ADVISORY COMMITTEE
ON
EVIDENCE RULES

Marina del Rey, California
April 29-30, 2004

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING
Los Angeles, California
April 29th and 30th 2004

I. Opening Remarks of the Chair

Including approval of the minutes of the Fall 2003 meeting, and a report on the January 2004 meeting of the Standing Committee. The Draft minutes of the Fall 2003 meeting and the minutes of the Standing Committee are included in the agenda book.

II. Consideration of Evidence Rules

At this meeting, the Committee will decide whether to recommend the release for public comment of the proposed amendments to the following rules:

A. Rule 404(a)

The Reporter's memorandum concerning the proposed amendment to Rule 404(a), that would prohibit the circumstantial use of character evidence in a civil case, is included in the agenda book.

B. Rule 408

The Reporter's memorandum on the proposed amendment to Rule 408—covering use of compromise evidence in criminal cases, the scope of the impeachment exception, and use by the party who made the offer of compromise—is included in the agenda book

C. Rule 410

The Reporter's memorandum on the proposed amendment to Rule 410, that would protect statements and offers by the prosecution during guilty plea negotiations, is included in the agenda book.

D. Rule 606(b)

The Reporter's memorandum on the proposed amendment to Rule 606(b), that would provide an exception for correcting errors in the rendering of the verdict, is included in the agenda book.

E. Rule 609(a)

The Reporter's memorandum on the proposed amendment to Rule 609(a)(2), that would limit automatic impeachment to a conviction of a crime containing a statutory element of dishonesty or false statement, is included in the agenda book.

F. Rule 706

The Committee has agreed to consider whether to propose an amendment to Rule 706 that would cover such issues as standards for appointment, regulation of ex parte communications, instructions to the jury, and compensation of court-appointed experts. The Reporter's memorandum on Rule 706 is included in the agenda book.

G. Rule 803(3)

The Committee has agreed to consider whether to propose an amendment to Rule 803(3), the state of mind exception to the hearsay rule. The proposal would provide a limitation on the use of the exception when a hearsay statement is offered to prove the state of mind or the conduct of someone other than the declarant The Reporter's memorandum on Rule 803(3)—including the effect of the Supreme Court's recent decision in *Crawford v. Washington*— is included in the agenda book

H. Rule 803(8)

The Committee has agreed to consider whether to propose an amendment to Rule 803(8), the public records exception to the hearsay rule. The proposal would streamline the exception and rectify some anomalies in the existing Rule. The Reporter's memorandum on Rule 803(8)—including the effect of the Supreme Court's decision in *Crawford v Washington*—is included in the agenda book.

III. Proposed Amendment Approved By the Judicial Conference

The Evidence Rules Committee's proposed amendment to Rule 804(b)(3) was approved by the Judicial Conference and referred to the Supreme Court. The Supreme Court has sent the proposal back to the Rules Committee for consideration in light of the Court's intervening decision in *Crawford v Washington.* The Reporter's memorandum on the proposed amendment and the Supreme Court's action is included in the agenda book

IV. Privileges

The agenda book includes Ken Broun's draft of the "survey rule" on the attorney-client privilege, as well as the commentary on the survey rule.

IV. New Business

A. Civil Rules Bearing On Admissibility Of Evidence

The Committee on Civil Rules is engaged in a project to restyle the Federal Rules of Civil Procedure. In the course of restyling Civil Rules 32 and 44, questions arose about whether something should be done about the overlap of those Rules with the Evidence Rules. Two specific questions are being considered: 1) whether stylistic changes should be made to remedy inconsistent references to and relationships with the Evidence Rules; and 2) whether the text of those Civil Rules should be replaced with a simple reference to the relevant Federal Rules of Evidence. Under the guidelines of the style project, the former questions are stylistic only, while the latter question (simple reference to the relevant evidence rules) is considered beyond the scope of the style project and would be taken up at a later point.

The Reporter to the Evidence Rules has prepared a memorandum analyzing the possible "style" and "substance" changes. This memorandum is included in the agenda book. The memorandum is designed to assist the Evidence Rules Committee in preparing a response to the Civil Rules Committee on whether changes should be made to Rules 32 and 44.

B. E-Government Act Privacy Rule

Section 205 of the E-Government Act requires the Judicial Conference to propose rules that will protect against disclosure of personal identifiers that are found in court filings. The E-Government Subcommittee of the Standing Committee has prepared a template of a proposed rule that is currently being considered by the other Advisory Committees. While the E-Government Act

does not require a change to the Evidence Rules, the E-Government Subcommittee would welcome any comments that the Evidence Rules Committee may have on the proposed privacy rule. The template is included in the agenda book, together with supporting materials.

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April 2004

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April 2, 2004
Projects

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April 2, 2004
Projects

Opening Business of the Committee Meeting

Judge Smith extended a welcome to those who were attending the Evidence Rules Committee for the first time: Stuart Levey, the new Justice Department representative, and Judge Beam, the Chair of the Drafting Committee for the Uniform Rules of Evidence. Judge Smith asked for approval of the draft minutes of the April 2003 Committee meeting. The minutes were approved unanimously Judge Smith then gave a short report on the June 2003 Standing Committee meeting. He noted that the Standing Committee was unanimous in approving the proposed amendment to Evidence Rule 804(b)(3). The amendment was thereafter approved by the Judicial Conference and is currently being considered by the Supreme Court.

Judge Smith also noted that the Evidence Rules Committee would participate in the work of the Standing Committee in implementing the privacy provisions of the E-Government Act. Judge Smith announced that he had appointed Judge Hinkel to be the Evidence Rules Committee's representative to the Standing Committee's subcommittee that is considering the privacy requirements mandated by the E-Government Act.

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 as part of the Committee's long-range planning. 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 those rules require amendment.

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 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 be released for public comment. With that timeline in mind, the Committee considered reports on several possibly problematic Evidence Rules at its April 2003

meeting, and this consideration continued at the Fall 2003 meeting.

1. Rule 404(a)

At its Fall 2002 meeting, the Committee tentatively agreed on language that would amend Evidence Rule 404(a) to prohibit the circumstantial use of character evidence in civil cases. The Committee determined that an amendment is necessary because the circuits are split over whether character evidence can be offered to prove conduct in a civil case. Such a circuit split can cause disruption and disuniform results in the federal courts Moreover, the question of the admissibility of character evidence to prove conduct arises frequently in section 1983 cases, so an amendment to the Rule would have a helpful impact on a fairly large number of cases. The Committee also concluded 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.

Judge Smith then asked whether any member of the Committee wanted to revisit or to question the amendment to Rule 404(a) that was tentatively approved at the Fall 2002 meeting. The Reporter suggested a technical change that could be made to the draft language intended to clarify that the protections of Rule 412 supersede the provision of Rule 404(a)(2) that permits proof of a victim's character. Committee members agreed that the suggested change was an improvement. No Committee member expressed any other concerns about the working draft of the proposed amendment. The working draft of the proposed amendment to Rule 404(a)(1) provides 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 subject to the limitations of 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;

* * *

The working draft of the Committee Note to the proposed amendment to Rule 404(a) reads as follows:

The Rule has been amended to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. 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, 476 (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." C. Mueller and L. 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, the admissibility of evidence of the victim's sexual behavior and predisposition is governed by the more stringent provisions of Rule 412.

2. Rule 408

The Reporter's memorandum on Rule 408, 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 while others hold that compromise evidence is excluded in subsequent criminal litigation when offered as an admission of guilt.

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 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.

At the Fall 2002 meeting, the Committee agreed to present, as part of its package, an amendment that would 1) limit the impeachment exception to use for bias, and 2) exclude compromise evidence even if offered by the party who made an offer of settlement. The remaining

issue–whether compromise evidence should be admissible in criminal cases–was the subject of extensive discussion at the Spring and Fall 2003 meetings. The Justice Department representative expressed concern that some statements made in civil compromise (e.g., to tax investigators) could be critical evidence needed in a criminal case to prove that the defendant had committed fraud. If Rule 408 were amended to exclude statements made in compromise in criminal cases, then this important evidence would be lost to the government. The DOJ representative recognized the concern that the use of civil compromise evidence in criminal cases would deter civil settlements But he contended that the Civil Division of the DOJ had not noted any deterrent to civil compromise from such a rule in the circuits holding that civil compromise evidence is indeed admissible in criminal cases.

Other Committee members noted that some courts have held that statements made to internal corporate investigators can qualify for protection under Rule 408; they reasoned that if such statements could not then be admitted in a criminal case, a shield could be placed over the corporation and criminal prosecution might be extremely difficult. In response, one member of the Committee asserted that it was unlikely that such internal corporate statements would even be covered by Rule 408, and adhered to the view that if compromise evidence is admissible in criminal cases, this would significantly diminish the incentive to settle civil litigation.

After extensive argument, the Committee unanimously agreed that Rule 408 should specify, one way or another, whether civil compromise evidence is admissible in subsequent criminal litigation. For one thing, the current split in the circuits makes it impossible for parties to plan in advance on how compromise evidence can be used, and creates disparate results on a critical question of evidence law.

A straw vote was taken and the Committee, with one dissent, agreed to proceed with an amendment providing that the protections of Rule 408 are limited to civil cases only. The Committee agreed unanimously with a suggestion that the Committee Note provide that while Rule 408 will not protect a party in a criminal case, a court might still use Rule 403 to exclude civil compromise evidence on a case-by-case basis.

Further discussion on the Rule indicated Committee dissatisfaction with Rule 408 as originally structured. As it stands, Rule 408 is structured in four sentences. The first sentence states that an offer or acceptance in compromise "is not admissible to prove liability for or invalidity of the claim or its amount." The second sentence provides the same preclusion for statements made in compromise negotiations–an awkward construction because a separate sentence is used to apply the same rule of exclusion applied in the first sentence. The third sentence says that the rule "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." The rationale of this sentence, added by Congress, is to prevent parties from immunizing pre-existing documents from discovery simply by bringing them to the negotiating table. The addition of this sentence at this point in the Rule, however, creates a structural problem because the fourth sentence of the rule contains a list of permissible purposes for compromise evidence, including proof of bias. As such, the third sentence provides a kind of break

in the flow of the Rule. Moreover, the fourth sentence is arguably completely unnecessary, because none of the permissible purposes involves using compromise evidence to prove the validity or amount of the claim. Because the only impermissible purpose for this evidence is when it is offered to prove the validity or amount of a claim, it is unnecessary to add a sentence specifying certain (though apparently not all) permissible purposes for the evidence.

For the Fall 2003 meeting, the Reporter prepared a restructured Rule 408 for the Committee's consideration. Committee members expressed the opinion that the restructured Rule was easier to read and made it much easier to accommodate an amendment (previously agreed upon by the Committee) that would prohibit the use of compromise statements for impeachment by way of prior inconsistent statement or contradiction.

In the discussion of a restructured Rule 408, the Committee considered whether to retain the language of the existing Rule that evidence "otherwise discoverable" is not excluded merely because it was presented in the course of compromise negotiations. After extensive debate, the Committee agreed with courts, commentators, and rules drafters in several states, and concluded that the "otherwise discoverable" sentence is superfluous. It was added to the Rule to emphasize that pre-existing records were not immunized simply because they were presented to the adversary in the course of compromise negotiations. But such a pretextual use of compromise negotiations has never been permitted by the courts. The Committee therefore agreed, with one dissent, to drop the "otherwise discoverable" sentence from the text of the revised Rule 408, with an explanation for such a change to be placed in the Committee Note.

Finally, the Committee considered whether it was necessary to improve the language that triggers the protection of the amendment: the Rule applies to compromise negotiations as to a "matter which was in dispute." The Reporter prepared a description of the cases and commentary on this question and the Committee determined that it would not be appropriate to change this language, as the courts were not in conflict as to its application.

The working draft of an amendment to Evidence Rule 408, together with the Committee Note, follows immediately below. The Committee will consider at its next meeting whether to change it in any respect and whether to forward it to the Standing Committee for release for public comment.

Rule 408. Compromise and Offers to Compromise

(a) General rule. -- ~~Evidence of~~ The following is not admissible in a civil case on behalf of any party, when offered to prove liability for or invalidity of a claim or its amount or for the impeachment purposes of prior inconsistent statement or contradiction:

(1) Evidence of 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 that ~~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~~

(2) Evidence of conduct or statements made in ~~compromise~~ negotiations ~~is likewise not admissible~~ over a civil claim that was disputed as to validity or amount.

~~This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.~~

(b) Other purposes. -- This rule ~~also~~ does not require exclusion when the evidence is offered for ~~another purpose, such as~~ a purpose not prohibited by subdivision (a). Examples of permissible uses include: proving bias or prejudice of a witness~~;~~ ; negativing a contention of undue delay~~;~~ ~~;or~~ and proving an effort to obstruct a criminal investigation or prosecution.

The working draft of the Committee Note to the proposed amendment to Rule 408 reads as follows:

Working Draft of Proposed Committee Note

Rule 408 has been amended to make it easier to read and apply, and to settle some questions in the courts about the scope of the Rule First, the amendment clarifies that Rule 408 does not protect against the use of 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"). Statements and offers made in civil compromise negotiations may be excluded in criminal cases where the circumstances so warrant under Rule 403. But there is no absolute exclusion imposed by Rule 408.

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 "strongly support[s] 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 amendment prohibits the use of statements made in settlement negotiations when offered 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 (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 makes clear that Rule 408 excludes compromise evidence even when a party seeks to admit its own settlement offer or statements made in settlement negotiations. If a party were to reveal its own statement or offer, this could 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").

The sentence of the Rule referring to evidence "otherwise discoverable" has been deleted as superfluous. *See, e.g* , Advisory Committee Note to Maine Rule of Evidence 408 (refusing to include the sentence in the Maine version of Rule 408 and noting that the sentence "seems to state what the law would be if it were omitted"); Advisory Committee Note to Wyoming Rule of Evidence 408 (refusing to include the sentence in Wyoming Rule

408 on the ground that it was "superfluous"). The intent of the sentence was to prevent a party from trying to immunize admissible information, such as a pre-existing document, through the pretense of disclosing it during compromise negotiations. *See Ramada Development Co. v Rauch,* 644 F.2d 1097 (5th Cir. 1981). But even without the sentence, the Rule cannot be read to protect pre-existing information simply because it was presented to the adversary in discovery

3. Rule 410

In extensive discussions over the previous two meetings, the Committee concluded that Rule 410 should be amended to protect statements and offers made by prosecuting attorneys, to the same extent as the Rule currently protects statements and offers made by defendants and their counsel A mutual rule of exclusion will encourage a free flow of discussion that is necessary to efficient guilty plea negotiations. 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. The latter Rule by its terms covers statements and offers 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.

A draft proposal was prepared by the Reporter for the April 2003 meeting that simply added "against the government" to the opening sentence of the Rule, at the same place in which the Rule provides that offers and statements in plea negotiations are not admissible "against the defendant." At that meeting the Committee determined that this would not be a satisfactory drafting solution. If the Rule were amended simply to provide that offers and statements in guilty plea negotiations were not admissible "against the government," this might provide too broad an exclusion. It would exclude, for example, statements made *by the defendant* during plea negotiations that could be offered "against the government," for example, to prove that the defendant had made a prior consistent statement, or to prove that the defendant believed in his own innocence, or was not trying to obstruct an investigation. Thus, the Committee resolved that any change to Rule 410 should specify that the government's protection would be limited to statements and offers *made by prosecutors* during guilty plea negotiations.

At the April 2003 meeting the Committee also determined that the Rule's protection should cover statements and offers made during the course of guilty pleas that are either rejected by the court or vacated on review. Currently the Rule specifically covers only guilty pleas that are "withdrawn".Committee members noted that as a policy matter, there was no basis for distinguishing a withdrawn plea from a plea that is rejected or vacated. In any of these cases, the policy of protecting plea negotiations warrants protection from these subsequent unforeseen developments–otherwise negotiations are likely to be chilled by uncertainty.

Finally, the Committee agreed that the question of whether the protections of Rule 410 can be waived should be addressed in the Committee Note and not in the Rule. The Supreme Court has decided that the defendant can agree that his statements made in plea negotiations can be used to impeach him should he testify at trial, but courts are still working out whether the power to waive the protections of Rule 410 extends to other situations. Thus, it would be counterproductive to codify a waiver rule in the text. But it would be important to acknowledge the waiver rule in the Committee Note, so as to prevent speculation that any amendment was rejecting Supreme Court precedent on the subject.

At its Fall 2003 meeting the Committee considered a draft of an amendment to Rule 410 that was intended to implement the consensus of the Committee. Committee members discussed whether the government should be protected from statements and offers made by the prosecutor in plea negotiations even where the evidence is offered by a different defendant. All Committee members, including the DOJ representative, recognized that a defendant should be able to inquire into a deal struck or to be struck with a former codefendant who is a cooperating witness at the time of the trial–and such inquiry may be pertinent to the bias or prejudice of the cooperating witness even if a deal has not been formally reached or even offered. On the other hand, most Committee members agreed that statements of fact made by a prosecutor in negotiations with one defendant should not be offered as any kind of party-admission by another defendant or in another proceeding. To allow such broad admissibility could tend to chill the open discussions that Rule 410 seeks to promote.

After substantial discussion, a straw vote was taken and the Committee tentatively agreed on language for a proposed amendment to Rule 410 that would provide that statements and offers by prosecutors in the course of plea discussions are not admissible except to prove the bias or prejudice of a witness. The vote was unanimous. The Committee then discussed whether the Rule should be broken down into subdivisions. All agreed that the addition of protection of prosecution statements and offers made it necessary to subdivide the Rule. The alternative (working within the existing Rule) would be a Rule with internal subparts– (1) through (4) – setting forth the evidence that is not admissible against the defendant, followed by a freestanding paragraph providing for exclusion of prosecution statements and offers, followed by another freestanding paragraph setting forth exceptions in which statements otherwise covered by the rule can be admitted against a defendant. The use of two consecutive hanging paragraphs would make the rule difficult to read and is certainly contrary to the working standards of the Style Subcommittee of the Standing Committee. The Evidence Rules Committee therefore agreed unanimously to set forth three subdivisions in its proposed amendment to Rule 410.

The Committee determined that it would revisit the working draft of the proposed amendment to Rule 410 to determine whether it should be forwarded to the Standing Committee for release for public comment. As the proposal currently stands, it reads as follows:

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

(a) Against the defendant. – 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~~ 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.

(b) Against the government. – Any statement or offer made in the course of plea discussions by an attorney for the prosecuting authority is not admissible against the government in the proceeding in which the statement or offer was made, except as proof of bias or prejudice of a witness.

(c) Exceptions. – ~~However, such a statement~~ A statement described in this rule 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 working draft of the Committee Note to the proposed amendment to Rule 410 reads as follows:

Working Draft of Committee Note to Rule 410

Rule 410 has been amended to make 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. Statements and offers by the prosecution are not excluded by the rule, however, if they are offered by a defendant to prove the bias or prejudice of a witness who may be cooperating with the government as the result

of, or in order to obtain, leniency from the government.

2. The protections provided to defendants are extended 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.

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 his statements made in plea negotiations 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. In such a case, the important evidence is the defendant's rejection, not the government's offer. *See generally United States v. Biaggi,* 909 F.2d 662, 690 (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").

4. Rule 606(b)

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. At its Spring 2003 meeting, the Committee agreed in principle on a proposed amendment to Rule 606(b) that would be part of a possible package of amendments to be referred to the Standing Committee in 2004.

The Committee reviewed the working draft of the proposed amendment at its Fall 2003 meeting. Once again, all Committee members recognized the need for an amendment to Rule 606(b). There are two basic reasons for an amendment to the Rule: 1. All courts have found an exception

to the Rule permitting jury testimony on certain errors in the verdict, even though there is no language permitting such an exception in the text of the Rule, and, more importantly, 2. The courts are in dispute about the breadth of that exception. Some courts allow juror proof whenever the verdict has an effect that is different from the result that the jury intended to reach, while other courts follow a narrower exception permitting juror proof only where the verdict reported is different from that which the jury actually reached because of some clerical error. The former exception is broader because it would permit juror proof whenever the jury misunderstood (or ignored) the court's instructions. For example, if the judge told the jury to report a damage award without reducing it by the plaintiff's proportion of fault, and the jury disregarded that instruction, the verdict reported would be a result different from what the jury actually intended, thus fitting the broader exception. But it would not be different from the verdict actually reached, and so juror proof would not be permitted under the narrow exception for clerical errors.

After extensive discussion, the Committee continued to be unanimous in its belief that an amendment to Rule 606(b) is warranted and that the amendment should codify the narrower exception of clerical error. An exception that would permit proof of juror statements whenever the jury misunderstood or ignored the court's instruction would have the potential of intruding into juror deliberations and upsetting the finality of verdicts in a large and undefined number of cases. As such, the broad exception is in tension with the policies of the Rule. In contrast, an exception permitting proof only if the verdict reported is different from that actually reached by the jury does not intrude on the privacy of jury deliberations, as the inquiry only concerns what the jury decided, not why it decided as it did.

The Committee then turned to the working draft of the proposed amendment to consider whether the language accurately captured the narrow exception that should be added to the Rule. The working language permitted juror proof into whether "the verdict reported is the verdict that was agreed upon by the jury." Committee members expressed concern that this language could be too broad. It might be construed, for example, to allow proof from a juror that he never actually "agreed" with the verdict the jury rendered, he only acquiesced because he wanted to make other jurors happy, or because he misunderstood the court's instructions. Thus, the language of the working draft could be read to encompass the broader exception to the Rule currently used by some courts; it could be read to allow an inquiry into jury deliberations, contrary to the policy of Rule 606(b).

The Committee deliberated and voted unanimously to change the language of the working draft to narrow the exception to situations where the verdict reported is "the result of a clerical mistake." Members pointed out that Civil Rule 60(a) uses the same term "clerical mistake" to cover the analogous situation of correcting mistakes in judgments and orders. Committee members recognized that the exception for "clerical mistakes" would rarely apply in practice. But that was considered to be the very reason for adopting the amendment: the "clerical mistake" language would provide a very narrow exception to allow for correction in the rare cases of clerical error, and it would thereby *reject* the broader exception used by those courts permitting juror testimony whenever the jurors misunderstood the impact of the verdict that they actually agreed upon.

The Committee resolved to revisit the proposed amendment at its next meeting, with the goal to finalize it as part of a package to be submitted to the Standing Committee for authorization for public comment. The Reporter was directed to research cases under Civil Rule 60(a) to determine whether helpful comparisons could be drawn between that Rule and the narrow amendment to Evidence Rule 606(b) proposed by the Committee.

The current working draft of a proposed amendment to 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~~ 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 of a clerical mistake. ~~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~~.

Draft 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). Cf. Fed.R.Civ.P. 60(a) (providing relief from "[c]lerical mistakes in judgments, orders, or other parts of the record . . .").

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.*

5. Rule 607

At its Spring 2002 meeting the Evidence Rules Committee directed the Reporter to prepare a memorandum to advise the Committee on whether it is necessary to amend Evidence Rule 607. Rule 607 states categorically that a party can impeach any witness it calls. On its face, the Rule permits a party to call a witness solely for the purpose of "impeaching" them with evidence that would not otherwise be admissible, such as hearsay. For example, the Rule would appear to permit a party to call an adverse witness solely to "impeach" the witness with a prior inconsistent statement that would not otherwise be admissible. The purpose of that tactic could well be to evade the hearsay rule in the hope that the jury would ignore the court's limiting instruction and consider the inconsistent statement for its truth.

The Committee wished to consider whether Rule 607 should be amended to prohibit a party from calling a witness for the sole purpose of impeaching that witness with evidence that would not otherwise be admissible. The Reporter's research indicated that the courts have uniformly prohibited this abusive practice even though Rule 607 contains no specific prohibitory language. So the

Committee discussed whether the Rule should be amended to "codify" this case law and thereby eliminate the divergence between the case law and the text of the Rule.

In discussion, the Committee was skeptical that any amendment to Rule 607 was necessary. The Committee noted that courts are uniform in prohibiting the abusive practice that any amendatory language would prohibit. The Committee continues to be committed to the principle that an amendment to the Evidence Rules is justified only in extreme circumstances in which courts are in conflict about the meaning of a Rule, or the Rule is creating practical problems of administration or unjust application. None of these conditions exist under Rule 607. .

The Committee also noted that it would be difficult to write an amendment that would fully encompass all the situations in which a party *should* be allowed to call witnesses and impeach them with otherwise inadmissible evidence. New Jersey and Ohio have tried to do so by permitting impeachment when the party is "surprised" by adverse testimony. But this fails to cover all of the situations in which impeachment should be permitted. For example, impeachment should be allowed where a party knows in advance that a witness will give partially favorable and partially unfavorable testimony. A more broadly worded rule permitting a party to call a witness and impeach the witness whenever it is in "good faith" is not very helpful and risks adding confusion to a body of case law that is currently quite understandable and uniform. Thus, the risk of "codification" is that the drafters may not get it completely right, thereby generating confusion and perhaps creating an unintended substantive change.

A vote was taken and the Committee unanimously agreed to terminate the consideration of any amendment to Rule 607.

6. Rule 609

Rule 609(a)(2) provides for automatic impeachment of all witnesses with prior convictions involving "dishonesty or false statement." Rule 609(a)(1) provides a nuanced balancing test for impeaching witnesses whose convictions do not fall within the definition of Rule 609(a)(2). At its Spring 2002 meeting the Evidence Rules Committee directed the Reporter to prepare a memorandum to advise the Committee on whether it is necessary to amend Evidence Rule 609(a)(2). An investigation into this Rule indicates that the courts are in conflict on how to determine that a certain conviction involves dishonesty or false statement within Rule 609(a)(2). The basic conflict is that some courts determine "dishonesty or false statement" solely by looking at the elements of the conviction for which the witness was found guilty. If none of the elements require proof of falsity or deceit beyond a reasonable doubt, then the conviction must be admitted under Rule 609(a)(1) or not at all. Other courts look behind the conviction to determine whether the witness committed an act of dishonesty or false statement before or after committing the crime. Under this view, for

example, a witness convicted of murder would have committed a crime involving dishonesty or false statement if he lied about the crime, either before or after committing it.

After discussion, Committee members unanimously agreed that Rule 609(a)(2) should be amended to resolve the dispute in the courts over how to determine whether a conviction involves dishonesty or false statement. And amendment would resolve an issue on which the circuits are clearly divided. The Committee was further unanimously in favor of an "elements" definition of crimes involving dishonesty or false statement. Committee members noted that requiring the judge to look behind the conviction to the underlying facts could (and often does) impose a burden on trial judges. Moreover, the inquiry is indefinite because it is impossible to determine, simply from a guilty verdict, what facts of dishonesty or false statement the jury might have found. Most importantly, whatever additional probative value there might be in a crime committed deceitfully, it is lost on the jury assessing the witness's credibility when the elements of the crime do not in fact require proof of dishonesty or false statement. This is because when the conviction is introduced to impeach the witness, the jury is told only about the conviction, not about its underlying facts.

Committee members noted that the "elements" approach to defining crimes that fall within Rule 609(a)(2) is litigant-neutral, in that it would apply to all witnesses in all cases. It was also noted that if a crime not involving false statement as an element (e g., murder or drug dealing) were inadmissible under Rule 609(a)(2), it might still be admitted under the balancing test of Rule 609(a)(1), moreover, if such a crime *were* committed in a deceitful manner, the underlying facts of deceit might still be inquired into under Rule 608. Thus, the costs of an "elements" approach are low as it would not result in an unjustified loss of evidence pertinent to credibility; and its benefits in judicial efficiency seem obvious.

A vote was taken and the Committee unanimously resolved to continue with an amendment to Rule 609(a)(2) that would use an "elements" approach to define the crimes that are automatically admissible for impeachment under Rule 609(a)(2). It was noted that an "elements" approach to the Rule would be consistent with the recently approved amendments to the Uniform Rules of Evidence. The Committee agreed to reconsider the working draft of the amendment and the Committee Note, with the view to finalizing it as part of a package of amendments to be sent to the Standing Committee in June, 2004.

The Working Draft of the Proposed Amendment to Rule 609 reads as follows:

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) *General rule.*—For the purpose of attacking the ~~credibility~~ character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which

the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted ~~if it involved dishonesty or false statement,~~ regardless of the punishment if the statutory elements of the crime necessarily involve dishonesty or false statement.

(b) *Time limit.* — Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) *Effect of pardon, annulment, or certificate of rehabilitation.* — Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime ~~which~~ that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) *Juvenile adjudications* — Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) *Pendency of appeal* — The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

The working draft of the proposed Committee Note to Rule 609 reads as follows:

Proposed Committee Note to Working Draft

The amendment provides that a conviction is not automatically admissible under Rule 609(a)(2) unless the statutory elements of the crime for which the witness was convicted necessarily involves proof beyond a reasonable doubt that the witness committed an act of dishonesty or false statement. The Rule prohibits the court from determining that a conviction is "automatically admissible" by inquiring into the underlying facts of the crime. Such facts are often difficult to determine. *See Emerging Problems Under the Federal Rules*

of Evidence at 173 (2d ed. 1998) ("The difficulty of ascertaining [facts underlying a conviction] especially from the records of out-of-state proceedings might make the broad approach operate unevenly and feasible only for local convictions. . . . A simple, almost mechanical, rule that only those convictions for crimes whose *statutory elements* include deception, untruthfulness or falsehood under Rule 609(a)(2) arguably would result in a more efficient, predictable proceeding.") (emphasis in original). See also Uniform Rules of Evidence, Rule 609(a)(2) (adopting an "elements" approach). Moreover, the probative value of the underlying facts of a conviction, when the conviction is offered to impeach the witness's character for truthfulness, is lost on the jury because the jury is not informed about the details of a conviction under Rule 609. *See, e g , United States v Beckett*, 706 F.2d 519 at n.1 (5th Cir. 1983) (a testifying witness is required "to give answers only as to whether he has been previously convicted of a felony, as to what the felony was, and as to when the conviction was had"); *Radtke v. Cessna Aircraft Co* , 707 F.2d 999 (8th Cir. 1983) (impeachment with a prior conviction is limited to the recitation of the conviction itself).*See also* C. Mueller & L. Kirkpatrick, *Federal Evidence* at 742 (2d ed. 1999) ("Scrutiny of underlying facts seems vaguely inconsistent with allowing inquiry only on the essentials of convictions (name of crime, punishment imposed, time, and sometimes place) with further details kept off limits: If the jury hears only the basics, why should the judge consider an elaboration of factual detail in deciding whether to permit the questioning?").

The legislative history of Rule 609 indicates that the automatic admissibility provision of Rule 609(a)(2) was to be narrowly construed. This amendment comports with that intent. See Conference Report to proposed Rule 609, at 9 ("By the phrase 'dishonesty and false statement' the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the [witness's] propensity to testify truthfully.").

It should be noted that while the facts underlying a conviction are irrelevant to the admissibility of that conviction under Rule 609(a)(2), those underlying facts might be a proper subject of enquiry under Rule 608. *See* e.g., *United States v Hurst*, 951 F.2d 1490 (6th Cir. 1991) (underlying facts of a conviction were the proper subject of inquiry under Rules 403 and 608 where they were probative of the defendant's character for untruthfulness and not unduly prejudicial).

The amendment also substitutes the term "character for truthfulness" for the term "credibility" in the first sentence of the Rule. The limitations of Rule 609 are not applicable if a conviction is admitted for a purpose other than to prove the witness's character for untruthfulness. *See, e.g., United States v. Lopez*, 979 F.2d 1024 (5th Cir. 1992) (Rule 609 not applicable where the conviction was offered for purposes of contradiction). The use of the term "credibility" in subsection (d) is retained, however, as that subdivision is intended to govern the use of a juvenile adjudication for any type of impeachment.

7. Rule 613(b)

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

At its April 2002 meeting, the Committee directed the Reporter to prepare a report on any conflict in the case law in interpreting Rule 613(b), so that the Committee could determine whether an amendment to the Rule would be necessary At the Fall 2003 meeting the Reporter reported orally that he would have a complete report ready by the next meeting, but that his research had indicated that the Rule did not appear to create problems for courts or litigants. Courts use their discretion to control the order of proof to prohibit the admission of a witness's inconsistent statement *before* the witness testifies. And prudent counsel are unlikely to wait to introduce the statement *after* the witness leaves the stand, because counsel would thereby assume the risk that the witness might not be available to explain or deny the statement. After discussion, Committee members agreed that any conceptual problems in the Rule largely have been solved by the proper use of judicial discretion and by prudent practice of counsel. Members expressed concern that a proposal to amend Rule 613(b) would not rise to the same level of necessity as exists in the proposals to amend the other Rules that are part of the tentative package to be presented to the Standing Committee. A vote was taken and the Committee unanimously determined that it would not proceed with an amendment to Rule 613(b).

8. Rule 704(b)

Rule 704(b) would seem to prohibit all expert witnesses from testifying that a criminal defendant either did or did not have the requisite mental state to commit the crime charged. It states that "[n]o expert witness . . . may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." Some courts have held (and others have implied) that the Rule is applicable only to mental health experts, and therefore does not prohibit intent-based testimony from such witnesses as law enforcement agents testifying about the narcotics trade. At a previous meeting, the Reporter was directed to prepare a report on whether it might be necessary to propose an amendment to Rule 704(b). At the Fall 2003 meeting, the Reporter indicated that while some courts have questioned the

applicability of Rule 704(b) to non-mental health experts, the Rule in fact imposes few limitations on proof in criminal cases even if it is applied to all experts. As construed by the courts, the Rule simply prohibits an expert from opining, in a conclusory fashion, that the defendant either did or did not intend to commit the crime charged. It does not prohibit testimony about facts or opinions that might be indicative of a mental state. In essence, the Rule prohibits only the expert testimony that would not assist the jury because it would be nothing more than a conclusion of law. In that sense, Rule 704(b) simply emphasizes the point made by Rule 702: that expert testimony is inadmissible unless it assists the jury.

The Committee considered whether to continue with an amendment that would not solve any problems in practice. Members were mindful that the Rule was directly enacted by Congress. A vote was taken and the Committee agreed unanimously that it would not propose any amendment to Rule 704(b).

9. Rule 706

Judge Gettleman has requested that the Committee consider an amendment to Rule 706 that would make stylistic changes and that also would dispense with the requirement of an order to show cause before an expert is appointed. Courts and commentators have raised other problems in the administration of the Rule, including allocation of the costs of an expert, the process of appointment, deposition of court-appointed experts, and instructions to the jury. The Committee agreed that it would consider a report on Rule 706 at the next Committee meeting, to determine whether an amendment to the Rule should be included as part of the package to be sent to the Standing Committee.

10. Rule 801(d)(1)(B)

At the request of Judge Bullock, the Committee considered a proposal to amend Rule 801(d)(1)(B), the hearsay exception for prior consistent statements. Prior consistent statements are admissible to rehabilitate a declarant in at least three situations: 1) to rebut a charge of recent fabrication or bad motive, when made before the motive arose; 2) to explain away an apparent inconsistency; and 3) to rebut a charge of bad memory. The problem raised by Judge Bullock is that Rule 801(d)(1)(B) permits prior consistent statements to be used substantively in only one situation–where they rebut a charge of recent fabrication or bad motive and are made before the motive arose. Thus the Rule mandates a dichotomy where some prior consistent statements are admissible only for rehabilitation and others are admissible for their truth. Judge Bullock contends that the distinction between substantive and rehabilitation use of a prior consistent statement is one that is lost on jurors and on counsel.

The Committee considered the merits of proposing an amendment to Rule 801(d)(1)(B) to provide that a prior consistent statement would be substantively admissible whenever it could be admitted to rehabilitate the witness's credibility. The Judges on the Committee uniformly contended that the amendment was unnecessary. The case law is basically uniform in its distinction between substantive and rehabilitation use of prior consistent statements. Courts are reaching the correct results. Committee members recognized that the instruction to use a prior consistent statement for rehabilitation and not for its truth is one that jurors will find difficult to follow. But this difficulty is not enough to justify an amendment. The general assumption is that jurors follow instructions, except in extreme situations (e.g., *Bruton*), and the Committee did not see Rule 801(d)(1)(B) as presenting such an exceptional situation. Other Committee members were concerned that an amendment could send the wrong signal–it might be seen as an invitation toward broader admissibility and therefore broader use of prior consistent statements, contrary to the Supreme Court's admonition in *Tome v United States* that the exception is to be narrowly construed.

After extensive discussion, the Committee agreed unanimously that it would not propose an amendment to Rule 801(d)(1)(B).

11. Rule 803(3)

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

The Committee directed the Reporter to prepare a report on Rule 803(3), analyzing whether the conflict in the case law warrants a possible amendment to the Rule to clarify whether statements can be admitted to prove the conduct of someone other than the declarant. The Reporter stated that the report would be ready for the Spring 2004 meeting so that if the Committee did find it necessary to propose an amendment, the proposal could be placed with the rest of the package that would be submitted to the Standing Committee.

12. Rule 803(8)

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

The Committee directed the Reporter to prepare a report on whether it is necessary to amend Rule 803(8) to clarify that a public report is admissible unless the court finds it to be untrustworthy under the circumstances. The Reporter stated that the report would be ready for the Spring 2004 meeting so that if the Committee did find it necessary to propose an amendment, the proposal could be placed with the rest of the package that would be submitted to the Standing Committee.

13. Rule 803(18)

Rule 803(18) provides a hearsay exception for "statements contained in published treatises, periodicals, or pamphlets" if they are "established as a reliable authority" by the testimony or admission of an expert witness or by judicial notice. This "Learned Treatise" exception does not on its face permit evidence in electronic form, such as a film or video The Committee considered whether the Reporter should be directed to prepare a report on the necessity of an amendment to Rule 803(18) that would cover electronic evidence explicitly.

The Reporter noted that there was only one reported Federal case on the matter, and that in that case the court had no trouble finding that learned treatises could be admitted even if in electronic form. There is no reported decision that *excludes* a learned treatise on the ground that it is electronic form. Committee members noted that in the absence of any conflict in the courts, and given the dearth of case law, an amendment to Rule 803(18) was not justified at this point. The Committee unanimously agreed that it would not propose an amendment to Rule 803(18) as part of any package of amendments to be submitted to the Standing Committee in June 2004.

14. Rule 806

At its Fall 2002 meeting the Committee directed the Reporter to prepare a memorandum on the advisability of amending Evidence Rule 806, the Rule permitting impeachment of hearsay

declarants under certain conditions. Rule 806 provides that if a hearsay statement is admitted under a hearsay exception or exemption, the opponent as a general rule may impeach the hearsay declarant to the same extent as if the declarant were testifying in court. The courts are in dispute, however, on 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, ordinarily the only way to impeach with bad acts is to proffer extrinsic evidence, because the declarant 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. Two circuits prohibit bad acts impeachment of hearsay declarants, and one permits it

The Committee reviewed the Reporter's report and discussed whether the problems raised by Rule 806 were serious enough to justify the substantial costs of an amendment. Several members opined that the Rule, fairly read, prohibits the use of extrinsic evidence to impeach a hearsay declarant, for the reasons expressed by the Third Circuit in *United States v. Saada,* 212 F.3d 210, 221-22 (3d Cir. 2000) If Congress had wanted to permit the use of extrinsic evidence to impeach a hearsay declarant, it certainly could have said so (as it had with inconsistent statements, by dispensing with the foundation requirement that is applied for in-court witnesses). Committee members expressed concern that an amendment permitting extrinsic evidence to impeach a hearsay declarant's character for truthfulness could be subject to abuse. It could lead to drawn-out proceedings and hearings on collateral matters–with little benefit given the fact that the only purpose would be to show that the hearsay declarant committed some act that had some bearing on the declarant's character for truthfulness. Members also noted that if the declarant were to testify, extrinsic evidence would be inadmissible under Rule 608(b), for the very reason that the delay and confusion resulting from proving up extrinsic evidence is not worth the attenuated benefit of impeaching the witness with a bad act. Committee members saw no justification for permitting proof of extrinsic evidence when it would not be permitted were the witness to testify.

The Committee resolved by unanimous vote to reject any proposed amendment to Rule 806.

PROJECT ON PRIVILEGES

At its Fall 2002 meeting, the Evidence Rules Committee decided that it would not propose

any amendments to the Evidence Rules on matters of privilege. The Committee determined, however, that it could – under the auspices of its Reporter and consultant on privileges, Professor Broun – 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. Thus, the Committee agreed to continue with the privileges project and determined 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 and where it might be going. The Committee determined that the survey of each privilege will be structured as follows:

1 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 draft would include alternative clauses or provisions.

2. 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.

3. 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.

At the Fall 2003 meeting, Professor Broun presented, for the Committee's information and review a draft of the survey rule, commentary, and future developments discussion with respect to the psychotherapist-patient privilege. Committee members commended Professor Broun on his excellent work product and provided commentary and suggestions. Some suggestions included the need to consider the relevance of statutory reporting requirements; the scope of waiver (which will be dealt with in a separate waiver rule); and whether the privilege should apply when confidential communications are released without the patient's authorization. Professor Broun noted that these suggestions were quite helpful and he would consider how to incorporate them in the working draft.

Professor Broun informed the Committee that he was beginning to work on the attorney-client privilege and that he would submit a progress report for the Spring 2004 meeting. After

discussion, it was resolved that the survey project would cover those privileges and rules that were covered in the original Advisory Committee's draft of privileges.

NEXT MEETING

The next meeting of the Advisory Committee on Evidence Rules is scheduled for April 29th and 30th, 2004.

The meeting was adjourned at 3:30 p.m., November 13.

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law
Reporter

The minutes for the Standing Committee meeting on January 15-16, 2004, will be sent to you in a subsequent mailing

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposal to amend Rule 404(a)
Date: April 2, 2004

At its October 2002 meeting the Evidence Rules Committee tentatively approved for further consideration an amendment to Rule 404(a). The amendment explicitly would prohibit the circumstantial use of character evidence in civil cases. This memorandum summarizes the work of the Committee on the proposed amendment to this point. The proposed amendment and proposed Committee Note are set forth. At this Committee meeting, the Committee must decide whether to refer the proposed amendment to the Standing Committee with the recommendation that it be released for public comment.

I. The Committee's Rationale for the Proposed Amendment

The Committee's discussions and determinations, over the course of two years of meetings, can be summarized as follows:

1) An amendment is appropriate because the circuits are split over whether character evidence can be offered to prove conduct in a civil case. (See the discussion of the conflicting case law in Section III, below). 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 was thought 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 Rule 404(a), 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 only where a criminal defendant seeks to show his good character or the pertinent bad character of the victim. This

so-called "rule of mercy" was thought necessary by the drafters to provide a counterweight to the resources of the government. It 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. But these considerations are not operative in civil litigation. In civil cases, the substantial problems raised by character evidence were considered by this Committee to outweigh the dubious benefit that character evidence might provide.

3) 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.

4) The Committee rejected a suggestion from the public that Rule 404(a) be amended to specify that the limitations on character evidence do not apply when character is "in issue." Rule 404(a) by its terms applies only when character evidence is offered circumstantially, and therefore by definition it does not apply when a party's character is an element of the case. Nor have the courts had any problem in holding that Rule 404(a) is inapplicable when character is "in issue."

5) At its last meeting, the Committee revised its working draft of the proposed amendment to Rule 404(a), making a technical change to the draft language intended to clarify that the protections of Rule 412 supersede the provision of Rule 404(a)(2) permitting proof of a victim's character. Committee members agreed that the suggested change was an improvement. No Committee member expressed any other concerns about the working draft of the proposed amendment.

The final draft of the proposed amendment, as well as a proposed Committee Note, is set forth in Section IV of this memorandum

II. The Existing Rule

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

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

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

* * *

The relevant portion of the Advisory Committee's Note to Rule 404(a) provides as follows:

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

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

In most jurisdictions today, the circumstantial use of character is rejected but with important exceptions: (1) an accused may introduce pertinent evidence of good character

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

* * *

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

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

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

III. Conflict in the Case Law

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

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

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

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

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

The court ultimately found, however, that the evidence of the defendants' bad tempers could not be admitted under Rule 404(a)(1), because the defendants never opened the door to this character evidence. Thus, the court construed the plaintiff to be the "prosecution" within the meaning of Rule 404(a)(1). *See also Crumpton v Confederation Life Ins. Co.*, 672 F.2d 1248, 1253 (5th Cir.1982)

("While Rule 404(a) generally applies to criminal cases, the unusual circumstances here place the case very close to one of a criminal nature. The focus of the civil suit on the insurance policy was the issue of rape, and the resulting trial was in most respects similar to a criminal case for rape. Had there been a criminal case against Crumpton, evidence of his character that was pertinent would have been admissible. We do not view the notes of the Advisory Committee as contravening this interpretation.").

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

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

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

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

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

Ultimately, however, the character evidence was found improperly admitted under Rule 405, because

it was specific act evidence. Rule 405 provides that if character evidence is offered to prove conduct, the only permissible forms are opinion and reputation. (The court held, however, that the specific act evidence was properly admitted as habit.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Summary of Case Law

The majority of cases hold that the exceptions for character evidence provided in Rule 404(a)(1) and (2) are applicable in criminal cases only. Those cases rely basically on the text of the Rule, which uses the terms "accused" and "prosecution", and the Advisory Committee Note, which specifically considers and rejects the possibility of permitting character evidence in a civil case. The minority view, of the Fifth and Tenth Circuits, is based on the argument that a civil party charged

with criminal activity is essentially in the same position as a criminal defendant, perhaps needing evidence of character to shield himself from the stigma of what amounts to a charge of criminal activity.

IV. Proposed Amendment and Committee Note

The proposed amendment to Rule 404(a) and the Committee Note are set forth beginning on the next page. The proposal is formatted in accordance with Administrative Office guidelines.

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;

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

Proposed Amendment to Evidence Rule 404(a)

(2) Character of alleged victim.—

~~Evidence~~ In a criminal case, and subject to the limitations imposed by 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;

* * *

Committee Note

The Rule has been amended to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. 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, 476 (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." C. Mueller and L. 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, the admissibility of evidence of the victim's sexual behavior and predisposition is governed by the more stringent provisions of Rule 412.

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposed Amendment to Rule 408
Date: April 2, 2004

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 the necessity of 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. Committee consideration continued at the Spring 2003 meeting and suggestions were made for improvement and for further research into other questions involving the Rule. Further changes were made at the Fall 2003 meeting.

The possible need for amendment of Rule 408 arises from at least 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 proof of settlement offers when it is the party who made the offer that wants the evidence admitted. Each of these questions has long been the subject of conflicting interpretations among the courts.

This report is divided into three parts. Part One describes the current rule and the Committee's consideration of a possible amendment up to this point. Part Two discusses the conflicting case law on the three problems raised above. Part Three sets forth the proposed amendment and Committee Note as tentatively approved by the Committee.

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 Concerning the Proposed Amendment to Rule 408

The Reporter's memorandum prepared for the Fall 2002 meeting noted that the courts have been long-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. These courts rely on policy analysis and conclude 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. These courts reason that there is nothing in the language of Rule 408 that would permit the use of evidence of civil compromise to prove criminal liability, and that to admit such evidence in a criminal case might discourage a party from settling a parallel civil case.

2) Some courts hold that statements made in settlement negotiations can be admitted to impeach a party-witness 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. Those 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 proffers 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.

At its Fall 2002 meeting, the Committee began its discussion on whether Rule 408 should be amended. The Committee agreed unanimously that Rule 408 should be amended to rectify the longstanding conflicts in the case law, discussed above. Conflicting case law in the context of Rule 408 was considered particularly problematic because the Rule is relied on by parties who enter settlement negotiations. If the protections of the Rule vary from court to court, this lack of predictability can upset the very policy of the Rule, which is to encourage settlement negotiations and civil compromise.

Admissibility in Criminal Cases

In initial discussions, 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 somewhere was argued to present a trap for the unwary. The member from the Department of Justice emphasized, however, that while the DOJ was in favor of an amendment to Rule 408 to resolve the split in the circuits, it had not at that time come to a conclusion as to whether civil settlements should be admissible or inadmissible in subsequent criminal litigation.

In subsequent meetings, after extensive discussion within the Department, the DOJ representative informed the Committee that the Department strongly favored a rule that would permit civil compromise evidence to be used in criminal cases. The Department's position was based on several rationales: 1) lawyers in the Civil Division did not believe that such a rule would create any major disincentive against settling civil matters brought by the government; 2) if statements made in compromise negotiations were inadmissible in criminal cases, this would make it difficult for the government to prosecute fraud where the statements made during civil compromise are acts of, or evidence of, fraud; and 3) the government would also find it difficult to prove scienter where the basis of scienter is that the defendant was made aware of and indeed admitted the wrongfulness of his conduct by entering into a civil compromise. In essence, the DOJ adopted the rationale of the case law holding that the current Rule 408 is inapplicable in criminal cases, i.e., the interest in admitting relevant evidence in a criminal case outweighs the marginal interest in encouraging settlement in parallel civil litigation.

Over the course of discussions of two further meetings, the Committee came to agree with the Justice Department's position–partly in recognition of its merits and partly in recognition of the fact that Rule 408 is in dire need of amendment one way or another, and the chances of amending the Rule over the DOJ's strong and considered objection are not good. At the Fall 2003 meeting, the Committee voted to propose an amendment to Rule 408 that would make the Rule inapplicable in criminal proceedings. One Committee member dissented.

The Scope of the Impeachment Exception

At previous meetings, Committee members discussed whether Rule 408 should permit impeachment by way of prior inconsistent statement and contradiction. Committee members quickly and unanimously 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. Such a provision is necessary, because the circuits have long been divided on the point, and differing results on the question are not justifiable. The Reporter noted that a provision limiting impeachment exists in several state versions of Rule 408.

Compromise Evidence Proffered By The Party That Made The Statement Or Offer

At previous meetings, the Committee discussed whether compromise evidence should be admissible in favor of the party who made the statement or offer of settlement. The Committee unanimously 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. Even inferential evidence that a party entered into compromise negotiations is entitled to protection under the policy of the Rule. 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, if a party could admit its own offer or statement in compromise it 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. There is also a possibility that a party might make "window-dressing" offers in an attempt to generate evidence for its own use at trial. 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 should include a provision 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 have long been divided on the point, and differing results on the question are not justifiable.

Research On Other Rule 408 Issues: "Matter In Dispute"

In the course of its deliberations on Rule 408, the Committee directed the Reporter to research whether courts were having problems in determining when a matter is "in dispute" under the terms of the Rule. The Reporter determined that while the courts use different terminology, there is essentially a common definition for the "trigger" for application of Rule 408—the Rule is triggered when the parties have rejected each other's claims for performance. When this point is reached depends upon the circumstances of each case, and thus a determination of whether Rule 408 bars admission of discussions cannot be made without hearing evidence as to the context of the challenged discussions.

Because there is no real conflict in the decisions about the meaning of a "dispute" under Rule 408, the Committee determined that there is no reason to propose a change in language, and moreover that any change would not result in more clarity or improvement, as the triggering mechanism of Rule 408 is inherently dependent on the circumstances of each case.

Research On Other Rule 408 Issues: "Otherwise Discoverable"

In the course of its deliberations on Rule 408, the Committee directed the Reporter to research whether the courts are having problems in determining the meaning and application of the sentence in Rule 408 providing that the Rule "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." The Reporter surveyed courts, commentators, and rules drafters in several states, and concluded that the "otherwise discoverable" sentence is superfluous. It was added to the Rule to emphasize that pre-existing records were not immunized simply because they were presented to the adversary in the course of compromise negotiations. But such a pretextual use of compromise negotiations has never been permitted by the courts. At its Fall 2003 meeting the Committee voted, with one dissent, to drop the "otherwise discoverable" sentence from the text of the revised Rule 408, with an explanation for such a change to be placed in the Committee Note.

Restructuring the Rule

In working on an amendment to Rule 408 over the course of several meetings, it became apparent to the Committee that the existing Rule is poorly structured and that changes to the text could best be done by restructuring the Rule itself. As it stands, Rule 408 is structured in four sentences. The first sentence states that an offer or acceptance in compromise "is not admissible to prove liability for or invalidity of the claim or its amount." The second sentence provides the same preclusion for statements made in compromise negotiations–an awkward construction because a separate sentence is used to apply the same rule of exclusion applied in the first sentence–one sentence for the offer and the other one for statements. The third sentence says that the rule "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." The addition of this sentence at this point in the Rule, however, creates a structural problem because the fourth sentence of the rule contains a list of permissible purposes for compromise evidence, including proof of bias. As such, the third sentence provides a kind of break in the flow of the Rule. (This structural problem is alleviated by the Committee's decision to delete the sentence). Most importantly, the fourth sentence is arguably completely unnecessary, because none of the expressed "exceptions" involves using compromise evidence to prove the validity or amount of the claim. The only impermissible purpose for this evidence is when it is offered to prove the validity or amount of a claim. So it is unnecessary to add a sentence specifying certain (though apparently not all) permissible purposes for the evidence.

For the Fall 2003 meeting, the Reporter prepared a restructured Rule 408 for the Committee's consideration. Committee members expressed the opinion that the restructured Rule was easier to read and made it much easier to accommodate the textual amendments agreed upon by the Committee, especially the amendment covering compromise statements for impeachment by way of prior inconsistent statement or contradiction.

II. Case Law and Commentary Bearing On the Proposed Textual Changes In Rule 408

A. Use of Compromise Evidence in a Subsequent Criminal Case

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

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

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

Majority Rule

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

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

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

2. Manko v United States, 87 F.3d 50, 54-5 (2d Cir. 1996) · The defendant was convicted of tax fraud related to interest expense deductions arising from sham transactions. In this case, it was the defendant who sought to introduce evidence that the Internal Revenue Service ("IRS") and the defendant had settled civil tax claims that were based on the same facts and theory as the criminal charges. This evidence, the defendant claimed, was an admission by the IRS that the defendant was at least partially justified in deducting the losses that were claimed to be fraudulent in the criminal trial. However, the trial judge did not let the defendant present this evidence on the ground that it was precluded under Rule 408. The Second Circuit concluded that the district court erred by excluding the IRS settlement under Rule 408, holding again that Rule 408 does not apply to criminal proceedings.

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

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

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

Minority View

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

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

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

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

2. *United States v. Bailey,* 327 F.3d 1131 (10th Cir. 2003): In the defendant's criminal trial for wire fraud, the government offered evidence of civil settlements entered into by the defendant. The civil cases involved parallel charges. The court found this to be error. It concluded

> Although the question is a very close one, we agree with those courts which apply Rule 408 to bar settlement evidence in both criminal and civil proceedings. We reach this conclusion for essentially the same reasons stated by those courts: the Federal Rules of Evidence apply generally to both civil and criminal proceedings; nothing in Rule 408 explicitly states that it is inapplicable to criminal proceedings; the final sentence is arguably unnecessary if the Rule does not apply to criminal proceedings at all; and the potential prejudicial effect of the admission of evidence of a settlement can be more devastating to a criminal defendant than to a civil litigant.

3. *United States. v. Skeddle*, 176 F.R.D. 254 (N.D Ohio1997): This court relied on the "plain language of Rule 408" which provides for certain situations when statements made during compromise negotiations are admissible. For example, Rule 408 does not require exclusion when the evidence is offered for another purpose, such as to prove bias or prejudice, negative a contention of undue delay, or prove an effort to obstruct justice. The Court reasoned that if Rule 408 did not apply in criminal cases, there would be no need to carve out an exception for certain circumstances in criminal cases.

B. Use of Compromise Evidence For Impeachment Purposes

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

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

Commentators

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

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

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

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

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

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

encouraging settlements."

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

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

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

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

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

> It has been proposed * * * that if a party could not be impeached by prior inconsistent settlement statements, the truth would not be fully "ascertained," since the effect of barring the use of inconsistent statements would be to "protect false representations." However, one commentator surveying the issue concluded that "it is questionable whether the narrower interpretation of the rule would contribute to the goal of deterring or detecting perjury at trial or lying during settlement negotiations." Moreover, "attack by prior inconsistent statements has the weakness of being indefinite: It indicates that the witness may have erred or lied, but not which or why." Besides, the classic notion that the prior statement is "often

inherently more trustworthy than the testimony itself" has been challenged in the context of a trial following free-wheeling, but failed, negotiations.

Finally, the degree of inconsistency required for impeachment is much lower than outright lying; "any material variance between the testimony and the previous statement will suffice " There is no way this variance can be ascertained with certainty; "Is bias at work, or bad character, or a defect in perception, memory or narrative ability or is it simple, human, error?"

The questionable deterrence value of such impeachment, the uncertainty of what it indicates, the low degree of inconsistency required, and its inability to distinguish between innocent errors and deliberate lies indicate that protecting a compromising party from impeachment by prior inconsistent statements does not inhibit the truthfinding process to any considerable degree. This becomes particularly clear when the facts that the "danger that the evidence will be used substantively as an admission is greater," and "the need for additional evidence on credibility is less" (since the party's interest is obvious), are weighed in on the other side of the scale, together with the strong public policy of encouraging compromise.

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

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

Case Law

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

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

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

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

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

> Although Rule 408 explicitly states that it "does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution," commentators have noted that "[t]he clear import of the Conference Report as well as the general understanding among lawyers is that [inconsistent] conduct or statements [made in connection with compromise negotiations] may not be admitted for impeachment purposes." M. Graham, Federal Rules of Evidence 116 (2d ed. 1987). See also Steven A. Saltzburg & Kenneth R. Redden, Federal Rules of Evidence

> Manual 286 (4th ed. 1986) ("In most cases .. the Court should decide against admitting statements made during settlement negotiations as impeachment evidence when they are used to impeach a party who tried to settle a case but failed. The philosophy of the Rule is to allow the parties to drop their guard and to talk freely and loosely without fear that a concession made to advance negotiations will be used at trial. Opening the door to impeachment evidence on a regular basis may well result in more restricted negotiations."). "[T]he risks of prejudice and confusion entailed in receiving settlement evidence are such that often ... the underlying policy of Rule 408 require [s] exclusion even when a permissible purpose can be discerned." David W. Louisell & Christopher B. Mueller, Federal Evidence § 170, at 443 (rev. vol. 2 1985). In this case the proffer of the Bauer letters for impeachment purposes was but a thinly veiled attempt to get the "smoking gun" letters before the jury. See Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 408[05] at 408-31, 408-34 (1991) ("The almost unavoidable impact of the disclosure of such evidence is that the jury will consider the offer or agreement as evidence of a concession of liability ... The danger that the evidence will be used substantively as an admission is especially great when the witness sought to be impeached, by showing the compromise with a third party, is one of the litigants in the suit being tried."). Accord McCormick on Evidence § 274, at 813 (Edward W. Cleary ed., 3d ed. 1984). Given the propriety of the initial exclusion, we cannot say that it was clearly erroneous for the district court to exclude the Bauer letters the second time around.

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

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

Thus, the *Williams* case could be construed as holding that Rule 408 prohibits admission of

statements and offers of settlement when offered to impeach through contradiction. Or it could be read as saying that exclusion must come under Rule 403

C. Use of Offers and Statements In Compromise in Favor of the Party Who Made the Offer or Statement

The courts are in dispute about whether Rule 408 operates to exclude statements and offers during settlement negotiations even when they are proffered by the party who made them. What follows is a discussion and analysis of the case law on the subject.

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

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

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

which party attempts to offer the evidence."

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

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

year old child is permanently injured and where defendant's liability is sharply contested.

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

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

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

D. The "Otherwise Discoverable" Sentence

The third sentence of Rule 408 provides. "This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." This language was added by Congress to deal with a specific perceived problem raised by the executive branch that will be discussed below. The sentence has not received much treatment in the cases, probably because it states a self-evident proposition and is basically superfluous.

Treatise Discussion

The best discussion of the meaning of the "otherwise discoverable" sentence is found in 23 Wright and Graham, *Federal Practice and Procedure* § 5310. The following description basically summarizes the analysis in that treatise. Material in quotation marks comes either from the treatise

or the legislative history:

> "This curious provision is the result of obfuscation of the meaning of the rule by government agencies." The DOJ, the EEOC, and the Treasury Department all pushed for the addition of the third sentence of the Rule. The concern was that if "factual information" obtained during settlement were excluded, "it would severely affect the enforcement efforts of agencies that investigate and attempt to settle alleged violations at the same time." The agencies argued that they frequently receive factual material ("documents, compilations, and the like") in the course of settlement discussions which is essential to the proof of a violation. The agencies further contended that without the "otherwise discoverable" sentence, agencies would be required "to initiate costly, duplicative and time consuming discovery proceedings to obtain information which it already has in its possession."

The agency's argument has two parts. First, there was a fear that statements made in settlement negotiations would be construed to protect against admission of any other evidence of the facts contained in such statements. That is, if a defendant said in a settlement negotiation, "we admit corporate misconduct", then the Rule would require exclusion of pre-existing documents that would provide evidence of that misconduct. Wright and Graham call this the "immunity argument." The second argument was that even if there were no immunity for such evidence, it would probably be cheaper to prove the facts by statements made in settlement negotiations than it would be to go out and get the other evidence through discovery. Wright and Graham refer to this as the "discovery costs argument."

Wright and Graham note that neither the commentators nor the state codifiers "have been much impressed with the immunity argument." (The third sentence of the Federal Rule is criticized in the Committee Notes of the state rules in Maine and Wyoming, among others). "All have found it quite simple to distinguish between the admissibility of statements made during compromise negotiations and the admissibility of other evidence offered to prove the facts that are the subject of these statements." The distinction is similar to that used in the attorney-client privilege, where the privilege protects the communication from the client to the attorney, but not the underlying fact communicated. In sum, the government's "immunity argument" is based on a concern that is not real in fact.

As to the discovery costs argument, Wright and Graham argue that it "seems irrelevant and overdrawn." If the fact communicated in settlement has already been produced in discovery, the costs of discovery have already been incurred and so the government's argument is "beside the point." On the other hand, if the fact has not already been discovered, the adversary is quite unlikely to refer to it in settlement negotiations, "lest he tip off his opponent as to the existence and importance of the fact " Thus, the discovery costs argument "only applies in cases where the opponent inadvertently reveals an undiscovered fact."

Despite the apparent lack of merit to the government's concerns, the House subcommittee was persuaded to add the "otherwise discoverable" sentence to the proposed Rule. The subcommittee explained that under the new sentence, "admissions of liability or opinions given during compromise negotiations continue inadmissible, but evidence of facts is admissible " The Senate Report explains the need for the sentence as follows:

> "This amendment adds a sentence to insure that evidence, such as documents, is not rendered inadmissible merely because it is presented in the course of compromise negotiations if the evidence is otherwise discoverable. A party would not be able to immunize from admissibility documents otherwise discoverable merely by offering them in a compromise negotiation."

Wright and Graham cite various sources to maintain that the "otherwise discoverable" sentence is "superfluous." For example, the drafters in Maine, rejecting the sentence, declared that it "seems to state what the law would be if it were omitted." The drafters in Wyoming called the sentence "superfluous." Mueller and Kirkpatrick refer to it as "redundant." And so forth.

Wright and Graham, in an exercise in fairness, try to make some sense of the provision by turning the language around, so that there might be an implication that information that is *not* discoverable is *not* admissible simply because it is disclosed in compromise negotiations. In other words, a sentence providing for inclusion of evidence may have meant, by negative inference, to exclude certain evidence. But after going through the various permutations on the word "discoverable"–does it mean discoverable under the Civil Rules?, discoverable independently by ordinary investigation?, etc., Wright and Graham conclude that the use of the word "discoverable" is simply an error. They conclude that given the indefiniteness of the term "otherwise discoverable", what Congress must have meant was "otherwise admissible." They note that in every explanation of the provision in the Congressional documents, "one can substitute the word 'admissible' for 'discoverable' without destroying the sense of what is said. "

Case Law

There is very little case law on the "otherwise discoverable" provision of Rule 408, but what exists seems to follow the analysis set out in Wright and Miller above: that the third sentence of the Rule should be read to state the unremarkable position that evidence otherwise admissible is not excluded simply because it was presented in the course of compromise negotiations. This reading leads to four practical points found in the case law:

1) Pre-existing documents (i.e., documents prepared independently of compromise) are not protected simply because they are presented in compromise negotiations. See *Young v McDowell*

Services, Inc, 1991 U.S.Dist.Lexis 21814 (N.D Ga.) (form letter prepared independently of negotiations was admissible, despite the fact that it was later presented in compromise negotiations).

2) Underlying facts are not protected simply because they are disclosed in compromise negotiations–thus they can be proved through evidence other than the compromise communication itself See *Liautaud v Generationxcellent, Inc.*, 2002 U.S.Dist Lexis 2404 (N.D.Ill.) (no protection of information that was proven independently of the compromise negotiations).

3) If a document *is* prepared for purposes of settlement, it is protected by the Rule. See *Ramada Development Co v Rauch,* 644 F.2d 1097 (5th Cir. 1981) (document prepared on behalf of both parties to assist them in settlement was protected by Rule 408; the third sentence of the Rule "was intended to prevent one from being able to immunize from admissibility documents otherwise discoverable merely by offering them in a compromise negotiation. Clearly such an exception does not cover the present case where the document, or statement, would not have existed but for the negotiations, hence the negotiations are not being used as a device to thwart discovery by making existing documents unreachable.").

4) A statement made in compromise remains protected even if it would have been possible to obtain the same or a similar statement in a deposition; while the Rule would not prevent such a deposition and admission of the deponent's statement, it does exclude the comparable statement made in a compromise negotiation. See *Kleen Laundry and Dry Cleaning Services, Inc., v. Total Waste Management Corp.*, 817 F.Supp. 225 (D.N.H. 1993) (the "otherwise discoverable" language of the Rule refers to pre-existing statements or statements made in depositions and the like; it does not allow admission of statements made in settlement negotiations simply because they could also have been obtained in a deposition).

Conclusion On The "Otherwise Discoverable" Sentence

It seems clear that courts and litigants could get along without the third sentence to Rule 408. Several states have rejected the sentence, e.g., Maine, Nevada, Wyoming. At best, the Rule serves only to emphasize the point of the second sentence–that only communications made for the purpose of compromise are protected by the Rule.

The third sentence is so likely to be superfluous, and so infrequently applied, that there is clearly no cause to delete or amend the sentence on its own account. But as part of a larger amendment, deletion makes sense as making the Rule easier to read and avoiding confusion about the continued inclusion of a superfluous sentence.

III. Proposed Amendment and Committee Note

The proposed amendment to Rule 408 and the Committee Note are set forth beginning on the next page. The proposal is formatted in accordance with Administrative Office guidelines.

Rule 408. Compromise and Offers to Compromise*

(a) General rule. -- Evidence of the following is not admissible in a civil case on behalf of any party, when offered to prove liability for or invalidity of a claim or its amount or to impeach through a prior inconsistent statement or contradiction:

(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 that ~~which~~ was disputed as to ~~either~~ validity or amount; and ~~, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of~~

(2) conduct or statements made in ~~compromise~~ negotiations ~~is likewise not admissible~~ over a civil claim that was disputed as to validity or amount.

~~This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.~~

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

(b) Other purposes. -- This rule ~~also~~ does not require exclusion when the evidence is offered for ~~another purpose, such as~~ purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice ~~of a witness,~~ ; negativing a contention of undue delay~~,~~ ; ~~or~~ and proving an effort to obstruct a criminal investigation or prosecution.

Committee Note

Rule 408 has been amended to make it easier to read and apply, and to settle some questions in the courts about the scope of the Rule First, the amendment clarifies that Rule 408 does not protect against the use of 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"). Statements and offers made in civil compromise negotiations may be excluded in criminal cases where the circumstances so warrant under Rule 403. But there is no absolute exclusion imposed by Rule 408.

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 "strongly support[s] 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 amendment prohibits the use of statements made in settlement negotiations when offered 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 (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 makes clear that Rule 408 excludes compromise evidence even when a party seeks to admit its own settlement offer or statements made in settlement negotiations If a party were to reveal its own statement or offer, this could itself reveal the fact that the adversary entered into settlement negotiations. 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").

The sentence of the Rule referring to evidence "otherwise discoverable" has been deleted as superfluous. *See, e.g.,* Advisory Committee Note to Maine Rule of Evidence 408 (refusing to include the sentence in the Maine version of Rule 408 and noting that the sentence "seems to state what the law would be if it were omitted"); Advisory Committee Note to Wyoming Rule of Evidence 408 (refusing to include the sentence in Wyoming Rule 408 on the ground that it was "superfluous"). The intent of the sentence was to prevent a party from trying to immunize admissible information, such as a pre-existing document, through the pretense of disclosing it during compromise negotiations *See Ramada Development Co v. Rauch,* 644 F.2d 1097 (5 th Cir. 1981). But even without the sentence, the Rule cannot be read to protect pre-existing information simply because it was presented to the adversary in discovery.

"Clean Copy" of Proposed Amendment To Rule 408

To assist the Committee in its evaluation of the proposed amendment, a "clean copy" of the Rule incorporating all of the proposed amendment is set forth below. If the Committee votes to refer the amendment to the Standing Committee, that Committee will be provided with a clean copy as well.

Rule 408. Compromise and Offers to Compromise

(a) General rule. – Evidence of the following is not admissible in a civil case on behalf of any party, when offered to prove liability for or invalidity of a claim or its amount or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise a civil claim that was disputed as to validity or amount; and

(2) conduct or statements made in negotiations over a civil claim that was disputed as to validity or amount.

(b) Other purposes. – This rule does not require exclusion when the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negativing a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposed Amendment to Rule 410
Date: April 2, 2004

At its Fall 2002 meeting the Evidence Rules Committee directed the Reporter to prepare a report on Rule 410—the Rule protecting statements and offered made by and on behalf of the accused during guilty plea negotiations—so that the Committee could determine the necessity of an amendment to that Rule. At subsequent meetings the Committee reviewed the Rule and suggestions were made for improvement and for further research into various questions involving the Rule. A final draft of the amendment was approved in principle at the Fall 2003 meeting.

The possible need for amendment of Rule 410 arises most importantly from the fact that the Rule provides only a one-way protection for statements and offers made during plea negotiations The Rule specifically states that such evidence is not admissible against "the defendant." This is unlike Rule 408, which provides protection for all parties who make statements and offers during compromise negotiations. The one-way protection provided by Rule 410 has created two practical problems: 1) it arguably constrains the process of guilty plea negotiations, contrary to the very policy supporting the Rule; 2) it has led courts to misapply Rule 408 to protect prosecution statements and offers in plea negotiations, even though Rule 408 does not apply to an attempt to compromise a criminal case.

A less serious reason for amending Rule 410 is that the current Rule does not provide for protection of statements and offers when the guilty plea is vacated or rejected, as opposed to withdrawn. The policy of the Rule provides no reason for a distinction between statements and offers made when the guilty plea is vacated or rejected, as opposed to withdrawn. In all these cases, the absence of evidentiary protection may provide an impediment to plea negotiations.

This report is divided into three parts. Part One describes the current rule and the Committee's consideration of a possible amendment up to this point. Part Two discusses the case

law on Rule 410 and the problem areas discussed above. Part Three sets forth the proposed amendment and Committee Note as tentatively approved by the Committee.

I. Rule 410 and the Committee's Determinations Up To This Point

The Rule

Rule 410 currently 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.

Committee Consideration and Resolution Concerning the Proposed Amendment to Rule 410

In the course of investigating a possible amendment to Rule 408, 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 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. Moreover, the proposed amendment to Rule 408 makes it absolutely clear that it will not protect statements and offers made by prosecutors, as the new language would provide that statements and offers covered by that Rule are not admissible in "a civil case."

As a policy matter, the Committee determined at its Fall 2002 meeting 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.

The Committee directed the Reporter to prepare a draft of an amendment to Rule 410 that would exclude statements and offers made by the government during guilty plea negotiations. That draft was reviewed and considered at the Spring 2003 meeting.

"Not Admissible Against the Government"

At the Spring 2003 meeting the Committee considered an amendment that would simply add the language "not admissible against the government" to the language of Rule 410, at the same place where the Rule provides that the covered evidence is not admissible against the defendant. While the Committee adhered unanimously to the position that statements made by prosecutors in guilty plea negotiations should be protected, some concerns were expressed about the consequences of an amendment providing that offers and statements in guilty plea negotiations are not admissible "against the government." That amendment, while simple, might provide too broad an exclusion. It would exclude, for example, statements made *by the defendant* during plea negotiations that could be offered against the government, for example, to prove that the defendant had made a prior consistent statement, or to prove that the defendant believed in his own innocence, or was not trying to obstruct an investigation. Thus, the Committee resolved that any change to Rule 410 should specify that the government's protection would be limited to statements and offers *made by prosecutors* during guilty plea negotiations.

The Committee also considered two other possible problems with Rule 410 that might be clarified if an amendment were to be proposed on other grounds. Those questions are: 1) whether the Rule's protection should cover guilty pleas that are either rejected by the court or vacated on review–currently the Rule specifically covers only guilty pleas that are "withdrawn"; 2) whether the Rule should specify that its protections are inapplicable if the defendant breaches the plea agreement.

Vacated or Rejected Guilty Pleas

As to the applicability of the Rule to rejected and vacated pleas, the Committee determined that that the question has not arisen often enough in the courts to justify an amendment on its own. However, if the Rule is to be amended on other grounds, the Committee agreed that it would be useful to clarify that the protections of the Rule are applicable to rejected and vacated pleas as well as to withdrawn pleas. Committee members noted that as a policy matter of furthering plea negotiations, there was no basis for distinguishing a withdrawn plea from a plea that is rejected or vacated.

Breached Plea Agreements

As to treatment of pleas that have been breached, the Committee was in general agreement that any attempt to clarify the Rule would be likely to cause more problems than it solved. For one thing, it would be difficult to write a rule that would determine with any clarity whether an agreement was breached or not. Should the exception be limited to material breaches, for example? What kind of breach would be "material" ? Committee members resolved that the question of admissibility of plea negotiations after an asserted breach could be handled by agreement between the parties and by a reviewing court

Other Questions of Rule Coverage

The Committee also considered a recent Second Circuit case holding that the protections of Rule 410 do not apply to statements made in plea negotiations with a foreign government. The Committee considered whether an amendment to Rule 410 to protect prosecution statements might also usefully include language providing that negotiations with foreign prosecutors are (or are not) protected. The Committee resolved that the question of the extraterritorial effect of Rule 410 had not been vetted sufficiently in the courts to justify an amendment at this point.

Finally, the Committee agreed that the question of whether the protections of Rule 410 can be waived should be addressed in the Committee Note and not in the Rule. The Supreme Court has decided that the defendant can agree to the use of statements made in plea negotiations to impeach him should he testify at trial, but courts are still working out whether the power to waive the protections of Rule 410 extends to other situations. Thus, it would be counterproductive to codify a waiver rule in the text. But it would be important to acknowledge the waiver rule in the Committee Note, to prevent speculation that any amendment was rejecting Supreme Court precedent on the subject.

Plea Negotiations With Other Defendants

At its Fall 2003 meeting the Committee considered a draft of an amendment to Rule 410 that

was intended to implement the consensus of the Committee. Committee members discussed whether the government should be protected from statements and offers made by the prosecutor in plea negotiations even where the evidence is offered by a different defendant. All Committee members, including the DOJ representative, recognized that a defendant should be able to inquire into a deal struck or to be struck with a former codefendant who is a cooperating witness at the time of the trial. Such an inquiry may be pertinent to the bias or prejudice of the cooperating witness even if a deal has not been formally reached or even offered. On the other hand, most Committee members agreed that statements of fact made by a prosecutor in negotiations with one defendant should not be offered as any kind of party-admission by another defendant or in another proceeding. To allow such broad admissibility could tend to chill the open discussions that Rule 410 seeks to promote.

Final Draft; Restructuring the Rule

After substantial discussion, a straw vote was taken and the Committee tentatively agreed on language for a proposed amendment to Rule 410 providing that statements and offers by prosecutors in the course of plea discussions are not admissible except to prove the bias or prejudice of a witness. The vote was unanimous. The Committee then discussed whether the Rule should be broken down into subdivisions. All agreed that the addition of protection of prosecution statements and offers made it necessary to subdivide the Rule. The alternative (working within the existing Rule) would be a Rule with internal subparts– (1) through (4) – setting forth the evidence that is not admissible against the defendant, followed by a freestanding paragraph providing for exclusion of prosecution statements and offers, followed by another freestanding paragraph setting forth exceptions in which statements otherwise covered by the rule can be admitted against a defendant. The use of two consecutive hanging paragraphs would make the rule difficult to read and is certainly contrary to the working standards of the Style Subcommittee of the Standing Committee. The Evidence Rules Committee therefore agreed unanimously to set forth three subdivisions in its proposed amendment to Rule 410.

II. Case Law and Commentary Bearing On Proposed Textual Changes To Rule 410

1. Case Law And Commentary On Protection Of Prosecution Statements And Offers

Case Law

There are only a handful of cases discussing the admissibility of statements and offers by prosecutors in guilty plea negotiations. They are not in conflict, in the sense that some hold that prosecution statements and offers during plea negotiations are protected and some do not. But there is a substantial conflict in reasoning and analysis that can arguably result in significant confusion. What follows is a description of the pertinent 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. And this will be made more clear if the proposed amendment to Rule 408 is enacted, as that amendment explicitly provides that Rule 408 excludes evidence only in a civil case.

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?

The problem with relying on Rule 403 to exclude prosecution statements and offers is that Rule 403 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 would a case by case balancing approach.

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. 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 of immunity 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 the admissibility of statements and offers to plead guilty that are 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.

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.

Commentary

Most commentators conclude that prosecutor statements and offers in plea negotiations should receive the same protection as those of defendants. This is because the policy of Rule 410 is to promote two-way communications. Representative is Mueller & Kirkpatrick, Evidence: Practice Under the Rules at 362, which states: "When a plea bargaining statement is offered against the government (such as an offer by the prosecutor to allow the defendant to plead to a lesser charge), it is also properly subject to exclusion in order to carry out the underlying policy of FRE 410."

But commentators also recognize that Rule 410 by its terms does not encompass this policy, as its protections run only to the defendant. See Weinstein's Federal Evidence, §410.05 (noting that nothing in the Rule bars the defendant from offering prosecution statements and offers in plea negotiations, but suggesting that a court should exclude this evidence as irrelevant if offered to prove that the prosecutor had personal doubts about the defendant's guilt).

2. Commentary on Rejected 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 does not, by its terms, protect statements and offers when the plea is rejected. 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 * * * ? 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: Practice Under the Rules, § 4.28, n. 1 (arguing that Rule 410 should apply to guilty pleas that are tendered but not accepted by the court).

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. But the Committee determined that if the Rule is to be amended on other grounds it would make good sense to cover statements and offers made concerning pleas that are subsequently rejected. There seems no reason to distinguish between plea agreements that are later withdrawn and those that are rejected by the court.

3. Commentary On 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: Practice Under the Rules, § 4.28, n. 1 (arguing that Rule

410 should apply to guilty pleas set aside on 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. The Committee has determined, however, that if the Rule is to be amended on other grounds–especially if it is amended to cover rejected plea agreements–the amendment should include coverage of vacated pleas. There seems no reason to distinguish between plea agreements that are later withdrawn and those that are vacated on appeal or collateral attack.

Conclusion on Case Law, Commentary, and the Need for an Amendment to Rule 410

It bears noting that the proposed amendment to Rule 410 is different from the other amendments in the Advisory Committee's proposed "package" in one important respect—all of the other amendments resolve longstanding conflicts in the case law. In contrast, there is no true conflict in the case law over the admissibility of prosecution statements and offers made during guilty plea negotiations. In each reported case in which the defendant offered a prosecution statement or offer made in plea negotiations, the proffer was rebuffed. So it could be argued that the uniformity of result in the few cases on the point indicate that there is no real problem in the application of the Rule, and that the proposed amendment to Rule 410 does not fit the same standard of "necessity" as the other proposed amendments. One could argue similarly that in light of the sparse case law, it would make sense to delay an amendment until more courts have weighed in on the subject.

On the other hand, while the *results* in the cases are uniform, the analysis is all over the place. This is arguably particularly unfortunate in an area in which predictability is crucial. If the prosecutor can't predict with certainty whether her statements or offers will be protected from disclosure at trial, then this uncertainty will deter the plea negotiations that Rule 410 intends to further.

Another point to be made in favor of the amendment is that some of the case law protecting prosecutor statements and offers has relied on *Rule 408.* This case law obviously will be invalidated by the proposed amendment to Rule 408–creating even greater uncertainty on whether prosecution statements and offers during plea negotiations are protected or not

It is obviously for the Committee to determine whether the cost-benefit analysis mandates an amendment to Rule 408.

III. Proposed Amendment and Committee Note

The proposed amendment to Rule 410 and the Committee Note are set forth beginning on the next page. The proposal is formatted in accordance with Administrative Office guidelines.

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

(a) Against the defendant. – 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~~ 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.

(b) Against the government. – A statement or offer made in

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

the course of plea discussions by an attorney for the prosecuting authority is not admissible against the government in the proceeding in which the statement or offer was made, except as proof of bias or prejudice of a witness.

(c) Exceptions. – ~~However, such a statement~~ A statement described in this rule 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.

Committee Note

Rule 410 has been amended to make 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) . The amendment endorses the results of this case law, but provides a unitary source of authority for excluding statements and offers by prosecutors that are made during guilty plea negotiations. Protecting those statements and offers will encourage the unrestrained candor

from both sides that produces effective plea discussions. Statements and offers by the prosecution are not excluded by the rule, however, if they are offered by a defendant to prove the bias or prejudice of a witness who may be cooperating with the government as the result of, or in order to obtain, leniency from the government.

2. The protections provided to defendants are extended to statements and offers made pursuant 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.

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 agreed that his statements made in plea negotiations 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 enforcing an agreement that the defendant's statements could be admitted 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. In such a case, the important evidence is the defendant's rejection, not the government's offer *See generally United States v. Biaggi,* 909 F.2d 662, 690 (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: Proposed Amendment to Rule 606(b)
Date: April 2, 2004

At its April 2002 meeting the Evidence Rules Committee directed the Reporter to prepare a report on Rule 606(b)–the Rule limiting the admissibility of testimony of jurors to evidence of "extraneous prejudicial information" or "outside influence." At its Fall 2002 meeting the Committee reviewed the Rule and agreed to continue its consideration of a possible amendment. Committee consideration continued at the Spring 2003 meeting and suggestions were made for improvement Further minor changes were made at the Fall 2003 meeting.

The possible need for amendment of Rule 606(b) arises from two case law developments. First, the courts have engrafted another exception onto the Rule, permitting juror testimony to correct certain errors in the preparation and rendering of the verdict; these errors are referred to as "differential errors", meaning that there is some differential between the verdict *actually* reported and the verdict that the jury *intended* to report . Second, the courts have long been in dispute over the breadth of this "differential error" exception. Some courts permit juror proof only where there is a "clerical error" in the reporting of the verdict; other courts have adopted a broader exception, permitting juror proof whenever the verdict reported is different from that intended by the jury. There is no indication that this dispute will be resolved without an amendment to the Rule.

This report is divided into three parts. Part One describes the current rule and the Committee's consideration of a possible amendment up to this point. Part Two discusses the conflicting case law on the scope of the "clerical error" exception; and at the request of the Committee, an analysis is included of the case law under Civil Rule 60(a), providing for relief from "clerical mistakes" in judgments and orders. Part Three sets forth the proposed amendment and Committee Note as tentatively approved by the Committee.

I. Rule 606(b) and the Committee's Determinations Up To This Point

The Rule

Rule 606(b) currently 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 and found that there was a misunderstanding about the instructions because 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.

Committee Deliberations

The Reporter's initial memorandum addressed two problems under the current Rule 606(b): 1. All courts have found an exception to the Rule, allowing juror testimony on clerical errors in the reporting of the verdict, even though there is no language permitting such an exception in the text of the Rule; and 2. The courts are in dispute about the breadth of that exception–some courts allow juror proof whenever the verdict has an effect that is different from the result that the jury intended to reach, while other courts follow a narrower exception permitting juror proof only where the verdict reported is different from that which the jury actually reached because of some clerical error. The former exception is broader because it would permit juror proof whenever the jury misunderstood (or ignored) the court's instructions. For example, if the judge told the jury to report a damage award without reducing it by the plaintiff's proportion of fault, and the jury disregarded that instruction, the verdict reported would be in an amount different from what the jury actually intended, thus fitting the broader exception. But it would not be different from the verdict actually reached, and so juror proof would not be permitted under the narrow exception for clerical mistakes.

The Committee discussed whether Rule 606(b) should be amended to account for errors in the reporting of the verdict, and if so, what the breadth of the exception should be. The Committee was unanimous in its belief that an amendment to Rule 606(b) is warranted. Not only would an amendment rectify a divergence between the text of the Rule and the case law (thus eliminating a trap for the unwary and the unpredictability that results from such divergence), but it would also eliminate a long-standing circuit split on an important question of Evidence law.

The Committee was also unanimous in its belief that if an amendment to Rule 606(b) is to be proposed, it should codify the narrower exception for clerical mistakes only. An exception that would permit proof of juror statements whenever the jury misunderstood or ignored the court's instruction was thought to have the potential of intruding into juror deliberations and upsetting the finality of verdicts, in a large and undefined number of cases. As such, the broad exception is in tension with the policies of the Rule. In contrast, an exception permitting proof only if the verdict reported is different from that actually reached by the jury does not intrude on the privacy of jury deliberations, as the inquiry only concerns what the jury decided, not why it decided as it did.

At its Fall 2003 meeting the Committee reviewed a working draft of the proposed amendment to consider whether the language accurately captured the narrow exception that should be added to the Rule. The draft language permitted juror proof into whether "the verdict reported is the verdict that was agreed upon by the jury." Committee members expressed concern that this language could be too broad. It might be construed, for example, to allow proof from a juror that he never actually "agreed" with the verdict the jury rendered, he only acquiesced because he wanted to make other jurors happy, or because he misunderstood the court's instructions. Thus, the language of the working draft could be read to encompass the broader exception to the Rule currently used by some courts; it could be read to allow an inquiry into jury deliberations, contrary to the policy of Rule 606(b).

The Committee deliberated and voted unanimously to change the language of the working draft to narrow the exception to situations where the verdict reported is "the result of a clerical mistake." Members pointed out that Civil Rule 60(a) uses the term "clerical mistake" to cover the analogous situation of correcting mistakes in judgments and orders. Committee members recognized that the exception for "clerical mistakes" would apply only rarely in practice. But that was considered to be the very reason for adopting the amendment. The "clerical mistake" language would provide a very narrow exception to allow for correction in the rare cases of clerical error, and it would thereby *reject* the broader exception used by those courts permitting juror testimony whenever the jurors misunderstood the impact of the verdict that they actually agreed upon.

The Committee resolved to revisit the proposed amendment at its next meeting, with the goal to finalize it as part of a package to be submitted to the Standing Committee with the recommendation that it be released for public comment. The Reporter was directed to research cases under Civil Rule 60(a) to determine whether helpful comparisons could be drawn between that Rule and the narrow amendment to Evidence Rule 606(b) proposed by the Committee.

II. Case Law on Differential Error , and on Civil Rule 60(a)

A. Differential 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 " This is so even though there is no exception permitting juror proof of a clerical error in the text of Rule 606(b). 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 limited 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 reached. 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 the 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 the text of 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): In this personal injury action, 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 reasoned 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): The jury reduced an award for proportional fault, even though they were instructed that the adjustment would be made by the court. The trial court took evidence from the jurors, and amended the verdict to comply with the jury's intent. 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 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): *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): 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.

B. Civil Rule 60(a)

Civil Rule 60(a) currently provides:

"Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders."

The case law on Rule 60(a) indicates that the term "clerical mistake" is to be construed narrowly, much as is the intent of the proposal to amend Evidence Rule 606(b). Rule 60(a) may be invoked only to correct an oversight– such as a mechanical, computational, or copying error– that led to a result that is other than what the court clearly intended.

What follows is some of the case law applying Civil Rule 60(a):

In re Transtexas Gas Corp., 303 F.3d 571, 581-582 (5th Cir. 2002): This was a challenge to a district court's confirmation of a bankruptcy plan. The question was whether the bankruptcy judge had jurisdiction to enter a certain order. This depended on whether a post-judgment motion filed by one of the interested parties divested the appellate court of authority and therefore continued jurisdiction in the bankruptcy court. The court noted that a Rule 60(a) motion would toll the time in which to take an appeal and therefore, if this was a Rule 60(a) motion, then the bankruptcy court retained authority to enter the challenged order. The court analyzed the motion made, and the applicability of Rule 60(a), in the following passage:

> There is some indication from the hearing transcript that the bankruptcy court might have been treating Transtexas's February 16 motion as if it were a motion to correct a clerical error under Rule 60(a). However, Transtexas's motion is not a proper Rule 60(a) motion because Transtexas does not seek the type of relief provided for in this rule.
>
> As we have repeatedly indicated, Rule 60(a) provides a very specific and limited type of relief. See, e.g., *In re W Tex. Mktg. Corp* , 12 F 3d 497, 503 (5th Cir. 1994); *Am. Precision Vibrator Co. v. Nat'l Air Vibrator Co.* (In re Am. Precision Vibrator Inc.), 863 F.2d 428, 429-30 (5th Cir. 1989). "Rule 60(a) finds application where the record makes apparent that the court intended one thing but by merely clerical mistake or oversight did another. Such a mistake must not be one of judgment or even of misidentification, but merely

of recitation, of the sort that a clerk or amanuensis might commit, mechanical in nature." *W. Tex. Mktg.*, 12 F.3d at 503 (quoting *Dura-Wood Treating Co., Div. of Roy O. Martin Lumber Co v Century Forest Ind , Inc* , 694 F 2d 112, 114 (5th Cir. 1982). In the instant case, neither party contends that the interest rate established in the confirmation order was the result of a clerical error or that entry of the second supplemental order was necessary to clarify or correct the confirmation order. Both parties agree that the second supplemental order merely reiterated a determination by the bankruptcy court that was already correctly reflected in the existing confirmation order. Under these circumstances, we cannot construe Transtexas's February 16 motion requesting entry of a separate order reiterating the interest rate applicable to the state taxing authorities' priority tax claims as a proper Rule 60(a) motion, nor can we construe the bankruptcy court's second supplemental order as an order correcting "clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission" pursuant to this rule. FED. R. CIV. P. 60(a); cf. *Lee v. Joseph E Seagram & Sons, Inc* , 592 F.2d 39, 43 (2d Cir. 1979) (reasoning that portions of a judgment or order that are clearly accurate and intentional cannot be altered by invoking Rule 60(a)); *Ferraro v. Arthur M Rosenberg, Inc.*, 156 F.2d 212, 214 (2d Cir. 1946) (reasoning that when "no clerical error is shown" it "changes nothing to call deliberate action accurately reflected in the record a clerical error for the purpose of attempting to invoke Rule 60").

Matter of West Texas Marketing Corp., 12 F.3d 497, 504-505 (5th Cir. 1994): In a bankruptcy action, the government and the defendant entered into a settlement of refund claims and priority tax claims. The defendant was entitled to a refund under the settlement After the defendant received the refund, the government claimed the refund was too much due to two miscalculations. The court reversed and remanded the dismissal of the government's adversary action seeking recovery of the overpayments. The stipulation for dismissal was a final resolution of all issues arising out of these particular tax claims, including those for interest. The government could not reform the judgment under Civil Rule 60(b) because it waited more than a year to seek relief. But the court held that the district court failed to consider Civil Rule 60(a) as a possible ground for relief, so the case had to be remanded. The court had this to say about the power to correct errors under Rule 60(a):

> Although the reach of Rule 60(a) has been notably narrowed, it may be available to provide relief in the present case. In * * * *Dura-Wood Treating Co., Division of Roy O. Martin Lumber Co v. Century Forest Industries, Inc.*, 694 F.2d 112, 114 (5th Cir.1982), the court set out these limits:
>
> > Rule 60(a) finds application where the record makes apparent that the court intended one thing but by merely clerical mistake or oversight did another. Such a mistake must not be one of judgment or even of misidentification, but merely of recitation,

of the sort that a clerk or amanuensis might commit, mechanical in nature ...

Thus it is proper to use Rule 60(a) to correct a damages award that is incorrect because it is based on an erroneous mathematical computation, whether the error is made by the jury or by the court... Correction of an error of "substantive judgment," therefore, is outside the reach of Rule 60(a).

The *West Texas* concluded as follows:

In sum, the relevant test for the applicability of Rule 60(a) is whether the change affects substantive rights of the parties and is therefore beyond the scope of Rule 60(a) or is instead a clerical error, a copying or computational mistake, which is correctable under the Rule. As long as the intentions of the parties are clearly defined and all the court need do is employ the judicial eraser to obliterate a mechanical or mathematical mistake, the modification will be allowed. If, on the other hand, cerebration or research into the law or planetary excursions into facts is required, Rule 60(a) will not be available to salvage the government's blunders Let it be clearly understood that Rule 60(a) is not a perpetual right to apply different legal rules or different factual analyses to a case. It is only mindless and mechanistic mistakes, minor shifting of facts, and no new additional legal perambulations which are reachable through Rule 60(a)

McNickle v. Bankers Life and Cas. Co., 888 F.2d 678, 682 (10th Cir. 1989): The court held that Rule 60(a) could be used by parties who sought to add an award of post-judgment interest to a judgment in their favor. The court recognized that Rule 60(a) may not be used to "change something that was deliberately done, even though it was later discovered to be wrong " It also noted that a correction under rule 60(a) "should require no additional proof." As applied to this case, Rule 60(a) could provide for relief because the parties were not trying to change the rate of post-judgment interest actually awarded, but rather to include an award of post-judgment the omission of which was an oversight. The court declared as follows:

The district court, by the terms of its March 19, 1986, judgment, intended to award interest as provided by law. The pertinent law here, § 3629(B), requires the award of prejudgment interest. By their Rule 60(a) motion, the plaintiffs essentially requested the court to insert the omitted particulars of the prejudgment interest award. This was neither an original post-judgment request for prejudgment interest nor a request that the amount due to them be changed in any way. Rule 60(a) specifically addresses the problem of omissions in judgments. If a court's judgment states that interest is to be "according to law" but the rate is not specified, the court may specify, in response to a Rule 60(a) motion, the appropriate rate at any time.

Employers Mut. Cas. Co. v. Key Pharmaceuticals, Inc., 886 F.Supp. 360, 364-365 (S.D.N.Y. 1995): Counterclaim plaintiffs were awarded a judgment, and sought to use Rule 60(a) to amend the judgment to include both pre- and post-judgment interest. The court held that it could not add pre-judgment interest to the award because it had not considered the question before entering judgment, and Rule 60(a) could not be used to amend a judgment on a question that had not been considered. However, Rule 60(a) could be used to clarify the amount of post-judgment interest. On the question of pre-judgment interest, the court explained as follows:

> As has often been noted, the purpose of Rule 60(a) is to afford courts a means of modifying their judgments in order to ensure that the record reflects the actual intentions of the court and the parties; the Rule is not meant to provide a way for parties to relitigate matters already decided, to charge errors in what a court has deliberately done, or to attempt to establish a right to relief which the court has not previously recognized. See, e.g , *Klingman v Levinson,* 877 F.2d 1357, 1360-61 (7th Cir. 1989); *In Re Frigitemp Corp.*, 781 F.2d 324, 327 (2d Cir. 1986). In short, "a motion under Rule 60(a) can only be used to make the judgment or record speak the truth and cannot be used to make it say something other than what originally was pronounced." 11 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2854 (1973)
>
> The Second Circuit Court of Appeals has recently addressed the scope of the errors correctable under Rule 60(a) In *Paddington Partners v. Bouchard*, 34 F.3d 1132 (2d Cir. 1994), the court reviewed a situation much like the one before us: A party who was awarded summary judgment on a contract claim governed by New York law failed to ask for an award of pre-judgment interest, and neither the magistrate judge nor the district judge involved in the case considered the issue of pre-judgment interest prior to entry of the judgment, which was silent with respect to interest. On motion by the interest-entitled party, the magistrate judge corrected the judgment, pursuant to Rule 60(a), to include the requisite award of pre-judgment interest. The question before the Court of Appeals was whether the magistrate judge abused her discretion by so amending the judgment.
>
> The court first considered the circumstances under which an error relating to pre-decision interest can be corrected under Rule 60(a).
>
> > To be correctable under Rule 60(a), the absence of an award of pre-decision interest in a judgment must fail to reflect the actual intention of the court. An error in a judgment that accurately reflects the decision of the court or jury as rendered is not "clerical" within the terms of Rule 60(a).
> >
> > Even if a plaintiff includes a demand for predecision interest in its complaint, such requests obviously may be overlooked or denied, and the absence of a provision for interest in any of the court's prejudgment orders is entirely consistent with the hypotheses that the court either was unaware of the request or intended simply to deny it. In either case, the failure of a Judgment to award such interest is an accurate

reflection of the court's decision, and hence can not be corrected under Rule 60(a).

The court additionally held that an unintentioned failure to award pre-decision interest is not a "clerical error" within the meaning of Rule 60(a) if it cannot be corrected without a finding of fact as to the dates from which the interest should run. Given that the magistrate judge and district judge had evidently never considered the issue of pre-decision interest prior to entry of judgment, and that the absence of an award of pre-decision interest could not be corrected without further findings of fact, the court held that the magistrate judge had abused her discretion in amending the judgment under Rule 60(a) to include an award of pre-decision interest.

The decision in *Paddington* dictates the result in this case. We cannot state that we ever actually intended to make an award of pre-decision interest in our order directing entry of judgment, or that we ever considered, much less resolved, the issue of pre-decision interest at any point during the course of our deliberations on the parties' summary judgment motions. The issue of pre-decision interest was simply not considered since the Court accepted the proposed judgment of the prevailing party, to which no objection was raised

The fact that we would need to make further factual findings before we could make an award of pre-decision interest further precludes recourse to Rule 60(a) here. Like the judges in *Paddington*, we have never determined the date or dates from which pre-decision interest should run. To do so, we would have to determine "the earliest ascertainable date [defendants' contract] cause of action existed . . . ." N.Y. Civ. Prac. L. & R. § 5001(b), which at this point we would surmise to be the date defendants were out-of-pocket as a result of plaintiffs' refusal to honor their indemnity commitments under the insurance policy. While this date would probably be fairly easy to determine (since it might be provable on the basis of documentary evidence), it nonetheless does not lend itself to the kind of automatic or mechanical determination as does, say, the date of a person's death in a wrongful death action.

In contrast to pre-judgment interest, the *Key Pharmaceuticals* court held that it did have authority under Rule 60(a) to amend the judgment to award post-judgment interest. It reasoned that New York law requires the clerk of the court to calculate post-decision interest "automatically" at an established statutory rate. Because the calculation can be done in a wholly mechanical way, with no discretion as to dates involved, the fixing of post-decision interest was a "ministerial oversight remediable as a clerical error under Rule 60(a)."

Conclusion on Rule 60(a) Case Law

If the Rule 606(b) exception is limited to clerical mistakes, then its narrow application will be analogous to that employed by the courts applying Civil Rule 60(a). It would therefore seem to be useful to add a "cf." citation to Rule 60(a) and a representative case. Relief under either rule

would be limited to those few cases where there has been some kind of ministerial, computational, or typographical kind of error.

III. Proposed Amendment and Committee Note

The proposed amendment to Rule 606(b) and the Committee Note are set forth beginning on the next page. The proposal is formatted in accordance with Administrative Office guidelines.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 606(b)

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 of a clerical mistake. ~~Nor may a~~ A juror's affidavit or evidence of any statement

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

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 entered was the result of a clerical mistake. 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 mistakes, 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 (10 th 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 mistake" 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 by the jury, or mistakenly stated that the defendant was 'guilty' when the jury had actually agreed that the defendant was not guilty." *Id.*

The narrow exception now added to the Rule is analogous to Fed.R.Civ.P. 60(a), which allows a court to correct "clerical mistakes" in judgments, orders, or other parts of the record. *See, e g , McNickle v Bankers Life and Cas. Co.*, 888 F.2d 678, 682 (10th Cir. 1989) (noting that Fed.R.Civ.P. 60(a) may not be used to "change something that was deliberately done, even though it was later discovered to be wrong" but rather is limited to correcting ministerial, typographical and similar errors).

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposed Amendment to Rule 609(a)
Date: April 2, 2004

At its April 2002 meeting the Evidence Rules Committee directed the Reporter to prepare a report on Rule 609(a)—the Rule permitting impeachment of witnesses with certain prior convictions. At its Fall 2003 meeting the Committee reviewed the Reporter's memorandum and tentatively agreed to an amendment to Rule 609(a).

The possible need for amendment of Rule 609(a) arises from a longstanding disagreement among the courts on the proper method for determining whether a proffered conviction "involved dishonesty or false statement" within the meaning of Rule 609(a)(2). If a witness's conviction falls within Rule 609(a)(2) it is automatically admissible to impeach his character for truthfulness. In contrast, if the conviction falls within Rule 609(a)(1) because it does not involve dishonesty or false statement, then it is admissible to impeach the witness only if 1) it is a felony and 2) it satisfies the balance tests of probative value and prejudicial effect mandated by that Rule. So the question of whether a conviction is covered by (a)(2) rather than (a)(1) can be critical to the outcome of both civil and criminal actions.

This report is divided into three parts. Part One describes the current rule and the Committee's consideration of a possible amendment up to this point. Part Two discusses the conflicting case law on the correct method for determining whether a conviction involved dishonesty or false statement. Part Three sets forth the proposed amendment and Committee Note as tentatively approved by the Committee. The question for the Committee at this meeting is whether to refer the amendment to the Standing Committee with the recommendation that it be released for public comment.

I. Rule 609(a) and the Committee's Determinations Up To This Point

The Rule

Rule 609(a) currently provides as follows:

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) *General rule.* — For the purpose of attacking the **credibility** of a witness,

(1) evidence that the witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime **shall be admitted if it involved dishonesty or false statement, regardless of the punishment.**

(b) *Time limit.* — Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) *Effect of pardon, annulment, or certificate of rehabilitation.* — Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) *Juvenile adjudications.* — Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) *Pendency of appeal.* — The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

The Original Advisory Committee Note pertinent to Rule 609(a) provides as follows:

As a means of impeachment, evidence of conviction of crime is significant only because it stands as proof of the commission of the underlying criminal act. There is little dissent from the general proposition that at least some crimes are relevant to credibility but much disagreement among the cases and commentators about which crimes are usable for this purpose. See McCormick § 43; 2 Wright, Federal Practice and Procedure: Criminal § 416 (1969). The weight of traditional authority has been to allow use of felonies generally, without regard to the nature of the particular offense, and of *crimen falsi*, without regard to the grade of the offense. This is the view accepted by Congress in the 1970 amendment of § 14-305 of the District of Columbia Code, P L. 91-358, 84 Stat. 473. Uniform Rule 21 and Model Code Rule 106 permit only crimes involving "dishonesty or false statement." Others have thought that the trial judge should have discretion to exclude convictions if the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965); McGowan, Impeachment of Criminal Defendants by Prior Convictions, 1970 Law & Soc. Order 1. Whatever may be the merits of those views, this rule is drafted to accord with the congressional policy manifested in the 1970 legislation. **[Note: The Rule ultimately adopted by Congress, and as amended in 1990, provides for trial court balancing of probative value and prejudicial effect as to convictions not involving dishonesty or false statement.]**

The proposed rule incorporates certain basic safeguards, in terms applicable to all witnesses but of particular significance to an accused who elects to testify. These protections include the imposition of definite time limitations, giving effect to demonstrated rehabilitation, and generally excluding juvenile adjudications.

Subdivision (a). For purposes of impeachment, crimes are divided into two categories by the rule: (1) those of what is generally regarded as felony grade, without particular regard to the nature of the offense, and (2) those involving dishonesty or false statement, without regard to the grade of the offense. Provable convictions are not limited to violations of federal law. By reason of our constitutional structure, the federal catalog of crimes is far from being a complete one, and resort must be had to the laws of the states for the specification of many crimes. For example, simple theft as compared with theft from interstate commerce Other instances of borrowing are the Assimilative Crimes Act, making the state law of crimes applicable to the special territorial and maritime jurisdiction of the United States, 18 U.S.C. § 13, and the provision of the Judicial Code disqualifying persons as jurors on the grounds of state as well as federal convictions, 28 U.S.C. § 1865. For evaluation of the crime in terms of seriousness, reference is made to the congressional measurement of felony (subject to imprisonment in excess of one year) rather than adopting state definitions which vary considerably. See 28 U.S.C. § 1865, *supra*, disqualifying jurors for conviction in state or federal court of crime punishable by imprisonment for more than one year.

Reporter's Note: Congress Changed the Advisory Committee's proposal to differentiate between crimes that involved dishonesty or false statement and all other crimes. The pertinent report of the House and Senate Conferees provides as follows:

Rule 609 defines when a party may use evidence of a prior conviction in order to impeach a witness. The Senate amendments make changes in two subsections of Rule 609.

The House bill provides that the credibility of a witness can be attacked by proof of prior conviction of a crime only if the crime involves dishonesty or false statement. The Senate amendment provides that a witness's credibility may be attacked if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involves dishonesty or false statement, regardless of the punishment.

The Conference adopts the Senate amendment with an amendment. The Conference amendment provides that the credibility of a witness, whether a defendant or someone else, may be attacked by proof of a prior conviction but only if the crime: (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted and the court determines that the probative value of the conviction outweighs its prejudicial effect to the defendant; or (2) involved dishonesty or false statement regardless of the punishment.

By the phrase "dishonesty and false statement" the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.

The admission of prior convictions involving dishonesty and false statement is not within the discretion of the Court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted. Thus, judicial discretion granted with respect to the admissibility of other prior convictions is not applicable to those involving dishonesty or false statement.

* * *

Reporter's Note: Rule 609(a) was amended in 1990 for two purposes: 1) to clarify that civil plaintiffs and defendants are treated equally under the Rule; and 2) to clarify that otherwise admissible convictions can be offered on direct as well as cross-examination. The Advisory Committee Note to the 1990 change explains as follows:

> The amendment to Rule 609(a) makes two changes in the rule. The first change removes from the rule the limitation that the conviction may only be elicited during cross-examination, a limitation that virtually every circuit has found to be inapplicable. It is common for witnesses to reveal on direct examination their convictions to "remove the sting" of the impeachment. *See, e.g., United States v. Bad Cob*, 560 F.2d 877 (8th Cir. 1977). The amendment does not contemplate that a court will necessarily permit proof of prior convictions through testimony, which might be time-consuming and more prejudicial than proof through a written record. Rules 403 and 611(a) provide sufficient authority for the court to protect against unfair or disruptive methods of proof.
>
> The second change effected by the amendment resolves an ambiguity as to the relationship of Rules 609 and 403 with respect to impeachment of witnesses other than the criminal defendant. *See Green v. Bock Laundry Machine Co* , 109 S. Ct. 1981 [490 U.S. 504] (1989). The amendment does not disturb the special balancing test for the criminal defendant who chooses to testify. Thus, the rule recognizes that, in virtually every case in which prior convictions are used to impeach the testifying defendant, the defendant faces a unique risk of prejudice — *i.e.*, the danger that convictions that would be excluded under Fed. R. Evid. 404 will be misused by a jury as propensity evidence despite their introduction solely for impeachment purposes. Although the rule does not forbid all use of convictions to impeach a defendant, it requires that the government show that the probative value of convictions as impeachment evidence outweighs their prejudicial effect.
>
> Prior to the amendment, the rule appeared to give the defendant the benefit of the special balancing test when defense witnesses other than the defendant were called to testify. In practice, however, the concern about unfairness to the defendant is most acute when the defendant's own convictions are offered as evidence. Almost all of the decided cases concern this type of impeachment, and the amendment does not deprive the defendant of any meaningful protection, since Rule 403 now clearly protects against unfair impeachment of any defense witness other than the defendant. There are cases in which a defendant might be prejudiced when a defense witness is impeached. Such cases may arise, for example, when the witness bears a special relationship to the defendant such that the defendant is likely to suffer some spill-over effect from impeachment of the witness.
>
> The amendment also protects other litigants from unfair impeachment of their witnesses. The danger of prejudice from the use of prior convictions is not confined to criminal defendants. Although the danger that prior convictions will be misused as character evidence is particularly acute when the criminal defendant is impeached, the danger exists in other situations as well. The amendment reflects the view that it is desirable to protect all

litigants from the unfair use of prior convictions, and that the ordinary balancing test of Rule 403, which provides that evidence shall not be excluded unless its prejudicial effect substantially outweighs its probative value, is appropriate for assessing the admissibility of prior convictions for impeachment of any witness other than a criminal defendant.

The amendment reflects a judgment that decisions interpreting Rule 609(a) as requiring a trial court to admit convictions in civil cases that have little, if anything, to do with credibility reach undesirable results. *See, e.g., Diggs v. Lyons*, 741 F.2d 577 (3d Cir. 1984), *cert denied*, 105 S. Ct. 2157 (1985). The amendment provides the same protection against unfair prejudice arising from prior convictions used for impeachment purposes as the rules provide for other evidence. The amendment finds support in decided cases. *See, e.g., Petty v. Ideco*, 761 F.2d 1146 (5th Cir. 1985); *Czajka v. Hickman*, 703 F.2d 317 (8th Cir. 1983).

Fewer decided cases address the question whether Rule 609(a) provides any protection against unduly prejudicial prior convictions used to impeach government witnesses. Some courts have read Rule 609(a) as giving the government no protection for its witnesses. *See, e.g., United States v. Thorne*, 547 F.2d 56 (8th Cir. 1976); *United States v. Nevitt*, 563 F.2d 406 (9th Cir. 1977), *cert. denied*, 444 U.S. 847 (1979). This approach also is rejected by the amendment. There are cases in which impeachment of government witnesses with prior convictions that have little, if anything, to do with credibility may result in unfair prejudice to the government's interest in a fair trial and unnecessary embarrassment to a witness. Fed. R. Evid. 412 already recognizes this and excluded [*sic*] certain evidence of past sexual behavior in the context of prosecutions for sexual assaults.

The amendment applies the general balancing test of Rule 403 to protect all litigants against unfair impeachment of witnesses. The balancing test protects civil litigants, the government in criminal cases, and the defendant in a criminal case who calls other witnesses. The amendment addresses prior convictions offered under Rule 609, not for other purposes, and does not run afoul, therefore, of *Davis v. Alaska*, 415 U.S. 308 (1974). *Davis* involved the use of a prior juvenile adjudication not to prove a past law violation, but to prove bias. The defendant in a criminal case has the right to demonstrate the bias of a witness and to be assured a fair trial, but not to unduly prejudice a trier of fact. *See generally* Rule 412. In any case in which the trial court believes that confrontation rights require admission of impeachment evidence, obviously the Constitution would take precedence over the rule.

The probability that prior convictions of an ordinary government witness will be unduly prejudicial is low in most criminal cases. Since the behavior of the witness is not the issue in dispute in most cases, there is little chance that the trier of fact will misuse the convictions offered as impeachment evidence as propensity evidence. Thus, trial courts will be skeptical when the government objects to impeachment of its witnesses with prior convictions. Only when the government is able to point to a real danger of prejudice that is sufficient to outweigh substantially the probative value of the conviction for impeachment

purposes will the conviction be excluded.

The amendment continues to divide subdivision (a) into subsections (1) and (2) thus facilitating retrieval under current computerized research programs which distinguish the two provisions. **The Committee recommended no substantive change in subdivision (a)(2), even though some cases raise a concern about the proper interpretation of the words "dishonesty or false statement." These words were used but not explained in the original Advisory Committee Note accompanying Rule 609. Congress extensively debated the rule, and the Report of the House and Senate Conference Committee states that "[b]y the phrase 'dishonesty and false statement,' the Conference means crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." The Advisory Committee concluded that the Conference Report provides sufficient guidance to trial courts and that no amendment is necessary, notwithstanding some decisions that take an unduly broad view of "dishonesty," admitting convictions such as for bank robbery or bank larceny.** Subsection (a)(2) continues to apply to any witness, including a criminal defendant.

Finally, the Committee determined that it was unnecessary to add to the rule language stating that when a prior conviction is offered under Rule 609, the trial court is to consider the probative value of the conviction *for impeachment*, not for other purposes. The Committee concluded that the title of the rule, its first sentence, and its placement among the impeachment rules clearly establish that evidence offered under Rule 609 is offered only for purposes of impeachment.

Description of the Operation of the Rule:

Subdivision (a) is the dominant provision in the Rule, covering convictions that Congress considered to be "recent" enough to have substantial probative value as to the witness' character for veracity. The most crucial inquiry under Rule 609(a) is whether the conviction that is the subject of impeachment falls under subdivision (a)(1) or subdivision (a)(2). The legislative presumption is that crimes involving dishonesty or false statement (covered by subdivision (a)(2)) are highly probative of the witness's character for truthfulness, while other convictions (covered by subdivision (a)(1)) are somewhat less probative.

Rule 609(a)(2) provides that if a witness has been convicted of any crime that "involved dishonesty or false statement," then the conviction "shall be admitted" to impeach the witness. See,

e.g., *United States v. Kiendra,* 663 F.2d 349 (1st Cir. 1981) (convictions for crimes of dishonesty are automatically admissible because Rule 609(a)(2) provides that they "shall" be admitted; the trial judge has no discretion to exclude such convictions). In contrast, if the conviction did not involve dishonesty or false statement, then Rule 609(a)(1) provides that the conviction is admissible only if it is a felony and only if it satisfies a specified balancing test. If the conviction is covered by Rule 609(a)(1), the Judge must balance the conviction's probative value in proving the witness' untruthful character, against the prejudice that would arise from introducing the conviction. If the witness is a criminal defendant, the conviction can be admitted under Rule 609(a)(1) only if the probative value of the conviction outweighs its prejudicial effect. The conviction of any other witness is admissible so long as its probative value is not substantially outweighed by its prejudicial effect; that is, the general balancing test of Rule 403 applies if the witness is not the accused.

Probably no single Rule provoked as much controversy in Congress as Rule 609. In the House of Representatives, the prevailing view was that a prior conviction should only be introduced if the crime involved dishonesty or false statement.

Under the bill originally approved by the Senate, witnesses other than the accused could also be impeached by crimes punishable by death or imprisonment in excess of one year if the Court determined that the probative value of the evidence outweighed its prejudicial effect.

The actual Rule represents a compromise of sorts. More impeachment is permissible under the Rule than under the House draft. But felony convictions not amounting to *crimen falsi* can be used to impeach any witness, *including a criminal defendant*, which represents an abandonment of the Senate's limitation.

The Rule as originally promulgated was anomalous in several respects, however. First, it referred to proving convictions only on "cross-examination," but it is clear, especially in light of Rule 607, that a party should be able to bring out otherwise admissible prior convictions on direct examination as well. Second, Rule 609(a)(1) was ambiguous as to whether the trial judge could exclude unduly prejudicial convictions when offered against prosecution witnesses or witnesses in civil cases; the Rule referred only to prejudice "against the defendant." See *Green v. Bock Laundry Mach. Co.,* 490 U.S. 504 (1989) (noting that the pre-amendment rule could not be applied as written, because it literally provided for automatic admissibility of all crimes of plaintiffs and their witnesses, while permitting possible exclusion of crimes of civil defendants and their witnesses pursuant to judicial balancing).

In 1990, the Rule was amended to delete the reference to cross-examination and to clarify that under Rule 609(a)(1), the trial judge must balance probative value and prejudicial effect as to all witnesses in all cases — though the balancing test is tilted more toward exclusion when the criminal defendant is the witness.

It is critical for the parties in both civil and criminal cases to determine whether a witness' conviction "involved dishonesty or false statement." The offering party will always wish to characterize a conviction as involving dishonesty or false statement, because then it will be

automatically admitted. The non-offering party will always wish to characterize a conviction as not involving dishonesty or false statement, because then there will be an opportunity to have the conviction excluded pursuant to the Rule 609(a)(1) weighing process.

If the conviction is found to involve dishonesty or false statement, it must be admitted no matter how prejudicial it is, no matter who the witness is, and no matter how cumulative it may be as to impeachment of the witness. While the Rule 403 test is applied as a backstop to many other Rules (see, e.g., Rules 404(b), 407, 608 and 702), this is not the case with Rule 609(a)(2). Rule 609(a)(2) is cast in mandatory language. Any possible doubt was erased by the 1990 amendment, which makes clear that the Rule 403 test is inapplicable to convictions involving dishonesty or false statement. The amendment added the Rule 403 test to govern most convictions offered under Rule 609(a)(1), but pointedly did not add such a test to Rule 609(a)(2).

Committee Consideration of a Proposed Amendment to Rule 609(a) at the Fall 2003 Meeting

The Reporter's research on Rule 609(a) indicated that the courts are in a long-standing conflict on how to determine that a certain conviction "involved dishonesty or false statement" within Rule 609(a)(2). The basic conflict is that some courts determine "dishonesty or false statement" solely by looking at the elements of the conviction for which the witness was found guilty. If none of the elements require proof of falsity or deceit beyond a reasonable doubt, then the conviction must be admitted under Rule 609(a)(1) or not at all. This is the narrow view of Rule 609(a)(2). Other courts look behind the conviction to determine whether the witness committed an act of dishonesty or false statement before or after committing the crime. Under this view, for example, a witness convicted of murder would have committed a crime involving dishonesty or false statement if he lied about the crime, either before or after committing it.

After discussion at the Fall 2003 meeting, Committee members unanimously agreed that Rule 609(a)(2) should be amended to resolve the dispute in the courts over how to determine whether a conviction involves dishonesty or false statement. The Committee concluded that an amendment would resolve an important practical issue on which the circuits are clearly divided—and have been so divided for more than 15 years.

The Committee was further unanimously in favor of an "elements" definition of crimes involving dishonesty or false statement. Committee members noted that requiring the judge to look behind the conviction to the underlying facts could (and often does) impose a burden on trial judges. Moreover, the inquiry is indefinite because it is impossible to determine, simply from a guilty verdict, just what facts of dishonesty or false statement the jury might have found when the witness

was convicted. Most importantly, whatever additional probative value there might be in a crime committed deceitfully, it is lost on the jury assessing the witness's credibility when the elements of the crime do not in fact require proof of dishonesty or false statement. This is because when the conviction is introduced to impeach the witness, the jury is told only about the conviction, not about its underlying facts.

Committee members noted that the "elements" approach to defining crimes that fall within Rule 609(a)(2) is litigant-neutral, in that it would apply to all witnesses in all cases. It was also noted that this "elements" approach was embraced in the latest version of the Uniform Rules of Evidence after extensive research and discussion by the Uniform Rules Drafting Committee. Furthermore, the "elements" approach is consistent with the limited breadth of Rule 609(a)(2) that was described in the Committee Note to the 1990 amendment to Rule 609.

The Committee also found that an "elements" test for Rule 609(a)(2) would be sound policy. Because almost every criminal act is in some broad sense a dishonest act in either preparation or execution, a broad construction of Rule 609(a)(2) would swallow up Rule 609(a)(1) and would lead to mandatory admission of almost all prior convictions, even though many of these convictions would have slight probative value as to the witness' character for truthfulness and would carry significant prejudicial effect. Given the predominance of the Rule 403 balancing approach throughout the Federal Rules and the general grant of discretion that the Rules provide to trial judges, it makes sense to limit where possible a rule that mandates admission and prohibits the use of judicial discretion and balancing.

The Committee considered whether the full impeachment of a witness would be impaired unduly by a rule limiting Rule 609(a)(2) to convictions in which dishonesty or false statement was an element of the crime charged against the witness. After extensive investigation and discussion, it concluded that an "elements" test for Rule 609(a)(2) would not unduly impair the impeachment of witnesses. First, if a crime not involving false statement as an element (e.g., murder or drug dealing) were inadmissible under Rule 609(a)(2), it might well be admitted under the balancing test of Rule 609(a)(1); moreover, if such a crime *were* committed in a deceitful manner, the underlying facts of deceit might well be a subject of inquiry under Rule 608. Thus, the costs of an "elements" approach are low as it would not result in an unjustified loss of evidence pertinent to credibility; and its benefits in promoting judicial efficiency are obvious.

A vote was taken and the Committee tentatively agreed to propose an amendment to Rule 609(a)(2) that would use an "elements" approach to define the crimes that are automatically admissible for impeachment under Rule 609(a)(2). The Committee agreed to reconsider the working draft of the amendment and the Committee Note, with the view to finalizing it as part of a package of amendments to be sent to the Standing Committee in June, 2004.

The Committee also agreed that if Rule 609(a) were to be amended, it would be useful to include a minor change to the opening clause of that Rule. Currently, the Rule purports to apply to convictions offered for "the purpose of attacking the credibility of a witness." As with Rule 608

before it was amended in 2003, the use of the term "credibility" is overbroad. Impeachment with a prior conviction under Rule 609(a) is an attack on the witness's *character for truthfulness*. As such it is distinct from other attacks on credibility, e.g., contradiction and bias. Accordingly, any amendment to Rule 609(a) should substitute the term "character for truthfulness" for the overbroad term "credibility."

II. Case Law and Commentary on the Proper Method for Determining Whether a Conviction "Involved Dishonesty or False Statement" Under Rule 609(a)(2).

As the Advisory Committee observed in the 1990 Committee Note, Rule 609(a) does not define or list those crimes that involve dishonesty or false statement. Courts have disagreed on whether Rule 609(a)(2) covers crimes that were committed in a dishonest manner, even if the elements of the crime do not require proof of dishonesty or false statement.

Looking At the Facts Underlying the Conviction

Most Circuits have held that a conviction is subject to admission under Rule 609(a)(2), even where dishonesty or false statement is not an essential element of the crime, if the proponent can show that the conviction rested on facts indicating that the witness was actually dishonest or deceitful in committing the crime. Indicative of this view is the Court's analysis in *United States v. Hayes*, 553 F.2d 824 (2d Cir. 1977). Hayes was charged with five counts of bank robbery, and the question was whether he could be impeached by a year-old conviction for importation of cocaine. The Court held that a drug distribution conviction was not on its face automatically admissible under Rule 609(a)(2) because, unlike a conviction for perjury, the prosecution did not have to prove dishonesty or false statement as an element of the crime of cocaine distribution. The Court nonetheless held that the drug conviction would be admitted under Rule 609(a)(2) if the conviction "rested on facts warranting the dishonesty or false statement description."

[In *Hayes*, the government presented no underlying facts of dishonesty, but interestingly, the Court held that the conviction was admissible anyway under the balancing approach of Rule 609(a)(1) *Hayes* illustrates the practical point that even if a litigant succeeds in having a crime categorized under Rule 609(a)(1) rather than Rule 609(a)(2), it is still quite possible that the conviction will be admitted after application of the balancing test.]

Other cases authorizing the court to look to the underlying facts of a conviction to determine whether it "involves dishonesty or false statement" include:

First Circuit

United States v. Grandmont, 680 F.2d 867 (1st Cir. 1982) (conviction for purse snatching is not automatically admissible under Rule 609(a)(2) *unless* the underlying facts indicate dishonesty).

Second Circuit

Blake v Coughlin, 2000 WL 233550 (2nd Cir.) (murder conviction automatically admissible under Rule 609(a)(2) where, following the murder, the witness feigned a suicide in order to throw the police off his trail, changed his appearance and his name, and moved three times over the ensuing seven weeks).

Fourth Circuit

United States v. Cunningham, 638 F.2d 696 (4th Cir. 1981) (conviction for writing worthless checks could be admitted under Rule 609(a)(2) if the underlying facts demonstrate dishonesty or false statement).

Seventh Circuit

Altobello v. Borden Confectionary Products, Inc., 872 F.2d 215, 216-217 (7 th Cir. 1989) (conviction fits Rule 609(a)(2) if the "manner in which" the witness committed it involved deceit).

Eighth Circuit

United States v. Yeo , 739 F.2d 385 (8th Cir. 1984) (the proponent has the burden of producing facts demonstrating that the particular conviction involved fraud or deceit).

Ninth Circuit

United States v. Mehrmanesh, 689 F.2d 822 (9th Cir. 1982) (a prior conviction for smuggling hashish was not automatically admissible on its face, because such surreptitious activity does not necessarily involve misrepresentation or falsification; however, the conviction would be automatically admitted if the government presented proof that the witness had actually used fraud or deceit in the smuggling); *United States v. Foster*, 227 F.3d 1096 (9th Cir 2000) (conviction for receipt of stolen property is not admitted automatically under Rule 609(a)(2) because the crime can be accomplished without any misrepresentation or deceit; however, the conviction can be admitted under Rule 609(a)(2) if the trial court finds that the crime "was actually committed by fraudulent or deceitful means").

Tenth Circuit

United States v Dunson, 142 F.3d 1213 (10th Cir. 1998) (shoplifting conviction is not the type of crime that is automatically admitted under Rule 609(a)(2); however, the trial judge can, upon

request, go behind the elements of the crime to determine whether the particular conviction rested on facts establishing dishonesty or false statement; in this case, the defendant proffered no underlying facts, so the conviction was not admissible against the prosecution witness under Rule 609(a)(2)); *United States v. Whitman*, 665 F.2d 313 (10th Cir. 1981) (larceny offense that was actually committed by fraudulent or deceitful means is automatically admitted under Rule 609(a)(2)).

At least two Circuits have held that the trial court may assess only the elements of the crime offered for impeachment. Thus, in these Circuits, the trial judge cannot look to the underlying facts of the conviction to determine whether it is automatically admissible under Rule 609(a)(2).

D.C. Circuit:

United States v. Lewis, 626 F.2d 940 (D.C. Cir. 1980):

> We do not perceive that it is the manner in which the offense is committed that determines its admissibility. Rather, we interpret Rule 609(a)(2) to require that the crime "involved dishonesty or false statement" as an element of the statutory offense. While narcotics may be sold in a manner that is "deceitful," which is one synonym for "dishonest," the statutory elements of offenses under the Controlled Substance Act do not require that the drugs be sold or possessed in a manner that involves deceit, fraud or breach of trust. If a narcotics pusher misrepresents the strength or quality of his heroin, as frequently happens, he may be defrauding the purchaser, but the statutory crime concerns itself only with the sale, not the fraud.

Third Circuit

Cree v. Hatcher, 969 F.2d 34 (3d Cir. 1992) ("the manner in which a particular defendant commits a crime is irrelevant; what matters is whether dishonesty or false statement is an element of the statutory offense").

Arguments in Favor of and Against a Rule Permitting Inquiry into the Underlying Facts of the Conviction:

As can be seen above, there is a clear split in the circuits over whether the trial court is

permitted to inquire into the underlying facts of the conviction to determine whether it involves "dishonesty or false statement" under Rule 609(a)(2). While there are arguments in favor of an approach permitting inquiry into underlying facts (and while the majority of the courts have adopted that view) most commentators argue that inquiry into underlying facts should not be permitted: that is, the conviction should be assessed on its face to determine whether the elements of the conviction involve dishonesty or false statement. The view of the commentators is shared by the ABA and by the Uniform Rules drafters as well. Furthermore, several state versions of Rule 609(a)(2) adopt an "elements" test, including Vermont and Michigan.

Arguments in favor of inquiry into underlying facts:

The argument in favor of inquiry into underlying facts is that it allows the judge to better evaluate the extent to which deception and dishonesty had pervaded the witness's conduct. Rule 609(a)(2) is based on the Congressional assessment that crimes involving dishonesty or false statement are highly probative of a witness's character for truthfulness. In this regard, a crime committed by dishonest means would seem to be as probative as a crime the elements of which involve dishonesty. Moreover, the actual elements of the conviction may not be a true indicator of the witness's misconduct, given the possibility of plea bargaining.

Arguments against inquiry into underlying facts:

The premise of an inquiry into underlying facts is that if the crime is committed in a deceitful manner, it is more probative of the witness's veracity than one not so committed. But if the conviction is admitted, the jury will generally hear only that the conviction was rendered and that a certain punishment was meted out. Rule 609 does not allow the jury to hear the underlying facts of the conviction. *See United States v Albers*, 93 F.3d 1469 (10th Cir. 1996) (the trial judge erred, though harmlessly, in permitting the prosecutor to bring out the underlying facts of a prior conviction for grand theft: "the defendant was entitled to the protection of the rule that only the prior conviction, its general nature, and punishment of felony range were fair game for testing the defendant's credibility"); *United States v. Pandozzi*, 878 F.2d 1526 (1st Cir. 1989) (the underlying factual details of a conviction cannot be inquired into on cross-examination); *Campbell v Greer*, 831 F.2d 700 (7th Cir. 1987) (when the witness was impeached with a rape conviction, it was error to inquire where a prior rape occurred); *United States v. Beckett*, 706 F.2d 519 (5th Cir. 1983) (a testifying witness is required "to give answers only as to whether he has been previously convicted of a felony, as to what the felony was, and as to when the conviction was had"); *Radtke v. Cessna Aircraft Co.*, 707 F.2d 999 (8th Cir. 1983) (impeachment with a prior conviction is limited to the recitation of the conviction itself). The Courts have consistently held that evidence of the conviction is limited to "the crime charged, the date, and the disposition." *Gora v. Costa,* 971 F.2d 1325, 1330 (7th Cir. 1992) ("it is error to elicit any further information for impeachment purposes"). This is part of the

reasoning for dispensing with a prohibition of extrinsic evidence to prove a conviction under Rule 609, whereas there is such a limitation when the witness is impeached with bad acts under Rule 608(b). If the witness has been convicted, the conviction itself can be proved easily, without a need to delve into the facts. Consequently, whatever greater probative value there is in the manner that a crime was committed will be lost on the jury when only the conviction itself is admitted.

More importantly, an approach permitting the trial court to inquire into the underlying facts of the conviction is likely to make Rule 609(a)(2) the predominant rule, and not the exception. This is because there is probably some act of deceit in almost every crime. Thus, Rule 609(a)(2) will swallow up Rule 609(a)(1), even though the balancing approach of the latter Rule is more consistent with the general framework of the Federal Rules. Note also that the Conference Report on Rule 609(a)(2), set forth above, indicates a Congressional intent to limit the rule to convictions in which lying is an element of the crime.

Finally, it is to say the least an indeterminate inquiry for a trial court to decide retrospectively just what facts actually led to the witness' conviction. If a witness has been convicted of drug distribution, how is the trial judge to determine whether the jury in that prior case found beyond a reasonable doubt that the witness had acted deceitfully in committing the crime? The general verdict of guilty is obviously an insufficient indication. Should the trial judge look at the indictment? At the record? Should the trial judge hold a hearing and essentially retry the prior case, when the only goal is to determine whether the conviction is "automatically" admitted? The process of going behind the crime to the underlying facts hardly seems "automatic".

For these reasons, the ABA Section on Criminal Justice suggests adding the following sentence to the second sentence of Rule 609(a)(2): "This subsection (2) applies only to those crimes whose statutory elements necessarily involve untruthfulness or falsification." The Uniform Rules drafters adopted a similar proposal.

Mueller and Kirkpatrick support the minority view, that the underlying facts of a conviction should be irrelevant under Rule 609(a)(2):

> There is something to be said for a formalistic approach in which a conviction fits [Rule 609(a)(2)] only if dishonesty or false statement is among the elements of the offense: It would simplify administration and spare courts and litigants from spending time on collateral inquiries. Scrutiny of underlying facts seems vaguely inconsistent with allowing inquiry only on the essentials of convictions (name of crime, punishment imposed, time, and sometimes place) with further details kept off limits: If the jury hears only the basics, why should the judge consider an elaboration of factual detail in deciding whether to permit the questioning? Also this approach would both cut down the number of convictions achieving "automatic admissibility" and exclude many misdemeanor convictions that, after all, could not qualify under [Rule 609(a)(1)] either.

Mueller and Kirkpatrick, *Federal Evidence* at 742.

Another commentator, Professor Stuart Green, puts the argument this way:

> There remains the question whether, even when the crime for which defendant was convicted does not require a showing of falsity or deceit, a court may look to the manner in which the crime was committed in order to determine whether a prior conviction involves deceit, and therefore falls within the scope of Rule 609(a)(2). According to Mueller and Kirkpatrick, "overwhelmingly ... the practice is to allow and even encourage inquiry into underlying facts." This is also the position endorsed by Richard Uviller, who argues that expanding the category of "dishonesty or false statement" crimes beyond the traditional list of crimen falsi offenses "accords with the governing concept of relevance: The behavior of the individual in committing the crime reveals a trait of character from which the inference of testimonial mendacity may be reasonably drawn. If anything, it is the actor's behavior that supports the inference, not the statutory definition of the crime." Richard Uviller,*Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 Duke L.J. 776, 791-92 (1993).
>
> There are, however, compelling reasons to question such a departure from the common law evidentiary approach to crimen falsi. The most commonly expressed argument centers on administrative concerns. Allowing courts to inquire into the underlying facts of a prior conviction tends to create confusion and administrative burdens. * * * A second reason for rejecting the fact-based inquiry approach is that it is at odds with the overall structure of the impeachment rules. By allowing (or requiring) courts to inquire into the underlying facts of the conviction, Rule 609(a)(1) is likely to be swallowed up by Rule 609(a)(2). Rule 609(a)(2) will become the rule, rather than the exception, even though the probative versus prejudicial weighing approach of the former rule is more representative of the Federal Rules' approach generally.
>
> A third (and, I believe, the most compelling) reason for rejecting the majority approach rests on an understanding of criminal law and procedure, rather than the law of evidence. One needs to recognize that criminal offenses are defined by their elements, not by the facts of their commission. To admit conviction evidence is to tell the jury nothing more than that the elements of the crime of which the witness was convicted were proven beyond a reasonable doubt. Undoubtedly, a large majority of criminal acts do involve some form of deception. A rapist or kidnapper may use deception to lure a victim to a remote location. A perpetrator bent on violating the antitrust laws may use duplicity in doing so. But, in each case, the fact that deception was used will never have been found beyond a reasonable doubt. To allow a court to look to underlying facts in determining whether to admit a prior conviction as a crime of deceit is thus to invite a circumvention of the reasonable doubt standard itself.

Stuart Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the*

Origins of Crimen Falsi, 90 J. Crim.L.& Crim. 1087, 1121-23 (2000).

III. Proposed Amendment and Committee Note

The proposed amendment to Rule 609(a) and the Committee Note are set forth beginning on the next page The proposal is formatted in accordance with Administrative Office guidelines.

Advisory Committee on Evidence Rules

Proposed Amendment: Rule 609(a)

Rule 609. Impeachment by Evidence of Conviction of Crime*

(a) General rule—For the purpose of attacking the ~~credibility~~ character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted ~~if it involved dishonesty or false statement,~~ regardless of the punishment if the statutory elements of the crime necessarily involve dishonesty or false statement.

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

(b) Time limit. — Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. — Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime ~~which~~ that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. — Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal . — The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Committee Note

The amendment provides that a conviction is not automatically admitted under Rule 609(a)(2) unless a statutory element of the crime for which the witness was convicted necessarily requires proof beyond a reasonable doubt that the witness committed an act of dishonesty or false statement. The Rule prohibits the court from "automatically" admitting a conviction by inquiring into the underlying facts of the crime. Such facts are often difficult to determine. *See Emerging Problems Under the Federal Rules of Evidence* at 173 (2d ed. 1998) ("The difficulty of ascertaining [facts underlying a conviction] especially from the records of out-of-state proceedings might make the broad approach operate unevenly and feasible only for local convictions. . . . A simple, almost mechanical, rule that only those convictions for crimes whose *statutory elements* include deception, untruthfulness or falsehood under Rule 609(a)(2)

arguably would result in a more efficient, predictable proceeding.") (emphasis in original). See also Uniform Rules of Evidence, Rule 609(a)(2) (adopting an "elements" approach). Moreover, the probative value of the underlying facts of a conviction, when the conviction is offered to impeach the witness's character for truthfulness, is lost on the jury because the jury is not informed about the details of a conviction under Rule 609. *See, e g , United States v Beckett*, 706 F.2d 519 at n 1 (5th Cir. 1983) (a testifying witness is required "to give answers only as to whether he has been previously convicted of a felony, as to what the felony was, and as to when the conviction was had"); *Radtke v. Cessna Aircraft Co.*, 707 F.2d 999 (8th Cir. 1983) (impeachment with a prior conviction is limited to the recitation of the conviction itself). *See also* C. Mueller & L. Kirkpatrick, *Federal Evidence* at 742 (2d ed. 1999) ("Scrutiny of underlying facts seems vaguely inconsistent with allowing inquiry only on the essentials of convictions (name of crime, punishment imposed, time, and sometimes place) with further details kept off limits: If the jury hears only the basics, why should the judge consider an elaboration of factual detail in deciding whether to permit the questioning?").

The legislative history of Rule 609 indicates that the automatic admissibility provision of Rule 609(a)(2) was to be narrowly construed. This amendment comports with that intent. See Conference Report to proposed Rule 609, at 9 ("By the phrase 'dishonesty and false statement' the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the [witness's] propensity to testify truthfully.").

It should be noted that while the facts underlying a conviction are irrelevant to the admissibility of that conviction under Rule 609(a)(2), those underlying facts might be a proper subject of enquiry under Rule 608. *See* e.g., *United States v. Hurst*, 951 F.2d 1490 (6th Cir. 1991) (underlying facts of a conviction were the proper subject of inquiry under Rules 403 and 608 where they were probative of the defendant's character for untruthfulness and not unduly prejudicial).

The amendment also substitutes the term "character for truthfulness" for the term "credibility" in the first sentence of the Rule. The limitations of Rule 609 are not applicable if a conviction

is admitted for a purpose other than to prove the witness's character for untruthfulness. *See, e g , United States v Lopez*, 979 F.2d 1024 (5th Cir. 1992) (Rule 609 was not applicable where the conviction was offered for purposes of contradiction). The use of the term "credibility" in subsection (d) is retained, however, as that subdivision is intended to govern the use of a juvenile adjudication for any type of impeachment.

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Consideration of Proposed Amendment to Evidence Rule 706
Date: April 2, 2004

Judge Gettleman has proposed what amounts to a stylistic change to Rule 706—the Rule governing court appointment of expert witnesses—for the Committee's consideration. The Committee has a statutory obligation to consider proposed amendments from members of the Judiciary or the public, and this memorandum sets forth the proposal together with some background discussion.

When a proposed amendment from the public has been submitted, the practice of the Committee has been to consider not only the specific proposal but also any other problems that may have arisen in the application of the Rule. This memorandum therefore also addresses the potential problems with the Rule that have been raised, mainly by commentators but occasionally by courts. These problems fall into the following categories:

1. Standards for when an expert should, must, or may not appoint an expert.

2. Procedures governing the selection of an expert by the court.

3. Treatment of ex parte communications between the court and the expert and between a party and the expert.

4. Limitations, if any, on depositions or cross-examination of court-appointed experts.

5. Standards for determining whether to inform the jury about the expert's appointment by the Court, and for limiting instructions if disclosure is made.

6. Clarification that the Rule does not affect the court's inherent authority to appoint a

technical adviser, when that appointee will not be a witness at trial.

7. Compensation of court-appointed experts where no government funding is available.

This memorandum is in six parts. Part One sets forth the current Rule 706 and the Advisory Committee Note. Part Two discusses Judge Gettleman's stylistic suggestions. Part Three discusses, in order, the potential problems with the Rule that are set forth above. Part Four sets forth the relevant State law variations. Part Five discusses the advantages and disadvantages of an amendment to Rule 706 Part Six sets forth a model for change to the Rule, as well as a model committee note.

Attached to this memorandum is a law review article by Joe Cecil and Tom Willging of the Federal Judicial Center. The article reports on and analyzes the results of a survey of federal judges who appointed expert witnesses. The article provides a foundation for the Committee in determining whether there are problems in the operation of Rule 706 that raise a critical need to amend Rule 706.

It is important to emphasize that this memorandum does not suggest that Rule 706 should be amended. That is a question for the Committee.

II. The Current Rule 706

Rule 706 currently provides as follows:

Rule 706. Court Appointed Experts

(a) *Appointment.* The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) *Compensation.* Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) *Disclosure of appointment.* In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) *Parties' experts of own selection.* Nothing in this rule limits the parties in calling expert witnesses of their own selection.

The pertinent part of the Advisory Committee Note to Rule 706 reads as follows:

The practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation, have been matters of deep

concern. Though the contention is made that court appointed experts acquire an aura of infallibility to which they are not entitled, Levy, Impartial Medical Testimony Revisited, 34 Temple L.Q. 416 (1961), the trend is increasingly to provide for their use. While experience indicates that actual appointment is a relatively infrequent occurrence, the assumption may be made that the availability of the procedure in itself decreases the need for resorting to it. The ever present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services.

The inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned. Scott v. Spanjer Bros., 298 F.2d 928 (2d Cir. 1962); Danville Tobacco Ass'n v. Bryant-Buckner Assocs., 333 F.2d 202 (4th Cir. 1964); Sink, The Unused Power of a Federal Judge to Call His Own Expert Witnesses, 29 S. Cal. L. Rev. 195 (1956); 2 Wigmore 563, 9 id. 2484; Annot., 95 A.L.R.2d 383. Hence the problem becomes largely one of detail.

Reporter's General Commentary on Rule 706:

The most striking feature of Rule 706 is that it is so rarely invoked. Generally speaking the trial court can and does rely on the parties, working through the adversary system, to reach the truth fairly by calling their own experts. Courts are understandably reluctant to resort to a court-appointed expert, because the appointment is highly likely to be outcome-determinative. *See, e g., Hiern v Sarpy*, 161 F.R.D. 332 (E.D. La. 1995) (contending that courts should appoint experts only in extreme circumstances, and the mere fact that the parties' retained experts have expressed divergent opinions does not require the court to appoint an expert to aid in resolving the conflict; the court's appointment of an expert "would just add an additional witness, who may testify in favor of one side or the other * * * giving one side an inappropriate numerical advantage."). *See also* Mueller and Kirkpatrick, *Evidence· Practice Under the Rules* at 939-940 (2d ed. 1999) ("Court authority to appoint expert witnesses should be exercised sparingly. The parties bear the main responsibility to present the case, and they need latitude in selecting and calling witnesses. Courts usually know less about the evidence and issues than the lawyers and are not usually well situated to decide what subjects require more expert information. ").

There are a few cases in which the experts are in such wild disagreement on a complex matter that the trial court has found it necessary to appoint an impartial expert. *See, e.g , Walker v. American Home Shield Long Term Disability Plan,* 180 F.3d 1065 (9th Cir. 1999) (trial court was within its discretion to appoint a medical expert where the expert testimony of the parties was confusing and conflicted). A few other cases have arisen in which the court has required technical assistance to sift through highly complex issues and unwieldy material, and the court has further found that it might be useful under the circumstances to have that witness testify. *See, e g , In re*

Joint E & S Dist Asbestos Litig., 982 F.2d 721 (2d Cir. 1992), *modified on other grounds*, 993 F.2d 7 (2d Cir. 1993) (both the District Court and the Bankruptcy Court have the power to appoint experts under Rule 706 to assist them on the difficult matter of estimating future claims in asbestos litigation).

Rule 706 is applicable only when an expert is appointed by the court to testify as a witness. The Rule does not purport to circumscribe the trial judge's authority to appoint a non-testifying technical consultant to assist the court in understanding highly complex issues. *See, e.g , Reilly v. United States,* 863 F.2d 149 (1st Cir. 1988) (Rule 706 does not limit the trial court's inherent authority to appoint a technical advisor; procedural requirements of Rule 706 are applicable only if the appointed expert is to be used as a witness).

Commentators—such as Cecil and Wilging in the article attached to this memo—have expressed the opinion that the problems of dealing with court-appointed experts are ordinarily problems of case management and pre-trial practice that are more properly addressed in the Federal Rules of Civil Procedure than in the Federal Rules of Evidence.

II. Judge Gettleman's Suggested Stylistic Change to Rule 706

Judge Gettleman has proposed an amendment to the appointment clause of Rule 706 that would read as follows:

Rule 706. Court Appointed Experts

(a) Appointment.— ~~The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection.~~ (1) The court may, on its own motion or the motion of any party, enter an order appointing an expert to act as the court's witness. Prior to any such appointment, the court shall notify and allow the parties a reasonable time to:

(A) object to the appointment;

(B) submit nominations by each party or by all parties jointly; and

(C) address the qualifications of any such expert.

(2) The court may appoint expert witnesses of its own choosing or may appoint an expert nominated by any party.

(3) An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

* * *

Judge Gettleman explains the proposed change as follows:

The proposal breaks up the run-on in the first sentence, and eliminates the "show cause" language that is rarely observed in practice. Especially where a court-appointed expert is suggested by a party, the notice of motion serves as a "show cause" order. Where the court

suggests the appointment, subsection (a) requires adequate advance notice.

It is for the Committee to determine whether Judge Gettleman's suggestion has merit, and whether the benefits of a style change outweigh the costs of amendment. Generally speaking, the Evidence Rules Committee has avoided making changes that are stylistic only. The Judicial Conference appears to take the position that the Evidence Rules should not be restylized—at least not globally—because the Evidence Rules are "substantive."

Nonetheless, Judge Gettleman's suggestion does appear to make the appointment clause read better, and it is true that the "show cause" language appears to be ignored in practice. *See, e.g., NEC Corp. v. Hyundai Electronics Ind. Co*, 30 F.Supp.2d 546 (E.D.Va. 1998) (court orders appointment of expert in a patent infringement case without the entry of a show cause order). And while the advantage of a style change may not on its own justify an amendment, it is possible that the cumulative advantages of the style change together with some substantive additions or changes to the Rule might justify the cost of amendment. These possible substantive changes are discussed in the following section.

III. Possible Substantive Changes to Rule 706

A. Standards for When Experts Should or Must Be Appointed

Rule 706 sets forth procedural requirements for court appointment of an expert, but it gives no guidance on when it is appropriate or necessary to make such an appointment. Case law indicates that the decision to make an appointment is within the broad discretion of the trial judge. *See, e.g*, *Ledford v. Sullivan,* 105 F.3d 354 (7th Cir. 1997) (denial of motion for the appointment of an expert is reviewed for abuse of discretion). Courts have noted that the trial court's discretion is to be "informed by such factors as the complexity of the matters to be determined and the court's need for a neutral, expert view." *Pabon v. Goord,* 2001 WL 856601 (S.D.N.Y.).

But "informative" factors do not impose an actual limitation on the court's decision regarding appointment of an expert witness. Put another way, appellate courts have generally held that the abuse of discretion review is limited to the *process* of decisionmaking and does not purport to regulate the actual decision of the trial court. The trial court's decision to appoint or not appoint an expert is essentially unreviewable; so long as the court has given consideration to the parties' requests on the matter. The following passage from *Quiet Technology DC-8, Inc , v. Hurel-Dubois UK Ltd* , 326 F.3d 1333, 1348-9 (7th Cir. 2003) is exemplary. The case involved complex, technical expert testimony, and the trial court refused to appoint an expert. The court reviewed the trial court's decision as follows:

> Quiet also argues that the district court abused its discretion by failing to appoint an independent expert to help it assess the admissibility of Frank's testimony. We are unpersuaded.
>
> Under Fed. R. Evid. 706(a), a district court may on its own motion or at a party's request appoint an independent expert to aid its analysis of the admissibility of proffered evidence. Such an appointment is especially appropriate where the evidence or testimony at issue is scientifically or technically complex. Where a party requests the appointment of an expert to aid in evaluating evidence that is relevant to a central issue in the case, the court is obligated to fairly consider the request and to provide a reasoned explanation for its ultimate decision on the matter. *Steele v Shah*, 87 F.3d 1266, 1271 (11th Cir. 1996).
>
> However, we are unfamiliar with any set of circumstances under which a district court bears an affirmative obligation to appoint an independent expert. Quite the contrary, as long as the district court thoroughly considers a request for the appointment of such an expert and reasonably explains its ultimate decision thereon, that decision is vested in the sound discretion of the trial court. See *Oklahoma Natural Gas Co v Mahan & Rowsey, Inc.*, 786 F.2d 1004, 1007 (10th Cir. 1986) ("The district court has discretion to appoint an independent expert witness. The fact that the parties' experts have a divergence of opinion does not require the district court to appoint experts to aid in resolving such conflicts. We

conclude that the district court was in no way obligated to appoint an expert in this case and its failure to do so cannot give rise to error." (citing Fed. R. Evid 706(a))) (other citations omitted). As Professors Wright and Gold have observed:

> Rule 706 fails to prescribe any standard for when a court should appoint a[n] expert witness. The provision also fails to provide a standard for selecting an expert witness after a court has decided to appoint one. The first two sentences of subdivision (a), which address the questions of appointment and selection, use the word "may" no less than four times. Accordingly, these questions are matters within the discretion of the trial court.

29 Charles Alan Wright & Victor James Gold, Federal Practice & Procedure § 6304, at 465 (1997); see also id. at 469 ("[E]ven where [various] factors . . . point in favor of appointing an [independent] expert witness, it is not an abuse of discretion to refuse to make that appointment.").

Importantly, in this case the reasons underlying the district court's denial of Quiet's request were principled and explicitly articulated, and thus the requirements set forth in *Shah* were satisfied. Indeed, despite the district court's grant of two continuances and its repeated extension of the motions deadline, Quiet failed to file any *Daubert* motion by that deadline. Instead, appellant waited until the eve of trial to inform the district court of its plan to raise a Daubert challenge to Frank's testimony, and the court held a hearing on this issue on the evening of the sixth day of trial. Although the court recognized that an expert could be of substantial assistance in its reliability determination, it concluded that adherence to its already twice-continued trial schedule was of greater importance in this case, given Quiet's lack of diligence in pursuing its challenge.

The permissive application of the abuse of discretion standard, as indicated in *Quiet Technology*, probably accounts for the fact that there appears to be no reported case in which the trial court's decision either to appoint or not appoint an expert has been reversed.

The question for the Committee is whether it is necessary to amend Rule 706 to set forth criteria that the court should use in exercising its discretion to appoint or not appoint an expert. Presumably, the discretion given to district courts is a recognition that the decision to appoint an expert is of necessity highly case-dependent. It would seem difficult to articulate criteria that would be helpful to a district court and yet not improperly limit its discretion. Adding a sentence to the rule stating that the appointment question is a matter for the trial court's discretion, while a correct statement of the law, would certainly not rise to the level of necessity that is required to amend an Evidence Rule

It should be noted that none of the state versions of Rule 706 purport to establish criteria for when an appointment should, must, or may not be made. The closest any state comes is Kansas,

which states that an expert may be appointed if the judge determines that it "may be desirable". This language is so bereft of content as to be superfluous.

Language purporting to provide criteria for when to appoint an expert is included in the draft amendment set forth in Part Six, should the Committee decide that an amendment on this subject is necessary.

B. Procedure for Selecting an Expert

Rule 706 imposes only a minimal regulation on the process of selecting an expert. The Rule provides that the court may request the parties to submit nominations; it may appoint an expert agreed upon by the parties; and it may appoint experts of its own selection. As Cecil and Willging point out, the relative lack of procedural safeguards has resulted in judges appointing an expert by picking a person that the judge worked with while in private practice. The authors criticize this practice because it "may reflect a narrow spectrum of professional opinion that was suited to the interests of the judges' former clients and colleagues" and that the parties "may perceive such an expert as biased."

Research has indicated only one case in which the trial court has been challenged for selecting one expert rather than another. In *Reynolds v. Goord,* 2000 WL 825690 (S.D.N.Y.), the court rejected the plaintiff's challenge to appointment of an expert in correctional medicine. The ground for the challenge was that the expert had been retained by the defendant in an unrelated action. The court noted that Rule 706 clearly provides that the trial court can appoint an expert witness of its own selection, and that the Committee Note to the Rule states that the inherent authority of a court to appoint an expert of its own selection is virtually unquestioned.

There are a number of procedural regulations that might be imposed on the selection process through amendment to Rule 706. Possibilities include: 1) requiring the parties to submit nominations; 2) limiting the court's selection to a list of candidates agreed upon by the parties (as is the rule in Kansas, New Mexico and South Dakota); and 3) limiting the court's selection to a list provided from a neutral licensing or reviewing body. *See, e.g* , Johnson, *Court-Appointed Scientific Expert Witnesses Unfettering Expertise,* 2 High Tech L.J. 249 (1988) (suggesting that Rule 706 should be amended to require the parties to submit a list of proposed experts to be appointed for each area of disputed testimony).

ABA Civil Trial Practice Standard 11(a) sets forth the following suggested limitations on the process of selecting a court-appointed expert:

a. Selection.

i. The court should invite the parties to recommend jointly an expert to be appointed by the court.

ii. If the parties cannot agree, the court should invite them to submit names of a specified number of experts with a summary of their qualifications and an explanation of the manner in which those qualifications "fit" the issues in the case.

iii. the court may choose one or more experts recommended by any of the parties; or it may reject the experts recommended by the parties and select an expert unilaterally.

iv. Before selecting an expert unilaterally, the court should

A. Consider seeking recommendations from a relevant professional organization or entity that is responsible for setting standards or evaluating qualifications of persons who have expertise in the relevant area, or from the academic community, and

B. afford the parties an opportunity to object to the appointee on the basis of bias, qualifications or experience.

These ABA standards provide some guidance, and encourage a judge not to appoint an expert simply because of a pre-existing relationship with the expert. The standards might be difficult to incorporate into a rule amendment, however. The standards are suggestive in nature; they do not purport to limit the trial judge's discretion. Generally speaking the Evidence Rules are not suggestive; rather they *govern* as opposed to *suggest* admissibility. For example, Rule 402 provides that relevant evidence is admissible; it does not say that relevant evidence *should* be admissible. It is notable that the word "should" appears in only three Evidence Rules. One is Rule 706, but that is in the context of the order to show cause language "i.e., why an expert should not be appointed" so it is not really on point. The second example is Rule 611(b), which provides that cross-examination "should" be within the scope of direct. The third example is Rule 611(c), which provides that leading questions "should" not be used on direct examination. None of these usages indicate that it is appropriate to amend Rule 706 to include a laundry list of non-binding suggestions for the trial court in making a selection decision.

On the other hand, if the suggestions of the ABA standard are changed to *requirements*, this might result in an unfortunate constraint of the trial court's discretion on the highly case-dependent question of appointment and selection of an expert.

Language concerning criteria for selecting an expert is included in the model set forth in Part Six. It is for the Committee to determine whether any amendment is necessary to control the selection process and, if so, whether the language of an amendment should be in the nature of a suggestion or a command.

C. Ex Parte Communications

Currently, Rule 706 does not address whether either the court or the parties can communicate ex parte with the court-appointed expert witness. As to judge-expert communications, it has been declared that "the law frowns upon ex parte communications between judges and court-appointed experts." *United States v Craven,* 239 F.3d 91, 102 (1st Cir. 2001); 29 Wright and Gold, Federal Practice and Procedure §6305 (1997) ("Ex parte communications between the judge and the expert . . . are discouraged."). As the Court in *Craven* explained:

> The reason is obvious: most ex parte contacts between a trial judge and another participant in the proceedings risk harm, and ex parte communications with key witnesses (such as court-appointed experts) are no exception. To the contrary, such ex parte contacts can create situations pregnant with problematic possibilities.

Research uncovers a few cases in which the trial court has been found in error for engaging in ex parte conversations with a court-appointed expert. *Craven* is one such case; the trial judge entered a downward departure for the defendant on the basis of an ex parte conversation with a court-appointed psychiatrist. The expert opined that the defendant was well on the road to rehabilitation; that opinion was contrary to substantial evidence presented by the government at the sentencing hearing. The court of appeals reversed the downward departure and stated that in future cases a court desiring additional information from a court-appointed expert witness must either 1) make a written request for a supplemental report and provide that report to the parties, or 2) bring the expert into court to be questioned by the parties. *See also Edgar v. K.L* , 93 F.3d 256 (7th Cir. 1996) (entering order disqualifying judge for engaging in ex parte conference with court-appointed experts and then using the methodology propounded by those experts).

Despite the reluctance to permit ex parte communications between the court and the expert, there is a general recognition that such communications may be essential at least during the appointment process. See the discussion in the Cecil/Willging article attached to this memo *See also NEC Corp. v. Hyundai Elec. Ind.,* 30 F.Supp.2d 546 (E.D.Va. 1998) (court's order prohibits ex parte conversations between the court and the expert "on any subject touching the merits of these cases", thus permitting ex parte contact about matters pertaining to the appointment itself). However, even in the cases where ex parte communications might be necessary, Cecil and Wilging suggest that the court make a record of all discussions and disclose the record to the parties.

ABA Civil Trial Practice Standard 11(b) addresses the problem of ex parte communications between a judge and an appointed expert. Standard 11(b) provides as follows:

b. Communications between Court and Expert. The court shall assure that the parties are aware of all communications between the court and a court-appointed expert by:

i. Permitting the parties to be present when the court meets or speaks with the expert;

ii. Providing that all communications between court and expert will be in writing with copies to the parties; or

iii. Recording oral communications between court and expert and making a transcript or copy of the recording available to the parties.

If Rule 706 is to be amended, the Committee might consider adding something like the ABA proposal to the end of the Rule. But it is not obvious that the Rule needs amending to cover the problem of ex parte communications. There does not appear to be a lot of confusion or dispute in the cases or among judges as to the proper use and regulation of ex parte communications. See Cecil and Willging, 43 Emory L.J. at 1029-33. It should also be noted that none of the state law variations on Rule 706 provide any treatment of ex parte communications.

As to ex parte communications between counsel and the court-appointed expert, there appears to be no reported case law on the subject, but obviously it would be problematic to permit such contacts as a general matter. See the court's order concerning appointment of an expert in *NEC, supra* (providing that "neither party, including counsel, shall communicate with any such expert on any subject other than in open court or with the Court's prior consent"). Questions of due process clearly arise if one of the parties is allowed ex parte access to the court-appointed expert, as that expert is likely to be the most important witness in the case. Again, none of the state versions of Rule 706 cover this point.

ABA Civil Trial Practice Standard 11(c) provides the following guidelines as to ex parte communications between the court-appointed expert and the parties:

c. Communications between Parties and Expert. The court shall assure that every party is aware of all communications between any party and a court-appointed expert by:

i. Permitting all parties to be present when any party meets or speaks with the expert, or

ii Providing that all communications between any party and the expert will be in writing [Reporter's note: shouldn't the possibility of tape recorded oral communications be added?]with copies to all parties.

The Task Force that promulgated this standard comments that it "is operative only if the court has not prohibited such contact."

If Rule 706 is to be amended, the Committee might consider amending the Rule in accordance with Standard 11(c), keeping in mind that it may be necessary to permit oral ex parte communications in certain unusual cases, so long as subsequent disclosure is made of the nature of those communications. Again, however, it is not apparent that the Rule needs amending to cover this problem. The dearth of case law on the subject appears to indicate that there is no problem that must be addressed at this time.

D. Deposition and Cross-examination of Court-Appointed Expert

1. Deposition

The text of the rule provides that the court-appointed expert's "deposition may be taken by any party." This seems to provide an absolute right to depose. One could argue that the rule is problematic if so unlimited, because court-appointed experts tend to be reluctant to subject themselves to the slings and arrows of adversary proceedings. That is why they haven't been retained by the parties in the first place. The possibility of being subject to serial, extensive depositions may make it less likely that a highly qualified expert will agree to serve.

While the deposition language in the Rule appears to be absolute, at least one court has exercised its authority to preclude depositions of court-appointed experts. That court was Judge Weinstein in the asbestos litigation. Judge Weinstein believed that extensive depositions would be intrusive, burdensome and unnecessary. He ruled that the parties would get a chance to address the experts all together at one time at an informal hearing. *In re Joint E & S. Dists Asbestos Litig.*, 151 F.R.D. 540 (S.D.N.Y. 1993) (denying a motion to depose court-appointed experts; in light of *Daubert* and the gatekeeping function that it imposes, it is more efficient for a Court to hold a pre-trial *Daubert* hearing at which the court-appointed expert could be questioned by all parties in the presence of the Trial Judge).

It is for the Committee to determine whether the language of Rule 706 should be amended to temper the apparently absolute language concerning depositions. It does not appear, however, that any problem has arisen with sufficient frequency to justify the costs of an amendment. As stated above, the only reported case is one in which Judge Weinstein did not feel constrained by the language in the rule. Language providing for court authority to limit depositions of court-appointed experts is set forth in Part Six of this memorandum.

2. Cross-Examination

Rule 706 provides that a court-appointed expert witness "may be called to testify by the court or any party" and "shall be subject to cross-examination by each party, including the party calling the witness." It would seem that this language is straightforward, and leaves questions of permissible cross-examination to the general rules of cross-examination and impeachment set forth in the Evidence Rules (e.g., Rules 608, 611 and 613). It might be argued that the court-appointed expert should receive some special protection against cross-examination, for fear that the spectre of excessive or intrusive cross-examination may cause some experts to be reluctant to take on the appointment. But it would seem clear that the trial court could use its authority under Rule 611(a) to protect the court-appointed expert from harassment on a case by case basis, so there is probably no need to amend Rule 706 to provide any additional protection

E. Informing Jury of Court Appointment of Expert

Rule 706(c) provides: "In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness." As pointed out by Cecil and Willging in their Emory article at pages 1038-9, judges are not in agreement on whether the jury should be told that an expert is court-appointed. There is, of course, a risk that the appointment of an expert will be outcome-determinative, and some commentators have proposed that because of this risk, Rule 706 should be amended to prohibit judicial comment on the court appointment. See Bua, *Experts--Some Comments Relating to Discovery and Testimony Under New Rules of Evidence,* 21 Trial Law. Guide 1 (1977). Others have suggested that the Rule be amended to require the judge to instruct the jury against excessive reliance on the appointed expert's testimony. See Lee, *Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence,* 6 Yale Law and Policy Review 480 (1988).

The states have taken various views on whether the jury should be informed of the court appointment. Most of the state versions follow the federal language. South Dakota, however, provides that the court appointment "shall be made known" to the jury. Alabama and Tennessee, in contrast, *prohibit* disclosure of the court appointment. Idaho and Kansas do not have any provision on disclosure.

Section 11(d) of the ABA Civil Trial Practice Standards provides the following guidance on the question of informing jurors about the expert's court-appointed status:

> **d. Jury Instructions.** If an expert witness retained by the court testifies at trial,
>
> > **i. No Identification as Court Appointee.** The court ordinarily should not identify the witness as one appointed by the court.
> >
> > **ii. If Identified as Court Appointee.** If the court determines that, in the circumstances, it is appropriate to identify the witness as a court appointee, the court should instruct the jury that:
> >
> > > A. It is not to give greater weight to the testimony of a court-appointed expert than any other witness simply because the court chose the expert;
> > >
> > > B. The jury may consider the fact that the witness is not retained by either party in evaluating the witness's opinion; and
> > >
> > > C. The jury should carefully assess the nature of, and basis for, each witness's opinion.
> >
> > **iii. Questioning.** The witness should be examined by counsel, in an order determined by the court.

Amendment of Rule 706 along the lines of the ABA standard requires an affirmative answer to at least two questions: First, does the disclosure of court appointment, especially without a limiting instruction, create an unacceptable risk of outcome-determination? Second, does the Rule, which currently leaves the matter to judicial discretion, provide sufficient safeguards, or is a more specific articulation necessary? The fact is that even under the current Rule, a court in its discretion may prohibit disclosure of the court appointment, or may give an instruction to limit the risk of excessive reliance on the expert. But on the other hand, the way the Rule is written, it appears to have a more permissive attitude toward jury disclosure of the expert's court appointment than that taken by the ABA.

Questions about the adequacy of the current language must be answered in a relative vacuum because the use of court-appointed experts in jury trials (indeed in any trial) is so infrequent. Cecil and Willging in 1994 located only seven jury trials in which court-appointed experts testified. See 43 Emory L.J. at 1038. The dearth of case law on the subject, and the dearth of conflict over the use of Rule 706(c), both counsel against proposing an amendment.

Although the empirical information is limited, it appears that courts concerned about the risk of outcome-determination follow one of three procedures: 1) they don't appoint an expert at all; or 2) they appoint an expert and do not inform the jury of the expert's status; or 3) they inform the jury of the expert's status and issue a cautionary instruction "that the fact of court appointment should not result in giving greater weight to that expert than to the parties' experts." 43 Emory L.J. at 1039. Each of these alternatives can be and has been employed under the current Rule. There is no obvious reason why a more specific articulation of authority is necessary, especially given the paucity of cases in which the problem of disclosure to a jury arises. Nonetheless, language along the lines of the ABA standard is included in Part Six, in a model amendment to Rule 706, for the information of the Committee should it decide to proceed with an amendment.

F. Reserving Court's Right to Appoint a Technical Advisor

As stated earlier, the procedural requirements of Rule 706 apply only if the expert is to be used as a witness. Courts have consistently held that Rule 706 does not limit the court's inherent power to appoint an expert as a technical advisor to assist the court in understanding complex questions raised by the experts in a case.

The question for the Committee is whether there is any problem concerning appointment of technical advisors that must be addressed by an amendment to Rule 706. It is absolutely clear that Rule 706 cannot be amended to cover or regulate the court's appointment of a technical advisor. The Evidence Rules regulate the presentation of evidence; if an expert is not going to provide evidence proffered at a trial, then the expert is by definition beyond the purview of the Evidence Rules. Any regulation of appointment of technical advisors must be placed, if anywhere, in the Rules of Civil Procedure.

The only question for Rule 706, therefore, is whether language should be added to clarify that the Rule *does not* regulate or limit the court's appointment of technical advisors. Such an amendment would appear unnecessary. Courts have had no trouble exercising their inherent authority to appoint technical advisors outside the purview of Rule 706. *See, e.g., AMAE v. State of California,* 231 F.3d 572, 590 (9th Cir. 2000) ("In those rare cases in which outside technical expertise would be helpful to a district court, the court may appoint a technical advisor like Dr. Klein. * * * Plaintiffs argue that the court committed legal error under Federal Rule of Evidence 706(a) by neither requiring Dr. Klein to submit a report or allowing him to be cross-examined. The short answer to Plaintiffs' argument is that Rule 706 applies to court-appointed expert witnesses, but not to technical advisors like Dr. Klein."); *Reilly v. United States,* 863 F.2d 149, 156 (1st Cir. 1988) ("We conclude, therefore, that Rule 706, while intended to circumscribe a court's right to designate expert witnesses, was not intended to subsume the judiciary's inherent power to appoint technical advisors."). There is no conflict in the courts about the relationship (or lack of it) between Rule 706 and the appointment of technical advisors. Also notable is that none of the state versions of Rule 706 have anything to say about technical advisors.

Under these circumstances, an amendment to include a reference to technical advisors does not appear justified. But for purposes of completeness, a reference to technical advisors is included in the model amendment in Part Six of this memorandum.

G. Compensation of Court-Appointed Expert Witnesses

Rule 706(b) provides for compensation of court-appointed expert witnesses. Compensation is payable from public funds in criminal and just compensation cases. In other civil actions and proceedings, "the compensation shall be paid in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs."

One problem that can arise in civil cases is that a party may be unable or unwilling to pay for the expert. A party might understandably be reluctant to pay an expert if he suspects that the witness will testify adversely to the party's case; and a party and definitely will be unwilling to pay after negative testimony is given. The Rule provides a good deal of flexibility and discretion in allocating, and enforcing payment of, the expert's expenses.

One question in the application of the Rule is whether it permits the court to allocate *all* of the costs of an expert to one side where that is necessary, e.g., where one of the parties is indigent. Case law under the Rule provides that courts have discretion to allocate all of the expert's fee to one side or the other, depending on ability to pay. The court in *Ledford v. Sullivan,* 105 F.3d 354, 360-361 (7th Cir.1997) provides a good discussion of the power to allocate all of the costs of an expert to one side:

> Ledford contends that the trial court abused its discretion when it reasoned that no funds existed to pay an expert. Rule 706(b) states: "In other civil actions and proceedings, the compensation [of an expert] shall be paid by the parties in such proportion and at such times as the court directs, and thereafter charged in like manner as other costs." Fed. R Evid. 706(b). A number of circuits have recognized that Rule 706(b) grants a district court the discretion to apportion all the costs of an expert to one side. *See, e.g., Steele v. Shah,* 87 F.3d 1266, 1271 (11th Cir. 1996) (remanding the case because the lower court failed to exercise its discretion to appoint and compensate an expert if the plaintiff was in fact indigent); *McKinney v Anderson,* 924 F.2d 1500, 1511 (9th Cir.1991) (finding that the phrase "such proportion as the court directs," *in an appropriate case,* permits the district court to apportion all costs to one side); *Webster v. Sowders,* 846 F.2d 1032, 1038-39 (6th Cir. 1988) (stating that "[a] District Court has authority to apportion costs under this rule [706(b)], including excusing impecunious parties from their share"); *United States Marshals Serv. v Means,* 741 F.2d 1053, 1059 (8th Cir. 1984) (stating that discretionary power to advance fees of expert witnesses should be exercised *only under compelling circumstances*).
>
> In this case, when the district court stated that no funds existed to pay for the appointment of an expert, it failed to recognize that it had the discretion to apportion all the costs to one side. We caution against reading Rule 706(b) in such a narrow fashion that the rule would allow for court-appointed experts only when *both* sides are able to pay their respective shares. Read in such a restrictive way, Rule 706(b) would hinder a district court from appointing an expert witness whenever one of the parties is indigent, even when that expert's testimony would substantially aid the court. *See McKinney,* 924 F.2d at 1511.

However, in this case, the trial court also stated, and we agree, that appointing an expert was unnecessary. The district court therefore exercised the discretion conferred upon it by Rule 706(b).

In light of the discretionary authority vested in the court under Rule 706 and the facts raised by Ledford's deliberate indifference claim, we find no abuse of discretion in the trial court's decision not to appoint an expert.

It would thus appear that it is unnecessary to add anything to the Rule that would permit trial courts to allocate expert fees to one party or the other, depending on the circumstances. The courts are already doing this under the current Rule.

It should be noted that there are two state variations on the question of allocation of fees. First, Arizona Rule 706 states in its first sentence that "Appointment of experts by the court is subject to the availability of funds or the agreement of the parties concerning compensation." This language presumably takes care of the reluctance of one or more parties to pay for the expert. The problem with the Arizona Rule, however, is that it could leave control of the appointment process solely in the hands of the parties. The parties could prevent the court from appointing an expert by simply refusing to agree on compensation. Rule 706, at least currently, presumes that the court should have authority to appoint an expert independent of the wishes of the parties. It seems obvious that such court authority and discretion should be retained in the Federal Rule.

Second, South Dakota provides that compensation of the expert "shall be paid in equal amounts by the opposing litigants." This provision is problematic, because it would prevent the court appointment of an expert witness in a civil case where one of the parties is indigent. The South Dakota provision would seem to be an unnecessary and unjustified limitation on the court's authority to appoint an expert witness.

While it would therefore appear unnecessary to amend Rule 706(b) in any way, Part Six does contain language specifically permitting the court to allocate all of the expert fee to one side. This is for the information of the Committee should it decide to proceed with an amendment to Rule 706 as a whole.

IV. State Law Variations

The state law variations have been discussed throughout Part Three, supra. This section sets out those state variations insofar as they are relevant to a possible amendment to Evidence Rule 706.

Alabama

Alabama's subdivision (c), covering disclosure of appointment by the court, provides as follows:

> **(c) Disclosure of Appointment.** The fact that the court has appointed a particular expert witness will not be disclosed to the jury.

Alaska

Alaska Rule 706 contains no provision concerning compensation of an expert.

Arizona

Arizona provides that an expert cannot be appointed unless there are public funds or else the parties agree on compensation. Thus, in Arizona, the court has no authority to require a party to pay for a court appointed expert. The first sentence of Arizona Rule 706 states:

> **(a) Appointment.** Appointment of experts by the court is subject to the availability of funds or the agreement of the parties concerning compensation.

Hawaii

The *entirety* of Hawaii Rule 706 is as follows:

> In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that a particular expert witness was appointed by the court.

Iowa

Iowa allows court appointment of an expert *only* upon motion of the parties. This would seem to impose an undue limitation on the court's power. After all, if it were left to the parties, experts would be appointed even less frequently than they are already.

Kansas

Kansas Rule 706 provides as follows:

> (a) Court appointed experts. If a judge determines that the appointment of expert witnesses in an action may be desirable the judge shall order the parties to show cause why expert witnesses should not be appointed, and after opportunity for hearing, may request nominations and appoint one or more such witnesses. If the parties agree in the selection of an expert or experts, only those agreed upon shall be appointed. Otherwise, the judge may make the selection. The judge shall determine the duties of the witness and inform the witness thereof at a conference at which the parties shall have an opportunity to participate. A witness so appointed shall advise the parties of the findings of the witness, if any, and may thereafter be called to testify by the judge or any party The witness may be examined and cross-examined by any party.
>
> This rule shall not limit the parties in calling their own expert witnesses. Expert witnesses appointed pursuant to this rule shall be entitled to reasonable compensation in such sum as the judge may allow. Such compensation shall be paid as follows:
>
> (1) In a criminal case by the United States as the judge shall order out of available funds;
>
> (2) In a civil case by the parties in equal portions, unless the judge otherwise directs, and the compensation shall be taxed as costs in the case.

Comment: This rule has been discussed in several sections of Part III. A further point should be made about the first clause, which provides that an expert can be appointed only on the court's motion. The parties are given no authority to request the appointment. Thus, the Kansas rule lacks the flexibility of Federal Rule 706.

Kentucky

Kentucky Rule 706 contains no provision governing whether the court may or must disclose to the jury the fact that the expert is court-appointed.

Nebraska

Nebraska provides that compensation of the court-appointed expert in civil cases is payable "by the opposing parties in equal portions to the clerk of the court".

New Mexico

New Mexico provides, as to appointment: "The court may appoint any expert witnesses of its own selection to give evidence in the action except that, if the parties agree as to the experts to be appointed, the court shall appoint only those designated in the agreement."

South Dakota

South Dakota has a number of provisions that differ from the Federal Rule:

1. Selection and appointment·

> Whenever, in a civil or criminal proceeding, issues arise upon which the court deems expert evidence is desirable, the court * * * may appoint one or more experts, not exceeding three on each issue, to testify at the trial. * * * Before appointing expert witnesses, the court may seek to bring the parties to an agreement as to the experts desired, and if the parties agree, the experts so selected shall be appointed.

2. Disclosure to the jury

South Dakota requires that the jury be informed that the court appointed the expert witness.

3. Compensation:

South Dakota requires compensation to be split equally among the opposing litigants in civil cases.

Tennessee

Tennessee Rule 706 provides that the court "ordinarily should appoint expert witnesses agreed upon by the parties, but in appropriate cases, for reasons stated on the record, the court may appoint expert witnesses of its own selection."

Tennessee also provides that the jury may not be informed that the expert was appointed by the court.

Uniform Rule

The Uniform Rule 706 is substantively identical to the Federal Rule. The caption to the rule, however, was changed to "Court Appointed Expert *Witness*". This was to emphasize that the Rule applies only when the court appoints the expert to be a witness–thus implicitly distinguishing the appointment of technical advisors.

Comment: If Rule 706 is to be amended, the change to the caption made by the Uniform Rules would seem to provide a helpful clarification.

V. Cost-Benefit Analysis of Amending Rule 706

Costs

It should be apparent from the discussion so far that the case for amending Rule 706 is not very strong The Committee generally proposes amendments to the Evidence Rules only under one of five limited circumstances:

1) There is a longstanding conflict among the courts on an important practical question (e.g., the proposed amendments to Rules 404 and 408).

2) Courts or parties have had substantial problems in applying the rule because of inadequate or confusing language in the text, and an amendment would provide for a more efficient resolution (e.g., the amendment to Rule 803(6), providing for more efficiency in proving business records).

3) The rule is subject to unconstitutional application that can be rectified by an amendment (e.g., the proposed amendment to Rule 804(b)(3)).

4) The existing rule leads to an unfair result (e.g., the amendment to Rule 701, closing a loophole that had permitted parties to evade discovery obligations).

5) There is pending legislation in Congress that would amend a rule directly, and the Committee's proposal would be an improvement over the legislative proposal (e.g., the amendment to Rule 702).

Moreover, in all of the above situations, a further condition is that the Committee has been convinced that the courts have already "played out" the problems raised by the Rule; that is, there has been a good deal of case law and the courts have had a good opportunity to try to work out the problems inherent in the Rule.

It appears that an amendment to Rule 706 would not qualify under any of the narrow categories for amendment set forth above. Most importantly, there appears to be no conflict in the cases about the meaning of the Rule. Moreover, there is simply not enough case law to indicate that the courts have had a fair opportunity to iron out any of the supposed problems presented in the Rule.

So there is a definite cost to proposing an amendment to Rule 706, beyond the ordinary costs of upsetting settled expectations and unintended consequences. The cost is that the Committee might appear to be proposing an amendment without meeting the threshold of necessity that is ordinarily attendant to Evidence Rules Committee proposals.

Benefits

None of the proposed areas of amendment would create a sea-change in Rule 706. Most of the proposals are all in the nature of clarification, e.g., clarifying that the Rule does not cover the appointment of technical advisors. Others would present codification of best practices, e.g., appoint from a list agreed upon by the parties. Others simply make the Rule easier to read and therefore easier to apply, e.g., Judge Gettleman's suggestion for stylistic improvement.

So it can be argued that the suggestions for amendment, while not absolutely necessary under the Committee's traditional approach, will be quite helpful to courts and practitioners, especially those without a working familiarity with the existing Rule. Some Committee members in the past have argued that the Evidence Rules Committee has the authority and indeed the duty to exercise "housekeeping" responsibility over the Rules. The suggestions for amendment addressed in this memo are all in the nature of housekeeping improvements.

Another possible advantage to an amendment (though admittedly speculative), is that a housekeeping improvement of the Rule will make it more user-friendly and therefore trial courts might have an incentive to use it more frequently. Appellate judges (such as Justice Breyer in *Joiner* and *Kumho*) and commentators (such as Cecil and Wilging) extol the virtues of using court-appointed experts and extend open invitations to trial courts to use Rule 706 more than they do today. It is at least possible that if the Rule is made easier to read and therefore easier to apply, then the use of court-appointed experts will present a more inviting prospect for trial courts. The counterargument is that Rule 706 is rarely invoked not because it is a difficult Rule, but rather because the trial court is concerned that an appointment will be outcome-determinative.

VI. Model Proposal and Committee Note

What follows is a model proposal that the Committee may wish to use if it decides that a proposal amendment to Rule 706 should be referred to the Standing Committee. There are of course several variations on the proposal. Any of the specific proposals can be deleted or altered.

Rule 706. Court Appointed ~~Experts~~ Expert Witnesses

(a) Appointment.— ~~The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection.~~ (1) The court may, on its own motion or the motion of any party, enter an order appointing an expert to act as the court's witness. Factors pertinent to appointment include the complexity of the matter and the court's need for a neutral expert view. Prior to any such appointment, the court shall notify and allow the parties a reasonable time to:

(A) object to the appointment;

(B) submit nominations by each party or by all parties jointly; and

(C) address the qualifications of any such expert.

(2) The court may appoint expert witnesses of its own choosing or may appoint an expert nominated by any party. But if the parties agree as to the experts to be appointed, the court shall appoint only those designated in the agreement.

(3) Before selecting an expert unilaterally, the court should [must]

(A) seek recommendations from a relevant professional organization or entity that is responsible for setting standards or evaluating qualifications of persons who have expertise in the relevant area, or from the academic community, and

(B) afford the parties an opportunity to object to the appointee on the basis of bias, qualifications or experience.

(4) An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party unless the court orders otherwise; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the

witness.

(b) Communications Between Court and Expert Witness. – The court must assure that the parties are aware of all communications between the court and a court-appointed expert witness by:

(1) Permitting the parties to be present when the court meets or speaks with the expert,

(2). Providing that all communications between court and expert will be in writing with copies to the parties; or

(3) Recording oral communications between court and expert and making a transcript or copy of the recording available to the parties.

(c) Communications Between Parties and Expert Witness. – The court must assure that every party is aware of all communications between any party and a court-appointed expert witness by:

(1) Requiring all parties to be present when any party meets or speaks with the expert witness, or

(2) Requiring that all communications between any party and the expert witness will be in writing or recorded with copies provided to all parties.

~~(b)~~ (d) **Compensation**. – Expert witnesses ~~so~~-appointed by the court are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds ~~which~~ that may be provided by law in criminal cases and civil actions and proceedings ~~involving just compensation under the fifth amendment~~ . In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs. In allocating the expert witness's fees, the court may take account of the financial capability of the parties, and may in its discretion order all of the expert's fees to be paid by one of the parties.

~~(c)~~ (e) **Disclosure of appointment**. – ~~In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.~~ If an expert witness appointed by the court testifies at trial, the court ordinarily should not identify the witness as one appointed by the court. If the court determines that, in the circumstances, it is appropriate to identify the witness as a court appointee, the court should instruct the jury that:

(1). It is not to give greater weight to the testimony of a court-appointed expert than any other witness simply because the court chose the expert;

(2) The jury may consider the fact that the witness is not retained by either party in evaluating the witness's opinion; and

(3). The jury should carefully assess the nature of, and basis for, each witness's opinion.

~~(d)~~ (f) **Parties' experts of own selection**. – Nothing in this rule limits the parties in calling expert witnesses of their own selection.

(g) **Technical Advisor**. – Nothing in this rule limits the court's power to appoint an expert to serve as a technical advisor rather than a witness.

Model Committee Note

The amendment makes several changes and additions to the Rule in an attempt to make it easier to apply, and to encourage the courts to appoint expert witnesses to assist the court, the parties, and the jury in cases of exceptional technical complexity. *See generally General Electric Co v. Joiner,* 522 U.S. 136, 149-150 (1997) (Breyer, J., concurring) (noting the possibility of using court-appointed expert witnesses in complex technical and scientific cases). *See also Walker v. American Home Shield Long Term Disability Plan,* 180 F.3d 1065 (9th Cir. 1999) (trial court was within its discretion to appoint a medical expert where the expert testimony of the parties was confusing and conflicted).

The amendment eliminates the "show cause" language that was rarely observed in practice. Especially where a court-appointed expert is suggested by a party, the notice of motion serves as a "show cause" order. Where the court suggests the appointment, Rule 706 still requires adequate advance notice to the parties.

The amendment emphasizes that a court-appointed expert is most useful in complex cases in which the experts proffered by the parties are especially contentious and a neutral expert view would therefore be most useful. But the Rule does not require a court to appoint an expert witness in any case. *See, e g., Quiet Technology DC-8, Inc , v Hurel-Dubois UK Ltd.,* 326 F.3d 1333, 1348-9 (7th Cir. 2003) ("we are unfamiliar with any set of circumstances under which a district court bears an affirmative obligation to appoint an independent expert").

The amended rule sets forth procedural requirements for the selection of a court-appointed expert witness Those requirements are intended to protect against the appointment of a biased or unqualified expert. The requirements are derived from ABA Civil Trial Practice Standard 11(a). *See also* Cecil and Willging, *Accepting* Daubert's *Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity,* 43 Emory L.J. 995 (1994) (reporting on a survey indicating that many judges appointed an expert by choosing a person that the judge worked with while in private practice, and criticizing this selection process because it "may reflect a narrow spectrum of professional opinion that was suited to the interests of the judges' former clients and colleagues" and the parties "may perceive such an expert as biased.").

The amendment imposes procedural limitations on *ex parte* communications between the court and the expert and between a party and the expert. These limitations are designed to protect against unfair influence of the expert as well as to counter any appearance of impropriety The language in the Rule is derived from ABA Civil Trial Practice Standards 11(b) and (c).

Rule 706 originally provided that the court-appointed expert's "deposition may be taken by any party." This apparently absolute right to depose could lead to substantial inconvenience for the court-appointed expert, especially in complex multi-party cases. The Rule has therefore been amended to allow the court to dispense with depositions, in favor of other procedural alternatives, where the circumstances require. *See, e g , In re Joint E. & S. Dists. Asbestos Litig.,* 151 F.R.D. 540 (S.D.N.Y. 1993) (denying a motion to depose court-appointed experts; in light of *Daubert* and the

gatekeeping function that it imposes, the Court found it more efficient to hold a pre-trial *Daubert* hearing at which the court-appointed expert could be questioned by all parties in the presence of the trial judge).

The amendment clarifies the original Rule concerning the court's authority to allocate all of the expert's fees to one side of an action. Courts have held that where one of the parties is indigent, the trial court has discretion to allocate all of the expert's fees to the party or parties with financial resources. *See, e.g., McKinney v. Anderson,* 924 F.2d 1500, 1511 (9th Cir.1991) (finding that the phrase "such proportion as the court directs,"in an appropriate case, permits the district court to apportion all costs to one side); *Webster v. Sowders,* 846 F.2d 1032, 1038-39 (6th Cir. 1988) (stating that "[a] District Court has authority to apportion costs under this rule [706(b)], including excusing impecunious parties from their share"); *United States Marshals Serv v Means,* 741 F.2d 1053, 1059 (8th Cir. 1984) (stating that discretionary power to advance fees of expert witnesses should be exercised only under compelling circumstances). The amendment codifies this case law.

The amendment establishes a presumption against disclosure to the jury of the expert's court-appointed status. The risk that the court's appointment of an expert might be outcome-determinative is likely to be aggravated by informing the jury of the court's appointment. Where disclosure appears necessary under the circumstances, it should be accompanied with instructions cautioning the jury against excessive reliance on the appointed expert's testimony. See Lee, *Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence,* 6 Yale Law and Policy Review 480 (1988) (advocating the use of such instructions); ABA Civil Trial Practice Standard 11(d).

Finally, the amendment makes clear that the procedural requirements of Rule 706 do not apply if the court appoints a technical advisor who will not testify as a witness in the action. The amendment is consistent with the case law on the appointment of technical advisors. *See, e.g., AMAE v. State of California,* 231 F.3d 572, 590 (9th Cir. 2000) ("Plaintiffs argue that the court committed legal error under Federal Rule of Evidence 706(a) by neither requiring Dr. Klein to submit a report or allowing him to be cross-examined. The short answer to Plaintiffs' argument is that Rule 706 applies to court-appointed expert witnesses, but not to technical advisors like Dr. Klein."); *Reilly v. United States,* 863 F.2d 149, 156 (1st Cir. 1988) ("We conclude, therefore, that Rule 706, while intended to circumscribe a court's right to designate expert witnesses, was not intended to subsume the judiciary's inherent power to appoint technical advisors.").

Appendix to Reporter's Memorandum on Rule 706

Law Review Article By Cecil and Willging on Court-Appointed Experts

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Scientific and Technological Evidence

*995 ACCEPTING DAUBERT'S INVITATION DEFINING A ROLE FOR COURT-APPOINTED EXPERTS IN ASSESSING SCIENTIFIC VALIDITY

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Thomas E Willging [FNa]

I INTRODUCTION

In Daubert v Merrell Dow Pharmaceuticals, Inc the Supreme Court urged federal judges faced with a challenge to scientific testimony to undertake "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodologyproperly can be applied to the facts in issue " [FN1] In response to concerns raised by Chief Justice Rehnquist, [FN2] Justice Blackmun, writing for the majority, expressed confidence in the ability of federal judges to undertake such a review, noting that, among other thing, judges "should also be mindful" of the authority to appointexperts under Rule 706 of the Federal Rules of Evidence [FN3]

In offering this aside the Court joined a long list of recent proponents of court-appointedexperts [FN4] The Court's invitation to consider court- appointed*996 experts is likely to receive greater attention as the demanding requirements for admissibility of such evidence established in Daubert[FN5] are applied to the growing volume of scientific and technical evidence [FN6] This article speaks to judges, attorneys and others who wish to consider using court-appointed experts by describing the experiences of judges who have appointedexperts and suggesting procedures and techniques for improving the use of such experts

Section II offers a brief summary of the authority of the court to appoint*997 an expert, either under Rule 706 of the Federal Rules of Evidence or under the inherent authority of the court The following sections describe the findings of a multi-year study of court-appointedexperts [FN7] Section III discusses how such experts have been used in federal courts and the reasons such experts have been appointed infrequently In brief,we found that much of the uneasiness with court-appointed experts arises from the difficulty in accommodating such experts in a court system that values, and generally anticipates, adversarial presentation of evidence Even judges who have appointed experts view such appointments as an extraordinary activity that is appropriate only in rare instances in which the traditional adversarial process has failed to permit an informed assessment of the facts Section IV discusses the problems that arise in identifying and appointing a suitable expert Parties rarely suggest appointing an expert and typically do not participate in the nomination of appointedexperts As a result, judges may not recognize the need for such assistance until the eve of trial and may have difficulty identifying and instructing anexpert without disrupting the trial schedule Section V discusses communication with the appointed experts Communication between the judge and the expert is sometimes inhibited, especially in instances in which ex parte communication with the expert is sought by the judge Also, we found that the testimony or report presented by an appointedexpert exerts a strong influence on the resolution of the issue addressed by theexpert Section VI discusses sources of

compensation of appointed experts and the problems that arise when one party is indigent Finally, in Section*998 VII we suggest possible changes to Rule 706 and outline a pretrial procedure that facilitates the early identification of disputed issues arising from scientific and technical evidence, clarifies and narrows disputes, and eases appointment of an expert when an independent source of information is necessary for a principled resolution of a conflict

II AUTHORITY TO APPOINT AN EXPERT

Two principal sources of authority permit a court to appoint anexpert, each envisioning a somewhat different role for the expert Appointment under authority ofRule 706 of the Federal Rules of Evidence most directly addresses the role of the appointed expert as a testifying witness, the structure, language, and procedures of Rule 706 specifically contemplate the use of appointed experts to present evidence to the trier of fact Supplementing this authority is the broader inherent authority of the court to appointexperts who are necessary to permit the court to carry out its duties, including authority to appoint atechnical advisor to consult with the court during the decision-making process The narrower testimonial focus and procedural confines ofRule 706 do not envision such a role [FN8] The authority to appoint a special master under Rule 53 of the Federal Rules of Civil Procedure, another source of expertise for a court, is addressed elsewhere in this volume [FN9] We found instances of experts appointed under authority of Rule 706 functioning much like a special master as well as preparing to offer testimony [FN10]

*999 A Rule 706 of the Federal Rules of Evidence

Rule 706 of the Federal Rules of Evidence specifies a set of procedures governing the process of appointment, the assignment of duties, the reporting of findings, testimony, and compensation ofexperts [FN11] Other questions such as how to identify the need for a Rule 706 expert, how to shape pretrial procedures to reduce conflicts between the parties' experts, how to compensate experts, and how to reduce interference with the adversarial process are not addressed by the rule but are discussed in later sections of this Article

The trial court has broad discretion in deciding whether to appoint a Rule 706 expert Although it has been suggested that "extreme variation" among the parties' experts is the primary circumstance suggesting that such an appointment may be beneficial, [FN12] courts frequently appoint experts because of the complexity of the issues or the evidence [FN13] Furthermore, ***1000** the trial court retains discretion to refuse to appoint an expert despite extreme variations in the parties' expert testimony [FN14] Such experts should be appointed when they are likely to clarify issues under consideration, it is not an abuse of discretion for a trial court to refuse to appoint anexpert under Rule 706 when "additional experts would add more divergence and opinion differences " [FN15]

Appellate courts on occasion have reminded judges of this authority Where atrial court has been unaware of or unclear on its authority to appoint a neutralexpert under Rule 706 or its inherent power to do so, a reviewing court may order the trial court to exercise its discretion and decide whether appointment of a neutralexpert is justified in the circumstances of the case [FN16] Indeed, in a case in which the experts' testimony is especially disparate on an issue of valuation, a trial court should consider the value of "a court-appointed witness who would be unconcerned with either promoting or attacking a particular estimate of plaintiff's damages " [FN17]The standard for review of a trial court's appointment of an expert under Rule 706 is whether the appointment constituted an abuse of discretion [FN18] One factor to consider in such a review is whether the expert selected by the court had any bias toward one party or one side of an issue [FN19]

Two recent cases demonstrate the range of functions that may be performed by court-appointedexperts Computer Associates International v ***1001** Altai, Inc [FN20] offers an example of an expansive role played by an appointed expert in difficult technical litigation concerning alleged infringement of a software copyright The question before the court was how to separate the idea underlying a computer program from its expression, since only the latter is protected by copyright The parties agreed to the court's appointment of a computer science professor from the

Massachusetts Institute of Technology to aid the judge in a nonjury trial in understanding thetechnical issues of the case In analyzing and interpreting the facts for the court, the appointedexpert also pointed out deficiencies in the legal doctrines and suggested alternative standards that would bring the copyright law protecting computer software into conformity with current practices in computer science The district court adopted this proposal and assessed the allegedly copied program under this new standard On appeal one party sought to overturn the standard, contending that the district court had erred by relying too heavily on the court-appointedexpert's opinions The court of appeals noted that the technical nature of assessments of computer software justified a more expansive role for expert assistance and that the appointed expert's opinion "was instrumental in dismantling the intricacies of computer science so that the court could formulate and apply an appropriate rule of law "[FN21] Since, in the final analysis, the district court judge exercised judicial authority in reviewing these findings, the court of appeals found the assistance provided by the expert to be appropriate

In contrast to this expansive role, the court in Renaud v Martin Marietta Corp ,[FN22] relied on the appointed expert for the more limited purpose of assessing the acceptability within the scientific community of the methodology used by the plaintiffs to measure exposure to a toxic chemical Residents of a community brought a toxic tort action against a nearby manufacturer alleging injuries due to contaminated drinking water Thedefendants challenged the admissibility of expert testimony by the plaintiffs ***1002** concerning the level of exposure to the chemical Estimates of exposure over an eleven-year period were based on an extrapolation from a single measure of contamination in one place and one time two years after the last alleged exposure The court appointed anexpert in geochemistry and hydrology to assess not the general question of causation, but the narrow question of the scientific acceptability of using a single data point to estimate exposure over such a period In her report to the court, the appointed expert wrote, " 'it is unsound scientific practice to select one concentration measured at a single location and point in time and apply it to describe continuous releases of contaminants over an 11-year period ' " [FN23] On this basis the court refused to admit the evidence of exposure and, in the absence of other evidence, granted the defendants' motion for summary judgment On appeal the plaintiffs challenged the authority of the expert to render such an assessment The court noted such duties are well within the scope of the authority of an appointed expert [FN24] The use of appointed experts to comment on the acceptability of scientific methods that underlie expert opinions may expand as courts assess the scientific validity ofexpert testimony under the standards established by the Supreme Court's decision in Daubert [FN25]

B Inherent Authority to Appoint a Technical Advisor

The court's authority under Rule 706 to appoint an expert to offer testimony represents a specific application of its broader inherent authority to inviteexpert assistance in a broad range of duties necessary to decide a case The most striking exercise of this broader authority involves appointing anexpert as a technical advisor to confer in chambers with the judge regarding the evidence, as opposed to offering testimony in open court and being subject to cross-examination Although few cases deal ***1003** with the inherent power of a court to appoint atechnical advisor, the power to appoint remains virtually undisputed,[FN26] tracing a clear line from the 1920 decision of the Supreme Court in Ex parte Peterson [FN27] to the recent decision of the United States Court of Appeals for the First Circuit in Reilly v United States [FN28] Generally, a district court has discretion to appoint atechnical advisor, but it is expected that such appointments will be "hen's teeth rare," a "last" or "near-to-last resort "[FN29] General factors that might justify an appointment are "problems of unusual difficulty, sophistication, and complexity, involving something well beyond the regular questions of fact and law with which judges must routinely grapple "[FN30] The role of the technical advisor, as the name implies, is to give advice to ***1004** the judge, not to give evidence and not to decide the case [FN31] Compensation of a technical advisor can be especially awkward, this issue is discussed at length in Section VI infra

III USE AND NONUSE OF COURT-APPOINTED EXPERTS

A Use of Court-Appointed Experts

Many commentators have mentioned that the use of court-appointed experts appears to be rare, an impression based on the infrequent references to such experts in published cases [FN32] To obtain an accurate assessment of the extent to which court-appointed experts have been employed, in 1988 we sent a one-page questionnaire to all active federal district court judges [FN33]

As indicated in Table 1, eighty-six judges, or 20% of those responding to the survey, revealed that they had appointed an expert on one or more occasions [FN34] The figures indicate that, taken together, these judges made approximately 225 appointments, far more than suggested by the paucity of published opinions dealing with the exercise of this authority [FN35]

Table 1
TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

***1005** Of the eighty-six judges reporting appointment of an expert, just over half had appointed an expert on only one occasion Only four judges appointed an expert in ten or more cases, a frequency that suggests a somewhat systematic use of appointed experts to deal with difficult scientific or technical issues In fact, the one judge who had appointed an expert in more than twenty cases employs this mechanism as a standard part of a pretrial procedure in cases in which medical experts offer diametrically ***1006** opposed testimony concerning the existence of an asbestos-related injury [FN36]

During the telephone interviews we asked the judges to describe the cases in which they had appointed experts under authority of Rule 706 [FN37] Three circumstances accounted for almost two-thirds of the appointments medical experts appointed in personal injury cases, engineering experts appointed in patent and trade secret cases, and accounting experts appointed in commercial cases The appointed expert usually served a different function in each type of case

The expertise sought by the courts in twenty-four cases was that of medical professionals concerning the nature and extent of injuries In thirteen of these cases experts were appointed to help assess claims for injuries arising from improper medical care [FN38] In eight other cases the appointed expert considered injuries arising from defective products, five of which were tort claims based on injuries caused by exposure to toxic chemical products [FN39]

The services of the appointed medical experts varied with the type of personal injury case In cases arising from claims of improper medical care, the parties' experts usually were in complete opposition and the appointed expert advised the court on the proper standards of medical care and treatment [FN40] During the product liability litigation the appointed medical expert addressed the cause and extent of injuries In four of five tort cases about toxic products, the appointed expert addressed the likelihood that the product caused the injuries

***1007** In fifteen cases judges sought experts with engineering skills [FN41] Twelve of these cases raised questions of patentability, patent infringement, or technical issues surrounding trade secret protection [FN42] Unlike the personal injury cases in which the expert was appointed to resolve a dispute among the parties' experts, in these cases the expert typically was appointed to interpret technical information for the judge Almost all of these cases were bench trials, and the parties agreed to the appointment of an expert to enhance the court's ability to understand the technology underlying the dispute

In twelve cases involving disputes over contracts or failed commercial enterprises, judges sought the assistance of accountants [FN43] Often these cases involved complex financial transactions, and the expert was appointed to assist the court in placing a value on a claim In reaching such an assessment, the appointed expert often functioned like a special master, reviewing records and preparing a report that was submitted as evidence in the case [FN44] In several cases the judge asked the appointed expert not to place a value on a disputed claim, but to address acceptable standards of accounting that should be followed in making such a determination, or to educate the court regarding acceptable methods for making such a determination

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The remainder of the appointments were scattered across a variety of specialties and types of cases In two cases economists were appointed to aid in class certification, in two cases handwritingexperts were appointed to verify signatures on legal documents, two statisticians were appointed, one to aid in a case challenging the accuracy of the Census and one in a ***1008** case challenging a congressional reapportionment plan, and two attorneys were appointed, one to address the reasonableness of a request for attorneys' fees and one to address mixed questions of law and fact surrounding patentability Other appointments included a real estate appraiser to aid in a condemnation proceeding, a geologist to advise the court on the likelihood of seismic activity in a construction area, a botanist to address plant growth in wetlands, a hydrologist to address water damage to property, a geneticist to examine the inherited properties of a strain of seed corn, a penologist to testify to prison conditions in a case charging overcrowding, a theologian to testify to the basis in religion of "secular humanism," and an agricultural economist to aid in a farm bankruptcy reorganization [FN45]

B Satisfaction with Appointed Experts

The judges who appointed experts were almost unanimous in expressing their satisfaction with theexpert all but two of the sixty-five judges indicated that they were pleased with the services provided The two judges who did not indicate that they were satisfied remain open to appointing anexpert in the future One judge indicated that he had little basis from which to form a judgment regarding the performance of the twoexperts he appointed, one expert was called on to do little before the case settled, and the other testified before a visiting judge The other judge that did not express satisfaction with the process indicated some frustration that the interactions with theexpert had been constrained by a need to avoid direct communication with the expertoutside the presence of the parties

C Receptivity to Appointment of Experts

The second question asked in the survey ("Areexperts appointed under Rule 706 likely to be helpful in certain types of cases?") was intended to assess the extent to which judges consider appointment of anexpert to be an acceptable alternative in at least some types of cases

Few judges fail to see any value in appointment ofexperts by the court ***1009** Eighty-seven percent of the judges responding to the question indicated that court-appointed experts are likely to be helpful in at least some circumstances [FN46] This openness to appointment of experts extended to judges who had never appointed an expert, 67% of whom indicated that such an appointment might be helpful

D Reasons for Appointing Experts

Judges who had made a single appointment were asked to describe their reasons for making the appointment They were also asked in another portion of the interview what concerns led to their decision to appoint anexpert Our interviews revealed two distinct sets of judges who have usedRule 706 One group uses the rule primarily to advance the court's understanding of the merits of the litigation and to enhance the court's ability to reach a reasoned decision on the merits, a smaller group, mostly multiple users, invokes the rule primarily to enhance settlement

1 T o Aid Decision Making

As might be expected, experts are most often appointed to assist in understandingtechnical issues necessary to reach a decision [FN47] The desire for such assistance was attributed by the judges to a lack of knowledge in an essential area, a concern over the technical nature of an issue or issues, or a concern over the need to properly articulate the rationale for a decision Many judges mentioned more than one of these concerns

In explaining the reason for the appointments, judges often admitted their need to become better informed on an essential topic of the litigation ***1010** Typical comments were "I was aware of the limits of my knowledge of [biochemistry]," and "The experts took almost diametrically opposed positions in areas in which I knew next to nothing " In some contexts, the judge's need for technical expertise was coupled with a first-time exposure to a complex legal specialty area, such as patent law One judge said, "This was my first patent trial and I did not understand the technical issues relating to computers and electronics The combination of a confusing area of law and complex, technical issues led me to seek help " Similarly, another judge said,

> I didn't know anything about computer software or the argot of the industry I was in almost total ignorance and at an absolute loss as to what to do to speed up the educational process and keep the trial to a reasonable length

The need for assistance in decision making often arose when the parties failed to present credible expert testimony, thereby failing to inform the trier of fact on essential issues Judges' doubts regarding the credibility of testimony by the parties' experts were common Usually an expert was appointed when the parties' experts offered directly conflicting testimony on topics that were beyond the comprehension of the court Twenty-seven of the forty-five judges who appointed an expert on only one occasion described a situation in which both parties employed testifying experts These judges often described a situation in which each party offered apparently competent expert testimony that was in direct opposition on virtually every issue to the other party's expert testimony Such total disagreement in areas unfamiliar to the judge invited a general distrust of the experts [FN48] This concern over the integrity of testimony of experts was echoed elsewhere in the survey When judges were asked in a separate question what concerns led them to appoint an expert, in eighteen of thirty-six cases judges indicated that there was a failure by one or both parties to present credible expert testimony to aid in resolving a disputed ***1011** issue Appointment of an independent expert enabled access to testimony that was thought to be both impartial and necessary to understand the testimony of the parties' experts

For example, one judge recounted his experience in a class action dealing with issues of public safety surrounding the construction of a school for children with multiple handicaps The proposed site was alleged to be on a seismic fault line The case involved complex scientific evidence presented in an emotionally charged setting "Outstanding experts in the field on both sides" clashed "in bitter opposition to each other " They "had become advocates " The judge realized that he could "apply the burden of proof and rule that plaintiffs had not met their burden," but that resolution did not seem fair because defendants had denied access to the type of testing that might be necessary to prove or disprove plaintiffs' claim Also, the judge was reluctant to resolve an issue of public health and safety, especially the safety of children, without addressing the merits of the claim He was uncomfortable with the burden of proof and decided after a bench trial to reopen the case to hear evidence from a court-appointed expert The expert recommended specific tests, and the court ordered that the tests be conducted The tests ruled out the alleged seismic danger, the judge then refused to enjoin the construction of the school on the site

The second typical circumstance involved appointment of an expert when at least one of the parties failed to offer expert testimony, resulting in what the judge perceived to be an inadequate presentation of issues This circumstance, reported by thirteen of the forty-five judges who had appointed an expert on one occasion, typically arose because of a party's inability to pay for expert testimony [FN49] In many of these cases the judge had heard expert testimony by one party and could have resolved the dispute in favor of that party because of the failure of the opponent to present countervailing expert testimony in support of a critical issue In discussing such cases the judges made clear their uneasiness in basing their decisions strictly on the adversarial presentations of the parties Such a resolution would have failed to adequately resolve the disputed issue and may have complicated a fair and accurate resolution of similar issues in ***1012** the future These judges were sufficiently concerned about the nature of the proffered expert testimony to undertake the considerable effort necessary to obtain an independent assessment from an appointed expert, thereby obtaining a valid rationale for a decision [FN50]

Though circumstances differed in these cases, each reveals a judge's marked dissatisfaction with the parties' experts' presentation of information and the traditional means of resolving such conflicting testimony In each circumstance an expert was appointed by the court when traditional adversarial presentation by parties failed to provide the court with information necessary to make a reasoned determination of disputed issues of fact

2 To Aid Settlement

Some judges suggested that appointment of an expert may bring about settlement, [FN51] although enhancement of settlement prospects was rarely an articulated purpose of the appointment Indeed, the judges we interviewed indicated that the prospect of settlement often argued against the appointment of anexpert In the words of a judge who had never made an appointment, judges might be reluctant to "get all dressed up with no place to go '[FN52]

When the appointment of an expert was made to aid in deciding the case, often the appointment appeared to be postponed until it seemed certain that the case was unlikely to settle In twenty of the forty-five cases described by the judges who had appointed an expert only once, the expert ***1013** was appointed at some late stage when trial or evidentiary proceeding was imminent or had begun [FN53] One judge indicated he would "exhaust other efforts to settle first" and "reserve appointment [of an expert] for a case that appears unsettleable by other means " Along the same lines, another judge clearly separated the appointment of anexpert from the settlement process

My purpose is not to encourage settlement It is to get better information for making a decision If I thought a case might settle, I would not appoint an expert I would send it to the magistrate [judge] for settlement discussion If [the magistrate judge's] response indicated that an expertmight aid settlement, I would consider [appointing one]

When the appointment was made prior to trial, nine of the twenty-two such cases we examined settled before the expert prepared a report or offered advice

We found other evidence to suggest that judges might resist appointing anexpert if settlement were the expected outcome Only seven of the forty-five one-time users ofRule 706 alluded to settlement in their responses to our open-ended question about concerns leading to the appointment In three of those cases, the parties indicated a desire to settle and expressed the need for an independent assessment In those three cases, the court seemed to be serving the limited role of selecting a neutral expertwho would guide the parties toward settlement The parties paid for the expert and were the primary beneficiaries of the appointment In the other four cases, the court noted the parties needed an independent assessment, but settlement was not the articulated purpose In two of those cases the court saw the appointment primarily as a way to increase understanding of voluminous documents and widely dispersed information, and aid either the parties or the court in resolving the dispute

Judges who have appointed more than one expert are more likely to view settlement as a reason to make an appointment, a majority of those judges reported that when appointing anexpert they had in mind enhancing the opportunity for settlement [FN54] These judges sometimes appeared to ***1014** appoint an expert in an effort to change parties' extreme evaluations of a case In situations in which theexperts for the parties are highly qualified, yet give disparate opinions (in the words of one judge "fixed on two equally good positions"), an appointment is intended to resolve the impasse and permit the parties to move on to discussion of other issues

Most one-time users also were asked whether they had ever threatened or proposed to appoint anexpert under Rule 706 "as a means of improving the quality of theexpert testimony or resolving the case " The majority (twenty-one of the thirty-six judges asked) said that they had not threatened to appoint anexpert for those purposes [FN55] Indeed, one judge who is active in encouraging settlement by other means has chosen not to use court-appointed experts as part of his approach to settlement, he raises appointment of anexpert only when he intends to make an appointment, reserving the court- appointment process for improving the information available to the court

On the other hand, about one-third of the one-time users indicated that they used the threat of appointment as a settlement device One judge describes an in terrorem effect He says that the threat is effective because the authority exists and the judge is known as one who will use it, he need not mention it each time Another judge, who has never appointed a Rule 706 expert, reports that he has "a regular procedure for addressing problems with experts and focusing attention on whether a court-appointedexpert is needed " His experience has been that "raising the issue has a salutary effect on the lawyers and they either settle the case or tone down the position of their expert " Another judge found that discussion of aRule 706 appointment can be helpful when the parties' experts

appear to agree on almost nothing Then the judge can " 'huff and puff' and say he is considering appointment of an independent expert since the parties are so far apart " Such a discussion can be helpful in "narrowing the issues " Another judge described the process and effect this way

***1015** I have threatened to use a court expert when I discover in the final pretrial conference that the parties' experts have taken diametrically opposite positions In those cases, the parties have reviewed their position after I've pointed out the "all or nothing" character of their position and the risks involved Generally, this changes their evaluation of their cases

As with judicial involvement in settlement in general,[FN56] there is no consensus on the use of court-appointed experts to aid in settlement The time and expense involved in the process, however, raises the question of whether an appointment for the purpose of improving judicial decision making will be worthwhile if the parties are likely to settle

E Reasons for Failure to Appoint an Expert

Almost all judges are willing to consider the appointment of an expert in at least some circumstances, so the infrequency of such appointments is not related to a strict opposition to the practice Our investigation revealed problems in identifying suitable experts, communicating effectively with such appointed experts, and compensating appointed experts Many of these practical problems can be overcome and are discussed in the following sections But the two principal reasons given in the survey for failure to appoint an expert are the infrequency of cases requiring such assistance and the reluctance of judges to intrude into the adversarial process These two issues set a limit on the opportunity to use such appointed experts that will not be overcome by improvements in procedures

1 Infrequency of Cases Requiring Extraordinary Assistance

To better understand the reasons for the infrequent appointment of experts, we asked eighty-one judges why they thought the authority had been exercised so infrequently [FN57] Fifty judges indicated that they see the appointment of an expert as an extraordinary action The importance of reserving appointment of experts for cases involving special needs was especially ***1016** apparent in the responses of the judges who had made only a single appointment Thirty- two of the forty-five judges who had appointed an expert on a single occasion indicated that they had not used the procedure more often because the unique circumstances in which they employed the expert had not arisen again They simply had not found another suitable occasion in which to appoint an expert

When we asked judges in the mail survey to indicate types of cases in which an appointed expert might be helpful, they usually indicated types of cases that are both rare and unusually demanding, implying that appointed experts should be reserved for cases with extraordinary needs Table 2 indicates the types of cases, as identified by the judges, in which the appointment of an expert would be helpful More than half of the judges mentioned patent cases Cases involving questions of product liability and antitrust violations also were common candidates for such assistance [FN58] It follows that one reason appointments are rare is that the kinds of cases in which judges are likely to require such assistance are themselves rare

Table 2

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

***1017** Often appointments were made in response to a combination of unusual events, such as a failure by the parties to provide a basis for a reasoned ***1018** resolution of a technical issue, combined with a perceived need by the court to protect poorly represented parties (such as minors or members of a certified class action) One judge, in a case alleging injuries to a family arising from toxic contamination of a water supply, appointed an expert when the plaintiff's attorney failed to retain an expert witness to establish the occurrence of injury to the children The judge

could have entered a summary judgment in favor of the defendant, and suggested he would have done so but for the presence of children. The failure of the plaintiff's attorney to present expert testimony and the presence of children combined to motivate the court to appoint an expert.

A number of judges mentioned the need for an appointed expert when the parties' experts are in complete disagreement, one judge remarking, "One needs a complete divergence in the views of the parties' experts in a technically complex field. Often experts differ, but not in a crazy way." Several of these judges questioned the belief that court-appointed experts were being used too infrequently. While acknowledging that such authority is useful, one judge remarked, "I don't know that [court-appointed experts have] been used too infrequently. It should remain a rare device that is suited for unusual circumstances."

2. Respect for the Adversarial System

Respect for the adversarial system was cited as a reason for the infrequent appointment of experts by thirty-nine of the eighty-one judges, including thirteen of the eighteen judges who had not appointed an expert. [FN59] Many of those who had appointed experts professed commitment to the adversarial process and the ability of juries to assess difficult evidence, and indicated they would appoint an expert only where the adversarial process had failed. The extent of the esteem for the adversarial system among the judges responding was revealed by several of the comments of judges who had appointed an expert on one or more occasions:

> I believe in the adversary system. I was a litigator for thirty years. I don't feel comfortable taking over the case (like a small claims court, without lawyers). I don't know why I would be better ***1019** equipped than the lawyers to find a top-flight person.
>
> [T]he lawyers are pretty good about shooting holes in each others' experts. It's generally a credibility question and the jury can sort it out.
>
> We're conditioned to respect the adversary process. If a lawyer fails to explain the basis for a case, that's his problem.
>
> In general, it conflicts with my sense of the judicial role, which is to trust the adversaries to present information and arguments. I do not believe the judge should normally be an inquisitor.

A related reason for infrequent appointment of experts is deference by the judge to objections by the parties. Several judges alluded to such resistance with comments such as "The parties resist, saying that they have their own experts," and "The plaintiffs or their attorneys do not want such an expert because it will reduce the value of their case. I don't appoint experts without consent of the parties." Judges who favored other alternatives over the use of court-appointed experts cited deference to the parties as an important consideration. [FN60]

One of the major reasons cited by commentators for such a small number of appointments of experts or advisors under either FRE 706 or the court's inherent authority is the concern that by making such appointments, a judge may intentionally or unintentionally abdicate his or her judicial responsibility. This specific reason was not given by any of the judges in the survey, but several recent articles address procedural or structural reforms to facilitate an increase in the use of court-appointed experts or advisors while alleviating concerns regarding the abdication of judicial function as well as the additional expense and time consumed when using such experts. [FN61]

***1020** IV. IDENTIFICATION AND APPOINTMENT OF EXPERTS

A. Timing of the Appointment

One of the impediments to broader use of court-appointed experts mentioned earlier is the difficulty in identifying the need for an expert in time to make the appointment without delaying the trial. [FN62] Thirteen judges indicated that effective appointment of an expert requires the court's awareness of the need for such assistance early in the litigation. Since the parties rarely suggest that the court appoint an expert, judges sometimes realize that they need assistance on the eve of trial when there is not sufficient time to identify and appoint an expert. Several judges

indicated that they had learned of the need for such assistance when it was too late

Procedures specified in Rule 706 imply that the appointment process "will ordinarily be invoked considerably before trial" to allow time for hearings on the appointment, consent of theexpert, notification of duties, research by the expert, and communication of the expert's findings to the parties in sufficient time for the parties to conduct depositions of the expert and prepare for trial [FN63] For example, one authority has suggested that identification of the need for a neutral expert should begin at a pretrial conference held pursuant to Federal Rule of Civil Procedure 16 [FN64] However, specific procedures for identifying such a need are left to the trial judge [FN65]

***1021** Timing of the appointment was discussed regarding fifty-two cases A majority of theexperts were appointed at an early point in the litigation, but a sizable minority were appointed on the eve of trial.[FN66] A few judges even appointed experts during or after bench trials Often, judges who acted immediately before, during, or after trial indicated that an earlier appointment would have been helpful Thirty-one of the judges reported that they appointed the expert early in the pretrial process, usually at the close of discovery, leaving time to recruit anexpert and permit the expert to prepare a report

Asked if it would have been helpful to appoint theexpert at an earlier point in the litigation, those who made an appointment shortly after discovery generally expressed satisfaction with the timing of the appointment By contrast, most of those judges who appointed the expert immediately before or during the trial indicated that appointment earlier in the process would have been helpful [FN67] Often they noted the need to reschedule the proceeding to permit time to appoint and employ theexpert Another judge mentioned that an earlier appointment would have been helpful in recruiting more skilled experts, remarking, "Only one of the potential experts was available With more time it may have been possible to choose among severalexperts "

B Initiation of the Appointment of theExpert

Our interviews revealed that the initial suggestion to appoint anexpert almost always comes from the judge, not the parties When asked who had initiated the appointment, almost all of the judges who responded (fifty-four of sixty-one judges) indicated that they had In only seven instances***1022**did the initial suggestion come from the parties, twice from the plaintiff, twice from the defendant, and three times from both parties In one instance the plaintiff's suggestion for appointment of a panel of experts [FN68] appeared to be part of a broader litigation strategy, since the plaintiff had recommended such appointments in related litigation in other districts

C Selection of the Appointed Expert

Identification and selection of a neutral expert by the court is a critical step in ensuring the fairness of the proceeding [FN69] When we asked why experts are appointed infrequently, the difficulty in identifying a suitable neutral expert to serve the court was mentioned by fourteen judges Some judges spoke of the difficulty in recruiting unbiased experts with the knowledge demanded in litigation Some didn't know where to turn to initiate the process, and expressed repeatedly in the interviews was the distrust ofexpert testimony in general Several judges doubted that such testimony would be truly neutral, even if theexpert was invited to testify by the court

Those judges who actually appointed experts did not seem to encounter such difficulty Only six of sixty-six judges reported difficulty finding a neutralexpert willing to serve [FN70] Those six judges cited either difficulty in ***1023** finding a skilled person who could be considered neutral (some had ties with the parties while others had previously taken positions on the technical issues that were the object of the dispute), or difficulty in finding a neutral expert who would consent to serve in the position

Perhaps one reason judges who made such appointments found little difficulty in identifyingexperts is that they often appointed experts with whom they were familiar We found that it is far more common for judges to appoint experts that they have identified and recruited, often based on previous personal or professional relationships, than

for judges to appoint experts nominated by the parties [FN71]

In forty-one of the sixty-six appointments, the judge appointed anexpert without suggestions by the parties In twenty-nine of these cases, the judge used pre-existing personal or professional contacts to identify anexpert The extent to which judges relied on their informal networks of friends andacquaintances raises concerns about the extent to which such networks can be relied on to provide skilled and neutralexperts to inform the deliberations of the trier of fact While such persons may be "disinterested" with regard to the issues of the specific case, there is little assurance that such acquaintances bring an unbiased, or even a well-informed, perspective to the disputed technical issues Personal associations formed while practicing law may reflect a narrow spectrum of professional opinion that was suited to the interests of the judges' former clients and colleagues Even if such an appointment results in the selection of a suitable expert, the parties may perceive such an expert as biased [FN72]

Judges did not always rely on friends and associates to suggestexperts, in nine instances in which an appointment was made without suggestions by the parties, judges contacted nearby institutions for assistance in identifying ***1024** suitable experts to serve the court [FN73] These were almost all instances in which medical expertise was needed, and the judges contacted nearby medical schools or associations for suggestions of candidates Such a procedure, while more burdensome and not foolproof,[FN74] is likely to be more effective than using informal contacts to identify skilled, neutral experts

In eighteen instances the expert was selected from a list of experts provided by one or more of the parties [FN75] Published cases commonly suggest that a court direct the parties to seek agreement on an appointment and exercise its discretion only if the parties fail to agree [FN76] Normally each party submitted a slate of experts that would be acceptable to them Occasionally one or more names would appear on each list, making selection easy Often the parties identified one or more suitable experts with little or no involvement by the judge When the parties could not agree, the judge often chose the expert from the slates after listening to objections from each of the parties

***1025** In summary, the identification of a need for, and selection of, a court-appointedexpert appears to be a process in which the parties infrequently play an active role The judge typically identifies the need for assistance and raises the possibility of such an appointment, sometimes very late in the pretrial process The judge is usually responsible for identifying suitable candidates and often relies on informal recommendations from friends and associates Such unsystematic approaches to identifying needs and recruitingexperts raise doubts about the extent to which the procedure provides the timely and neutral assistance warranted by the critical nature of the expert's task

V COMMUNICATION WITH THE APPOINTED EXPERT

A Instruction of the Appointed Expert

Rule 706(a) specifies two options for instructing theexpert in his or her duties, both of which ensure that the parties will be aware of the assignment The court may communicate with theexpert either in writing (filing a copy with the clerk) or at a conference in which the parties have an opportunity to participate [FN77] In practice, judges instructed experts by conference call (involving the judge, the expert, and the parties), informal conferences in chambers, formal hearings in open court, and letters and written orders, sometimes with accompanying documents and exhibits In only two instances, one an emergency and the other a nonadversarial proceeding, did judges instruct experts outside the presence of the parties

Judges' instructions were used to meet multiple needs, including (1) establishing a record of the terms and conditions of the appointment, (2) clarifying the role of theexpert in relation to the role of the judge, (3) defining the legal and technical issues in the case and identifying the technical issues the expert was to address, and (4) establishing procedures for assembling information, communicating with the parties, and reporting findings and opinions The following discussion summarizes how judges***1026** met those needs in the cases we encountered [FN78]

Regarding the terms and conditions, judges included the rate of payment, [FN79] any ceiling on the total amount of work and payment, the allocation of payment among the parties, the timing of installment payments, the amount of an initial payment, the court's role, if any, in reviewing the bills and serving as a conduit for payments, and reallocation of payments upon taxation of costs

Judges used the order of appointment to define the role of the court- appointedexpert in relation to the judicial role, distinguishing between the expert's duty to provide technical expertise and the judge's duty to decide the case One judge said,

> I instructed [the expert] that his role was to help me and that he was not to decide the case His main role was to interpret the language to me, give me background on computer technology, tell me how the various systems work

Similarly, another judge said, " [I] emphasized that I did not want him to give his opinion on the substance of the dispute, but to explain and guide me through the testimony " Another defined the expert's role as that of "interpreter " [FN80] On the other hand, one judge seemed to want an opinion from the appointedexpert on the ultimate issue [FN81] He issued an order "instructing [the expert] to answer the question in the case, whether the device in issue was an infringing device "

Occasionally words may differ in their technical and legal meanings When using legal terms-of-art, a judge may have a special need to define ***1027** issues and roles clearly For example, even in a technical area such as patent law, the apparent identity of technical and legal terms may be deceiving In the case of Pennwalt Corp v Durand-Wayland, Inc [FN82] plaintiff urged that the "doctrine of equivalents" compelled a finding of infringement because the court-appointed expert had testified that "the internal operations are functionally equivalent because they perform some of the same operations " [FN83] The court emphasized that the expert was "a technical, not a legal expert" and that, as such, he "was not expected to, and did not analyze infringement under a legal standard " [FN84] The court went on to find that the testimony on the facts relating to equivalency was not inconsistent with the court's conclusion that there was no legal equivalency

In addition to defining the roles of the judge andexpert, the court also must define the issues for the expert to consider This may be as straightforward as directing a panel of physicians to determine a plaintiff's injuries, prognosis, and the treatment required [FN85] In other cases, defining thetechnical issues for the expert may require an explanation of legal issues as well For example, in a case dealing with conditions of confinement at a correctional facility, the court used the appointment of an expertto articulate the applicable legal standards [FN86]

Defining the issues to be considered by the expert seems to serve multiple purposes For the expert, a written definition will serve as an essential guide to the generally unfamiliar world of litigation and the role of the appointed expert For the parties and counsel, the use of court-appointedexperts is so rare that a clear definition of the issues and the process should enhance understanding and allay concerns For the court itself, the process of defining the issues may help clarify the roles of the court and expert In one of the few cases in which a party contested an appointment, ***1028** the court asked the parties to propose instructions to theexpert After reviewing them, the court formulated its own instructions, addressing issues raised by the parties' proposals [FN87]

Instructions to experts have been, at times, open-ended For example, in a complex antitrust case the court established a process for the expert to "formulate the technical issue(s) the expert thinks are appropriate and form opinions thereon " [FN88] If a judge wishes to have an expert examine the methodology of the parties' experts, this should be communicated in the order of appointment [FN89]

Finally, the form of the expert's report should be defined and a process for assembling information for theexpert should be established By detailing the formalities of reporting, the court may prevent unnecessary confusion regarding ex parte communications between theexpert and the court [FN90] In one reported case, the court invited the parties to bring their own experts to participate in the conference at which the judge instructed the court-appointed expert A joint meeting of the experts at that stage could initiate a process of assembling common information for all of the experts [FN91] In other cases, the court established a way for the parties to convey

information to the expert without the court's participation

In several of the cases, the courts closely supervised the transfer of information to theexpert by specifying the transcripts and portions of exhibits to be delivered to theexpert, ruling on proposals from the parties, ***1029** and providing for court review of additional requests from theexpert The court also permitted the expert to interview, on the record, all lay and expert witnesses, and to view the site of the dispute [FN92]

In another case, the court provided for the expert's participation in the discovery process The expert, a law professor with special expertise in antitrust law, was to consider all pleadings and writings of the parties and advise the court and the parties about "the discoverability oftechnical matters" and the "nature [of], reason for, and terms of protective orders " [FN93] The expert also was to advise the parties as to additional discovery that might be necessary to render an opinion on the technical issues The expert was given explicit power to call meetings to resolve disputes about the formulation of thetechnical issues or about discovery Disputes not resolved through this process would be brought to the court In that case, the court extended the process of developing information through the final pretrial conference After providing for a written report and deposition of theexpert, the court ordered the parties to exchange written expert reports with each other and the court's expert The court also ordered the parties' experts to submit to depositions that would include questioning by the court'sexpert After hearing and cross-examining the parties' experts, the court's expert could revise her written report

B Ex Parte Communication

1 Communication Between the Judge and theExpert

Rule 706 does not explicitly address the issue of whether the judge and the appointedexpert may communicate ex parte during the course of the litigation Case law and canons of judicial ethics discourage off-the-record contacts between a judge and an expert witness Reacting to ex parte communication between the district court and anexpert, one appeals court ruled that "if any experts are appointed to advise the district court on any***1030** further matters in this litigation, they shall prepare written reports, copies of which shall become part of the record and shall be made available to all parties or their attorneys " [FN94] Another appellate tribunal recommended that all communications with an expert be conducted in either an on-the-record conference in chambers or an on-the-record conference call [FN95] The norm, as stated in the Code of Conduct for United StatesJudges, is that a judge should not consider "ex parte or other communications on the merits of a pending or impending proceeding "[FN96] The scope of the term "ex parte" is not defined further Whether this concept is applicable to court-appointed expertsis unclear

A broad prohibition of ex parte communications between a judge and a court-appointedexpert would impede necessary communication when the expert is appointed to serve as a technical advisor to the court, [FN97] a role analogous to that of a judicial clerk In such cases either the parties consented to off-the-record discussions between the judge and the expert or the court relied on its broader inherent power to appoint the expertas a technical advisor. In either event, the very purpose of the appointment was to secure anexpert who would "act as a sounding board for the judge helping the jurist to educate himself in jargon and theory disclosed by the testimony and to think through the critical technical problems " [FN98] That ***1031** educational function seems to contemplate ex parte communication, albeit with procedural safeguards [FN99] In the analogous context of seeking "the advice of a disinterested expert on the law applicable to a proceeding before the judge," the Code of Conduct for United States Judges permits the judge to obtain such advice and outlines a procedure for advising the parties about the consultation [FN100]

Our interviews revealed considerable ex parte communication between judges and experts as well as some confusion concerning the proper standard More than half of the judges who responded to the question "Did you communicate directly with the expert outside of the presence of the parties?" answered in the affirmative [FN101] About half of the judges limited their ex parte discussion to procedural aspects of theexpert's service including matters of availability [FN102] Often lengthy ex parte communications were required to recruit anexpert As one

judge said "I communicated extensively with [the prospective expert] in chambers prior to the appointment to convince him to accept it "

Some judges expressly structured the work of the court-appointed expert to prevent any danger of ex parte contact by, for example, instructing the expert to communicate only through formal reports [FN103] At least one judge, however, regretted limiting ex parte communication, saying that he "would not use an expert again unless I could discuss matters privately ***1032** [The court-appointed expert] did not educate me on a one-to-one basis and that is what I needed "

The remaining judges communicated with the court-appointed experts on at least some occasions to elicit technical advice outside the presence of the parties In most of these situations the very purpose of the appointment was to provide the judge with one-to-one technical advice We did not systematically ask about consent, but some judges indicated that the parties expressly consented to the ex parte communications In all other cases it appeared from the context of the interviews that the parties were generally aware of the arrangements and either expressly consented or failed to object For example, one judge had the "prior, general permission of the parties" to communicate on a one-to-one basis with the expert The parties expressly "agreed to waive their right to a report" from the expert and "to permit continuing dialogue during the trial and the preparation of my opinion " In addition to dialogue about technical issues in the case, the judge asked the expert to review a draft opinion for technical errors

In one case the communication with the expert was a side-by-side review of documents claimed to be privileged The parties selected the expert, participated in the process of instructing the expert, and did not oppose the procedure The expert advised the judge of the business purpose, setting, and significance of each document In another case, with the permission of the parties, the expert sat with the judge throughout a lengthy trial and discussed the evidence with him during breaks and at the end of the day Neither the judge nor the expert disclosed the contents of these discussions to the parties

Several judges devised procedures to subject their contact with a technical advisor to some of the checks and balances of the adversary system For example, one judge communicated ex parte with the expert, but made a record of the discussions and disclosed the exact content to the parties Another judge indicated that the parties' agreement to ex parte discussion was conditioned on his reporting the substance of such discussions to the parties These procedures inform the parties of the content of the judge's information about a case and allow them an opportunity to clarify, rebut, or even reinforce the expert's statements By notifying the parties of the substance of discussions and granting the parties an opportunity to respond, judges comport with the spirit of the limited permission for ex ***1033** parte communication with legal experts in the Code of Conduct for United States Judges Such procedures may also improve the efficiency of the litigation by focusing the attention of all participants on the same issues

2 Communications Between the Parties and the Expert

Rule 706 also fails to address the question of whether ex parte communication should be permitted between the expert and the parties [FN104] Some judges apply the same rules to court-appointed experts that they would apply to themselves [FN105] This would seem especially apt for cases in which the expert, as a technical advisor, is intimately involved in the decision-making process Even in the absence of an explicit order, however, attorneys should be aware that "ex parte attempts to influence the expert are improper " [FN106]

We found that about half of the responding judges permitted direct, separate communication between the expert and one or more parties Often, the nature of the appointment and the role of the expert led naturally, if not inexorably, to that practice The clearest example was the medical examination of a party by an expert to determine the extent of injuries Normally such examinations are conducted in private (i e , technicaly ex parte) with a copy of the report furnished to the parties and the ***1034** court [FN107] Adversarial participation would invade the privacy of the party and might compromise the expert's ability to obtain information on which to base a diagnosis

Several judges would permit ex parte communication between parties and expert witnesses under special circumstances Most of these instances concerned investigation of facts to support the expert's assessment For example, in a case in which an appointed expert also served as a special master, the judge permitted the expert to clarify questions that he or she had posed by communicating directly with the parties The judge instructed the expert to disclose fully to the parties all separate communications In a more traditional Rule 706 appointment, the expert was required to examine a list of secret ingredients in a product The judge and parties carefully crafted a way for the defendant's agent to communicate the trade secrets so that only the secrets were disclosed to the expert and no discussion of other issues was permitted In another case, the judge permitted the expert to meet separately with the parties as a part of the expert's assignment to formulate a proposed remedial decree The judge reasoned that "because [the expert] was looking at alternative remedies, he needed to look behind the claims and identify the needs of the parties " [FN108]

In several cases, ex parte communication between an expert and a single party appeared to have been unnecessarily closed While there may have been a special need to exclude the opposing party in these cases, none was apparent For example, in one institutional case the judge "permitted the expert to communicate directly with the officers at the [institution] with the idea of getting the fullest possible report of conditions " In another case, the judge permitted the expert to "interview the ***1035** parties about entries in their books and records" and to seek "justification or explanation for various entries " In yet another case the judge stated that "the nature of the task, including the collection of billing records, required that the parties be able to meet with the expert to furnish information "

In each of these cases the ex parte contact seemed to be more a matter of convenience than necessity Permitting the opposing party to participate might prevent due process challenges Because expert communication with parties separately may, in effect, generate evidence outside of the adversarial system, due process may require that the adverse party be notified of the ex parte contact and be given an opportunity to be present at the meeting(s) or, at least, to respond to the substance of the communication Absent precautions, a broad grant of investigative authority to an appointed expert may be susceptible to challenge on due process grounds We did not uncover any such challenges relating to court-appointed experts, but several cases dealing with the powers of special masters may provide useful analogies [FN109]

C Pretrial Reports and Depositions

Unless the parties agree otherwise, the court-appointed expert must advise the parties of any findings, submit to a deposition by any party, and respond to cross-examination of his or her testimony, if any, at trial [FN110] Findings may be presented in a written report, by deposition, in testimony ***1036** in open court, or through some combination of the above [FN111]

We found that, except when used as a technical advisor, [FN112] the expert invariably reports findings to the parties In several cases the parties met informally with the expert to discuss his or her report Generally, the findings are in the form of a written report furnished to the court and the parties In two instances the expert reported orally to the parties, once by deposition, and once in a meeting in the judge's conference room In the few cases where the expert was appointed immediately before or during trial, the expert reported by way of testimony at the trial or hearing One judge reported the practice of using the report of the expert as the equivalent of direct testimony at the trial

Three of the judges, all of whom had appointed experts more than once, asked the expert for a preliminary report, then permitted the expert to modify this report after reviewing the reports of the parties' experts The use of a preliminary report "serve [s] to give [the judge] an independent report" and allows "an opportunity to take into account the reports of other experts " Formal depositions are relatively infrequent, occurring in about one case in four

D Presentation of Expert Opinion in Court

1 Frequency and Nature of Testimony

Although Rule 706 seems to anticipate that court-appointed experts will testify at trial, [FN113] our earlier review of reported decisions found that*1037 court-appointed experts can serve a range of nontestimonial functions during different stages of the litigation [FN114] Although published opinions reveal some instances of court-appointed experts presenting testimony at trial, [FN115] references to nontestimonial functions were two to three times more frequent [FN116]

Our interviews revealed that testimonial use of experts was more frequent than suggested by the published opinions Roughly half of the cases discussed by the surveyed judges involved court-appointed experts' testimony presented in court, usually at a trial, less frequently at a pretrial evidentiary hearing Approximately one in five of the testimonial uses of court-appointed experts occurred in jury trials On the other hand, settlement was less frequent than commentary on Rule 706 led us to expect [FN117]

2 Advising Jury of Court-Appointed Status

One of the controversial aspects of Rule 706 is that it explicitly grants the trial judge discretion whether to inform the jury that the expert was appointed by the court [FN118] Some commentators have opposed informing the jury of the expert's status, fearing that that knowledge that the court appointed the expert will undermine the adversarial system and dominate the jury decision-making process [FN119] One court concluded that a court- appointed expert "would most certainly create a strong, if not overwhelming, impression of 'impartiality' and 'objectivity' which could potentially transform a trial by jury into a trial by witness "[FN120]

Reference to the court's role in the appointment of an expert, however, has rarely been challenged in litigation, and there is little case law on the issue [FN121] When faced with such a challenge, courts may be concerned that scientific proof will "assume a posture of mystic infallibility in the eyes of a jury of laymen "[FN122] The trial court retains discretion, however, to decline to place a judicial imprimatur on a witness if concerned that the jury will give undue weight to a court's expert [FN123]

Only seven jury trials were identified from the interviews in which the court-appointed expert offered testimony in court In all but one of these cases, the judge or the party calling the witness informed the jury of the expert's court-appointed status In the only exception, it appears that*1039 neither party was sufficiently advantaged by the report to want to underscore its source At the other extreme, one judge reported that the advantaged party called the expert "with great flourish," had the order appointing the expert read to the jury, and asked a series of questions emphasizing neutrality, the source of the appointment, and the method of payment

We found no consensus about whether courts should permit or prohibit the identification of an expert as appointed by the court One judge declared that the jury "should know" because the fact that "one of the experts was not paid by a party" is "relevant to the assessment of credibility " Another found a benefit from disclosure in that "the knowledge that such a disclosure will be made is effective in bringing about settlement " One judge would vary the disclosure with the type of case, permitting disclosure of court sponsorship of a technical expert in a patent case, and not permitting it of an orthopedic expert in a personal injury case

In two of the cases in our study, the judge disclosed the appointed status of the expert and issued a cautionary instruction that the fact of court appointment should not result in giving greater weight to that expert than to the parties' experts One of the judges who reported using the cautionary instruction said, " [I am] not satisfied with the current procedure because I don't think the jury should be influenced by the act of the judge in appointing the expert "

Two judges who had used court-appointed experts on multiple occasions indicated that they would use in limine rulings to prevent the lawyers from calling attention to the court-appointed status of the witness One recommended the following procedure to disguise the status "I would allow the favored party to call the expert and allow the other party to cross-examine I would instruct the lawyers not to mention the fact of appointment "

Our impression is that none of the judges doubt that the status of the expert is relevant to credibility The question is whether a jury can weigh credibility without being unduly impressed by the neutral posture and apparent judicial imprimatur of the court's expert As we discuss below, judges and juries both tended to reach conclusions that were consistent with the advice of a court-appointed expert Given that finding, concern about undue influence seems reasonable

***1040** 3 Sequencing the Testimony of the Court-Appointed Expert

How should the court-appointed expert's testimony be sequenced in relation to the testimony of the parties' witnesses? The timing and sequence of the testimony may have serious effects on the jury's recollection of the evidence and may distort the normal primacy and recency benefits that accompany the opening and closing presentations during the trial [FN124] A presentation by the expert in either the beginning or the end of the trial can be expected to have greater influence than a presentation during the middle of the trial (e g , after the close of the plaintiff's case and before the defendant presents direct testimony) The logic of the case, however, might suggest a different sequence, for example, after the testimony of the experts for both parties [FN125] The trial court has discretion to control the order of presentation of the evidence [FN126] With little additional guidance from the rules or case law, courts have explored this question on a case-by-case basis

The judge in one series of cases called an expert and asked three questions to elicit the expert's opinion [FN127] The party most disadvantaged by the expert's report was then allowed to cross-examine In the other six cases in which a court expert testified at a jury trial, the judge more or less left the issue of presenting the expert to the parties Indeed, in none of the six cases did the judge ask any questions of the expert The absence of questions from the judge contrasted starkly with the practices of judges in bench trials in almost all of the bench trials, the judge reported asking questions of the expert

In two of the six cases described above, the judge reported that the ***1041** party favored by the court-expert's report called the expert and conducted a direct examination In all cases, the disadvantaged party cross- examined In cases in which the judge directly called the expert, both parties had an opportunity to cross-examine

4 Effect of the Testimony of the Appointed Expert

Our interviews revealed that juries and judges alike tend to decide cases consistent with the advice and testimony of court-appointed experts We asked, "Was the disputed issue resolved in a manner consistent with the advice or testimony of the 706 expert?" Of fifty-eight responses, only two indicated that the result was not consistent with the guidance given by the expert Both of those cases involved bench trials in which the judge pursued a legal analysis that was independent of the technical issues In one, the judge decided about an appropriate remedy but found it useful to have the expert's analysis of the strengths and weaknesses of an alternative proposal In the other, the judge ruled that the plaintiff had not met its legal burden of proof [FN128] Two of the fifty-eight judges indicated that the expert did not give any advice, but simply had explained the technical issues and the testimony of the parties' experts Three judges indicated that the information provided by the expert was used in conjunction with other information to shape a resolution of the issue

In the remaining fifty-one cases, including seven jury trials, the outcome was consistent with the expert's advice or testimony Whether the advice of the expert influenced the outcome is, of course, another matter Twenty-one of the judges who indicated consistent outcomes also volunteered the information that the experts' opinions were not the exclusive, or even the most important, factor in determining the outcome of their cases Seven of the twenty-one

cases settled following the submission of the expert's report or testimony, and the judges believed that the resolution was consistent with the report of the appointed expert In the remaining fourteen cases the judge indicated that the report or testimony of the appointed expert provided a context for understanding and evaluating other evidence presented by the parties

In eleven of those fourteen cases the judge indicated that he or she followed***1042** the advice of the appointed expert, either generally or regarding one of several issues For example, one appointedexpert set forth a general plan for restructuring a business following a declaration of bankruptcy The parties made additions and alterations to this plan which the judge then adopted One appointedexpert outlined the historical and legal backgrounds of the prohibitions on sex discrimination in athletics, which were then used in assessing the testimony of the parties' experts In another case, the judge used an expert on institutional conditions while maintaining that the expert was "neutral and recited the conditions" without giving "a final opinion statement " At the same time, the expert gave the judge "ideas about solutions" that benefited all parties

In three of the fourteen cases the judge had questioned one party's expert testimony, but the appointed expert confirmed that testimony While the resolutions of the cases were consistent with the testimony of appointed experts, it is clear that the testimony of each appointed expert was one of several sources of information influential in resolving the case In one of the three cases, the judge reported that the Rule 706 expert confirmed the testimony offered by the plaintiff's expert, removing the judge's doubts about the plaintiff's evidence and paving the way for a ruling that the plaintiff had met his or her burden of proof In a sentencing matter, the judge "was able to use the expert's testimony to craft modifications of the sentence and recommendations for conditions of confinement " In another case, the expert confirmed the judge's impression about the abnormality of a defendant's record- keeping practices on a critical point

In discussing their appointment of an expert, judges often expressed enormous personal and professional respect for the expert [FN129] In at least two cases, the expert was appointed primarily to serve as a technical advisor to the judge and not as a witness In such cases the judge's rapport with the expert implied a faith in the expert's credibility that could easily have led the judge to follow the advice of the expert

One judge in a bench trial reported that he gave more credence to the 706expert and to the parties' experts with whom the 706 expert agreed than to the opposing expert Another judge reported that the appointed expert's testimony was "very influential" in a bench trial Another judge ***1043**relied more on the 706 expert because he was neutral In yet another case, the judge reported mixed reliance on a 706 expert "In some areas, his testimony dominated, in others, the parties' experts had superior knowledge Some [of the parties' experts] were national experts who were quite knowledgeable " In only one instance did a judge indicate disagreement with the court's expert

Our final question when the case involved a jury trial was, "Did the testimony of the court-appointedexpert appear to overwhelm the expert testimony offered by the parties?" In a dozen jury cases,[FN130] it appears that the testimony of court-appointed experts dominated the proceedings In general, the testimony of the court's expert affirmed the testimony of one of the parties' experts, thereby overcoming contrary evidence

The most dramatic illustration of dominance by a court expert occurred in a case in which a large number of workers claimed damages due to working conditions At the behest of the court, a physician examined all of the workers and reported findings for each plaintiff The physician's court-appointed status was disclosed to the jury, and the judge reported that "the juries discounted the experts for each side " In fact, in each individual case, the jury followed the findings of the court-appointed expert, finding sometimes for the plaintiff and sometimes for the defendant

In a series of asbestos cases, a judge indicated that the testimony of the expert must have overwhelmed the testimony of the opposing experts Each of four jury verdicts agreed with the court expert that the plaintiff had not suffered an asbestos-related impairment [FN131] In another case involving a question of sanity, the judge was "sure the testimony of the court-appointed expert was decisive for the jury " In another jury trial, the judge found the

appointed expert to be a "brilliant" person who "overshadowed every other expert" and "was recognized as an authority by the experts of both parties " In one jury case, the court'sexpert was the only expert In yet another case, the judge said that the jury "agreed ***1044** with" the 706 expert, but the judge found the word "overwhelm" too strong to describe the jury reaction In another case the judge said theexpert's testimony "was the most credible and was therefore given more weight "

In three of the twelve jury cases judges did not find testimony of the court-appointedexperts to dominate the jury's decision In two, judges said that they were unsure of the influence of the court'sexpert on the jury Finally, in one case the judge recalled that the jury "awarded an amount that reflected a compromise between the amount supported by the 706 expert and the amount supported by theexpert of one of the parties "

We are wary of overstating the strength of these findings in light of the inability of social psychologists to demonstrate greater deference to appointed experts by jurors in controlled laboratory settings [FN132] The Advisory Committee notes accompanying Rule 706 warn that "court-appointed experts acquire an aura of infallibility to which they are not entitled " [FN133] Our findings of consistency between appointed experts' testimony and the resolution of disputed issues seem to justify this concern

When viewed in the light of the circumstances leading to an appointment, perhaps it should come as no surprise that the outcome of a case is greatly influenced by the testimony of an appointedexpert Since the absence of an impartial factual basis to decide the case was a prerequisite to the appointment, it follows that the testimony of the appointed expert is likely to be influential The primary reasons for appointment of anexpert were either a failure of the parties to offer credible expert testimony or an actual or anticipated conflict in the testimony of the parties' experts that defied resolution through traditional means Regarding the failure of advocacy cases, we reported (in Section III) that in eighteen of the thirty-six cases involving judges who had usedRule 706 only once, the judges indicated that there was a failure by one or both parties to present credibleexpert testimony In many of these cases there was no credible evidence at all on the technical issue Given a void of evidence on a critical issue, the court-appointed expert's testimony would necessarily be influential

***1045** Similarly, in cases with an unresolvable conflict among the parties'experts, the equipoise in the evidence prior to appointment renders the court-appointed expert likely to tip the scale to one side or another Any other result would raise significant questions about whether there had been a need for an outsideexpert These reasons tend to explain and qualify our findings Nevertheless, the central finding is clear judges who appointed anexpert indicated that the final outcome on the disputed issue was almost always consistent with the testimony of the appointed expert.

In summary, the concerns of judges and commentators that court-appointedexperts will exert a strong influence on the outcome of litigation seem to be well founded Whether such influence is appropriate is a different question In almost all cases, the jury was aware of the expert's court-appointed status and seemed influenced by theexpert's apparent neutrality Some judges think that it is important for the jury to know the status as an aid in assessing credibility Some judges who presided over jury trials, however, expressed misgivings about permitting revelation of court-appointed status because it seemed to have led to automatic reliance on theexpert by the jury Potential controls, such as imposing in limine restrictions on lawyers and camouflaging the source of a witness, remain untested

Judges were, of course, always aware of the experts' status In their instructions to experts and in the course of work with them, judges frequently showed a conscious effort to maintain control of the legal and policy analysis and decision making, while limiting technical information and advice to a subsidiary, instrumental role Nevertheless, our interviews reveal a high degree of consistency between the outcome of litigation and the testimony and advice of court-appointedexperts

VI COMPENSATION OF COURT-APPOINTED EXPERTS

Payment of court-appointed experts presents an awkward problem for judges Although judges appoint the experts, typically judges must turn to the parties for compensation Furthermore, because anexpert may serve long before the case is resolved, a means must be found to provide prompt payment while retaining the option of reallocating the expenses among the parties based on the resolution of the issues Parties may resist compensating experts they did not retain and who offer testimony that is damaging to their interests If the parties balk at payment the judge must either ***1046** enforce payment by means of a formal order and a hearing, thereby disrupting the litigation and increasing the level of acrimony between the parties, or postpone payment,thereby leaving the expert uncompensated for an indefinite period

Interviews with judges suggest that such practical problems in providing compensation can thwart the appointment of an expert Judges expressed concerns regarding payment when describing how theexperts were compensated [FN134] and at a number of other points in the interviews When asked why more judges do not use court-appointed experts, fourteen judges focused on the difficulties in providing compensation Reliance on the parties for payment of fees was cited by several judges as the principal reason for restricting appointment ofexperts to cases in which the parties consent to an appointment As one judge who had never appointed anexpert stated, the lawyers find the process "hard to justify to their clients when the client is paying forexpert testimony already," particularly when the court-appointed expert may "hurt the client's case, making the client even angrier " When asked what changes in the rule would make court-appointedexperts more useful, the most common suggestion from judges was for clarification of the means of compensating the expert [FN135] While appointment of an expert poses many practical problems, providing a mechanism ensuring the prompt compensation for appointedexperts appears to be one of the more serious ones

Rule 706, supplemented by statutory authority and case law, grants judges broad discretion in allocating the costs of appointed experts among the parties but allows little opportunity to turn elsewhere for compensation The following sections address four different circumstances that affect the manner of compensation special instances of land condemnation actions and criminal cases in which the rule permits theexpert to be compensated from public funds, matters involving general civil litigation (in which the court must rely on the parties for compensation), general civil litigation when one of the parties is indigent, and occasions when the court wishes to employ a technical advisor as opposed to a testifying expert

***1047** A Statutory Basis for Compensation from Public Funds

In two circumstances, land condemnation cases and criminal cases, Rule 706 and related statutes authorize payment of the appointed expert from public funds In land condemnation cases, all costs, including fees for an appointed expert to testify regarding compensation for the taking of property, are assessed against the government, not the property owner [FN136] In the few instances we encountered in which anexpert was appointed to assist in a condemnation proceeding, the fee was paid by the Department of Justice with little difficulty

Obtaining payment for experts in criminal cases follows a similar process Again, the rule and related statutes [FN137] permit payment of the expert's fees from public funds The Criminal Justice Act authorizes payment of experts' expenses when such assistance is needed for effective representation of indigent individuals in federal criminal proceedings [FN138] In criminal cases in which the United States is a party, the Comptroller General has ruled that the source of payment is to be the Department of Justice, not the Administrative Office of the U S Courts [FN139] Four judges revealed that they had appointed experts to aid in assessing the physical or mental condition ***1048** of a defendant, three of the judges indicated no difficult in obtaining payment, while one indicated some initial reluctance by the Department of Justice followed by prompt payment

B Payment of Fees by Parties

In the most common litigation context, the court appoints anexpert with the expectation that the expert will offer testimony at a trial or hearing or produce a pretrial report that will facilitate settlement Except for criminal and land

condemnation cases, under Rule 706(b) "the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs "[FN140] The flexibility of the rule permits the court to rely on the parties to compensate the expert when service is rendered rather than waiting until the conclusion of the litigation The court may order the advance payment of a reasonable fee [FN141] for a court-appointed expert and defer the final decision on costs assessment until the outcome of the litigation is known [FN142] Such an order is intended to limit the possibility of a deferred payment's biasing an expert's testimony in favor of (or against) the party with the ***1049** greatest ability to pay [FN143] The court may allocate the fees among the parties as it finds appropriate both as an interim measure and in the final award One court has held that the "plain language of Rule 706(b) permits a district court to order one party or both to advance fees and expenses for experts that it appoints " [FN144] In brief, the court has discretion to order a single party to pre-pay the full cost of the appointment [FN145]

At the conclusion of the litigation, Rule 706 also provides that the expert's "compensation shall be charged in like manner as costs " [FN146] This means that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs " [FN147] Courts sometimes have apportioned fees among the parties, in some cases simply splitting the costs equally [FN148] and in other cases basing the apportionment on the outcome of ***1050** the litigation [FN149] Of course, if the parties settle short of a resolution on the merits of the dispute, allocation of the expert's fees may be part of such a settlement agreement

Most judges require the parties to split the expert's fee, with the party prevailing at trial being reimbursed for its portion Often the parties arrive at this arrangement without judicial involvement In other instances, especially those in which the parties are reluctant to endorse the court's appointment of an expert, the judge may issue an order that requires the parties to pay a fixed amount to cover the expert's fees In several cases in which an appointed expert served for a lengthy period, the court required the parties to make periodic payments into an account from which the court then compensated the expert Judicial participation in the payment process varied greatly Some judges permitted the expert to bill the parties directly, other judges had the expert submit the bill directly to the judge with copies to the parties and required the parties to pay a proportional amount unless they objected to the bill

Obtaining payment for the expert from the parties proved to be troublesome in several instances As one judge noted, "It [is] a bitter pill for the disadvantaged party to have to pay for harmful testimony "[FN150] Occasionally, one of the parties would simply refuse to pay Then the judge generally held a hearing and, when necessary, demanded that the payment be made In several instances the court had to impose injunctive relief as a means of ensuring that the payment was made In discussing these instances the judges repeatedly indicated their great uneasiness at the prospect of incurring the services of an expert and then being unable to pay for those services in a timely manner Concerns about securing payment moved several judges to employ a court-appointed expert only with the consent of the parties

***1051** C Compensation of Appointed Experts When One Party Is Indigent

As a practical matter, the indigent status of one or more of the parties restricts the ability of a court to allocate the expense of the expert among the parties The court has the authority to order the nonindigent party to advance the entire cost of the expert [FN151] However, the judges indicated a great reluctance to employ such experts when the expense cannot be shared We asked a number of the judges, including those who had not appointed experts, what they would do if one of the parties was indigent Often they responded that they would proceed with the evidence at hand and decide the case to the best of their abilities, since forcing one party to bear the full expense of the court-appointed expert was a step they were unwilling to take

We found six instances in which a judge appointed an expert when one or more of the parties were indigent In each case, the indigent status of the party limited the extent to which the party could present expert testimony, limited the effectiveness of the adversarial examination of the opponent's contentions, and raised concerns that the judge sought to address by appointment of an expert Three of these cases involved prisoners proceeding pro se and

challenging the conditions of their incarceration In each circumstance there was reason to believe that there was merit in the prisoner's complaint, [FN152] and the court appointed an expert with the expectation ***1052** that the expert would be compensated by the state In one recent prison condition case, the court indicated that if plaintiff prisoners could properly demonstrate indigence, the court would appointexperts and require the defendants to pay [FN153] Experts were appointed in two other cases, but in both cases alternative authorities for appointing anexpert and imposing costs on the defendants were utilized [FN154]

The most difficult circumstance identified concerned the appointment of anexpert in a suit by an indigent family contending that exposure to toxic chemicals caused a number of physical injuries as well as emotional harm The indigent status of the plaintiffs limited the amount ofexpert testimony they offered The judge doubted the integrity of the defendants' expert testimony and appointed an expert to testify about whether the chemicals had carcinogenic properties The judge indicated that the presence of children as plaintiffs in the case caused him to be especially reluctant to decide the case without additional expert testimony, since the children as well as the parents would be barred by an adverse judgment from raising future claims In this case, much of the difficulty was avoided when the defendant agreed to pay the expense of the court-appointed expert

These few instances suggest the difficulties that may be encountered when addedexpert assistance is required and one or more of the parties are indigent Although Rule 706 supports the imposition of the expenses on the nonindigent party, [FN155] judges seem willing to impose one-sided expenses only when the indigent party's claim shows some merit, or when the nonindigent party has agreed to assume the cost of theexpert The difficulties in providing payment in such circumstances suggest that the ***1053** few instances recounted above may be far overshadowed by instances in which no appointment was made because of an inability to find a means of fairly compensating an appointed expert [FN156]

D Compensation of Technical Advisors

Finally, it also proves difficult to compensate an expert appointed as a "technical advisor" who may confer in private with the judge and who is not expected to offer testimony Through our interviews we identified several instances in which a Rule 706 expert advised the court on the interpretation of evidence submitted by the parties rather than presenting evidence as a witness Payment in these circumstances was simplied by the fact that the parties apparently consented to the appointment and agreed to share the cost of theexpert In a limited number of circumstances, the Administrative Office of the U S Courts has been willing to assume the costs of such services, but the Administrative Office has denied requests for such services where appointment of such anexpert would be appropriate under Rule 706 of the Federal Rules of Evidence or under Rule 53 of the Federal Rules of Civil Procedure Securing compensation for a court-appointed expert remains an impediment to the full utilization of Rule 706

In Reilly v United States , [FN157] the Court of Appeals for the First Circuit addressed the district court's use of a technical advisor and payment of the technical advisor's fees and expenses by the Administrative Office Citing statutory authority that permits the judiciary to employ consultants and experts [FN158] the district judge petitioned the Director of the Administrative Office for permission to appoint and compensate atechnical advisor. [FN159] The judge expressly disavowed appointment under authority ofRule 706 since he wished to employ the expert to advise him in chambers regarding interpretation of evidence presented at trial, and not to present additional***1054** evidence or testimony Permission to appoint thetechnical expert was granted and the expert was compensated from the funds appropriated to the judiciary We are aware of only one other instance in which the Administrative Office has agreed to pay the expenses of a technical advisor. [FN160] In both of these instances the payment was at the behest of a plaintiff who suffered childhood injuries In one case, the proceedings were nonadversarial, in the other, the presentation on a highly technical issue was one-sided [FN161] It seems that this form of payment is available only in very unusual circumstances in which theexpert is to provide technical assistance to the judge rather than to present evidence to the court, and in which the Director of the Administrative Office has approved such an expenditure prior to the appointment

VII IMPROVING THE USE OF COURT-APPOINTED EXPERTS

This section presents the judges' overall assessments of the service provided by the court-appointedexperts and their suggestions for improvements in Rule 706 and related procedures A pretrial procedure is described that is intended to ease the consideration of scientific and technical evidence The pretrial procedure is based on early identification of issues likely to requireexpert testimony, specification of disputed issues of science and technology, and screening of expected testimony of parties'experts This procedure will diminish the difficulties that arise when a judge determines that appointment of an expert is appropriate

A Satisfaction with Appointed Experts and Suggestions for Improvements

The judges who appointed experts were almost unanimous in expressing their satisfaction with theexpert all but two of the sixty-five judges ***1055** indicated that they were pleased with the services provided [FN162] Whatever difficulties may have arisen as a result of the appointments, the judges indicated that the appointedexperts provided highly valued services [FN163]

When asked about the need for changes, most judges indicated that they were satisfied with the present form of the rule [FN164] Those judges who suggested changes focused on problems that have been discussed earlier, especially problems related to compensation [FN165] and ex parte communication [FN166] In general, the suggestions called for more guidance concerning the exercise of judicial discretion in these areas These suggestions are reviewed in order of their frequency

Ten judges repeated their concern over difficulties in compensating the appointedexpert and recommended more explicit guidance concerning allocation of costs The need for guidance is especially great where one of the parties is hard pressed to make an equal contribution The difficulty of imposing costs on indigent parties caused four judges to suggest that a separate fund be established to permit compensation ofexperts in such ***1056** cases [FN167] The present rule grants the judge authority to allocate compensation expenses under almost any plan that he or she regards as appropriate and that is not arbitrary or capricious [FN168] Some clarification concerning the exercise of this authority may be beneficial

Six judges mentioned the need for more guidance concerning ex parte communication between the judge and the expert [FN169] These judges mentioned their frustration in avoiding ex parte communication when theexpert was appointed to educate the judge regarding unfamiliar issues The presentform of the rule does not explicitly address such use, it focuses instead on the testimonial function of suchexperts and reliance on cross-examination to guard against bias These judges recommend that the rule (or perhaps the Advisory Committee notes) be amended to address the appropriate forms of interaction with an appointedtechnical advisor. Such a revision could define the extraordinary circumstances that justify ex parte communication [FN170] The aim would be to balance the felt need of some judges for technical advisors with proper deference to adversarial principles For example, an amendment to the rule or notes could describe the circumstances that would merit such assistance, the extent to which-and the manner in which-the parties should be given an opportunity to confront facts communicated to the judge, and the procedures used to guard against improper delegation of judicial authority Such an amendment could also address circumstances under which ex parte communication between the judge and the appointedexpert could be undertaken with the prior explicit consent of the parties

Three judges were concerned with the difficulty in selecting a neutral, unbiasedexpert and commented on the need for greater access to candidates who are both independent and knowledgeable One judge suggested that independent panels of experts be assembled to consider various topics ***1057** of concern and report to the courts, another suggested establishing a pool of independentexperts who would only serve when appointed by the courts, and one suggested that outside organizations should play a more active role in directing courts to competent, independent experts The facts that judges often appoint experts with whom they are acquainted and that some judges reported difficulty finding experts [FN171] suggest that judges may welcome opportunities to consider

experts presenting a broader range of professional expertise and opinion [FN172] Cooperation with organizations outside the judiciary may expand such opportunities [FN173]

Two judges recommended that Rule 706, or a parallel rule of civil procedure, attend more to the pretrial aspects of litigation [FN174] One of these judges suggested that Rule 706 should be framed within the Federal Rules of Civil Procedure rather than the Federal Rules of Evidence [FN175] Placement of such authority in the Federal Rules of Civil Procedure would be consistent with the rules increasing attention to issues relating to***1058** expert evidence and pretrial procedures, [FN176] and would permit integration of the rule allowing for court-appointedexperts with the authority for appointment of special masters [FN177] Consideration of a rule of civil procedure for court-appointed experts could also provide an occasion to consider procedures for exercising a court's inherent authority to use technical advisors. [FN178]

B A Pretrial Procedure to Aid in Understanding Complex Expert Testimony

Even within the structure of the present rule, there is opportunity to tailor procedures to permit more focused consideration of scientific and technical evidence This section presents a pretrial procedure that is intended to ease the consideration of difficult scientific and technical evidence [FN179] This procedure is based on (1) early identification of issues likely to require expert testimony, (2) specification of disputed issues of science and technology, and (3) screening of expected testimony by parties' experts to ensure admissibility This pretrial procedure need not culminate in the appointment of anexpert by the court, it permits several alternatives to such an appointment If, however, the judge determines that appointment of anexpert would be appropriate, the suggested procedure ***1059** should aid such an appointment

This proposed pretrial procedure is intended for cases that turn on evidence that is not readily comprehensible Furthermore, the procedure will be most useful to judges who wish to inquire into the nature ofexpert testimony and identify likely difficulties arising from the presentation of scientific andtechnical evidence It is intended to permit recognition of difficulties at an early point in the litigation and allow the judge to narrow disputed issues by encouraging the parties and experts to specify their assumptions and designate areas of agreement and disagreement If questions of admissibility are raised, the proposed procedure would enable the judge to conduct in limine hearings to resolve such questions and to enter summary judgment where claims or defenses are not supported or rebutted by admissible evidence In those extraordinary cases in which the court requires the assistance of an appointedexpert, an effective pretrial procedure will enable an appointment in time to avoid delay in the litigation and difficulties in securing the effective services of an expert Description of the proposed procedure is divided into (1) those pretrial practices that function independently of appointment of an expert and (2) special practices suited for such an appointment

C Clarification of Disputed Issues Arising from Complex Evidence

1 Early Identification of Disputed Expert Testimony

All but the simplest techniques for addressing problems arising from difficult expert testimony require early awareness of disputed scientific and technical issues One of the major impediments to the appointment ofexperts, according to our survey, is that judges are often unaware of disputes amongexperts about technical issues until it is too late to make an appointment [FN180] Even if a judge decides to invoke none of the extraordinary pretrial procedures intended to address issues of expert testimony, such as appointment of an expert or special master, knowledge of especially difficult disputed issues prior to trial will enable a more informed consideration ofsuch issues when they are presented If extraordinary procedures are to be invoked, awareness of looming difficulties may be critical if the full range of pretrial devices are to be considered

***1060** Judges have a number of opportunities to make some inquiry into the nature of profferedexpert testimony,

if only to ensure that it will assist the trier of fact as required under Rule 702 of the Federal Rules of Evidence The initial Rule 16 conference provides a natural opportunity to probe into issues that appear to require expert support, but such a conference may come before the parties are aware of the conflicts Judges who use a scheduling order in lieu of an in-chambers Rule 16 conference may, as part of a standard pretrial order, require disclosure of anticipated expert testimony [FN181] Once disclosure is ordered, it is a small step to require parties to bring disclosed conflicts to the court's attention as soon as they become evident Or the court, in its standing order, could require the parties to submit a copy of the expert disclosures to the court and the court could use those disclosures to identify impending battles of experts.

Recent amendments to Rule 26(a)(2) of the Federal Rules of Civil Procedure increases the information to be disclosed on experts that are to testify at trial, thereby easing early identification of disputed issues Not less than ninety days before the trial each party must disclose written reports prepared by the testifying witnesses that include, among other things, "a complete statement of all opinions to be expressed and the basis and reasons therefor, [and] the data or other information considered by the witness in forming the opinions "[FN182] Failure to make such disclosures will bar testimony by the expert at trial [FN183] The Manual for Complex Litigation also encourages early identification of difficult or complex litigation, and early intervention by the judge to ensure the efficient conduct of the litigation [FN184]

2 Attempts to Narrow Disputes

Rule 16 of the Federal Rules of Civil Procedure encourages efforts to narrow disputes during pretrial, a mandate that can extend to disputes between parties' experts as well as the parties themselves One subject ***1061** appropriate for discussion at the pretrial conference is "the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof " [FN185] Efforts to narrow disputes among experts may be especially useful where identification of disputed issues suggests that the experts' testimony will be in direct and complete opposition Interviews with judges revealed that early indications of complete and thorough disagreement between experts often foreshadowed greater difficulties at trial

A variety of devices can be used to explore the differences among experts, determine the extent of their disagreement, and clarify issues that underlie the dispute Identifying the differences in assumptions that drive the more general disagreements will permit the trier of fact to try to focus on the assumptions rather than attempt to sort through the consequences of such disagreements Some judges approach this task by asking experts to stipulate to those issues on which they agree and disagree, much like the factual stipulations that parties are often asked to provide [FN186] Alternatively, the parties may be asked to submit a joint report, setting forth areas of agreement and disagreement [FN187] Some judges present the parties with a list of issues that they should respond to in preparing such a report [FN188] With especially demanding expert testimony, some judges convene a joint conference with counsel and the key experts and engage in a formal or informal colloquy concerning the differences between the experts [FN189]

***1062** 3 Screening of Expert Testimony

Identifying and narrowing disputed issues may lead to doubts concerning the admissibility of some of the proffered expert testimony Questions may arise concerning the qualifications of those likely to be called as experts, or the validity and fit of the information on which the experts base their testimony As part of the gatekeeping role recognized by the Supreme Court in Daubert , the judge may wish to conduct a separate pretrial hearing to determine the admissibility of proposed expert testimony [FN190] Such a hearing may dispose of questionable testimony, thereby providing the parties with a better understanding of the evidence to be presented at trial [FN191] If the court finds that there is no admissible evidence to support essential elements of a claim or defense, the court may dispose of the action or defense by summary judgment [FN192]

D Appointment of an Expert

When a pretrial procedure based on the above elements fails to reveal information necessary to permit a reasoned resolution of the disputed issues, a judge may wish to consider appointing anexpert Our interviews suggested that such cases will be infrequent and will be characterized by evidence that is particularly difficult to comprehend, credible experts who find little basis for agreement, and a profound failure of the adversarial system to provide the information necessary to sort through the conflicting claims and interpretations Judges who had appointedexperts emphasized the extraordinary nature of such a procedure and showed no willingness to abandon the adversarial process before it had failed to provide the information necessary to understand the issues and resolve the dispute

***1063** Cases involving unrepresented or poorly represented parties may also merit appointment of anexpert When one or more of the parties are unable to or choose not to presentexpert testimony, a court may be uneasy resolving the issue on the basis of expert testimony provided by a single party If the court doubts the competence of the testifying experts or the validity of the information on which the testimony is based, it may have to choose between appointing an expert and proceeding without competent testimony on a critical issue Several judges, in describing the issues that caused them to consider an appointment, also mentioned the interests of minors or a public interest that was not adequately represented In such cases the importance of reaching a correct resolution of disputed evidentiary issues may be especially great, and appointing anexpert may be the most practical means of obtaining information

The pretrial procedure outlined above should ensure that every effort has been made to obtain the necessary information short of appointing an expert Where appointment of an expert appears to be the only means of obtaining necessary information, an effective pretrial procedure also provides an early indication of the problem, permitting the appointment to be undertaken in a timely manner without disrupting or postponing the anticipated trial An effective pretrial procedure also will develop material that will aid in instruction of the appointedexpert While we do not advocate appointment of an expert to encourage settlement, early awareness by the parties that such an appointment is being considered will permit them to engage in settlement negotiations with an awareness of that prospect

Appointing an expert increases the burden on the judge, increases the expense to the parties, and raises unique problems concerning the presentation of evidence These added costs will be worth enduring only if the information provided by the expert is critical to the resolution of the disputed issues An effective pretrial procedure is intended to identify cases that can be resolved in an expeditious manner without appointing anexpert, as well as cases that require such assistance

1 Initiation of the Appointment

The interviews suggest that the appointment process will have to be initiated by the judge, rarely do the parties raise this possibility on their own Again, an effective pretrial procedure is intended to inform the judge of the nature of the underlying evidentiary disputes so that the judge is***1064** less reliant on the parties to inform the court of such disputes The possibility of such an appointment may be raised at pretrial conferences [FN193] The court can initiate this process on its own by entering an order to show cause why anexpert witness or witnesses should not be appointed [FN194]

In responding to the order, parties should address a number of issues that may prove troublesome as the appointment process proceeds Parties should be asked to nominate candidates for the appointment and give guidance concerning characteristics of suitable candidates Those judges who encouraged bothparties to create a list of candidates and permitted the parties to strike nominees from each other's list found this to be a useful method for increasing party involvement and developing a list of acceptable candidates

Greater party involvement in identifying suitable candidates diminishes the judge's reliance on friends and colleagues for a recommendation When parties fail to recommend a suitable candidate, the judge may find it

difficult to identify a candidate who is both knowledgeable in the relevant specialties and disinterested with respect to the outcome of the litigation Academic departments and professional organizations may be a source of such expertise

Compensation of the expert also should be discussed with the parties during initial communications concerning the appointment Unless the expert is to testify in a criminal case or a land condemnation case, the judge should inform the parties that they must compensate the appointedexpert for his or her services [FN195] Typically each party pays half of the expense, with the prevailing party being reimbursed by the losing party at the conclusion of the litigation Raising this issue at the outset will indicate that ***1065** the court seriously intends to pursue an appointment and may help avoid subsequent objections to compensation If difficulty in securing compensation is anticipated, the parties may be ordered to contribute a portion of the expected expense to an escrow account prior to the selection of the expert If this procedure is followed, objections to payment should be less likely to impedethe work of the expert once the appointment is made

Finally, the court should make clear the anticipated procedure for interaction with theexpert in its initial communications The assistance sought by the court and the anticipated manner of interaction can be described If ex parte communication between the court and theexpert is expected, the court should outline the specific nature of such communications, the extent and manner in which the parties will be informed of the content of such communications, and the parties' opportunities to respond Each of these issues is discussed in greater detail below This initial communication may be the best opportunity to raise such considerations, entertain objections, and inform the parties of the court's expectations of the practices to be followed regarding the appointedexpert

2 Communicating with the Appointed Expert

Conversations with judges revealed that communications withexperts is one of the most troubling areas when dealing with court-appointed experts Several judges mentioned the need for guidance regarding ex parte communications with experts Complete avoidance of ex parte communication seems impractical in light of the judge's obligation to contact theexpert, explain the general nature of the task, and determine theexpert's willingness to undertake the assignment While an initial letter inviting participation may be drafted withthe assistance of the parties, there are likely to be telephone inquiries and other incidental communications (e g , concerning time of hearing, details of compensation) in which full participation by the parties is unnecessary

Once the expert has agreed to serve and seeks more specific information regarding the nature of the task, concerns over communications between the judge and experts outside the presence of the parties become more acute Participation of the parties in the instruction of the expert offers an early opportunity to ease such concerns and ensure that the parties are fully aware of the services being sought of theexpert Since appointment of an expert is a rare event, the parties and the expert are likely to require ***1066** clear guidance regarding the expectations of the court

A common practice is to instruct the expertat a conference with the parties present, then formalize the instructions with a written order filed with the clerk This practice permits easy interaction with the expert at the initial conference, ensures that the parties and the expert understand the nature of the task, and avoids misunderstanding and disagreements over the initial instructions The instructions themselves can be based on the materials prepared by the parties as part of the pretrial process, which should set forth areas of disagreement and confusion A written order also will help the expert focus his or her inquiry and will serve as a reminder of the limitations of theexpert's role in relation to the judge's role

If an appointed expert has questions regarding his or her duties, the parties should be informed of the nature of the inquiry [FN196] In most cases, this should pose no difficulty A written request for clarification from theexpert and a written response by the court, with copies to all interested parties, will permit parties to remain informed of the proceedings and offer objections or clarifications to the response If the judge and theexpert expect to confer in person, several options are available Representatives of the parties can be invited to attend the conference or, if this

proves impractical, a record of the discussion can be forwarded to the parties In any event, we believe that parties should be informed when the expert communicates with the judge, as well as informed of the nature of those communications This will permit a party to challenge the substance of theexpert's advice or object to inquiries and information that exceed the expert's agreed-upon duties

The technical advisor who provides a judge with instruction and advice outside the presence of the parties poses a more difficult problem [FN197] While the need for such assistance should be diminished by the pretrial procedure outlined above, our interviews suggested that, in a very few circumstances, such an appointment may be essential for a reasoned resolution of a dispute [FN198] The difficulty is in providing such assistance while*1067 preserving the effective participation of the parties in presenting and refuting evidence

The United States Court of Appeals for the First Circuit affirmed the inherent authority of the court to appoint a technical advisor and offered a number of suggestions for diminishing the concerns that arise when such an appointment is made [FN199] Before making the appointment, the court should inform the parties of its intention to appoint a technical advisor, identify the person to be appointed, and give the parties an opportunity to object to the appointee on the basis of bias or inexperience Theexpert should be instructed on the record and in the presence of the parties, or the duties of the expert should be recorded in a written order At the conclusion of his or her service, the technical advisor should file an affidavit attesting to his or her compliance with these instructions Some judges have gone further, making a record of discussions and disclosing the record to the parties These safeguards may do little to comfort those who see in the technical expert an unforgivable intrusion into the adversarial system, but such safeguards will permit the parties to remain informed of the nature of thetechnical assistance and raise objections when the intended form of assistance encroaches on the duties of the judge At the same time, information about the expert's advice will permit parties to challenge misplaced factual assumptions and debatable opinions

Ex parte communication between the appointedexpert and representatives of the parties poses a separate but more manageable set of problems [FN200] Ex parte communication between experts and parties will rarely be necessary, the most common instance occurs during the physical examination of a party Theexpert can notify the opposing party of the intended nature of the examination and then report the findings, giving the opposing party an opportunity to raise objections Ex parte communication may also be necessary when anexpert must learn a trade secret in order to advise the court regarding a motion for a protective order The ex parte communication serves the same purpose as an in camera examination of claims of privilege and should be equally permissible Ex parte communication may also arise when the expert must assemble data from *1068 the parties In this instance, the order of appointment can specify the procedures and safeguards that will control such communications

In most other occasions, ex parte communication seems unnecessary Even in the instance in which theexpert must seek clarification of the position of a party, the opposing party can be notified and may participate by conference call In such circumstances, it is likely that many parties will consent to ex parte communication between the expert and the opposing party When anexpert is deposed, representatives of all parties can be invited to attend

3 Testimony of Appointed Experts

We found that almost all appointed experts, other than those serving as technical advisors, presented a written report of their findings In approximately half of the appointments, experts concluded their service with the presentation of a report In the remaining instances, the appointedexperts also presented their findings in court, either at trial or in a pretrial evidentiary hearing

Presentation of expert testimony presents few problems when the judge acts as the finder of fact In such a case, the judge is obviously aware of the expert's court-appointed status and is sensitive to the role of the appointed expert and the duties of the judge The judge and the parties will have reviewed the report prior to the proceeding, [FN201] and testimony can be presented in a less formal manner In at least one case, theexpert was permitted to adopt the report as his direct testimony after being sworn in

When an appointed expert testifies before a jury, the court must decide how the appointedexpert will be presented to the jury The court may, in its discretion, decide whether to disclose to the jury that theexpert was appointed by the court [FN202] In six of the seven instances we encountered, the court advised the jury or permitted the parties to advise the jury that the expert was appointed by the court Still, we found no consensus among the judges about whether the court's sponsorship of such anexpert should be mentioned Those who favor acknowledging the court's sponsorship***1069** note that the purpose of appointing anexpert often is to provide a credible witness for the jury to rely on, and independence from the parties is an important indicator of credibility Those opposed cite the tendency of such testimony to influence the jury, and question whether it is necessary to so diminish the credibility of the parties' experts

We believe that in almost all cases the court's sponsorship of theexpert should be explicitly acknowledged, along with whatever limiting instructions are thought to be appropriate regarding the weight to be given theexpert's testimony relative to the testimony of the parties'experts If experts are appointed when doubts about the credibility of the parties' experts persist and other efforts to provide a basis for a reasoned decision have failed, knowledge of the independence of the appointed expert will be relevant to achieving the goals of the appointment There may be instances in which the appointed expert offers testimony that serves as background information for the jury or serves as a context for the interpretation of the testimony by the parties' experts In these cases, the court's sponsorship is less relevant to the task of the jury, but in such cases acknowledging sponsorship should disadvantage neither party In other cases, if the need for independent testimony is sufficiently great to appoint an expert, this same need argues that such an action should be explicitly acknowledged

VII CONCLUSION

Appointment of an expert by the court represents a striking departure from the adversarial process of presenting information for the resolution of disputes But such an appointment should not be regarded as showing a lack of faith in the adversarial system We learned that judges who appointed experts appear to be as devoted to the adversarial system as those who made no such appointments Most appointments were made after extensive efforts failed to find a means within the adversarial system to gain the information necessary for a reasoned resolution of the dispute Appointment of an expert was rarely considered until the parties had been given an opportunity and failed to provide such information We find it hard to fault judges for failing to stand by a procedure that had proved incapable of meeting the court's need for information, to insist, in such a circumstance, that the court limit its inquiry to inadequate presentations by the parties is a poor testament to the adversarial system and the role of***1070** the courts in resolving disputes in a principled and thoughtful manner

A better approach is to encourage the parties to present information that is responsive to the concerns of the court, inform the parties of the manner in which their presentations fall short, encourage the development of more useful testimony, and appoint an expert only when no other means is available for reaching a reasoned decision An effective pretrial procedure, such as the one outlined above, will encourage the development of such information, thereby strengthening the presentations of the parties and facilitating the appointmentof an expert when such efforts have failed

Appointment of an expert will undoubtedly remain a rare and extraordinary event, suited only to the most demanding cases Regardless, Rule 706 remains an important alternative source of authority to deal with some of the most demanding evidentiary issues that arise in federal courts

[FNa] Joe S Cecil and Thomas E Willging are researchers at the Federal Judicial Center We greatly appreciate the assistance of Nancy R Daspit of Emory University School of Law and Jane Ganz Heinrichs of American University Washington College of Law in preparing this Article Much of the material concerning our study of court-appointed experts appears in a more detailed report entitled, Court-Appointed Experts Defining the Role of Experts Appointed Under Federal Rule of Evidence 706 (Federal Jud Ctr , 1993) A summary of the findings of the study appears in The Use of Court-Appointed Experts in Federal Courts , 78 Judicature 41 (1994) A shorter version of

this Article also will appear in the Reference Manual on Scientific Evidence , published by the Federal Judicial Center

[FN1] Daubert v Merrell Dow Pharmaceuticals, 113 S Ct 2786, 2796 (1993)

[FN2] Id at 2800 (Rehnquist, C J , dissenting) ("I defer to no one in my confidence in federal judges, but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its 'falsifiability,' and I suspect some of them will be too ")

[FN3] Id at 2797-98

[FN4] See, e g , Jack B Weinstein & Margaret A Berger, Weinstein's Evidence Manual A Guide to the United States Rules Based on Weinstein's Evidence 13 06 [01] (1993), 3 Jack B Weinstein & Margaret A Berger, Weinstein's Evidence Commentary on Rules of Evidence for the United States Courts and Magistrates 706 [01] (1994) [hereinafter Weinstein's Evidence] See also AAAS-ABA Nat'l Conference of Lawyers & Scientists Task Force on Science & Technology in the Courts, Enhancing the Availability of Reliable and Impartial Scientific and Technical Expertise to the Federal Courts A Report to the Carnegie Commission on Science, Technology, and Government (1991) , Carnegie Comm'n on Science, Technology, & Gov't, Science and Technology in Judicial Decision Making Creating Opportunities and Meeting Challenges 37 (1993), American Association for the Advancement of Science, Executive Summary, Science, Technology and the Courts The Use of Court-Appointed Experts (Jan 1994), Margaret A Berger, Novel Forensic Evidence The Need for Court-Appointed Experts after Daubert , 1 Shepard's Expert & Sci Evidence Q 487 (1994), E Donald Elliott, Toward Incentive-Based Procedure Three Approaches to Regulating Scientific Evidence , 69 B U L Rev 487 (1989), Samuel R Gross, Expert Evidence , 1991 Wis L Rev 1113, 1211, Rebecca J Klemm, A Court-Appointed Expert as the Sole Source of Statistical Analysis , 34 Jurimetrics J 149 (1994), Tahirih V Lee, Court Appointed Experts and Judicial Reluctance A Proposal to Amend Rule 706 of the Federal Rules of Evidence , 6 Y ale L & Pol'y Rev 480 (1988), Ellen Relkin, Some Implications of Daubert and Its Potential for Misuse Misapplication to Environmental Tort Cases and Abuse of Rule 706(a) Court-Appointed Experts , 15 Cardozo L Rev 2255 (1994), Joseph Sanders, From Science to Evidence The Testimony on Causation in the Bendectin Cases , 46 Stan L Rev 1 (1993) But see Richard O Lempert, Civil Jurors and Complex Cases, Let's Not Rush to Judgment , 80 Mich L Rev 68, 124 (1981) ("This reform is undoubtedly oversold "), Peter Huber,A Comment on Toward Incentive-Based Procedure Three Approaches for Regulating Scientific Evidence by E Donald Elliott , 69 B U L Rev 513, 514("The idea is fine in theory but unworkable in practice ")

[FN5] Margaret A Berger, Procedural Paradigms for Applying the Daubert Test , 78 Minn L Rev 1345 (1994), Bert Black et al , Science and the Law in the Wake of Daubert A New Search for Scientific Knowledge , 72 Tex L Rev 715 (1994), Paul C Giannelli, Daubert Interpreting the Federal Rules of Evidence , 15 Cardozo L Rev 1999 (1994), Edward J Imwinkelried, The Next Step After Daubert Developing A Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Testimony , 15 Cardozo L Rev 2271 (1994),Arvin Maskin, The Impact of Daubert on the Admissibility of Scientific Evidence The Supreme Court Catches Up with a Decade of Jurisprudence , 15 Cardozo L Rev 1929 (1994) For interpretations of Daubert that suggest somewhat less demanding requirements for admissibility, see Kenneth Chesebro, Taking Daubert's "Focus" Seriously The Methodology/Conclusion Distinction , 15 Cardozo L Rev 1745 (1994) Barry J Nace, Reaction to Daubert, 1 Shepard's Expert & Sci Evidence Q 51 (1993), Anthony Z Roisman,Conflict Resolution in the Courts The Role of Science , 15 Cardozo L Rev 1945 (1994) and Joseph Sanders, Scientific Validity, Admissibility, and Mass Torts After Daubert, 78 Minn L Rev 1387 (1994)

[FN6] Federal Cts Study Comm , Report of the Federal Courts Study Committee 97 (1990) ("Economic, statistical, technological, and natural and social scientific data are becoming increasingly important in both routine and complex litigation ") See also Relkin, supra note 4, at 2255 n 4 (Rule 706 experts will become more common following Daubert)

[FN7] We gathered information for this study through a mail survey and telephone interviews First, we sent a cover letter and a one-page questionnaire to each active federal district court judge asking the following questions "Have you appointed an expert under the authority of Rule 706 of the Federal Rules of Evidence?" and "Are experts appointed under Rule 706 likely to be helpful in certain types of cases?" The questionnaire was intended to determine the extent to which the authority to appoint anexpert under Rule 706 had been employed and the extent to which opportunities for such appointments exist Second, we asked those judges who had made such appointments to participate in a telephone interview concerning their experiences with court-appointedexperts We sought to identify uses of Rule 706 that judges have found appropriate, and, at the same time, identify reasons for nonuse We also contacted judges who had not appointedexperts but who had indicated, when responding to the mailed questionnaire, strong feelings regarding such practices We asked these judges how they responded to a number of the situations that the appointing judges had identified as being suitable for making an appointment We do not identify individual judges without permission, consistent with assurances we offered judges who agreed to participate in this study For a more detailed report of this study, see Joe S Cecil & Thomas E Willging, Court-Appointed Experts Defining the Role of Experts Appointed Under Federal Rule of Evidence 706 (Federal Jud Ctr 1993)

[FN8] Reilly v United States, 863 F 2d 149, 155-56 (1st Cir 1988) ("Rule 706 was not intended to subsume the judiciary's inherent power to appointtechnical advisors.")

[FN9] Margaret G Farrell, Coping with Scientific Evidence The Use of Special Masters , 43 Emory L J 927 (1994)

[FN10] In Students of Cal Sch for the Blind v Honig, 736 F 2d 538, 549 (9th Cir 1984) vacated on other grounds , 471 U S 148 (1985), the Court of Appeals upheld the lower court's appointment of theexpert witness as a special master to oversee the additional tests ordered as a result of theexpert's testimony At least one district court has held that a single appointee may serve as both a special master and as a court-appointedexpert in the same case Hart v Community Sch Bd , 383 F Supp 699, 765-66 (E D N Y 1974), aff'd ,512 F 2d 37 (2d Cir 1975) Another district court expressly granted a special master the power, subject to approval by the court, to "seek the assistance of court-appointed experts" Young v Pierce, 640 F Supp 1476, 1478 (E D Tex 1986) vacated on other grounds , 822 F 2d 1368 (5th Cir 1987), order reinstated , 685 F Supp 984, 985-86 (E D Tex 1988)

[FN11] Rule 706 Court Appointed Experts

(a) Appointment The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations The court may appoint any expert witnesses agreed upon by the parties, and may appointexpert witnesses of its own selection An expert witness shall not be appointed by the court unless the witness consents to act A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate A witness so appointed shall advise the parties of the witness' findings, if any, the witness' deposition may be taken by any party, and the witness may be called to testify by the court or any party The witness shall be subject to cross-examination by each party, including a party calling the witness

(b) Compensation Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow The compensation thus fixed is payable from funds which may be provided by law in criminal

cases and civil actions and proceedings involving just compensation under the fifth amendment In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs

(c) Disclosure of appointment In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness

(d) Parties' experts of own selection Nothing in this rule limits the parties in calling expert witnesses of their own selection

[FN12] Students of Cal Sch for the Blind , 736 F 2d at 548 (court- appointed expert to provide neutral testimony on seismic safety of school), Eastern Air Lines, Inc v McDonnell Douglas Corp , 532 F 2d 957, 999-1000 (5th Cir 1976) (neutral expert to provide insight into multi-million dollar disparity between partisan experts testimony)

[FN13] Computer Assocs Int'l v Altai, Inc , 982 F 2d 693, 713 (2d Cir 1992) (complicated nature of computer software programming justifies assessment by court-appointed expert if similarities arise to the level of a wrongful appropriation of copyrighted work), McKinney v Anderson, 924 F 2d 1500, 1511 (9th Cir 1991) (court appointed an environmental toxicologist to describe health effects of second-hand smoke and the concentration of such smoke in the prison), Beaver v Bd of County Comm'rs of Gooding County, No 91-0165-S- EJL, 1991 U S Dist LEXIS 20506 (D Idaho Sept 19, 1991) (court recognized need for expert testimony concerning fifteen distinct claims regarding prison conditions, ranging from nutritional sufficiency to fire safety standards), Unique Concepts, Inc v Brown, 659 F Supp 1008, 1011 (S D N Y 1987) (court appointed expert for issues of patent construction, validity and infringement)

[FN14] Oklahoma Natural Gas Co v Mahan & Rowsey, Inc , 786 F 2d 1004, 1007 (10th Cir) cert denied , 479 U S 853 (1986), Georgia-Pacific Corp v United States, 640 F 2d 328, 333-35 (Ct Cl 1980)

[FN15] Georgia-Pacific , 640 F 2d at 334 See also Mallard Bay Drilling, Inc v Bessard, 145 F R D 405, 406 (1993)

[FN16] Wilson v Great Amer Indus , 979 F 2d 924, 934 (2d Cir 1992) Fugitt v Jones, 549 F 2d 1001, 1006 (5th Cir 1977)

[FN17] Eastern Air Lines, Inc , v McDonnell Douglas Corp , 532 F 2d 957, 1000 (5th Cir 1976)

[FN18] Gates v United States, 707 F 2d 1141, 1144 (10th Cir 1983)

[FN19] Id

[FN20] 775 F Supp 544, 549, 559-60 (E D N Y 1991) aff'd in relevant part , 982 F 2d 693 (2d Cir 1992)

[FN21] 982 F 2d at 713-14

[FN22] 749 F Supp 1545, 1552-53 (D Colo 1990), aff'd ,972 F 2d 304 (10th Cir 1992) Another example of a

court's limited use of a court- appointed expert is found in Superior Beverage Co , Inc v Owens-Illinois, Inc , No 83 C 512, 1987 WL 9901 (N D Ill Jan 30, 1987)(court-appointed expert to consider only whether plaintiffs' proposed method of classwide proof presented an "economically and statistically valid alternative to individualized proof")

[FN23] Renaud , 749 F Supp at 1553 See generally Elliott, supra note 4 (suggesting that in cases with "substantial doubt" regarding the scientific integrity of testimony by a party'sexpert, the court appoint a "peer review expert learned in the relevant fields to testify at trial concerning whetherthe principles, techniques, and conclusions by the experts for the parties would be generally accepted as valid by persons learned in the field")

[FN24] 972 F 2d at 308 The court of appeals also rejected the plaintiffs' argument that they were wrongly denied the right to depose the appointed expert, noting that "the appointed experts were more technical advisors to the Court than expert witnesses as contemplated by Fed R Evid 706, and accordingly dispositions and cross-examination were inappropriate " Id

[FN25] Relkin, supra note 4

[FN26] In the words of the Advisory Committee on the Rules of Evidence, " [t]he inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned "Fed R Evid 706 advisory committee's note See also United States v Green, 544 F 2d 138, 145 (3d Cir 1976)(" [T]he inherent power of a trial judge to appoint an expert of his own choosing is clear "), cert denied sub nom Tefsa v United States, 430 U S 910 (1977), Scott v Spanjer Bros , 298 F 2d 928, 930 (2d Cir 1962)("Appellate courts no longer question the inherent power of a trial court to appoint an expert under proper circumstances ") In the following statecases, the courts recognized the inherent authority of the court to appointexperts or masters or advisors: In the Matter of the Appraisal of Shell Oil Co , 607 A 2d 1213, 1222 (Del 1992)(" [T]he Court of Chancery has the inherent authority to appoint neutral expert witnesses "), Appeal of 322 Boulevard Assocs , 600 A 2d 630 (Pa Commw Ct 1991)("Courts historically possess the inherent authority to appoint masters to assist them in performing various functions ")

[FN27] 253 U S 300 (1920). In approving the appointment of an auditor to segregate the claims that were in dispute and to express an opinion on the disputed items, the Court in Peterson found that " [c]ourts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties " Id at 312

[FN28] 863 F 2d 149, 154 & n 4 (1st Cir 1988) (In a case involving appointment by the district court of an economist to assist the court in calculating damages to an infant resulting from medical malpractice, the United States (defendant) conceded that "a district court has inherent authority to appoint anexpert as a technical advisor." The circuit court agreed that "such power inheres generally in a district court "), see alsoBurton v Sheheen, 793 F Supp 1329, 1339 (D S C 1992) ("Confronted further with the unusual complexity and difficulty surrounding computer generated [legislative] redistricting plans and faced with the prospect of drawing and generating its own plan, the court appointed [name] astechnical advisor to the court pursuant to the inherent discretion of the court "), vacated on other grounds , 113 S Ct 2954 (1993); Bullard Co v General Elec Co , 348 F 2d 985, 990 (4th Cir 1965) ("Of course, the District Court has the right on an intricate subject of suit, as here [a patent infringement case], to engage an advisor to attend the trial and assist the court in its comprehension of the case "), Friends of the Earth v Carey, 535 F 2d 165, 173 & n 13 (2d Cir 1976)(District judge has "power to obtain such expert advice and assistance as may be necessary to guide him" and "to assist him in the performance of his duties "), vacated on other grounds , 552 F 2d 25 (2d Cir), cert denied , 434 U S 902 (1977)

[FN29] Reilly , 863 F 2d at 157

[FN30] Id

[FN31] Id ("Advisors . . . are not witnesses and may not contribute evidence Similarly, they are not judges, so they may not be allowed to usurp the judicial function ") See also Burton , 793 F Supp at 1339 n 25 (" [The advisor] was not appointed as an expert under Fed R Evid 706 or [as] a special master under Fed R Civ P 53 ")

[FN32] Weinstein's Evidence , supra note 4, 706(1), at 706-13 The editors of the Manual for Complex Litigation note that " [e]ven in complex litigation" use of a court-appointedexpert, special master, or magistrate judge "is the exception and not the rule " Manual for Complex Litigation, Second § 21 5 (1985) [hereinafter MCL 2d]

[FN33] Questionnaires were sent to 537 active federal district court judges, 431 judges responded (a response rate of 80%)

[FN34] This figure includes some judges who made appointments underRule 706 that could have taken place under alternative authority For example, we learned in telephone interviews that nine of theexperts appointed under Rule 706 functioned also as special masters, or examined parties to determine fitness to stand trial Although these appointments could have been made under alternative authority, some judges made the appointment underRule 706 to ensure that the appointed expert was available to testify and be cross-examined When a judge indicated that an appointment was pursued under authority of Rule 706the case was included in the study

[FN35] Determining an exact number of appointments was not possible, since the questionnaire asked judges to indicate the range of appointment activity in which they fell By multiplying the midpoint of each range by the number of judges within that range, we estimate that there were 225 instances in whichexperts were appointed under authority of Rule 706 By comparison, computer searches for references to Rule 706 at the time of the initial mail survey (January 1988) showed only 58 reported cases in which the rule was mentioned, including 47 reported cases in which an appointment was made or discussed extensively Reported cases are likely to underestimate the degree of appointment activity since reported cases address only disputed issues If an appointment was made in a case that settled, a published opinion that mentions the appointment is even less likely See Evolving Role of Statistical Assessments as Evidence in the Courts 171 (Stephen E Fienberg ed , 1988) (prepared by the Special Comm on Empirical Data in Legal Decision Making of the Ass'n of the Bar of NYC) ("One of the difficulties in trying to assess the potential value of the use of court-appointedexperts is that their greatest value may occur prior to trial, especially if they are able to resolve conflicting analyses in reports by opposing statisticalexperts But in such cases the likelihood of a pretrial settlement is high, and for such cases thereare no published opinions or other easily accessible records ")

[FN36] See Carl B Rubin & Laura Ringenbach, The Use of Court Experts in Asbestos Litigation, 137 F R D 35 (1991)

[FN37] All judges who appointed experts were asked to describe the nature of the case and the issues addressed by the expert Judges who made more than one appointment were asked to describe all the cases in which anexpert had been appointed When judges mentioned more than one case, the specific issues addressed by theexpert were explored in detail only for the most recent case

[FN38] Most of these cases involved medical malpractice, but three cases involved claims against insurance companies for compensation for, or permission to undergo, medical treatment. For purposes of this study we combined these cases with malpractice cases since in each case the appointed expert was addressing the proper treatment under accepted medical standards. In the three remaining cases psychiatrists or psychologists were appointed to address the competency of a party to sue or to stand trial.

[FN39] Two of the remaining product liability cases claimed injuries arising from swine flu inoculations.

[FN40] An exception concerned an instance in which a medical expert was appointed to resolve a conflict over a diagnosis by reading an X-ray.

[FN41] We include in this category experts who had knowledge of the development of computer hardware and software (accounts for six cases).

[FN42] For example, in one case involving trade secrets two employees left a company and started a competing enterprise. Their former company claimed that they took and used proprietary software in their new company. Such cases are similar to patent cases in that in both types of cases the judge sought assistance in understanding the underlying technology. The three remaining cases involved disputes over construction in which the expert offered an independent assessment of whether a completed structure conformed to the contract.

[FN43] We include in this category those appointed experts who were identified as accountants or described as providing accounting services. Some may have lacked formal training as accountants. We did not inquire about the credentials of the appointed experts.

[FN44] Some judges expressed a preference for appointing an expert under Rule 706, as opposed to a special master under Fed. R. Civ. P. 53, so that the accountant could testify in court and be cross-examined by the parties.

[FN45] In eight cases the judge described an appointment but was unable to characterize the nature of the expertise that was rendered. Four of these cases involved challenges to prison conditions, in which the appointed expert (in one case, a panel of experts) assessed conditions in the prison and reported to the court.

[FN46] See infra Table 2, at 1017. Forty-nine of the 385 judges responding to the question indicated "no," or wrote a comment in the margin to that effect. Another 46 judges did not respond to this second question. All but one of these judges had indicated that they had not appointed an expert. Many of these judges indicated that they did not have sufficient experience with court-appointed experts to know if such an appointment would be helpful. These findings are in accord with the results of other surveys on the willingness of judges to consider using court-appointed experts. See, e.g., Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend At Least Half Their Time on General Civil Cases, 69 B.U. L. Rev. 731,741 tbl. 3.6 (1989).

[FN47] More than two-thirds of the forty-five judges who had made only one appointment reported that they made the appointment to obtain assistance in understanding technical issues necessary to reach a decision. We did not ask judges who appointed experts on more than one occasion about the reasons for their most recent appointment, but

focused instead on the general characteristics of cases in which they appointed experts

[FN48] The extent of the judges' disillusionment with the role played by expert witnesses in such a circumstance was revealed by the suspicion with which the judges view such testimony For example, in relating the reasons for appointing experts, judges remarked "I discovered that experts in asbestos were so diverse in their opinions that they confused the jury", "The main issue is whether the parties' experts are 'real' experts or simply 'hired guns' ", "I use an independent medical expert only when I smell a rat, based on my knowledge of the lawyers and doctors in the community", " [T]he 'swearing contests' that take place between expert witnesses are a national disgrace, and the [Rule] 706 procedure may offer an alternative to sitting there and listening to it "

[FN49] See discussion of this issue infra note 152 and related text See also Beaver v Bd of County Comm'rs of Gooding County, No 91-0165-S-EJL, 1991 U S Dist LEXIS 20506 (D Idaho Sept 19, 1991)

[FN50] Even if there is no consensus on the scientific or technological issues, the expert may clarify the parties' arguments and provide information about the extent to which the testimony of the parties falls within the accepted principles, theories, and conclusions of persons learned in the field See generally Elliott, supra note 4, at 508 (suggesting that in cases with "substantial doubt" regarding the scientific integrity of testimony by a party's expert, the court appoint a "peer review expert learned in the relevant fields to testify at trial concerning whether the principles, techniques, and conclusions by the experts for the parties would be generally accepted as valid by persons learned in the field")

[FN51] See Eric D Green & Charles R Nesson, Problems, Cases and Materials on Evidence 700 (1983) (role of court-appointed expert in narrowing the disputed issues)

[FN52] Our sample was somewhat unsuited for an examination of the extent to which concerns over settling a case influenced the judge's decision to appoint an expert If a judge threatens such an appointment to settle a case and is successful, this instance would not be included in our sample unless the appointment was made Our study was not designed to capture cases in which the threat alone was sufficient to bring about a settlement

[FN53] In such cases the expert almost always testified or issued a report

[FN54] We asked those who had made multiple appointments, "How do the prospects for settlement of the case influence your decision to appoint an expert?" Of the nineteen judges who responded to the question, nine indicated that the possibility of settlement would positively influence their decisions to appoint experts and two indicated that the prospect of settlement was a secondary consideration supporting appointment Four of the multiple users said that serious prospects for settlement would lead them to not appoint an expert and four more said that the prospects of settlement would have no effect on their decision

[FN55] Again, successful use of threats to appoint experts to improve expert testimony may mean that such a judge would not be included among our interviewees

[FN56] See generally D Marie Provine, Settlement Strategies for Federal Judges (Federal Jud Ctr 1986)

[FN57] Sixty-three judges who had appointed an expert on one or more occasions were asked why so few other judges had appointed an expert, eighteen judges who had not appointed an expert were simply asked why so few judges appoint Rule 706 experts

[FN58] In the twelve-month period from October 1, 1992, to September 30, 1993, a total of 7,740 civil cases were terminated during or after trial Of these, there were 94 patent cases and 19 antitrust cases Product liability cases were not listed separately in the reference source 1993 Admin Off U S Cts , Ann Rpt Director AI-78-9, tbl C-4

[FN59] Judges were permitted to offer more than one reason, and many of the judges who cited the unique circumstances in which such an appointment would be appropriate also stressed the importance of the judge not intruding on the adversarial system where it appears to be functioning

[FN60] See also MCL 2d, supra note 32, § 21 5 ("Counsel may view such referrals as infringing on their prerogatives, as encroaching on the right to a jury trial, or as imposing additional time and expense ")

[FN61] Edward V DiLello, Note, Fighting Fire with Firefighters A Proposal for Expert Judges at the Trial Level , 93 Colum L Rev 473 (1993) (discussing problems with partisan expert evidence, the use of and problems with special masters and court-appointed experts to address these problems, and proposing the creation of "Magistrate Judge (Expert)," (based on the model of the Court of Appeals for the Federal Circuit) as an efficient and effective means to resolve factual issues in complex technical cases), Klemm, supra note 4 (briefly describing her experiences as a court-appointed expert in EEOC v United Ass'n of Journeymen, Local #120, No C68-473 (N D Ohio Sept 1, 1992), listing the advantages of having a court-appointed neutral expert, and suggesting that guidelines be developed for such experts), Gross, supra note 4 (discussing problems with the use of expert evidence generally, describing the use of neutral court-appointed experts and why it has failed in formal litigation but worked in some administrative contexts, and recommending changes based on the use of mandatory court-appointed experts), Lee, supra note 4 (discussing problems with the use of partisan expert evidence, the advantages and problems of court-appointed experts, and proffering reforms for Rule 706)

[FN62] The role of timing of the appointment is discussed in greater detail in Cecil & Willging, supra note 7, at 22-23

[FN63] Weinstein's Evidence , supra note 4, 706 [02], at 706-14, see also United States v Weathers, 618 F 2d 663, 664 n 1 (10th Cir), cert denied , 446 U S 956 (1980) The Manual for Complex Litigation recommends consideration of the use of a court-appointed expert, special master, or magistrate judge " [w]ell in advance of the final pretrial conference " MCL 2d, supra note 32, § 21 5

[FN64] Weinstein's Evidence , supra note 4, 706 [02], at 706-14 to -15

[FN65] For example, a court may want to time the neutral expert's testimony and final report to allow that expert to hear and comment on the testimony of the parties' experts See, e g , Leesona Corp v Varta Batteries, Inc , 522 F Supp 1304, 1311-12 (S D N Y 1981)

[FN66] In discussing the timing of the appointment, the term trial is used in a broad sense to indicate the anticipated evidentiary hearing before the court in which the opinion of the appointed expert would be solicited Usually this

will be a formal trial before a judge or jury Sometimes, however, thecourt invited the assistance of an expert to aid in resolving an issue to be addressed in a pretrial hearing In this circumstance the timing of the appointment was examined with reference to the pretrial hearing rather than to the trial itself For convenience, this pretrial hearing is referred to as a trial

[FN67] It is worth noting that all but one of these instances in which an appointment was made immediately before or during trial involved a judge rather than a jury serving as the finder of fact One judge remarked that a bench trial permits such flexibility because the judge can schedule the proceedings without having to accommodate the need for a continuous period of service by jurors

[FN68] Panels of experts also may be appointed by the court Rule 706 uses the plural term expert witnesses to indicate that more than one expert may be appointed in a case See In re Joint E & S Dists Asbestos Litig , 122 Bankr 6, 7 (E & S D N Y 1990) (appointing an expert to, among other things, "aid court in selecting an appropriate panel of knowledgeable and neutralexperts pursuant to rule 706"), later proceeding , 982 F 2d 721 (2d Cir 1992) (affirming appointment of Rule 706 panel), Gates v United States, 707 F 2d 1141, 1144 (10th Cir 1983), Fund for Animals, Inc v Florida Game & Fresh Water Fish Comm'n, 550 F Supp 1206, 1208 (S D Fla 1982), Lightfoot v Walker, 486 F Supp 504, 506 (S D Ill 1980) later proceeding , 619 F Supp 1481 (S D Ill 1985), aff'd 797 F 2d 505 (7th Cir 1986); In re Repetitive Stress Injury Cases Pending in the U S Dist Ct , 142 F R D 584 (E D N Y 1992), vacated on other grounds sub nom Debruyne v National Semiconductor Corp (In re Repetitive Stress Injury Litig), 11 F 3d 368 (2d Cir 1993)

[FN69] By neutral expert we mean an expert who can respond to the technical or scientific issue in a manner consistent with generally accepted knowledge in an area, without regard to the interests advanced by either party This would rule out experts with significant ideological, financial, or professional interests in debatable normative issues related to the issue in dispute Cf In re Philadelphia Mortgage Trust, 930 F 2d 306, 309 (3d Cir 1991) (comparing "neutral" court-appointedexpert with accountants appointed to assist a trustee in bankruptcy)

[FN70] Some judges may have encountered difficulty in finding a neutralexpert and abandoned their efforts to appoint such a person, thereby eluding our investigation

[FN71] Judges are afforded great discretion under Rule 706 in designating a procedure for appointing such an expert Gates v United States, 707 F 2d 1141, 1144 (10th Cir 1983) Rule 706(a) provides that " [t]he court may appoint any expert witnesses agreed upon by the parties, and may appointexpert witnesses of its own selection " See also Superior Beverage Co , No 83 C 512, 1987 WL 9901 (N D Ill Jan 30, 1987)(court canvassed individuals in judicial and academic circles to get names of potentialexperts because parties could not agree on recommendations, the court then sent each potentialexpert a letter requesting information on their qualifications and possible conflicts of interest, the court selected theexpert based on its evaluation of theexperts' responses)

[FN72] We should note that while our interview with judges raised the possible dangers of such appointments, we found no indication that such harms have resulted

[FN73] The selection procedure suggested in the Manual for Complex Litigation is for the court to "call on professional organizations and academic groups to provide a list of qualified, willing, and available persons " MCL 2d, supra note 32, § 21 51, see also 1 McCormick on Evidence § 17, at 71 (John William Strong ed , 4th ed 1992) (recommending "establishing panelsof impartial experts designated by groups in the appropriate fields, from which panel court appointed expertswould be selected ")

[FN74] Professional associations and academic groups also may have skewed approaches to a specific issue, perhaps giving subconscious, or even conscious, priority to the impact of a rule or ruling on their professional autonomy Medical malpractice cases, for example, may test the ability of medical schools or professional associations to assist in identifying neutral experts

[FN75] The few reported cases dealing with selection of experts tend to emphasize nomination by the parties See, e g , Gates , 707 F 2d at 1144, DeAngelis v A Tarricone, Inc , 151 F R D 245 (1993), Beaver v Bd of County Comm'rs of Gooding County, No 91-0165-S-EJL, 1991 LEXIS 20506 (D Idaho Sept 19, 1991),Fund for Animals, Inc v Florida Game & Fresh Water Fish Comm'n, 550 F Supp 1206, 1208 (S D Fla 1982) Leesona Corp v Varta Batteries, Inc , 522 F Supp 1304, 1311 (S D N Y 1981) Lightfoot v Walker, 486 F Supp 504, 506 (S D Ill 1980), later proceeding , 619 F Supp 1481 (S D Ill 1985), aff'd , 797 F 2d 505 (7th Cir 1986), United States v Ridling, 350 F Supp 90, 99 (E D Mich 1972)

[FN76] Superior Beverage Co , No 83 C 512, 1987 WL 9901 (N D Ill Jan 30, 1987), United States v Michigan, 680 F Supp 928, 957 (W D Mich 1987),Unique Concepts, Inc v Brown, 659 F Supp 1008, 1011 (S D N Y 1987), later proceeding , 735 F Supp 145 (S D N Y 1990), aff'd , 939 F 2d 1558 (Fed Cir 1991) Hatuey Prods , Inc v United States Dep't of Agric , 509 F Supp 21, 23 (D N J 1980) See also Gross, supra note 4, at 1220-30 (offering two alternative reforms to the current use of court-appointed experts, both emphasizing procedures requiring the use of experts nominated and/or agreed on by the parties), Pamela Louise Johnston,Court-Appointed Scientific Expert Witnesses Unfettering Expertise , 2 High Tech L J 249, 267-68 (1988) (suggesting thatRule 706 be amended to require parties to submit a list of proposedexperts suitable for appointment by the court for each area of disputed scientific testimony)

[FN77] Fed R Evid 706(a) The rule distinguishes communications regarding the appointment from those informing the expert and the parties about the expert's duties The appointment process may necessarily involve ex parte communication between the judge and a proposedexpert The rule envisions that a court may make "its own selection" and that the expert witness will then consent to the appointment Id The opportunity for an informal exchange of information about the qualifications of theexpert and the needs of the court seems appropriate, if not essential, to aid the court and the expert in their respective decisions

[FN78] For an example of an order appointing an expert, see In re Swine Flu Immunization Prods Liab Litig , 495 F Supp 1185 (1980) (comprehensive order appointing panel ofexperts to review swine flu cases, detailing the areas of inquiry, the duties of the panel, the content and timing of the reports, the deposition process, exchange of information by counsel, and the charges and method of claiming compensation)

[FN79] Issues regarding compensation of experts are discussed in Section VI

[FN80] For an example of a broad grant of authority to a court-appointedexperts that included the opportunity to suggest a modification of legal doctrine governing software copyright, seeComputer Assocs Int'l v Altai, Inc , 775 F Supp 544 (E D N Y 1991), aff'd in relevant part, 982 F 2d 693 (2d Cir 1992)

[FN81] Fed R Evid 704 removes the traditional objection to testimony on the "ultimate issue to be decided by the trier of fact " In discussing the inherent power of a court to obtain assistance from atechnical advisor, the First Circuit stressed the point that such advisors "may not be allowed to usurp the judicial function " Reilly v United

States, 863 F 2d 149, 157 (1st Cir 1988)

[FN82] 833 F 2d 931 (Fed Cir 1987)

[FN83] Id at 937

[FN84] Id at 936

[FN85] See, e g , In re Swine Flu, 495 F Supp at 1186 (1980) see also Superior Beverage Co v Owens-Illinois, Inc , No 83 C 512, 1987 WL 9901 (N D Ill Jan 30, 1987)(expert "is to consider only whether the method of classwide proof proposed by plaintiffs presents an economically and statistically valid alternative to individualized proof," explicitly prohibiting expert from drawing any conclusions regarding the ultimate issues in the case)

[FN86] Stickney v List, 519 F Supp 617 (D Nev 1981) See also United States v Mich , 680 F Supp 928, 983-84, 986-88 (W D Mich 1988)

[FN87] Students of the Cal Sch for the Blind v Riles, No Civ S 80-473-MLS (N D Cal filed March 31, 1982) See also Leesona Corp v Varta Batteries, Inc , 522 F Supp 1304, 1311-12 & n 18 (S D N Y 1981)(parties asked to prepare a statement of the technical issues for inclusion in written instructions to the expert)

[FN88] Kerasotes Mich Theaters v Nat'l Amusements, No 85-CV-40448-FL (E D Mich Feb 2, 1989) (order appointing expert under Rule 706)

[FN89] Professor Elliott has proposed that Rule 706 process be used to appoint an expert to conduct a "peer review" of the scientific acceptability of the methods used by the parties' experts to reach their conclusions Elliott, supra note 4 Under the proposal, a judge would make a determination of "whether there would be 'substantial doubt' among qualified scientists concerning the basis for an expert's testimony " Id at 508 The purpose of the experts would be to assess the approaches of the parties' experts and not to present a view on the merits of the dispute Id at 510 It is open to question whether the "substantial doubt" standard in the proposal alters the legal standard for judging the admissibility of the evidence or, if admitted, the legal standard for applying the burden of proof in a civil case

[FN90] See discussion at notes 94-103 and related text

[FN91] United States v Articles Provimi, 74 F R D 126, 127 (1977) supplementing 425 F Supp 228 (D N J 1977)

[FN92] Students of the Cal Sch for the Blind v Riles, No Civ S 80-473- MLS, at 6-7 (N D Cal filed March 31, 1982) See also In re Joint E & S Dists Litig , 122 Bankr 6, 7 (E & S D N Y 1990)(providing detailed guidelines for expert panel), Superior Beverage Co v Owens-Illinois, Inc , No 83 C 512, 1987 WL 9901 (N D Ill Jan 30, 1987) (permitting expert to access all material currently filed with court, to consult with outside sources, and to

request additional information from parties)

[FN93] Kerasotes Mich Theaters , No 85-CV-40448-FL (E D Mich Feb 2, 1989) (order appointingexpert under Rule 706)

[FN94] Bradley v Milliken, 620 F 2d 1143, 1158 (6th Cir) cert denied , 449 U S 870 (1980)

[FN95] United States v Green, 544 F 2d 138, 146 n 16 (3d Cir 1976) cf Leesona Corp v Varta Batteries, Inc , 522 F Supp 1304, 1312 (S D N Y 1981) In Green , the court presumed that the general prohibitionon ex parte communication between the court and a witness applied, and the court carved out a limited exception The district judge and a law clerk had communicated with the expert over the phone about observations of the defendant's behavior in court The fact that they had talked was placed in the record, and defendant's counsel had an opportunity to cross-examine the expert The Third Circuit recited as a general rule that "the court should avoid ex parte communications with anyone associated with the trial, even its own appointedexpert," but found no violation of due process and no "reversible error" in the circumstances of the case Green , 544 F 2d at 146 n 16 The court cautioned, however, that "a proper way [to proceed] would be to utilize an on-the-record conference in chambers or an on-the-record conference call so that counsel for all parties may participate " Id

[FN96] Canon 3(A)(4) of the Code of Conduct for U S Judges provides that " [a] judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law and, except as authorized by law, neither initiate nor consider ex parte or other communications on the merits or procedures affecting the merits of a pending or impending proceeding " Judicial Conf U S , Code of Conduct for U S Judges I-9 (Rev Sept 1987)

[FN97] For illustrations of the contexts in which such discussions took place and for a description of some safeguards short of prohibition, see discussion infra pp 1031-33

[FN98] Reilly v United States, 863 F 2d 149, 158 (1st Cir 1988) See alsoBurton v Sheheen, 793 F Supp 1329 (D S C 1992)

[FN99] Reilly , 863 F 2d at 158, 159-60 (ground rules included advising parties if expert ranged into area not discussed in briefs, appellate court recommended inclusion of a comprehensive job description on the record and submission of an affidavit of the expert's compliance with the ground rules at the end of the appointment)

[FN100] The relevant portion of Canon 3(A)(4), as an exception to the rule regarding ex parte communication recited in note 96 above, provides that a judge "may obtain the advice of a disinterestedexpert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties a reasonable opportunity to respond " Judicial Conf U S , supra note 96, at I-9 But the reader should note that at least one court has held that "the adversary system precludes the court from receiving out-of-court advice on legal issues in a case " Reed v Cleveland Bd of Educ , 607 F 2d 737, 748 (6th Cir 1979)

[FN101] Two-thirds of the multiple users of the Rule 706 process reported ex parte communication with an expert in at least one case

[FN102] One judge limited discussion further he advised the parties that he would meet with theexpert for dinner the evening before trial, that they were welcome to attend, and that the case was not to be discussed

[FN103] See, e g , Superior Beverage Co v Owens-Illinois, Inc , No 83 C 512, 1987 WL 9901N D Ill Jan 30, 1987) (" [n]either the parties nor counsel shall initiate contact with [theexpert] without the court's prior approval," " [the expert] may request additional information from the parties through written requests")

[FN104] During the original consideration of the Federal Rules of Evidence, a committee from the American Bar Association suggested that a direct prohibition on ex parte communication by a party with a court-appointedexpert should be added to Rule 706 While the suggested procedure was not adopted, Weinstein and Berger suggest that such a prohibition "may prove useful to the court and parties in using" the appointment procedure Weinstein's Evidence , supra note 4, 706 [02], at 706-20 n 21

[FN105] See, e g , Leesona Corp v Varta Batteries, Inc , 522 F Supp 1304, 1312 n 18 (S D N Y 1981) (parties were not permitted to communicate directly with the court's expert materials selected by the parties for the expert to use were transmitted through the court and entered in the court's docket), see also Kerasotes Mich Theaters v Nat'l Amusements, No 85-CV- 40448-FL (E D Mich Feb 2, 1989) (order appointingexpert under Rule 706) (expert "shall be limited in the same manner as judicial officers as to ex parte communications" unless parties stipulate to alterations or move for the court to alter the restrictions)

[FN106] Weinstein's Evidence , supra note 4, 706 [02], at 706-20 n 21 See also Model Code of Professional Responsibility DR 7-110 (1980) ("a lawyer shall not communicate as to the merits of a cause with a judge or an official before whom the proceeding is pending " (emphasis added)) Presumably, theexpert is an "official" agent of the court Cf Model Rules of Professional Conduct Rule 3 5 (1983) ("A lawyer shall not (a) seek to influence a judge by means prohibited by law, (b) communicate ex parte with [a judge] except as permitted by law ")

[FN107] Cf Fed R Civ P 35, which provides for a physical examination of a party and production of a report Presumably the party who calls for the examination is not entitled to be present during it The plain language of Rule 35 does not confer such a right In any event, the practice under Rule 35 could serve as a guide regarding physical or mental examinations under Rule 706 The ABA exempted medical examinations from their proposed restriction on ex parte communication between a party and a court-appointedexpert Weinstein's Evidence , supra note 4, 706 [02], at 706- 20 n 21

[FN108] To the extent that the expert was exclusively serving as a mediator, this seems fair If, however, theexpert is also playing a role in the formulation of a decree, there would seem to be a need for procedures that would permit the parties to confront the "facts" gleaned from ex parte interviews The same concerns that inhibit some trial judges from engaging in settlement discussions seem to apply See generally D Marie Provine, Settlement Strategies for Federal Judges 21-41 (Federal Jud Ctr 1986)

[FN109] See Ruiz v Estelle, 679 F 2d 1115, 1162-63 (5th Cir 1982) (finding the order of a special master appointment to be "too sweeping" and that such a broad power, the equivalent of permitting ex parte communication to become part of the findings without adversarial testing, exceeded the traditional power given masters and "denies the parties due process") Cf Church of Scientology Int'l v Kolts, 846 F Supp 873 (C D Cal 1994) (due process

claim for damages against a special master based on the master's alleged ex parte communications with a reporter survived a 12(b)(6) motion to dismiss), Young v Pierce, 822 F 2d 1368, 1375 (5th Cir 1987)order on remand, 685 F Supp 975, 982-83, 985 (E D Tex 1988)(special master given authority to interview employees of government agency defendant, subject to the rights of the parties to notice and the opportunity to be present at such interviews and to object to questions)

[FN110] Fed R Evid 706(a) See also Unique Concepts, Inc v Brown, 659 F Supp 1008, 1011 (S D N Y 1987) Cf Reilly v United States, 863 F 2d 149, 159 (1st Cir 1988) (" [w]here anadvisor was not an evidentiary source, there was neither a right to cross-question him as to the economics of the situation nor a purpose in doing so ") Weinstein and Berger observe that the right of a party to depose the court-appointedexpert in a criminal case "goes considerably further than any other rule or statute in authorizing depositions in a criminal case " Weinstein's Evidence , supra note 4, 706 [02], at 706-21

[FN111] Leesona Corp v Varta Batteries, Inc , 522 F Supp 1304, 1312 (S D N Y 1981) One district court has used a procedure in which the parties waive their rights to disclosure of theexpert's report and conclusions SAS Inst v S&H Computer Sys , 605 F Supp 816 (M D Tenn 1985) An apparent purpose of the waiver of a report was to allow the expert to report directly to the court and perhaps also assist the court in framing an opinion Note, however, that the role of a technical advisor is to assist the court regarding factual issues, not legal conclusions See Pennwalt Corp v Durand-Wayland, Inc , 833 F 2d 931 (Fed Cir 1987)(court-appointed expert "was a technical, not a legal, expert He was not expected to, and did not, analyze infringement under a legal standard "), cert denied, 485 U S 961 (1988) See also Reilly , 863 F 2d at 157-59 (technical advisor did not usurp judicial functions based on limits placed by the court and evidence of compliance with those limits)

[FN112] As noted above in the discussion of ex parte communication between the judge and theexpert (see discussion supra notes 105-06), in several cases theexpert reported directly to the judge without any report to the parties

[FN113] Rule 706 is captioned "Court Appointed Experts " The text of the rule, however, refers exclusively to "expert witnesses" or "witness " Fed R Evid 706 See also Wheeler v Shoemaker, 78 F R D 218, 227 n 14 (D R I 1978) ("court-appointed expert's function is solely to furnish impartial testimony and opinion respecting his particular area of expertise to assist the jury's evaluation of the partisanexperts")

[FN114] Thomas E Willging, Court-Appointed Experts 18-23 (Federal Jud Ctr 1986)

[FN115] See, e g , Phillips Oil Co v OKC Corp , 812 F 2d 265 (5th Cir)(expert testimony was required to explain accounting interpretation of term in contract), cert denied , 484 U S 851 (1987); U S Fidelity & Guar Co v Williams, 676 F Supp 123 (E D La 1987)(in suit brought by marine insurer to recover amounts paid for damage to yacht, an expert was appointed to testify as to the generally accepted meaning of a particular provision in an insurance contract), Grothusen v Nat'l R R Passenger Corp , 603 F Supp 486, 490 (E D Pa 1984)(testimony on disputed issue of damages in Federal Employer's Liability Act (FELA) case), Camrex Contractors v Reliance Marine Applicators, 579 F Supp 1420, 1429 (E D N Y 1984) (court "could have" appointedexpert on commercial practices to clarify contract term), Eastern Airlines v McDonnell Douglas Corp , 532 F 2d 957, 1000 (5th Cir 1976) (appeals court suggested that "jury might benefit from the testimony of a neutralexpert" in computing lost profits), Pennwalt Corp v Becton, Dickinson & Co , 434 F Supp 758, 761 n 8 (D N J 1977)(athletic director testified that "jock itch" was familiar term in the 1960s and 1970s)

[FN116] See Thomas E Willging, Court-Appointed Experts 18, 20-21 (Federal Jud Ctr 1986) Authority to appoint a court-appointed expert in a nontestimonial capacity is found in the court's inherent power to appoint an expert or master and its power under Fed R Civ P 53 to appoint a special master See Reilly v United States, 863 F 2d 149, 154 (1st Cir 1988)(court has inherent power to appoint an expert as an advisor and this power is not subject to Rule 706, unless the expert acts as a witness), Reed v Cleveland Bd of Educ , 607 F 2d 737, 746 (6th Cir 1979) (authority to appoint nontestimonial experts to assist in the remedial phase of a case derives from Fed R Civ P 53 or the inherent power of the court, not Fed R Evid 706), see also Hart v Community Sch Bd , 383 F Supp 699, 762-67 (E D N Y 1974)(appointment of an "expert master" under Fed R Civ P 53 and Fed R Evid 706)

[FN117] See supra Section III D 2

[FN118] Fed R Evid 706(c)

[FN119] See, e g , Nicholas J Bua, Experts-Some Comments Relating to Discovery and Testimony Under New Federal Rules of Evidence , 21 Trial Law Guide 1 (1977), Weinstein's Evidence, supra note 4, 706 [02], at 706-26

[FN120] Kian v Mirro Aluminum Co , 88 F R D 351, 356 (E D Mich 1980)

[FN121] In one district court case, the plaintiff challenged the disclosure of the court-appointed designation to the jury The trial court overruled plaintiff's motion to set aside the jury verdict and grant a new trial The only stated reason was that there was no abuse of discretion because the expert's testimony related to a "disputed issue " Grothusen v Nat'l R R Passenger Corp , 603 F Supp 486, 490 (E D Pa 1984) See also , DeAngelis v A Tarrocone, Inc , 151 F R D 245, 247 (S D N Y 1993)(describing appropriate context to be presented to jury when hearing testimony from a court-appointed expert)

[FN122] United States v Addison, 498 F 2d 741, 744 (D C Cir 1974)

[FN123] Weinstein's Evidence , supra note 4, 706 [02], at 706-27 See also Tahirih V Lee, Court-Appointed Experts and Judicial Reluctance A Proposal to Amend Rule 706 of the Federal Rules of Evidence , 6 Yale L & Pol'y Rev 480, 500 (1988) (suggesting that Rule 706 be amended to include a duty of the court to caution the jury against excessive reliance on the testimony of the expert appointed by the court)

[FN124] See John W Thibault & Laurens Walker, Procedural Justice A Psychological Analysis 54, 66 (1975) See also Irwin A Horowitz & Thomas E Willging, The Psychology of Law 110-11 (1984)

[FN125] In Leesona Corp v Varta Batteries, Inc , 522 F Supp 1304, 1311 n 17 (S D N Y 1981), the court, in a bench trial of a patent infringement action, expressly instructed the court-appointed expert to attend the trial during the testimony of witnesses for the parties and to testify after completion of the parties' cases

[FN126] Fed R Evid 611(a)

[FN127] The questions were "What did you do to prepare for this appearance?", "Do you have an opinion as to whether or not plaintiff has an asbestos-related disease?", and "What is that opinion?" See generally Carl B Rubin & Laura Ringenbach, The Use of Court Experts in Asbestos Litigation, 137 F R D 35 (1991) For another instance of experts appointed to aid the court in asbestos litigation, see In re New York City Asbestos Litigation, 1992 U S Dist LEXIS 3721 (S D N Y 1992)

[FN128] Kerasotes Mich Theaters v National Amusements, No 85-CV-40448- FL (E D Mich Feb 2, 1989) (order appointing expert under Rule 706)

[FN129] For example, in one case the judge went so far as to say the expert was "probably the most wonderful man I ever met He was honest, self- effacing, dedicated, respected, and objective "

[FN130] The dozen jury cases in this analysis include the seven cases discussed supra pp 1038-39, and five additional cases identified by judges who had used court-appointed experts on more than one occasion

[FN131] In a subsequent publication this judge has reported that the jury agreed with the court-appointed expert concerning the presence or absence of asbestos-related disease in thirteen of sixteen cases Carl B Rubin & Laura Ringenbach, The Use of Court Experts in Asbestos Litigation, 137 F R D 35, 41 (1991)

[FN132] See, e g , Nancy J Brekke et al , Of Juries and Court-Appointed Experts The Impact of Nonadversarial Versus Adversarial Expert Testimony , 15 Law & Hum Behav 451 (1991) (jurors did not accord more weight to nonadversarial testimony presented by an expert appointed by the court when compared with adversarial testimony presented by the party)

[FN133] Fed R Evid 706 advisory committee's note

[FN134] We asked the judges who had appointed experts, "How was the amount of compensation determined? Who paid?"

[FN135] This suggestion was mentioned by ten of the nineteen judges who suggested changes in the rule See also Weinstein's Evidence , supra note 4, 706 [03], at 706-27 to -29

[FN136] Fed R Evid 706(b), Fed R Civ P 71A(l) According to the advisory committee notes accompanying Rule 706, "The special provision for Fifth Amendment compensation cases is designed to guard against reducing constitutionally guaranteed just compensation by requiring the recipient to pay costs " It is not enough merely to have a case involving a taking under the Fifth Amendment wherein an expert is used in some capacity In order for the costs of the expert to be covered by government funds, the expert must have been appointed in direct connection to the issue of the taking See , e g , Sullivan v Kenton County, No 84-6061, 1986 WL 17019 (6th Cir May 16, 1986), (text in LEXIS and Westlaw), where the court disallowed costs for an expert because he had been appointed to resolve a boundary dispute between two private parties, not to help resolve the Fifth Amendment issue involved in the case

[FN137] See, e g , Fed R Evid 706(b); 18 U S C § 3006A(e) (1988)

[FN138] 18 U S C § 3006A(e) (1988) In fiscal year 1987, $1,421,332 was spent on psychiatrists and other experts under the provisions of the Criminal Justice Act Memorandum to Chair and Members of the Judicial Conference Committee on Defender Services, Summary Report on Appointments and Payments Under the Criminal Justice Act for Fiscal Year 1988 (on file with authors) See generally John F Decker, Expert Services in the Defense of Criminal Cases The Constitutional and Statutory Rights of Indigents , 51 U Cin L Rev 574 (1982)

[FN139] In re Payment of Court-Appointed Expert Witness, 59 Comp Gen 313 (1980) (expert appraisal of property to be forfeited in a criminal case, same rule applies to land condemnation proceedings) In the event of a dispute over payment, the district court may order the Department of Justice to make immediate payment pending resolution of the dispute Id at 314 (court issued order for immediate payment after the Administrative Office and the Justice Department disagreed about payment)

[FN140] Fed R Evid 706(b) By statute, payments to court-appointed experts are taxable as costs to the losing party 28 U S C § 1920(6) (1988) Cf McKinney v Anderson, 924 F 2d 1500, 1510-11 (9th Cir 1991) (overruling magistrate's decision to deny appointment of an expert as unduly restrictive because "Rule 706 allows the courts to assess the cost of the experts compensation as it deems appropriate"), Miller v Cudahy, 656 F Supp 316 (D Kan 1987), aff'd in part and rev'd in part , 858 F 2d 1449 (10th Cir 1988) (costs for what the district court had incorrectly characterized as a court-appointed expert could not be taxed, beyond the statutory allowance, to the party ordered by the court to use the expert), cert denied , 492 U S 926 (1989) Hart v Community Sch Bd , 383 F Supp 699, 767 (E D N Y 1974) (fee of special master appointed pursuant to Fed R Civ P 53 to assist with post-trial enforcement of a desegregation decree can be assessed against the defendant when the appointments is made)

[FN141] Rule 706(b) states that court-appointed experts "are entitled to reasonable compensation in whatever sum the court may allow " This language puts to rest the issue of whether a court-appointed expert witness is relegated to the relatively small per diem fees allowed for the parties' witnesses, expert or not 28 U S C § 1821 (1988) See also Crawford Fitting Co v J T Gibbons, Inc , 482 U S 437 (1987) (dictum), where the court stated that the statutory fee limit for the parties' witnesses does not apply to compensation for court-appointed expert witnesses

[FN142] Rule 706 provides that "compensation shall be charged in like manner as other costs " See also United States v Articles Provimi, 425 F Supp 228, 231 (D N J 1977) (assessing one-half of the costs of the expert's services, "with further decision on the expert's costs to abide the event") Cf Baker Indus v Cerberus, Ltd , 570 F Supp 1237, 1248 (D N J 1983) (85% of costs were assessed against defendant and 15% against plaintiff who prevailed on almost all issues)

[FN143] Model Code of Professional Responsibility DR 7-109(C) prohibits a contingent fee for expert witnesses, presumably on the grounds that it may influence the witness to favor the party best able to pay The rule has been upheld against a challenge that it unconstitutionally limited access to the courts Person v New York City Bar Ass'n, 554 F 2d 534 (2d Cir), cert denied , 434 U S 924 (1977) Model Rules of Professional Conduct Rule 3 4(b) cmt 3 (1993) contains the same prohibition in circumstances such that a contingent fee could be characterized as an "inducement" to testify falsely At least one jurisdiction has decided to permit contingent fees for expert witnesses as long as the fee is not a percentage of the recovery See D C Ct App Rules of Professional Conduct , Rule 3 4 cmt 8 (1990) ("A fee for the service of a witness who will be proffered as an expert may be made contingent on the outcome of the litigation, provided, however, that the fee, while conditioned on recovery, shall not be a percentage of the recovery ")

Note that an appointment in a case with an indigent party in which the expert is to be compensated by the losing

party, in effect, may make the expert's fee contingent on the success of the indigent party The Manual for Complex Litigation suggests that judges should be wary of making such appointments underRule 706 MCL 2d, supra note 32, § 21 51 n 162 ("The judge should be wary of making an appointment underFed R Evid 706 if, in effect, the expert will be on a contingent fee basis ") See also Note, Contingent Fees forExpert Witnesses in Civil Litigation , 86 Yale L J 1680 (1977)

[FN144] United States Marshals Serv v Means, 741 F 2d 1053, 1058 (8th Cir 1984) (en banc), see alsoWebster v Sowders, 846 F 2d 1032, 1039 (6th Cir 1988)(allocation of Rule 706 costs, at least temporarily, to the party against whom a preliminary injunction is granted is permitted when the parties obtaining the relief were impecunious) Cf Cagle v Cox, 87 F R D 467, 471 (E D Va 1980) (advance authorization for payment forexperts is not permitted, but taxation of plaintiffs' expert witness fees as costs is allowed to improve access of indigents to court),Maldonado v Parasole, 66 F R D 388, 390 (E D N Y 1975) (indigency is a proper consideration in taxation of costs pursuant to Fed R Civ P 54(d))

[FN145] McKinney v Anderson, 924 F 2d 1500 (9th Cir 1991)

[FN146] Fed R Evid 706(b)

[FN147] Fed R Civ P 54(d)

[FN148] See United States v Michigan, 680 F Supp 928, 956-57 (W D Mich 1987) Unique Concepts, Inc v Brown, 659 F Supp 1008, 1011 (S D N Y 1987)

[FN149] See, e g , Matter of Fleshman, 82 B R at 996 (Bankr W D Mo 1987) (court stated that parties would have to pay for an appraiser's services "according to a ratio determined by comparing the final outcome to their initial contentions"), cf Baker Indus v Cerberus, Ltd , 570 F Supp 1237, 1248 (D N J 1983) (assessment of 85% of special master costs against defendant and 15% against plaintiff who prevailed on almost all issues was approved)

[FN150] Several judges mentioned that they suspected that the prospect of the losing party reimbursing the winning party for the additional amount of the expert's fee encouraged settlement, but this topic was not developed in the interviews

[FN151] McKinney v Anderson, 924 F 2d 1500, 1511 (9th Cir 1991) (district court has discretion to appoint an expert witness in a case involving an indigent litigant and require the opposing party to compensate the witness), United States Marshals Serv v Means, 741 F 2d 1053, 1058 (8th Cir 1984)(en banc)

[FN152] In one case an inmate charged that he received inadequate care for a broken bone treated by a prison doctor The state offered the doctor's testimony and the plaintiff offered noexpert testimony The court appointed an expert who confirmed that the medical care the prisoner received did not meet the standards of the profession In a second case, prisoners claimed that inadequate facility staffing led to unsafe conditions The court-appointedexpert testified on the conditions of incarceration and compared them to conditions in similar institutions Although the judge made an effort to allocate the expense fairly among the parties, he expressed considerable doubt that the prisoners would pay and appeared willing to impose the entire expense on the state if this should be necessary In a

third case, an expert was appointed to aid the court in deciding a motion for contempt against a state based on violation of an earlier order to reduce prison overcrowding Again, the expert testified on the conditions of incarceration In each of these cases, the fact that the defendant was the state and that some preliminary investigation revealed the complaint to be of merit appeared to weigh heavily in the court's decision to appoint the expert and impose the costs on the defendant A preliminary inquiry would seem to be appropriate to avoid the concerns expressed in the Manual for Complex Litigation , supra note 143

[FN153] Beaver v Bd of County Comm'r of Gooding Co , No 91-0165-S-EJC, 1991 U S Dist LEXIS 20506 (D Idaho Sept 19, 1991)

[FN154] In one case, an indigent pro se party resisted attending a deposition, claiming an inability to participate due to a medical condition and presenting a letter from a personal physician The deposing party objected and the court, at the deposing party's request, appointed an independent medicalexpert and assessed costs against the deposing party The expert confirmed the validity of the excuse Despite the fact that the appointment was made at the suggestion of the deposing party, that party then resisted payment for some time In a second instance, an indigent criminal defendant charged with fraud claimed that she did not sign certain checks that were introduced as evidence Since the federal prosecutor did not plan to presentexpert testimony on this topic, the court appointed anexpert in handwriting analysis and assessed the expense to the Department of Justice This expense was then paid under the statutory authority to provide expert assistance for indigent defendants in a criminal proceeding trial under the Criminal Justice Act 18 U S C § 3006A(e) (1988)

[FN155] See supra note 142

[FN156] David Medine, The Constitutional Right to Expert Assistance for Indigents in Civil Cases , 41 Hast L J 281, 298 (1990) ("court appointment of expert witnesses (under Fed R Evid 706) does not provide adequate assistance to indigent civil litigants"))

[FN157] 682 F Supp 150 (D R I), aff'd in part, 863 F 2d 149 (1st Cir 1988)

[FN158] 5 U S C § 3109 (1988); 28 U S C § 602(c) (1988)

[FN159] Reilly , 682 F Supp at 152-55 The court also secured the permission of the Chief Judge of the First Circuit Court of Appeals and the Circuit Council The court of appeals did not address which of these permissions would be necessary in order to appoint a technicalexpert Reilly , 863 F 2d at 154 n 2

[FN160] Letter from L Ralph Mecham, Director, Administrative Office of the United States Courts, to Gary J Golkiewicz, Chief Special Master, United States Claims Court (October 10, 1989) (on file with authors) (approving a request to hire an economic expert to assist a special master in a case brought under the National Vaccine Injury Compensation Program) No similar authority exists for appointment of atechnical advisor to serve the courts of appeals See E I du Pont de Nemours and Co v Collins, 432 U S 46, 57 (1977)

[FN161] In the words of the court of appeals, the case "involved esoterica complex economic theories, convoluted by their nature, fraught with puzzlement in their application " Reilly , 863 F 2d at 157

[FN162] The judges were asked, "Were you satisfied with the services provided by the 706expert? Would you use a 706 expert again in the same circumstances?" (We did not have time to pose these questions to three of the sixty-eight judges interviewed) The two judges who did not indicate that they were satisfied remain open to appointing an expert in the future One judge indicated that he had little basis from which to form a judgment regarding the performance of the two experts he appointed, one expert was called on to do little before the case settled, and the other testified before a visiting judge The other judge who did not express satisfaction with the process indicated some frustration that the interactions with theexpert had been constrained by a need to avoid direct communication with the expert outside the presence of the parties As we noted earlier, supra note 70, we interviewed only judges who reported using an expert and may have missed judges who attempted to use an expert but were so dissatisfied that they abandoned the effort

[FN163] Our question concerning satisfaction with the process elicited a great many testimonials regarding the experts who were appointed For example "He was outstanding He was very interested in the intersection of law and medicine and his testimony showed an understanding of the role of anexpert and the role of the judge He studied the statute and knew what would be helpful to me as a judge," "He gave me a very thoughtful assessment of the position of the two parties and of his reasons for agreeing with the one," and, "Here, the individual was skillful and he was very aware that he was acting for the court He bent over backwards to be fair to both sides " We attempted in the initial interviews to question the judges to determine the extent to which their satisfaction could be attributed to the procedure they employed or to the individual who served as theexpert Those who responded indicated that their satisfaction with the process was due to both the individual and the procedure

[FN164] Judges were asked what, if any, changes would make court-appointedexperts more useful Multiple users were asked specifically about changes to Rule 706 One-time users were asked about changes in general, but were encouraged in the interview to address changes in the rule

[FN165] See supra Section VI

[FN166] See supra Section V B

[FN167] One judge suggested that filing fees be raised by $1 to help build a fund used to payexperts when the cost becomes uncollectible See also supra Section VI D

[FN168] See supra notes 141-45 and accompanying text

[FN169] See supra Section V B 1

[FN170] Reilly v United States, 863 F 2d 149, 156 (1st Cir 1988)(such appointments "should be reserved for truly extraordinary cases where the introduction of outside skills and expertise, not possessed by the judge, will hasten the just adjudication of a dispute without dislodging the delicate balance of the juristic role Appropriate instances, we suspect, will be hen's teeth rare The modality is, if not a last, a near-to-last resort, to be engaged only where the trial court is faced with problems of unusual difficulty, sophistication, and complexity, involving something well beyond the regular questions of fact and law with which judges must routinely grapple ")

[FN171] See supra Section IV C Again, our study was not well suited to determine the extent to which the judges were thwarted in making an appointment by failing to identify a suitable candidate

[FN172] When judges who appointed an expert on more than one occasion were asked how their use of court-appointed experts changed with experience, those who reported changes (eleven of twenty-three) often mentioned that they did a better job of selecting and appointing experts Six of the ten judges reporting changes mentioned specific improvements in the process of appointing experts, such as exercising greater care in selecting an expert, encouraging greater party participation, becoming more active in recruiting a qualified person to serve as the appointed expert, and beginning the appointment process earlier in the litigation

[FN173] A recent special task force of the AAAS/ABA National Conference of Lawyers and Scientists, supported by the Carnegie Corporation, is exploring ways to increase the number of scientists and engineers who are willing to serve as appointed experts See generally Science, Technology and the Courts The Use of Court-Appointed Experts-Demonstration Project Planning Conference (Executive Summary) (January 1994) (on file with author) As part of a proposed pilot project, various scientific societies will serve as sources of expertise for judges who desire to make such an appointment This project also is developing guidelines for experts assisting the courts, and is exploring the possibility of assembling a panel of qualified experts to prepare authoritative statements on the state of the art in specific areas of science and technology A greater willingness of qualified persons to serve as appointed experts, combined with clearer instruction for judges concerning recruitment of experts beyond the judge's immediate circle of acquaintances, should address this concern

[FN174] This is likely to be an increasing concern as judges employ pretrial hearings as a means of assessing admissibility of scientific and technical evidence See generally Margaret A Berger, Procedural Paradigms for Applying the Daubert Test , 78 Minn L Rev 1345 (1994), Marc S Klein, The Revolution in Practice and Procedure Daubert Hearings , 1 Shepard's Expert & Sci Evid Q 655 (1994)

[FN175] Only four of the sixty-five users we interviewed had appointed experts under Rule 706 during criminal proceedings In criminal proceedings there is separate statutory authority enabling appointment of an expert See, e g , 18 U S C § 3006(e) (1988)

[FN176] See Fed R Civ P 16(c)(4) (permitting consideration of limitations or restrictions on the use of expert testimony at a pretrial conference) and Fed R Civ P 26(a)(2) (requiring disclosure without a discovery request of anticipated expert testimony, information supporting that testimony, and qualifications and experience of expert witness)

[FN177] Fed R Civ P 53

[FN178] See Reilly v United States, 863 F 2d 149 (1st Cir 1988) Locating the authority to appoint an expert in the Federal Rules of Civil Procedure also would permit easy integration with recent changes intended to ease the difficulties that arise with expert testimony Timing of appointment, ex parte communication, discovery and compensation of the expert may all be considered part of a comprehensive pretrial procedure intended to facilitate early identification of litigation disputes which turn on evidence that is not readily comprehensible, and to permit the court to select from a range of options depending on the degree of assistance required

[FN179] For similar proposals to facilitate consideration of expert evidence in toxic tort litigation, see William W

Schwarzer, Management of Expert Evidence , in Reference Manual for Scientific Evidence (Federal Jud Ctr , forthcoming), and Margaret A Berger, Procedural and Evidentiary Mechanisms forDealing with Experts in Toxic Tort Litigation A Critique and Proposal , submitted to the Carnegie Commission on Science, Technology, and Government (November 1991) [hereinafter Berger, Carnegie Proposal] See also Paul C Giannelli, Scientific Evidence A Proposed Amendment to Rule 702, 115 F R D 102 (1987) (proposing that the Federal Rules of Evidence be amended to bar experttestimony unless the proponent gives the adverse party advance written notice of the nature of the testimony)

[FN180] See supra Section IV A

[FN181] See, e g , William W Schwarzer, Guidelines for Discovery, Motion Practice and Trial, 117 F R D 273, 276 (1987) ("If the expert is expected to testify at trial, a written statement of his anticipated testimony should be given to opposing counsel in advance of the deposition ") See also Litigation Management Manual , 59-60 (Federal Jud Ctr 1992)

[FN182] Fed R Civ P 26(a)(2)(B)

[FN183] Fed R Civ P 37(c)(1)

[FN184] MCL 2d, supra note 32, § 20 1

[FN185] Fed R Civ P 16(c)(3)

[FN186] Fed R Civ P 36(a)

[FN187] Berger, Carnegie Proposal , supra note 179, at 53 See also Litigation Management Manual 60 (Federal Judicial Center 1992)

[FN188] See, e g , The Evolving Role of Statistical Assessments as Evidence in the Courts , supra note 35, at app II (Recommended Standards on Disclosure of Procedures Used for Statistical Studies to Collect Data Submitted as Evidence in Legal Cases), in app F (Recommendations on Pretrial Proceedings in Cases with Voluminous Data)

[FN189] Jack B Weinstein, Role of Expert Testimony and Novel Scientific Evidence in Proof of Causation , Address at ABA Annual Meeting, Managing Mass Torts, San Francisco, Cal (August 9, 1987) (on file with authors) (describing an occasional practice of swearing in all the experts, seating them at the table together with counsel and engaging them in recorded colloquy under court direction) Other techniques for clarifying and narrowing issues are found in the Manual for Complex Litigation MCL 2d, supra note 32, § 21 33

[FN190] 113 S Ct 2786, 2795 & n 7 (1993) See alsoMargaret A Berger, Procedural Paradigms for Applying the Daubert Test , 78 Minn L Rev 1345 (1994) Marc S Klein, The Revolution in Practice and Procedure Daubert Hearings , 1 Shepard's Expert & Sci Evid Q 655 (1994)

[FN191] See generally Berger, supra note 190, Johnny K Richardson, Use of Motions In Limine in Civil Proceedings , 45 Mo L Rev 130 (1980), Stephen A Saltzburg, Tactics of the Motion In Limine , 9 Litig 17 (1983) The arguments for and against motions in limine are set forth in 21 Charles A Wright & Kenneth W Graham, Federal Practice and Procedure § 5037, at 193- 96 Other techniques for clarifying and narrowing issues are found in MCL 2d, supra note 32, § 21 33

[FN192] Celotex Corp v Catrett, 477 U S 317 (1986) In re Agent Orange Prod Liab Litig , 611 F Supp 1223 (E D N Y 1985), aff'd on other grounds , 818 F 2d 187 (2d Cir 1987), cert denied sub nom Lombardi v Dow Chem Co , 487 U S 1234 (1988)

[FN193] Although Rule 16 does not specifically address court-appointed experts as a topic to be considered at a pretrial conference, the rule does recognize that it may be necessary to inquire into the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems Fed R Civ P 16(c)(12)

[FN194] Fed R Evid 706(a) See also In re Joint E & S Dists Asbestos Litig , 830 F Supp 686, 694 (E D N Y 1993) (parties are entitled to be notified of the court's intention to use an appointed expert and be given an opportunity to review the expert's qualifications and work in advance)

[FN195] If the appointed expert is to serve as a technical advisor, the judge may wish to seek permission of the Administrative Office to compensate the expert as a consultant to the judiciary Such compensation is likely to be approved only in highly unusual cases

[FN196] There may be questions concerning nonsubstantive issues, such as the timing of a report or hearing, or conditions of compensation, that do not require the participation of the parties

[FN197] Although such an appointment does not require the authority of Rule 706, several of the judges invoked this rule and obtained consent of the parties in retaining a technical advisor.

[FN198] See Reilly v United States, 863 F 2d 149, 156-57 (1st Cir 1988) MCL 2d, supra note 32, § 21 54

[FN199] Reilly v United States, 863 F 2d 149, 159-61 (1st Cir 1988)

[FN200] Some judges apply the same restrictions on parties' ex parte communications as they impose on themselves and their law clerks When the appointed expert is serving as a technical advisor, such restrictions would be especially appropriate

[FN201] Formal depositions of appointed experts proved to be infrequent, although on occasion an appointedexpert met informally with the parties to discuss the report

[FN202] Fed R Evid 706(c)

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposed Amendment to Rule 803(3)
Date: April 2, 2004

At its Fall 2003 meeting the Evidence Rules Committee directed the Reporter to prepare a report on Rule 803(3)—the hearsay exception for a declarant's statement of his or her state of mind—so that the Committee could determine the necessity of an amendment to that Rule.

The possible need for amendment of Rule 803(3) arises from a dispute in the courts about whether the hearsay exception covers statements of a declarant's state of mind when offered to prove the conduct of another person. Statements of a declarant's state of mind are admissible to prove the *declarant's* own subsequent conduct, subject to Rule 403, under the famous *Hillmon* doctrine. Thus, a statement of the declarant, "I am going to Colorado" can be used to prove that the declarant actually went. But where the declarant's statement is offered to prove the conduct of another person, evidentiary problems arise that are treated in conflicting ways by the federal courts. Thus, "I am going to the parking lot to meet Angelo", when offered to prove that Angelo actually met the declarant there, will be admissible in some federal courts and not in others. Federal Rule 803(3) is silent on the admissibility of state of mind statements when offered to prove the conduct of a non-declarant; there is legislative history, however, indicating that the exception should not permit a state of mind statement to prove the conduct of another.

The Reporter's intent was to provide the Committee with an extensive discussion of the conflicting case law and the case for and against an amendment to Rule 803(3). However, an important Supreme Court decision handed down on March 8, 2004 throws the propriety of *any proposal to amend a hearsay exception into substantial doubt.* That opinion, *Crawford v. Washington,* is attached to this memorandum. The Court in *Crawford* radically revised its Confrontation Clause jurisprudence; whether a hearsay statement falling within a hearsay exception violates the accused's right to confrontation is now subject to a radically different analysis. The constitutional law is in flux after *Crawford.* This has a direct bearing on the scope of Rule 803(3),

because the use of the state of mind exception to prove the conduct of a non-declarant occurs almost exclusively in criminal cases, where the statement is offered to prove the conduct of the accused. This means that any amendment of Rule 803(3) that would apply to criminal cases is almost surely premature and unwise so shortly after *Crawford*.

The Supreme Court has emphasized the caution necessary in the rules process after *Crawford* by sending back the proposed amendment to Evidence Rule 804(b)(3). That proposed amendment was intended to conform the Rule to Confrontation Clause requirements; but given the dramatic change in Confrontation Clause analysis wrought by *Crawford*, the Supreme Court found that the proposed amendment conformed to constitutional jurisprudence that was no longer controlling, and therefore "remanded" the proposal

This memorandum is in four parts. Part One sets forth the existing Rule and the Committee Note. Part Two provides a short discussion of the case law governing the admissibility of state of mind statements offered to prove the conduct of a non-declarant. Part Three discusses the holding and rationale of *Crawford* and its impact on any proposed amendment that would affect a hearsay exception in general and state of mind statements in particular. Part Four sets forth model amendments to Rule 803(3), solely for the information of the Committee. Absolutely no suggestion is made that the Rule should be amended at this point To the contrary, any amendment should be tabled for the near future to await lower court analysis of the meaning of *Crawford*

I. The Current Rule 803(3) and the Original Committee Note

Rule 803(3) currently provides as follows:

> **Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial**
>
> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (3) *Then existing mental, emotional, or physical condition.* — A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

The pertinent part of the original Committee Note provides as follows:

> **Exception (3)** is essentially a specialized application of Exception (1), presented separately to enhance its usefulness and accessibility. See McCormick §§ 265, 268.
>
> The exclusion of "statements of memory or belief to prove the fact remembered or believed" is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind. Shepard v. United States, 290 U.S. 96, 54 S. Ct. 22, 78 L. Ed. 196 (1933); Maguire, The Hillmon Case — Thirty-three Years After, 38 Harv. L. Rev. 709, 719-31 (1925); Hinton, States of Mind and the Hearsay Rule, 1 U. Chi. L.Rev. 394, 421-23 (1934). The rule of Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 12 S. Ct. 909, 36 L. Ed. 706 (1892), allowing evidence of intention as tending to prove the doing of the act intended, is, of course, left undisturbed.
>
> * * *

The Report of the House Committee on the Judiciary concerning the Rule provides in pertinent part as follows:

> Rule 803(3) was approved in the form submitted by the Court to Congress. However, the Committee intends that the Rule be construed to limit the doctrine of Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 295-300 (1892), so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person.

Reporter's Background Discussion of Rule 803(3):

Rule 803(3) provides an exception for statements of present state of mind, emotion, or physical condition. The theory of trustworthiness supporting the admissibility of these statements is that they are based on unique perception, that is, the declarant has a unique perspective into his own feelings and emotions. There is also an argument that state of mind statements are spontaneous, because in order to be admissible under the exception they must be reflective of a "then existing state of mind." However, as applied to statements of a declarant's state of mind, the spontaneity requirement does not really guarantee sincerity. It is impossible to tell how spontaneous a state of mind statement really is, because it describes an internal event; a declarant's "then existing" state of mind could well be the product of days of contemplation and fabrication. *See, e g., United States v Lawal,* 736 F.2d 5 (2d Cir. 1984) (the defendant's statement of anger at being "set up," made at the time drugs were found in his suitcase in a Customs search, was admissible under Rule 803(3) as a statement of a then existing state of mind even though there was a likelihood of fabrication; the defendant had time during a long airplane trip to think up a story should he be caught). A state of mind statement is unlike, for instance, the present sense impression, where it can be determined through reference to an external event that the declarant did or did not have time to fabricate.

Rule 803(3) does not permit a statement of memory or belief to prove the fact remembered or believed. The "statement of memory or belief" exclusion is a codification of the holding in *Shepard v United States* , 290 U.S. 96 (1933), where the Court held that a statement of the defendant's wife, accusing him of poisoning her, could not be admitted under the state of mind exception to prove that the defendant had actually poisoned her. The *Shepard* exclusion is considered necessary "to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind."Advisory Committee Note to Rule 803(3). *See also United States v Cardascia*, 951 F.2d 474 (2d Cir. 1991) (Rule 803(3) could not be applied to admit statements of the declarant's state of mind with regard to conduct that occurred eight months earlier; a contrary rule would significantly erode the hearsay rule, beyond the intended breadth of the hearsay exception).

While a state of mind statement cannot be offered to prove that a past event occurred, it can be offered in some cases to prove the occurrence of an event *subsequent* to the statement. *See, e.g., United States v Tokars,* 95 F.3d 1520 (11th Cir. 1996) (statements of the defendant's wife that she intended to divorce the defendant were admissible to show a motive for the defendant to murder her). The Advisory Committee states that Rule 803(3) preserves the rule of *Mutual Life Insurance Co. v Hillmon*, 145 U S. 285 (1892), allowing a hearsay statement by a declarant to prove the declarant's state of mind, when probative that the declarant subsequently acted in accordance with that state of mind. In *Hillman*, a declarant's hearsay statement about his intent to go to a certain place was held admissible to prove that the declarant actually went there.

An example may help to illustrate what is included within the exception and what is not. If a declarant (*D*) states, "I am going to New York tomorrow," and subsequently disappears, the

statement may be introduced as probative that *D* went to New York; intent to do an act in the future is probative that the act occurred. If, on the other hand, *D* states "Two years ago I went to New York," the statement may be said to reflect the state of mind called "memory," but the statement is not admissible under the state of mind exception, because that exception precludes a statement of memory when offered to prove that the fact remembered is actually true. If *D* says, "I am going to New York tomorrow because Joe stole my money and I have to get it back from him," the statement cannot be used to prove that Joe stole money from *D*, because that would be using the state of mind statement to prove the truth of a past fact, which is prohibited by *Shepard*. *See, e.g., United States v Liu,* 960 F.2d 449 (5th Cir.1992) (no abuse of discretion in excluding a defendant's hearsay statements that he had participated in a crime because he feared a police officer he thought to be corrupt, the Rule admits statements as to the declarant's fear, but not as to why he held that state of mind or what he believed induced it) But it could be used to prove that *D* went to New York, subject to the Rule 403 balance of probative value and prejudicial effect.

Where the state of mind statement is offered to prove future conduct of the declarant, the hearsay rule poses no bar, but the declarant's statement must be scrutinized under Rule 403. Exclusion under Rule 403 could occur under one of three circumstances:

1) if the inference from state of mind to subsequent action by the declarant is weak (*see, e.g., United States v. Williams*, 704 F.2d 315 (6th Cir. 1983) (statement of the defendant that he intended to satisfy a tax indebtedness when his mother sold her house, offered to explain his possession of a large amount of cash upon arrest, was admissible under Rule 803(3) as a statement of intent to prove subsequent conduct; however, the statement was properly excluded on relevance grounds because the intent to perform the future act was conditioned on the sale of the house, and this condition had not been met);

2) if there is no dispute about the declarant's subsequent conduct, so that any proof of the point would not be relevant (*see, e.g., United States v. Scrima*, 819 F.2d 996 (11th Cir. 1987) (in a prosecution for income tax evasion, the defendant attempted to rebut the government's "net worth" theory by offering the testimony of someone to whom the defendant had boasted, prior to the relevant tax years, of having a large sum of money to invest; this testimony was inadmissible, because the defendant's state of mind was not relevant to any subsequent conduct at issue in the case; the only relevant fact was whether the defendant actually had the money, and his out-of-court boast was hearsay with respect to that fact));

3) if prejudice, confusion, or delay is created that substantially outweighs the statement's probative value as to the declarant's future course of action (*see generally United States v. Brown*, 490 F.2d 758 (D.C. Cir. 1973) (principal danger with state of mind statements offered to prove subsequent conduct is that the jury will consider the declarant's statement for the truth of a past event, such as a prior threat by the defendant; such inferences are improper, and must be weighed against the probative value of the declarant's statement as tending to prove the declarant's subsequent course of action).

The most obvious risk of prejudice is that the jury will consider the hearsay statement not as proof of state of mind and the subsequent conduct of the declarant, but rather for the truth of the facts that are related in the statement. As the court put it in *United States v. Fontenot*, 14 F.3d 1364, 1371 (9th Cir.1994):

> The state-of-mind exception does not permit the witness to relate any of the declarant's statements as to why he held the particular state of mind, or what he might have believed would have induced the state of mind. If the [memory or belief] reservation in the rule is to have any effect, it must be understood to narrowly limit those admissible statements to declarations of condition — "I'm scared" — and not belief — "I'm scared because [someone] threatened me."

On the other hand, it is possible that a statement containing an accusation of past conduct might nonetheless be admissible under Rule 403 to prove the declarant's subsequent conduct if that conduct is in dispute and if the statement is highly probative of that conduct. For example, assume a murder case in which the defendant claims that he killed the victim by accident. The defense is that the defendant and the victim were rabbit hunting together; the victim was walking ahead of the defendant to scare up rabbits; and the defendant tripped on a log and his gun accidentally discharged, killing the victim. The prosecution proffers a hearsay statement from the victim, made three days before his death, in which the victim told his mother that he was afraid the defendant was going to kill him because the victim still owed the defendant a large sum of money from a drug deal. This statement should be admitted under Rules 803(3) and 403, with an instruction that the jury is not to use the statement for the fact that the victim owed the defendant money from a drug deal or that the victim had reason to fear the defendant. Rather, it is admissible to show that the victim feared the defendant, whether that fear was reasonable or not. This fearful state of mind is probative of the victim's subsequent conduct–it makes it much less likely that the victim would be walking voluntarily ahead of a person he feared while that person was carrying a loaded gun. The hearsay statement is prejudicial because the jury may use it for the truth of the facts related even though instructed not to do so. But a trial court would certainly be within its discretion in finding that the prejudicial effect does not substantially outweigh the probative value of the statement in proving the victim's disputed actions. *See, e.g.,* United States v. Hartmann, 958 F.2d 774 (7th Cir. 1992) (a homicide victim's wife and others were charged with defrauding life insurance companies by, *inter alia*, fraudulently listing the wife as the husband's beneficiary on life insurance policies, and subsequently killing the husband; the husband's statements describing the dismal state of his marriage, his desire to replace his wife as beneficiary on his insurance policies, and his fear of being murdered by his wife and her lover were admissible as evidence of his state of mind and were relevant to prove that the declarant would not have listed his wife as beneficiary).

II. Using a State of Mind Statement to Prove the Conduct of a Non-Declarant

The legislative history of Rule 803(3) fails to resolve whether, as in the famous *Hillmon* dictum, a declarant's statement of state of mind can be used to prove the subsequent conduct of someone other than the declarant. For example, if the declarant says, "I am going to meet Joe to buy some drugs from him," can the statement be used to prove the subsequent conduct of both the declarant *and* Joe?

The rationale for extending the state of mind exception to prove the subsequent conduct of a nondeclarant is dubious. Recall that the basis for admitting state of mind statements is that the declarant has a unique perspective into his own state of mind. This rationale obviously does not apply to the declarant's conclusion about the state of mind of someone else. A declarant might have unique perception of his own state of mind, but he has no special perspective into the thoughts and feelings of another person. And a statement predicting the future conduct of another is dependent on the declarant's knowledge of that other person's state of mind.

It is true that the Court in *Hillmon* stated that the letters were competent evidence to prove that Walters went to Colorado *with Hillmon*. But the actual precedential import of that extension of the state of mind exception is subject to doubt. All of the cases relied upon by the *Hillmon* Court, except one, were cases in which the state of mind exception was used to prove only the conduct of the declarant (e.g., to prove that the declarant took a certain train at a certain time). Almost all of the analysis in the *Hillmon* opinion considers the use of the state of mind exception to prove the declarant's conduct. Discussion of using this exception to prove the conduct of someone other than the declarant is clearly an afterthought. Finally, the entire evidentiary discussion in *Hillmon* is, at least technically, dictum, because the Court reversed judgments for the plaintiff not on the ground that evidence was improperly excluded, but rather on the ground that the insurer-defendants were entitled to separate verdicts.

The Court in *Hillmon* cited the old New Jersey case of *Hunter v. State*, 40 N.J.L. 495 (1878), where that Court allowed the state of mind exception to prove that a meeting between two people took place. But the reasoning in that case was peculiar, to say the least. The *Hunter* court stated that "a reference to the companion who is to accompany the person leaving is as natural a part of the transaction as is any other incident or quality of it. If it is legitimate to show by a man's own declarations that he left his home to be gone a week, or for a certain destination, which seems incontestable, why may it not be proved in the same way that a designated person was to bear him company?" This "analysis" amounts to an assertion that if one part of a statement is reliable, all parts of a statement must be admitted, no matter how unreliable those parts may be. Such a proposition has been rejected time and again by the United States Supreme Court, and would amount to an exception to the hearsay rule for "partly reliable narratives." *See Williamson v United States,* 512 U.S. 594 (1994) (rejecting the notion that an entire narrative can be admissible simply because part of the narrative is reliable, and noting that "one of the most effective ways to lie is to mix falsehood with truth").

Finally, even if *Hillmon* were a holding that state of mind statements can be used to prove the conduct of a nondeclarant, this is a holding based on the common law. It is not a controlling discussion of the Federal Rules of Evidence, enacted almost 100 years later.

The report of the House Judiciary Committee stated that the Committee intended that Rule 803(3) be construed to limit the *Hillmon* doctrine "so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person." The Senate Report made no mention of this limitation.

Federal courts are in conflict about whether statements offered to prove the conduct of a non-declarant are admissible under Rule 803(3). See generally Note, *Federal Rule of Evidence 803(3) and the Criminal Defendant The Limits of the Hillmon Doctrine*, 35 VAND. L. REV. 659 (1982) (noting conflict in the courts and arguing that Rule 803(3) should be limited to statements offered to prove the declarant's future conduct). *See also Brown v. Tard*, 552 F.Supp. 1341, 1351-52 (D.N.J.1982) (noting that although under the New Jersey counterpart to Federal Rule 803(3) courts may admit a declarant's statement of intent to prove a defendant's subsequent actions, federal courts are split on their interpretation of Rule 803(3)).

There are basically three views in the courts on whether a statement is admissible under Rule 803(3) when offered to prove the conduct of a non-declarant.

1. Some courts have adopted the House limitation and refused to admit a statement that the declarant intended to meet with a third party as proof that the declarant and the third party did indeed meet. *See, e.g., Gual Morales v. Hernandez Vega*, 579 F.2d 677 (1st Cir. 1978) (excluding a witness' statement that "I intend to see [the defendant]" when offered to prove that the witness met with the defendant); *United States v. Jenkins,* 579 F.2d 840 (4th Cir. 1978) (accepting the House limitation on *Hillmon* but also finding that the declarant's statement, "I'm on my way to see Jenkins," was admissible as nonhearsay for the impeachment purpose of attacking Jenkins' testimony that he had left his house to see a friend other than the declarant; the dissent argued that the statement was in fact admitted to show that Jenkins met with the declarant and that such admission was error).

2. Some courts have permitted the declarant's statement to be used to prove another's conduct, at least where the trial court gave a limiting instruction that the statement cannot be used to prove the intent or conduct of another but can only be used for the inference that the declarant carried out his intended action (though that instruction seems to work at cross-purposes with the court's holding that the state of mind statement can be used to prove the conduct of a non-declarant). *United States v. Astorga-Torres*, 682 F.2d 1331 (9th Cir. 1982); *United States v. Houlihan,* 871 F.Supp. 1495, 1499 (D.Mass. 1994).

3. Many courts have taken a compromise approach, allowing a declarant's statement of intent to be admitted to prove the conduct of a non-declarant, but only "when there is independent evidence which connects the declarant's statement with the non-declarant's

activities." *See, e.g., United States v Delvecchio*, 816 F.2d 859 (2d Cir. 1987) (an informant's statement that he was going to meet Delvecchio to complete a drug transaction was inadmissible where there was no independent evidence of Delvecchio's presence at the meeting). *Compare United States v. Sperling*, 726 F.2d 69 (2d Cir. 1984) (an informant's statement that he planned to meet Sperling to complete a drug transaction was admissible where the declarant's statement of intent to meet with the defendant was confirmed by later eyewitness testimony that the meeting actually took place) See also C. Mueller and L. Kirkpatrick, *Evidence* at 938 (1st ed. 1995) ("Some modern cases take the clearly correct position that the exception in its present form cannot justify use of statements of intent by themselves as proof of what others did. And yet a growing number of cases approve use of a statement to prove what the speaker and another did together if other evidence confirms what the statement suggests the other did."). The amount of independent evidence required by these courts has never been explicitly stated.

It is also notable that at least four states have specific provisions in their evidence rules that prohibit the use of state of mind statements to prove the conduct of a nondeclarant. See California Evidence Code section 1250; Florida Evidence Code § 90.803; Louisiana Code Evid. Art 803(3) ("A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove *the declarant's* then existing condition or his future action."); and Maryland Rule of Evidence 803(b)(3). See also the Commentary to Tennessee Rule of Evidence 803(3) ("The Commission contemplates that only the declarant's conduct, not some third party's conduct, is provable by this [state of mind] hearsay exception."). And several states have, by judicial decision, rejected the use of the state of mind exception to prove the conduct of a nondeclarant. See, e.g., *People v Franklin,* 782 P.2d 1202 (Colo.1989); *State v. Engweiler,* 118 Or App. 132, 846 P.2d 1163 (1993); *State v Phillips*, 194 W.Va. 569, 461 S.E.2d 75 (1995).

Note that it will sometimes occur that the declarant's hearsay statement will refer to another person, directly or indirectly, but the statement is not in fact offered to show that the non-declarant had a certain state of mind or acted in accordance with a particular mental state. For instance, a statement of the victim that he planned to go to the defendant's *house* to deliver a package contains a *reference* to a third party, but it does not refer directly or indirectly to that third party's *state of mind or action*. In such cases, the statement is admissible under any view of Rule 803(3) to prove that the declarant went to the defendant's house, because the statement is offered only to show that the declarant acted in accordance with his or her own mental state. As a result, there is no problem of determining the state of mind of a non-declarant, as to which the declarant has no unique perception. *See, e.g., United States v. Donley,* 878 F.2d 735 (3d Cir. 1989) (in a first-degree murder prosecution a government witness testified that the victim said, in the presence of her husband the defendant, that she was moving out of the marital home and separating from him; shortly thereafter, the victim was found dead; the testimony was properly admitted to show the existence of her intention and plan and the defendant's awareness of it, from which could be inferred a motive for the killing; the statement did not purport to express an opinion about the non-declarant's state of mind).

III. The Effect of *Crawford v. Washington* on Proposed Amendments to Hearsay Exceptions Used In Criminal Cases.

In the landmark case of *Crawford v. Washington,* attached to this memorandum, the Supreme Court rejected 25 years of its Confrontation Clause jurisprudence. It held that the defendant's right to confrontation was violated because uncrossexamined "testimonial" hearsay evidence was admitted against him at trial. In *Crawford,* the defendant's wife made a statement to police officers that appeared to implicate the defendant in the crime charged. She was unavailable to testify at trial. Under the jurisprudence established in *Ohio v Roberts,* 448 U.S. 56 (1980), a hearsay statement satisfied the Confrontation Clause if 1) it fit a "firmly-rooted" hearsay exception, or 2) the statement carried "particularized guarantees of trustworthiness" that assured its reliability. The state courts found that Mrs. Crawford's statement to police officers satisfied the "particularized guarantees of trustworthiness" prong of *Roberts*, reasoning that Mrs. Crawford was not trying to shift blame, and that she was relating relatively recent events to a "neutral" police officer.

The Supreme Court, in an opinion by Justice Scalia, rejected the *Roberts* structure for determining whether a hearsay statement satisfies the Confrontation Clause. Justice Scalia engaged in an extensive historical analysis— including, of course, the trial of Sir Walter Raleigh which is said to be the spur for development of the right to confrontation. Justice Scalia determined that the original intent of the Confrontation Clause was not to exclude unreliable evidence per se, but rather to exclude "testimonial" evidence that had not been cross-examined by the accused. Justice Scalia summarized the historical evidence as follows:

> This history supports two inferences about the meaning of the Sixth Amendment. * * * First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's * * * .The Sixth Amendment must be interpreted with this focus in mind.
>
> This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.
>
> The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused -- in other words, those who "bear testimony." 1 N. Webster, An American Dictionary of the English Language (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus

reflects an especially acute concern with a specific type of out-of-court statement.

> The historical record also supports a second proposition: that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the "right . . to be confronted with the witnesses against him," Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. As the English authorities above reveal, the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations.

The bottom line from *Crawford* is that "testimonial" hearsay statements cannot be admitted against an accused unless the declarant is unavailable *and* the accused has or had the opportunity to cross-examine the declarant. Unless these two requirements are met, the "testimonial" hearsay statement must be excluded *even if it is clearly reliable and even if it fits into a standard hearsay exception*. [An example of a statement that would qualify under *Crawford* is testimony from a prior trial in which the defendant was subject to the same charges, the defendant cross-examined the declarant, and the witness is unavailable for the subsequent trial].

On the other hand, if the hearsay statement is not "testimonial", the *Crawford* Court strongly implies that there will be no constitutional regulation at all. The only question would be evidentiary—whether the statement fits a hearsay exception. It should be noted, however, that the Court did not explicitly hold that non-testimonial hearsay is completely outside the purview of the Confrontation Clause. Indeed the Court in *Crawford* noted that it had previously rejected the argument that the Confrontation Clause was irrelevant to non-testimonial hearsay. *White v. Illinois,* 502 U.S. 346 (1992). Justice Scalia observed that the analysis in *Crawford* "casts doubt" on the holding in *White*, but there was no need to resolve the question of non-testimonial hearsay, because the hearsay statement at issue in *Crawford* was clearly testimonial.

The most important question after *Crawford* is whether a hearsay statement is "testimonial" or not. Surprisingly, the *Crawford* Court did not define the term "testimonial." The closest the Court came to a definition is set forth in the following passage:

> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White* v. *Illinois,* 502 U.S. 346, 365 (1992) (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in

judgment); "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it.

* * *

Whatever else the term ["testimonial"] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

In another part of the opinion, the Court indicated that statements taken at guilty plea allocutions are testimonial:

Courts have invoked *Roberts* to admit other sorts of plainly testimonial statements despite the absence of any opportunity to cross-examine. See *United States* v. *Aguilar*, 295 F.3d 1018, 1021-1023 (CA9 2002) (plea allocution showing existence of a conspiracy); *United States* v. *Centracchio*, 265 F.3d 518, 527-530 (CA7 2001) (same); *United States* v. *Dolah*, 245 F.3d 98, 104-105 (CA2 2001) (same); *United States* v. *Petrillo*, 237 F.3d 119, 122-123 (CA2 2000) (same).

While the precise definition of "testimonial" is not clear, what is clear is that *Crawford* will impose a significant change from the current use of hearsay by the prosecution in federal criminal trials. The change wrought by *Crawford* will undoubtedly affect statements offered under the Rule 803 hearsay exceptions. Under *Roberts* these exceptions generally had been held firmly rooted by federal courts, and so statements fitting the exceptions automatically satisfied the Confrontation Clause Under *Crawford,* the question is not whether the hearsay exception is firmly rooted but whether the particular statement offered is or is not testimonial.

So it is clear that the confrontation analysis after *Crawford* must proceed statement by statement rather than exception by exception. One cannot make a categorical conclusion, for example, that if a statement fits the excited utterance exception, it by definition satisfies the Confrontation Clause. Some excited utterances will be testimonial, most will not. For example, if a police officer encounters a stabbing victim in an alley, and asks the victim "Who did this to you?", the victim's response may well be considered testimonial even though it fits the excited utterance exception. On the other hand, if a stabbing victim is lying in his bedroom, and his wife comes in the house to ask him what happened, the victim's statement identifying the perpetrator is less likely to be found testimonial because law enforcement is not involved—though it could still be argued that the statement is testimonial, because it remains accusatory and the kind of statement one might think

would end up at a trial

Impact of* Crawford *on a Statement Offered Under Rule 803(3) to Prove the Conduct of a Non-Declarant

As applied specifically to state of mind statements offered to prove the conduct of a non-declarant, there are clearly some statements that will be found testimonial after *Crawford*. For example, in *United States v. Sperling*, cited supra, an informant told a police officer that he was going to meet Sperling to do a drug deal. This statement was offered under Rule 803(3) to prove that the defendant met Sperling and did the deal. Under the Second Circuit's view, this statement was sufficiently reliable to prove the defendant's conduct because the government produced substantial independent evidence to indicate that the deal between the two actually took place. After *Crawford*, the statement in *Sperling* would have to be excluded as testimonial—the *Sperling* Court's independent evidence requirement, intended to guarantee that the statement was reliable, would be irrelevant to the constitutional analysis. If the hearsay is testimonial, it doesn't matter how reliable it is.

On the other hand, in many cases a state of mind statement offered to show the conduct of a non-declarant is not made to law enforcement and does not constitute an accusation. *See, e.g*, *United States v. Pheaster*, a case involving a kidnaping, in which the victim (Larry) was sitting in a restaurant and said to his friend "I am going out to the parking lot to meet Angelo." This statement was offered to show that Angelo actually met Larry in the parking lot, where the kidnaping occurred. Larry's statement is unlikely to be found testimonial after *Crawford*, because law enforcement did not generate the statement and it was not apparently made for purposes of producing evidence at a trial. Nor was the statement tantamount to a trial-type accusation. It was more like the off-hand comment to a friend that Justice Scalia said was unlikely to be found testimonial in his opinion in *Crawford*. However, because the Court in *Crawford* refused to define the term "testimonial", no definitive conclusion can be drawn about whether a *Pheaster*-type statement will be found testimonial. Moreover, the question remains whether, if the statement is found non-testimonial, there may still be some reliability-based regulation imposed by the Confrontation Clause.

In sum, it is clear that the Confrontation Clause after *Crawford* will result in exclusion of certain statements offered under Rule 803(3) to prove the conduct of a non-declarant. But the precise scope of the *Crawford* exclusionary rule must await further case development on exactly which hearsay statements are testimonial and which are not — and on whether there is any constitutional regulation of non-testimonial hearsay.

Impact of Crawford *on a Proposed Amendment to Rule 803(3)*

In this uncertain post-*Crawford* landscape, it would seem risky to promulgate an amendment to Rule 803(3) that would cover or regulate the use of statements to prove the conduct of a non-declarant. Certainly it would make no sense to amend the Rule in a way that would purport to find a statement admissible as a matter of evidence, when it could then be excluded under the Constitution. One of the traditional reasons for amending an Evidence Rule is to *rectify* a possible unconstitutional application. There is no justification for amending an Evidence Rule in a way that would *exacerbate* an unconstitutional application.

It could be argued that an amendment to Rule 803(3) makes sense after *Crawford* because most state of mind statements will be non-testimonial, and as to those statements the hearsay exception becomes more important than ever— because there is probably no constitutional backstop for non-testimonial hearsay. But any case for amendment is defeated by five important counterarguments:

1. Any amendment will purport to hold admissible some statements that will probably be testimonial and therefore excluded under the Confrontation Clause. This will undoubtedly cause confusion and will put the Committee in the untenable position of proposing an amendment that will result in unconstitutional application.

2. The problem of state of mind statements offered to prove the conduct of a non-declarant occurs almost exclusively in criminal cases, where such statements are offered almost exclusively against the accused. Thus, the amendment would have its exclusive impact exactly where the law is most in need of case law development before any rule usefully can be promulgated.

3. Even if the amendment were to cover only non-testimonial hearsay statements, it would be imprudent to propose an amendment, because the Supreme Court left open what constitutional requirements, if any, apply to non-testimonial hearsay.

4 The Supreme Court itself has counseled caution in the promulgation of amendments that purport to interrelate with the right to confrontation after *Crawford*. The Court's "remand" of the proposed amendment to Rule 804(b)(3) is probably an indication that the Rules Committee should delay any amendment to a hearsay exception until the courts begin to sort out the meaning of *Crawford*

5. A proposed amendment so soon after *Crawford,* in the absence of any longstanding conflict in the courts about the meaning of that case, would be inconsistent with the restraint that the Evidence Rules Committee has always shown in proposing amendments to the Evidence Rules.

Alternatively, it could be argued that it would be useful to amend Rule 803(3) to "codify" the *Crawford* standard, i.e., to provide that "testimonial" statements offered under Rule 803(3) are

not admissible under the exception But the counterarguments to such an amendment are very strong They include:

1. It would be perilous to try to define the term "testimonial" at this point when the Supreme Court refused to do so and intentionally left the question to lower court development. It is also likely that the proposed definition in the Rule would have to be changed to adjust to case law during the rulemaking process.

2. If the idea is to conform the hearsay rule to the Constitution, it makes no sense to propose an amendment to Rule 803(3) only. Most of the other exceptions will have the same problem of comporting with the Constitution after *Crawford.* It would be confusing, to say the least, to amend Rule 803(3) without proposing similar amendments to other Rules such as 803 (1), (2), (4), 804(b)(2)(3), and 807, to name a few. Yet the dramatic alternative of proposing amendments to each of the affected hearsay exceptions is equally untenable.

3. The status of non-testimonial hearsay is unresolved after *Crawford*, so it would be impossible to codify a rule to cover non-testimonial hearsay offered under Rule 803(3).

Under these circumstances, it would seem that the prudent and least disruptive course is to wait for the case law to develop on the new relationship between the Confrontation Clause and the hearsay exceptions. If the Committee agrees with this conclusion, it may wish to review the case law as it develops from meeting to meeting. If so, the Reporter can provide the Committee with a report on the post-*Crawford* case law at each future meeting.

IV. Possible Language For a Future Amendment to Rule 803(3)

Let us assume for a moment that the Confrontation Clause, and all its uncertainties after *Crawford*, have disappeared; and the only question is how to amend Rule 803(3) to rectify the conflict in the courts over whether a state of mind statement can be used to prove the conduct of a non-declarant.

There are two possible textual amendments that are credible. One is to provide that state of mind statements are *never* admissible to prove the conduct of a non-declarant. The other option is to codify the compromise position of the Second Circuit and other courts, i.e., such statements are admissible to prove the conduct of a non-declarant if there is independent corroborating evidence supporting the truthfulness of the statement.

The third possible option—that Rule 803(3) should permit the use of state of mind statements to prove the conduct of a non-declarant, without qualification—is not credible, for reasons stated previously in this memorandum. The rationale of the exception does not justify such an unqualified use; moreover, the legislative history, while not crystal clear, does cut against the use of the state of mind exception to prove the conduct of a non-declarant.

The amendatory language for the two credible options could be as follows:

Option One: Prohibiting Use of State of Mind Statements to Prove the Conduct of a Non-Declarant

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(3) *Then existing mental, emotional, or physical condition.* — A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), <u>when offered to prove the declarant's then existing condition or future action</u> , but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of <u>the</u> declarant's will.

Option Two: Addition of Corroborating Evidence Requirement for Statements Offered to Prove the Conduct of a Non-Declarant

(3) Then existing mental, emotional, or physical condition.—A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including:

(A) a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will; or

(B) a statement offered to prove the conduct of a person other than the declarant unless it is supported by independent evidence indicating that the statement is true.

Reporter's Note:

One problem that the Committee will have to encounter if it decides to proceed with option two is whether it should try to define the standard of proof of supporting evidence required for the exception. Should it be a preponderance? Prima facie? The case law employing the independent evidence requirement does not appear to define a standard of proof with any precision or consistency.

Appendix To Reporter's Memorandum On Rule 803(3)

The Supreme Court's Opinion In *Crawford v. Washington*

1 of 7 DOCUMENTS

MICHAEL D. CRAWFORD, PETITIONER v. WASHINGTON

No. 02-9410

SUPREME COURT OF THE UNITED STATES

2004 U.S. LEXIS 1838; 72 U.S.L.W. 4229

November 10, 2003, Argued
March 8, 2004, Decided

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON State v Crawford, 147 Wn 2d 424, 54 P 3d 656, 2002 Wash LEXIS 598 (2002)

DISPOSITION: Reversed and remanded

SYLLABUS: Petitioner was tried for assault and attempted murder. The State sought to introduce a recorded statement that petitioner's wife Sylvia had made during police interrogation, as evidence that the stabbing was not in self-defense Sylvia did not testify at trial because of Washington's marital privilege Petitioner argued that admitting the evidence would violate his Sixth Amendment right to be "confronted with the witnesses against him " Under *Ohio* v. *Roberts,* 448 U S 56, 65 L Ed 2d 597, 100 S Ct 2531, that right does not bar admission of an unavailable witness's statement against a criminal defendant if the statement [*2] bears "adequate 'indicia of reliability,'" a test met when the evidence either falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." *Id* , at 66 The trial court admitted the statement on the latter ground The State Supreme Court upheld the conviction, deeming the statement reliable because it was nearly identical to, *i e* , interlocked with, petitioner's own statement to the police, in that both were ambiguous as to whether the victim had drawn a weapon before petitioner assaulted him

Held The State's use of Sylvia's statement violated the Confrontation Clause because, where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation Pp 5-33

(a) The Confrontation Clause's text does not alone resolve this case, so this Court turns to the Clause's historical background That history supports two principles First, the principal evil at which the Clause was directed was the civil-law mode of criminal procedure, particularly the use of *ex parte* examinations as evidence against the accused. The Clause's primary object is [*3] testimonial hearsay, and interrogations by law enforcement officers fall squarely within that class Second, the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination English authorities and early state cases indicate that this was the common law at the time of the founding And the "right . to be confronted with the witnesses against him," Amdt 6, is most naturally read as a reference to the common-law right of confrontation, admitting only those exceptions established at the time of the founding See *Mattox* v *United States,* 156 U.S 237, 243, 39 L. Ed. 409, 15 S. Ct. 337. Pp 5-21

(b) This Court's decisions have generally remained faithful to the Confrontation Clause's original meaning See, *e g* , *Mattox, supra* Pp 21-23

(c) However, the same cannot be said of the rationales of this Court's more recent decisions See *Roberts, supra,* at 66 The *Roberts* test departs from historical principles because it admits statements consisting of *ex parte* testimony upon a mere reliability [*4] finding Pp 24-25

(d) The Confrontation Clause commands that reliability be assessed in a particular manner· by testing in the crucible of cross-examination *Roberts* allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability, thus replacing the constitutionally prescribed method of assessing reliability with a wholly foreign one Pp 25-27

(e) *Roberts'* framework is unpredictable Whether a statement is deemed reliable depends on which factors a judge considers and how much weight he accords each of them. However, the unpardonable vice of the *Roberts* test is its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude. Pp 27-30

(f) The instant case is a self-contained demonstration of *Roberts'* unpredictable and inconsistent application It also reveals *Roberts'* failure to interpret the Constitution in a way that secures its intended constraint on judicial discretion. The Constitution prescribes the procedure for determining the reliability of testimony in criminal trials, and this Court, no less than the state courts, lacks authority [*5] to replace it with one of its own devising Pp 30-32.

147 Wash 2d 424, 54 P 3d 656, reversed and remanded

JUDGES: SCALIA, J , delivered the opinion of the Court, in which STEVENS, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined REHNQUIST, C. J , filed an opinion concurring in the judgment, in which O'CONNOR, J , joined

OPINIONBY: SCALIA

OPINION:

JUSTICE SCALIA delivered the opinion of the Court

Petitioner Michael Crawford stabbed a man who allegedly tried to rape his wife, Sylvia At his trial, the State played for the jury Sylvia's tape-recorded statement to the police describing the stabbing, even though he had no opportunity for cross-examination The Washington Supreme Court upheld petitioner's conviction after determining that Sylvia's statement was reliable The question presented is whether this procedure complied with the Sixth Amendment's guarantee that, "in all criminal prosecutions, the accused shall enjoy the right . to be confronted with the witnesses against him "

I

On August 5, 1999, Kenneth Lee was stabbed at his apartment Police arrested petitioner later that night After giving petitioner and his wife *Miranda* warnings, detectives [*6] interrogated each of them twice Petitioner eventually confessed that he and Sylvia had gone in search of Lee because he was upset over an earlier incident in which Lee had tried to rape her The two had found Lee at his apartment, and a fight ensued in which Lee was stabbed in the torso and petitioner's hand was cut

Petitioner gave the following account of the fight.

"Q Okay Did you ever see anything in [Lee's] hands?

"A I think so, but I'm not positive.

"Q Okay, when you think so, what do you mean by that?

"A I coulda swore I seen him goin' for somethin' before, right before everything happened He was like reachin', fiddlin' around down here and stuff and I just I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut . but I'm not positive I, I, my mind goes blank when things like this happen I mean, I just, I remember things wrong, I remember things that just doesn't, don't make sense to me later " App 155 (punctuation added).

Sylvia generally corroborated petitioner's story about the events leading up to the fight, but her account of the fight itself was [*7] arguably different -- particularly with respect to whether Lee had drawn a weapon before petitioner assaulted him

"Q Did Kenny do anything to fight back from this assault?

"A (pausing) I know he reached into his pocket or somethin' . I don't know what

"Q After he was stabbed?

"A He saw Michael coming up He lifted his hand . his chest open, he might [have] went to go strike his hand out or something and then (inaudible)

"Q Okay, you, you gotta speak up

"A Okay, he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his . put his right hand in his right pocket took a step back . . Michael proceeded to stab him . then his hands were like how do you explain this . . open arms . with his hands open and he fell down . and we ran (describing subject holding hands open, palms toward assailant)

"Q Okay, when he's standing there with his open hands, you're talking about Kenny, correct?

"A Yeah, after, after the fact, yes

"Q Did you see anything in his hands at that point?

"A (pausing) um um (no) " *Id* , at 137 (punctuation added)

The State charged petitioner [*8] with assault and attempted murder. At trial, he claimed self-defense Sylvia did not testify because of the state marital privilege, which generally bars a spouse from testifying without the other spouse's consent See Wash Rev Code § 5 60 060(1) (1994) In Washington, this privilege does not extend to a spouse's out-of-court statements admissible under a hearsay exception, see *State* v *Burden*, 120 Wn. 2d 371, 377, 841 P 2d 758, 761 (1992), so the State sought to introduce Sylvia's tape-recorded statements to the police as evidence that the stabbing was not in self-defense Noting that Sylvia had admitted she led petitioner to Lee's apartment and thus had facilitated the assault, the State invoked the hearsay exception for statements against penal interest, Wash. Rule Evid. 804(b)(3) (2003)

Petitioner countered that, state law notwithstanding, admitting the evidence would violate his federal constitutional right to be "confronted with the witnesses against him " Amdt. 6 According to our description of that right in *Ohio* v *Roberts,* 448 U S. 56, 65 L Ed 2d 597, 100 S Ct. 2531 (1980), it does not bar admission of an unavailable witness's statement against a criminal defendant [*9] if the statement bears "adequate 'indicia of reliability '" *Id* , 448 U S at 66, 65 L Ed. 2d 597, 100 S Ct 2531 To meet that test, evidence must either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness " *Ibid* The trial court here admitted the statement on the latter ground, offering several reasons why it was trustworthy Sylvia was not shifting blame but rather corroborating her husband's story that he acted in self-defense or "justified reprisal", she had direct knowledge as an eyewitness, she was describing recent events, and she was being questioned by a "neutral" law enforcement officer App 76-77. The prosecution played the tape for the jury and relied on it in closing, arguing that it was "damning evidence" that "completely refutes [petitioner's] claim of self-defense." Tr. 468 (Oct 21, 1999) The jury convicted petitioner of assault

The Washington Court of Appeals reversed It applied a nine-factor test to determine whether Sylvia's statement bore particularized guarantees of trustworthiness, and noted several reasons why it did not The statement contradicted one she had previously given, it was made in response to specific questions, [*10] and at one point she admitted she had shut her eyes during the stabbing The court considered and rejected the State's argument that Sylvia's statement was reliable because it coincided with petitioner's to such a degree that the two "interlocked." The court determined that, although the two statements agreed about the events leading up to the stabbing, they differed on the issue crucial to petitioner's self-defense claim "[Petitioner's] version asserts that Lee may have had something in his hand when he stabbed him, but Sylvia's version has Lee grabbing for something only after he has been stabbed." App 32

The Washington Supreme Court reinstated the conviction, unanimously concluding that, although Sylvia's statement did not fall under a firmly rooted hearsay exception, it bore guarantees of trustworthiness. "'When a codefendant's confession is virtually identical [to, *i e* , interlocks with,] that of a defendant, it may be deemed reliable '" 147 Wash 2d 424, 437, 54 P 3d 656, 663 (2002) (quoting *State* v *Rice*, 120 Wn 2d 549, 570, 844 P 2d 416, 427 (1993)) The court explained

"Although the Court of Appeals concluded that the statements [*11] were contradictory, upon closer inspection they appear to overlap

"Both of the Crawfords' statements indicate that Lee was possibly grabbing for a weapon, but they are equally unsure when this event may have taken place They are also equally unsure how Michael received the cut on his hand, leading the court to question when, if ever, Lee possessed a weapon In this respect they overlap

"Neither Michael nor Sylvia clearly stated that Lee had a weapon in hand from which Michael was simply defending himself And it is this omission by both that interlocks the statements and makes Sylvia's statement reliable " 147 Wash 2d, at 438-439, 54 P 3d, at 664 (internal quotation marks omitted) n1

n1 The court rejected the State's argument that guarantees of trustworthiness were unnecessary since petitioner waived his confrontation rights by invoking the marital privilege It reasoned that "forcing the defendant to choose between the marital privilege and confronting his spouse presents an untenable Hobson's choice " 147 Wash 2d, at 432, 54 P 3d, at 660 The State has not challenged this holding here The State also has not challenged the Court of Appeals' conclusion (not reached by the State Supreme Court) that the confrontation violation, if it occurred, was not harmless We express no opinion on these matters.

[*12]

We granted certiorari to determine whether the State's use of Sylvia's statement violated the Confrontation Clause. 539 U.S 914, 157 L Ed 2d 309, 124 S. Ct 460 (2003)

II

The Sixth Amendment's Confrontation Clause provides that, "in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him " We have held that this bedrock procedural guarantee applies to both federal and state prosecutions *Pointer* v *Texas,* 380 U S 400, 406, 13 L Ed. 2d 923, 85 S Ct 1065 (1965) As noted above, *Roberts* says that an unavailable witness's out-of-court statement may be admitted so long as it has adequate indicia of reliability -- *i e* , falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness " 448 U S , at 66, 13 L Ed 2d 923, 85 S. Ct 1065. Petitioner argues that this test strays from the original meaning of the Confrontation Clause and urges us to reconsider it

A

The Constitution's text does not alone resolve this case One could plausibly read "witnesses against" a defendant to mean those who actually testify at trial, cf. *Woodsides* v. *State*, 3 Miss. 655, 664-665, 1 Morr St. Cas 95 (1837), those whose statements are offered at [*13] trial, see 3 J. Wigmore, Evidence § 1397, p 104 (2d ed. 1923) (hereinafter Wigmore), or something in-between, see *infra*, at 15-16 We must therefore turn to the historical background of the Clause to understand its meaning.

The right to confront one's accusers is a concept that dates back to Roman times. See *Coy* v *Iowa,* 487 U S 1012, 1015, 101 L Ed 2d 857, 108 S Ct 2798 (1988); Herrmann & Speer, Facing the Accuser· Ancient and Medieval Precursors of the Confrontation Clause, 34 Va J Int'l L 481 (1994) The founding generation's immediate source of the concept, however, was the common law. English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers See 3 W Blackstone, Commentaries on the Laws of England 373-374 (1768)

Nonetheless, England at times adopted elements of the civil-law practice. Justices of the peace or other officials examined suspects and witnesses before trial. These examinations were sometimes read in court [*14] in lieu of live testimony, a practice that "occasioned frequent demands by the prisoner to have his 'accusers,' *i e* the witnesses against him, brought before him face to face " 1 J Stephen, History of the Criminal Law of England 326 (1883). In some cases, these demands were refused See 9 W Holdsworth, History of English Law 216-217, 228 (3d ed. 1944), *e g* , *Raleigh's Case*, 2 How St. Tr 1, 15-16, 24 (1603); *Throckmorton's Case*, 1 How. St Tr. 869, 875-876 (1554); cf *Lilburn's Case*, 3 How St Tr. 1315, 1318-1322, 1329 (Star Chamber 1637)

Pretrial examinations became routine under two statutes passed during the reign of Queen Mary in the 16th century, 1 & 2 Phil & M , c 13 (1554), and 2 & 3 *id* , c 10 (1555) These Marian bail and committal statutes required justices of the peace to examine suspects and witnesses in felony cases and to certify the results to the court. It is doubtful that the original purpose of the examinations was to produce evidence admissible at trial See J Langbein, Prosecuting Crime in the Renaissance 21-34 (1974) Whatever the original purpose, however, they came to be used as evidence [*15] in some

cases, see 2 M Hale, Pleas of the Crown 284 (1736), resulting in an adoption of continental procedure. See 4 Holdsworth, *supra*, at 528-530

The most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries One such was the 1603 trial of Sir Walter Raleigh for treason Lord Cobham, Raleigh's alleged accomplice, had implicated him in an examination before the Privy Council and in a letter At Raleigh's trial, these were read to the jury Raleigh argued that Cobham had lied to save himself "Cobham is absolutely in the King's mercy, to excuse me cannot avail him, by accusing me he may hope for favour " 1 D Jardine, Criminal Trials 435 (1832) Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that "the Proof of the Common Law is by witness and jury. let Cobham be here, let him speak it Call my accuser before my face " 2 How St. Tr , at 15-16. The judges refused, *id* , at 24, and, despite Raleigh's protestations that he was being tried "by the Spanish Inquisition," *id* , at 15, the jury convicted, and Raleigh was [*16] sentenced to death

One of Raleigh's trial judges later lamented that "'the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.'" 1 Jardine, *supra*, at 520 Through a series of statutory and judicial reforms, English law developed a right of confrontation that limited these abuses For example, treason statutes required witnesses to confront the accused "face to face" at his arraignment. *E g* , 13 Car 2, c 1, § 5 (1661); see 1 Hale, *supra*, at 306 Courts, meanwhile, developed relatively strict rules of unavailability, admitting examinations only if the witness was demonstrably unable to testify in person. See *Lord Morley's Case*, 6 How St Tr 769, 770-771 (H L 1666); 2 Hale, *supra*, at 284, 1 Stephen, *supra*, at 358 Several authorities also stated that a suspect's confession could be admitted only against himself, and not against others he implicated See 2 W Hawkins, Pleas of the Crown c 46, § 3, pp 603-604 (T Leach 6th ed. 1787), 1 Hale, *supra*, at 585, n *(k)*, 1 G Gilbert, Evidence 216 (C Lofft ed. 1791), cf *Tong's Case*, Kel J 17, 18, 84 Eng Rep 1061, 1062 (1662) [*17] (treason) But see *King* v. *Westbeer*, 1 Leach 12, 168 Eng Rep 108, 109 (1739)

One recurring question was whether the admissibility of an unavailable witness's pretrial examination depended on whether the defendant had had an opportunity to cross-examine him In 1696, the Court of King's Bench answered this question in the affirmative, in the widely reported misdemeanor libel case of *King* v. *Paine*, 5 Mod. 163, 87 Eng Rep 584. The court ruled that, even though a witness was dead, his examination was not admissible where "the defendant not being present when [it was] taken before the mayor . . . had lost the benefit of a cross-examination." *Id* , at 165, 87 Eng Rep., at 585 The question was also debated at length during the infamous proceedings against Sir John Fenwick on a bill of attainder Fenwick's counsel objected to admitting the examination of a witness who had been spirited away, on the ground that Fenwick had had no opportunity to cross-examine See *Fenwick's Case*, 13 How. St Tr 537, 591-592 (H C. 1696) (Powys) ("That which they would offer is something that Mr. Goodman hath sworn when he was [*18] examined . ., sir J F. not being present or privy, and no opportunity given to cross-examine the person, and I conceive that cannot be offered as evidence . "), *id* , at 592 (Shower) ("No deposition of a person can be read, though beyond sea, unless in cases where the party it is to be read against was privy to the examination, and might have cross-examined him . . Our constitution is, that the person shall see his accuser") The examination was nonetheless admitted on a closely divided vote after several of those present opined that the common-law rules of procedure did not apply to parliamentary attainder proceedings -- one speaker even admitting that the evidence would normally be inadmissible See *id* , at 603-604 (Williamson), *id* , at 604-605 (Chancellor of the Exchequer); *id* , at 607, 3 Wigmore § 1364, at 22-23, n 54 Fenwick was condemned, but the proceedings "must have burned into the general consciousness the vital importance of the rule securing the right of cross-examination " *Id* , § 1364, at 22, cf *Carmell* v. *Texas,* 529 U.S 513, 526-530, 146 L Ed 2d 577, 120 S Ct. 1620 (2000)

Paine had settled [*19] the rule requiring a prior opportunity for cross-examination as a matter of common law, but some doubts remained over whether the Marian statutes prescribed an exception to it in felony cases The statutes did not identify the circumstances under which examinations were admissible, see 1 & 2 Phil. & M., c. 13 (1554); 2 & 3 *id* , c 10 (1555), and some inferred that no prior opportunity for cross-examination was required. See *Westbeer*, *supra*, at 12, 168 Eng Rep., at 109, compare *Fenwick's Case*, 13 How St. Tr , at 596 (Sloane), with *id* , at 602 (Musgrave). Many who expressed this view acknowledged that it meant the statutes were in derogation of the common law. See *King* v *Erıswell*, 3 T R 707, 710, 100 Eng. Rep 815, 817 (K. B 1790) (Grose, J.) (dicta), *id* , at 722-723, 100 Eng. Rep., at 823-824 (Kenyon, C J) (same), compare 1 Gilbert, Evidence, at 215 (admissible only "by Force 'of the Statute'"), with *id* , at 65 Nevertheless, by 1791 (the year the Sixth Amendment was ratified), courts were applying the cross-examination rule even to examinations by justices of the peace in felony cases See *King* v [*20] *Dingler*, 2 Leach 561, 562-563, 168 Eng. Rep 383, 383-384 (1791), *King* v *Woodcock*, 1 Leach 500, 502-504, 168 Eng Rep 352, 353 (1789), cf *King* v *Radbourne*, 1 Leach 457, 459-461, 168 Eng Rep 330, 331-332 (1787), 3 Wigmore § 1364, at 23. Early 19th-century treatises confirm that requirement See 1 T Starkie, Evidence 95 (1826), 2 *id* , at 484-492, T. Peake, Evidence 63-64 (3d ed 1808) When Parliament amended the statutes in 1848 to make the requirement explicit, see 11

& 12 Vict , c 42, § 17, the change merely "introduced in terms" what was already afforded the defendant "by the equitable construction of the law " *Queen* v *Beeston*, 29 Eng L & Eq R 527, 529 (Ct. Crim App 1854) (Jervis, C J) n2

n2 There is some question whether the requirement of a prior opportunity for cross-examination applied as well to statements taken by a coroner, which were also authorized by the Marian statutes See 3 Wigmore § 1364, at 23 (requirement "never came to be conceded at all in England"), T Peake, Evidence 64, n. *(m)* (3d ed 1808) (not finding the point "expressly decided in any reported case"), *State* v *Houser*, 26 Mo 431, 436 (1858) ("there may be a few cases but the authority of such cases is questioned, even in [England], by their ablest writers on common law"); *State* v. *Campbell*, 30 S C L 124 (1844) (point "has not been plainly adjudged, even in the English cases") Whatever the English rule, several early American authorities flatly rejected any special status for coroner statements See *Houser*, *supra*, at 436, *Campbell*, *supra*, at 130; T. Cooley, Constitutional Limitations *318

[*21]

B

Controversial examination practices were also used in the Colonies Early in the 18th century, for example, the Virginia Council protested against the Governor for having "privately issued several commissions to examine witnesses against particular men *ex parte*," complaining that "the person accused is not admitted to be confronted with, or defend himself against his defamers " A Memorial Concerning the Maladministrations of His Excellency Francis Nicholson, reprinted in 9 English Historical Documents 253, 257 (D Douglas ed 1955) A decade before the Revolution, England gave jurisdiction over Stamp Act offenses to the admiralty courts, which followed civil-law rather than common-law procedures and thus routinely took testimony by deposition or private judicial examination. See 5 Geo 3, c 12, § 57 (1765), Pollitt, The Right of Confrontation: Its History and Modern Dress, 8 J Pub L 381, 396-397 (1959) Colonial representatives protested that the Act subverted their rights "by extending the jurisdiction of the courts of admiralty beyond its ancient limits " Resolutions of the Stamp Act Congress § 8th (Oct 19, 1765), reprinted in Sources of Our [*22] Liberties 270, 271 (R Perry & J. Cooper eds 1959) John Adams, defending a merchant in a high-profile admiralty case, argued "Examinations of witnesses upon Interrogatories, are only by the Civil Law Interrogatories are unknown at common Law, and Englishmen and common Lawyers have an aversion to them if not an Abhorrence of them " Draft of Argument in *Sewall* v *Hancock* (1768-1769), in 2 Legal Papers of John Adams 194, 207 (K. Wroth & H. Zobel eds 1965)

Many declarations of rights adopted around the time of the Revolution guaranteed a right of confrontation. See Virginia Declaration of Rights § 8 (1776), Pennsylvania Declaration of Rights § IX (1776); Delaware Declaration of Rights § 14 (1776), Maryland Declaration of Rights § XIX (1776); North Carolina Declaration of Rights § VII (1776); Vermont Declaration of Rights Ch. I, § X (1777), Massachusetts Declaration of Rights § XII (1780), New Hampshire Bill of Rights § XV (1783), all reprinted in 1 B. Schwartz, The Bill of Rights A Documentary History 235, 265, 278, 282, 287, 323, 342, 377 (1971) The proposed Federal Constitution, however, did not At the Massachusetts ratifying convention, Abraham Holmes objected [*23] to this omission precisely on the ground that it would lead to civil-law practices. "The mode of trial is altogether indetermined; . . whether [the defendant] is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told . We shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, the *Inquisition* " 2 Debates on the Federal Constitution 110-111 (J Elliot 2d ed 1863) Similarly, a prominent Antifederalist writing under the pseudonym Federal Farmer criticized the use of "written evidence" while objecting to the omission of a vicinage right "Nothing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question . . Written evidence [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth." R. Lee, Letter IV by the Federal Farmer (Oct 15, 1787), reprinted in 1 Schwartz, *supra*, at 469, 473 The First Congress responded by including the Confrontation Clause in the proposal that became the Sixth Amendment. [*24]

Early state decisions shed light upon the original understanding of the common-law right. *State* v *Webb*, 2 N C 103 (1794) *(per curiam)*, decided a mere three years after the adoption of the Sixth Amendment, held that depositions could be read against an accused only if they were taken in his presence Rejecting a broader reading of the English authorities, the court held "It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine " *Id* , at 104

Similarly, in *State* v *Campbell*, 30 S C L. 124 (1844), South Carolina's highest law court excluded a deposition taken by a coroner in the absence of the accused It held "If we are to decide the question by the established rules of the common law, there could not be a dissenting voice For, notwithstanding the death of the witness, and whatever the respectability of the court taking the depositions, the solemnity of the occasion and the weight of the testimony, such depositions are *ex parte*, and, therefore, utterly incompetent" *Id*, at 125 The court said that one of [*25] the "indispensable conditions" implicitly guaranteed by the State Constitution was that "prosecutions be carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his personal examination" *Ibid*

Many other decisions are to the same effect Some early cases went so far as to hold that prior testimony was inadmissible in criminal cases *even if* the accused had a previous opportunity to cross-examine See *Finn* v *Commonwealth*, 26 Va 701, 708 (1827), *State* v *Atkins*, 1 Tenn. 229 (1807) *(per curiam)* Most courts rejected that view, but only after reaffirming that admissibility depended on a prior opportunity for cross-examination See *United States* v *Macomb*, 26 F. Cas 1132, 1133, F. Cas. No. 15702 (No 15,702) (CC Ill 1851), *State* v *Houser*, 26 Mo. 431, 435-436 (1858), *Kendrick* v *State*, 29 Tenn 479, 485-488 (1850), *Bostick* v *State*, 22 Tenn 344, 345-346 (1842), *Commonwealth* v *Richards*, 35 Mass 434, 437, 18 Pick 434 (1837), *State* v *Hill*, 20 S C L 607, 608-610 (S C. 1835); *Johnston* v *State*, 10 Tenn 58, 59 (1821) [*26] Nineteenth-century treatises confirm the rule See 1 J. Bishop, Criminal Procedure § 1093, p 689 (2d ed 1872); T Cooley, Constitutional Limitations *318

III

This history supports two inferences about the meaning of the Sixth Amendment

A

First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's, that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit, and that the founding-era rhetoric decried The Sixth Amendment must be interpreted with this focus in mind.

Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon "the law of Evidence for the time being." 3 Wigmore § 1397, at 101; accord, *Dutton* v *Evans*, 400 U S 74, 94, 27 L Ed 2d 213, 91 S Ct 210 (1970) (Harlan, J., concurring in result) Leaving the regulation of out-of-court statements [*27] to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court

This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them

The text of the Confrontation Clause reflects this focus It applies to "witnesses" against the accused -- in other words, those who "bear testimony" 1 N Webster, An American Dictionary of the English Language (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact" *Ibid* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance [*28] does not The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Various formulations of this core class of "testimonial" statements exist· "*ex parte* in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23, "extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White* v *Illinois*, 502 U.S 346, 365, 116 L. Ed. 2d 848, 112 S. Ct 736 (1992) (THOMAS, J , joined by SCALIA, J , concurring in part and concurring in judgment), "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al as *Amici Curiae* 3 These formulations all share a common nucleus and then define [*29] the Clause's coverage at various levels

of abstraction around it Regardless of the precise articulation, some statements qualify under any definition -- for example, *ex parte* testimony at a preliminary hearing

Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard Police interrogations bear a striking resemblance to examinations by justices of the peace in England The statements are not *sworn* testimony, but the absence of oath was not dispositive Cobham's examination was unsworn, see 1 Jardine, Criminal Trials, at 430, yet Raleigh's trial has long been thought a paradigmatic confrontation violation, see, *e g* , *Campbell*, 30 S C L , at 130 Under the Marian statutes, witnesses were typically put on oath, but suspects were not. See 2 Hale, Pleas of the Crown, at 52 Yet Hawkins and others went out of their way to caution that such unsworn confessions were not admissible against anyone but the confessor See *supra*, at 8 n3

n3 These sources -- especially Raleigh's trial -- refute THE CHIEF JUSTICE's assertion, *post*, at 3 (opinion concurring in judgment), that the right of confrontation was not particularly concerned with unsworn testimonial statements But even if, as he claims, a general bar on unsworn hearsay made application of the Confrontation Clause to unsworn testimonial statements a moot point, that would merely change our focus from direct evidence of original meaning of the Sixth Amendment to reasonable inference We find it implausible that a provision which concededly condemned trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly OK (The claim that unsworn testimony was self-regulating because jurors would disbelieve it, cf *post*, at 2, n 1, is belied by the very existence of a general bar on unsworn testimony.) Any attempt to determine the application of a constitutional provision to a phenomenon that did not exist at the time of its adoption (here, allegedly, admissible unsworn testimony) involves some degree of estimation -- what THE CHIEF JUSTICE calls use of a "proxy," *post*, at 3 -- but that is hardly a reason not to make the estimation as accurate as possible Even if, as THE CHIEF JUSTICE mistakenly asserts, there were no direct evidence of how the Sixth Amendment originally applied to unsworn testimony, there is no doubt what its application would have been

[*30]

That interrogators are police officers rather than magistrates does not change the picture either Justices of the peace conducting examinations under the Marian statutes were not magistrates as we understand that office today, but had an essentially investigative and prosecutorial function See 1 Stephen, Criminal Law of England, at 221, Langbein, Prosecuting Crime in the Renaissance, at 34-45. England did not have a professional police force until the 19th century, see 1 Stephen, *supra*, at 194-200, so it is not surprising that other government officers performed the investigative functions now associated primarily with the police The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace

In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class n4

n4 We use the term "interrogation" in its colloquial, rather than any technical legal, sense Cf *Rhode Island* v *Innis*, 446 U S 291, 300-301, 64 L Ed 2d 297, 100 S Ct 1682 (1980) Just as various definitions of "testimonial" exist, one can imagine various definitions of "interrogation," and we need not select among them in this case Sylvia's recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition

[*31]

B

The historical record also supports a second proposition that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts Rather, the "right to be confronted with the witnesses against him," Amdt 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding See *Mattox* v *United States*, 156 U S 237, 243, 39 L Ed 409, 15 S. Ct 337 (1895), cf. *Houser*, 26 Mo , at 433-435. As the English authorities above reveal, the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine The Sixth Amendment therefore incorporates those limitations The numerous early state

decisions applying the same test confirm that these principles were received as part of the common law in this country n5

n5 THE CHIEF JUSTICE claims that English law's treatment of testimonial statements was inconsistent at the time of the framing, *post*, at 4-5, but the examples he cites relate to examinations under the Marian statutes As we have explained, to the extent Marian examinations were admissible, it was only because the statutes *derogated* from the common law See *supra*, at 10 Moreover, by 1791 even the statutory-derogation view had been rejected with respect to justice-of-the-peace examinations -- explicitly in *King* v *Woodcock*, 1 Leach 500, 502-504, 168 Eng Rep 352, 353 (1789), and *King* v *Dingler*, 2 Leach 561, 562-563, 168 Eng. Rep 383, 383-384 (1791), and by implication in *King* v *Radbourne*, 1 Leach 457, 459-461, 168 Eng Rep 330, 331-332 (1787)

None of THE CHIEF JUSTICE's citations proves otherwise. *King* v *Westbeer*, 1 Leach 12, 168 Eng Rep 108 (1739), was decided a half-century earlier and cannot be taken as an accurate statement of the law in 1791 given the directly contrary holdings of *Woodcock* and *Dingler* Hale's treatise is older still, and far more ambiguous on this point, see 1 M Hale, Pleas of the Crown 585-586 (1736), some who espoused the requirement of a prior opportunity for cross-examination thought it entirely consistent with Hale's views See *Fenwick's Case*, 13 How. St Tr. 537, 602 (H C 1696) (Musgrave). The only timely authority THE CHIEF JUSTICE cites is *King* v *Erıswell*, 3 T R 707, 100 Eng. Rep. 815 (K. B 1790), but even that decision provides no substantial support *Erıswell* was not a criminal case at all, but a Crown suit against the inhabitants of a town to charge them with care of an insane pauper *Id* , at 707-708, 100 Eng Rep., at 815-816. It is relevant only because the judges discuss the Marian statutes in dicta One of them, Buller, J , defended admission of the pauper's statement of residence on the basis of authorities that purportedly held *ex parte* Marian examinations admissible *Id* , at 713-714, 100 Eng. Rep , at 819 As evidence writers were quick to point out, however, his authorities said no such thing See Peake, Evidence, at 64, n *(m)* ("Mr J Buller is reported to have said that it was so settled in 1 Lev 180, and Kel 55, certainly nothing of the kind appears in those books"), 2 T Starkie, Evidence 487-488, n *(c)* (1826) ("Buller, J . refers to *Radbourne*'s case , but in that case the deposition was taken in the hearing of the prisoner, and of course the question did not arise" (citation omitted)). Two other judges, Grose, J , and Kenyon, C J , responded to Buller's argument by distinguishing Marian examinations as a statutory exception to the common-law rule, but the context and tenor of their remarks suggest they merely *assumed* the accuracy of Buller's premise without independent consideration, at least with respect to examinations by justices of the peace See 3 T R , at 710, 100 Eng. Rep., at 817 (Grose, J), *id* , at 722-723, 100 Eng Rep , at 823-824 (Kenyon, C J). In fact, the case reporter specifically notes in a footnote that their assumption was erroneous See *id* , at 710, n *(c)*, 100 Eng. Rep , at 817, n *(c)* Notably, Buller's position on pauper examinations was resoundingly rejected only a decade later in *King* v. *Ferry Frystone*, 2 East 54, 55, 102 Eng Rep 289 (K B 1801) ("The point has been since considered to be so clear against the admissibility of the evidence that it was abandoned by the counsel without argument"), further suggesting that his views on evidence were not mainstream at the time of the framing.

In short, none of THE CHIEF JUSTICE's sources shows that the law in 1791 was unsettled *even as to examinations by justices of the peace under the Marian statutes* More importantly, however, even if the statutory rule in 1791 were in doubt, the numerous early state-court decisions make abundantly clear that the Sixth Amendment incorporated the *common-law* right of confrontation and not any exceptions the Marian statutes supposedly carved out from it See *supra*, at 13-14, see also *supra*, at 11, n 2 (coroner statements) The common-law rule had been settled since *Paine* in 1696 See *King* v *Paine*, 5 Mod 163, 165, 87 Eng Rep 584, 585 (K B)

[*32]

We do not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements They suggest that this requirement was dispositive, and not merely one of several ways to establish reliability. This is not to deny, as THE CHIEF JUSTICE notes, that "there were always exceptions to the general rule of exclusion" of hearsay evidence *Post*, at 5 Several had become well established by 1791 See 3 Wigmore § 1397, at 101, Brief for United States as *Amicus Curiae* 13, n. 5 But there is scant evidence that exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case n6 Most of the hearsay exceptions covered statements that by their nature were not testimonial -- for example, business records or statements in furtherance of a conspiracy We do not infer from these that the Framers

thought exceptions would apply even to prior testimony Cf *Lilly* v *Virginia,* 527 U S 116, 134, 144 L Ed 2d 117, 119 S Ct 1887 (1999) (plurality opinion) ("Accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to [*33] the hearsay rule") n7

n6 The one deviation we have found involves dying declarations The existence of that exception as a general rule of criminal hearsay law cannot be disputed See, *e g* , *Mattox* v *United States,* 156 U S 237, 243-244, 39 L Ed 409, 15 S Ct 337 (1895), *King* v *Reason,* 16 How St Tr 1, 24-38 (K B 1722), 1 D. Jardine, Criminal Trials 435 (1832), Cooley, Constitutional Limitations, at *318, 1 G. Gilbert, Evidence 211 (C Lofft ed. 1791), see also F Heller, The Sixth Amendment 105 (1951) (asserting that this was the *only* recognized criminal hearsay exception at common law) Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. See *Woodcock, supra,* at 501-504, 168 Eng Rep , at 353-354, *Reason, supra,* at 24-38, Peake, Evidence, at 64, cf *Radbourne, supra,* at 460-462, 168 Eng Rep , at 332-333. We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations If this exception must be accepted on historical grounds, it is *sui generis* [*34]

n7 We cannot agree with THE CHIEF JUSTICE that the fact "that a statement might be testimonial does nothing to undermine the wisdom of one of these [hearsay] exceptions " *Post,* at 6 Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse -- a fact borne out time and again throughout a history with which the Framers were keenly familiar This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances

IV

Our case law has been largely consistent with these two principles Our leading early decision, for example, involved a deceased witness's prior trial testimony *Mattox* v. *United States,* 156 U S. 237, 39 L Ed 409, 15 S Ct 337 (1895) In allowing the statement to be admitted, we relied on the fact that the defendant had had, at the first trial, an adequate opportunity to confront the witness "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once [*35] had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination This, the law says, he shall under no circumstances be deprived of . . " *Id* , at 244, 39 L Ed 409, 15 S Ct 337

Our later cases conform to *Mattox*'s holding that prior trial or preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine See *Mancusi* v. *Stubbs,* 408 U S 204, 213-216, 33 L Ed. 2d 293, 92 S Ct. 2308 (1972), *California* v. *Green,* 399 U.S 149, 165-168, 26 L Ed 2d 489, 90 S Ct 1930 (1970), *Pointer* v *Texas,* 380 U S , at 406-408, 13 L Ed 2d 923, 85 S Ct 1064, cf *Kirby* v *United States,* 174 U.S. 47, 55-61, 43 L Ed 890, 19 S. Ct 574 (1899) Even where the defendant had such an opportunity, we excluded the testimony where the government had not established unavailability of the witness See *Barber* v *Page,* 390 U S 719, 722-725, 20 L. Ed 2d 255, 88 S Ct 1318 (1968), cf *Motes* v *United States,* 178 U S. 458, 470-471, 44 L Ed 1150, 20 S Ct 993 (1900). We similarly excluded accomplice confessions where the defendant had no opportunity to cross-examine. See *Roberts* v *Russell,* 392 U S 293, 294-295, 20 L. Ed 2d 1100, 88 S. Ct. 1921 (1968) *(per curiam), Bruton* v *United States,* 391 U S 123, 126-128, 20 L Ed 2d 476, 88 S Ct 1620 (1968); [*36] *Douglas* v *Alabama,* 380 U S 415, 418-420, 13 L Ed 2d 934, 85 S. Ct. 1074 (1965) In contrast, we considered reliability factors beyond prior opportunity for cross-examination when the hearsay statement at issue was not testimonial. See *Dutton* v *Evans,* 400 U S., at 87-89, 27 L Ed 2d213, 91 S Ct 210 (plurality opinion)

Even our recent cases, in their outcomes, hew closely to the traditional line *Ohio* v *Roberts,* 448 U.S , at 67-70, 65 L Ed 2d 597, 100 S Ct 2531, admitted testimony from a preliminary hearing at which the defendant had examined the witness *Lilly* v *Virginia, supra, 527 U S 116, 144 L Ed 2d 117, 119 S Ct 1887,* excluded testimonial statements that the defendant had had no opportunity to test by cross-examination. And *Bourjaily* v *United States,* 483 U S 171, 181-184, 97 L Ed 2d 144, 107 S Ct 2775 (1987), admitted statements made unwittingly to an FBI informant after applying a more general test that did *not* make prior cross-examination an indispensable requirement n8

n8 One case arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial is *White* v *Illinois*, 502 U S 346, 116 L Ed 2d 848, 112 S Ct 736 (1992), which involved, *inter alia*, statements of a child victim to an investigating police officer admitted as spontaneous declarations *Id*, at 349-35, 1116 L Ed 2d 848, 112 S Ct 736 It is questionable whether testimonial statements would ever have been admissible on that ground in 1791, to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made "immediately upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage." *Thompson* v *Trevanion*, Skin 402, 90 Eng. Rep 179 (K B 1694) In any case, the only question presented in *White* was whether the Confrontation Clause imposed an unavailability requirement on the types of hearsay at issue See 502 U S , at 348-349, 116 L Ed 2d 848, 112 S Ct 736 The holding did not address the question whether certain of the statements, because they were testimonial, had to be excluded *even if* the witness was unavailable We "[took] as a given that the testimony properly falls within the relevant hearsay exceptions " *Id*, at 351, n 4, 116 L Ed 2d 848, 112 S. Ct 736

[*37]

Lee v *Illinois*, 476 U S 530, 90 L Ed 2d 514, 106 S Ct 2056 (1986), on which the State relies, is not to the contrary There, we *rejected* the State's attempt to admit an accomplice confession. The State had argued that the confession was admissible because it "interlocked" with the defendant's. We dealt with the argument by rejecting its premise, holding that "when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted " *Id*, at 545, 90 L Ed. 2d 514, 106 S Ct 2056 Respondent argues that "the logical inference of this statement is that when the discrepancies between the statements *are* insignificant, then the codefendant's statement *may* be admitted " Brief for Respondent 6. But this is merely a possible inference, not an inevitable one, and we do not draw it here If *Lee* had meant authoritatively to announce an exception -- previously unknown to this Court's jurisprudence -- for interlocking confessions, it would not have done so in such an oblique manner Our only precedent on interlocking confessions had addressed the entirely different question whether a limiting instruction cured prejudice to codefendants from admitting a defendant's [*38] *own* confession against him in a joint trial See *Parker* v *Randolph*, 442 U S 62, 69-76, 60 L Ed 2d 713, 99 S. Ct 2132 (1979) (plurality opinion), abrogated by *Cruz* v *New York*, 481 U S 186, 95 L Ed 2d 162, 107 S Ct. 1714 (1987)

Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine. n9

n9 THE CHIEF JUSTICE complains that our prior decisions have "never drawn a distinction" like the one we now draw, citing in particular *Mattox* v *United States*, 156 U S 237, 39 L Ed 409, 15 S. Ct 337 (1895), *Kirby* v *United States*, 174 U S 47, 43 L Ed 890, 19 S Ct 574 (1899), and *United States* v *Burr*, 25 F Cas 187, F Cas No. 14694 (No 14,694) (CC Va 1807) (Marshall, C. J) *Post*, at 4-6 But nothing in these cases contradicts our holding in any way *Mattox* and *Kirby* allowed or excluded evidence depending on whether the defendant had had an opportunity for cross-examination *Mattox*, *supra*, at 242-244, 39 L Ed 409, 15 S Ct 337, *Kirby*, *supra*, at 55-61, 43 L Ed 890, 19 S. Ct. 574 That the two cases did not extrapolate a more general class of evidence to which that criterion applied does not prevent us from doing so now. As to *Burr*, we disagree with THE CHIEF JUSTICE's reading of the case Although Chief Justice Marshall made one passing reference to the Confrontation Clause, the case was fundamentally about the hearsay rules governing statements in furtherance of a conspiracy The "principle so truly important" on which "inroads" had been introduced was the "rule of evidence which rejects mere hearsay testimony." See 25 F. Cas., at 193 Nothing in the opinion concedes exceptions to the Confrontation Clause's exclusion of testimonial statements as we use the term THE CHIEF JUSTICE fails to identify a single case (aside from one minor, arguable exception, see *supra*, at 22, n 8), where we have admitted testimonial statements based on indicia of reliability other than a prior opportunity for cross-examination If nothing else, the test we announce is an empirically accurate explanation of the results our cases have reached

Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements See *California* v *Green*, 399 U S 149, 162, 26 L Ed 2d 489, 90 S. Ct 1930 (1970) It is therefore irrelevant that the reliability of some out-of-court statements "'cannot be replicated, even if the declarant testifies to the same matters in court'" *Post*, at 6 (quoting *United States* v *Inadi*, 475 U S 387, 395, 89 L Ed 2d 390, 106 S Ct 1121 (1986)) The Clause does not bar

admission of a statement so long as the declarant is present at trial to defend or explain it (The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted See *Tennessee* v *Street,* 471 U S 409, 414, 85 L Ed 2d 425, 105 S Ct 2078 (1985))

[*39]

V

Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales *Roberts* conditions the admissibility of all hearsay evidence on whether it falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness " 448 U S , at 66, 65 L Ed 2d 597, 100 S Ct 2531. This test departs from the historical principles identified above in two respects First, it is too broad It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause At the same time, however, the test is too narrow It admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations

Members of this Court and academics have suggested that we revise our doctrine to reflect more accurately the original understanding of the Clause. See, *e g , Lilly,* 527 U S , at 140-143, 144 L Ed 2d 117, 119 S Ct 1887 (BREYER, J , concurring); *White,* 502 U S , at 366, 116 L. Ed 2d 848, 112 S. Ct. 736 [*40] (THOMAS, J , joined by SCALIA, J , concurring in part and concurring in judgment); A. Amar, The Constitution and Criminal Procedure 125-131 (1997), Friedman, Confrontation· The Search for Basic Principles, 86 Geo. L J 1011 (1998) They offer two proposals First, that we apply the Confrontation Clause only to testimonial statements, leaving the remainder to regulation by hearsay law -- thus eliminating the overbreadth referred to above. Second, that we impose an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine -- thus eliminating the excessive narrowness referred to above

In *White,* we considered the first proposal and rejected it 502 U S., at 352-353, 116 L Ed 2d 848, 112 S Ct 736 Although our analysis in this case casts doubt on that holding, we need not definitively resolve whether it survives our decision today, because Sylvia Crawford's statement is testimonial under any definition. This case does, however, squarely implicate the second proposal

A

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous [*41] notions of "reliability " Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee It commands, not that evidence be reliable, but that reliability be assessed in a particular manner by testing in the crucible of cross-examination The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined Cf 3 Blackstone, Commentaries, at 373 ("This open examination of witnesses . is much more conducive to the clearing up of truth"), M Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better")

The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability It thus replaces the constitutionally prescribed method [*42] of assessing reliability with a wholly foreign one In this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds, it does not purport to be an alternative means of determining reliability See *Reynolds* v *United States,* 98 U S 145, 158-159, 25 L Ed 244 (1879).

The Raleigh trial itself involved the very sorts of reliability determinations that *Roberts* authorizes In the face of Raleigh's repeated demands for confrontation, the prosecution responded with many of the arguments a court applying *Roberts* might invoke today. that Cobham's statements were self-inculpatory, 2 How. St Tr., at 19, that they were not made in the heat of passion, *id* , at 14, and that they were not "extracted from [him] upon any hopes or promise of Pardon," *id* , at 29 It is not plausible that the Framers' only objection to the trial was that Raleigh's judges did not properly weigh these factors before sentencing him to death. [*43] Rather, the problem was that the judges refused to allow Raleigh to confront Cobham in court, where he could cross-examine him and try to expose his accusation as a lie

Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty This is not what the Sixth Amendment prescribes

B

The legacy of *Roberts* in other courts vindicates the Framers' wisdom in rejecting a general reliability exception The framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations

Reliability is an amorphous, if not entirely subjective, concept There are countless factors bearing on whether a statement is reliable, the nine-factor balancing test applied by the Court of Appeals below is representative See, *e g* , *People* v *Farrell*, 34 P. 3d 401, 406-407 (Colo 2001) (eight-factor test) Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them Some courts wind up attaching the same significance to opposite facts For example, the Colorado Supreme Court [*44] held a statement more reliable because its inculpation of the defendant was "detailed," *id* , at 407, while the Fourth Circuit found a statement more reliable because the portion implicating another was "fleeting," *United States* v. *Photogrammetric Data Servs , Inc* , 259 F 3d 229, 245 (2001) The Virginia Court of Appeals found a statement more reliable because the witness was in custody and charged with a crime (thus making the statement more obviously against her penal interest), see *Nowlin* v *Commonwealth*, 40 Va App 327, 335-338, 579 S E 2d 367, 371-372 (2003), while the Wisconsin Court of Appeals found a statement more reliable because the witness was *not* in custody and *not* a suspect, see *State* v. *Bintz*, 2002 WI App 204, P13, 257 Wis. 2d 177, 187, 650 N.W 2d 913, 918 Finally, the Colorado Supreme Court in one case found a statement more reliable because it was given "immediately after" the events at issue, *Farrell*, *supra*, at 407, while that same court, in another case, found a statement more reliable because two years had elapsed, *Stevens* v. *People*, 29 P. 3d 305, 316 (2001) [*45]

The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude. Despite the plurality's speculation in *Lilly*, 527 U S , at 137, 144 L Ed 2d 117, 119 S Ct 1887, that it was "highly unlikely" that accomplice confessions implicating the accused could survive *Roberts*, courts continue routinely to admit them See *Photogrammetric Data Servs , supra*, at 245-246, *Farrell*, *supra*, at 406-408, *Stevens*, *supra*, at 314-318, *Taylor* v *Commonwealth*, 63 S W 3d 151, 166-168 (Ky 2001), *State* v *Hawkins*, 2002 Ohio 7347, No 2001-P-0060, 2002 WL 31895118, PP34-37, *6 (Ohio App , Dec 31, 2002), *Bintz*, *supra*, PP7-14, 257 Wis. 2d, at 183-188, 650 N W 2d, at 916-918, *People* v *Lawrence*, 55 P 3d 155, 160-161 (Colo. App 2001), *State* v *Jones*, 171 Ore App 375, 387-391, 15 P 3d 616, 623-625 (2000), *State* v *Marshall*, 136 Ohio App 3d 742, 747-748, 737 N E 2d 1005, 1009 (2000), *People* v *Schutte*, 240 Mich App 713, 718-721, 613 N W.2d 370, 376-377 (2000), [*46] *People* v *Thomas*, 313 Ill. App 3d 998, 1005-1007, 730 N E 2d 618, 625-626, 246 Ill. Dec. 593 (2000); cf *Nowlin*, *supra*, at 335-338, 579 S. E 2d, at 371-372 (witness confessed to a related crime); *People* v *Campbell*, 309 Ill App. 3d 423, 431-432, 721 N E 2d 1225, 1230, 242 Ill Dec 694 (1999) (same) One recent study found that, after *Lilly*, appellate courts admitted accomplice statements to the authorities in 25 out of 70 cases -- more than one-third of the time. Kirst, Appellate Court Answers to the Confrontation Questions in *Lilly v Virginia*, 53 Syracuse L Rev 87, 105 (2003) Courts have invoked *Roberts* to admit other sorts of plainly testimonial statements despite the absence of any opportunity to cross-examine See *United States* v *Aguilar*, 295 F 3d 1018, 1021-1023 (CA9 2002) (plea allocution showing existence of a conspiracy), *United States* v *Centracchio*, 265 F 3d 518, 527-530 (CA7 2001) (same), *United States* v *Dolah*, 245 F 3d 98, 104-105 (CA2 2001) (same), *United States* v *Petrillo*, 237 F 3d 119, 122-123 (CA2 2000) (same), *United States* v. *Moskowitz*, 215 F 3d 265, 268-269 (CA2 2000) [*47] (same); *United States* v *Gallego*, 191 F.3d 156, 166-168 (CA2 1999) (same); *United States* v *Papajohn*, 212 F 3d 1112, 1118-1120 (CA8 2000) (grand jury testimony), *United States* v. *Thomas*, 30 Fed Appx 277, 279 (CA4 2002) (same), *Bintz*, *supra*, PP15-22, 257 Wis 2d, at 188-191, 650 N. W 2d, at 918-920 (prior trial testimony); *State* v *McNeill*, 140 N C App 450, 457-460, 537 S E. 2d 518, 523-524 (2000) (same)

To add insult to injury, some of the courts that admit untested testimonial statements find reliability in the very factors that *make* the statements testimonial As noted earlier, one court relied on the fact that the witness's statement was made to police while in custody on pending charges -- the theory being that this made the statement more clearly against penal interest and thus more reliable *Nowlin*, *supra*, at 335-338, 579 S E. 2d, at 371-372. Other courts routinely rely on the fact that a prior statement is given under oath in judicial proceedings *E g* , *Gallego*, *supra*, at 168 (plea allocution), *Papajohn*, *supra* [*48] , at 1120 (grand jury testimony) That inculpating statements are given in a testimonial setting is not an antidote to the confrontation problem, but rather the trigger that makes the Clause's demands most urgent. It is not enough to point out that most of the usual safeguards of the adversary process attend the statement, when the single safeguard missing is the one the Confrontation Clause demands

C

Roberts' failings were on full display in the proceedings below Sylvia Crawford made her statement while in police custody, herself a potential suspect in the case Indeed, she had been told that whether she would be released "depended on how the investigation continues " App. 81 In response to often leading questions from police detectives, she implicated her husband in Lee's stabbing and at least arguably undermined his self-defense claim Despite all this, the trial court admitted her statement, listing several reasons why it was reliable In its opinion reversing, the Court of Appeals listed several *other* reasons why the statement was *not* reliable Finally, the State Supreme Court relied exclusively on the interlocking character of the statement and disregarded every [*49] other factor the lower courts had considered The case is thus a self-contained demonstration of *Roberts'* unpredictable and inconsistent application.

Each of the courts also made assumptions that cross-examination might well have undermined The trial court, for example, stated that Sylvia Crawford's statement was reliable because she was an eyewitness with direct knowledge of the events. But Sylvia at one point told the police that she had "shut [her] eyes and . . didn't really watch" part of the fight, and that she was "in shock." App. 134. The trial court also buttressed its reliability finding by claiming that Sylvia was "being questioned by law enforcement, and, thus, the [questioner] is neutral to her and not someone who would be inclined to advance her interests and shade her version of the truth unfavorably toward the defendant " *Id* , at 77 The Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by "neutral" government officers. But even if the court's assessment of the officer's motives was accurate, it says nothing about Sylvia's perception of her situation. Only cross-examination [*50] could reveal that

The State Supreme Court gave dispositive weight to the interlocking nature of the two statements -- that they were both ambiguous as to when and whether Lee had a weapon The court's claim that the two statements were *equally* ambiguous is hard to accept Petitioner's statement is ambiguous only in the sense that he had lingering doubts about his recollection "A I coulda swore I seen him goin' for somethin' before, right before everything happened But I'm not positive " *Id* , at 155 Sylvia's statement, on the other hand, is truly inscrutable, since the key timing detail was simply assumed in the leading question she was asked "Q Did Kenny do anything to fight back from this assault?" *Id* , at 137. Moreover, Sylvia specifically said Lee had nothing in his hands after he was stabbed, while petitioner was not asked about that

The prosecutor obviously did not share the court's view that Sylvia's statement was ambiguous -- he called it "damning evidence" that "completely refutes [petitioner's] claim of self-defense." Tr 468 (Oct 21, 1999) We have no way of knowing whether the jury agreed with the prosecutor or the court Far from obviating [*51] the need for cross-examination, the "interlocking" ambiguity of the two statements made it all the more imperative that they be tested to tease out the truth

We readily concede that we could resolve this case by simply reweighing the "reliability factors" under *Roberts* and finding that Sylvia Crawford's statement falls short. But we view this as one of those rare cases in which the result below is so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion Moreover, to reverse the Washington Supreme Court's decision after conducting our own reliability analysis would perpetuate, not avoid, what the Sixth Amendment condemns The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising.

We have no doubt that the courts below were acting in utmost good faith when they found reliability. The Framers, however, would not have been content to indulge this assumption They knew that judges, like other government officers, could not always be [*52] trusted to safeguard the rights of the people, the likes of the dread Lord Jeffreys were not yet too distant a memory They were loath to leave too much discretion in judicial hands. Cf U S Const., Amdt 6 (criminal jury trial), Amdt 7 (civil jury trial), *Ring* v *Arizona,* 536 U.S. 584, 611-612, 153 L Ed 2d 556, 122 S. Ct 2428 (2002) (SCALIA, J , concurring) By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like this one, the Framers had an eye toward politically charged cases like Raleigh's -- great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear It is difficult to imagine *Roberts'* providing any meaningful protection in those circumstances

* * *

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law -- as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether Where testimonial [*53] evidence is at issue, however, the Sixth Amendment demands what the common law required. unavailability and a prior opportunity for cross-

examination We leave for another day any effort to spell out a comprehensive definition of "testimonial " n10 Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed

n10 We acknowledge THE CHIEF JUSTICE's objection, *post*, at 7-8, that our refusal to articulate a comprehensive definition in this case will cause interim uncertainty But it can hardly be any worse than the status quo See *supra*, at 27-30, and cases cited The difference is that the *Roberts* test is *inherently*, and therefore *permanently*, unpredictable

In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no [*54] opportunity to cross-examine her That alone is sufficient to make out a violation of the Sixth Amendment *Roberts* notwithstanding, we decline to mine the record in search of indicia of reliability Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes confrontation

The judgment of the Washington Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion

It is so ordered

CONCURBY: REHNQUIST

CONCUR:

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, concurring in the judgment

I dissent from the Court's decision to overrule *Ohio* v *Roberts,* 448 U.S 56, 65 L. Ed 2d 597, 100 S Ct 2531 (1980) I believe that the Court's adoption of a new interpretation of the Confrontation Clause is not backed by sufficiently persuasive reasoning to overrule long-established precedent Its decision casts a mantle of uncertainty over future criminal trials in both federal and state courts, and is by no means necessary to decide the present case.

The Court's distinction between testimonial and nontestimonial statements, contrary to its claim, [*55] is no better rooted in history than our current doctrine Under the common law, although the courts were far from consistent, out-of-court statements made by someone other than the accused and not taken under oath, unlike *ex parte* depositions or affidavits, were generally not considered substantive evidence upon which a conviction could be based. n1 See, *e g* , *King* v *Brasier*, 1 Leach 199, 200, 168 Eng Rep 202 (K B 1779), see also J. Langbein, Origins of Adversary Criminal Trial 235-242 (2003), G Gilbert, Evidence 152 (3d ed 1769) n2 Testimonial statements such as accusatory statements to police officers likely would have been disapproved of in the 18th century, not necessarily because they resembled *ex parte* affidavits or depositions as the Court reasons, but more likely than not because they were not made under oath n3 See *King* v *Woodcock*, 1 Leach 500, 503, 168 Eng Rep. 352, 353 (1789) (noting that a statement taken by a justice of the peace may not be admitted into evidence unless taken under oath). Without an oath, one usually did not get to the second step of whether confrontation was required

n1 Modern scholars have concluded that at the time of the founding the law had yet to fully develop the exclusionary component of the hearsay rule and its attendant exceptions, and thus hearsay was still often heard by the jury See Gallanis, The Rise of Modern Evidence Law, 84 Iowa L Rev 499, 534-535 (1999); Mosteller, Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions, 1993 U Ill. L Rev 691, 738-746 In many cases, hearsay alone was generally not considered sufficient to support a conviction; rather, it was used to corroborate sworn witness testimony. See 5 J Wigmore, Evidence, § 1364, pp 17, 19-20, 19, n 33 (J Chadbourn rev 1974) (hereinafter Wigmore) (noting in the 1600's and early 1700's testimonial and nontestimonial hearsay was permissible to corroborate direct testimony), see also J Langbein, Origins of Adversary Criminal Trial 238-239 (2003) Even when unsworn hearsay was proffered as substantive evidence, however, because of the predominance of the oath in society, juries were largely skeptical of it. See Landsman, Rise of the Contentious Spirit Adversary Procedure in Eighteenth Century England, 75 Cornell L Rev 497, 506 (1990) (describing late 17th-century sentiments), Langbein, Criminal Trial

before the Lawyers, 45 U Chi. L Rev 263, 291-293 (1978) In the 18th century, unsworn hearsay was simply held to be of much lesser value than were sworn affidavits or depositions [*56]

n2 Gilbert's noted in 1769

"Hearsay is no Evidence though a Person Testify what he hath heard upon Oath, yet the Person who spake it was not upon Oath, and if a Man had been in Court and said the same Thing and had not sworn it, he had not been believed in a Court of Justice, for all Credit being derived from Attestation and Evidence, it can rise no higher than the Fountain from whence it flows, and if the first Speech was without Oath, an Oath that there was such a Speech makes it no more than a bare speaking, and so of no Value in a Court of Justice, where all Things were determined under the Solemnities of an Oath "

n3 Confessions not taken under oath were admissible against a confessor because "'the most obvious Principles of Justice, Policy, and Humanity'" prohibited an accused from attesting to his statements 1 G Gilbert, Evidence 216 (C Lofft ed 1791) Still, these unsworn confessions were considered evidence only against the confessor as the Court points out, see *ante*, at 16, and in cases of treason, were insufficient to support even the conviction of the confessor, 2 W Hawkins, Pleas of the Crown, C. 46, § 4, p 604, n 3 (T Leach 6th ed. 1787)

[*57]

Thus, while I agree that the Framers were mainly concerned about sworn affidavits and depositions, it does not follow that they were similarly concerned about the Court's broader category of testimonial statements. See 1 N Webster, An American Dictionary of the English Language (1828) (defining "Testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact *Such affirmation in judicial proceedings, may be verbal or written, but must be under oath*" (emphasis added)) As far as I can tell, unsworn testimonial statements were treated no differently at common law than were nontestimonial statements, and it seems to me any classification of statements as testimonial beyond that of sworn affidavits and depositions will be somewhat arbitrary, merely a proxy for what the Framers might have intended had such evidence been liberally admitted as substantive evidence like it is today n4

n4 The fact that the prosecution introduced an unsworn examination in 1603 at Sir Walter Raleigh's trial, as the Court notes, see *ante*, at 16, says little about the Court's distinction between testimonial and nontestimonial statements. Our precedent indicates that unsworn testimonial statements, as do some nontestimonial statements, raise confrontation concerns once admitted into evidence, see, *e g* , *Lilly* v. *Virginia,* 527 U S. 116, 144 L Ed. 2d 117, 119 S Ct 1887 (1999); *Lee* v *Illinois,* 476 U S 530, 90 L Ed 2d 514, 106 S. Ct. 2056 (1986), and I do not contend otherwise My point is not that the Confrontation Clause does not reach these statements, but rather that it is far from clear that courts in the late 18th century would have treated unsworn statements, even testimonial ones, the same as sworn statements

[*58]

I therefore see no reason why the distinction the Court draws is preferable to our precedent Starting with Chief Justice Marshall's interpretation as a Circuit Justice in 1807, 16 years after the ratification of the Sixth Amendment, *United States* v *Burr,* 25 F Cas 187, 193, F. Cas. No 14694 (No 14,694) (CC Va 1807), continuing with our cases in the late 19th century, *Mattox* v *United States,* 156 U S 237, 243-244, 39 L Ed 409, 15 S Ct 337 (1895); *Kirby* v. *United States,* 174 U S 47, 54-57, 43 L Ed. 890, 19 S Ct 574 (1899), and through today, *e g* , *White* v *Illinois,* 502 U S. 346, 352-353, 116 L Ed 2d 848, 112 S Ct 736 (1992), we have never drawn a distinction between testimonial and nontestimonial statements And for that matter, neither has any other court of which I am aware I see little value in trading our precedent for an imprecise approximation at this late date

I am also not convinced that the Confrontation Clause categorically requires the exclusion of testimonial statements Although many States had their own Confrontation Clauses, they were of recent vintage and were not interpreted with any regularity before 1791 State cases that recently followed the ratification of the Sixth [*59] Amendment were not uniform; the Court itself cites state cases from the early 19th century that took a more stringent view of the right to confrontation than does the Court, prohibiting former testimony even if the witness was subjected to cross-examination

See ante, at 13 (citing *Finn* v *Commonwealth*, 26 Va 701, 708 (1827), *State* v *Atkins*, 1 Tenn 229 (1807) *(per curiam)*)

Nor was the English law at the time of the framing entirely consistent in its treatment of testimonial evidence Generally *ex parte* affidavits and depositions were excluded as the Court notes, but even that proposition was not universal See *King* v *Erriswell*, 3 T R 707, 100 Eng Rep 815 (K B 1790) (affirming by an equally divided court the admission of an *ex parte* examination because the declarant was unavailable to testify); *King* v. *Westbeer*, 1 Leach 12, 13, 168 Eng Rep 108, 109 (1739) (noting the admission of an *ex parte* affidavit), see also 1 M Hale, Pleas of the Crown 585-586 (1736) (noting that statements of "accusers and witnesses" which were taken under oath could be admitted into evidence if [*60] the declarant was "dead or not able to travel") Wigmore notes that sworn examinations of witnesses before justices of the peace in certain cases would not have been excluded until the end of the 1700's, 5 Wigmore § 1364, at 26-27, and sworn statements of witnesses before coroners became excluded only by statute in the 1800's, see *ibid*, *id*, § 1374, at 59 With respect to unsworn testimonial statements, there is no indication that once the hearsay rule was developed courts ever excluded these statements if they otherwise fell within a firmly rooted exception See, *e g*, *Erriswell*, *supra*, at 715-719 (Buller, J), 720 (Ashhurst, J), 100 Eng Rep , at 819-822 (concluding that an *ex parte* examination was admissible as an exception to the hearsay rule because it was a declaration by a party of his state and condition) Dying declarations are one example See, *e g*, *Woodcock*, *supra*, at 502-504, 168 Eng Rep , at 353-354, *King* v *Reason*, 16 How St Tr 1, 22-23 (K B 1722)

Between 1700 and 1800 the rules regarding the admissibility of out-of-court statements were still being developed See n 1, *supra* There were always [*61] exceptions to the general rule of exclusion, and it is not clear to me that the Framers categorically wanted to eliminate further ones It is one thing to trace the right of confrontation back to the Roman Empire, it is quite another to conclude that such a right absolutely excludes a large category of evidence It is an odd conclusion indeed to think that the Framers created a cut-and-dried rule with respect to the admissibility of testimonial statements when the law during their own time was not fully settled

To find exceptions to exclusion under the Clause is not to denigrate it as the Court suggests Chief Justice Marshall stated of the Confrontation Clause "I know of no principle in the preservation of which all are more concerned I know none, by undermining which, life, liberty and property, might be more endangered It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important " *Burr*, 25 F Cas , at 193 Yet, he recognized that such a right was not absolute, acknowledging that exceptions to the exclusionary component of the hearsay rule, which he considered as an "inroad" on the right to confrontation, had been introduced [*62] See *ibid*

Exceptions to confrontation have always been derived from the experience that some out-of-court statements are just as reliable as cross-examined in-court testimony due to the circumstances under which they were made. We have recognized, for example, that co-conspirator statements simply "cannot be replicated, even if the declarant testifies to the same matters in court " *United States* v. *Inadi*, 475 U S 387, 395, 89 L Ed 2d 390, 106 S Ct 1121 (1986) Because the statements are made while the declarant and the accused are partners in an illegal enterprise, the statements are unlikely to be false and their admission "actually furthers the 'Confrontation Clause's very mission' which is to 'advance the accuracy of the truth-determining process in criminal trials '" *Id*, at 396, 89 L Ed 2d 390, 106 S Ct 1121 (quoting *Tennessee* v *Street*, 471 U S 409, 415, 85 L Ed. 2d 425, 105 S. Ct 2078 (1985) (some internal quotation marks omitted)) Similar reasons justify the introduction of spontaneous declarations, see *White*, 502 U S , at 356, 116 L. Ed 2d 848, 112 S Ct 736, statements made in the course of procuring medical services, see *ibid*, dying declarations, see *Kirby*, *supra*, at 61, 43 L Ed 2d 890, 19 S Ct 574, and countless other hearsay [*63] exceptions That a statement might be testimonial does nothing to undermine the wisdom of one of these exceptions.

Indeed, cross-examination is a tool used to flesh out the truth, not an empty procedure See *Kentucky* v *Stincer*, 482 U S 730, 737, 96 L Ed 2d 631, 107 S Ct 2658 (1987) ("The right to cross-examination, protected by the Confrontation Clause, thus is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial"), see also *Maryland* v *Craig*, 497 U S 836, 845, 111 L Ed 2d 666, 110 S Ct 3157 (1990) ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact") "In a given instance [cross-examination may] be superfluous, it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation " 5 Wigmore § 1420, at 251 In such a case, as we noted over 100 years ago, "The law in its wisdom declares that the rights of the public shall [*64] not be wholly sacrificed in order that an incidental benefit may be preserved to the accused " *Mattox*, 156 U S , at 243, 39 L Ed 2d 409, 15 S Ct 337, see also *Salinger* v *United States*, 272 U S 542, 548, 71 L Ed 398, 47 S Ct. 173 (1926) By creating an immutable category of excluded evidence, the Court adds little to a trial's truth-finding function and ignores this longstanding guidance.

In choosing the path it does, the Court of course overrules *Ohio* v *Roberts*, 448 U S 56, 65 L Ed 2d 597, 100 S Ct 2531 (1980), a case decided nearly a quarter of a century ago *Stare decisis* is not an inexorable command in the area of constitutional law, see *Payne* v *Tennessee*, 501 U S 808, 828, 115 L Ed 2d 720, 111 S Ct 2597 (1991), but by and large, it "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process," *id*, at 827, 115 L Ed. 2d 720, 111 S Ct 2597 And in making this appraisal, doubt that the new rule is indeed the "right" one should surely be weighed in the balance Though there are no vested interests involved, unresolved questions for the future of everyday [*65] criminal trials throughout the country surely counsel the same sort of caution The Court grandly declares that "we leave for another day any effort to spell out a comprehensive definition of 'testimonial,'" *ante*, at 33. But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of "testimony" the Court lists, see *ibid*, is covered by the new rule They need them now, not months or years from now Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner

To its credit, the Court's analysis of "testimony" excludes at least some hearsay exceptions, such as business records and official records See *ante*, at 20 To hold otherwise would require numerous additional witnesses without any apparent gain in the truth-seeking process Likewise to the Court's credit is its implicit recognition that the mistaken application of its new rule by courts which guess wrong as to the scope of the rule is subject to harmless-error analysis See *ante*, at 5, n 1

But these are palliatives to what I believe is a mistaken change [*66] of course It is a change of course not in the least necessary to reverse the judgment of the Supreme Court of Washington in this case The result the Court reaches follows inexorably from *Roberts* and its progeny without any need for overruling that line of cases In *Idaho* v *Wright*, 497 U S 805, 820-824, 111 L Ed 2d 638, 110 S Ct. 3139 (1990), we held that an out-of-court statement was not admissible simply because the truthfulness of that statement was corroborated by other evidence at trial. As the Court notes, *ante*, at 31, the Supreme Court of Washington gave decisive weight to the "interlocking nature of the two statements." No re-weighing of the "reliability factors," which is hypothesized by the Court, *ante*, at 31, is required to reverse the judgment here A citation to *Idaho* v *Wright*, *supra*, 497 U S. 805, 111 L. Ed 2d 638, 110 S Ct 3139, would suffice For the reasons stated, I believe that this would be a far preferable course for the Court to take here

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposed Amendment to Rule 803(8)
Date: April 2, 2004

At its Fall 2003 meeting the Evidence Rules Committee directed the Reporter to prepare a report on Rule 803(8)—the hearsay exception for public reports—so that the Committee could determine the necessity of an amendment to that Rule.

The possible need for amendment of Rule 803(8) arises from several anomalies in the Rule as well as a dispute in the courts about the scope of the Rule. The Reporter's intent was to provide the Committee with an extensive discussion of the conflicting case law and the case for and against an amendment to Rule 803(8). However, an important Supreme Court decision handed down on March 8, 2004 throws the propriety of any immediate proposal to amend a hearsay exception into substantial doubt. That opinion, *Crawford v. Washington,* is attached to the memorandum on Rule 803(3) in this agenda book. The Court in *Crawford* radically revised its Confrontation Clause jurisprudence. The question of whether a statement falling within a hearsay exception satisfies the accused's right to confrontation is now subject to a radically different analysis. The constitutional law is in flux after *Crawford.* This uncertainty has a direct bearing on the proper scope of Rule 803(8), because most of the problems in using the Rule have arisen when the government offers a public report in a criminal case. This means that any amendment of Rule 803(8) that would apply to criminal cases is almost surely premature and unwise so shortly after *Crawford.*

This memorandum is in four parts. Part One sets forth the existing Rule and the Committee Note. Part Two provides a short discussion of the anomalies present in the current Rule 803(8). Part Three provides a short discussion of *Crawford* and its impact on any proposed amendment to Rule 803(8). Part Four sets forth model amendments to Rule 803(8), solely for the information of the Committee. Absolutely no suggestion is made that the Rule should be amended at this point. To the contrary, any amendment should be tabled for the near future to await lower court (and probably further Supreme Court) analysis of the meaning of *Crawford.*

I. The Current Rule 803(8) and the Original Committee Note

Rule 803(8) currently provides as follows:

> **Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial**
>
> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (8) *Public records and reports.* — Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

The pertinent part of the original Committee Note provides as follows:

> **Exception (8).** Public records are a recognized hearsay exception at common law and have been the subject of statutes without number. McCormick § 291. See, for example, 28 U.S.C. § 1733, the relative narrowness of which is illustrated by its nonapplicability to nonfederal public agencies, thus necessitating resort to the less appropriate business record exception to the hearsay rule. Kay v. United States, 255 F.2d 476 (4th Cir. 1958). The rule makes no distinction between federal and nonfederal offices and agencies.
>
> Justification for the exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record. As to items (a) and (b), further support is found in the reliability factors underlying records of regularly conducted activities generally. See Exception (6) *supra.*
>
> (a) Cases illustrating the admissibility of records of the office's or agency's own activities are numerous. Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123, 39 S. Ct. 407, 63 L. Ed. 889 (1919), Treasury records of miscellaneous receipts and disbursements; Howard v. Perrin, 200 U.S. 71, 26 S. Ct. 195, 50 L. Ed. 374 (1906), General Land Office records; Ballew v. United States, 160 U.S. 187, 16 S. Ct. 263, 40 L. Ed. 388 (1895), Pension Office records.
>
> (b) Cases sustaining admissibility of records of matters observed are also numerous. United States v. Van Hook, 284 F.2d 489 (7th Cir. 1960), remanded for resentencing, 365 U.S. 609, 81 S. Ct. 823, 5 L. Ed. 2d 821, letter from induction officer to district attorney, pursuant to army regulations, stating fact and circumstances of refusal to be inducted;

T'Kach v. United States, 242 F.2d 937 (5th Cir. 1957), affidavit of White House personnel officer that search of records showed no employment of accused, charged with fraudulently representing himself as an envoy of the president; Minnehaha County v. Kelley, 150 F.2d 356 (8th Cir. 1945), Weather Bureau records of rainfall; United States v. Meyer, 113 F.2d 387 (7th Cir. 1940), *cert. denied*, 311 U.S. 706, 61 S. Ct. 174, 85 L. Ed. 459, map prepared by government engineer from information furnished by men working under his supervision

(c) The more controversial area of public records is that of the so-called "evaluative" report. The disagreement among the decisions has been due in part, no doubt, to the variety of situations encountered, as well as to differences in principle. Sustaining admissibility are such cases as United States v. Dumas, 149 U.S. 278, 13 S. Ct. 872, 37 L. Ed. 734 (1893), statement of account certified by postmaster general in action against postmaster; McCarty v. United States, 185 F.2d 520 (5th Cir. 1950), certificate of settlement of General Accounting Office showing indebtedness and letter from army official stating government had performed, in action on contract to purchase and remove waste food from army camp; Moran v. Pittsburgh-Des Moines Steel Co., 183 F.2d 467 (3d Cir. 1950), report of Bureau of Mines as to cause of gas tank explosion; Petition of W —, 164 F. Supp. 659 (E.D. Pa. 1958), report by Immigration and Naturalization Service investigator that petitioner was known in community as wife of man to whom she was not married. To the opposite effect and denying admissibility are Franklin v. Skelly Oil Co., 141 F.2d 568 (10th Cir. 1944), state fire marshal's report of cause of gas explosion; Lomax Transp. Co. v. United States, 183 F.2d 331 (9th Cir. 1950), certificate of settlement from General Accounting Office in action for naval supplies lost in warehouse fire; Yung Jin Teung v. Dulles, 229 F.2d 244 (2d Cir. 1956), "status reports" offered to justify delay in processing passport applications Police reports have generally been excluded except to the extent to which they incorporate firsthand observations of the officer. Annot., 69 A.L.R.2d 1148. Various kinds of evaluative reports are admissible under federal statutes: 7 U.S.C. § 78, findings of secretary of agriculture *prima facie* evidence of true grade of grain; 7 U.S.C. § 210(f), findings of secretary of agriculture *prima facie* evidence in action for damages against stockyard owner; 7 U.S.C. § 292, order by secretary of agriculture *prima facie* evidence in judicial enforcement proceedings against producers association monopoly; 7 U.S.C. § 1622(h), Department of Agriculture inspection certificates of products shipped in interstate commerce *prima facie* evidence; 8 U.S.C. § 1440(c), separation of alien from military service on conditions other than honorable provable by certificate from department in proceedings to revoke citizenship; 18 U.S.C. § 4245, certificate of director of prisons that convicted person has been examined and found probably incompetent at time of trial *prima facie* evidence in court hearing on competency; 42 U.S.C. § 269(b), bill of health by appropriate official *prima facie* evidence of vessel's sanitary history and condition and compliance with regulations; 46 U.S.C. § 679, certificate of consul presumptive evidence of refusal of master to transport destitute seamen to United States. While these statutory exceptions to the hearsay rule are left undisturbed, Rule 802, the willingness of Congress to recognize a substantial measure of admissibility for evaluative reports is a helpful guide.

Factors which may be of assistance in passing upon the admissibility of evaluative reports include: (1) the timeliness of the investigation, McCormick, Can the Courts Make

Wider Use of Reports of Official Investigations, 42 Iowa L. Rev. 363 (1957); (2) the special skill or experience of the official, *id.;* (3) whether a hearing was held and the level at which conducted, Franklin v. Skelly Oil Co., 141 F.2d 568 (10th Cir. 1944); (4) possible motivation problems suggested by Palmer v. Hoffman, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943). Others no doubt could be added.

The formulation of an approach which would give appropriate weight to all possible factors in every situation is an obvious impossibility. Hence the rule, as in Exception (6), assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present. **In one respect, however, the rule with respect to evaluative reports under item (c) is very specific: they are admissible only in civil cases and against the government in criminal cases in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case.**

* * *

Reporter's Background Discussion of Rule 803(8)

Rule 803(8) is one of the most complex of all the Federal Rules of Evidence. The exception is divided into three parts and each is slightly different in its reach. Part (A) permits any record, report, etc., setting forth the activities of an office or agency to be admitted. It applies in both civil and criminal cases and allows *any* party to take advantage of it. *See, e.g., United States v. Hardin*, 710 F.2d 1231 (7th Cir. 1983) (DEA statistical report showing the average retail price and purity of cocaine purchased by DEA undercover agents, offered to prove the defendant's intent to distribute the large amount of cocaine he was arrested with, was admissible under Rule 803(8)(A)). Part (B) covers matters observed by public officials pursuant to duty imposed by law when there is also a duty to report these matters; this Part does not on its face appear to allow anyone to use this exception in a criminal case to admit reports of matters observed by police officers and law enforcement personnel. Thus, (B) appears to apply to both sides equally in civil and criminal cases. In criminal cases it permits both the government and the accused to utilize the exception for some public reports–specifically reports of matters observed by someone who is a public official but not a law enforcement officer– but would seem to limit *both* sides by barring law enforcement reports from admission into evidence. Part (C) covers findings resulting from an investigation made pursuant to legal authority. It applies in *both* civil and criminal cases, but appears to state that *only* the defendant can utilize it in a criminal case. This is apparently a judgment that the government should be bound by its own findings, but that the defendant is protected by confrontation principles

from being similarly bound—though of course the constitutional basis of the exclusionary language must be revisited in light of *Crawford*.

Because of the strong presumption of reliability accorded to public reports, the burden of proving untrustworthiness is borne by the party seeking exclusion. The Fourth Circuit explained the rationale for placing the burden on the objecting party:

> Placing the burden on the opposing party makes considerable practical sense. Most government-sponsored investigations employ well-accepted methodological means of gathering and analyzing data. It is unfair to put the party seeking admission to the test of "re-inventing the wheel" each time a report is offered. * * * [I]t is far more equitable to place that burden on the party seeking to demonstrate why a time tested and carefully considered presumption is not appropriate.

Ellis v. International Playtex, Inc., 745 F.2d 292, 301 (4th Cir. 1981).

II. Problems In Rule 803(8) That Might Justify an Amendment

Rule 803(8) contains at least three textual anomalies that have raised problems in the courts and that might arguably justify an amendment. These problems are set forth briefly.

1. *Trustworthiness clause.* It is unclear whether the trustworthiness clause at the end of the Rule applies only to reports offered under subpart (C), or whether it applies to all reports offered under the exception. The better reading is that it should apply to all reports, just like the trustworthiness clause of Rule 803(6) applies to all business records. *See, e g., Nachtsheim v. Beech Aircraft Corp* , 847 F.2d 1261 (7th Cir. 1988) (the trustworthiness criterion was applied to exclude a report offered under subdivision (B)). But that reading is not evident from the text, and there are cases that appear to admit public reports under subdivisions (A) and (B) without much consideration of trustworthiness.

2. *Rule 803(8)(B) and exculpatory reports:* Subpart (B) excludes from its coverage public reports setting forth "matters observed by police officers and other law enforcement personnel" if such reports are offered "in criminal cases." Read literally, the Rule would not provide a hearsay exception for a forensic report prepared by the police that concluded that the defendant was innocent. Such a report would be offered by the defendant, but the exclusionary language of Rule 803(8)(B) covers all police reports offered in criminal cases. Yet some lower courts have refused to be bound by the plain meaning of the rule, reasoning that Congress intended to regulate only police reports that unfairly *inculpate* a criminal defendant, and that the exception should therefore apply to public reports offered by the accused. See, e.g., *United States v Smith*, 521 F.2d 957 (D.C.Cir. 1975) (despite its exclusionary language, Rule 803(8)(B) should be read in light of Congress' intent to exclude police reports only when offered *against* a criminal defendant). Other courts have read the Rule literally. *United States v. Sharpe,* 193 F.3d 852, 868 (5th Cir. 1999) (the defendant's reliance on Rule 803(8)(B) to admit an exculpatory police report was "misplaced" because the Rule does not grant admissibility for any such reports offered in criminal cases).

3. *Rule 803(8)(B) and (C) and law enforcement reports:* Rule 803(8)(B) and (C) both contain language appearing to exclude from the hearsay exception all records prepared by law enforcement personnel, when such records are offered against a criminal defendant. Read literally, these provisions would prevent the government from introducing simple tabulations of non-adversarial information. For example, these subdivisions appear not to grant a hearsay exception for a routine printout from the Customs Service recording license plates of cars that crossed the border on a certain day, when offered in a criminal case. Most courts have refused to apply the plain exclusionary language of these subdivisions literally, however. They reason that the language could not have been intended to cover reports that are ministerial in nature and prepared under non-adversarial circumstances; it is only adversarial, evaluative reports (such as crime scene reports) that carry the risk of fabrication that the exclusionary language was designed to regulate. See, e.g., *United States v Orozco*, 590 F.2d 789 (9th Cir. 1979) (customs records of border crossings are admissible under Rule 803(8) because they are ministerial and not prepared under adversarial circumstances);

United States v. Grady, 544 F.2d 598 (2d Cir. 1976) (reports concerning firearms' serial numbers were admissible because they were records of routine factual matters prepared in non-adversarial circumstances). But other cases appear to apply the Rule to exclude all law enforcement reports. *See United States v. Oates,* 560 F.2d 45 (2d Cir. 1977) (arguing that it is "manifest that it was the clear intention of Congress to make evaluative and law enforcement reports absolutely inadmissible against defendants in criminal cases.").

Undeniably part of the problem with Rule 803(8) is that it is unnecessarily complicated. The three subdivisions purport to categorize public reports, but to little effect—not only are the subdivisions overlapping, but each subdivision provides that the report is admissible, so it doesn't matter which subdivision the court chooses. The exclusionary language in subdivisions (b) and (c) is confusing and cannot logically apply literally to exclude every single law enforcement report as well as every report that *exculpates* the accused. Moreover, the description of reports admissible under subdivision (C) is problematic because it appears to allow only factual findings, and not opinions, to be admitted. The Supreme Court had to construe away this anomaly in *Beech Aircraft v Rainey* In sum, a rule that is this unnecessarily complex and convoluted is bound to create confusion for courts and litigants.

Yet however strong the case for a reworking of Rule 803(8), the Supreme Court's decision in *Crawford* indicates that any amendment should wait a few years for case law development on how the new Confrontation Clause jurisprudence affects the Federal Rules hearsay exceptions.

III. The Impact of *Crawford* on the Public Records Exception

The *Crawford* decision and its general impact on hearsay exceptions is extensively discussed in the memorandum on Rule 803(3) in this agenda book. This section deals briefly with the specific effect of *Crawford* on the admissibility of public records under Rule 803(8).

Unlike state of mind statements, which are offered almost exclusively in criminal cases, public records are used at least as frequently in civil as in criminal cases. So it could be argued that an amendment to Rule 803(8), if tailored only to civil cases, would be unaffected by *Crawford.* The problem with that argument is that most of the *problems* in applying Rule 803(8), discussed above, have arisen in criminal cases. The most frequently arising and probably the most important problem is the admissibility of law enforcement reports when offered against the accused in criminal cases. Any attempt to amend the Rule without dealing with the problems of law enforcement reports in criminal cases is therefore necessarily a half-measure; and it may create confusion about whether it is intended to cover criminal as well as civil cases. Put another way, any attempt to fix the Rule should be a complete and not a partial fix. And a complete fix should wait for case law development on the meaning of *Crawford.*

So what exactly is the effect of *Crawford* on public reports offered against the accused in criminal cases? The most important effect is on the exclusionary language in subdivisions (B) and (C). This language limits (and some courts say totally precludes) the use of law enforcement reports in criminal cases. As indicated in the Advisory Committee Note, the rationale for including this language is to protect the accused's right to confrontation. The cases that have limited the apparently absolute exclusionary rule have reasoned that total exclusion of law enforcement reports is unnecessary to protect the accused's right to confrontation. They have reasoned that many law enforcement reports do not carry a risk of *untrustworthiness*–specifically, those reports that are nothing more than routine tabulations of factual data (like traffic reports or border crossing reports) are not untrustworthy and therefore are admissible despite the absolute language of Rules 803(8)(B) and (C).

The problem with this analysis is that the exclusionary language of the Rule—as well as the conflicting case law construing that language—is written under the rubric of *trustworthiness-based* Confrontation Clause. But after *Crawford,* the Confrontation Clause is no longer trustworthiness-based. Rather, its rationale is to exclude hearsay statements that are *testimonial*, whether they are trustworthy or not. So *Crawford* essentially pulls the rug out from under both the exclusionary language in Rule 803(8)(B) and (C) and the extensive case law construing that language.

This is not to say that law enforcement reports are going to be more or less admissible after *Crawford.* The question will be whether a particular law enforcement report is or is not testimonial. An argument could be made that routine tabulations of unexceptional data are not in fact testimonial within the meaning of *Crawford*, because such reports are not prepared with a view to producing them as accusatory statements in a criminal case. Thus, there is an argument that only those law enforcement reports prepared with an eye toward prosecuting a particular accused will be found to

be testimonial after *Crawford*. If that is the case, then the admissibility of law enforcement reports will end up in about the same place as it is in most courts today, i.e., tempering the absolute exclusionary rule in the text, and excluding only those reports prepared under adversarial circumstances.

On the other hand, it could be argued that *every* law enforcement report is testimonial when offered against an accused. The Court in *Crawford*, in compiling its list of clearly testimonial statements, seemed to focus on the participation of law enforcement in the production of the hearsay. The examples included accomplice confessions to law enforcement, grand jury testimony, and plea allocutions of accomplices. If the listing of these examples is intended to mean that law enforcement participation in preparing the statement *is* what makes a hearsay statement testimonial, then the result of *Crawford* would be that Rule 803(8)(B) and (C) are to be applied the way they are written, i.e., all law enforcement reports must be excluded from criminal cases.

Of course, there is no way to predict with certainty how law enforcement reports will fare after *Crawford*. This is because the Court specifically declined to define the term "testimonial." The definition of that term must await a good deal of case law and perhaps an eventual resolution in the Supreme Court. Thus, even if admissibility of law enforcement reports ends up in exactly the same place as it is today, that will only occur after a few years of case law.

In light of all this uncertainty, it would seem unwise to prepare an amendment to Rule 803(8) that would purport to have an effect on law enforcement reports. And as discussed above, the half measure of amending Rule 803(8) to cover only civil cases and evidence offered *by* an accused runs at least two risks: 1) piecemeal amendment of an Evidence Rule; and 2) inadvertent effect on criminal cases. The problems of applying Rule 803(8) in civil cases and cases in which an accused offers a public report do not appear to be so critical as to need immediate attention; these problems can probably wait until the courts decide what impact *Crawford* should have when public reports are offered in criminal cases against an accused.

IV. Models For a Possible Amendment to Rule 803(8)

As stated in this memorandum, it would seem prudent for the Committee to await further case law developments concerning the meaning of *Crawford* before proposing an amendment to Rule 803(8). In the meantime, the Committee may wish to think about a few drafting alternatives that might be considered to rectify the anomalies presented by the current text of Rule 803(8). Of course, these drafting models may have to be revised, or scrapped, depending on how the post-*Crawford* case law develops.

Model One–Rectifying the Textual Anomalies

As discussed above, the most obvious textual anomalies in the existing Rule 803(8) are: 1) confusing placement of the trustworthiness clause; 2) apparent exclusion of exculpatory law enforcement reports offered by the accused under Rule 803(8)(B); 3) overbroad exclusion of law enforcement reports when offered by the government under Rules 803(8)(B) and (C) (subject of course to *Crawford*).

If these three textual anomalies were all addressed in an amendment to Rule 803(8), the amendment might look like this:

> (8) Public records and reports.—Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel made under adversarial circumstances and offered against the accused, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made under adversarial circumstances pursuant to authority granted by law~~, unless~~. This exception is inapplicable if the sources of information or other circumstances indicate lack of trustworthiness in the preparation of the record, report, statement or data compilation.

Model Two: Deleting Overlapping Categories

As discussed above, the textual problems of Rule 803(8) arguably result from the unnecessary complexity of three overlapping categories of public records. If the Committee might wish in the future to revise the Rule to make it leaner and less confusing, such an amendment might look like this:

> (8) Public records and reports.—Records, reports, statements, or data compilations, in any form, of public offices or agencies made pursuant to a duty imposed by law , ~~setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law,~~ unless the sources of information or other circumstances indicate lack of trustworthiness.

This is the Nebraska version. One problem with the model is that the sole exclusionary factor is untrustworthiness. While this is a familiar standard, and basically codifies the current case law in civil cases, it does not match the *post-Crawford* standard for constitutional permissibility when hearsay is offered against an accused. There are two possible responses to this problem:

> 1) A second sentence could be added to the Rule to cover the use of public reports against an accused. For example, this second sentence could provide: "Hearsay offered against an accused is not admissible if it is testimonial."
>
> 2) As discussed above, it is possible that the admissibility of law enforcement reports will end up in the same place after *Crawford* as before that case, i.e., routine nonadversarial reports will be admissible, all other law enforcement reports will not. If that is the case, then there will be no need to add any special language to the Rule to cover the use of law enforcement reports against the accused. This is because a trustworthiness test and the testimonial test would have ended up in the same place. If this comes to pass, then all that would be necessary would be a line in the Committee Note indicating an intent to conform the Rule to the requirements of the Confrontation Clause.

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposed Amendment to Rule 804(b)(3)
Date: April 2, 2004

As you know, the Evidence Rules Committee proposed an amendment to Evidence Rule 804(b)(3). The amendment provided that statements against penal interest offered by the prosecution in criminal cases would not be admissible unless the government could show that the statements carried "particularized guarantees of trustworthiness." The intent of the amendment was to assure that statements offered by the prosecution under Rule 804(b)(3) would comply with constitutional safeguards imposed by the Confrontation Clause. The amendment was approved by the Judicial Conference and referred to the Supreme Court.

The amendment to Rule 804(b)(3) essentially codified the Supreme Court's Confrontation Clause jurisprudence, which required a showing of "particularized guarantees of trustworthiness" for hearsay admitted under an exception that was not "firmly rooted."

But while the amendment was pending in the Supreme Court, that Court granted certiorari and decided *Crawford v Washington*. *Crawford* is set forth, and discussed in detail, in the memorandum on Rule 803(3) in this agenda book. *Crawford* essentially rejected the Supreme Court's prior jurisprudence, which had held that the Confrontation Clause demands that hearsay offered against an accused must be reliable. The *Crawford* Court replaced the reliability-based standard with a test dependent on whether the proffered hearsay is "testimonial" or not. Hearsay that is testimonial is now excluded under the Confrontation Clause even if it is reliable. In contrast, if hearsay is non-testimonial, it appears (though it is not certain) that the Confrontation Clause poses little, if any, barrier to its admissibility.

Shortly after the Supreme Court decided *Crawford*, it considered the proposed amendment to Rule 804(b)(3). The Court decided to send the amendment back to the Rules Committee for reconsideration in light of *Crawford*. This action was not surprising, because the very reason for the amendment was to bring the Rule into line with the Confrontation Clause. Now that the governing

standards for the Confrontation Clause have been changed, the proposed amendment did not meet its intended goal. It embraced constitutional standards that are no longer applicable.

For reasons discussed in other memoranda included in this agenda book, it would seem prudent to hold off on any consideration of an amendment to a hearsay exception until the courts are given some time to figure out the meaning and all the implications of *Crawford.* Therefore, no proposal is currently being made to revise the proposed amendment to Rule 804(b)(3) in light of *Crawford.* An attempt to bring the Rule into line with *Crawford* standards at this point would be unwise given the fact that those standards have not yet been clarified.

This does not mean that the proposed amendment to Rule 804(b)(3) is necessarily a dead letter, even in its current form. Under *Williamson v. United States*, an accomplice confessions to law enforcement is not admissible against an accused if the accused is specifically identified in the statement. The statements excluded from the hearsay exception under *Williamson* are the very kind of statements that the *Crawford* Court listed as testimonial, and therefore inadmissible under the Confrontation Clause. It may end up that the existing Rule 804(b)(3) (as limited by *Williamson*) and the Confrontation Clause (as interpreted by post-*Crawford* jurisprudence) provide a contiguous rule of exclusion–i.e., excluding only accomplice confessions made to law enforcement. If that ends up to be the case, Rule 804(b)(3) will then cover only those declarations against penal interest that are not testimonial. The admissibility of declarations against penal interest covered by the Rule might then be predominantly, if not solely, a question of evidentiary law.

An argument can be made that the proposed amendment to Rule 804(b)(3) makes sense solely as a matter of evidentiary law. Put another way, the proposed amendment to Rule 804(b)(3) can be justified after *Crawford*, but for different reasons other than those invoked when the amendment was referred to the Supreme Court. That argument proceeds as follows:

1. Hearsay exceptions are rightfully concerned with reliability, both before and after *Crawford.* The Supreme Court in *Crawford* held that reliability was not a concern of the Confrontation Clause; but it did not say that reliability was of no concern at all. Rather, it implied that reliability concerns were to be addressed by evidentiary rather than constitutional rules.

2. The proposed amendment to Rule 804(b)(3) requires a showing of an additional reliability factor before a declaration against penal interest can be offered against an accused. This additional factor — "particularized guarantees of trustworthiness" — is well-defined in the case law and provides a solid protection against the use of unreliable declarations against interest in criminal cases.

3. This extra reliability requirement is arguably necessary as a policy matter, because declarations against penal interest are often of questionable reliability even when they are made to people other than law enforcement personnel. The statements are made by people whose credibility is questionable — either they have committed a crime or are lying about

it — and the "against penal interest" requirement is so liberally applied that it is arguably all too easy for the government to meet that standard with any accomplice statement made to any person. In these circumstances, it can be argued that an additional "particularized guarantees of trustworthiness" requirement serves an important purpose. It assures that an accused will not be convicted primarily or even solely from the mouth of an unavailable declarant of dubious credibility.

4. The additional reliability requirement set forth in the amendment also protects against the possibility that the government will evade the admissibility requirements of the coconspirator exception by offering a statement under Rule 804(b)(3). Many statements by purported coconspirators could potentially qualify as either coconspirator hearsay or a declaration against penal interest. (An example is a statement from a drug dealer to a conspirator, telling him to deliver a package of drugs to the defendant who is alleged to be part of the conspiracy). However, to be admissible under the coconspirator exception, the government must present some independent evidence that the defendant and the declarant are both members of the same conspiracy. Without an additional reliability requirement in Rule 804(b)(3), it would be all too easy for the government to evade the independent evidence requirement of Rule 801(d)(2)(E) by offering the statement as "tending" to subject the declarant to a risk of criminal liability. It can therefore be argued that the text of the proposed amendment is necessary to close a loophole in the Rules.

5. Finally, an amendment adding an extra reliability requirement would resolve an existing conflict in the case law over the admissibility requirements of Rule 804(b)(3). Currently, courts are in dispute over whether the government must satisfy an extra reliability requirement when offering a declaration against penal interest to inculpate the accused. The amendment would side with the majority view (at least the majority view before *Crawford*) that the government does indeed need to satisfy an extra reliability requirement before admitting an inculpatory declaration against penal interest.

The above argument is dependent on post-*Crawford* jurisprudence defining the term "testimonial" as covering all accomplice statements to law enforcement. If the courts end up adopting a broader view of "testimony" that would cover accomplice statements even when not made to law enforcement, then such statements might well violate the Confrontation Clause even if they would be admissible under Rule 804(b)(3) If the courts end up adopting a narrower definition of the term "testimonial," then it could be that statements not admissible under Rule 804(b)(3) after *Williamson* might nonetheless satisfy the Confrontation Clause. In either of these situations, the Committee may wish to think about an amendment different from the proposed amendment that was approved by the Judicial Conference before *Crawford*. At any rate, any proposal to amend Rule 804(b)(3)—whether the same or a reworked proposal—should wait until the courts have had the opportunity to work out the meaning of *Crawford*.

Proposed Amendment to Rule 804(b)(3) As Approved By the Judicial Conference

For the convenience of the Committee, the proposed amendment to Rule 804(b)(3), and the proposed Committee Note, is reproduced below. It is apparent that if the Committee were to re-propose the amendment at some later point in time, the Committee Note would have to be rewritten to accommodate the changes wrought by *Crawford*.

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 in a criminal case a ~~A~~ statement tending to expose the declarant to

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

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, 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 to confirm the requirement that the prosecution must 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 amendment distinguishes "corroborating circumstances that clearly indicate" trustworthiness (the standard applicable to statements offered by the accused) from "particularized guarantees of trustworthiness" (the standard applicable to statements offered by the government). The reason for this differentiation lies in the guarantees of the Confrontation Clause that are applicable to statements against

penal interest offered against the accused. 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 v. Virginia, 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). In contrast, "corroborating circumstances" can be found, at least in part, by a reference to independent corroborating evidence that indicates the statement is true.

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, supra,* 527 U.S. at 138 (the fact that the hearsay 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.

IV

ATTORNEY-CLIENT PRIVILEGE SURVEY RULE

(a) Definitions. As used in this rule:

(1) A "communication" is any expression through which a privileged person intends to convey information to another privileged person or any record containing such an expression;

(2) A "client" is a person who or an organization that consults a lawyer to obtain professional legal services;

(3) An "organization" is a corporation, unincorporated association, partnership, trust, estate, sole proprietorship, governmental entity, or other for-profit or not-for-profit association.

(4) An "attorney" is a person who is authorized to practice law in any domestic or foreign jurisdiction or whom a client reasonably believes to be an attorney;

(5) A "privileged person" is a client, that client's attorney, or an agent of either who is reasonably necessary to facilitate communications between the client and the attorney.

(6) A communication is "in confidence" if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one except a privileged person will learn the contents of the communication.

(b) General Rule of Privilege.

A client has a privilege to refuse to disclose and to prevent any other person from disclosing a communication made in confidence between or among privileged persons for the purpose of obtaining or providing legal assistance for the client. The client's identity and the fee paid to the attorney are privileged only if the disclosure of this information would thereby disclose a confidential communication, such as the client's motive for seeking representation.

(c) Who May Claim the Privilege.

A client, a personal representative of an incompetent or deceased client, or a person succeeding to the interest of a client may invoke the privilege. A client may, implicitly or explicitly, authorize an attorney, agent of the attorney, or an agent of a client to invoke the privilege on behalf of the client.

(d) Standards for Organizational Clients

With respect to an organizational client, the attorney-client privilege extends to a communication that

(1) is otherwise privileged;

(2) is between an organization's agent and a privileged person where the communication concerns a legal matter of interest to the organization within the scope of the agent's agency or employment; and

(3) is disclosed only to privileged persons and other agents of the organization who reasonably need to know of the communication in order to act for the organization.

(e) Privilege of Co-Clients and Common-Interest Arrangements.

If two or more clients are jointly represented by the same attorney in a matter or if two or more clients with a common interest in a matter are represented by separate attorneys and they agree to pursue a common interest and to exchange information concerning the matter, a communication of any such client that is otherwise privileged and relates to matters of common interest is privileged as against third persons. Any such client may invoke the privilege unless the client making the communication has waived the privilege. Unless the clients agree otherwise, such a communication is not privileged as between the clients. Communications between clients or agents of clients outside the presence of an attorney or agent of an attorney representing at least one of the clients are not privileged.

(f) Exceptions. The attorney-client privilege does not apply to a communication

(1) from or to a deceased client if the communication is relevant to an issue between parties who claim an interest through the same deceased client, either by testate or intestate succession or by an inter vivos transaction;

(2) that occurs when a client consults an attorney to obtain assistance to engage in a crime or fraud or aiding a third person to do so. Regardless of the client's purpose at the time of consultation, the communication is not privileged if the client uses the attorney's advice or other services to engage in or assist in committing a crime or fraud.

(3) that is relevant and reasonably necessary for an attorney to reveal in a proceeding to resolve a dispute with a client concerning the compensation or reimbursement that the attorney reasonably claims the client owes the attorney;

(4) that is relevant and reasonably necessary for an attorney to reveal in order to defend against an allegation by anyone that the attorney, the attorney's agent, or any person for whose conduct the attorney is responsible acted wrongfully or negligently

during the course of representing a client;

(5) relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(6) between a trustee of an express trust or a similar fiduciary and an attorney or other privileged person retained to advise the trustee concerning the administration of the trust, if relevant to a beneficiary's claim of breach of fiduciary duties;

(7) between an organizational client and an attorney or other privileged person, if offered in a proceeding that involves a dispute between the client and shareholders, members, or other constituents of the organization toward whom the directors, officers, or similar persons managing the organization bear fiduciary responsibilities, provided the court finds

(A) those managing the organization are charged with breach of their obligations toward the shareholders, members, or other constituents or toward the organization itself;

(B) the communication occurred prior to the assertion of the charges and relates directly to those charges; and

(C) the need of the requesting party to discover or introduce the communication is sufficiently compelling and the threat to confidentiality sufficiently confined to justify setting the privilege aside.

COMMENTARY ON ATTORNEY-CLIENT PRIVILEGE SURVEY RULE

(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 definition in part (a) (1) is taken from the Restatement (Third) of the Law Governing Lawyers § 69 (2000).

The definition of a communication within the meaning of the rule provides an essential limiting parameter of the rule. In addition to providing a guideline as to what is within the rule, the definition necessarily and perhaps more importantly defines what is not a communication.

Confining the privilege to "expressions" is consistent with the federal cases. For example, a client's appearance is not regarded as a communication, *see United States v. Kendrick,* 331 F.2d 110, 113-114 (4th Cir. 1964); *Provenzano v. Singletary,* 3 F.Supp. 2d 1353, 1367 (M.D. Fla. 1997) *aff'd,* 148 F.3d 1327 (11th Cir 1998), nor is his or her demeanor, *In re Walsh*, 623 F.2d 489 (7th Cir. 1980). A characterization of a client as a "sly fox" is not a communication protected by the privilege. *United States v. Sayan,* 968 F.2d 55, 64 (D.C. 1992). There is some authority that the mental competency of a client is within the privilege, *see Gunther v. United States,* 230 F.2d 222, 223-224 (D.C. Cir. 1956), but this is clearly a minority position. *See* Edward J Imwinkelried, The New Wigmore §6.7.1 (2002). Even in the *Gunther* case, the court does not quarrel with the definition of a communication as an expression, but rather expresses concern that testimony with regard to competency would necessarily open the inquiry into the "factual data," *i.e.*, the actual communications between lawyer and client.

The federal courts have consistently held that the identity of a client is not itself a communication. *E g , United States v. Blackman,* 72 F.3d 1418, 1425 (9th Cir. 1995); *Lefcourt v. United States,* 125 F.3d 79, 86 (2d Cir.1997); *In re Shargel,* 742 F.2d 61, 62 (2d Cir. 1984). Whether the revelation of identity is tantamount to the disclosure of a communication is another question and is addressed in the commentary to part (b).

The definition recognizes that a communication need not be oral, but may be contained in a record intending to convey information between lawyer and client. *See* 1 John W.Strong, et al. McCormick on Evidence, § 89 at 359 (5th ed. 1999). This does not mean that any information contained in a document passed between lawyer and client is a communication. Indeed, the courts have consistently held that a preexisting document does not become privileged simply because it is passed from client to lawyer. *See, e.g., Fisher v. United States,* 425 U.S. 391, 404 (1976); *United States v. Robinson,* 121 F.3d 971, 975 (5th Cir. 1997). Rather, the record itself must be an expression of information from the client to the lawyer or vice versa

The definition does not distinguish between communications coming from the client and communications coming from the lawyer. A communication meets the definition so longs as it is between privileged persons – defined later in the rule as both lawyer and client – regardless of which one is speaking. Some federal cases take a narrow view of the privilege and confine its application either to expressions made by the client or to attorney communications that reveal client confidences. *See, e.g., In re Fischel,* 557 F.2d 209, 212 (9th Cir. 1977); *Potts v Allis-Chalmers Corp.,* 118 F.R.D. 597, 602 (N.D Ind. 1987). The court in *Potts* criticized the extension of the privilege to all communications from the attorney as "contrary to the expressed intention of the Seventh Circuit to confine the privilege to the narrowest limits consistent with the privilege's purpose."

However, there is also support in the federal cases for the broad extension of the privilege to all communications from lawyer to client. *Sprague v. Thorn Americas, Inc.,* 129 F.3d 1355, 1369-70 (10th Cir. 1997); *United States v Amerada Hess Corp.,* 619 F.2d 980, 986 (3d Cir. 1980). *See also* Timothy P. Glynn, Federalizing Privilege, 52 Amer.U.L.Rev 59, 100-101 (2002). The Court in the *Sprague* case gives the topic extended discussion, setting forth the rationale for both the narrow and the broad approach to the issue. In deciding upon a broad application of the rule, the Court relies upon the reasoning of the district court in *In re LTV Securities Litigation,* 89 F.R.D. 595, 605 (N.D Tex. 1981). In *LTV,* the court rejected the narrower view, emphasizing that predictability of confidence is central to the role of the attorney and that "[a]doption of such a niggardly rule has little to justify it and carries too great a price tag." The court also relied upon an earlier Tenth Circuit case, *Natta v. Hogan,* 392 F.2d 686, 692-93 (10th Cir. 1968) where the court noted: "The recognition that privilege extends to statements of a lawyer to a client is necessary to prevent the use of the lawyer's statements as admissions of the client." The operation of the privilege to protect communications going both from the lawyer and from the client is also consistent with proposed Federal Rule 503 and Uniform Rule of Evidence 502.

Thus, despite some authority to the contrary, the Survey Rule adopts the broader approach to the definition of communications.

(2) A "client" is a person who or an organization that consults a lawyer to obtain professional legal services;

This definition is based on Proposed Rule 503(a) (1) and Uniform Rule 502(a)(1), with some language changes.

The definition is in accord with the law generally, *see* 1 Strong, McCormick on Evidence, *supra* at § 88 (5th ed. 1999). The federal cases confirm that the payment of a fee is not essential. *United States v. Costanzo,* 625 F.2d 465, 469 (3d Cir. 1980). However, the consultation must be for legal services, not as a friend, *Modern Woodmen of America v. Watkins,* 132 F.2d 352, 354 (5th Cir. 1942), as a business advisor, *United States v. United Shoe Machinery Corp.,* 89 F.Supp. 357, 360 (D. Mass. 1950), or as an accountant, *Olender v United States,* 210 F.2d 795, 866-67 (9th Cir. 1954). The court in *Modern Woodman*, stated (132 F.2d 352):

> If the statement is about matters unconnected with the business at hand, or in a general conversation, or to the lawyer merely as a personal friend, the matter is not privileged. The fact that a person is a lawyer does not disqualify him as a witness, for he, like any other person, may testify to any competent facts except those which came to his knowledge by means of confidential relations with his client.

(3) An "organization" is a corporation, unincorporated association, partnership, trust, estate, sole proprietorship, governmental entity, or other for-profit or not-for-profit association.

This definition is consistent with Proposed Federal Rule 503(a)(1), Uniform Rule 502 and Restatement (Third) of the Law Governing Lawyers § 73-74 (2000), although none of those sources contain a separate definition of organization.

The definition is supported by federal case authority. Despite some musings to the contrary, *see Radiant Burners, Inc v. American Gas Assn.*, 207 F. Supp. 771, 772-73 (N.D.Ill. 1962), the privilege has consistently been applied to corporations. *See Upjohn Corp v. United States*, 449 U.S. 383, 389-92 (1981); *Radiant Burners, Inc. v. American Gas Assn.*, 320 F.2d 314, 322-24 (7th Cir. 1963). The few cases dealing with the issue have extended the privileged to unincorporated associations. *See United States v. Rowe*, 96 F.3d 1294, 1296 (9th Cir. 1996) (law firm); *Kneeland v. National Collegiate Athletic Ass'n*, 650 F. Supp. 1076, 1087 (W.D. Tex. 1986), *rev'd on other grounds*, 850 F.2d 224 (5th Cir. 1988) (unincorporated association). *See also Nesse v. Shaw Pittman*, 206 F.R.D. 325, 329-30 (D.D.C. 2002) (privilege applied to communications to law firm's general counsel but not to member of management committee). For the view that the privilege should not extend to unincorporated entities, *see* 24 C. Wright & K. Graham, Federal Practice & Procedure § 5477 (1986).

The applicability of the privilege to governmental entities has also been recognized by the federal courts. *See Town of Norfolk v. Corps of Engineers*, 968 F.2d 1438, 1457-58 (1st Cir. 1992) (Army Corps of Engineers); *Coastal Corp. v. Duncan*, 86 F.R.D. 514, 520 (D.Del. 1980) (Department of Energy, *dictum*). Again, some writers have argued against such an extension of the privilege. *See* 24 Wright & Graham *supra*, at § 5477. This is not to say that the privilege applies to communications between federal officials and government attorneys in all instances. For example, in the context of grand jury subpoenas, the courts have held that the privilege will not apply where one federal government arm, *i.e.*, the grand jury, seeks information from counsel for another federal government agency. *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 915-16 (8th Cir. 1997); *In re Lindsey*, 158 F.3d 1263, 1278 (D.C. Cir. 1998). *Also see* the discussion in connection with the Standard for Organizations Clients, part (d).

(4) An "attorney" is a person who is authorized to practice law in any domestic or foreign jurisdiction or whom a client reasonably believes to be an attorney;

This definition is based upon Proposed Federal Rule of Evidence 503(a)(2) and Uniform Rule of Evidence 502(a)(3).

The few federal cases dealing with the issue have held that the privilege applies when the client reasonably believes that the person consulted is a lawyer, even if that belief is incorrect. *See United States v. Tyler,* 745 F. Supp. 423, 435 (W.D.Mich. 1990) (reasonable belief that fellow prisoner was a lawyer); *United States v. Boffa,* 513 F.Supp. 517, 523 (D.Del. 1981) (reasonable belief is sufficient, but not established under the facts of case); *United States v. Ostrer,* 422 F.Supp. 93, 98 (S.D.N.Y. 1976) (reasonable belief that lawyer was extending legal, rather than simply friendly, advice).

The courts have also held that communications with an individual licensed as an attorney in a foreign jurisdiction are within the privilege, *Renfield Corp. v. E. Remy Martin & Co., S.A.,* 98 F.R.D. 442, 444 (D.Del. 1982). Because of licensing arrangements and titles of lawyers vary significantly from nation to nation, there has been some dispute as to who is qualified as a lawyer in a particular country. In the *Renfield* case, the court stated that the requirement is a functional one of whether the individual is competent to render legal advice and is permitted by law to do so. The corporate in-house counsel in *Renfield* was found to be so authorized under French law In *Honeywell, Inc. v. Minolta Camera Co., Ltd.,* 1990 WL 66182, 2-4 (D.N.J. 1990), the court took issue with the functional test, finding that communications to a Japanese individual who had never been licensed as an attorney in Japan or elsewhere were not within the privilege, despite the fact that the person sought to give legal advice. The language of this definition takes an approach consistent with both *Renfield* and *Honeywell.* The test is whether the person in question was *authorized* to practice law in the foreign jurisdiction. The lawyer in *Renfield* was; the person in *Honeywell* was not. Whether an individual is in fact authorized to practice will necessarily be dependent on the court's analysis of the facts and the law of the foreign jurisdiction. The definition gives as much general guidance as is warranted.

A question related to the application of the privilege to persons authorized to practice law in foreign jurisdictions is the issue of whether the court's should recognize as privileged communications with non-lawyers who are covered by a comparable privilege in other countries. However, this question is more appropriately viewed as a choice of law problem. The question is whether the foreign privilege should be recognized, not whether the federal attorney-client privilege should apply. *See, e g., Golden Trade, S.r.L. v Lee Apparel Co* 143 F.R.D. 514, 518-19 (S.D.N.Y. 1993)(communications between attorney and foreign patent agent assisting him come within ambit of the privilege); *SmithKline Beecham Corp. v. Apotex Corp.,* 193 F.R.D. 530, 535-36 (N.D. Ill. 2000) (question was the application of the privilege by law of the United Kingdom).

There is also the related issue of the application of the privilege to communications with United States patent agents. A number of cases have held that communications between a patent

agent and a client may be privileged where the proceeding is before the patent office and the agent is registered with that office. *See, e g , In re Ampicillin Antitrust Litigiation,* 81 F R.D. 377, 391 (D.D.C. 1978); Daiske Yoshida, Note, The Applicability of the Attorney-Client Privilege to Communications with Foreign Legal Professionals, 66 Fordham L.Rev. 209 (1997). There are certainly instances in which a patent agent is acting as the agent either of an attorney or the client and the communications are privileged under the usual application of the attorney-client privilege. *See Foseco Int'l Ltd v. Fireline, Inc.* 546 F.Supp. 22, 25 (N.D. Ohio 1982); *see also* discussion in connection with definition (a) (5). However, some courts, such as in both *Ampicillin* and *Foseco,* have the recognized the existence of privileged communications beyond the situation where the patent agent is acting for the attorney. The definition in this Survey Rule would not recognize such an extension. However, the exclusion of patent agents from the definition of attorney within the rule does not mean that such communication are not privileged. There may well be a separate privilege governing patent agents subject to its own rules and limitations. It is simply not the attorney-client privilege and thus not covered by this Survey Rule.

(5) A "privileged person" is a client, that client's attorney, or an agent of either who is reasonably necessary to facilitate communications between the client and the attorney.

This definition is based upon Restatement (Third) of the Law Governing Lawyers § 70 (2000). It is also consistent with both Proposed Federal Rule 503 and Uniform Rule 502.

The issues involved in this definition concern the question of who is an agent of either the client or the attorney. The definition itself provides only a broad rule, stating that the agent be "reasonably necessary to facilitate communications."

The words "reasonably necessary" are added to the definition in the Restatement § 70 in dealing with the agents of either the client or the lawyer. However, the Comment to the Restatement section notes that "a person is a confidential agent for communication if the person's participation is reasonably necessary to facilitate the client's communication with a lawyer or another privileged person. Although the same language is not used in either Proposed Federal Rule 503 or Uniform Rule 502, the addition of the words "reasonably necessary" is not inconsistent with those rules.

The language is also consistent with the federal cases. The leading case on the issue involved communications made by a client to an accountant in his attorney's employ. *United States v Kovel,* 296 F.2d 918, 922 (2d Cir. 1961). The court noted that what was "vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer." The court compared the role of the accountant to that of a foreign language interpreter:

> [T]he presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not to destroy the privilege, any more than would that of the linguist . . .; the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit.

See also United States v Alvarez, 519 F.2d 1036, 1045-46 (3d Cir. 1975) (privilege extended to client communication with psychiatrist); *Mendenhall v Barber-Greene Co.,* 531 F. Supp. 951, 953-54 (N.D. Ill. 1982) (privilege applied to communications with foreign patent agents who were agents of the attorney); *Cedrone v Unity Sav. Ass'n.*, 103 F.R.D. 423, 429 (E.D.Pa. 1984) (internal memoranda and conversations between lawyers in the same firm were within the privilege).

A leading case setting forth limits on the privilege where agents are involved is *United States v. Ackert,* 169 F.3d 136, 139 (2d Cir. 1998), where the court found that there was an insufficient showing that an investment banker was hired to translate or interpret information given to the attorney by the client. Rather, the consultant was sought out for information about a proposed transaction and its tax consequences. It was not sufficient that the information was of assistance to the attorney

The party claiming the privilege has the burden of showing that the person with whom the

communications took place was the agent of either the lawyer or the client for the purpose of facilitating legal services. Where that burden is not met, the privilege fails. *See United States v. Adlman,* 68 F.3d 1495, 1500 (2d Cir. 1995) (insufficient showing that auditor was consulted to assist in giving legal as opposed to tax advice); *Von Bulow v Von Bulow,* 811 F.2d 136, 146 (2d Cir. 1987) (party failed to meet burden to show that person claiming to be a paralegal was assisting lawyer in representation of the client); *FTC v. TRW, Inc.,* 628 F.2d 207, 213 (D.C. Cir. 1980) (party failed to meet burden of showing that the report prepared by a credit reporting agency was done as an agency for attorneys); *Dabney v. Investment Corp Of America,* 82 F.R.D. 464, 464-65 (E.D. Pa. 1979) (law student not found to been acting as agent or associate of attorney; no privilege).

The same considerations apply where it is the client, rather than the lawyer, who has employed or used the agent. *See In re Bieter,* 16 F.3d 929, 938-40 (8th Cir. 1994) (business consultant found to be agent of client); *In re Grand Jury Proceedings,* 947 F.2d 1188, 1190-91 (1991) (clients' conversations with accountant immediately before consulting lawyer were privileged; earlier conversations not found to be for purpose of assisting client in communicating with his lawyer); *Miller v. Haulmark Transport Systems,* 104 F.R.D. 442, 444-45 (E.D.Pa. 1984) (presence of insurance agent instrumental in arranging coverage that was the subject of the lawsuit did not destroy privilege where presence was the limited purpose of aiding the attorney).

(6) A communication is "in confidence" if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one except a privileged person will learn the contents of the communication.

This definition is based on Restatement (Third) of the Law Governing Lawyers § 71 (2000), although it differs from the Restatement section as discussed below. It is also consistent with both Proposed Federal Rule 503 and Uniform Rule 502.

There are primarily two kinds of situations in which the confidentiality of a communication may come into question First, is where someone other than the lawyer or client was present and in a position to hear the communication. Second, is where the client may have intended that the communication be relayed to another person.

In the first scenario, the presence of a third person will not destroy confidentiality where the other person is an agent of either the lawyer or the client for the purpose of assisting in the rendering of legal services. *See* discussion in the commentary to part (a)(5). *Compare Kevlik v. Goldstein,* 724 F.2d 844, 849 (1st Cir. 1984) (confidentiality not destroyed by presence of client's father) *with Cafritz v. Kolslow,* 167 F.2d 749 (D.C. Cir. 1948) (presence of client's sister destroyed confidentiality where no sufficient reason shown for her presence). *See also Cavallaro v United States,* 284 F.3d 236, 247 (1st Cir. 2002) (presence of accountants who were not acting to aid in obtaining legal advice destroyed confidentiality of the communications); Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence, § 183, 186 (2d ed. 1994).

The phrase "reasonably believe that no one except a privileged person will learn the contents of the communication" is consistent with federal cases holding that reasonable precautions must be taken to assure confidentiality. *United States v Gann,* 732 F.2d 714, 723 (9th Cir. 1984) (no privilege where statement made by client to attorney on telephone within hearing of law enforcement personnel); *United States v. Waller,* 581 F.2d 585, 585-86 (6th Cir. 1978) (leaving notepad in prominent place in a public courtroom was not consistent with a claim of confidentiality). *But see Gomes v. Vernon,* 255 F.3d 1118, 1133 (9thCir. 2001) (prisoners did all as they could to secure documents' confidentiality within the context of a prison situation).

The second situation in which confidentiality is in doubt is where the client may have intended the communication to be communicated to another person. Under the definition, if the communication is made with the intention of it being conveyed publicly, there is no confidentiality. This result is consistent with a great number of federal cases. *See, e.g., In re Grand Jury Proceedings,* 33 F.3d 342, 355 (4th Cir. 1994) (matters were communicated to attorneys for use in connection with public disclosures); *United States v. Oloyede,* 982 F.2d 133 (4th Cir. 1992) (information intended for use in citizenship applications); *Colton v. United States,* 306 F.2d 633, 638 (2d Cir 1962) (information given for inclusion in tax return not confidential).

Federal cases have held that matters communicated to an attorney where the client is seeking advice on the possibility of disclosure may still be privileged. *In re Grand Jury Proceedings,* 33

F.3d 342, 354 (4th Cir. 1994); *United States v. (Under Seal),* 748 F.2d 871, 878 (4th Cir. 1984). However, these same cases conclude that once there is a decision to disclose the privilege no longer exists. Furthermore, as stated in *Under Seal,* all of the details underlying the data which was to be published is outside the privilege The court noted (748 F 2d at 875, n. 7):

> The details underlying the published data are the communications relating the data, the document, if any, to be published containing the data, all preliminary drafts of the document, and any attorney's notes containing material necessary to the preparation fo the document. Copies of other documents, the contents of which were necessary to the preparation of the published document, will also lose the privilege.

Not all federal courts have followed the Fourth Circuit in this respect. Thus, the court in *Schenet v Anderson,* 678 F. Supp. 1280, 1283 (E.D. Mich. 1988), relying in large measure on *United States v Schlegel,* 313 F. Supp. 177, 179 (D. Neb. 1970), declined to follow that authority, stating:

> [T]he attorney-client privilege applies to all information conveyed by clients to their attorneys for the purpose of drafting documents to be disclosed to third persons and all documents reflecting such information, to the extent that such information is not contained in the document published and is not otherwise disclosed to third persons. With regard to preliminary drafts of documents intended to be made public, the court holds that preliminary drafts may be protected by the attorney-client privilege. Preliminary drafts may reflect not only client confidences, but also the legal advice and opinions of attorneys, all of which is protected by the attorney client privilege. The privilege is waived only as to those portions of the preliminary drafts ultimately revealed to third parties.

The Survey Rule definition of "in confidence" does not deal directly with this split in authority. The language can be interpreted as supporting either line of case authority.

The definition of "in confidence" found in Restatement § 71 differs from the definition in this Survey Rule in that the Restatement section adds that the communication may be in confidence if made either to a privileged person or "another person with whom communications are protected under a similar privilege." The Restatement Comment supplies no authority for this addition. The additional clause is contrary to cases that find that communications made by one spouse to a lawyer in the presence of the other spouse are not confidential unless the non-client spouse is found to be an agent of the client. *See discussion in State v Gordon,* 504 A.2d 1020, 1024-26 (Conn. 1985) (issue was whether wife, who participated in conferences and assisted husband's defense counsel was really agent of the State).

(b) General Rule of Privilege.

A client has a privilege to refuse to disclose and to prevent any other person from disclosing a communication made in confidence between or among privileged persons for the purpose of obtaining or providing legal assistance for the client. The client's identity and the fee paid to the attorney are privileged only if the disclosure of this information would thereby disclose a confidential communication, such as the client's motive for seeking representation.

The general rule of privilege set out in Section (b) is derived from several sources including Restatement (Third) of the Law Governing Lawyers § 67 (2000), Proposed Federal Rule of Evidence 503 and Uniform Rule of Evidence 502. However, the second sentence of the section, dealing with identity and fee, is not contained in any of those sources and is intended to reflect and emphasize the prevailing holdings of federal cases.

The first sentence of the rule draws upon the definitions contained in Section (a)(1)-(6). The discussions in this commentary concerning the case law supporting those definitions is also pertinent to the general rule. Thus, cases such as *United States v. Ostrer,* 422 F.Supp. 93, 98 (S.D.N.Y. 1976) (reasonable belief that lawyer was extending legal, rather than simply friendly, advice) support the general rule as well as the definition of "attorney" in Section (a)(4). *See generally* 1 John W. Strong, et al., McCormick on Evidence § 88 (5th ed. 1999).

Other significant federal cases ruling on whether a communication was for the purpose of obtaining or providing legal assistance include: *Simon v. G.D. Searle & Co.,* 816 F.2d 397, 402-04 (8th Cir. 1987)(documents intended to apprise lawyers of business matters will be privileged only if they embody an implied request for legal advice based on the documents); *United States v Tedder,* 801 F.2d 1437, 1442-43 (4th Cir. 1986) (communications not privileged where lawyer consulted as a friend and not for legal advice); *United States v. Wilson,* 798 F.2d 509, 513 (1st Cir. 1986) (no privilege where lawyer's services sought as a negotiator or messenger rather than as a lawyer); *United States v. Johnston,* 146 F.3d 785, 794 (10th Cir. 1998) (no privilege where lawyer was acting as a messenger for drug dealers rather than as a lawyer); *United States v. Knoll,* 16 F.3d 1313, 1322 (2d Cir. 1994) (papers relating solely to business transactions not privileged); *United States v. Aramony,* 88 F.3d 1369, 1387-90 (4th Cir. 1996) (executive's communications to internal investigators and corporate counsel were not privileged where executive did not seek legal advice on his own behalf).

The court's discussion in *United States v Frederick,* 182 F.3d 496 (7th Cir. 1999) is particularly enlightening. In *Frederick,* the court considered communications made by a client to an individual who was both an accountant and a lawyer. The information concerned both tax returns and IRS audits. The court rejected the existence of an client-accountant privilege. 182 F.3d at 500 It then affirmed the trial court's rejection of an attorney-client privilege under the circumstances of the case, finding that the communications with the lawyer/accountant were in his capacity as an accountant. In the course of its discussion, the court considered the issue of documents prepared for

use both in preparing tax returns and for use in litigation, stating (182 F.3d at 501-02):

> Put differently, a dual-purpose document – a document prepared for use in preparing tax returns *and* for use in litigation – is not privileged; otherwise, people in or contemplating litigation would be able to invoke, in effect, an accountant's privilege, provided that they used their lawyer to fill out their tax returns. And likewise if a taxpayer involved in or contemplating litigation sat down with his lawyer (who was also his tax preparer) to discuss both legal strategy and the preparation of his tax returns, and in the course of the discussion bandied about numbers related to both consultations: the taxpayer could not shield these numbers form the Internal Revenue Service. This would be not because they were numbers, but because, being intended (though that was not the only intention) for use in connection with the preparation of tax returns, they were an unprivileged category of numbers. (*Emphasis by the court*)

See also *Montgomery County v MicroVote Corp*, 175 F.3d 296, 301-04 (3d Cir. 1999) (reversing trial court determination that lawyer acted as an "election consultant," finding instead that the services were legal, applying Pennsylvania law but citing Federal authority); *United States v. Bauer,* 132 F.3d 504, 507-09 (9th Cir. 1997) (privilege attached where attorney not merely conveying public information as an officer of the court, but giving legal advice); *Rehling v. City of Chicago,* 207 F.3d 1009, 1019 (7th Cir. 2000) (police department counsel was giving legal advice to senior officers when he advised them concerning placement of disabled officer).

Although there do not seem to be federal cases directly on point, the modern trend, adopted by this section of the Survey Rule, is that the client may assert the privilege against an eavesdropper, provided that reasonable precautions were taken to preserve the confidentiality of the communication. *See* Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence, § 186 (2d ed. 1994). *See also Lively v Washington County Dist Court,* 747 P.2d 320, 321 (Okla. 1987)(phone conversation with attorney secretly videotaped). Both Proposed Federal Rule 503 and Uniform Rule 502 take this position.

The second sentence of this section of the rule, dealing with the identity of the client and the fee paid to the attorney, is not contained in any of the other rules that have served as the basis for this Survey Rule. As discussed in the commentary to section (a) (1) of this Survey Rule, the identity of the client is not itself a communication and is therefore ordinarily outside the rule. The sentence is intended to reenforce the holding of a majority of federal cases that clearly establish that rule, while making clear that the privilege may attach but only if the disclosure of such information would disclose a confidential communication.

A view at odds with this sentence of the rule was at least suggested by language in *Baird v. Koerner,* 279 F.2d 623, 632 (9th Cir. 1960). In that case, an attorney had paid back taxes on behalf of an undisclosed client. The court held that the disclosure of the client's identity would necessary convey information that would be conceded to be part of the usual privileged comunication between attorney and client. The *Baird* case has been cited as creating what has come to be known as a "last

link" rule, *i.e.*, that where "a strong probability exists that disclosure of such information would implicate the client in the very criminal activity for which legal advice was sought" the privilege will attach. *United States v. Hodge and Zweig,* 548 F.2d 1347, 1353 (9th Cir. 1977). *See also* discussion in 1 John W. Strong, et al., McCormick on Evidence § 90 (5th ed. 1999).

The "last link" rule has been almost universally rejected in the federal courts. Instead, the courts have held that the identity or facts of retention of a lawyer are ordinarily not protected by the privilege, despite their incriminating nature. Cases such as *In re Shargel,* 742 F 2d 61 (2d Cir. 1984), are representative of the prevailing view. In *Shargel,* the government sought information as to whether an attorney had represented certain defendant and the amount of fees pays as evidence of "unexplained wealth." 742 F.2d at 62. In finding that no privilege protected the identity and amount of fees, the court stated (742 F.2d at 64):

> It seems evident to us that a broad privilege against the disclosure of the identity of clients and of fee information might easily become an immunity for corrupt or criminal acts. [citation omitted] Such a shield would create unnecessary but considerable temptations to use lawyers as conduits of information or of commodities necessary to criminal schemes or as launderers of money. The bar and the system of justice will suffer little if all involved are aware that assured safety from disclosure does not exist.
>
> We adhere to our prior decisions, therefore, and define the limits of the privilege in terms of the goal of enabling lawyers to render informed legal advice and advocacy. We of course continue to recognize that "there may be circumstances under which the identification of a client may amount to the prejudicial disclosure of a confidential communications," [citation omitted]. However, we find no such circumstances here.

See also In re Grand Jury Proceedings, 791 F.2d 663, 665 (8th Cir. 1986) (court rejects "last link" analysis), *Clarke v. American Commerce Nat'l Bank,* 974 F.2d 127 (9th Cir. 1992) (identity not privileged where records did not reveal communications); *Vingelli v United States,* 992 F.2d 449, 452 (2d Cir. 1992) (same). Several federal cases refusing to protect the identity of clients involved situations where a lawyer seeks to shield the name of clients making fee payments in excess of $10,000 in cash. *See, e.g , Lefcourt v United States,* 125 F.3d 79, 86 (2d Cir. 1997); *United States v. Leventhal,* 961 F.2d 936, 941 (11th Cir. 1992).

What is required in order for the privilege to apply is a link to communications, including the motive of the client Such circumstances may occur, for example, where revelation of the client's identity would necessarily link the client to already disclosed communications. *See, e g., In re Grand Jury Proceedings,* 517 F.2d 666, 672 (5th Cir. 1975); *United States v Liebman,* 742 F.2d 807, 810 (3d Cir. 1984). The privilege may also exist where the disclosure of identity would necessarily reveal tihe client's motive. For example, in *In re Subpoenaed Grand Jury Witness,* 171 F.3d 511, 514 (7th Cir. 1999), the court protected identity, stating.

> We will not go into detail as to why we make this finding – that would be showing the hand to the government – but we are sure that disclosure of this information would identify a client of Hagen's who is potentially involved in targeted criminal activity which, on this record, would lead to revealing that client's motive to pay the legal bills for some of Hagen's other clients. And motive, we think, is protected by the attorney-client privilege.

See also In re Grand Jury Proceeding, Cherney, 898 F.2d 565, 568 (7th Cir. 1990) (identity protected where revelation would reveal client's motive).

(c) Who May Claim the Privilege.

A client, a personal representative of an incompetent or deceased client, or a person succeeding to the interest of a client may invoke the privilege. A client may, implicitly or explicitly, authorize an attorney, agent of the attorney, or an agent of a client to invoke the privilege on behalf of the client.

This section of the Survey Rule is based on Restatement (Third) of the Law Governing Lawyers § 86 (2000), Proposed Federal Rule of Evidence 503 (c) and Uniform Rule of Evidence 502(c).

The section is fully consistent with federal law. All authorities agree that the privilege is that of the client, not the attorney. *See* 1 John W. Strong, et al., McCormick on Evidence § 92 (5th ed. 1999); Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 200 (2d ed. 1994). *See also In re Grand Jury Subpoena,* 220 F.3d 406, 408 (5th Cir. 1967) (in-house counsel had no right to assert privilege waived by corporate client). The attorney may raise the privilege on behalf of the client, *Fisher v United States,* 425 U.S. 391, 402 n. 8 (1976), and the attorney is duty bound to assert the privilege in the client's absence. *Republic Gear Co v. Borg-Warner Corp.*, 381 F.2d 551, 556 (2d Cir 1967).

Although there seem to be no specifically articulating that the attorney has implicit authority to invoke the privilege, the language in this section providing for implicit authority is consistent with general law, *see* Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence, § 200 (2d ed. 1994), as well as with Proposed Federal Rule 503(c) and Uniform Rule 502(c). These sources all provide that an attorney's authority is presumed in the absence of evidence to the contrary.

Most of the federal cases dealing with authority to invoke the privilege involve the question of who is the client. Thus, in *Commodity Futures Trading Comm'n v. Weintraub,* 471 U.S. 343, 350-51 (1985) the Supreme Court held that the trustee in bankruptcy, not the debtor's directors had the right to claim the privilege. *But see In re Foster,* 188 F.3d 1259, 1265-66 (10th Cir. 1999) (individual debtor may hold privilege as opposed to trustee in bankruptcy). *See also United States v. International Bhd of Teamsters,* 119 F.3d 210, 215 (2d Cir. 1997) (campaign organization in union election, not campaign manager, held privilege); *In re Bevill, Bresler & Schulman Asset Mgt. Corp* , 805 F 2d 120, 126 (3d Cir. 1986) (corporation, not officers, held privilege); *In re Grand Jury Subpoenas,* 144 F.3d 653, 658-59 (10th Cir. 1998) (corporate officer could claim privilege for communications on his own behalf but not on behalf of corporation).

The language of this section providing that the privilege may be claimed by "a person succeeding to the interest of a client" is consistent with these cases, although it does not elaborate on the issue.

As set forth in this section, a personal representative of an incompetent or deceased may claim the privilege. There is no longer any doubt that, in the federal court, the privilege survives the death of the client. *Swidler & Berlin v. United States,* 524 U.S. 399, 405-06 (1998). The privilege

in that case was claimed by the attorney on behalf of the deceased client. Because the issue was not raised in the case, there was no discussion of the question of who can raise the privilege on behalf of the deceased person and, perhaps more controversially, who, if anyone, would have the ability to waive it.

The issue of who actually holds the privilege after death has not been addressed in the federal cases. Both Proposed Federal Rule 503(c) and Uniform Rule 502(c) provide that the privilege may be claimed by the client's personal representative. Neither rule expressly states that the personal representative also has the right to waive the privilege. However, states with statutory or rule privileges containing similar language have held that the right to claim the privilege necessarily entails the right to waive it. *See, e g , In Curtis' Estate,* 394 P.2d 59, 62 (Kan. 1964); *Scott v. Grinnell,* 161 A.2d 179, 183 (N.H. 1960). It likely that if this Survey Rule were adopted either as a rule or a statute, the language would have the same necessary effect. This Survey Rule obviously does not have the same effect. It seems probable that the federal courts will go in the direction that gives the personal representative the right both to claim and waive the privilege, but that matter has not yet been resolved.

(d) Standards for Organizational Clients

With respect to an organizational client, the attorney-client privilege extends to a communication that

(1) is otherwise privileged;

(2) is between an organization's agent and a privileged person where the communication concerns a legal matter of interest to the organization within the scope of the agent's agency or employment; and

(3) is disclosed only to privileged persons and other agents of the organization who reasonably need to know of the communication in order to act for the organization.

Section (d) is not contained in this form in any of the standard sources. It is derived in part from Restatement (Third) of the Law Governing Lawyers §§ 73-74 (2000), but differs from the Restatement in at least two important respects. First, unlike Restatement §73, the Survey Rule requires, consistent with *Upjohn Corp v United States,* 449 U.S. 383 (1981), that the communication concern a legal matter "within the scope of the agent's agency or employment." Section (d) also differs from the Restatement in that it provides, through its definition of organization in Section (a) (3), that communications between attorneys and agents of private organizations and governmental are to be analyzed under the same test. Specific problems in connection with the application of the privilege in the governmental context are discussed below.

Neither Proposed Federal Rule 503 nor Uniform Rule 502 have a specific section dealing with the organizational client. However, Survey Rule Section (d) is consistent with those rules. Proposed Rule 503(b) makes privileged communications between the client "or his representative." Uniform Rule 502(a)(4) includes a person "who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client."

The language of this section is an attempt to articulate the Supreme Court's holding in the *Upjohn* case. As stated in 1 John W. Strong, et al., McCormick on Evidence § 87.1 at 349 (5th ed. 1999), the basic principles of the holding are that information communicated by corporate agents to an attorney or representative of an attorney will be privileged if (1) it is communicated for the express purpose of securing legal advice for the corporation; (2) it relates to the specific corporate duties of the communicating employee; and (3) it is treated as confidential within the corporation itself. *Upjohn Corp. v. United States, 449 U.S. at 394.* Although the Court in *Upjohn* cautioned that it was not stating a rule for all cases, the court's opinion in that case has been widely regarded as doing so. The rule is firm in the federal courts. *See, e.g., Admiral Ins. Co. v United States Dist. Court,* 881 F.2d 1486, 1492-93 (9th Cir. 1989) (employee's communications to lawyer concerning matters within the scope of his employment even though the company planned to terminate the employee after the interview); *James Julian, Inc. v. Raytheon Co.,* 93 F.R.D. 138, 141-42 (D. Del.

1982) (privilege upheld against claim that corporation did not adequately maintain confidentiality); *Leucadia, Inc. v Reliance Ins Co.*, 101 F.R.D. 674, 678 (S.D.N.Y. 1983)(communications between employees of predecessor company made in confidence for the purpose of legal advice were privileged)

Although Section (a) (3) defines organizations as including government entities and, as stated above, Section (d) applies the same standard to government entities as to other organizations, there may be a significant difference in the application of the test in the government situation. The key portion of the standard in this respect is Section (d) (1) requiring that the communication be "otherwise privileged." Federal courts have held that there is no privilege for communications made to a government attorney in the course of that attorney's duties in the face of a grand jury subpoena. In so holding, the court in *In re Lindsey,* 158 F.3d 1263, 1272 (D. C. Cir. 1998) stated:

> When any executive branch attorney is called before a federal grand jury to give evidence about alleged crimes within the executive branch, reason and experience, duty and tradition dictate that the attorney shall provide that evidence. With respect to investigations of federal criminal offenses, and especially offenses committed by those in government, government attorneys stand in a far different position from members of the private bar.

To the same effect is *In re Grand Jury Subpoenas Duces Tecum,* 112 F.3d 910, 915-16 (8th Cir. 1997) (President Clinton and his wife could not claim privilege for communications to White House lawyers as against a grand jury subpoena). The same holding has been applied where a federal grand jury seeks information from attorneys for state agencies. *In re Witness Before the Special Grand Jury 2000-2,* 288 F 3d 289, 294 (7th Cir 2002) ("[I]nterpersonal relationships between an attorney for the state and a government official acting in an official capacity must be subordinate to the public interest in good and open government, leaving the government lawyer duty-bound to report internal criminal violations, not to shield them from public exposure).

Thus, the test for privilege with regard to communications between corporate and government employees and their corporate or government lawyers may be the same, but the privilege will not exist at all in the government context where the information is sought in a criminal case.

Specific exceptions to the privilege in dealing with claims against trustees and disputes between organizations and their shareholders, members or other constituents are considered in connection with Sections (f) (5) and (6) of the Survey Rule.

(e) Privilege of Co-Clients and Common-Interest Arrangements.

If two or more clients are jointly represented by the same attorney in a matter or if two or more clients with a common interest in a matter are represented by separate attorneys and they agree to pursue a common interest and to exchange information concerning the matter, a communication of any such client that is otherwise privileged and relates to matters of common interest is privileged as against third persons. Any such client may invoke the privilege unless the client making the communication has waived the privilege. Unless the clients agree otherwise, such a communication is not privileged as between the clients. Communications between clients or agents of clients outside the presence of an attorney or agent of an attorney representing at least one of the clients are not privileged.

Section (e) is based on Restatement (Third) of the Law Governing Lawyers §§ 75-76 (2000), although it is modified in some respects. It is also consistent with Proposed Federal rule 503((b) and Uniform Rule 502(b).

The portion of the rule covering situations where two or more clients consult a single lawyer or law firm, has not been the subject of much controversy in the federal or state courts. Communications among the lawyer and joint clients are privileged as against the rest of the world; they are not privileged as between or among the parties. *See Grand Trunk Western R. Co. v. H W Nelson Co.,* 116 F.2d 823, 835 (6th Cir. 1941); 1 John W. Strong, et al., McCormick on Evidence § 91 (5th ed. 1999).

Most of the federal court decisions, however, involve the other scenario addressed by Section (e), where two or more clients with a common interest in a matter are represented by separate attorneys and agree to pursue a common interest and to exchange information concerning the matter.

The language of the survey differs from Restatement § 76, dealing with common interest arrangements, in that it states specifically that the clients must not only have a common interest, but agree to pursue it together before they communicate in confidence. *See, e.g., United States v Melvin,* 650 F.2d 641, 646 (5th Cir. 1981) (conversations including party who had not yet agreed to the joint representation not privileged).

The common interest privilege applies whether or not a litigated matter is involved, *see In re Regents of Univ of California,* 101 F.3d 1386, 1389-90 (Fed. Cir. 1996) (patent application) and to plaintiffs in litigation as well as defendants, *see Schachar v American Academy of Ophthalmology, Inc* , 106 F.R.D. 187, 191 (N.D. Ill. 1985) (plaintiffs involved in different lawsuits). However, the rule makes clear, as do the cases that the communications must otherwise be privileged. Thus, information supplied by the client must be shown to be communicated for the purpose of obtaining legal advice. If not, it is not privileged, irrespective of the existence of a joint defense or common interest. *See United States v. Bay State Ambulance & Hosp. Rental Serv* , 874 F.2d 20, 29 (1st Cir. 1989) (client failed to show that communication was for purposes involving the joint defense).

A common interest privilege sometimes will not arise, even where two clients jointly consult lawyers with regard to related matters. For example, in *In re Grand Jury Subpoena Duces Tecum,* 112 F.3d 910, 922 (8th Cir. 1997), the court held that matters discussed in connection with the Whitewater investigation between Hilary Rodham Clinton and her lawyers and lawyers representing the Office of the President were not within the common interest doctrine. Mrs. Clinton's interests were in avoiding personal liability, criminal or civil; the White House as a governmental institution did not have a similar interest.

The last sentence of the Survey Rule, dealing with communications between clients or their agents outside the presence of an attorney or her agent is not found in the Restatement, Proposed Federal Rule 503 or Uniform Rule 502. Although there is no direct authority on the point, by way of dictum, the court in *United States v. Gotti,* 771 F Supp. 535, 545 (E D.N.Y 1991) stated that such communications would not be protected. *See also* Stephen A. Saltzburg, Michael M. Martin, Daniel J. Capra, Federal Rules of Evidence Manual, § 501[5][e] at 501-33 (8th ed. 2002)

As in the case of the joint defense, the common interest privilege does not apply in later actions between or among the parties. *E.g , Simpson v. Motorists Mut. Ins. Co.,* 494 F.2d 850, 854 (7th Cir. 1974) (statement made by insurer defending an insured not privileged in a coverage action against the insurer).

The sentence in section (e) providing that any client may invoke the privilege "unless the client making the communication has waived" it is consistent with the federal cases. *See., e.g , In re Grand Jury Subpoenas, 89-3 & 89-4,* 902 F.2d 244, 248, 249 (4th Cir. 1990) (no unilateral waiver of privilege); *In re Grand Jury Subpoenas Duces Tecum,* 406 F. Supp. 381, 394 (S.D.N.Y. 1975) (waiver of privilege by one co-client did not destroy privilege as to communications by other co-clients).

This section of the Survey Rule includes the language of Restatement §§ 75-76, providing that the communication is not privilege as between clients *"unless the clients agree otherwise."* The rule adopts the language based upon the considerations set forth the Reporter's Note to Restatement § 75 (at 583):

> No direct authority has been found for giving effect to agreements among co-clients that the privilege shall be preserved in subsequent adverse proceedings between them. The approach taken [in the Restatement section and Comment] is consistent with the theory of the co-client privilege and with the basis for removing the privilege in subsequent adverse proceedings, the presumed intent of the co-clients and fairness considerations. [citation omitted] The result is similar to that which would obtain if the parties contracted on other matters. Perhaps most obviously, the result is the same that would be reached if, during litigation itself, adversary parties agreed to a confidentiality obligation as part of an effort to expedite pretrial discovery or for other reasons.

(f) Exceptions. The attorney-client privilege does not apply to a communication

(1) from or to a deceased client if the communication is relevant to an issue between parties who claim an interest through the same deceased client, either by testate or intestate succession or by an inter vivos transaction;

This subsection is taken from Restatement (Third) of the Law Governing Lawyers § 81 (2000). A similar provision is found in Proposed Federal Rule 503(d)(2) and Uniform Rule 502(d)(2).

The provision is supported by cases from a number of jurisdictions. *See* John W. Strong, et al, McCormick on Evidence, § 94 at 379 (5th ed. 1999). The Supreme Court, while deciding that the privilege generally survives the death of the client, noted the existence of this exception. *Swidler & Berlin v United States,* 524 U.S. 399, 404 (1998). Indeed, the Court looked to cases applying the testamentary exception as affirming the survival of the privilege under other circumstances. In addition to a number of state cases, the Court also cites *Glover v. Patten,* 165 U S. 394 (1897) for its recognition fo the testamentary exception in the federal courts. In *Glover*, the Court stated (165 U.S. at 406)

> [W]e are of opinion that, in a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged. While such communications might be privileged if offered by third persons to establish claims against an estate, they are not within the reason of the rule requiring their exclusion, when the contest is between the heirs or next of kin.

The Court in *Glover* goes on to note that it would be arbitrary to hold that the privilege belongs to one and not to others claiming from the deceased. The same considerations would seem to apply regardless of whether the litigation involves testate or intestate succession or inter vivos transactions.

(2) that occurs when a client consults an attorney to obtain assistance to engage in a crime or fraud or aiding a third person to do so. Regardless of the client's purpose at the time of consultation, the communication is not privileged if the client uses the attorney's advice or other services to engage in or assist in committing a crime or fraud.

This exception is based on the language of Restatement (Third) of the Law Governing Lawyers § 82 (2000), with one significant difference. Restatement § 82 requires that the criminal or fraudulent purpose for which a client seeks assistance be "later accomplished." The exception set forth in (f)(1) is also consistent with Proposed Federal Rule 503(d)(1) and Uniform Rule 502(d)(1). Neither of these rules contain the requirement that the crime or fraud actually take place.

The elimination of the requirement of actual fulfillment of the criminal or fraudulent purpose is consistent with most, but not all, federal authority For cases holding that there is no such requirement *see United States v. Collis,* 128 F.3d 313, 320 (6th Cir. 1997) (crime or fraud need only have been the objective of the client); *In re Grand Jury Proceedings,* 87 F.3d 377, 381 (9th Cir. 1996) (since government need not prove that the crimes succeeded, it is not required to prove that the communications in fact helped the targets commit the crime); *In re Grand Jury Subpoena Duces Tecum (Marc Rich & Co , A G.),* 731 F.2d 1032, 1039 (2d Cir. 1984) ("the client need not have succeeded in his criminal or fraudulent scheme for the exception to apply;" court finds documents unprivileged without resolving the issue of whether a crime or fraud had in fact been committed); *In re Rigby,* 199 B.R. 358, 361-62 (Bankr. E.D. Tex. 1995) (finding that "whether or not there has been an actual harm caused . . . is irrelevant. 'No harm, no foul' . . is not the standard It is the intent of the client that controls and not the success of the fraudulent act").

To the contrary is *In re Sealed Case,* 107 F.3d 46, 49 (D.C. Cir. 1997). In that case, the court stated that the client must have carried out the crime or fraud, citing the Comment to the Restatement arguing that to hold otherwise would "penalize a client for doing what the privilege is designed to encourage – consulting a lawyer for the purpose of achieving law compliance." However, in that case, there was no question that the crime had in fact been committed by a corporate vice-president. The only issue was whether the corporation itself had consulted its counsel for a criminal purpose and the court found the evidence insufficient to support the invocation of the crime-fraud exception under these circumstances

By requiring that the consultation be "for the purpose of obtaining assistance to engage in a crime or fraud," the exception set out in this subsection takes into account the federal cases that state that communication must be made "in furtherance of" a crime or fraud. *See, e.g , In re BankAmerica Corp. Securities Litigation,* 270 F.3d 639, 642 (8th Cir. 2001) ("legal advice was obtained in furtherance of the fraudulent activity and was closely related to it"); *In re Spalding Sports Worldwide, Inc ,* 203 F.3d 800, 808 (Fed. Cir. 2000)(communication not "in furtherance" where disputed conduct actually lowered the chance of fraud). *See also* Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence, § 195 (2d ed. 1994). A statement that is merely relevant to a criminal or fraudulent act, and not in furtherance of it, is not within the exception. *In re Richard*

Roe, Inc. 68 F.3d 38, 40 (2d Cir. 1995) (lower court improperly used relevancy test). Again, the crime or fraud need not actually have been completed so long as the client intended the communications to be in its furtherance. *E.g., In re Grand Jury Subpoena Duces Tecum (Marc Rich & Co., A.G.),* 731 F.2d 1032, 1039 (2d Cir. 1984).

The exception is also consistent with virtually all of the federal cases in that it looks only to the client's intention. The attorney's intention is irrelevant. *See, e.g., In re Sealed Case,* 754 F.2d 395 (D.C. Cir. 1985); *United States v Friedman,* 445 F.2d 1076 (9th Cir. 1971) (attorney need not be aware of the illegality involved). *But see In re Sealed Case,* 107 F.3d 46, 47 n. 2 (D.C. Cir. 1998) ("there may be rare cases . . . in which the attorney's fraudulent or criminal intent deat a claim of privilege even if the client is innocent").

The language in this subsection referring to statements made for the purpose of aiding a third person to commit a crime or fraud is also consistent with the federal cases. *See, e g , In re Doe,* 551 F.2d 899, 900-902 (2d Cir. 1977) (client informed lawyer of scheme by third persons to bribe juror in client's case; crime/fraud exception applied); *United States v. Hodge & Zweig,* 548 F.2d 1347, 1354-55 (9th Cir. 1977) (consultation for the purpose of carrying out agreement of members of drug conspiracy to furnish bail and pay legal expenses for arrested members).

The language of this exception is limited to statements to obtain assistance to engage in crime or fraud. It does not include other tortious conduct. Several federal cases that have looked at the issue have expanded the exception to include intentional torts. Virtually all are district court opinions. *E.g , Recycling Solutions, Inc. v Dist. of Columbia,* 175 F.R.D. 407, 409 (D.D.C. 1997); *Horizon of Hope Ministry v Clark County, Ohio,* 115 F.R.D. 1,5 (S.D. Ohio (1986). *See also the dictum in United States v. United Shoe Machinery Corp.,* 89 F. Supp. 357, 358 (D. Mass. 1950) (communications not privileged if made "for the purpose of committing a crime or tort") The District of Columbia Circuit uses language that includes "other type of misconduct fundamentally inconsistent with the basic premises of the adversary system." *In re Sealed Case,* 754 F.2d 395 , 399 (D.C. Cir. 1989); *In re Sealed Case*, 676 F.2d 793, 812 (D.C. Cir. 1982). However, these District of Columbia Circuit cases both involved activities that were criminal or fraudulent, rather than simply tortious.

Several other federal cases have refused to extend the exception beyond fraud or crime. Most prominent is *Motley v Marathon Oil Co.,* 71 F.3d 1547, 1551 (10th Cir. 1995) (crime/fraud exception did not apply to statements even if in furtherance of illegal racial discrimination if not criminal or fraudulent). *See also Bulk Lift Intl. v Flexon & Systems, Inc.,* 122 F.R.D. 493, 496 (W.D.La. 1988) (fraud, not mere inequitable conduct must be involved). *See also Cooksey v. Hilton Int'l Co.,* 863 F.Supp. 150, 151 (S.D.N.Y. 1994) (exception may apply to "intentional torts moored in fraud"). The rationale of such cases is perhaps best reflected in the Comment to Restatement (Third) of the Law Governing Lawyers, §82, p. 616-17: "[L]imiting the exception to crimes and frauds produces an exception narrower than principle and policy would otherwise indicate. Nonetheless, the prevailing view limits the exception to crimes and frauds. The actual instances in which a broader exception might apply are probably few and isolated, and it would be difficult to formulate a broader exception

that is not objectionably vague."

There is an old Supreme Court case, *Alexander v United States,* 138 U.S. 353, 360 (1891), in which the Court stated that the crime/fraud exception "should be limited to cases where the party is tried for the crime in furtherance of which the communication was made." However, the *Alexander* case involved a situation in which the consultation with the lawyer had nothing to do with any future crime. The murder in question, if had been committed by the client, had already taken place. The consultation had to do with business advice dealing with the ownership of horses. At most, the communications had relevancy to the past crime, but were not made to obtain assistance to engage in a crime or fraud. The federal courts have generally not hesitated to apply the exception despite the fact that the criminal or fraudulent conduct is not directly involved in the case in which the privilege is claimed. One case clearly applying the privilege to a case not involving the subject of the communication is *Petition of Sawyer,* 229 F.2d 805, 808-09 (7th Cir. 1956). The court in *Sawyer* refused to apply the Supreme Court's statement in *Alexander,* finding it dictum. Instead, it held that the crime/fraud exception applied to remove the privilege from communications made by a non-party witness in the case to his attorney because the statements were made in connection with a proposal to give false testimony *See also, United States v. Reeder,* 170 F.3d 93, 106 (1st Cir. 1999) (consultations with attorney not privileged under the crime/fraud exception even though consultations involved conduct that covered up rather than directly involved the crimes involved in the case); *In re Berkeley & Co.,* 629 F.2d 548, 554-55 (8th Cir. 1980) (court doubts validity of statements in *Alexander*, but finds applicability of exception based upon related nature of the subject of the communication and the crimes under investigation); *SEC v. Harrison,* 80 F.Supp. 226, 230-31 (D.D.C. 1948) (exception applicable in investigatory proceedings in which no charge of fraud was made; *Alexander* case distinguished as involving communications concerning a past crime). In all of these instances, the statements related in some way to the conduct involved in the litigation. However, it could hardly be otherwise in order for the communications to be relevant.

Ordinarily, the key factor under the crime/fraud exception is the intent of the client to engage in the crime or fraud at the time of the consultation with the lawyer. Indeed, there is language in federal cases limiting the exception to situations where it is shown that "the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme." *In re Sealed Case,* 754 F.2d 395, 399 (D.C. Cir. 1985). However, there are also cases applying the exception where the evidence does not really show the client's state of mind at the time of the consultation with the attorney. The second sentence of the exception is intended to deal with the situation where the client uses the lawyer's advice to engage in or assist a crime or fraud, irrespective of the client's intention at the time of consultation. The language is taken from Restatement § 82 (b) and is supported by federal cases as well as cases from other jurisdictions. *See United States v. Ballard,* 779 F.2d 287, 292-93 (5th Cir. 1986) (conversations with attorney concerning the disclosure of transfer of assets prior to bankruptcy filing not within privilege where client hired another lawyer who filed bankruptcy without disclosing assets); *Fidelity-Phenix Fire Ins. Co. v. Hamilton,* 340 S.W.2d 218 (Ky. 1960)(no privilege where client consulted lawyer who told him that insurance policy did not cover a fire because of coverage limitations; client then had another lawyer file suit on policy relating a different set of facts). These cases must be distinguished

from situations where there is simply proof that the client committed a crime or fraud after consulting the lawyer. *See, e g , Pritchard-Keang Nam Corp. v. Jaworska,* 751 F.2d 277, 281-82 (8th Cir 1984) (that communications with attorneys may help prove that a fraud occurred does not mean that the communications were used in perpetrating the fraud); *In re Sealed Case,* 107 F.3d 46, 50 (D C Cir. 1997) (mere fact that a person commits a crime after consulting with counsel does not establish a prime facie case that the consultation was in furtherance of the fraud; showing "temporal proximity between the communication and a crime is not enough"). The distinction between these cases and cases such as *Ballard* and *Fidelity-Phenix,* reflected in the second sentence of this subsection, is, in the latter instance, the existence of evidence of the use of the consultation with the attorney in the perpetration of the crime of fraud.

This Survey Rule as a whole does not deal with any of the procedural aspects of the attorney-client privilege. For example, questions such as when the privilege must be asserted, what the standard of proof for its application and the appealability of rulings with regard to its application or non-application are not covered. Questions with regard to waiver are covered in a separate Survey Rule. However, some procedural aspects of the application of the crime/fraud exception have been the subject of considerable federal court attention and should be mentioned briefly. The Supreme Court has held that a court, in its discretion, may hold an *in camera* review of the evidence to determine the existence of a crime/fraud exception to the privilege. *United States v. Zolin,* 491 U.S. 554, 572 (1989). The Court in *Zolin* held that the judge may review documents *in camera* where there is a "factual basis adequate to support a good faith belief by a reasonable person" that such an inspection may reveal evidence to establish the existence of the exception.

The Court in *Zolin* did not address the standard of proof for determining the existence of the exception Various courts, including various federal courts, have expressed it differently. *See discussion in In re Grand Jury Subpoenas,* 144 F.3d 653, 660 (10th Cir. 1998). The essence of the test most commonly applied is that there must be evidence from which the existence of an unlawful purpose could reasonably be found. *See* John W. Strong, et al, McCormick on Evidence, § 95 at 382 (5th ed 1999), Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence, § 195 at 373-74 (2d ed. 1994)

(3) that is relevant and reasonably necessary for an attorney to reveal in a proceeding to resolve a dispute with a client concerning the compensation or reimbursement that the attorney reasonably claims the client owes the attorney;

This subsection is based upon Restatement (Third) of the Law Governing Lawyers §83(1). It is covered in Proposed Federal Rule 503 (d)(3) and Uniform Rule 502(d)(3) by language excepting from the privilege communications "relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer." The Restatement language is used in this section as well as the next (Section (f) (4)) because it more specifically states the rule as found in the case law. In both this subsection and subsection (4), the Restatement language, unlike that of the Proposed Federal rule or the Uniform Rule, makes clear that there is an exception from the privilege only insofar as the communications are relevant and reasonably necessary to resolve the dispute. The Restatement language also follows the case law in that it limits breaches of duty by the client to instances involving compensation or reimbursement.

There is federal case authority for an exception to the privilege where an attorney is in a fee dispute with a client. *Cannon v U.S Acoustics Corp*, 532 F 2d 1118, 1120 (7th Cir. 1976) (recognizing exception).

Although not specifically covered by this section, the language of the section, as well as section (f) (4), limiting revelations to those relevant and reasonably necessary to resolve the dispute would make such case appropriate for protective orders limiting the dissemination of the information. *See, e.g., Siedle v. Putnam Investments, Inc.*, 147 F.3d 7, 10 (1st Cir. 1998) (documents that may be subject to attorney-client privilege properly sealed against public revelation).

This subsection does not definitively resolve the issue of whether the exception should apply in an action brought by corporate counsel for retaliatory discharge. Although the issue raised in such instances is ordinarily confidentiality under the applicable Rules of Professional Conduct, questions of privilege may also arise. The few cases considering the issue are split on the issue as to whether a retaliatory discharge complaint is the kind of dispute between lawyer and client as to compensation or reimbursement that will give rise to the exception. *Compare Willy v Costal States Management Co*, 939 S.W.2d 193, 196-200 (Tex. Ct. App. 1996) (discharge claim may not be brought where proof of the claim would necessarily reveal confidential communications) *with Kachmer v. SunGard Data Systems, Inc.*, 109 F.3d 173, 178 (3d Cir. 1997) (possibility of revelation of confidential communications did not preclude retaliatory discharge action). *See also Siedle v. Putnam Investments, Inc* 147 F.3d 7, 11 (1st Cir. 1998) (lawyer may not use confidential information as a sword to make out a claim of defamation against client). The language used in the subsection leaves the question of whether instances of retaliatory discharge or similar claims involve compensation.

(4) that is relevant and reasonably necessary for an attorney to reveal in order to defend against an allegation by anyone that the attorney, the attorney's agent, or any person for whose conduct the attorney is responsible acted wrongfully or negligently during the course of representing a client;

This subsection is based upon Restatement (Third) of the Law Governing Lawyers § 83(2). Like subsection (f)(3), the same concept is covered in Proposed Federal Rule 503 (d)(3) and Uniform Rule 502(d)(3) by language excepting from the privilege communications "relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer." Again as in subsection (3), the Restatement language is used to make clear that the exception to the privilege applies only to the extent that the information is relevant and reasonably necessary to reveal in the attorney's defense.

The exception as set forth is consistent both with the general law, *see* John W. Strong, et. al, McCormick on Evidence, § 91 at 367-68 (5th ed. 1999), and the federal cases, *see* Stephen A. Saltzburg, Michael M. Martin, Daniel J. Capra, Federal Rules of Evidence Manual, §§ 501.02([1][i], 501 03 [1][ii] (8th ed. 2002). Cases dealing with the exception include *Tasby v. United States,* 504 F.2d 332, 336 (8th Cir. 1974) (privilege inapplicable where ineffective assistance of counsel alleged); *In re National Mtg Equity Corp. Mtg. Pool Certificates Secs. Litig* , 120 F.R.D. 687, 691-92 (C.D. Cal. 1988) (attorney-client privilege did not prevent attorney from revealing client confidences to defend against third-party allegations of fraud against the attorney); *First Fed Sav & Loan v. Oppenheim, Appel, Dixon & Co* , 110 F.R.D. 557 (S.D.N.Y. 1986) (attorney entitled to disclose information to defend himself against charges brought by a third party, although exception would be limited to protect against unnecessary violation of the client's interest). *See also United States v. Ballard,* 779 F.2d 287 (5th Cir. 1986) (exception recognized but court holds that bringing of malpractice action against attorney did not operate as a waiver of the privilege in subsequent criminal action against client).

This rule is properly treated as an exception to the privilege rather than as a waiver by the client. As illustrated by the *In re National Mtg. Equity Corp. Mtg. Pool Certificates Secs. Litig.* and *First Fed. Sav & Loan* cases cited above, the exception may be invoked by counsel even though the client has taken no action that might be construed as a waiver.

(5) relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

This subsection is taken from Proposed Federal Rule 503(d)(4) and Uniform Rule 502(d)(5).

Although there do not appear to be any federal cases dealing with the issue, the rationale of the Advisory Committee in proposing the exception to the Federal Rule seems sound:

> When the lawyer acts as attesting witness, the approval of the client to his so doing may safely be assumed, and waiver of the privilege as to any relevant lawyer-client communication is a proper result.

An argument can be made that the exception is unnecessary. The communications are arguably not intended to be confidential.

(6) between a trustee of an express trust or a similar fiduciary and an attorney or other privileged person retained to advise the trustee concerning the administration of the trust, if relevant to a beneficiary's claim of breach of fiduciary duties;

Subsection (6) is based upon Restatement (Third) of the Law Governing Lawyers § 84 (2000).

Sometimes referred to as the fiduciary doctrine, this exception is most often supported by the argument that the fiduciary acts for the beneficiaries and that the attorney is seeking advice for their benefit. For example, the court in *Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Corp.*, 543 F. Supp. 906, 909 (D.D.C. 1982), dealing with the privilege in the context of a claim by beneficiaries of an ERISA plan against their employer, stated:

> When an attorney advised a fiduciary about a matter dealing with the administration of an employee's benefit plan, the attorney's client is not the fiduciary personally, but rather, the trust's beneficiaries

Professor Imwinkelried states the rationale somewhat differently and less dependently on the theory that the fiduciary acts for the beneficiary in communicating with the attorney He states simply that "the rationale for overriding the fiduciary's privilege is that the fiduciary's duty to the beneficiary is paramount to the fiduciary's right to the privilege." Edward J. Imwinkelried, The New Wigmore, §6.13.2 at 960 (2002).

Whatever is the best articulation of the rationale for the rule, the rule as set forth in this subsection is consistent with the federal cases. *See In re Occidental Petroleum Corp* , 217 F.3d 293 (2000) (no privilege where breaches of fiduciary duty relating to Employee Stock Ownership Plan alleged); *In re Long Island Lighting Co.*, 129 F.3d 268, 271, 273 (2d Cir. 1997)(employer, as fiduciary under employee benefit plan covered by ERISA, could not claim privilege as to matters concerning the administration of the plan); United States v. Evans, 796 F.2d 264, 265-66 (9th Cir. 1986) (no privilege as between pension trustee and attorney advising the trustee with regard to administration of the trust).

Under this subsection, there is no requirement that the beneficiary be required to show "good cause," such as must be done in order for the communications to come within the exception set forth in subsection (7), below. *See Helt v Metropolitan Dist. Comm'n,* 113 F.R.D. 7, 10 n.2 (D. Conn. 1986) (*dictum*).

The exception does not apply where the fiduciary is communicating with the an attorney with regard to his or her personal liability. *See, e.g , United States v Mett,* 178 F.3d 1058, 1064-66 (9th Cir. 1999).

(7) between an organizational client and an attorney or other privileged person, if offered in a proceeding that involves a dispute between the client and shareholders, members, or other constituents of the organization toward whom the directors, officers, or similar persons managing the organization bear fiduciary responsibilities, provided the court finds

(A) those managing the organization are charged with breach of their obligations toward the shareholders, members, or other constituents or toward the organization itself;

(B) the communication occurred prior to the assertion of the charges and relates directly to those charges; and

(C) the need of the requesting party to discover or introduce the communication is sufficiently compelling and the threat to confidentiality sufficiently confined to justify setting the privilege aside.

This subsection is based on Restatement (Third) of the Law Governing Lawyers § 85 and the case of *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970). The rationale of this exception is similar to that articulated in support of the fiduciary doctrine: management of an organization acts for the benefit of the organization's shareholders or other constituents or, to paraphrase Professor Imwinkelried's statement in connection with the fiduciary doctrine, management's duty to the shareholders is paramount to management's right to the privilege.

Nevertheless, there are some significant differences between fiduciaries, as in the case of employers acting for their employees with regard to an ERISA plan, and corporate management. As stated in Jack P. Friedman, Is the *Garner* Qualification of the Corporate Attorney-Client Privilege Viable after *Jaffee v Redmond*?, 55 Bus. Law. 243, 272-73 (1999):

> Notwithstanding the fiduciary duty that corporate management owes to corporate shareholders, modern scholarship suggest that corporate directors and officers do not manage exclusively for the benefit of shareholders. Corporate directors owe a fiduciary duty primarily to the corporation itself and a corporation may have interests that differ from those of its shareholders.

Thus, the courts in sometimes finding an exception to the privilege in actions brought by shareholders against corporate management do not always do so. The exception as stated in the leading case of *Garner v Wolfinbarger* would apply only if certain criteria were met. The court in *Garner* imposed a "good cause" criteria on the shareholders seeking the benefit of the exception. The court articulated the criteria as follows(430 F.2d at 1104):

> There are many indicia that may contribute to a decision of presence or absence of good cause, among them the number of shareholders and the percentage of stock they represent; the bona fides of the shareholders; the nature of the shareholders' claim and whether it is

> obviously colorable; the apparent necessity or desirability of the shareholders having the information and availability of it from other sources; whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether the communication related to past or to prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

As in the case of the Restatement, the list of nine factors in *Garner* is reduced and embellished in subsection (f)(7). *See* Comment c. to Restatement §85. For example, one criterion that is not articulated in the exception is whether the communication is "of advice concerning the litigation itself." The Restatement comments also notes the elimination of a specific statement of such a criterion, stating (Restatement (Third) of the Law Governing Lawyers § 85, Comment at 631):

> The factor can be misunderstood. It does not mean that all communications that might also be immunized under the lawyer work-product doctrine [internal cross-reference omitted] should be immune from discovery by a beneficiary, particularly if the communication also is subject to a "good cause" exception as work product. The factor instead refers to situations in which a second lawyer has been retained to defend the organization or its managers against the beneficiary's claim and thus the communications were not contemporaneous with the acts being challenged by the beneficiary. It is important that *Garner* be applied in a way that recognizes the legitimate interest of an organization in resisting a derivative or similar claim.

For a case discussing the distinction between the exception as applied with regard to pre-litigation communications from corporate management to counsel and communications between management and litigation counsel, as to which the work product privilege applies, see *In re Int'l Systems & Controls Corp. Securities Litigation,* 693 F.2d 1235, 1239 (5th Cir. 1982) (communications between management and counsel involved in litigation considered under work product privilege).

The *Garner* doctrine has been followed by many federal courts that have considered the question, usually irrespective of whether the action is derivative or brought by shareholders in their own right. *See, e.g., Fausek v. White,* 965 F.2d 126, 130-31 (6th Cir. 1992)(exception applies where shareholder brought action in his own right); *In re Gen. Instrument Corp. Sec Litig.,* 190 F.R.D. 527, 529 (N.D. Ill. 2000) (applies exception in derivative action); *Bailey v Meister Brau,* 55 F.R.D. 211, 213 (N.D. Ill. 1972) (conversations between corporate officer and counsel not privileged in securities law action brought by shareholder); *Valente v. Pepsico, Inc.,* 68 F.R.D. 361, 367-68 (D.Del. 1975) (communications by corporate directors owing fiduciary duties to minority shareholders not privileged in class action brought by minority shareholders). Cases have also extended the doctrine beyond the corporation to other organizations. *E.g., Nellis v Air Line Pilots*

Ass'n, 144 F.R.D. 68 (E.D. Va. 1992) (labor union).

Other courts have put limitations on its applicability. *See, e.g., Weil v Investment/Indicators Research & Management, Inc* , 647 F.2d 18, 23 (9th Cir. 1981)(doctrine limited to derivative actions; shareholders did not own stock at time of the suit); *In re LTV Securities Litigation,* 89 F R.D. 595, 607-08 (N.D. Tex. 1981) (*Garner* exception does not apply where the communications took place after the alleged wrongdoing was completed).

Some courts have rejected the *Garner* holding and its good cause limitation. *See Shirvani v Capital Investing Corp* , 112 F.R.D. 389, 390-91 (D.Conn. 1986) (shareholder interests can be protected by application of the crime/fraud exception).

The Friedman article, cited above, takes the position that *Garner* establishes a balancing test for the privilege and that balancing in connection with privilege was rejected by the United States Supreme Court in cases such as *Jaffee v Redmond,* 518 U.S. 1, 18 (1996) (psychotherapist-patient privilege must be absolute in order to be effective in promoting a free flow of information between patient and psychotherapist). Friedman would provide an absolute exception applicable in shareholder derivative actions, such as *Garner* itself, arguing that in such cases the shareholders are acting in the role of management. But he would reject the exception entirely where in non-derivative actions. Friedman, *supra* at 281.

Other writers are critical of the exception generally as inhibiting the free flow of information between management and corporate counsel. *See, e.g.,* Stephen A. Saltzburg, Michael M. Martin, Daniel J. Capra, Federal Rules of Evidence Manual, § 501.02[5]([I][ii] (8th ed. 2002). The authors of that text state that if *Garner* is to apply at all, it should be limited to shareholders derivative litigation. One of the authors of that text, Stephen A. Saltzburg, took a somewhat different position in a law review article, Stephen A. Saltzberg, Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: *Garner* Revisited, 12 Hofstra L. Rev. 817 (1984). In that article, Saltzburg is critical of the doctrine as inhibiting the flow of information from corporate officers to the corporation's attorney. However, he is also critical of the limitation of the doctrine to derivative cases, arguing that the rationale should be the same whether the shareholders sue on behalf of the corporation or in their own right.

Like the drafters of Restatement § 85, this Survey Rule adopts what can be discerned as the prevailing federal rule – there is an exception to the attorney-client privilege for communications between management and corporate or organizational counsel in actions brought by shareholders or other constituents under the circumstances set forth in subsection (f)(7). The exception applies both in derivative and non-derivative cases.

The argument that the *Garner* doctrine creates a qualified privilege, bringing in a balancing test and thus created uncertainty in the application of the privilege certainly raises a valid concern. However, one could also look at the exception not as creating a balancing test for the application of the privilege but rather as applying the exception unless the shareholder fails to bring himself or

herself within the policy of the exception. In other words, the exception is absolute once the shareholder demonstrates that the cause of action he or she brings and their status entitle them to it. Similarly, although the argument that the exception should be limited to derivative actions has some appeal, one could argue that the analogy to the fiduciary doctrine is such that the shareholder himself or herself is entitled to the benefit of the communications, whether or not the suit is brought on behalf of the corporation.

This is one of the areas of the Survey Rule whose full parameters will have to await future judicial development.

ISSUES TO BE COVERED IN FUTURE DEVELOPMENTS SECTION OF ATTORNEY-CLIENT PRIVILEGE SURVEY RULE

Following is a list of some of the issues that might be covered in a future development section of the commentary on the attorney-client privilege Survey Rule.

1. Should all lawyer to client communications be privileged or only those that reflect the client's communications?

2. The applicability of the privilege to governmental entities

3. What are the precise circumstances under which a non-client will be held to be an agent of the attorney or the client?

4. Are preliminary drafts of documents ultimately disclosed publicly privileged?

5. Dual purpose communications, e.g., where the lawyer is also an accountant. \

6 May the personal representative waive the privilege for a deceased client?

7. Communications between joint clients outside the presence of their attorneys.

8. Various issues under the crime/fraud exception:

    A. The need for actual fulfillment of the criminal purpose

    B. Is only the client's intent relevant?

    C. To what extent is tortious conduct within the exception?

    D Does the intent to commit the crime have to exist at the time of the consultation?

9. The applicability of the privilege where there is a a retaliatory discharge claim.

10. Is the *Garner* viable? Should it be limited to derivative actions?

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Style Project Concerning Civil Rules That Govern Admissibility of Evidence
Date: April 2, 2004

The Civil Rules Committee and the Standing Committee are currently in the middle of a project to restylize the Civil Rules. This follows the projects that have successfully restyled the Appellate and Criminal Rules (Note that there is no plan to restylize the Evidence Rules as they are thought to be "substantive" in nature.) In the course of this restylization, questions have been raised about the relationship between a few of the Civil Rules and the Rules of Evidence.

The two most important Civil Rules in question are Rules 32 and 44. (Each of these existing Rules, and the proposed style changes to these Rules, is attached to this memorandum.) Both of these Rules operate as Rules of Evidence–they set forth requirements that, when met, provide for admissibility of depositions (Rule 32) and official records (Rule 44). Obviously these Rules overlap with existing Evidence Rules. The most obvious examples are: 1) an overlap between Civil Rule 32 providing for admissibility of depositions and Evidence Rule 804(b)(1) providing for admissibility of prior testimony; and 2) an overlap between Rule 44 and Evidence Rules 902, governing authentication of official records.

The Evidence Rules Committee has been invited to provide its perspective on two questions concerning both Rule 32 and Rule 44: 1) whether stylistic changes should be made to remedy inconsistent references to and relationships with the Evidence Rules; and 2) whether the text of those Civil Rules should be replaced with a simple reference to the relevant evidence rules. Under the guidelines of the Civil Rules style project, the former questions are stylistic only, while the latter question (simple reference to the relevant Evidence Rules) is considered beyond the scope of the style project and would be taken up at a later point.

Part I of this memorandum sets out some possible suggestions for improvement to the restylized Rules 32 and 44. Of course, the suggestions are meant only to assist the Committee and are not intended to limit or control the Committee's suggestions for stylistic improvement, if any.

On the question of substituting the text of a Civil Rule with a simple reference to the controlling Evidence Rules, the question for the Committee is whether it believes it worthwhile to work jointly with the Civil Rules Committee to propose amendments to achieve this goal. Work on these amendments would proceed outside (and probably after) the work of the style project. Part II of this amendment provides background on the relationship between relevant Civil Rules and the Evidence Rules, and the problems that must be encountered if they are to be amended. If the Evidence Rules Committee decides that it would like to take on a joint project, then the Civil Rules Committee will be so informed and the work can begin.

I. Stylistic Suggestions For Rules 32 and 44

Attached to this memorandum is the proposed restyled Rules 32 and 44. The left column is the existing Rule and the right side is the proposed restylization With no intent to be exclusive, this section of the memorandum provides some suggestions for possible stylistic improvement. It should be noted that these suggestions are *not* in the nature of "pure" style, e.g., put a clause in a different place, etc. The Style Subcommittee of the Standing Committee has substantial expertise on questions of style. Rather, the suggestions are geared to eliminating possible confusion about *the effect of the rules on the admissibility of evidence*. As such the suggestions would seem to provide the kind of assistance that the Evidence Rules Committee is especially qualified to give.

To reiterate: the suggestions in this section are only intended to guide the Committee's discussion. Committee members may well find other potential areas for improvement in these two evidence-based rules; if so, these suggestions should be raised so that the Committee as a whole can determine whether to refer any suggestions to the Civil Rules Committee.

A. Rule 32

1. Inconsistent References to Evidence Rules

Rule 32 currently refers to evidence rules in inconsistent ways. For example, the opening sentence of Rule 32(a) refers to "rules of evidence." But subdivision (a)(1) refers to the "Federal Rules of Evidence". This inconsistent reference is continued in the restylized Rule 32(a) — (a)(1)(B) refers to "rules of evidence" while (a)(2) refers to "the Federal Rules of Evidence." The Committee may wish to suggest that references to evidence rules should be made consistent throughout—specifically, all references should be to "the Federal Rules of Evidence." The rationale for this suggestion is that inconsistent references can lead litigants to think that the references mean something different—for example, a practitioner might think that a reference to "rules of evidence" is intended to mean something more than (or other than) the Federal Rules of Evidence, because if the drafters wanted to refer to the Federal Rules of Evidence they knew how to do that in other parts of the Civil Rules.

The references in the Rule 32 to "rules of evidence" were included before the enactment of the Federal Rules of Evidence, while references to "the Federal Rules of Evidence" were added in 1980, in recognition of the fact that the Evidence Rules had been enacted. Thus, the inconsistent references appear to be nothing more than a historical anomaly–the very kind of inconsistency that can be rectified by restylizing the Rules.

It is especially confusing to retain inconsistent references to the Evidence Rules when those references are made in the same Rule, indeed in the same subdivision of a single rule.

The Civil Rules Committee has expressed concern that a general reference to "rules of evidence" might still have meaning because it might refer to more than the Federal Rules of Evidence . For example, the reference might be to common-law rules, to statutory authority, or to state rules of evidence. If this concern is founded, then it would be true that replacing "rules of evidence" with "Federal Rules of Evidence" would result in a substantive change — a change by definition outside the scope of the style project. But the concern appears unfounded–it would seem impossible to refer to a "rule of evidence" that is not already covered by the Federal Rules of Evidence. The Federal Rules of Evidence are applicable in all Federal proceedings in which "rules of evidence" are referred to in the Civil Rules.

There need be no concern that "rules of evidence" might be an intentional reference to state rules that might be applicable in some proceeding. The Federal Rules of Evidence *already* accommodate state rules of evidence when they carry substantive effect in cases where the rule of decision is provided by state law; and that is the only kind of case in which state rules of evidence can apply in Federal proceedings. See Federal Rules 302, 501, 601 So there is no need to refer to state rules of evidence in the Civil Rules.

Nor should there be a concern that a reference to "rules of evidence" might refer to Federal evidence law that exists outside the Evidence Rules (e.g., statutory privileges, legislation allowing the use of hearsay in certain kinds of proceedings, etc.). This is because the Federal Rules of Evidence already accommodate extrinsic federal evidence law where such law is applicable. See Federal Rules 402, 501, 801, 1101.

Research has uncovered no case that has drawn any kind of distinction between "rules of evidence" and "Federal Rules of Evidence" in Rule 32. There is no intimation whatsoever in the case law that "rules of evidence" refers to anything other than the Federal Rules of Evidence.

In conclusion, the Evidence Rules Committee may wish to suggest that all references to "rules of evidence" should be changed to "Federal Rules of Evidence." This is a stylistic and not a substantive change. And it arguably furthers at least two of the goals of restylization: to make the rules more user-friendly and to remedy any unnecessary confusion in the existing rules.

2. Caption to Restylized Rule 32(a)(2)

The restylized Rule 32(a)(2) provides as follows:

> **(2)** ***Impeachment and Other Uses.*** Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence.

It can be argued that the caption to the subdivision is confusing. The text of the subdivision is clearly intended to be limited to evidentiary uses of a deposition *when the deponent testifies as a witness*. The caption, however, is not so limited when it refers to "other uses." Those "other uses" are not tied to the situation in which the deponent testifies as a witness. Thus, it would appear that the caption could be interpreted as expanding the potential uses of depositions beyond what was permitted by the original rule. If so, that result would be a substantive, rather than a stylistic change.

It seems clear that subdivision (a)(2) is intended only to cover admissibility questions that arise when the deponent is a witness at trial. That intent is evident from the subdivisions that follow. Subdivision (a)(3) governs admissibility questions when the deponent is a party or agent. Subdivision (a)(4) governs admissibility questions when the deponent is unavailable. Thus, the structure of Rule 32(a) is to focus on who the deponent is — the identity of the deponent determines how the deposition can be used.

The structure of the Rule could arguably be made more consistent, and less potentially confusing to practitioners, by changing the heading to Rule 32(a)(2) as follows:

2. ~~*Impeachment and Other Uses*~~ *Deponent as a Witness*

The Evidence Rules Committee may wish to make a suggestion to the Civil Rules Committee to change the heading accordingly. It should be noted that changing the heading to Rule 32(a)(2) does not involve a change of meaning to the existing Rule. The heading has been proposed to be *added* to the existing Rule as part of restylization. So any change could not, by definition, be one of substance

3. Deleting the Reference to "Materiality" in Rule 32(d)(3)(A).

Civil Rule 32(d)(3)(A) regulates the making of objections concerning depositions. The current Rule provides:

> Objection to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

The reference to an objection on grounds of "materiality" pre-dates the Federal Rules of Evidence and is of historical interest only. Under the Federal Rules of Evidence, there is no such thing as an objection to the "materiality" of evidence. This is because the definition of "relevance" in Rule 401 encompasses the old standard of materiality. In the words of Rule 401, evidence to be

relevant must be probative of a "fact that is of consequence to the determination of the action." The Advisory Committee Note to Rule 401 explains the rejection of the term "materiality" in the following passage:

> The rule uses the phrase "fact that is of consequence to the determination of the action" to describe the kind of fact to which proof may properly be directed. The language is that of California Evidence Code § 210; it has the advantage of avoiding the loosely used and ambiguous word "material."

So the drafters of the Evidence Rules intentionally eliminated any objection that was previously made on grounds of "materiality." When Civil Rule 32 and Evidence Rule 402 are considered together, then, there is an obvious anomaly: a party who fails to make an objection to the "materiality" of deposition testimony does not waive an objection at trial— but it is an objection that he is not permitted to make at trial in any event. See also Mueller and Kirkpatrick, Federal Evidence § 84 (noting that there are "good reasons" to avoid the term materiality; that term is "ambiguous because it is easily confused with 'substantial' or 'sufficient' and it is often understood to describe facts that are whole elements of claims or defenses ").

A strong argument can be made, therefore, that the term "materiality" should be struck from Rule 32(d)(3)(A). Nothing (except confusion) will be lost, because the Rule will still provide that objections to relevance are not waived, and under the Evidence Rules "relevance" encompasses any objection to "materiality."

The Civil Rules Committee restyled Rule 32(d)(2)(A) but retained the term "materiality" in the restylized proposal. The Committee was understandably concerned that deletion of the term "materiality" might have some unintended substantive consequence. But a strong argument can be made that the term "materiality" in Rule 32(d)(2)(A) by definition can have no substantive effect. That argument proceeds as follows:

1. Rule 32(d) addresses whether objections must be made at a deposition in order to preserve an objection that the party would wish to make at trial when the deposition is offered into evidence.

2. The Evidence Rules govern the validity of objections made to evidence proffered at a trial. Put another way, if the Evidence Rules do not permit an objection (either under a specific Evidence Rule or under extrinsic rules incorporated by reference in Rules 402, 601, etc.) then the objection cannot be entertained.

3. Because there is no such thing as an objection based on materiality under the Evidence Rules, it follows that such an objection cannot be entertained–even if it is technically "preserved" under the Civil Rule.

4. So a Rule serves no substantive purpose by providing that an objection is preserved when it cannot be asserted when it counts.

It must be said that retaining the word "materiality" is unlikely to have any negative consequence as a practical matter. To the extent the word encourages the use of "materiality" objections at trial, it would seem that most courts would simply treat that objection as going to the "fact of consequence" element of Rule 401. Arguably there is a possibility that a lawyer making an objection solely on the basis of "materiality" would waive an objection that the evidence was not logically relevant to the proposition the evidence is offered to prove. But there are no cases that appear to raise this problem—probably because any lawyer that still makes an objection on materiality also probably throws in the other classic objections "incompetent and irrelevant" as well.

But all this is to say that any inclusion or deletion of the term "materiality" in Rule 32(d)(3)(A) is indeed a question of style rather than substance. And if a goal of restylization is to make the rules more clear, more understandable, and user-friendly, then it would seem to call for deletion of a term that no longer retains any independent legal content.

The Evidence Rules Committee therefore may wish to consider whether to suggest the deletion of the term "materiality" as part of the restylization of Rule 32(d)(3)(A).

Rule 44

1. Use of the term "otherwise admissible"

Civil Rule 44 provides a means of authenticating official records. Subdivision (a)(1) covers domestic records and subdivision (a)(2) covers foreign records. Both of these subdivisions provide that compliance with the means set forth authenticates a record that is "otherwise admissible." This is a restylization of the existing Rule 44, which provides for authentication of records "when admissible for any purpose."

An argument can be made that the reference "otherwise admissible" could be changed in two ways to avoid confusion in the application of the Rule. First, the language could be deleted as superfluous, on the ground that authenticity is at most a *condition* of admissibility; authenticity is never sufficient to guarantee admissibility of a record, so it is unnecessary to add the term "otherwise admissible." The record must still satisfy Rule 403 and the hearsay rule. Note that Evidence Rules 901 and 902 do not use the term "otherwise admissible"; rather they use the arguably more helpful terminology that authenticity may be a condition of admissibility, and when that is so the condition can be satisfied by following the requirements of one of those rules. The counterargument to this suggestion is that the words "otherwise admissible" are technically accurate and help to inform the practitioner that satisfying authentication requirements does not mean the record will be automatically admitted.

Another possible drafting solution is to add a specific reference to the Federal Rules of Evidence. For example, the restyled version of the rule could be changed as follows.

> The following authenticates an official record — or an entry in it — that is otherwise admissible under the Federal Rules of Evidence * * *

This change would have the advantage of providing a consistent reference to "the Federal Rules of Evidence" whenever the Civil Rules refer to questions of evidentiary admissibility. See the discussion of style suggestions under Rule 32.

The Evidence Rules Committee may wish to discuss the above stylistic suggestions to Rule 44—or any others raised by a Committee member — to determine whether they should be referred to the Civil Rules Committee.

2. Constitutional Question

The Supreme Court's recent decision in *Crawford v. Washington* is set forth and discussed in the memorandum on Rule 803(3) in this agenda book. The *Crawford* decision will probably have some effect on Civil Rule 44. Whether the change wrought by *Crawford* should have an effect on the restylization of the Rule is unclear.

Crawford holds that admission of a hearsay statement violates the accused's right to confrontation if that statement is "testimonial". As discussed previously, the *Crawford* Court did not precisely define the term "testimonial." But given the examples and discussion in *Crawford*, it appears at the very least that a hearsay statement prepared by the government with the view to using it against an accused at trial will be found testimonial.

It follows that an attestation under Rule 44(a)(1), (2), etc. could well be found testimonial. I have spoken with the U.S. Attorney's office in Philadelphia and the view of that office is that attestations made to prove authenticity (e.g., under the similar Evidence Rule 902) are no longer valid after *Crawford* because they are testimonial.

Of course, Rule 44 is a Civil Rule, and so one might think that it could not run into any *Crawford* questions. But the problem is that Criminal Rule 27 permits authentication of an official record in any manner permissible in a civil action. So this reference brings Rule 44 into play It also brings the overlapping Evidence Rules—902, etc.— into play, but that is the very reason that the Evidence Rules Committee will be deferring any amendment of any rule that raises Confrontation issues post-*Crawford*, at least until the courts have an opportunity to work through all of the implications of that decision.

One could argue that any problem created by *Crawford* is not a problem within Rule 44, but rather is a problem presented by Criminal Rule 27 But the response to that point is that it is not Criminal Rule 27 that is being amended so soon after *Crawford*. An amendment of a rule affected by *Crawford*, so soon after that case, could be seen as problematic. But on the other hand, it could be argued that the amendment is *only* for style, so the intent is to leave whatever substantive anomalies existed in the old rule undisturbed. And it would be odd if the Civil Rules Committee were to propose a style package that would cover every single Civil Rule other than Rule 44.

The Committee may wish to discuss whether it should provide any suggestions to the Civil Rules Committee concerning the effect of *Crawford* on Rule 44 and the restylizing of that Rule. One possible suggestion could be that the Committee Note could include a reference to *Crawford* and indicate that the restylizing is not intended to address any post-*Crawford* constitutional questions one way or the other.

I. Long-Term Project for Integration of Civil and Evidence Rules

There are at least three Civil Rules that operate as admissibility rules· Rule 32, Rule 44, and Rule 80, which provides that whenever testimony from one proceeding "is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony "

The Civil Rules Committee and the Evidence Rules Committee have long had a dialog on whether these Civil Rules can be better integrated with the Rules of Evidence. The position of the Evidence Rules Committee has been straightforward: rules on evidence should be placed in the Evidence Rules. That is where people will look for them.

So the first principle of integrating the Civil and Evidence Rules would be to consider the option of stripping down Rules 32, 44 and 80 to provide that admissibility of whatever information is covered by the respective rule "is governed by" either the Federal Rules of Evidence in general or a specific Evidence Rule if that is appropriate. That was the option recently used for Criminal Rule 11 (f). Criminal Rule 11 had contained extensive language concerning the admissibility of plea agreements and negotiations when a guilty plea agreement is not reached or has been withdrawn. The language tracked, to a large extent, the language of Evidence Rule 410. In 2002, Rule 11 was amended to provide as follows:

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

The rest of this memorandum is intended to provide the Committee with some initial perspective of the issues that might be encountered by a joint project to integrate Rules 32, 44 and 80 with the Evidence Rules. As will be seen, the goal of a stripped down reference to the pertinent Evidence Rules may not be attainable without significant consideration of possible changes in practice resulting from essentially eliminating the text of the Civil Rules. The policy questions are most complex with respect to Rule 32, but there are also difficult questions presented by Rule 44.

The question is whether, in light of the analysis below, the Committee wishes to begin a project that will provide more of a clear connection between Civil Rules 32, 44 and 80 and the Evidence Rules.

A. Rule 32

The nearest counterpart in the Evidence Rules to Civil Rule 32 is Evidence Rule 804(b)(1), the hearsay exception for prior testimony Yet it would not be prudent for Civil Rule 32 to be amended to provide simply that "admissibility of deposition testimony is governed by Federal Rule of Evidence 804(b)(1)." This is because, even if there were no Civil Rule 32, the admissibility of deposition testimony would be governed by more than one Evidence Rule. For example, a deposition

would be admissible if the deponent testifies at trial and the deposition is inconsistent with the trial testimony. The governing rule for that usage is Rule 801(d)(1), not 804(b)(1). Moreover, even if deposition testimony were admissible under Rule 804(b)(1), it might nonetheless be excluded under Rule 403. See *Li v. Canarozzi,* 142 F.3d 83 (2d Cir. 1998) (deposition qualifies as prior testimony under Rule 804(b)(1), but it was properly excluded under Rule 403). Finally, the restyled Rule 32(a)(6) tracks the rule of completeness language of Evidence Rule 106. So the "simplest" amendment to Rule 32 would probably have to refer to "the Federal Rules of Evidence" rather than to any particular Evidence Rule.

But a simple reference to the Evidence Rules as governing admissibility would result in a change in the current scope of Rule 32. This is because while admissibility of deposition testimony under Rule 32 is generally the same as, or more limited than, admissibility under the Evidence Rules, there are a few situations in which deposition testimony is admissible under Rule 32 *but not* under the Evidence Rules.

The most important way in which Rule 32 is broader than the Evidence Rules is in its definition of witness-unavailability. Rule 32 provides that a deponent is unavailable to give trial testimony when the witness is more than 100 miles from the place of trial. The Federal Rule of Evidence concerning unavailability is more strict on this point. A witness is unavailable due to absence if the declarant's presence cannot be procured "by process or other reasonable means." So for example, a deponent under Rule 32 is "unavailable" to testify in a Manhattan Federal Court if he is in Syracuse on the day of trial; but he is *not* unavailable under Evidence Rule 804(b)(1), because his presence can be secured by process. See, e.g., *Ueland v. United States* , 291 F.3d 993 (7th Cir. 2002) (deposition of a federal prisoner should have been admitted under Rule 32 even though the deponent was not "unavailable" within the meaning of Evidence Rule 804; the prisoner was incarcerated more than 100 miles from the courthouse).

Another possible way in which Rule 32 may be more expansive than the Evidence Rules is that Rule 32 allows a deposition to be admitted even if the deponent is not unavailable, when the party can show "exceptional circumstances" requiring the use of the deposition. There is no such "exceptional circumstances" language in the Evidence Rules. The "exceptional circumstances" language has been narrowly construed by the courts. See, e.g., *Angelo v. Armstrong World Industries,* 11 F.3d 957 (10th Cir. 1993) (holding that "exceptional circumstances" language is to be construed in light of the grounds of unavailability set forth in Rule 32; court refuses to find exceptional circumstances where the Rule-stated grounds of unavailability did not exist). Nonetheless, the possibility exists that a deposition will be admissible if there are some "exceptional circumstances" under Rule 32, and the deposition could not be admitted under Rule 804(b)(1).

So it appears that amending Rule 32 simply to refer to the Federal Rules of Evidence will result in less opportunities for admitting a deposition than is the case under current practice. There would seem to be three possible solutions to this lack of complete overlap:

1. Provide that admissibility of depositions is governed by the Federal Rules of Evidence,

and accept the fact that this results in a new limitation on the use of depositions at trial.

2 Provide that admissibility of depositions of an unavailable deponent is governed by Rule 32 and the Federal Rules of Evidence, while the admissibility of depositions in all other instances is governed solely by the Federal Rules of Evidence.

3. Amend the Rules of Evidence to provide that notwithstanding the unavailability requirements of Rule 804, a deposition in a civil case is not excluded by the hearsay rule if the declarant is more than 100 miles from the courthouse or exceptional circumstances justify admission.

If the Committee decides to pursue a project to integrate the Evidence Rules and the Civil Rules, then it will have to decide which of the above solutions is least problematic—though it could find each of the solutions so problematic that the benefits of any amendment might be outweighed by the costs.

B. Rule 44

Several years ago the Reporters to the Evidence and Civil Rules Committees were asked to research whether Rule 44 might usefully be amended to state simply that "admissibility of an official record is governed by the Federal Rules of Evidence." The request was made by Judge Stotler, who was then the Chair of the Standing Committee. The question was first referred to the Civil Rules Committee, and the initial impression was that it would be easy to delete the existing language of Rule 44 and leave the field to the Evidence Rules. But it was discovered upon further investigation by Ed Cooper, the Reporter to the Civil Rules Committee, that the problem was not as simple as it might initially appear. Ed's conclusion was that substantial thought must be given to whether Rule 44 and the Evidence Rules are coextensive. If Rule 44 in fact provides coverage that is broader than the Evidence Rules in some respects, then it is apparent that the Rule could not so simply be abrogated.

This Reporter then conducted headache-inducing research into the relationship between, and respective coverage of, Rule 44 and the Evidence Rules. This section of the memorandum recaps findings and conclusions I made at that time. I have checked to see if there is any new case law that affects the subject matter and have found none.

The following preliminary conclusions are intended to give the Evidence Rules Committee some perspective of what awaits it if it decides to undertake a joint project to integrate Rule 44 with the Evidence Rules:

1. Rule 44, which sets forth requirements for authenticating official records, has been applied in a few situations in which the Evidence Rules are apparently not applicable. Mostly this has occurred in immigration cases, specifically deportation proceedings. The Federal Rules of Evidence are not applicable to these proceedings. Thus, the abrogation of the text of Rule 44 would appear to have some practical effect in these immigration cases. That practical effect might be limited, however, because there is a regulation that is employed in these immigration proceedings that closely tracks the language of Rule 44. Moreover, the irony is that Rule 44 itself is not really supposed to apply to these proceedings either--and yet the courts apply it. So if the text of the Rule is abrogated, it seems as if the extant case law, and possibly some settled expectations, might be affected–though there is unlikely to be a significant change as a practical matter. The alternative of amending the Evidence Rules to provide that those Rules are applicable to immigration proceedings would present sensitive policy questions and is likely to be opposed by many, including the Justice Department.

2. As a textual matter, Rule 44 does directly overlap with certain Evidence Rules, specifically Rules 803(10), 902(3),(4), and (5), and 1005. Generally speaking, the Evidence Rules are either coextensive with, or broader in application than, Rule 44. A few situations could be hypothesized, however, in which a public record might be self-authenticating under Rule 44 but not under the Evidence Rules. Whether it is worth it to abrogate the text of Rule 44 and then to amend the Evidence Rules to account for these loopholes is a question for the Committees. Given the intricate, technical nature of these rules, it would be difficult to state with certainty that nothing would be lost in abrogating Rule 44 and transposing some of that Rule's language into the Evidence Rules. But because it is so complicated, and there is so little case law because Rule 44 is rarely invoked, it is unlikely that any loss of coverage will be very important as a practical matter.

Evidence Rules That Might Overlap With Civil Rule 44

There are a number of Evidence Rules dealing with the admissibility of official records, which must be investigated to determine whether and to what extent they overlap with Rule 44. It should be kept in mind, however, that *overlap* does not mean *conflict*. Rule 44 (c) states that it is not intended to preclude authentication under any other rule. And Rules 901 and 902 similarly provide for authentication by other rules.

The public records rules, and their relationship to Rule 44 or lack thereof, will be discussed sequentially

1. Rule 803(8)--Rule 803(8) sets forth a hearsay exception for certain public records. However, this Rule does not at all overlap with Rule 44. With respect to proof of public records, Rule 44(a) specifically provides that an official record, "when admissible for any purpose, may be evidenced by an official publication thereof . . ." Thus, Rule 44(a) does not establish a hearsay exception for public records. As the district court stated in *Phillips v. Medtronic,* 1990 WL 58440 (D.Kan.), compliance with Rule 44(a) "does not render a document admissible under the Federal

Rules of Evidence. Rule 44 simply provides the method of proving an official record if it is otherwise admissible." (As discussed previously, the Evidence Rules Committee may wish to suggest that Rule 44 explicitly state that it covers authenticity and not any other admissibility requirement).

2. Rule 803(10)-- Rule 803(10) provides a hearsay exception for the absence of a public record. Unlike Rule 803(8), Rule 803(10) does extensively, if not completely, overlap with Rule 44. This is because Rule 44(b) provides that a statement that no record was found, when authenticated under subdivision (a), "is admissible" to prove the lack of a record. See *United States v Beason,* 690 F.2d 439 (5th Cir. 1982) (affidavit offered as proof of nonpayment of tax was admissible under either Rule 803(10) or Civil Rule 44).

3. Rule 901(b)(7)--This Rule describes, as an example of sufficient authentication, evidence that a public report "is from the public office where items of this nature are kept." Certainly, satisfaction of the proof requirements of Rule 44 would provide sufficient evidence that an official record "is from the public office where items of this nature are kept." Thus, the two rules have some overlapping application. However, Rule 44 is a provision dealing with self-authentication and Rule 901 is not.

4. Rule 901(b)(10)--This Rule describes, as an example of sufficient authentication, any method of authentication provided by, inter alia, "rules prescribed by the Supreme Court pursuant to statutory authority." The Advisory Committee Note to the Rule indicates that Civil Rule 44 is one of the rules contemplated as a source for authenticating evidence outside the Evidence Rules.

5. Rule 902(1)-- This Rule provides that domestic public documents under seal are self-authenticating when accompanied by "a signature purporting to be an attestation or execution." It is obviously targeted at the same kinds of records covered by Civil Rule 44(a)(1), though Rule 902(1) is significantly less detailed.

6. Rule 902(2)--Rule 902(2) provides that domestic public documents not under seal are self-authenticating if a public officer certifies under seal that the signer has signed the document in an official capacity and that the signature is genuine. Again, there is an overlap in coverage with Rule 44(a)(1), which provides a means for establishing self-authentication of domestic official records--though the path to self-authentication provided by Rule 44(a)(1) is somewhat different from that provided by Rule 902(2).

7. Rule 902(3)--This Rule sets forth requirements for self-authentication of foreign public documents. It closely tracks, but is not identical to, Rule 44(a)(2). The Advisory Committee Note to Rule 902(3) states that the Rule is "derived from Rule 44(a)(2) of the Rules of Civil Procedure but is broader in applying to public documents rather than being limited to public records."

8. Rule 902(4)--Rule 902(4) provides that a copy of an official record or document authorized by law to be recorded is self-authenticating where certified as correct by the custodian

or other authorized person, and where the certificate complies with the self-authentication provisions of Rules 901(1)-(3), or, inter alia, any "rule prescribed by the Supreme Court pursuant to statutory authority." Thus, the Rule authorizes the court to treat a properly certified copy of a public record as properly authenticated. According to the Advisory Committee Note, the reference to certification procedures in other rules is designed is a deliberate reference to Rule 44, which also permits self-authentication of copies.

9. Rule 902(5)--This Rule establishes self-authentication for "[b]ooks, pamphlets, or other publications purporting to be issued by public authority." According to the Advisory Committee Note, Rule 902(5) is based on Civil Rule 44(a), which provides that domestic and foreign official records may be evidenced by an official publication.

10. Rule 1005--Rule 1005 provides a limited exception to the best evidence rule by permitting the admission of copies of two kinds of public records: (1) official records, and (2) documents authorized to be recorded or filed that have actually been recorded or filed. There is an overlap with Rule 44, which allows proof of copies of official records that meet the certification requirements of that Rule

Does Rule 44 Provide Coverage that the Evidence Rules Do Not?

If the coverage of the Evidence Rules is equal to or greater than Rule 44, then a case can be made for amending Rule 44 to provide simply that authentication of official records is governed by the Federal Rules of Evidence. So the only situation in which abrogation of the current text of Rule 44 would have practical consequences is where Rule 44 provides a ground of authentication that might not be provided in the Evidence Rules If that is the case, then an amendment to Rule 44 would only be viable under one of three circumstances: 1) by amending the Evidence Rules to incorporate the Rule 44 provisions that provide greater coverage; 2) by amending Rule 44 to provide that authentication is governed by the Evidence Rules, with the exception of additional specified methods of authentication retained in Rule 44; or 3) by deciding that the inclusion of the greater coverage is not important as a practical matter and therefore can be discarded in favor of a simple reference to the Federal Rules of Evidence in Rule 44.

Most of the case law indicates that the Evidence Rules and Rule 44 are generally coextensive, and that in certain situations the Evidence Rules are actually broader in application. There are, however, some possible situations in which Rule 44 might permit authentication where the Evidence Rules would not.

Situations In Which Rule 44 and the Evidence Rules Are Interchangeable

Cases in which Rule 44 and the Evidence Rules were found interchangeable include: *United States v. Darveaux,* 830 F.2d 124 (8th Cir. 1987) (Rule 44 and Evidence Rule 902(3) are applied to reach the same result in authenticating a judgment of conviction); *First National Life Ins Co., v Calif. Pac. Life Ins Co* , 876 F.2d 877 (11th Cir. 1989) (complaint and cross-claim offered into evidence without a seal held not properly authenticated under either Rule 44 or Evidence Rules 901(1) and (2)), *California Assoc. Of Bioanalysts v. Rank,* 577 F.Supp. 1342 (C.D.Cal. 1983) (official publication was self-authenticating "under Rule 902(5) of the Federal Rules of Evidence, as well as under Rule 44(a)(1) of the Federal Rules of Civil Procedure"); *United States v Hart,* 673 F Supp. 932 (N.D.Ind. 1987) (report concerning nonpayment of taxes was admissible under Evidence Rule 803(10), Criminal Rule 27 and Civil Rule 44(b)); *Vote v United States,* 753 F.Supp. 866 (D Nev. 1990) (certificates of assessments and payments were admissible under Rule 803(8), and properly authenticated under both Rule 902(1) and Rule 44); *United States v. Jongh,* 937 F.2d 1 (1st Cir 1991) ("good cause" excuse for the lack of a final certification, provided in Rule 902(3), was derived from Rule 44 and the rules are to be read identically as to the "good cause" exception); *United States v Yousef,* 175 F.R.D. 192 (S.D.N.Y. 1997) ("good cause" standard for dispensing with final certification in Rule 902(3) is derived from Rule 44 and should be applied in the same manner).

Situations In Which the Evidence Rules Are More Comprehensive Than Rule 44

There are a few situations in which the Evidence Rules might be found more comprehensive than Rule 44. For example, Rule 1005 includes "data compilations" among the official records that can be proven by copy. Rule 44 contains no such reference. Judge McLaughlin opines that although there is no conflict between Rules 44 and 1005, the latter rule is "broader" because it permits copies of computerized printouts that might not be permitted under Rule 44. McLaughlin, *Weinstein's Evidence* ¶ 1005[3]. Also, the Advisory Committee Note to Rule 902(3) states that it is broader than Rule 44 because Rule 902(3) "applies to public *documents* rather than being limited to public *records*." (Emphasis supplied). See also Mueller & Kirkpatrick, 5 *Federal Evidence* § 542 (coverage of Rule 803(10) and Rule 902(4) is broader than that provided by Civil Rule 44)

For some cases finding or implying that the Evidence Rules are broader than Rule 44, see *United States v Squillacote,* 221 F.3d 542, 561 (4th Cir 2000) (Rule 902(3) authentication process for official foreign records is "essentially identical" to that set forth in Rule 44(a)(2), but the Evidence Rule is broader because it covers foreign public documents as well as public records); *United States v. Pent-R-Books, Inc.,* 538 F.2d 519 (2d Cir. 1976) (administrative records certified by a postal official rather than the custodian were not admissible under Rule 44; however, Rule 902 "has expanded the means by which official documents and copies thereof may be authenticated";

here the record was properly authenticated under Rule 902(1) because it was certified by a person who had authority to make the certification); *Amfac Distribution Corp v Harrelson,* 842 F.2d 304 (11th Cir. 1988) (state court judgment might not have been admissible under Rule 44 because the attestation and certification were stapled to the front of the judgment instead of the back; however, the judgment was properly authenticated under Rule 902 because the copy of the judgment bore a seal and a signature purporting to be an attestation of the custodian of the original judgment).

Situations In Which Rule 44 Has Been Applied Without Reference to the Evidence Rules

There are a few reported cases in which Rule 44 has been used as the sole means of authenticating official records. In some of these cases, I cannot figure out why the Evidence Rules were not used. For example, in *INA v. Italica,* 567 F.Supp. 59 (S.D.N.Y. 1983), the plaintiff offered certified copies of Italian weather records, to support a claim for damage due to freezing of two cargoes of wine. The records were certified by the custodian and by a department of the Italian government, but they did not bear a final certification attesting to the genuineness of the signature and official position of the persons who attested to the records's accuracy. Nonetheless, the Court found "good cause" to dispense with the final certification under Rule 44. The Court cited only Rule 44; but it seems clear that the documents were also admissible under Rule 902(3). That Rule contains a "good cause" standard that is derived from and is just as generous as that provided by Rule 44. See *United States v. Jongh,* 937 F.2d 1 (1st Cir. 1991) ("good cause" excuse for the lack of a final certification, provided in Rule 902(3), was derived from Rule 44 and the rules are to be read identically as to the "good cause" exception).

Similarly, in *Crescent Towing & Salvage Co., v. M/V Anax*, 40 F.3d 741 (5th Cir. 1994), an action brought to enforce a maritime lien, the court considered the type of evidence that must be presented to prove a judicial sale conducted in a foreign country, such as would extinguish all pre-existing maritime liens. The Court stated that the evidence must include "a certified copy of the foreign court's judgment which meets the authentication requirements of Federal Rule of Civil Procedure 44(a)(2)". But it would seem that authentication of such a judgment would also be permissible under the virtually identical Rule 902(3). It is unclear why the Court mentioned only the Civil Rule, because the Evidence Rules do in fact apply to an admiralty action of the type presented in *Crescent Towing.*

Immigration Cases

Rule 44 has often been invoked in immigration deportation hearings, as a means of authenticating official records such as immigration forms. No reference in these cases is made to the

Evidence Rules governing authentication, i.e., Rule 44 is used independently of the Evidence Rules. See *Espinoza v INS,* 45 F.3d 308 (9th Cir. 1994) (form prepared by border agents who apprehended the alien was properly authenticated under Rule 44, where it was certified by the district director of the INS); *Lopez v INS,* 45 F.3d 436 (9th Cir. 1994) (I-213 form was properly authenticated under Rule 44). In relying on Rule 44, the courts note that civil deportation hearings are not governed by the Federal Rules of Evidence. *Baliza v. INS*, 709 F.2d 1231 (9th Cir. 1983). Thus, at first glance, it would appear that abrogation the existing text of Rule 44 would be problematic, because it would mean that there would be no authentication rules that could be invoked in these deportation hearings.

The issue is not that simple, however. While Rule 44 is cited as authority for authenticating official records in deportation hearings, the fact is that the Civil Rules are no more applicable than the Evidence Rules in these proceedings. The courts have, through case law, *imported* Rule 44 as a proper means of authentication. See, e.g., *Chung Young Chew v. Boyd*, 309 F.2d 857 (9 th Cir. 1962) (while Rule 44 was not controlling in administrative hearings, the Rule nevertheless defined an acceptable method of authenticating a public record that should have been followed); *Maroon v INS*, 364 F.2d 982 (8th Cir. 1966) (although Rule 44 did not control in an administrative proceeding, the procedure therein set forth should be followed to the extent possible). These cases were decided well before the Evidence Rules were in effect. It is reasonable to assume that when the Evidence Rules became effective, the courts saw no need to invoke Rule 902 as a means of authenticating official records in deportation proceedings, because Rule 44 was all but identical and sufficient to meet the purpose, and because neither Rule 44 nor the Evidence Rules were directly applicable to these proceedings anyway.

What complicates matters further is that it appears that a party does not even need Rule 44 to authenticate official records in deportation proceedings. 8 C.F.R.§ 287.6 contains language that is "virtually identical" to Rule 44. *Espinoza v INS,* 45 F.3d 308 (9th Cir. 1994) (form prepared by border agents who apprehended the alien was properly authenticated under both Rule 44 and C.F.R. 287.6). So it would seem that, at least with respect to civil deportation proceedings, the abrogation of Rule 44 would not be critical as a practical matter. But the issue is so complex and arcane that it would be hard to state absolutely that the abrogation of Rule 44 in this area would have no effect at all. If the Committees decide to proceed with a joint venture to integrate the Civil Rules concerning admissibility and the Evidence Rules, careful consideration should be given to how to handle authentication of official records in immigration proceedings.

Official v. Public Records

Rule 44 provides for authentication of "official" records. The captions to Rules 902(1)-(4) and Rule 1005 refer to "public" records Could a record be "official" and yet not "public"? It would seem so. For example, in *Banco De Espana v Federal Reserve Bank*, 114 F.2d 438 (2d Cir. 1940), a case decided well before the adoption of the Federal Rules, the Federal Reserve offered the

affidavit of the then Spanish ambassador testifying to the contents of secret instructions from his government, authorizing the sale of silver to the United States. The Spanish bank argued, inter alia, that Rule 44(a) applied only to public records and copies thereof, so that any evidence relating to secret documents was not subject to authentication under that Rule. Rejecting this contention, the Court stated that the Rule spoke not of "public" records, but only of "official" ones, and that it saw no necessity for reading into the Rule a requirement that the original be open to examination by the public. The Rule, said the court, was based on the presumption of ministerial regularity in the attestations and certifications of the public officials involved; given that premise, it did not matter that the document was not released to the public. Consequently, the Court held the ambassador's affidavit to be an appropriate subject for authentication under Rule 44 (a).

If the Evidence Rules govern only public records and not all official records, the case could be made that the text of Rule 44 should not be abrogated because it provides more expansive coverage. In fact, however, the reference to "public" records in Rules 902 and 1005 is in the captions only. There is no such limitation in the text of any of these rules. The rules permit authentication of any document for which the certification requirements have been met. Indeed, while the captions refer to public records, the text of at least Rules 902(4) and 1005 refers explicitly to "official" records and documents. So it is probable that Rule 44 is not in fact more expansive in application than the Evidence Rules with respect to official, as opposed to public, documents.

However, there is at least some uncertainty created by the tension in the Evidence Rules between the captions and the text. Perhaps this could be solved by an amendment to the captions of each of the problematic Rules, along with minor clarifications of the text. But it could be thought better to retain Rule 44 as a safety valve to resolve any such tension Whether it is worth the cost of amending the rules to solve a problem that has not yet arisen and may never arise is a question for the Committees should they decide to proceed with the project.

Other Possible Cases In Which Rule 44 Might Be Broader than the Evidence Rules

While the Evidence Rules discussed above are drawn from Rule 44, there is no single Evidence Rule that is identical to Rule 44. If the Rules are parsed, it is possible to hypothesize some situations in which the Evidence Rules might not provide for authentication that would be provided for under Rule 44. These situations have not arisen in the cases yet, however, which suggests that the problem of a gap in coverage is hypothetical only. Some of the possible "gaps" in the coverage of the Evidence Rules that are covered by Rule 44 include the following

1 Publications-- Rule 44 permits proof of any domestic or foreign record "by an official publication thereof." The only Federal Rule providing self-authentication for a *publication* of an official record is Rule 902(5). That Rule states that "Books, pamphlets, or other publications purported to be issued by public authority" are self-authenticating. Rule 902(5) seems to be using

"publications" in a somewhat different sense than that employed in Rule 44, which covers publication of any official record. However, the admittedly sparse case law on the subject seems to say that Rule 902(5) provides for self-authentication of any official publication, not limited as to type or subject matter. *California Assoc Of Bioanalysts v Rank,* 577 F.Supp. 1342 (C.D.Cal. 1983) (official publication was self-authenticating "under Rule 902(5) of the Federal Rules of Evidence, as well as under Rule 44(a)(1) of the Federal Rules of Civil Procedure"). Weinstein's Evidence, citing the Advisory Committee Comment to Rule 902(5), states that "Rule 902(5) is based on Rule 44(a) of the Federal Rules of Civil Procedure, which provides that domestic and foreign official records may be evidence by an official publication." Thus, Rules 44 and 902(5) *appear* to be coextensive with respect to official publications However, there is enough uncertainty in the language of the Rules to justify consideration before simply abrogating the text of Rule 44.

2 Treaty Exception-- Rule 44(a)(2) allows certification of a foreign official document without the ordinarily required final certification if a treaty provides for that. There is no such exception provided for in Rule 902(3), the Evidence Rules analogue in this respect. It is possible, of course, that a court would hold that any treaty dispensing with final certification must take precedence over the final certification requirement of Rule 902(3). However, the lack of a treaty exception in Rule 902(3) might be of some concern if the text of Rule 44 were abrogated.

Conclusion on Rule 44 and the Evidence Rules

The abrogation of the text of Rule 44 presents a complex question because there are six Evidence Rules that are directly derived from Rule 44, and several others that are related in coverage. It is a daunting task to try to figure out whether abrogation of the text of Rule 44 would actually create a gap in coverage with respect to authentication. There is enough uncertainty, however, to indicate that a gap in coverage is at least possible. The question for the Committees is whether that possible gap is worth worrying about.

C. Rule 80

Civil Rule 80(c) provides that whenever testimony from one proceeding "is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony." This Rule would not seem necessary because the transcript of otherwise admissible testimony would be admissible under Rule 803(8) as a public record. And public records are self-authenticating in precisely the manner set forth in Rule 80(c), i.e., through certification. See

Rule 902(4). So it would seem that Rule 80(c) can be deleted; or if the section needs to be retained for reference purposes, it could be amended to provide that the admissibility of a transcript is governed by the Federal Rules of Evidence.

Rule 32 Use of Depositions in Court Proceedings	Rule 32. Using Depositions in Court Proceedings
(a) **Use of Depositions.** At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions	(a) **Using Depositions.** (1) ***In General.*** At any trial or hearing, all or part of a deposition may be used against a party on these conditions **(A)** the party was present or represented at the taking of the deposition or had reasonable notice of it, **(B)** it is used to the extent it would be admissible under the rules of evidence if the deponent were present and testifying, and **(C)** the use is permitted by paragraphs (2) through (8)
(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence (2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose	(2) ***Impeachment and Other Uses.*** Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence (3) ***Deposition of Party, Agent, or Designee*** An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4)
(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds **(A)** that the witness is dead, or **(B)** that the witness is at a greater distance than 100 miles from the pl ace of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition, or **(C)** that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or **(D)** that the party offering the deposition has been unable to procure the attendance of the witness by subpoena, or **(E)** upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.	(4) ***Unavailable Witness.*** A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds **(A)** that the witness is dead, **(B)** that the witness is more than 100 miles from the place of trial or hearing or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition, **(C)** that the witness cannot attend or testify b ecause of age, illness, infirmity, or imprisonment, **(D)** that the party offering the deposition could not procure the witness's attendance by subpoena, or **(E)** on application and notice, that exceptional circumstances make it desirable — in the interest of justice and with due regard to the importance of live testimony in open court — to allow the deposition to be used.

A deposition taken without leave of court pursuant to a notice under Rule 30(a)(2)(C) shall not be used against a party who demonstrates that, when served with the notice it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition, nor shall a deposition be used against a party who, having received less than 11 days notice of a deposition, has promptly upon r eceiving such notice filed a motion for a protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held.	**(5)** ***Limitations on Use*** **(A)** *Deposition Taken on Short Notice* A deposition may not be used against a party that, having received less than 11 days notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place — and this motion was still pending when the deposition was taken **(B)** *Unavailable Deponent, Party Could Not Obtain an Attorney* A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(m) may not be used against a party that demonstrates that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition
(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the offeror to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken, and, when an action has been brought in any court of the United States or of any State and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor A deposition previously taken may also be used as permitted by the Federal Rules of Evidence	**(6)** ***Using Part of a Deposition*** If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts **(7)** ***Substituting a Party*** Substituting a party under Rule 25 does not affect the right to use a deposition previously taken **(8)** ***Deposition Taken in Earlier Action*** A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action A deposition previously taken may also be used as permitted by the Federal Rules of Evidence

Rule 32(b)

(b) Objections to Admissibility Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.	**(b) Objections to Admissibility** Subject to Rules 28(b) and 32(d)(3), an objection may be made at a trial or hearing to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying
(c) Form of Presentation Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise	**(c) Form of Presentation** Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise

Rule 32(d)

(d) Effect of Errors and Irregularities in Depositions **(1) As to Notice** All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice **(2) As to Disqualification of Officer** Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence **(3) As to Taking of Deposition** **(A)** Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time	**(d) Objections.** **(1)** ***To the Notice*** An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice **(2)** ***To the Officer's Qualification*** An objection based on disqualification of the officer before whom a deposition is to be taken is waived if it is not made **(A)** before the deposition begins, or **(B)** promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known **(3)** ***To the Taking of the Deposition.*** **(A)** *Objection to Competence, Relevance or Materiality* An objection to a deponent's competence — or to the competence, relevance, or materiality of testimony — is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time
(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition	**(B)** *Objection to an Error or Irregularity* An objection to an error or irregularity at an oral examination is waived if **(i)** it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time, and **(ii)** it is not timely made during the deposition
(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized. **(4) As to Completion and Return of Deposition** Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.	**(C)** *Objection to a Written Question* An objection to the form of a written question under Rule 31 is waived if it is not served in writing on the party submitting the question within the time for serving responsive questions or — if the question is a recross- question — within 5 days after being served with the question. **(4)** ***To Completing and Returning the Deposition.*** An objection to how the testimony has been transcribed or how the deposition has been prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer is waived unless a motion to suppress is made promptly after the defect or irregularity becomes known or, with reasonable diligence, could have been known.

Rule 44 Proof of Official Record	Rule 44. Proving an Official Record
(a) Authentication **(1) Domestic** An official record kept within the United States, or any state, district, or commonwealth, or within a territory subject to the administrative or judicial jurisdiction of the United States, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office	**(a) Authentication.**[1] **(1)** ***Domestic Record*** The following authenticates[2] an official record — or an entry in it — that is otherwise admissible and is kept within the United States, any state, district or commonwealth, or any territory subject to the administrative or judicial jurisdiction of the United States **(A)** an official publication of the record, or **(B)** a copy attested by the officer with legal custody of the record — or by the officer's deputy— and accompanied by a certificate that the officer has custody The certificate must be made under seal [3] **(i)** by a judge of a court of record of the district or political subdivision where the record is kept, or **(ii)** by any public officer with a seal of office and with official duties in the district or political subdivision where the record is kept

1 The Style Subcommittee suggests that the Advisory Committee may wish to consider whether Rule 44(a) should be deleted because this topic is addressed in the Federal Rules of Evidence

Cooper This question is part of a larger series, beginning with Civil Rule 32 The Evidence Rules Committee is alert to these questions A few small questions may be addressed in the Style Project, and a few others may fit into the Style-Substance track But for the most part the relationships between the Civil Rules and the Evidence Rules should be taken on as a single package and in a separate enterprise

2 **Cooper** Present Rule 44(a) is captioned "authentication " The present rule, however, says that an official record "may be evidenced by" the described means The Style rule says that those means "authenticates" [should this be "authenticate"?] the record It may be argued that "evidenced by" permits contrary evidence more freely than "authenticates" would do But if authentication by these means is clearly understood to permit contrary evidence, the change seems proper Suppose, for instance, it can be shown that the official publication does not accurately describe the document?

3 The Style Subcommittee suggests that the Advisory Committee may wish to consider whether the style draft reference to "under seal" instead of the current rule's "authenticated by the seal of the court" is a substantive change

(2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof, or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation	**(2) *Foreign Record.*** **(A)** *In General* The following authenticates[4] a foreign official record — or an entry in it — that is otherwise admissible **(i)** an official publication of the record, **(ii)** a copy attested by an authorized person and accompanied by a final certification of genuineness, as described in (B)[5], or **(iii)** other means ordered by the court under (C)
A final certification may be made by a secretary of embassy or legation, consul general, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i)admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties	**(B)** *Final Certification of Genuineness* A final certification must certify the genuineness of the signature and official position of the attester or of any foreign official whose certificate of genuineness relates to the attestation or is in a chain of certificates of genuineness relating to the attestation A final certification may be made by a secretary of a United States embassy or legation, by a consul general, vice consul, or consular agent of the United States, or by a diplomatic or consular official of the foreign country assigned or accredited to the United States Final certification is unnecessary if the record and attestation are certified as provided in a treaty or convention to which the United States and the foreign country where the record is located are parties **(C)** *Other Means of Proof* If all parties have had a reasonable opportunity to investigate a foreign record's authenticity and accuracy, the court may, for good cause, either **(i)** admit an attested copy without final certification, or **(ii)** allow the record to be proved by an attested summary with or without a final certification

4 **Cooper** See note 2 on "authenticates" as compared to "may be evidenced by "

5 **Cooper** One question may remain (2)(A)(ii) seems to say that the copy must be accompanied by a final certification of genuineness But (2)(B) says that a final certification is unnecessary if record and attestation are certified as provided in a treaty or convention, etc "Final certification" is manifestly a term of special meaning The reference to "as described in (B)" may not dispel possible confusion An alternative would be to move the final sentence of Style (2)(B) into the list in (2)(A)

(i) * * *

(ii) * * *

(iii) a record and attestation certified as provided in a treaty or convention to which the United States and a foreign country where the record is located are parties, or

(iiiv) other means * * *

(This alternative was suggested to the Style Subcommittee, there may be a good reason for discarding it that Cooper has not recognized)

(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry	**(b) Lack of a Record.** A written statement that a diligent search of designated records revealed no record or entry of a specified tenor is admissible as evidence that the records contain no such record or entry For domestic records, the statement must be authenticated under (a)(1) For foreign records, the statement must comply with (a)(2)(C)(ii)
(c) Other Proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law	**(c) Other Proof.** A party may prove an official record — or an entry or lack of an entry in it — by any other method authorized by law

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposed Rules on Privacy in Response to the E-Government Act
Date: April 2, 2004

Section 205 of the E-Government Act requires the Judicial Conference to propose rules that will protect against disclosure of personal identifiers that are found in court filings. This requirement was generated from Congressional recognition that court filings are now readily available online. Thus it is no longer the case that court records can be accessed only by those interested and diligent enough to travel to the courthouse. Because court filings are now easily accessible, there is a risk that personal information included in court filings could be distributed easily and widely over the internet

In response to the E-Government Act, the Chair of the Standing Committee appointed a subcommittee to draft a model that would work as a basis for proposed rule amendments to be considered by the Advisory Committees. Professor Capra serves as the principal Reporter to the Subcommittee, and Judge Hinkel serves as the Evidence Rules Committee's representative.

The Advisory Committees have the responsibility to work from the model prepared by the E-Gov subcommittee. Proposed amendments to the procedural rules (Civil, Criminal, Bankruptcy and Appellate) are to be prepared. The goal set by the Standing Committee is for the Advisory Committees to propose a substantially similar amendment for each set of procedural rules, with variations only as necessary to take account of problems peculiar to a particular set of rules.

The E-Government Subcommittee of the Standing Committee has prepared a template of a proposed rule that is currently being considered by the other Advisory Committees. While the E-Government Act does not require a change to the Evidence Rules, the E-Government Subcommittee would welcome any comments that the Evidence Rules Committee may have on the proposed privacy rule.

This memorandum has the following materials attached for the Committee's consideration and review:

1. The proposed amendments to the Civil and Appellate Rules, adapting the E-Gov subcommittee's template.

2. A timeline for enactment of the rules required by the E-Government Act

3. The minutes of the E-Government Subcommittee meeting.

4. The E-Government Act of 2004.

Civil Rule Implementing the E-Government Act

The Direction to Prescribe A Civil Rule

Section 205 (a) of the E-Government Act of 2002, Pub.L. 107-347, 116 Stat. 2899, 2913, 44 U.S.C. 101 note, requires each district court to establish a website. Section 205(c)(1) provides that the court "shall make any document that is filed electronically publicly available online." The court "may convert any document that is filed in paper form to electronic form"; if converted to electronic form, the document must be made available online. Section 205(c)(2) provides an exception – a document "shall not be made available online" if it is "not otherwise available to the public, such as documents filed under seal."

Section 205(c)(3) directs adoption of implementing rules:

> (A)(i) The Supreme Court shall prescribe rules, in accordance with sections 2072 and 2075 of title 28 * * * to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically.
>
> (ii) Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.
>
> (iii) Such rules shall take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security.
>
> (iv) To the extent that such rules provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such information may file an unredacted document under seal, which shall be retained by the court as part of the record, and which, at the discretion of the court and subject to any applicable rules issued in accordance with chapter 131 of title 28, United States Code, shall be either in lieu of, or in addition[,sic] to, a redacted copy in the public file.

Standing Committee E-Government Subcommittee

The Standing Committee has appointed an E-Government Subcommittee, chaired by Judge Sidney A. Fitzwater, to coordinate study of E-Government Act rules by the several advisory committees. Minutes of the Subcommittee meeting on January 14, 2004, are attached. Professor Daniel J. Capra, Reporter of the Evidence Rules Committee, has been designated Lead Reporter for the Subcommittee. Professor Capra has prepared a "template" rule and Committee Note for consideration by the advisory committees. Copies are attached. A variant form has been prepared by Professor Patrick J. Schiltz, Reporter for the Appellate Rules Committee; that proposal and a supporting memorandum also are attached.

Each advisory committee has been asked to study the template rule at its Spring 2004 meeting and to suggest any desirable changes or variations. The Subcommittee, in consultation with the advisory committee reporters, will consider the advisory committee reactions in June. The next step will be an attempt to generate a uniform rule that may be adopted in uniform – or nearly uniform – terms for each of the Appellate, Bankruptcy, Civil, and Criminal Rules. Some variations may prove suitable for the different circumstances faced by the different procedure systems.

Consideration of the E-Government Act rule may entail consideration of changes in other rules. Possible Civil Rules candidates are described below after presentation of a suggested Civil Rule "5.2" derived from the Template and the Appellate Rule variation. (Designation as Rule 5.2 is a first approximation. This rule is closely related to Rule 5, which includes filing in subdivisions (d) and (e). We have proposed a new Rule 5.1 to address notice of constitutional challenges to federal and state statutes; we might want to redesignate that as Rule 5.2 to bring this filing rule closer to Rule 5. There may be too much here to simply tack privacy onto Rule 5 as a new subdivision (f).)

Rule 5.2. Privacy in Court Filings

(a) Limits on Disclosing Personal Identifiers. A party[1] that files an electronic or tangible paper that includes any of the following personal identifiers may disclose only these elements:

(1) the last four digits of a person's social-security number;[2]

(2) the initials of a minor child's[3] name;[4]

(3) the year of a person's date of birth;

(4) the last four digits of a financial-account number; and

(5) the city and state of a home address.

(b) Exception for a Filing Under Seal. A party may include complete personal identifiers [listed in subdivision (a)] in a filing made under seal. But the court may require the party to file a redacted copy for the public file.[5]

[1] Both Template and Appellate Rule are directed only to a party. Apparently that includes a party who files something in response to a court order to file. It is not clear whether all things filed with a court are filed by a party: what of an amicus? Who files the trial transcript? The court's opinion?

[2] "person" commonly includes artificial entities, such as corporations. Should taxpayer identification numbers be included?

[3] Style: is this redundant? Why not just "minor' s name"?

[4] Will this prove awkward when suit is on behalf of a minor?

[5] With the addition of the bracketed words, this tracks the Appellate Rule. It may leave open the question whether there is

(c) Social Security Appeals; Access to Electronic Files. [6]
In an action for benefits under the Social Security Act[7], access to an electronic file is permitted only [8] as follows, unless the court orders otherwise:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the [an?] administrative record; and

(2) [a person who is not a party or a party 's attorney]{other persons} may have remote electronic access to:

(A) the docket maintained under Rule 79(a); and

(B) an opinion, order, judgment, or other written disposition, but not any other part of the case file or the administrative record.

~~**(d) Judicial Conference Standards.** A party must comply with all policies and interim rules adopted by the Judicial Conference to protect privacy and security concerns related to the public availability of court filings.~~[9]

a right file under seal. The Template clearly says that a party who wishes to file complete personal identifiers may file an unredacted document under seal; it goes on to provide that the court may require a redacted copy for the public file. The result seems unintentional – it establishes a right file under seal by simply including a complete personal identifier, and then leaves it up to the court to direct filing a public copy. More thought is needed.

[6] The Template does not include this subdivision. The Appellate Rule does. Failure to include a parallel provision in the Civil Rule would essentially moot the Appellate Rule.

[7] The Appellate Rule formulation is: "In an appeal involving the right to benefits under the Social Security Act * * *." This language may fit the Civil Rules if the only actions we wish to reach are appeals from benefit denials. Actions by the government to recover overpayments may not involve the same level of private information. It would help to have advice from someone familiar with the various forms of social-security benefit actions that may come to the district courts.

[8] The Appellate Rule is "authorized as follows." That seems to mean the same as "permitted only." If so, there is no gap: the rule does not mean to distinguish between "access" in the introduction and "remote electronic access" in paragraphs (1) and (2). The distinction, however, may be important: do we mean to close off electronic access from a public terminal in the clerk's office?

[9] This provision in the Template raises a familiar concern. A recent illustration in the Civil Rules is shown by Rule 7.1. Rule 7.1 requires much less corporate disclosure than had been required by many local rules. Some drafts included a provision that would require additional disclosures as required by the E-Government Act Rule March 25, 2004 - 3-

Committee Note

(A Committee Note can be adapted from the Template, Appellate Rules, and any other model.)

Parallel Civil Rules Changes

Each Advisory Committee is to determine whether existing rules should be changed to reflect the new circumstances created by electronic access to materials filed with the court. Several Civil Rules may be candidates for future amendment; some of the more obvious possibilities are described briefly below. It may be premature, however, to consider amendments before gaining any experience with electronic access. Anticipated problems may not arise, and unanticipated difficulties are almost inevitable.

Rule 5(d). The statute requires that any document filed electronically be made available online. Paper documents converted to electronic form also must be made available online. Rule 5(d) now requires filing of "[a]ll papers after the complaint required to be served upon a party." Rule 5(d) was recently amended to forbid filing of discovery papers until they are used in the proceeding or the court orders filing. Rule 5(d) might be amended further to except other papers from filing.

Rule 5, whether in subdivision (d) or otherwise, also might be the place to add provisions on sealing filed papers. Rule 26(c)(6) already authorizes a protective order sealing a deposition. Section 205(c)(2) of the E-Government Act provides that a filed document shall not be made available online if it is "not otherwise available to the public, such as documents filed under seal."

Rule 5(d) also may be used to anticipate a pervasive problem. Filing discovery materials, when that happens, invokes all the limits of the proposed E-Government Act rule. Apparently depositions, responses to interrogatories, documents (including computer-generated information), requests for

Judicial Conference. Doubts were expressed about this attempt to delegate Enabling Act authority, despite the Rule 5(e) precedent that authorizes Judicial Conference standards for electronic filing. Doubts also were expressed about the practical availability of Judicial Conference standards; those doubts may dwindle as reliance on the Judiciary website becomes universal. There is a separate difficulty with requiring reliance on "interim rules"; initial interim rules will be superseded by adoption of Enabling Act rules. Section 205(c)(3)(B)(i) seems to contemplate interim rules only for the period before adoption of the first set of Enabling Act rules. Unless the Judicial Conference can adopt "interim rules" to bridge gaps between adoption and amendment of Enabling Act rules, the reference to interim rules should be dropped. The Appellate Rule draft omits this subdivision entirely.

The reference to interim rules raises a separate point. Section 205(c)(3)(A)(i) contemplates rules that protect not only privacy but also "security." Nothing in any of the drafts addresses "security" concerns.

admission, and perhaps even reports of Rule 35 examinations, must be redacted. Rule 5(d) might be amended to provide a reminder of the duties imposed by Rule "5.2."

Amendments designed to limit filing requirements or to expand sealing practices must be approached with great care. It does not seem likely that these topics should be made part of the initial E-Government Act rules process, unless it seems appropriate to amend Rule 5(d) to refer to the Rule 5.2 duty to redact discovery materials when filed.

Rule 10. Rule 10(a) provides that "the title of the action shall include the names of all the parties." This provision is at odds with subdivision (a)(2) of the proposed rule, which permits only the initials of a "minor child." It might be desirable to add a cross-reference to Rule "5.2." (The E-Government Act might provide an occasion for reconsidering the question of pseudonymous pleading. There has not been any enthusiasm in recent years for considering an amendment that would attempt to guide this practice. But electronic access may suggest further consideration, particularly if it is easily possible to search court filings along with all other online materials that refer to a named person.)

Special problems arise from Rule 10(c), which indirectly reflects the practice of attaching exhibits to a complaint. The exhibit must be redacted to conform to Rule "5.2." It is difficult to guess whether this requirement will impose significant burdens in effecting the redaction, or whether there may be practical difficulties. If Rule "5.2(b)" survives, permitting filing of the complete complaint and exhibits under seal, these difficulties may be substantially reduced.

Again, it is difficult to frame amendments beyond a possible reference to Rule 5.2 in Rule 10(a).

Rule 11. The Minutes of the E-Government Subcommittee meeting reflect discussion of the question whether Rule 11 should be "amended to contemplate violations of the privacy/access rules. Judge [Jerry A. Davis] noted that CACM had reviewed this issue and determined that Rule 11 already covers any arguable violation of these policies and that it is better to leave it to the discretion of the courts as to how to deal with violations or abuse of any new rule regarding electronic filing. The Subcommittee agreed with this assessment."

Rule 11(b)(1) states that an attorney or party presenting a paper to the court certifies that it is not presented for any improper purpose. If it is desirable to use Rule 11 or any other rule of procedure to reach liability for such acts as purposefully filing a defamatory pleading, the present language seems adequate. The determination whether to bend Rule 11 to this purpose at all will be difficult — it at least approaches substantive questions of defamation liability, the right to petition courts, and privilege. It would not be wise to take on these issues by amending Rule 11, unless it be to disclaim any attempt to answer them.

Rule 12(f). The agenda includes a pending question addressed to the effect of a Rule 12(f) order to strike "from any pleading

any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Is the stricken material physically or electronically expunged? Or is it preserved to maintain a complete record, for purposes of appeal or otherwise, but sealed? Electronic access to court files may make this question more urgent, but there is no apparent change in the principles that will guide the answer.

Rule 12(f) could be amended to refer directly to an order to strike information that violates Rule "5.2." Authority to strike seems sufficiently supported, however, both by present Rule 12(f) and by the implications of Rule "5.2."

Rule 16. Rule 16(b) or (c) might be amended to include scheduling-order directions or pretrial-conference discussion of electronic-filing issues. The most apparent subjects would be limiting filing requirements or permitting filing under seal. Care would need to be taken to avoid interference with the purposes of the E-Government Act. But there may be an advantage, particularly in early years, from assuring that parties and court think of the privacy and security issues that may arise from electronic access.

Rule 26 or Other Discovery. Rule 5(d) limits on filing discovery materials are noted above. It is conceivable that a reminder of E-Government Act access — and the need to redact filed documents to comply with Rule "5.2" — should be added somewhere in the discovery rules as well.

The protective-order provisions of Rule 26(c) do not seem to need amendment. They provide ample authority to respond on a case-specific basis "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense * * *."

Rule 56. Summary-judgment affidavits are among the papers covered by Rule "5.2." It would be possible to add a cross-reference to Rule 56.

Rule 80(c). Rule 80(c) — inevitably part of the future project to reconcile the Civil Rules with the Evidence Rules — states that whenever stenographically reported testimony is admissible in evidence at a later trial, it may be proved by the transcript. Although the proof might include filing, and a corresponding need to redact under Rule "5.2," there is no apparent need to amend Rule 80(c) to refer back to Rule "5.2."

Rule 25.1 Privacy in Court Filings

(a) Limits on Disclosing Personal Identifiers. If a party must include any of the following personal identifiers in an electronic or paper filing [with the court?], the party is limited to disclosing:

(1) only the last four digits of a person's social-security number;

(2) only the initials of a minor child's name;

(3) only the year of a person's date of birth;

(4) only the last four digits of a financial-account number; and

(5) only the city and state of a [person's?] home address

(b) Exception for a Filing Under Seal. A party may include complete personal identifiers in the filing if it is [made? kept?] under seal. But the court may require the party to file a redacted copy for the public file.

(c) Social-Security Appeals; Access to Electronic Files. In an appeal involving the right to benefits under the Social Security Act, access to an electronic file is authorized as follows, unless the court orders otherwise:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record; and

(2) a person who is not a party or a party's attorney may have remote electronic access to:

(A) the docket maintained under Rule 45(b)(1) [the appellate docket?]; and

(B) an [a judge's?] opinion, order, judgment, or other written disposition, but not any other part of the case file or the administrative record.

JK — 3/9/04

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Memorandum To Members of and Liaisons to the Standing Committee Subcommittee on the E-Government Act
From: Dan Capra, Lead Reporter
Re: Timeline for Enactment of Rules Protecting Privacy of Court Filings
Date: January 20, 2004

The following is the projected timeline for enactment of National Rules protecting privacy of court filings, as directed by section 205 of the E-Government Act. This timeline was reached by the Subcommittee at its meeting in Scottsdale on January 14, 2004.

Spring 2004– Advisory Committees on Civil, Criminal, Bankruptcy and Appellate Rules will each consider a rough draft of a privacy rule These drafts will be derived from a template prepared by Professor Capra. That template will be adapted by the respective Reporters to accommodate issues particular to civil, criminal, bankruptcy or appellate practice. While the privacy rules will proceed from a template, it is recognized that the privacy rules will not be identical. For example, it may be appropriate for the Bankruptcy Rule simply to refer to the Civil Rule; and the Appellate Rule may simply provide that whatever was protected below must be protected on appeal.

Summer 2004– Reporters will confer on the results of the consideration of the rough drafts by the respective Advisory Committees. Reporter will work out any issues that may be necessary for an integrated approach to privacy.

Fall, 2004– Advisory Committees will each consider a final draft of a privacy rule as amended, if necessary, by the Reporters If possible, the Committees each will vote out a rule with the recommendation that the Standing Committee release it for public comment. If more issues or concerns arise in any of the Advisory Committees, then a vote for public comment can be deferred to the Spring 2005 meeting of that Committee.

January, 2005– If all Advisory Committees have recommended a privacy rule for public comment, then each of those proposals will be submitted to the Standing Committee with the

recommendation that they be released for public comment in August, 2005

Spring, 2005– Final date for each Advisory Committee to prepare a privacy rule for submission for public comment

June, 2005– Final date for submitting proposed privacy rules to the Standing Committee with the recommendation that they be released for public comment.

August 2005– Proposed privacy rules released for public comment.

January/Early February 2005– Public hearings, if necessary. [It would seem most efficient for the privacy rules to be released as a package. Public hearings, if necessary, then could be held on the entirety of the privacy package, rather than as individual committee proposals. In other words, it would seem wasteful to have a separate public hearing for each Committee's privacy rule, when the goal is to provide an integrated approach to privacy.]

February 15, 2006– Public comment period ends.

Spring 2006– Advisory Committees consider public comments. Each Advisory Committee votes out a privacy rule with the recommendation that it be forwarded to the Judicial Conference.

June 2006– Standing Committee approves each of the privacy rules and forwards the rules to the Judicial Conference with the recommendation that they be approved and sent to the Supreme Court.

Summer, 2006– Judicial Conference approval of privacy rules.

September 2006– Privacy rules referred to the Supreme Court.

May 2007– Supreme Court sends privacy rules to Congress

December 1, 2007– Effective date of national rules on privacy of court filings.

E-Government Subcommittee

Minutes of the meeting of January 14, 2004
Scottsdale, AZ

The E-Government Subcommittee (the "Subcommittee") met on January 14, 2004, at the Hermosa Inn in Scottsdale, Arizona.

The following members of the Subcommittee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Robert L. Hinkel, Liaison from the Evidence Rules Committee
Hon. John G. Roberts, Jr., Liaison from the Appellate Rules Committee
Hon. Shira A. Scheindlin, Liaison from the Civil Rules Committee
Hon A Thomas Small, Liaison from the Bankruptcy Rules Committee
Hon. Reta M. Strubhar, Liaison from the Criminal Rules Committee
Hon. David F. Levi, Chair, Standing Committee *(ex officio)*
Hon. Jerry A. Davis, Liaison from the Committee on Court Administration and Case Management
Hon. James B. Haines, Jr., Liaison from the Committee on Court Administration and Case Management
Professor Daniel R. Coquillette, Reporter to the Standing Committee *(ex officio)*
Professor Daniel J. Capra, Lead Reporter and Reporter to the Evidence Rules Committee *(consultant)*
Professor Edward H. Cooper, Reporter to the Civil Rules Committee *(consultant)*
Professor Jeffrey W Morris, Reporter to Bankruptcy Rules Committee *(consultant)*
Professor Patrick J. Schiltz, Reporter to the Appellate Rules Committee *(consultant)*
Professor David H. Schlueter, Reporter to the Criminal Rules Committee *(consultant)*

The following individuals participated via teleconference:

Hon. Donetta W. Ambrose, CACM liaison
Katie Simon, Esq., Administrative Office of the Federal Courts
Abel J. Matos, Esq., Administrative Office of the Federal Courts

Also present were:

Robert Deyling, Esq., Attorney Advisor, Administrative Office of the Courts
Professor Steven Gensler, Supreme Court Judicial Fellow
Peter G. McCabe, Esq., Secretary, Standing Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
Al Cortese, Esq
Brook D. Coleman, Esq.

Welcome and Introduction:

Judge Levi extended a welcome to the Subcommittee and thanked all in attendance for coming Those attending the meeting introduced themselves.

Business of the Subcommittee Meeting:

Judge Fitzwater welcomed the Subcommittee members and other individuals in attendance. He briefly outlined the charge of the Subcommittee and began by focusing the discussion on where e-government issues have been, where those issues currently stand, and where the Subcommittee should focus going forward. Beginning with where e-government issues have been, Judge Fitzwater explained that an incredible amount of work had already been done by the Committee on Court Administration and Case Management ("CACM"). Judge Fitzwater asked Judge Davis to explain CACM's role and progress on this issue to the Subcommittee

CACM Report:

Judge Davis reported to the Subcommittee that CACM began its involvement in e-government with a study regarding the effect electronic court filings would have on the privacy of litigants and what, if any, policies should be adopted to deal with any privacy issues. During CACM's study, a number of government agencies became involved and provided input to CACM. In the summer of 2000, CACM presented a number of policy options and solicited feedback from court file users. CACM received over 150 comments from a wide spectrum of users (e.g., media, data resellers, financial services). Judge Davis referred the Subcommittee to attachment 1 of the meeting materials, which contained a summary of these comments.

Judge Davis further explained that in March 2001, CACM conducted a public hearing regarding the various policy options. The prior research and this hearing further clarified the fact that there were huge benefits to electronic access to court files. However, it was also clear that there were looming concerns about privacy and how to balance the two.

CACM decided that its recommendations to the Judicial Conference regarding electronic filings would be based on the premise that there should be a consistent and uniform nationwide policy With that in mind, CACM recommended the following:

- Civil Cases. CACM recommended that civil case files be available electronically to the same extent that they are available as paper files. However, CACM made one exception to this recommendation for social security cases. It reasoned that those cases should not be available electronically since there are a high number of such cases, and the cases contain a large amount of private information. Finally, CACM recommended that certain personal identifiers such as social security numbers and names of minor children should not be included in the electronically available civil files.

- Criminal Cases. CACM decided that criminal cases presented more daunting issues since safety concerns regarding informants and other parties may require certain precautions. In order to examine this issue, CACM delayed a position on criminal cases for two years in order to allow for a FJC study to be completed.

- Bankruptcy Cases CACM determined that it was appropriate to treat bankruptcy cases like civil cases.

- Appellate Cases. Similarly, CACM determined that cases on appeal should be treated as they were at the lower court level.

Judge Davis went on to explain that in the spring of 2002, certain district courts informed CACM that their filings were online. CACM distributed model notice provisions and local rules accordingly. Later that year, the President signed the E-Government Act of 2002, which as the Subcommittee knows, requires the federal courts to put their court files online. Some of the E-Government Act provisions were inconsistent with the model rules that CACM had formulated so CACM modified those provisions to comply.

With respect to the position of CACM on criminal cases, its concerns basically turned on protecting certain vulnerable parties involved in criminal cases. When the FJC completed its study, these concerns did not appear to bear out. The study convinced CACM and others that the benefits of public access outweighed the seemingly low amount of risk to these parties. This position was further reinforced by the commitment of any criminal file access policy to the value of sealing certain sensitive documents from public access.

In fall 2002, CACM recommended to the Judicial Conference that, like civil cases, criminal cases should be available electronically to the same extent that they are publicly available at the courthouse. However, CACM further recommended that this change not go into effect until all aspects of implementation were settled. The model rule was drafted and sent to the Department of Homeland Security and other agencies for their feedback.

Judge Haines added that the bankruptcy courts had been slightly ahead in the process, as they had a rule regarding truncated social security numbers that went into effect this past December He added that the bankruptcy courts are canaries in the mine on this issue because bankruptcy involves a lot of personal information. This forced the bankruptcy courts to be innovative in how they should balance the concerns of privacy and access. Finally, the bankruptcy courts experienced the implementation issues connected to the recently enacted rule on truncating social security numbers. He advised that, in his opinion, allowing for ample notice and planning had been invaluable to the success of that implementation

Judge Davis concluded by noting that he had provided only a rough overview of what CACM has done and asked if the Subcommittee members had any questions for him. Finally, he noted that the key to successful adoption and implementation is to educate the bar regarding these rules and about their role in implementation. Judge Ambrose echoed this assertion and added that another key was to avoid the problem of inconsistency (i e. what is contained in a criminal case file should be the same from district to district)

The members of the Subcommittee then discussed the CACM recommendations with the members of CACM who were present. Professor Capra asked if consideration had been given to adding to the list of privacy items in a criminal case. Judge Davis responded that CACM had considered adding plea agreements and other similar documents However, Judge Davis stated that CACM concluded that it should leave those determinations to each of the courts by giving the courts and the attorneys involved the discretion regarding what to seal from the public, if anything. Judge Ambrose pointed out that the initial draft policy did have a list of documents for which public access would not be allowed. But, at the end of the day, CACM determined that a better policy was to keep the list simple and allow the courts to make their own determinations regarding what to seal on a case by case basis.

Section 205(c) of the E-Government Act of 2002 – Potential Amendments.

Professor Capra requested that John Rabiej update the subcommittee regarding the proposed amendments to § 205(c) of the E-Government Act. Mr. Rabiej explained that currently, § 205(c)(iv) states that a party can submit an unredacted version of a filed document if it wishes. The provision mandates that a party would have to submit two copies of a document, one with the private provisions redacted, and one with the full text of the document unredacted. He explained that this provision was made at the behest of the Department of Justice, as the Department felt it was a necessary provision to preserve the integrity of original evidence. The Judicial Conference has opposed this provision and has been working with the DOJ on compromise legislation. The compromise reached would allow parties to file a separately sealed document that contains a complete list of the data that has been redacted in the publicly filed document(s). This "reference list" would not be publicly available, but would be available to the court so that it can take notice of the redacted information. This compromise amendment has passed the House of Representatives and is currently in the Senate Government Reform Committee. The Subcommittee discussed this proposed legislation and how it would affect the rulemaking process.

Court Transcripts:

Professor Capra asked if there had been any developments regarding the treatment of court transcripts within the scope of the E-Government Act. Professor Davis responded that it was the position of CACM that when a transcript is filed with the court, it becomes a part of the case file and should, therefore, be electronically available. CACM's general policy is to require that the lawyers take on the responsibility for

redacting any private information before any document is filed Ms. Simon added that the Judicial Conference adopted a policy that states that if a transcript is going to be filed electronically, the court reporter must initially provide the transcript to the parties in hard copy. The parties then have to notify the court reporter that they intend to submit redactions within five days of that hard filing. The parties then have an additional 21 days to submit any such redactions. The transcript is filed electronically once those redactions are made.

Ms Simon further explained that the Judicial Conference adopted this policy in principle, but has delayed implementation in order to determine the impact, if any, on court reporter income. A pilot program is being conducted to study this impact, but Ms. Simon noted that most of the districts being studied in the pilot program are already complying with the Judicial Conference policy of making transcripts publicly available. Judge Davis pointed out that there will be issues for court reporters in districts where there has not been compliance with the Judicial Conference policy The Subcommittee agreed that court reporter compensation could be an explosive issue once the transcripts are all electronically available as mandated by the Conference and now the E-Government Act.

General Discussion:

The Subcommittee discussed the general importance of educating the bar with respect to all of these changes. For example, Judge Haines noted that, with respect to transcripts, attorneys need to start thinking about why they are asking personal questions of witnesses during trial (such as home address information). Given the potential availability of this information over the internet once made part of the transcript, lawyers may need to change their standard procedures. In addition, attorneys will need to be educated regarding their responsibility for their client's personal information. Judge Fitzwater asked Judge Small how the bankruptcy courts were handling the recent changes. Judge Small noted that it was early, but that he believed that the changes had been well-received. Judge Small added that he thought the process was going well due in most part to the well-communicated notice of the changes to the bench and bar. The Subcommittee again discussed how to best notify members of the bar regarding these impending changes and policies.

On another note, Judge Levi asked the representatives from CACM why special provision had been made for Social Security cases, but not for other cases where privacy issues were arguably just as important Judge Davis responded that the issue had been fiercely debated within CACM and that a compromise had been made primarily because social security cases are solely individual matters involving a government agency. Therefore, the cases require a meaningful amount of personal information to be included in court filings Judge Davis acknowledged that, as Judge Levi stated, ERISA cases and other similar cases have a high frequency of personal information, but Judge Davis pointed out that the option to seal documents still exists in those cases. Ms. Simon also explained that there are a high number of social security appeals filed, and that requesting the sealing of documents in each case would be burdensome -- while ERISA cases, for

example, are not appealed with the same frequency. In addition, Ms. Simon noted that the administrative record involved in social security cases would be too burdensome to scan in electronically for every case since those records are not currently available electronically

State Law Best Practices Survey:

Judge Fitzwater informed the Subcommittee that Mr. Deyling had conducted an overview of best practices in state courts with respect to privacy and access issues He asked Mr. Deyling to discuss his findings.

Mr. Deyling stated that following his review of state court practices, he determined that the Subcommittee may want to consider the following issues when drafting rules implementing § 205(c):

- Scope or Purpose Provision. Mr. Delying noted that several states have a statement regarding the purpose of their privacy provisions -- ranging from succinct statements of purpose to more detailed statements of the public policy governing the rule. Mr. Deyling noted that some state provisions also set out whether the rule should be about privacy, access, or both. Finally, he noted that some states have determined whether the rules are about paper, electronic availability, or both.

- Uniformity. Mr. Deyling observed that notice to the litigants and their attorneys was important and that location neutrality -- whether that be desk vs. courthouse or one district vs. another district -- was pivotal for the success of any privacy and access provision.

- Definitions. Mr. Deyling noted that many states had attempted to define everything in a case file, while other states had defined what was not considered part of the file or had left it ambiguously defined. In addition, some states had provisions that stated that certain categories of documents were presumptively sealed.

- Reference List. Mr. Deyling explained that many states, like the currently proposed national amendment, had a system where the private information at issue could be put in a separate document where it was not accessible to the public.

- Education. Mr. Deyling observed that some states provided attorneys with a list of documents that they should consider attempting to seal.

- Directions to Clerk of Court. Many state court rules provided instructions to the clerk of the court regarding, for example, what goes on the electronically available docket sheet.

- Bulk Information Mr. Deyling explained that some states had provisions governing the practice of downloading and manipulating bulk information from the court websites.

The Subcommittee discussed Mr. Deyling's presentation regarding best practices in the state courts.

The members of the Subcommittee observed that a fundamental question exists as to whether the rules to be implemented are simply for court records, or whether the scope is expanded to things not filed such as exhibits, judges' notes, etc. However, it was noted that if the Subcommittee starts venturing into this realm as opposed to just determining that what is currently available at the court house to the public should also be available electronically, the Subcommittee is taking on a lot more than what it is charged with doing by virtue of § 205(c). Judge Fitzwater agreed, and noted that § 205(c) speaks to making what is "filed" electronically available, limiting the spectrum of what any rule should cover. Committee members were in general agreement that any national rule should remain simple and should apply only to court filings that are electronically available over the internet.

The Subcommittee also discussed whether the rules should list documents that the Subcommittee believes should be sealed. Professor Schlueter noted that the Subcommittee needed to determine for whom these rules were being drafted. He further suggested that perhaps the rules should refer practitioners to the Judicial Conference policy guidelines -- that way, the Subcommittee would not be prescribing attorney conduct, but would be aiding their conversion to this new system. The Subcommittee discussed the advantages of this approach and likened it to current Fed.R.Civ.P 5 Professor Capra also suggested that the rule could read like the Eleventh Circuit's model rule, which provides some mandatory information that should be redacted, along with suggestions for other information in a note to the rule.

Judge Levi noted that the respective Advisory Committees may have different issues to address and the focus of the Subcommittee should be to determine how each of the Advisory Committees can efficiently address each of their specific issues and concerns. The Subcommittee members agreed that the Advisory Committees should take a common approach to the extent possible, with variations as necessary to accommodate particular issues that will arise in civil, criminal, bankruptcy and appellate proceedings.

Finally, the Subcommittee discussed the general commercial interest in court information Members noted that a number of databases were being created and sold online. It was also noted that the fees obtained from PACER, which included fees paid by these commercial companies, were important to the various courts' information technology budgets.

Access Issues:

The Subcommittee discussed the practical effects of electronic filing on access. Judge Scheindlin asked whether complete versions of redacted documents were available to the judges electronically if they needed to see them. Judge Hinkel stated that on CM/ECF in his district, he has access to the unredacted document, while the public and lawyers do not. Ms. Simon noted that the most recent version of CM/ECF does allow for judges to view redacted and sealed documents in camera via electronic means.

Judge Levi inquired as to whether CACM had reviewed the official forms used, for example, in judgments He noted that a practitioner in his district had informed him that the criminal judgment form provided the individual's entire social security number. Judge Davis noted that the forms were generally reviewed. Ms. Simon added that the criminal judgment form had been reviewed in September 2003, and the social security information had been moved to the statement of reason, which is not publicly filed.

The Subcommittee generally discussed the fact that PACER currently provides a gateway to access to these documents via the requirement to pay to use the service. This gateway allows public access to be monitored if necessary to protect privacy interests. The members questioned, however, whether this would always be the case or whether there would be a movement to provide cost-free access.

Template Rule Regarding § 205(c):

The Subcommittee then discussed what the template rule that the advisory committees would modify should look like. Professor Capra noted that CACM had done a lot of really important work and perhaps the rule should build on that foundation. The Subcommittee discussed whether the rule should provide an exhaustive list of categories for redaction, whether the rule should provide a brief list of main categories, and if so, whether reference should be made to further categories via the Judicial Conference policies. A discussion ensued regarding the pros and cons of referencing the Judicial Conference policies, including, but not limited to, a discussion of whether such policies were accessible enough to practitioners.

Members of the Subcommittee further discussed how to approach drafting the rules. Some members suggested that each of the advisory committees should consider what issues are specifically important to them, and draft a rule accordingly. Other members were concerned that this would create four inconsistent rules. Professor Capra suggested that he could draft a template rule that all of the advisory committees could then take and modify as they saw fit. The advisory committees could then compare their versions to be sure that there was not too much variation as between all of the rules The Subcommittee members agreed with that approach.

The question then turned to timing on the implementation of these rules. The members of the Subcommittee agreed that the advisory committees should review the template rule to be prepared by Professor Capra at their respective spring meetings. They

should have their rules finalized for presentation to their advisory committees by their fall 2004 meetings. The Standing Committee can then review the various rules at its January 2005 meeting, or at its June 2005 meeting at the latest. The Subcommittee agreed on this schedule and noted that, barring any problems, the rules would then become effective on December 1, 2007.

The Subcommittee also discussed the possibility that § 205(c) would implicate other rules For example, in Fed.R.Civ.P. 16, the Advisory Committee on Civil Rules may want to consider adding a discussion of § 205(c) to the pre-trial conference phase.

In addition, the Subcommittee discussed whether Fed.R.Civ P. 11 should be amended to contemplate violations of the privacy/access rules. Judge Davis noted that CACM had reviewed this issue and determined that Rule 11 already covers any arguable violation of these policies and that it was better to leave it to the discretion of the courts as to how to deal with violations or abuse of any new rule regarding electronic filing. The Subcommittee agreed with this assessment.

Finally, Judge Fitzwater reminded each advisory committee of its obligation to continue to consider best practices of the state courts. He encouraged the advisory committees to call on Mr. Deyling and the work he has already done in this area.

Conclusion of Meeting:

Judge Fitzwater thanked the members of the Subcommittee for their input and thought on these matters. He gave special thanks to the members of CACM, who had worked so hard and provided so much guidance to the Subcommittee on this issue He reviewed the plan of action for the Subcommittee and adjourned the meeting at 11:30 a.m.

Respectfully submitted,

Brooke Coleman, Esq.

E-GOVERNMENT ACT OF 2002

PUBLIC LAW 107-347

SECTION 205

Public Law 107–347
107th Congress

An Act

To enhance the management and promotion of electronic Government services and processes by establishing a Federal Chief Information Officer within the Office of Management and Budget, and by establishing a broad framework of measures that require using Internet-based information technology to enhance citizen access to Government information and services, and for other purposes.

Dec. 17, 2002
[H.R. 2458]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

E-Government Act of 2002.

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

44 USC 101 note.

(a) SHORT TITLE.—This Act may be cited as the "E-Government Act of 2002".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

SEC. 205. FEDERAL COURTS.

44 USC 3501 note.

(a) INDIVIDUAL COURT WEBSITES.—The Chief Justice of the United States, the chief judge of each circuit and district and of the Court of Federal Claims, and the chief bankruptcy judge of each district shall cause to be established and maintained, for the court of which the judge is chief justice or judge, a website that contains the following information or links to websites with the following information:

(1) Location and contact information for the courthouse, including the telephone numbers and contact names for the clerk's office and justices' or judges' chambers.

(2) Local rules and standing or general orders of the court.

(3) Individual rules, if in existence, of each justice or judge in that court.

(4) Access to docket information for each case.

(5) Access to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format.

(6) Access to documents filed with the courthouse in electronic form, to the extent provided under subsection (c).

(7) Any other information (including forms in a format that can be downloaded) that the court determines useful to the public.

(b) MAINTENANCE OF DATA ONLINE.—

(1) UPDATE OF INFORMATION.—The information and rules on each website shall be updated regularly and kept reasonably current.

(2) CLOSED CASES.—Electronic files and docket information for cases closed for more than 1 year are not required to be made available online, except all written opinions with a date of issuance after the effective date of this section shall remain available online.

(c) ELECTRONIC FILINGS.—

Public information.

(1) IN GENERAL.—Except as provided under paragraph (2) or in the rules prescribed under paragraph (3), each court shall make any document that is filed electronically publicly available online. A court may convert any document that is filed in paper form to electronic form. To the extent such conversions are made, all such electronic versions of the document shall be made available online.

(2) EXCEPTIONS.—Documents that are filed that are not otherwise available to the public, such as documents filed under seal, shall not be made available online.

Regulations.

(3) PRIVACY AND SECURITY CONCERNS.—(A)(i) The Supreme Court shall prescribe rules, in accordance with sections 2072 and 2075 of title 28, United States Code, to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically.

(ii) Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.

(iii) Such rules shall take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security.

(iv) To the extent that such rules provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such information may file an unredacted document under seal, which shall be retained by the court as part of the record, and which, at the discretion of the court and subject to any applicable rules issued in accordance with chapter 131 of title 28, United States Code, shall be either in lieu of, or in addition, to, a redacted copy in the public file.

(B)(i) Subject to clause (ii), the Judicial Conference of the United States may issue interim rules, and interpretive statements relating to the application of such rules, which conform to the requirements of this paragraph and which shall cease to have effect upon the effective date of the rules required under subparagraph (A).

(ii) Pending issuance of the rules required under subparagraph (A), any rule or order of any court, or of the Judicial Conference, providing for the redaction of certain categories of information in order to protect privacy and security concerns

arising from electronic filing shall comply with, and be construed in conformity with, subparagraph (A)(iv).

(C) Not later than 1 year after the rules prescribed under subparagraph (A) take effect, and every 2 years thereafter, the Judicial Conference shall submit to Congress a report on the adequacy of those rules to protect privacy and security. Deadlines. Reports.

(d) DOCKETS WITH LINKS TO DOCUMENTS.—The Judicial Conference of the United States shall explore the feasibility of technology to post online dockets with links allowing all filings, decisions, and rulings in each case to be obtained from the docket sheet of that case.

(e) COST OF PROVIDING ELECTRONIC DOCKETING INFORMATION.—Section 303(a) of the Judiciary Appropriations Act, 1992 (28 U.S.C. 1913 note) is amended in the first sentence by striking "shall hereafter" and inserting "may, only to the extent necessary,".

(f) TIME REQUIREMENTS.—Not later than 2 years after the effective date of this title, the websites under subsection (a) shall be established, except that access to documents filed in electronic form shall be established not later than 4 years after that effective date. Deadlines.

(g) DEFERRAL.—

(1) IN GENERAL.—

(A) ELECTION.—

(i) NOTIFICATION.—The Chief Justice of the United States, a chief judge, or chief bankruptcy judge may submit a notification to the Administrative Office of the United States Courts to defer compliance with any requirement of this section with respect to the Supreme Court, a court of appeals, district, or the bankruptcy court of a district.

(ii) CONTENTS.—A notification submitted under this subparagraph shall state—

(I) the reasons for the deferral; and

(II) the online methods, if any, or any alternative methods, such court or district is using to provide greater public access to information.

(B) EXCEPTION.—To the extent that the Supreme Court, a court of appeals, district, or bankruptcy court of a district maintains a website under subsection (a), the Supreme Court or that court of appeals or district shall comply with subsection (b)(1).

(2) REPORT.—Not later than 1 year after the effective date of this title, and every year thereafter, the Judicial Conference of the United States shall submit a report to the Committees on Governmental Affairs and the Judiciary of the Senate and the Committees on Government Reform and the Judiciary of the House of Representatives that— Deadline.

(A) contains all notifications submitted to the Administrative Office of the United States Courts under this subsection; and

(B) summarizes and evaluates all notifications.