.C. Sep. 28, 1998). In this case, the Florida Defendants obviously have not made the required showing that they will be unable to present their case without such depositions. Indeed, most of the deponents whom they have identified by title appear to be state employees within their control.

**5. De bene esse deposition denied because deponent is one whose acts are at issue and videotape is no substitute for live testimony.**

BRIAN BREGMAN, Plaintiff v. DISTRICT OF COLUMBIA, et al., Defendants.

Civil Action No. 97-789 (HHK/JMF)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

1998 U.S. Dist. LEXIS 22793

September 28, 1998, Decided
September 28, 1998, Filed

Plaintiff claims that a police officer, named Paul Clark, used excessive force to arrest him, kicked him in the head, and falsely imprisoned him. The Corporation Counsel represents the defendants, the District of Columbia and Officer Clark. Plaintiff proceeds under 42 U.S.C. §§ 1983 and upon a common law count, premised, of course, upon the District's vicarious responsibility for Clark's alleged actions.

Clark's deposition was taken and the parties are otherwise engaged in discovery. Officer Clark has now advised the Corporation Counsel's office that he is resigning from the police department and is moving to Europe. He intends to be in Europe when this case will go to trial. The Corporation Counsel has now moved to take Clark's deposition, *de bene esse*.

Depositions, *de bene esse*, are properly used when it is impossible for the witness to appear as required due to circumstances beyond that witness's control. The gravity of a final illness and the near certainty of a sudden death are, for example, grounds for such a deposition because there is a danger of the testimony being lost. *E.g.* Johnson v. Washington Metropolitan Area Transit Authority, 1993 U.S. Dist. LEXIS 1266, No. 86-3110- LFO, 1993 WL 37445 at *1 (D.D.C. Feb. 3, 1993). It hardly follows that this extraordinary device should be used whenever a party decides for himself that something in his life is more important that attending his or her trial. In such a situation, using this device permits a person to abandon whatever obligation he may have to give his testimony in favor of something he thinks is more important. Courts do themselves no honor when they encourage such an irresponsible attitude towards the Court's processes and its need that the finder of fact hear from the witnesses before it. It would be, in my view, a perversion of the purpose of a deposition *de bene esse* to use it to encourage a witness to believe that his desires are more important than the Court's ordinary processes.

Furthermore, Clark is central to the District's defense of its own interests and yet he has advised his employer that he is leaving his employment and the District will apparently have to shift for itself. The deposition the Corporation Counsel seeks rewards Clark for his behavior; he gets to give his testimony and do what he wants to do without cost. While that meets his needs, I will, however, not be a party to encouraging Clark's abandoning what I consider the clear obligation he has to his employer to assist in its defense of his behavior.

Finally, as Judge Oberdorfer has reminded us, the new courtroom technology, while marvelous, does not mean that a court has the right to equate videotaped testimony with an actual appearance before the finder of fact. Johnson v. Washington Metropolitan Area Transit Authority, 1993 U.S. Dist. LEXIS 1266, 1993 WL 37445 at *1. While, in an extraordinary case, there may be choice but to permit that substitution, it hardly means that the two can be equated and that depositions, *de bene*

*esse*, can always be substituted. I certainly see no reason to encourage an attitude in which the parties' convenience and their desires to do something other than appear in court compels the daily substitution of videotape for real presence. To the contrary, Clark's desire to be elsewhere cannot possibly justify that substitution in this case.

**6. Costs are treated differently depending on whether it's a de bene esse or a discovery deposition:**

JOSEPH J. URCIOLO, SR., Plaintiff, v. VERSA PRODUCTS, INC., Defendant.

Civil Action No. 90-2142 (JHG)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

1992 U.S. Dist. LEXIS 4298

April 9, 1992, Decided
April 9, 1992, Filed

For example, plaintiff has requested costs incident to the taking of the de bene esse deposition of Dr. Mittman, including airfare ($ 314.00), car rental ($ 60.27), and parking fees ($ 10.00). The Court cannot, however, find that such expenses are permitted under 28 U.S.C. §§ 1920 or Local Rule 214 or that there are exceptional circumstances justifying such an award. See, e.g., George R. Hall, Inc. v. Superior Trucking Co., Inc., 532 F. Supp. 985, 995 (N.D. Ga. 1982); McHenry v. Joseph T. Ryerson Co., 104 F.R.D. 478, 480 (N.D. Ind. 1985).

Similarly, plaintiff has requested the Clerk of the Court to tax the defendant for a total of $ 750.00 expended for Dr. Mittman's deposition witness fee. Although under 28 U.S.C. §§ 1821(b) plaintiff is entitled to a witness fee of $ 40.00 per day, plus allowable travel expenses, plaintiff has failed to show the Court contractual or statutory authority or exceptional circumstances justifying a higher award. See Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987).

In addition, plaintiff seeks the video and transcript costs for Dr. Mittman's deposition. Although under 28 U.S.C. §§1920 and Local Rule 214, the costs of the original and one copy of any deposition noticed by the prevailing party are taxable as costs, had Dr. Mittman testified at trial, defendant would only be taxed for the statutorily required witness fee pursuant to 28 U.S.C. §§1821. It would be grossly unfair to require defendant to incur the costs of the video and transcript of Dr. Mittman's de bene esse deposition when the rules allowing recovery of costs for copies of depositions were clearly intended to apply to discovery depositions and the de bene esse deposition of Dr. Mittman was for the convenience and benefit of the plaintiff. As another court concluded in an analogous case, The cost of this videotape fits most appropriately . . . as a variant form of a witness fee, and the fee recovered for this videotaped testimony will be limited, as are other witness fees." Fressell v. AT&T Technologies, Inc., 103 F.R.D. 111, 116 (N.D. Ga. 1984).

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposal Concerning Preservation of Exhibits on Appeal
Date: April 1, 2003

Judge Roll, a member of the Criminal Rules Committee, has requested consideration of a possible rule amendment that would preserve exhibits during an appeal. Judge Roll initially brought the matter to Judge Carnes, Chair of the Criminal Rules Committee. Judge Carnes was unsure whether the matter was within the purview of Criminal Rules, and so the question was referred to John Rabiej. What follows is the pertinent text of the email from Judge Roll to John Rabiej:

> The topic I raise is one I have discussed with you in the past. It deals with the disposition of exhibits after trial and before appeal. The practice in the District of Arizona (and elsewhere for the most part) is to have all trial exhibits returned to the respective parties after trial has been completed. This procedure is followed in both criminal and civil proceedings. Exhibits are returned in criminal cases regardless of the verdict. As a practical matter, this is of concern to me and to several other district jduges with whom I have spoken.
>
> Two matters are of particular concern: 1) the ability of appellate courts to timely retrieve trial exhibits from the respective parties; and 2) the integrity of those retrieved exhibits.
>
> An example of how the current procedure could produce disastrous results may be seen in some of the mega-cases prosecuted in federal court. One matter which has been assigned to me involves a drug tunnel connecting a residence in Naco, Sonora with a mobile home just across the border in Naco, Arizona. The tunnel was over 200 feet long. In this case, many individuals were indicted and 7 tons of cocaine and fully automatic weapons were seized. The origin of the drugs, according to prior presentence reports involving certain defendants, is two major Mexican drug cartels. This summer, lead defendant William Dillon, who was recently apprehended in Mexico and returned to the United States, will go to trial in this district. His trial will far exceed in length and complexity the two earlier trials of co-defendants over which I presided. It will also likely involve 400-500 exhibits. Under the current procedure, after the trial is completed, even if Mr. Dillon is convicted and faces mandatory guidelines of life, the respective exhibits will be returned to the government and Mr. Dillon's retained counsel unless and until requested by the Ninth Circuit.

The opportunity for serious mischief in connection with trial exhibits seems too apparent to dispute.

With the blessing of our chief judge, a very small pilot program has been initiated here in Tucson division. All documentary and photographic exhibits admitted into evidence at trial are scanned before being returned to counsel. The compact disc containing the scanned exhibits is then made part of the court file and is forwarded to the Ninth Circuit in the event of appeal.

The reasons for the current procedure of releasing all exhibits immediately following return of verdict are not insubstantial. Most of us are aware of state court clerks' offices inundated with enormous numbers of trial exhibits committed to their care until requested by an appellate court or otherwise released by court order.

However, technology has now progressed to the point whereby the only options are no longer limited to 1) retention of all exhibits by the clerk's office, or 2) release of all exhibits to counsel. Other methods are available to guarantee the availability and integrity of trial exhibits until appeals have been exhausted.

I fear that the federal judiciary's failure to address this very serious matter will mean that in only a matter of time, a very high profile matter will be resolved unsatisfactorily because of the unavailability/loss/alteration of one or more trial exhibits.

Although I realize that this matter involves both civil and criminal litigation, if it is within the area of responsibility for the criminal rules committee, I would respectfully request that this item be an agenda item for our next meeting.

Thank you for your consideration of this matter.

Ed Cooper, the Reporter to the Civil Rules Committee, was of the opinion that if a rule change were to be made, it would be most appropriately placed in the Evidence Rules, the Appellate Rules, or the local rules of the respective courts. The matter was therefore referred to the Evidence Rules Committee and to the Appellate Rules Committee for consideration.

This memorandum provides background for a possible response by the Evidence Rules Committee to Judge Roll's request. It is assumed that the proposal is correct on the merits, i.e., that there should be a rule providing that the court preserve, electronically or otherwise, trial exhibits until appeals have been exhausted. The question addressed by this memorandum is whether that rule is properly placed in the Evidence Rules, or whether it might be more appropriately set in another body of Rules–specifically local rules or Appellate Rules.

### *Evidence Rules*

It is true that exhibits are evidence, but that does not mean that all rules concerning exhibits must or should be placed in the Evidence Rules. Generally speaking, the Evidence Rules deal with

the *admissibility*, as opposed to the preservation or production, of evidence. What follows is a list of the very few Evidence Rules that deal with the issues that underlie Judge Roll's proposal: preservation of evidence, treatment of exhibits, and rules concerning appeal.

There are two rules that deal specifically with *preserving* evidence:

1. Rule 612 requires that if a portion of a statement used to refresh the recollection of a witness is withheld over objection, that portion "shall be preserved and made available to the appellate court in the event of an appeal." (The rule does not say whether it is the court or the party that has the duty to preserve the evidence).

2. Rule 1006 provides that if a summary is used in lieu of voluminous evidence, the "originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place."

There are two rules that mention exhibits specifically:

1. Rule 803(5) provides that a past recollection recorded "may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party."

2. Rule 803(18) provides, similarly, that statements from a learned treatise "may be read into evidence but may not be received as exhibits."

There are four rules (in addition to Rule 612, *supra*) that deal with the treatment of evidence questions on appeal:

1. Rule 103 imposes requirements for preserving a claim of error on appeal (subdivision (a)) and for plain error review if those requirements are not met (subdivision (d)).

2. Rule 201(f) provides that judicial notice may be taken at any stage of the proceedings. While not directly referring to appeal, the Rule has been construed to permit the taking of judicial notice of adjudicative facts on appeal, insofar as that is consistent with the right to jury trial. See *Federal Rules of Evidence Manual* § 201.02[8].

3. Rule 605, governing the competency of the judge as a witness, provides that an objection to such testimony need not be made in order to preserve a claim of error on appeal.

4. Rule 1101 provides that the Federal Rules of Evidence "apply to . . . the United States courts of appeals".

*Conclusion on Existing Evidence Rules:*

The existing evidence Rules provide some support – but not strong support – for locating a rule about the preservation of exhibits for appeal within the Evidence Rules. The closest analog is Rule 612, which specifically refers to preservation of certain evidence for appeal. But generally speaking, the Evidence Rules are much more geared toward the admissibility of evidence at a trial.

Think about it this way: If the Evidence Rules *were* amended to add a rule concerning preservation of exhibits on appeal, where would that rule be located? It is not a general rule concerning judge/jury functions and preservation of claims of error (Article 1). It has nothing to do with judicial notice, presumptions, relevance, privilege, treatment of witnesses, experts, or hearsay (Articles 2-8). It is not really an authenticity rule (Article 9), although admittedly the threat of tampering with the exhibit is the reason for the rule. It is not a best evidence rule (Article 10) and has nothing to do with the jurisdiction of the Evidence Rules (Article 11). Put simply, if you can't even figure out where to put a rule, it probably doesn't belong there.

***Local Rules***

A rule requiring a court to preserve an exhibit during the time of appeal could be looked at as a rule of court administration. Rules of court administration are usually found in the local rules of each district court. This is especially so with rules governing technology (such as a rule requiring or authorizing electronic preservation of exhibits). Every court involved in electronic filing has promulgated local rules governing electronic filing, including the filing of exhibits. Within five years or so, every district court will be using electronic case filing, and so local rules could cover the problem of preserving exhibits nationwide.

Rule 5 of the Model Rules on Electronic Filing, approved by the Judicial Conference in 2001, already provides that "Filing Users must submit in electronic form all documents referenced as exhibits or attachments, unless the court permits conventional filing." (The Rule was derived from the local rule of the Southern District of New York Bankruptcy Court, and has been adopted in many other courts.) Thus, the Model Rule contemplates that the court will have an electronic version of every exhibit that is filed in the case. If that is so, then a rule requiring the preservation of all exhibits pending appeal is probably unnecessary, or at most a minor provision that could be added to the local electronic filing rules.

There are other examples of local rules that specifically provide for court retention of exhibits during the appeal (though this does not appear to be a majority rule). Examples include:

> *Eastern District of California, Local Criminal Rule 39(e):* Absent a stipulation of all parties, see L.R. 83-141, **the Clerk shall maintain all exhibits during the pendency of the**

**criminal trial and all appeals** unless otherwise provided in these Rules.

*District of Wyoming, Local Rule 79.2: (a) Custody of Exhibits.* The Clerk of Court or courtroom deputy clerk shall mark and have safekeeping responsibility for all exhibits marked and offered at trial or hearing. All rejected exhibits (exhibits tendered, but not admitted) shall also be retained by the Clerk of Court. **The Clerk of Court shall continue to have custody of the exhibits during the period after trial until the expiration of the time for appeal or termination of appeal proceedings.**

*Western District of Pennsylvania, Local Rule 5.1(e):* Trial exhibits shall be retained by the clerk until it is determined whether an appeal has been taken from a final judgment. **In the event of an appeal, exhibits shall be retained by the clerk until disposition of the appeal.** Otherwise, they may be reclaimed by counsel for a period of thirty (30) days after which the exhibits may be destroyed by the clerk.

Thus, it would appear that the problem raised by Judge Roll is currently being handled by local rules in some courts and could eventually be solved by local rules throughout the country. Custody and preservation of exhibits is the kind of detail that may not justify a national rule. Moreover, districts may wish to experiment to determine whether the process of scanning exhibits is too burdensome, or to determine whether certain exhibits are so bulky or sensitive that they should not have to remain within the custody of the court. Local rules are much more conducive to experimentation and local flexibility than are national rules.

The downside of local rulemaking, of course, is that it is unlikely that all of the districts will promulgate a rule that requires the court to retain exhibits during an appeal. The question whether a rule should be local or national depends on many factors, including the importance of the problem addressed, the need for flexibility and adaptation, and the virtue of local experimentation in solving the problem. The Committee may wish to discuss whether a rule concerning preservation of exhibits is so important, and so susceptible to a single and unvarying solution, that it should be placed in a national rather than a local rule.

### *Appellate Rules*

If the problem of preserving exhibits for appeal does require a national solution, this does not necessarily mean that the solution must be placed in the Evidence Rules. After all, a rule preserving exhibits during an appeal is essentially a rule *about* appeal. So a strong argument can be made that a national rule, if any, should come by amendment to the Appellate Rules.

There are a number of Appellate Rules that deal directly with exhibits, and indirectly with their preservation.

1. Rule 11(b)(2) imposes a duty on the district clerk to forward the record to the circuit court clerk, and provides that unless directed otherwise "the district clerk will not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule or the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt." [Appellate Rule 6(b)(2)(C) provides an identical rule for appeals from a judgment, order, or decree of a district court or a bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case.] Rule 11(b)(2) deals specifically with the production, and implicitly with the preservation, of exhibits, and so would seem to be a salutary place to add an amendment requiring exhibits to be preserved, should such an amendment be justified on the merits.

2. Rule 30(e) provides that exhibits designated for inclusion in the appendix "may be reproduced in a separate volume, or volumes, suitably indexed." This Rule is less on point than Rule 11(b)(2), but it does show some attempt in the Appellate Rules to provide an integrated treatment of exhibits on appeal.

In sum, if a rule preserving exhibits during appeal is deemed an appropriate subject for a national rule, and justified on the merits, it seems to be better placed in the Appellate Rules than in the Evidence Rules. One possible reservation is that Appellate Rule 1 says that the Rules "govern procedure in the United States Courts of Appeals." Thus it could be argued that the Appellate Rules cannot apply to the district courts having custody of the exhibits. But Rule 11(b)(2) already imposes a duty on district court clerks to forward the record, so it appears that this power problem has already been answered to the rulemakers' satisfaction.

***Possible Course of Conduct***

This Committee has been asked to respond to Judge Roll's proposal, with a preliminary determination of whether the proposed rule might be properly placed in the Evidence Rules. If the Evidence Rules are an appropriate location for a rule concerning preservation of exhibits during appeal, then the Committee would take the proposal under advisement to determine whether an amendment should be proposed.

A strong argument can be made that a rule governing preservation of exhibits on appeal is more appropriately placed in either the local rules or the Appellate Rules, because the Evidence Rules generally do not deal with preservation of evidence and they generally do not deal with appeals. If the Committee determines that the Evidence Rules are not the most appropriate place for

such an amendment, then its position can be made known by letter to John Rabiej, who referred the matter to this Committee.

This memorandum has assumed that a rule requiring court custody of exhibits pending appeal is justified on the merits. It should be noted, however, that important questions of scope and language must be resolved if such an amendment is ultimately considered. For one thing, the rule must be limited to documentary and photographic exhibits, because those are the exhibits that can be scanned and stored electronically. The court should not be required to keep custody of physical exhibits such as drugs and firearms. Indeed, many local rules provide for special treatment of either physical or "sensitive" exhibits. See Middle District Alabama Local Rule 5.2:

> (c) Return of Sensitive Exhibits--Duty of Parties, U. S. Attorney, and Other Agencies: All exhibits of a sensitive nature filed with the Court, such as firearms or other weapons, narcotics or illegal drugs or contraband of any kind, moneys of any denomination (both real and counterfeit), and any other sensitive exhibits shall be returned by the Clerk to the party, the U. S. Attorney, or any other agency filing such exhibit at the conclusion of the trial. Such party, the U. S. Attorney, or agency shall preserve said sensitive exhibits until conclusion of the appeal or until the time for an appeal has expired.

Thus, any rule change should be limited to photographic and documentary exhibits.

Second, any rule change must consider the relationship between the new rule and Appellate Rule 11(b)(2), which provides for certain dispensation with respect to physical exhibits and exhibits that are unusually bulky.

The Committee may wish to point out these necessary qualifications on any rule amendment in its letter to the AO.

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Legislative Initiatives That Might Affect the Federal Rules of Evidence
Date: April 1, 2003

Two bills have been proposed in Congress that if enacted would have an impact on the Federal Rules of Evidence. The bills, and memoranda prepared by John Rabiej describing the bills, are attached to this memorandum. As John notes, no Committee action is required at this time on either of the legislative initiatives. However, it might be appropriate to get a sense of the Committee as to the legislative proposals, in case a quick response from the Committee becomes necessary.

This memorandum provides a short description of the three provisions in the two bills that would impact the Evidence Rules, as well as the Reporter's preliminary analysis of the problems, if any, raised by those provisions.

***H.R. 538–Parent Child Privilege***

This bill would add a new Rule 502 to the Federal Rules of Evidence. It provides for both a privilege to refuse to give adverse testimony against a parent or child, as well as a privilege that would preserve confidential communications between parent and child. Both of these parent-child privileges have been rejected as a matter of federal common law by virtually every court. See *Federal Rules of Evidence Manual* § 501.02. Proponents of the privilege, despairing of common law development, have from time to time proposed a legislative solution. H.R. 538 is the latest incarnation.

The legislation in its current form is, to put it mildly, problematic. What follows is a list, by no means complete, of some of the drafting defects, and some of the more substantive problems, that plague the bill:

1. *One New Federal Privilege:* Federal Rule of Evidence 501 provides that privileges "shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience." The Rule gives the federal courts the primary responsibility for developing evidentiary privileges. Congress rejected a detailed list of privileges in favor of a common law, case-by-case approach. Given this background, it is arguably not advisable to single out a parent-child privilege for legislative enactment. Amending the Federal Rules to include a parent-child privilege would create an anomaly: that very specific privilege would be the only codified privilege in the Federal Rules of Evidence. All of the other federally-recognized privileges would be grounded in the common law. This results in an inconsistent, patchwork approach to federal privilege law that is hard to justify, especially given the infrequency of cases involving testimony by parents against their children or children against their parents. Moreover, the granting of special legislative treatment to one of the least-invoked privileges in the federal courts is likely to result in confusion for both Bench and Bar. A specific legislative grant of a privilege might even be considered to create a negative inference that could limit judicial development of new privileges. Such a negative inference would be directly contrary to the Supreme Court's directive that federal courts have the authority and obligation to create new privileges where warranted by reason and experience. The negative inference as to new privileges is made worse by subdivision (f) of the bill, which provides that there is no intent to affect the applicability and enforceability of "other *recognized* evidentiary privileges". Nothing is said about an intent to affect the development of new privileges not previously recognized under federal common law.

2. *Jumbled Definitions:* The definitions in subdivision (a) are put in an odd order. First comes "child", then "confidential communication" then "parent". The second definition, for confidential communication, uses the term "parent" as part of its own definition, even though that term has not yet been defined. It seems obvious, and more logical, that the definitions of "confidential communication" and "parent" should switch places.

3. *Can't Be Compelled Unless It's Voluntary*: Subdivision (b), the adverse testimonial privilege, provides that a parent cannot be compelled to give adverse testimony against a child and a child cannot be compelled to give adverse testimony against the parent. But then there is an "unless" clause. Read as a whole, the subdivision reads that a parent or child cannot be compelled to testify unless they voluntarily and knowingly waive the privilege. This is an odd construction, to say the least. If the parent or child voluntarily and knowingly waive the privilege, then they are *not* being compelled to testify. The very nature of compulsion is that there is no waiver of the privilege. It's like saying "The state cannot compel you to incriminate yourself, but if you want to, then the state can compel you." The "unless" clause is superfluous because the prohibition on compulsion

assumes that there will be no waiver.

It is also odd that the adverse testimonial privilege protects against compulsion of testimony adverse to one who is a parent or child "at the time of the proceeding." Can you stop being a parent or child? The answer is yes if the parent-child relationship is one of the non-biological relationships protected by the rule. But simply having to include the "at the time of the proceeding" language shows the difficulty of drafting a logical-sounding parent-child privilege.

*4. Compulsion and Confidentiality:* Subdivision (c), the confidential communication privilege, provides that neither a parent nor child shall be compelled to divulge a confidential parent-child communication. This would seem to indicate that the privilege is held, and can be waived, by the witness-spouse, as is true with the adverse testimonial privilege. But the "unless" clause in this subdivision is triggered by a knowing and voluntary waiver by *both* the parent and child. If there is a knowing and voluntary waiver by both parties, then the witness can be compelled to disclose the confidential communication. The relationship between compulsion of an individual witness and bilateral waiver is obviously muddled.

*5. No Crime-Fraud Exception:* The exceptions to the privileges, set forth in subdivision (d), are analogues of most of the exceptions that have been developed by courts construing the marital privileges. But one standard exception is missing–that for communications made for purposes of furthering crime or fraud. If a crime-fraud exception applies for communications between attorney and client, and for communications between spouses, why shouldn't there be a similar exception for communications between parent and child?

*6. Clerical Amendment Misnumbering:* At the end of the bill, there is a clerical amendment that would change the table of contents for the Federal Rules of Evidence by adding the following "new item":

"Rule 501. Parent-child privilege."

The problem is that we already have a Rule 501. This change would make the table of contents inaccurate. Obviously, the change was meant to say "Rule 502", not "Rule 501."

*7. Policy Questions:* Besides all the drafting problems, the bill raises a fundamental policy question: why should we have a parent-child privilege? Is the cost in the loss of reliable evidence worth the benefit? If so, why has virtually every federal and state court refused to adopt such a privilege? These are questions that might usefully be discussed.

### *S. 644: Exception to Marital Privileges*

One provision in S. 644 would amend Title 28 – *not the Evidence Rules* – by adding a new section that would provide an exception to the two marital privileges, i.e., the privilege to refuse to give adverse testimony, and the privilege against disclosure of confidential communications. Those privileges would be inapplicable in any Federal proceeding in which a spouse is charged with a crime against a child of either spouse or against a child under the custody or control of either spouse.

This provision essentially codifies the federal common law on the subject, and accordingly seems completely unnecessary. See, e.g., *United States v. White*, 974 F.2d 1135 (9th Cir. 1992) (marital confidential communications privilege is inapplicable where the litigant-spouse admits crime or abuse of a family member, or threatens such abuse: "Protecting threats against a spouse or a spouse's children is inconsistent with the purposes of the marital communications privilege: promoting confidential communications between spouses in order to foster marital harmony."); *United States v. Allery*, 526 F.2d 1362 (8th Cir. 1975) (applying a similar exception to the marital privilege against adverse testimony); *United States v. Bahe,* 128 F.3d 1440 (10th Cir. 1997) (finding an exception to the privilege for confidential marital communications where the defendant is charged with sexually assaulting an 11-year-old relative visiting the home: "It would be unconscionable to permit a privilege grounded on promoting communications of trust and love between marriage partners to prevent a properly outraged spouse with knowledge from testifying against the perpetrator of such a crime.").

More than being unnecessary, the statutory provision could give rise to a negative inference concerning the other exceptions to the marital privileges that have been recognized under the federal common law (e.g., legal separation and crime-fraud). Why enact a law codifying one part of the federal common law but not another?

The question raised by John Rabiej is whether the Evidence Rules Committee has any standing to comment on the bill. The bill does not attempt to amend the Federal Rules of Evidence. On the other hand, it does affect the law of evidence, and the Rules Committee has more than a passing interest in the proper common law development of privilege law. The Committee may wish to discuss whether it is appropriate to formulate a comment advising Congress that the exception to the privileges provided in S.644 is unnecessarily duplicative of common law and, as such, could create confusion about the status of other common law exceptions to the privileges.

*S. 644: Amendment to Federal Rule of Evidence 414*

Another part of S. 644 would directly amend one of the Federal Rules of Evidence, Rule 414, and would indirectly amend another, Rule 415. It would amend Rule 414 as follows:

**Rule 414. Evidence of Similar Crimes in Child Molestation Cases**

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation or possession of sexually explicit materials containing apparent minors is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, ''child'' means a person below the age of ~~fourteen~~ 18, and ''offense of child molestation'' means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

(2) any conduct proscribed by chapter 110 of title 18, United States Code;

(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

(4) contact between the genitals or anus of the defendant and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(5).

*Comment:*

While the bill would directly amend the Federal Rules and therefore this Committee would seem to have standing to comment on the bill, there is a catch. Congress enacted Rule 414 directly, bypassing the rulemaking process. Indeed, the Advisory Committee and the Judicial Conference prepared detailed comments on the initial legislation and these comments were rejected or ignored by Congress. This history calls into doubt whether comments on an amendment to Rule 414 would be invited or heeded. The Committee may wish to discuss the approach it wishes to take to this legislation if it appears likely to be enacted.

On the merits, there are legitimate questions about the changes. Rule 414 and 415 are based on the assumption that prior *acts* of child molestation are especially probative of the defendant's propensity to molest children. Allowing free admission of *possession* of child pornography must be based on an assumption that possession of such materials is especially probative of propensity to *commit* an act of child molestation. That seems to be a debatable proposition. A prior similar act seems much more probative of propensity to act than is possession of pornographic material.

Raising the age from 14 to 18 may also raise questions of probative value. If, for example, the defendant is charged with molesting a four-year-old, it can be questioned whether a prior act of sex with a 17-year-old has the heightened probative value that provides the underpinning for the Rule.

One could look at these changes as "substantive" decisions, perhaps beyond the purview of rulemaking. But one could also look at these changes as based on assumptions about the probative value of evidence. That is a question for rulemakers.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

March 19, 2003

MEMORANDUM TO PRIVILEGES SUBCOMMITTEE

SUBJECT: *Pending Legislation*

For your information, I have attached a copy of H.R. 538, the "Parent-Child Privilege Act of 2003." It was introduced by Congressman Andrews on February 5, 2003.

We will monitor the bill's progress. Until some movement is detected, there is no need to respond to Congress. I thought the bill might be "instructive."

John K. Rabiej

Attachment

cc: Honorable Anthony J. Scirica (with attach.)
Honorable Jerry E. Smith (with attach.)
Daniel J. Capra (with attach.)
Peter G. McCabe, Secretary (with attach.)

108TH CONGRESS
1ST SESSION

# H. R. 538

To amend the Federal Rules of Evidence to establish a parent-child privilege.

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IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 5, 2003

Mr. ANDREWS introduced the following bill; which was referred to the Committee on the Judiciary

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# A BILL

To amend the Federal Rules of Evidence to establish a parent-child privilege.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "Parent-Child Privilege Act of 2003".

**SEC. 2. PARENT-CHILD PRIVILEGE.**

(a) IN GENERAL.—Article V of the Federal Rules of Evidence is amended by adding at the end the following:

**"Rule 502. Parent-Child Privilege**

"(a) DEFINITIONS.—For purposes of this rule, the following definitions apply:

"(1) The term 'child' means the son, daughter, stepchild, or foster child of a parent or the ward of a legal guardian or of any other person who serves as the child's parent. A person who meets this definition is a child for purposes of this rule, irrespective of whether or not that person has attained the age of majority in the place in which that person resides.

"(2) The term 'confidential communication' means a communication between a parent and the parent's child, made privately or solely in the presence of other members of the child's family or an attorney, physician, psychologist, psychotherapist, social worker, clergy member, or other third party who has a confidential relationship with the parent or the child, which is not intended for further disclosure except to other members of the child's family or household or to other persons in furtherance of the purposes of the communication.

"(3) The term 'parent' means a birth parent, adoptive parent, stepparent, foster parent, or legal guardian of a child, or any other person that a court has recognized as having acquired the right to act as a parent of that child.

"(b) ADVERSE TESTIMONIAL PRIVILEGE.—In any civil or criminal proceeding governed by these rules, and subject to the exceptions set forth in subdivision (d) of this rule—

"(1) a parent shall not be compelled to give testimony as a witness adverse to a person who is, at the time of the proceeding, a child of that parent; and

"(2) a child shall not be compelled to give testimony as a witness adverse to a person who is, at the time of the proceeding, a parent of that child;

unless the parent or child who is the witness voluntarily and knowingly waives the privilege to refrain from giving such adverse testimony.

"(c) CONFIDENTIAL COMMUNICATIONS PRIVILEGE.—(1) In any civil or criminal proceeding governed by these rules, and subject to the exceptions set forth in subdivision (d) of this rule—

"(A) a parent shall not be compelled to divulge any confidential communication made between that parent and the child during the course of their parent-child relationship; and

"(B) a child shall not be compelled to divulge any confidential communication made between that

child and the parent during the course of their parent-child relationship;

unless both the child and the parent or parents of the child who are privy to the confidential communication voluntarily and knowingly waive the privilege against the disclosure of the communication in the proceeding.

"(2) The privilege set forth in this subdivision applies even if, at the time of the proceeding, the parent or child who made or received the confidential communication is deceased or the parent-child relationship has terminated.

"(d) EXCEPTIONS.—The privileges set forth in subdivisions (c) and (d) of this rule shall be inapplicable and unenforceable—

"(1) in any civil action or proceeding by the child against the parent, or the parent against the child;

"(2) in any civil action or proceeding in which the child's parents are opposing parties;

"(3) in any civil action or proceeding contesting the estate of the child or of the child's parent;

"(4) in any action or proceeding in which the custody, dependency, deprivation, abandonment, support or nonsupport, abuse, or neglect of the child, or the termination of parental rights with respect to the child, is at issue;

"(5) in any action or proceeding to commit the child or a parent of the child because of alleged mental or physical incapacity;

"(6) in any action or proceeding to place the person or the property of the child or of a parent of the child in the custody or control of another because of alleged mental or physical capacity; and

"(7) in any criminal or juvenile action or proceeding in which the child or a parent of the child is charged with an offense against the person or the property of the child, a parent of the child or any member of the family or household of the parent or the child.

"(e) APPOINTMENT OF A REPRESENTATIVE FOR A CHILD BELOW THE AGE OF MAJORITY.—When a child who appears to be the subject of a privilege set forth in subdivision (b) or (c) of this rule is below the age of majority at the time of the proceeding in which the privilege is or could be asserted, the court may appoint a guardian, attorney, or other legal representative to represent the child's interests with respect to the privilege. If it is in furtherance of the child's best interests, the child's representative may waive the privilege under subdivision (b) or consent on behalf of the child to the waiver of the privilege under subdivision (c).

"(f) NON-EFFECT OF THIS RULE ON OTHER EVIDENTIARY PRIVILEGES.—This rule shall not affect the applicability or enforceability of other recognized evidentiary privileges that, pursuant to rule 501, may be applicable and enforceable in any proceeding governed by these rules.".

(b) CLERICAL AMENDMENT.—The table of contents for the Federal Rules of Evidence is amended by adding at the end the following new item:

"Rule 501. Parent-child privilege.".

(c) EFFECT OF AMENDMENTS.—The amendments made by this Act shall apply with respect to communications made before, on, or after the date of the enactment of this Act.

○

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

# ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

March 24, 2003
*Via Fax*

MEMORANDUM TO JUDGE SMITH AND PROFESSOR CAPRA

SUBJECT: *Pending Legislation*

I have attached a copy of S. 644, "Comprehensive Child Protection Act of 2003," which was introduced by Senator Hatch on March 18, 2003. Section 6 directly amends Evidence Rule 414 and section 7 amends title 28 to make inapplicable the marital communications and adverse spousal privilege in a proceeding involving a crime against a child of either spouse.

Two reasons were given justifying the amendments to Rule 414. First, the amendments would extend the rule's coverage to permit admission of evidence of offenses involving any victim under age 18 — raising the existing age from 14 years. (The legislation uses the term "minors," even though "child" is redefined to mean anyone 18 years or younger and the word "minor" does not appear anywhere else in the rule.) The second reason is to permit admission of the possession of "virtual" evidence of sexually explicit material that appears to involve minors, but which in fact represents a computer graphic involving no "real" person. The change is intended to address the Supreme Court's *Ashcroft v. Free Speech Coalition* decision. I have attached an excerpt from the Congressional Record containing Senator Hatch's remarks explaining the purposes of the bill.

In the past, we have taken no position on a stand-alone statutory provision affecting a privilege. We do inform Congress of any technical drafting problems with proposed "privilege" language and note that piecemeal enactment of privileges is troublesome. The change to Rule 414 is direct. Ordinarily we would consider advising Congress that the change circumvents the Rules Enabling Act. The bill's amendment, however, sounds "substantive" to me and more akin to a political judgment than a procedural rule. If we do object, I am not sure what we would tell Congress other than the change should go through the rulemaking process. It would be difficult to hold off Congressional action by suggesting that a "substantive" amendment similar to the one in S. 644 would be forthcoming if the rulemaking process were to be engaged. One alternative is

to remain silent or to mute our objections, viewing Congress's amendment of Congressionally-created rules with more diffidence. There are several Congressionally-created rules, and I worry about setting bad precedent giving an impression that we are abdicating control over any rule enacted by Congress. So any "exceptions" must be carefully circumscribed. In any event, we should comment on its drafting, identifying problems. For example, the change from 14 to 18 years raises several interpretational issues as to what it applies to.

Our Legislative Affairs Office does not believe that an immediate response to the bill is warranted. They are contacting Congressional staff to get a better reading of the Hill's interest in it. The bill does have some powerful sponsors, including Senators Feinstein, Grassley, and Sessions besides Hatch. We will continue to closely monitor developments and advise you immediately of any change.

John K. Rabiej

Attachments

cc: Honorable Anthony J. Scirica (with attach.)
Professor Daniel R. Coquillette (with attach.)
Peter G. McCabe, Secretary (with attach.)

II

108TH CONGRESS
1ST SESSION

# S. 644

To enhance national efforts to investigate, prosecute, and prevent crimes against children by increasing investigatory tools, criminal penalties, and resources and by extending existing laws.

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IN THE SENATE OF THE UNITED STATES

MARCH 18, 2003

Mr. HATCH (for himself, Mrs. FEINSTEIN, Mr. DEWINE, Mrs. HUTCHISON, Mr. SESSIONS, and Mr. GRASSLEY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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# A BILL

To enhance national efforts to investigate, prosecute, and prevent crimes against children by increasing investigatory tools, criminal penalties, and resources and by extending existing laws.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "Comprehensive Child Protection Act of 2003".

**SEC. 2. NATIONAL CRIMES AGAINST CHILDREN RESPONSE CENTER.**

(a) IN GENERAL.—Chapter 33 of title 28, United States Code, is amended by adding at the end the following:

**"§ 540A. National Crimes Against Children Response Center**

"(a) ESTABLISHMENT.—There is established within the Federal Bureau of Investigation a National Crimes Against Children Response Center (referred to in this section as the 'Center').

"(b) MISSION.—The mission of the Center is to develop a national response plan model that—

"(1) provides a comprehensive, rapid response plan to report crimes involving the victimization of children; and

"(2) protects children from future crimes.

"(c) DUTIES.—To carry out the mission described in subsection (b), the Director of the Federal Bureau of Investigation shall—

"(1) consult with the Deputy Assistant Attorney General for the Crimes Against Children Office and other child crime coordinators within the Department of Justice;

"(2) consolidate units within the Federal Bureau of Investigation that investigate crimes against

children, including abductions, abuse, and sexual exploitation offenses;

"(3) develop a comprehensive, rapid response plan for crimes involving children that incorporates resources and expertise from Federal, State, and local law enforcement agencies and child services professionals;

"(4) develop a national strategy to prevent crimes against children that shall include a plan to rescue children who are identified in child pornography images as victims of abuse;

"(5) create regional rapid response teams composed of Federal, State, and local prosecutors, investigators, victim witness specialists, mental health professionals, and other child services professionals;

"(6) implement an advanced training program that will enhance the ability of Federal, State, and local entities to respond to reported crimes against children and protect children from future crimes; and

"(7) conduct outreach efforts to raise awareness and educate communities about crimes against children.

"(d) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated for the Federal Bureau

of Investigation such sums as necessary for fiscal year 2004 to carry out this section.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 33 of title 28, United States Code, is amended by adding at the end the following:

"540A. National Crimes Against Children Response Center.".

**SEC. 3. INTERNET AVAILABILITY OF INFORMATION CONCERNING REGISTERED SEX OFFENDERS.**

(a) IN GENERAL.—Section 170101(e)(2) of the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. 14071(e)(2)) is amended by adding at the end the following: "The release of information under this paragraph shall include the maintenance of an Internet site containing such information that is available to the public.".

(b) COMPLIANCE DATE.—Each State shall implement the amendment made by this section within 3 years after the date of enactment of this Act, except that the Attorney General may grant an additional 2 years to a State that is making a good faith effort to implement the amendment made by this section.

(c) NATIONAL INTERNET SITE.—The Crimes Against Children Section of the Department of Justice shall create a national Internet site that links all State Internet sites established pursuant to this section.

**SEC. 4. DNA EVIDENCE.**

Section 3(d) of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a(d)) is amended to read as follows:

"(d) QUALIFYING FEDERAL OFFENSE.—For purposes of this section, the term 'qualifying Federal offense' means—

"(1) any offense classified as a felony under Federal law;

"(2) any offense under chapter 109A of title 18, United States Code;

"(3) any crime of violence as that term is defined in section 16 of title 18, United States Code; or

"(4) any offense within the scope of section 4042(c)(4) of title 18, United States Code.".

**SEC. 5. INCREASE OF STATUTE OF LIMITATIONS FOR CHILD ABUSE OFFENSES.**

Section 3283 of title 18, United States Code, is amended by striking "25 years" and inserting "35 years".

**SEC. 6. ADMISSIBILITY OF SIMILAR CRIME EVIDENCE IN CHILD MOLESTATION CASES.**

Rule 414 of the Federal Rules of Evidence is amended—

(1) in subsection (a), by inserting "or possession of sexually explicit materials containing appar-

ent minors" after "or offenses of child molestation"; and

(2) in subsection (d), by striking "fourteen" and inserting "18".

**SEC. 7. MARITAL COMMUNICATION AND ADVERSE SPOUSAL PRIVILEGE.**

(a) IN GENERAL.—Chapter 119 of title 28, United States Code, is amended by inserting after section 1826 the following:

**"§ 1826A. Marital communications and adverse spousal privilege**

"The confidential marital communication privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against—

"(1) a child of either spouse; or

"(2) a child under the custody or control of either spouse.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 119 of title 28, United States Code, is amended by inserting after the item relating to section 1826 the following:

"1826A. Marital communications and adverse spousal privilege.".

(b) AVAILABILITY.—Amounts made available under subsection (a) shall remain available until expended.

(c) REVERSION.—If the lease described in section 4(c)(1) is not executed by the date that is 2 years after the date of enactment of this Act, any amounts made available under subsection (a) shall revert to the Treasury of the United States.

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By Mr. HATCH (for himself, Mrs. FEINSTEIN, Mr. DEWINE, Mrs. HUTCHISON, Mr. SESSIONS, and Mr. GRASSLEY):

S. 644. A bill to enhance national efforts to investigate, prosecute, and prevent crimes against children by increasing investigatory tools, criminal penalties, and resources and by extending existing laws; to the Committee on the Judiciary.

Mr HATCH. Mr. President, we have all been devastated by the repeated news flashes of violent crimes being committed against children across the Nation. In June 2002, Elizabeth Smart, a 14 year old from my home State of Utah was kidnapped at gun point from her home in Salt Lake City. Just this past week, the entire Nation rejoiced with the Smart family after Elizabeth was found alive and reunited with her loved ones.

Five year old Samantha Runnion was not so lucky. Just one month after Elizabeth Smart's abduction, Samantha was kidnapped while playing with a neighborhood friend down the street from her home in Stanton, CA. The following day, her body was found along a highway, nearly 50 miles from her home. California authorities have charged Alejandro Avila with Runnion's abduction, sexual assault and murder. Reportedly, Avila was acquitted two years ago of molesting two young girls under the age of 14.

Elizabeth Smart and Samantha Runnion are just two, among many, recent child victims. The list of tragic cases involving minor victims goes on and on.

These horrific incidents illustrate the need for comprehensive legislation—at both the State and national level—to protect our children. We need to ensure that federal and state law enforcement officers have all the tools and resources they need to find, prosecute, and punish those who commit crimes against our youth.

Today, I rise to reintroduce the "Comprehensive Child Protection Act of 2003" which enhances existing laws, investigative tools, criminal penalties and child crime resources in a variety of ways. I introduced this important bill with Senator FEINSTEIN last year, but it failed to go anywhere. My unwavering commitment to this issue compels me to introduce it again this year. Let me elaborate on the Act's specific provisions.

By broadening existing laws, the Act enhances the ability of child victims to pursue and prevail in criminal proceedings against their predators.

First, the Act extends the statute of limitations period that applies to offenses involving the sexual or physical abuse of children under 18 years of age. Current law permits such cases to be brought until the victim reaches the age of 25 years. This amendment will allow meritorious cases of child sexual and physical abuse to be brought up until the date the minor reaches the age of 35 years.

It is well-documented that child abuse victims often do not come forward until years after the abuse occurred. Victims fail to come forward because they fear their disclosures will lead to further humiliation, shame, and even ostracism. Abusers should not benefit from the lasting psychological harms they have inflicted on innocent children.

I believe that there should rarely, if ever, be a time when we say to a victim who has suffered as a child at the hands of an abuser: you have identified your abuser, you have proven the crime; yet the abuser will remain free because you, the victim, waited to long to come forward. Our criminal justice system should be ready to adjudicate all meritorious claims of child abuse. This amendment is meant to recognize that the arm of the law should be long in the prosecution of crimes of this heinous nature.

Second, the Act amends an existing Federal evidentiary rule, Federal Rule of Evidence 414, to permit the admission into evidence of prior offenses involving child molestation, or the possession of sexually explicit materials containing actual or apparent minors. The current evidentiary rule permits such evidence to be admitted only where the victim was under 14 years of age. This amendment extends the rule to apply to any minor—any victim who was under 18 years of age at the time the offense was committed.

In addition, the amendment makes clear that even where an individual possesses what may be virtual, as opposed to actual, child pornography, and therefore, may have a valid defense against prosecution in light of the Supreme Court's recent decision in Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (2002), such evidence is nonetheless admissible under Rule 414. Like the possession of actual child pornography, the possession of virtual child pornography is highly probative evidence that should be admissible in a case involving child molestation or exploitation.

Third, the Act also limits the scope of the common law marital privileges by making them inapplicable in a criminal child abuse case in which the abuser or his or her spouse invokes a privilege to avoid testifying. Where a child abuser is charged with a crime against the child of either spouse, or a child under the custody or control of either spouse, neither the abuser nor his or her spouse should be permitted a marital privilege to avoid providing critical evidence.

The marital privileges exist because we in society believe that forcing a person to testify against his or her spouse, or permitting a spouse to testify about confidential marital communications, may jeopardize a marriage. While we value trusting, harmonious marriages, our societal interest in the proper administration of justice far exceeds our interest in preserving marital harmony where a spouse has chosen a vulnerable, defenseless child in the home as his or her victim. In my view, it is more important to prosecute and punish child abusers than it is to minimize the potential risk to the life of a marriage in which child abuse is occurring.

The Act increases the investigative tools available to law enforcement agencies in several significant ways.

First, the Act amends the DNA Analysis and Backlog Elimination Act by increasing the categories of offenses that are included in the database of convicted offender DNA profiles, the Combined DNA Index System, CODIS. Without question, DNA—which is unique to each individual and maintains its evidentiary integrity for long periods of time—is a valuable investigatory tool. Time and again DNA evidence has aided in solving difficult criminal cases by linking suspects to crimes and by eliminating others.

This Act expands the class of offenses that are included in CODIS by adding all federal felony offenses to the database. Currently, the DNA Analysis and Backlog Elimination Act includes only select Federal offenses. The successful experiences of approximately 19 States, including Utah, which currently authorize the collection of DNA samples for all felony offenses illustrate the need for this extension. These States have solved numerous crimes where DNA has been found—frequently based on an offender's conviction for a non-violent offense—such as burglary, theft or a narcotics offense.

Remarkably, not all States currently authorize the collection of DNA samples from all types of child offenders. Thus, the Act also expands the definition of qualifying offense to include all state offenses against children, such as those involving child kidnapping or abuse. This expansion will increase law enforcement's ability to solve such crimes where DNA evidence is found.

Second, the Act extends the Federal wiretap statute by adding sex trafficking, sexual abuse, exploitation, and other sex-related offenses as predicate offenses to the statute. As we all know, the Internet is becoming an increasingly popular means by which sexual predators make contact with child victims. Although predators typically initiate a relationship online, they ultimately seek to make personal contact with the child—both over the telephone and through face to face meetings. But as the law exists today, investigators are restricted in their ability to investigate such predators. This provision will enable investigators, who meet the statutory requirements of the Federal wiretap statute, to obtain court authorization to monitor such communications. This amendment will not only aid investigators in obtaining evidence of these crimes, it will also help